
Arlen W. Langvardt

*University of Nebraska College of Law*, langvard@indiana.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation


This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Beyond the Schoolhouse Gate: Protecting the Off-Campus First Amendment Freedoms of Students


It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Tinker v. Des Moines Independent Community School District

Perhaps it would be well if those entrusted to administer the teaching of American history and government to our students began their efforts by practicing the document on which that history and government are based. Shanley v. Northeast Independent Community School District

I. INTRODUCTION

The vital function served by a system of public education cannot, rationally, be questioned. Education serves as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." For schools to operate effectively, a limited abrogation of students' first amendment rights is

2. 462 F.2d 960, 978 (5th Cir. 1972).
4. U.S. Const. amend. I reads:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The first amendment is made applicable to the states by section one of the fourteenth amendment, which reads, in pertinent part:

   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any
a necessity. However, these rights are such that students cannot be subjected to whatever action school officials feel is appropriate. While "there is no denying that the child's speech right is different in kind as well as degree from the right of free speech possessed by adults," the student nevertheless has a right to freedom of expression, which is part of "the fundamentally just claim all children have against the state—that it should respect and leave open the possibilities of choice that they will have on reaching maturity."

*Thomas v. Board of Education* was one of a number of student publication cases considered by federal courts during the years 1969 through 1979. Unlike the bulk of those cases, however, *Thomas* confronted the Second Circuit Court of Appeals with the question whether suspensions constitutionally could be imposed upon high school students who produced, almost entirely off-campus, what some might regard as an objectionable unofficial publication, and who did not actively distribute the publication on school grounds. The punishments imposed were held not to have withstood the first amendment's proscription. This note will analyze the *Thomas* decision, focusing on high school students' freedom to produce essentially off-campus publications having limited connection with the school, and the propriety of inhibitory intervention on the part of school officials.

---

5. See, e.g., Tinker v. Des Moines Independent Community School Dist., 393 U.S. at 507. Mr. Justice Fortas stressed the need for comprehensive authority of state and school officials to control in-school conduct, but added that the exertion of such control must be "consistent with fundamental constitutional safeguards." *Id.* See also Thomas v. Board of Educ., 607 F.2d 1043, 1049 (2d Cir. 1979), where Chief Judge Kaufman noted that education could not flourish if teachers could not place sanctions on incorrect responses or substandard work, and could not silence those who speak out of turn and disrupt the classroom or library atmosphere.


7. Garvey, supra note 6, at 339.

8. *Id.*

9. 607 F.2d 1043 (2d Cir. 1979).

10. *Id.* at 1045-46.

11. *Id.* at 1050.

12. The right of the college or university student to engage in such activity is beyond the scope of this note. Because of factors such as the college student's age and increased maturity in comparison to the typical high school student, courts and commentators have agreed that less restrictive standards are to be applied at the university level, allowing for generally more exten-
II. A DECADE'S PERSPECTIVE

While first amendment doctrine teaches that courts must maintain a skeptical attitude concerning government claims that state imposed restrictions on expression are constitutionally permissible, the first amendment's umbrella is not protective of all speech. The courts traditionally have paid considerable deference to school officials in terms of the discipline imposed in and control exerted over their respective schools, thus reflecting judicial reluctance to interfere in the day-to-day operation of the public schools. This hesitancy to intervene is set aside when there arises the danger that fundamental freedoms, such as the freedom of expression, may be infringed impermissibly. Since 1969, federal courts have been faced with a number of cases in which secondary school students have alleged that school policies and school officials' actions concerning student publications, both officially recognized and "underground" publications, denied them protective rights of expression for such students. See, e.g., Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973); Quartermann v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 n.5 (2d Cir. 1971); Schwartz v. Schucker, 238 F. Supp. 238, 242 (E.D.N.Y. 1969); Wright, The Constitution on Campus, 22 VAND. L. REV. 1027, 1052-53 (1969).

Additionally, this note deals only with the regulation of students' off-campus first amendment rights. Administrators appear to be more free to intervene where a student's off-campus conduct is not speech-oriented and has an adverse effect on school discipline and/or the welfare of students than where speech is involved. See Annot., 53 A.L.R. 3d 1124, 1128 (1973). See also E. Reutter, THE COURTS AND STUDENT CONDUCT 3 (1975).

17. "Underground" publications are generally student-created and produced and are not recognized as official school publications. They are generally directed toward students and may or may not be intended for distribution on school property. Frequently they contain material critical of school policies and officials, along with other material of such nature that the authors feel would not be published in an officially recognized student publication because of administrative pressure not to publish such material.
Protected rights of expression and chilled the exercise thereof. These cases have presented the courts with the difficult task of weighing the students' first amendment claims and protecting the legitimate exercise of guaranteed rights, while keeping in mind the necessity of an orderly school environment conducive to learning. Some analysis of the cases setting the stage for the Thomas decision is necessary.

_Tinker v. Des Moines Independent Community School District_ began the influx of students' rights cases in the ten years prior to Thomas. _Tinker_ remains the leading case in the area of students' first amendment freedoms. The plaintiffs in _Tinker_ were secondary school students who had worn armbands during the school day as a peaceful protest of United States involvement in the Vietnam conflict, and were suspended from school for contravening an administrative policy by refusing to remove the armbands. The Court held that in the absence of a showing that the expression would materially and substantially interfere with maintenance of appropriate discipline in the school, the expression could not be prohibited. What has become known as the _Tinker_ test was formulated:

[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

This test would appear to be met by a showing of actual disorder and disruption, or a showing of "facts which might reasonably have led school authorities to forecast substantial disruption . . . or material interference" with the operation of the school.

18. See note 5 & accompanying text supra.
20. Id. at 504.
21. Id. at 509. The court borrowed the language used in its holding from an earlier Fifth Circuit case, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), in which a school disciplinary regulation prohibiting the wearing of so-called "freedom buttons" advocating the exercise of the right to vote was found to be arbitrary and unreasonable and therefore an infringement of first amendment rights. Id. at 748-49. The _Burnside_ court held that school administrators cannot interfere with students' rights of expression "where the exercise of such rights in the school building and schoolrooms do [sic] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Id. at 749.
22. 393 U.S. at 513.
23. Id. at 514. See also Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971) (case indicating that school officials need not wait to intervene until actual disruption or interference occurs, so long as facts which provided some basis for a reasonable forecast of such disruption or interference can be demonstrated); Frasca v. Andrews, 463 F. Supp. 1043, 1049 (E.D.N.Y. 1979) (same).
The *Tinker* approach suggests that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Similarly, a desire on the part of school officials to avoid "the discomfort and unpleasantness that always accompany an unpopular viewpoint" or "an urgent wish to avoid the controversy which might result from the expression" cannot serve as justification for administrative curtailment of first amendment rights.

Commentators have indicated that while the *Tinker* test is recognized as determinative in a freedom of expression case involving students, there is disagreement among courts concerning the definition and scope of the *Tinker* test:

General agreement on the appropriate verbal formula merely serves to hide a fundamental disagreement about its meaning. One approach has been to treat the 'threat of material and substantial disruption, like the 'clear and present danger' test developed in sedition cases, and to require a rather high probability of serious disruption before expression may be curtailed. Most courts have been willing to allow greater leeway to the determinations of school administrators, demanding that the finding be not 'clear and present,' but merely a 'reasonable forecast' before expression may be restricted.

The real value of the *Tinker* decision lies in its implicit message that school officials cannot arbitrarily, unreasonably, and without sufficient justification, curtail students' rights of free expression.

With cases such as *Scoville v. Board of Education*, the *Tinker*
principle was extended into the realm of student publication cases. A significant number of the student publication cases during the past decade involved a further extension of the *Tinker* rule and rationale. At the heart of these cases was the alleged invalidity of school policies requiring administrative approval of publications prior to distribution on school grounds. The central argument was that such policies constituted unconstitutional forms of prior restraints, going well beyond reasonable time, place, and manner regulations—restrictions on speech which must be respected. One of the dangers of a prior restraint system is that items of expression may be censored arbitrarily on the basis of intended content. Once an arm of the state goes beyond the enforcement of reasonable time, place, and manner restrictions and begins regulating expression on the basis of content, the actions rest on shaky constitutional ground.

*Eisner v. Stamford Board of Education* established the prevailing view that policies requiring administrative approval prior to the distribution of written material on campus are not unconstitutional per se because the school system "has authority to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process as the state conceives it." While the *Eisner* court recognized that prior restraint systems in high schools may pass constitutional muster, it found the particular policy being considered constitutionally deficient for its failure to prescribe a definite, short period within which administrative review of the submitted material had to be completed and a decision made concerning distribution. Obtaining a judicial decree would not, however, be necessary because such a require-

---


35. 440 F.2d 803 (2d Cir. 1971).

36. *Id.* at 805.

37. *Id.* at 807.

38. *Id.* at 810.
A concise statement of the requirements of a constitutionally permissible prior approval system in high schools was supplied by the Fourth Circuit in *Baughman v. Freienmuth.* To be valid, the system must clearly spell out what expression is forbidden; define the term "distribution" and its application to different kinds of material; provide for a prompt decision concerning whether the submitted material may be distributed; provide for a prompt appeals procedure in the event of a decision adverse to student interests; and include a statement of what happens in the event of the administration's failure to act promptly. The principles of *Eisner* and *Baughman*—recognizing that constitutional prior approval systems for high schools can be devised—represent the majority view among federal courts considering the question.

The position taken in *Eisner* and *Baughman* has not met with universal approval from courts and commentators. The court in *Fujishima v. Board of Education,* expressly rejected prior approval systems, calling *Eisner* and its progeny the results of misapplications of *Tinker.* According to the court, the reference in *Tinker* to facts supporting a reasonable forecast of material and

39. *Id.*
40. 478 F.2d 1345 (4th Cir. 1973).
41. *Id.* at 1351. Presumably the policy's statement concerning forbidden expression must comport with the *Tinker* test, as well as current constitutional standards pertaining to obscenity and defamation. The *Baughman* court noted that "a regulation imposing prior restraint must be much more precise than a regulation imposing post-publication sanctions." *Id.* at 1349. This implies that if the policy being considered merely mouths the words of the *Tinker* test, the policy may not have the necessary precision and specificity. Such a finding was made by the court in *Jacobs v. Board of School Comm'rs,* 490 F.2d 601, 605 (7th Cir. 1973), *cert. granted,* 417 U.S. 929 (1974), *vacated as moot,* 420 U.S. 128 (1975). Additionally, mere inclusion of the terms "libelous" and "obscene" does not necessarily provide sufficient precision:

> [W]hile school authorities may ban obscenity and unprivileged libelous material [assuming constitutional standards are met] there is an intolerable danger, in the context of prior restraint, that under the guise of such vague labels they may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive. That they may not do.

*Baughman v. Freienmuth,* 478 F.2d at 1351.


43. 460 F.2d 1355 (7th Cir. 1972).
44. *Id.* at 1358.
substantial disruption or interference with school operation should not be read as an authorization of any system of prior restraint. Instead, according to Fujishima, the Tinker forecast rule "is properly a formula for determining when the requirements of school discipline justify punishment of students" for exercising rights of expression. While Fujishima has not received significant judicial approval, its bold rejection of prior restraint systems in high schools would meet with the approval of commentators who denounce such systems in the public schools.

In Trachtman v. Anker, a Second Circuit case decided before Thomas v. Board of Education, the court employed the Tinker test in a manner different from past applications. In Trachtman, staff members of the school newspaper sought administrative approval to distribute in school a questionnaire surveying the sexual attitudes, preferences, knowledge, and experience of ninth through twelfth grade students, with the objective of publishing the questionnaire's results in the school newspaper. The court held that denial of permission to distribute the questionnaire was constitutional since there was a reasonable basis for the school officials' belief that the questionnaire could cause significant emotional harm to some students. While most applications of Tinker...
have focused on the "material and substantial" interference or disruption portion of the test, Trachtman evidenced an apparent reliance on the portion of the Tinker test referring to interference with the rights of others. Commentators have protested Trachtman because it is seen as a "deep bow" to the wisdom of school administrators and as condonation of prior restraint upon the mere showing of speculative harm to what may be only a few students.

Only a limited number of cases during the ten years prior to Thomas dealt with or made reference to school officials' authority to regulate expression which was conducted essentially off-campus but had some effect on or relationship with the school environment. These cases are discussed in a later section.

III. THE FACTS OF THOMAS

Four high school students of Granville Junior-Senior High School in Granville, a small town in upstate New York, produced a satirical publication directed to the school community and patterned after the nationally-known magazine, National Lampoon. School topics were satirized in the publication, which was entitled Hard Times. Additionally, an editorial on masturbation and articles making reference to prostitution, sodomy, and castration were included. A banner across the cover of Hard Times described the contents as "uncensored, vulgar, immoral." The students worked, according to the court, almost exclusively off-campus and after school hours in producing their publication. An occasional

52. "The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences." Id. See also note 22 & accompanying text supra.


55. See § IV of text infra.

56. 607 F.2d 1043, 1045.

57. Id. n.3. Chief Judge Kaufman's majority opinion stated that the publication was "saturated with distasteful sexual satire." Id. Judge Newman, in his concurrence in the result, called the language employed in the publication "indecent and vulgar" for persons of school age. He added that "[t]he pages of the federal reports will not be enriched by . . . repetition [of the language used]. The students responsible for the publication proudly labeled it 'vulgar'. This was not false advertising." Id. at 1054 (Newman, J., concurring in the result).
article was typed or written in the school building, but after school hours. Sometimes the students asked a teacher for advice on grammar and content. After a school official learned of the publication while it was in its preparatory stages, the students were warned to keep the publication away from the school and to avoid the use of the names of students and teachers and material that would hurt persons connected with the school. The students, after this warning, deleted some names and articles, and sought to sever any tangible connections with the school.\textsuperscript{58}

A local shop printed \textit{Hard Times} and the copies were stored in a teacher's classroom closet by permission of the instructor. At the end of each day, the students removed copies of the publication and sold them to classmates at a store in Granville rather than on the school grounds.\textsuperscript{59} The court noted that the student editors refused to sell copies to junior high school students.\textsuperscript{60} After most of the copies had been sold, a teacher noticed that a Granville high school student had a copy in his possession while at school, confiscated it, and presented it to the school's principal. The principal and the superintendent of schools agreed that they should take no action until the impact of the publication could be assessed. However, after the president of the Granville Board of Education learned of \textit{Hard Times} through her son and expressed her shock, the principal began an investigation—five days after the copy had been confiscated.\textsuperscript{61}

The principal and superintendent decided to suspend the student editors from school for five days.\textsuperscript{62} In a letter to the students' parents, the principal stated that the suspensions were based on the production of a "morally offensive, indecent, and obscene" publication.\textsuperscript{63} For the court, this was sufficient to demonstrate that the principal was making no attempt to base the suspensions on insubordination connected with acts occurring on school grounds.\textsuperscript{64} After the suspensions took effect, the students, through their parents, brought suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief from alleged deprivations of first and

\textsuperscript{58} \textit{Id.} at 1045.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} n.2.
\textsuperscript{61} \textit{Id.} at 1045-46.
\textsuperscript{62} The school officials decided that the five-day suspension would be reduced to three days if the students each wrote an essay dealing with the potential harm of "irresponsible and/or obscene writing." \textit{Id.} at 1046. Additionally, the students were to be segregated from other students in study halls for at least a month, they were to lose all student privileges during the period of suspension, and suspension letters were to be included in their files. \textit{Id.} The essay requirement was later enjoined by the district judge. \textit{Id.}
\textsuperscript{63} \textit{Id.} at 1050 n.12.
\textsuperscript{64} \textit{Id.}
fourteenth amendment rights.\textsuperscript{65} In the district court, preliminary injunctive relief was denied, the court determining that the plaintiffs had not shown a sufficient likelihood of success on the merits and that the publication was not protected by the first amendment because it was potentially damaging to school discipline.\textsuperscript{66} A request for permanent injunctive relief was also denied by the district court, and the students lodged their appeal.\textsuperscript{67}

\section*{IV. THE DECISION IN THOMAS}

\subsection*{A. Analysis}

The Second Circuit noted that the typing of a few \textit{Hard Times} articles on school typewriters and the storing of the publication in a teacher's closet were insufficient to "alter the fact that \textit{Hard Times} was conceived, executed, and distributed outside the school. At best, therefore, any activity within the school itself was \textit{de minimis}."\textsuperscript{68} While the court recognized that the defendant school officials disclaimed the desire to punish the students for any off-campus expression, it observed that by basing the suspensions on the administrators' evaluation of the content of the off-campus publication rather than on any in-school conduct,\textsuperscript{69} the school officials "ha[ dap], perhaps inadvertently, overstepped the boundary line they claim to have created."\textsuperscript{70}

That the activities in question occurred almost entirely off school grounds was sufficient, in the court's view, to distinguish the case at hand from \textit{Tinker} and most of its progeny,\textsuperscript{71} and sufficient to make unnecessary any extended discussion of whether the administrators' actions satisfied the \textit{Tinker} test. Instead, the court held that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."\textsuperscript{72} Because only an "independent, impartial decisionmaker"\textsuperscript{73} could have imposed the punishments meted out in this case, the failure of the administrators to satisfy that standard made the suspensions violative of the first amendment.\textsuperscript{74} The chil-

\begin{thebibliography}{99}
\bibitem{65} Id. at 1046.
\bibitem{67} 607 F.2d at 1046, 1047.
\bibitem{68} Id. at 1050 (footnote omitted).
\bibitem{69} See notes 63-64 & accompanying text \textit{supra}.
\bibitem{70} 607 F.2d at 1050 n.12.
\bibitem{71} Id. at 1050.
\bibitem{72} Id.
\bibitem{73} Id.
\bibitem{74} Id. The court's basis for decision made it unnecessary to determine whether
ling effect resulting from the punishment of students engaging in strictly limited categories of speech within the school could, according to the court, be tolerated constitutionally, but the levying of sanctions for off-campus expression could not be.\textsuperscript{75} Accordingly, a reversal of the district court’s decision and a remand to that court for the entering of appropriate relief were necessary.\textsuperscript{76}

The *Thomas* decision is founded upon a basic philosophy that the disciplinary actions of a public school administrator should be evaluated according to standards which allow some deference to the administrator’s expertise only if “the arm of [administrative] authority does not reach beyond the schoolhouse gate.”\textsuperscript{77} Once a school official attempts, consciously or inadvertently,\textsuperscript{78} to regulate activity taking place in the general community and having only a minimal connection with the school, he becomes subject to principles binding government officials in the community at large.\textsuperscript{79} The court’s position that the school officials constitutionally could not have punished the students since any “violations” occurred not in the school but in the public arena,\textsuperscript{80} “rests upon a fundamental axiom—speech may not be suppressed nor any speaker punished unless the final determination that [the speech is] unprotected is made by an impartial, independent decisionmaker.”\textsuperscript{81} In support of this statement, the court cited cases such as *Freedman v. Maryland*\textsuperscript{82} and *Southeastern Promotions, Ltd. v. Conrad*.\textsuperscript{83} Recognizing that *Freedman* and *Southeastern Promotions* arose in the context of prior restraints, the court nevertheless found their principles and rationales appropriate to cases involving subsequent punishment, especially punishment stemming from informal administrative settings.\textsuperscript{84} The assertion that an independent decisionmaker is necessary in a case arising in a factual context such as that of *Thomas* becomes notably stronger because of the likelihood that the publication would include negative statements about the school or about the very administrators who would be seeking to punish the students involved.\textsuperscript{85}

*Hard Times* was obscene. The school officials claimed it to be obscene at the time the suspensions were ordered and still claimed it to be such at oral argument on appeal. *Id.* at 1050-51 n.13.

75. *Id.* at 1051.
76. *Id.* at 1052-53.
77. *Id.* at 1044-45.
78. *See* notes 63-64 & accompanying text *supra*.
79. 607 F.2d at 1050.
80. *See* note 75 & accompanying text *supra*.
81. 607 F.2d at 1048.
82. 380 U.S. 51, 58 (1965).
84. 607 F.2d at 1048 n.8.
In coming to its decision, the *Thomas* court did not treat in any depth the few cases which had considered the propriety of school officials' punishing students for off-campus expression. The first amendment was also found to have been violated in a Fifth Circuit case, *Shanley v. Northeast Independent Community School District*. Since the underground newspaper in *Shanley* was produced entirely outside school, no school materials were used, distribution occurred before and after school and near, but not on, school grounds, and there was no disruption in school traceable to the distribution, suspensions of the students involved for their failure to comply with an "approval prior to distribution" policy violated the first amendment. The *Shanley* opinion included a discussion of the *Tinker* test, taking the common sense approach that any authority that school officials might have to regulate off-campus speech clearly could not exceed their authority to regulate on-campus speech. The *Shanley* court was careful to point out, however, that its holding did not mean that any attempt by school officials to regulate expression occurring off-campus and after school hours was automatically unconstitutional. *Shanley*, then, did not foreclose the possibility that a school administrator could constitutionally regulate some off-campus expression.

A result contrary to that in *Thomas* was reached in *Baker v. Downey City Board of Education*, in which two high school seniors had been suspended for the use of what school officials called "profanity and vulgarity" in a publication produced off-campus and distributed to students just outside the main gate of the school. The action taken by the school officials was held a reasonable exercise of their power and discretion in the maintenance of an atmosphere conducive to learning.

The *Baker* court noted that there was some evidence of disruption of classes which could be traced to students' possession of and

---

87. 462 F.2d 960 (5th Cir. 1972).
88. Id. at 964.
89. Id. at 975. The court observed that the publication included nothing obscene, libelous, or inflammatory, and that as underground papers go, it was "probably one of the most vanilla-flavored ever to reach a federal court." Id. at 964.
90. Id. at 970, 974.
91. Id. at 969.
92. Id. at 974.
94. Id. at 519.
95. Id. at 523.
preoccupation with the publication.  

96 Tinker was cited but the court did not clarify whether it was to serve as the standard. For the Baker court, it did not seem significant that the production and distribution occurred entirely off-campus. The students were regarded as having intended that the publication be well-circulated in the school, since they handed out copies just outside the school gate.  

97 The court went on to note, in sweeping language, that "when the bounds of decency are violated in publications distributed to high school students, whether on campus or off campus, the offenders become subject to discipline."  

98 The reasoning in Thomas casts grave doubts on the validity of such a broad statement.  

99 In view of the Thomas court's effort to distinguish the facts before it from those of Tinker on the ground that Tinker involved on-campus expression and Thomas dealt with what was for all practical purposes off-campus expression, a conclusion which could be drawn is that the Tinker standard of material and substantial disruption, or a reasonable forecast of it, does not apply in cases involving expression which takes place off the school grounds. Similarly, it would appear to follow from the Thomas facts and holding that where the acts of expression are primarily off-campus acts but there is a minimal connection with the school, Tinker again should not be applied. Presumably if the connection with school was more than de minimis and tended to predominate over the off-campus aspects of the expression, the Tinker analysis would become appropriate.  

While the foregoing theories logically can be derived from Thomas, it is not entirely clear whether the court would have felt itself so free to distinguish Tinker had it been faced with a differ-

96 Id. at 522.  
97 Id. at 521.  
98 Id. at 526.  
99 Id.  
100 Two other cases, Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir.), cert. denied, 414 U.S. 1032 (1973), and Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969), involved off-campus distribution of publications. The students' suspensions in those cases were upheld on grounds apart from the distribution of the publication and akin to insubordination: the use of profanity in addressing school officials and the violation of school regulations in Sullivan, 475 F.2d at 1075-76, and flagrant disobedience of school authorities in Schwartz, 298 F. Supp. at 241. Therefore, these cases are different from Thomas in that in Thomas, the suspensions were based on the off-campus activity. While Judge Newman, in his concurrence in the result in Thomas, cited Sullivan as authority for disciplining students for off-campus distribution where circulation on campus was intended, 607 F.2d at 1058 n.13 (Newman, J., concurring in the result), a close analysis of the case reveals that it should not be cited for that proposition.  
101 607 F.2d at 1050.
ent factual context—such as off-campus expression which did substantially disrupt the school environment or posed a serious threat of doing so. Under such facts, the Tinker standard conceivably could have been found appropriate and the figurative placement of a barrier at the edge of the school grounds to stop overzealous school officials (or their counterparts who inadvertently might cross the line of impermissible regulation\textsuperscript{102}) might not have been seen as necessary, or even desirable. The court conceded the possibility that such a factual context might have necessitated a different analysis:

We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale. We need not, however, address this scenario because, on the facts before us, there was simply no threat or forecast of material and substantial disruption within the school.\textsuperscript{103}

The court stressed that the Granville administrators did nothing for nearly a week after discovering the nature of the publication and made no showing of actual disruption within the school or facts providing a reasonable basis for the forecast of such disruption. The suspensions were predicated on the administrators' belief that Hard Times was "morally offensive, indecent, and obscene,"\textsuperscript{104} not on actual or potential disruption.\textsuperscript{105} The conclusion which should be drawn is that while the Tinker analysis did not fit under the particular facts of Thomas, Tinker is not necessarily inapplicable to all factual scenarios involving essentially off-campus expression.\textsuperscript{106}

In justifying the limitation of the autonomy of school officials to the school and the school day,\textsuperscript{107} the court stressed that school administrators could not be given the opportunity to win public approval by imposing sanctions on students engaging in off-campus expression. School officials inclined to act in such a manner would, as would well-meaning administrators who exceeded their sphere of authority, impermissibly chill the exercise of protected freedoms.\textsuperscript{108} In emphasizing that school officials with unchecked power to regulate off-campus expression might inhibit future expression by placing sanctions on protected speech, the court

\textsuperscript{102} See notes 63-64 & accompanying text supra.
\textsuperscript{103} 607 F.2d at 1052 n.17.
\textsuperscript{104} 607 F.2d at 1050 n.12. See notes 63-64 & accompanying text supra.
\textsuperscript{105} 607 F.2d at 1052 n.17.
\textsuperscript{106} While the Thomas court appeared to reserve the option of applying the Tinker analysis to certain cases involving off-campus expression, see note 103 & accompanying text supra, it failed to offer guidelines sufficient to enable one to devise, with certainty, a hypothetical off-campus expression case to which Tinker clearly would be applied.

\textsuperscript{107} Id. at 1052.
\textsuperscript{108} Id. at 1051.
resorted to a logical extremes analysis. It stated that if the officials possessed the kind of power they attempted to assert in the case of *Hard Times*, they could punish a student who purchased a copy of *National Lampoon* and loaned it to a friend attending the same school, or a student who viewed an X-rated film while on his own time. While one cannot deny the significance of the basic point that there would be a constitutionally impermissible risk in according school administrators wide-ranging authority to punish the exercise of expression regardless of where it occurs, the court's use of the logical extremes approach does appear to stretch believability. There is a clear distinction between the expression involved in *Thomas* and the viewing of an X-rated movie away from school grounds. The distinction lies in the connection—though admittedly minimal—which *Hard Times* had with the school and the complete lack of connection between the viewing of an X-rated movie and the school environment. Additionally, it is difficult to envision a rational school official attempting to punish a student for viewing such a movie. While the punishments imposed in *Thomas* were admittedly unconstitutional, it is not so difficult to see what prompted the administrators to follow a course of conduct which they felt was justified but must be regarded as impermissible.

B. The Concurrence in the Result

Judge Newman concurred in the result because he agreed that punishment had improperly been imposed for essentially off-campus activity. He concluded, however, that the majority had ignored half of the case, stating that the students sought relief that would allow them to distribute *Hard Times* on school property. The majority did not decide whether the school could regulate on-campus distribution of the publication, since it thought the students had, on appeal, abandoned any claim to such relief.

110. 607 F.2d at 1051.
111. This approach is utilized to illustrate that a given principle, once recognized, would, when stretched to its logical extremes, produce illogical results. For a resort to logical and illogical extremes reasoning similar to that employed in *Thomas*, see Shanley v. Northeast Independent Community School Dist., 462 F.2d at 977.
112. For an expression of views similar to these, see 607 F.2d at 1058 n.13 (Newman, J., concurring in the result).
113. 607 F.2d at 1053 (Newman, J., concurring in the result).
114. *Id.* at 1054.
115. *Id.* at 1052 n.18.
The thesis of Judge Newman is that Cohen v. California\textsuperscript{116} and Federal Communications Commission v. Pacifica Foundation,\textsuperscript{117} coupled with cases such as Ginsberg v. New York,\textsuperscript{118} establish the principle that school officials constitutionally may prohibit on-campus distribution of publications which, while not obscene,\textsuperscript{119} include language which is "indisputably indecent."\textsuperscript{120} For Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."\textsuperscript{121} He suggested that the Tinker standard, normally given substantial weight in cases involving administrative approval prior to distribution of the material,\textsuperscript{122} should not be applied in a distribution case involving a publication which contains indecent language.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{116} 403 U.S. 15 (1971). Cohen involved the reversal of a conviction for disturbing the peace where the statute as applied was an impermissible regulation of speech. Id. at 26. Cohen had walked through a courthouse corridor wearing a jacket which bore the inscription "Fuck the Draft." Id. at 16. It was held that the display of a four-letter word could not be made a criminal offense. Id. at 26. Judge Newman cited Cohen for the proposition that one does not have an absolute right to express himself as he chooses, when he chooses and wherever he chooses. 607 F.2d at 1055 (citing Cohen, 403 U.S. at 19). It must be remembered, however, that Cohen's speech was held protected.
\item \textsuperscript{117} 438 U.S. 726 (1978). This case arose out of a radio station's playing, during the middle of the afternoon, a recording of the George Carlin comedy monologue "Filthy Words." Id. at 729. In upholding the FCC's authority to impose sanctions on broadcasting stations which aired broadcasts which were not obscene but included "indecent" language, id. at 738, the Supreme Court expressed grave concern over the accessibility of such language to children in the audience. It appeared to authorize the withholding of some forms of offensive expression from children. Id. at 749. Professor Tribe regards Pacifica as an unfortunate aberration ultimately to be discarded before it leaves any significant impact on first amendment doctrine. L. Tribe, supra note 6, at 67-68 (1979 Supp.).
\item \textsuperscript{118} 390 U.S. 629 (1968). Ginsberg established the principle that the state has the constitutional power to regulate in order to protect the well-being of minors. Id. at 638.
\item \textsuperscript{119} The constitutional obscenity standards are set out in Miller v. California, 413 U.S. 15 (1973). The term "obscenity" applies to works describing or depicting sexual conduct. The standard to be applied by the trier of fact is whether an average person, applying contemporary community standards, would find that: (1) the work, taken as a whole, appeals to a prurient interest in sex; (2) the work depicts or describes, in a patently offensive way, sexual conduct which is specifically defined by applicable state law; and (3) the work as a whole is lacking in serious literary, artistic, political, or scientific value. Id. at 24.
\item \textsuperscript{120} 607 F.2d at 1057.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} See notes 36-47 & accompanying text supra.
\item \textsuperscript{123} 607 F.2d at 1055. While the majority did not decide whether the school officials could regulate on-campus distribution of Hard Times because it felt that the students were no longer pursuing such a claim, see notes 114-15 & accom-
In addition, Judge Newman expressed the position that in a case in which the *Tinker* standard of a reasonable forecast of substantial interference is met, school authority may be exercised against off-campus activity, "territoriality . . . not necessarily [being] a useful concept in determining the limit of [school officials'] authority."  

V. CONCLUSION

While it would not appear wise to read *Thomas v. Board of Education* as standing for the proposition that school officials may never regulate off-campus expression, the basic tenor of the decision is encouraging. The hesitancy in *Thomas* to allow administrators to venture into the general community and thereby chill the exercise of protected rights of expression (including the right to express oneself in a manner which some might not approve of) is judicial recognition that students' first amendment rights cannot be sacrificed merely because some figures of authority claim the abrogation of freedoms to be necessary or desirable. By walking through the schoolhouse gate and entering the school, students of necessity sacrifice some of the expansiveness characteristic of their rights of expression. When they again walk through the schoolhouse gate and leave the school grounds, the previously sacrificed expansiveness must be regained if the first amendment guarantee is to retain its vitality.

*Arlen W. Langvardt '81*

---

124. See notes 101-06 & accompanying text *supra*.  
125. *Id.* at 1058 n.13.