Protecting Student Free Speech and Free Press Rights: Constitutional Aspects of S.18

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> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."
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> U.S. Constitution, Amendment I

> "That the people have a right to freedom of speech, and of writing, and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained."
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> Vermont Constitution, Ch. 1, Art. 13

I. Introduction

My name is Peter Teachout. I am a professor of constitutional law at Vermont Law School. I appreciate the opportunity to appear before the House Education Committee. I hope that my comments may be of some help.

S.18 is intended to amend Vermont law to provide student journalists in the state's public schools with a greater degree of protection for freedom of expression and freedom of the press than is currently provided under the First Amendment as interpreted and applied by the United States Supreme Court. It is possible that the Vermont state constitutional provision protecting freedom of speech and the press, Article 13 of Chapter I, may be read as providing greater protections for student journalists than does the federal constitution, but that provision has not been applied in the student newspaper and media context by the Vermont Supreme Court yet so we do not have any firm guidance in that respect.

The legislation is needed, according to supporters, because, in the one case in which the Supreme Court considered whether censorship by school authorities of material published in a school newspaper violated the First Amendment rights of student editors, *Hazelwood v. Kulmeier* (1988), the Court held that school authorities had broad discretion to determine what could be published in a school newspaper, subject only to the requirement that the censorship be supported by "legitimate pedagogical" reasons. I discuss this case and its implications at greater length below. I am not aware of any instance in which this authority has been abused by school administrators in Vermont, but nationally there have been instances in which school administrators have used – or attempted to use - this broad discretion to censor student

newspaper articles criticizing school policy or portraying decisions by school authorities in a an unfavorable light or, more generally, addressing "controversial" issues. The purpose of S. 18 is to provide a measure of protection for freedom of speech and freedom of the press for student editors of school newspapers that is not currently provided by existing Supreme Court jurisprudence.

II. Key Supreme Court Decisions Affecting Student Free Speech and Press Rights

There are only four U.S. Supreme Court decisions dealing with student free speech and press rights, only two of which have direct bearing here: *Tinker v. Des Moines* (1969) and *Hazelwood v. Kulmeier* (1988).

The *Tinker* case is important because it established the fundamental principle that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the school house gate" and then went on to establish basic guidelines for when school authorities may and may not discipline or suspend students for engaging in expressive activities. In that case, high school students were sanctioned for wearing black armbands to school expressing their opposition to the Vietnam War. The Court found that the imposition of sanctions violated the students' free speech rights since there was no evidence that the silent passive wearing of the armbands in class would "materially and substantially interfere" with the school's ability to perform its educational mission. In so ruling, the Court stressed that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression:"

> "Any departure from absolute regimentation may cause trouble. Any variation from the majority opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who group up and live in this relatively permissive, and often disputatious, society."

Thus under only two circumstances, according to the Court, would sanctioning students for expressive activity be justified: Sanctions could only be justified upon a showing that the students' expressive activity (1) would "materially and substantially interfere" with the school's ability to perform its educational mission or (2) infringed upon "the rights of other students." It is important to start with *Tinker* because it establishes the base rules that govern Supreme Court jurisprudence in this area.

The *Hazelwood* case is directly relevant to the concerns underlying S.18 because it addresses specifically the question of when school authorities may regulate, control, or censor student expression when that expression occurs in the context of school-sponsored activities like school newspapers or dramatic protections. *Hazelwood* gives school authorities greater authority to impose limitations on student expression when that expression occurs in the context of a school-sponsored activity. In that case, students in the Journalism II class at Hazelwood High were responsible for producing a school newspaper called the Spectrum which was published every three weeks. On this occasion, two of the articles prepared by students, and submitted to the Principal for review prior to publication, described, respectively, (1) students' experiences with pregnancy and (2) the impact of divorce on students at the school. The Principal censored both articles prior to publication. The student journalists sued claiming that the Principal's action violated their rights to freedom of speech and of the press. At trial the Principal sought to justify his decision to censor the articles on a number of grounds: he was concerned that, even though names were changed to preserve anonymity, it might be possible to identify the pregnant students; he also believed the references to sexual activity and birth control were inappropriate for the younger students; he thought the parent of the student in the divorce story, who was harshly judged by the student in the story, ought to be given a chance to respond before the story appeared.

By a 5-3 vote, the Supreme Court upheld the Principal's right to censor the two articles, holding that he had acted "reasonably" in doing so. Importantly, the Court did not overrule the *Tinker* case, but instead distinguished it, drawing a clear distinction between student rights to free expression generally on school grounds, and student rights to free expression when engaged in school sponsored activities like school newspapers and dramatic productions. In the latter context, the Court said, school authorities may be legitimately concerned that the views expressed by students may be taken by the public as reflecting the imprimatur or approval of school authorities:

> "Hence a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself,' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards."

In a dissenting opinion, Justice Brennan, joined by Justices Marshall and Blackmun, expressed the view that the censorship exercised by the Principal in this case "served no legitimate pedagogical purpose;" that censoring student expression on the basis of a discretionary judgment that the expression was "inappropriate, personal, sensitive, and unsuitable" for student

consumption should not be allowed; and that, even if the decision itself might be justified, the Principal, by censoring the two articles in their entirety without opportunity for student input, had acted in a ham-handed and arbitrary way. According to the dissent, a much more selective approach to editing or redaction would have served as well.

Two other Supreme Court cases have allowed school authorities somewhat greater latitude in disciplining student speech and expression on school grounds than the *Tinker* case does: In *Bethel v. Frazier* (1986), the Court upheld the right of school authorities to sanction a student for giving a sexually-suggestive speech in a school assembly that was "pervasively lewd and vulgar." And in *Morse v. Frederick* [the "bong-hits-for-Jesus" case] (2007), the Court upheld the right of school authorities to prohibit and sanction student speech advocating the illegal use of drugs and alcohol. These cases have been very clearly limited to the particular exceptions they represent.

For purposes of S.18, the *Hazelwood* case is clearly the most relevant. In the view of critics, the *Hazelwood* decision is problematical because it seems to give school authorities virtually unfettered discretion to censor student expression in the context of school-sponsored activities, such as school newspapers and dramatic productions, so long as school authorities can justify that censorship by arguing that it serves "a legitimate pedagogical purpose." In that context, school authorities can censor student work that they find "inadequately researched," "biased or prejudiced," "vulgar or profane," "unsuitable" for certain members of the student audience, or in any other respect does not meet "high standards." That criticism has triggered two types of response:

First, the judicial response: In subsequent cases, lower federal courts have sought to distinguish the *Hazelwood* case on its facts and thus limit its application: In *Hazelwood* the student newspaper was produced by students in a journalism course which was part of the regular curriculum; it is a different case, the courts have held, when the student newspaper is the product of student extracurricular activity. In *Hazelwood* the student paper was routinely subject to official review and approval before publication; it is a different case when the student newspaper, even though under the guidance of a faculty sponsor, has always been published without requiring prior submission and review by school authorities. Where those different circumstances prevail, the lower courts have held, the ability of school authorities to censor student production is much more restricted.

Second, the legislative response: A number of states have adopted state laws, along the lines of S.18, providing greater protection for freedom of speech and press for student journalists than that provided under the First Amendment as interpreted and applied by the Court in *Hazelwood*. Those states include California, Massachusetts, Iowa, Colorado, Kansas, Arkansas, and Oregon. S.18 appears to be most closely modeled on the Oregon law. There is no

constitutional problem with states providing greater protection of student free speech and free press rights than that provided by the federal or state constitutions.

To the extent that S.18 seeks to provide greater protection of student free speech and free expression rights in the context of student produced newspapers and other media, there are no constitutional problems with the proposed legislation.

III. Key Provisions of S.18

S.18 is divided into two sections: The first section, "Sec. 1623. FREEDOM OF EXPRESSION," (at pp. 1-4 of the bill), deals with protecting the free speech and press rights of student journalists and editors at the primary and secondary school level. The second, "Sec. 180. STUDENT RIGHTS – FREEDOM OF EXPRESSION" (at pp. 4-8 of the bill), deals with protecting the free speech and press rights of student journalists and editors at the post-secondary level. For the most part the two sections run along parallel tracks, but there is one key difference in the authority that school administrators are granted with respect to censorship of material proposed for publication. School administrators at the K-12 level have greater, but still limited discretion, to censor material in advance of publication than do school administrators at the post-secondary level. Under the proposed legislation, student journalists and editors at the post-secondary level would enjoy the same freedom from prior restraint (from "censorship") by school authorities as journalists and editors of the private press enjoy from censorship by government authorities in "the real world." By the same token, student editors at the post-secondary level are required to exercise the same responsibility for what is published and what is withheld from publication.

There are several key provisions in S.18 worthy of note:

A. Preamble

First, the preamble, or "findings," paragraph of both sections of S.18 sets out the large objectives of the bill. I think this is helpful in making clear why this legislation is being considered and the basic principles and aims it is intended to protect and advance:

> "(1) . . . [F]reedom of expression and freedom of the press are fundamental principles in our democratic society granted to every citizen of the nation by the First Amendment to the U.S. Constitution and to every resident of this State by Vt. Const. Ch. I, Art. 13,
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> "(2) These freedoms provide all citizens, including students, with the right to engage in robust and uninhibited discussion of issues.

"(3) The General Assembly intends to ensure free speech and free press protections for both public school students and students at public institutions of higher education in this State in order to encourage students to become educated, informed, and responsible members of society."

This statement of purpose was missing from S.18 when it was first introduced in the Senate and its addition here makes a valuable and helpful contribution.

B. Distinction Between "Prior Restraint" and "Subsequent Sanction"

Both sections of the bill draw a distinction between the authority of school administrators to censor in advance material proposed for publication and their authority to impose some sort of sanction after the fact for irresponsible publication.

Prior Restraint

As noted above, the one key difference in the two sections is that school administrators at the K-12 level have greater discretion to censor in advance material proposed for publication than do school administrators at the post-secondary level. At the K-12 level, school administrators may censor in advance material that is:

"(1) libelous or slanderous;
"(2) constitutes an unwarranted invasion of privacy;
"(3) may be defined as obscene, gratuitously profane, threatening, or intimidating;
"(4) may be defined as harassment, hazing, or bullying under section 11 of this title;
"(5) violates federal or State law; or
"(6) creates the imminent danger of materially or substantially disrupting the ability of the school to perform its educational mission."

These categories are listed in paragraph (e) of both sections of the bill. The administrator's ability to do so, however, is dependent upon his or her "providing lawful justification without delay." So there is protection against arbitrary censorship built into the bill. Importantly, the bill provides that *"content shall not be suppressed solely because it involves political or controversial subject matter, or is critical of the school or its administration."* Paragraph (f) of Section 1623.

School administrators at the post-secondary level, however, may not censor in advance material falling into one of the listed categories. The only circumstance in which censorship in advance would be permitted would be upon a showing that the proposed publication will "cause direct, immediate and irreparable harm" of the most serious sort. S.18 establishes in this respect

the same standard for the exercise of prior restraint on publication by student journalists at the post-secondary level as that which protects the private press from government censorship in the public sphere. This is the same highly restrictive standard that the Supreme Court employed in in the *Pentagon Papers* case rejecting the government's request to enjoin the publication of the classified material involved there.

Imposition of Subsequent Sanctions

On the other hand, student journalists and editors at both levels – at both the K-12 and post-secondary level - would not be protected from the imposition of subsequent school-imposed sanctions for having published material falls in one of the categories of harmful speech listed in paragraph (e) of each section. Nor, it is important to add, would student editors be immune from subsequent actions for damages in civil courts for having published unprotected material. In such cases, the courts would apply the same standards that would be applied were the school newspaper or media a non-school media outlet. Not all the categories of speech listed in paragraph (e) of both sections would necessarily expose students to liability in civil courts (although some, such as liable, would). The important thing to appreciate is that, as written, S.18 would authorize school administrators to impose "school sanctions" upon student journalists after the fact for having published material that falls in one of the categories listed in paragraph (e) even though, at the post-secondary level, pre-publication censorship of such material would not be permitted.

Disclaimer of Association and Attribution

It needs to be noted that paragraph (j) of each section of the bill seeks to make clear that the "expressions" by student journalists in school-sponsored media should not be taken as expressions of "school policy."

> "(j) No expression made by students in school-sponsored media shall be deemed to be an expression of school policy."

This is important just as a matter of general public understanding in the same way, and for the same reason, that radio and TV stations often make clear that "the views of the speaker are not necessarily the views of this station." It also may help serve to provide a degree of insulation from liability for schools and school authorities in civil court actions for the publication of material that, for example, is found to be libelous, but whether it would be effective in doing so would likely depend on the particular circumstances involved.

IV. Conclusion

To the extent S.18 seeks to limit the ability of school authorities to censor and sanction student expressive activity in the context of school-sponsored media, it provides an important extra measure of protection of student freedom of speech and freedom of the press that is not currently provided under First Amendment law. The proposed legislation falls in line in this respect with similar legislation that has been adopted in a number of other states.

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