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

Testimony of Professor Peter R. Teachout
before the House Judiciary Committee,
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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 Judiciary Committee to testify about the constitutional aspects of S.18. 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 in my judgment because, in the one case in which the Supreme Court considered whether a school administrator's censorship 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, almost unfettered, discretion to determine what could, and what could not, be published in a school newspaper, subject only to the minimal requirement that the censorship be supported by some "legitimate pedagogical" reason. I discuss this case and its implications at greater length below.

When I first testified on the constitutionality of S.18 before the Senate Education Committee back in January, I was unaware of any instances of abuse of this discretion by school authorities in Vermont although I was aware of problems that student journalists and editors had encountered in other states. But I have since come to learn that censorship is a problem in Vermont. At the hearing before the House Education Committee on April 4th, Alex Silberman, the student editor of the Burlington High School newspaper testified that the school newspaper had been prevented from printing stories or parts of stories – stories that were clearly relevant and important to the students - because school authorities thought the stories were too controversial or potentially embarrassing. He also testified that the threat of potential censorship by school officials contributed to self-censorship by student journalists and editors themselves. The experience at Burlington High moreover is reflective of a larger national problem. Not only have stories proposed for publication in school newspapers elsewhere been censored by school administrators, most often out of concern with possible controversy or embarrassment, but faculty advisors to student newspapers have been dismissed or disciplined by superiors for failing to exercise censorship. It is, in short, a real problem - both in Vermont and nationally. The purpose of S. 18 is to provide a measure of free press protection for student editors of school newspapers that is not currently provided by existing Supreme Court jurisprudence. I strongly support adoption of this bill and urge the House Judiciary Committee to approve it.

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

There are 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." The Court then went on to establish basic guidelines for when school authorities may and may not discipline 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." The Court continued:

> "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."

Consequently, there were only two circumstances in which school authorities could sanction students for engaging in expressive activities: The first was when the expressive activity threatened to "materially and substantially interfere" with the school's ability to perform its educational mission; and the second was when the expressive activity infringed upon "the rights of other students." It is important to start with the *Tinker* case because it establishes the base rules that govern Supreme Court jurisprudence in this area.

The *Hazelwood* case is more directly relevant to the concerns underlying S.18, however, because it addresses specifically the question of when school authorities may regulate, control, or censor student expression in the context of school-sponsored activities like school newspapers or dramatic protections. *Hazelwood* gives school authorities much wider discretion to censor and discipline 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 justified his decision 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 believed the references to sexual activity and birth control were inappropriate for the younger students; and 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 legitimately be concerned that the views

expressed by students might 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 summarily censoring the two articles without providing 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 present purposes, the *Hazelwood* case is clearly the most relevant. In the view of critics, the *Hazelwood* decision is problematical because it gives school authorities virtually unfettered discretion to censor student expression in the context of school-sponsored activities so long as school authorities can justify that censorship by claiming that it serves "a legitimate pedagogical purpose." Thus, according to *Hazelwsood,* school authorities can censor student publication of work that the school authorities 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." Criticism of the *Hazelwood* decision 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 lower 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 Supreme 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.

To the extent that S.18 seeks to provide greater free speech and free expression protections for student journalists and editors, there are no constitutional problems with the proposed legislation. The legislation is intended, rather, to cure what are perceived to be the deficiencies in the levels of protection provided by existing Supreme Court jurisprudence in this area.

III. Key Provisions of S.18

To understand what S.18 does and does not do, it is important to appreciate that the bill makes two basic distinctions: First, S.18 treats student journalists and editors at the post-secondary (college, university) level differently from student journalists and editors at the primary and secondary levels. Basically, student editors of college or university newspapers are provided somewhat greater press freedom (with accompanying greater responsibility) than are high school journalists and editors. To appreciate the exact nature of this difference in treatment, however, one needs to appreciate another distinction made in S.18: between the authority of school officials to censor in advance material submitted for publication by student editors on the one hand and their authority to impose sanctions after the fact for irresponsible publication on the other. Notwithstanding this difference in treatment, it is important to stress that student editors at both levels are given much greater protection from censorship under S.18 than they currently enjoy under existing U.S. Supreme Court jurisprudence.

Censorship (or "Prior Restraint")

Under the proposed legislation, student journalists and editors at the post-secondary level would enjoy the same freedom from prior restraint (or "censorship") by school authorities that journalists and editors of the private press enjoy from censorship by government authorities in the outside world. That imposes upon student editors at the post-secondary level, of course, the same level of responsibility. Under the terms of S.18, the only circumstance in which censorship by school authorities would be permitted would be upon a showing that the proposed publication will "cause direct, immediate and irreparable harm" of the most serious sort. This is the same highly restrictive standard that the Supreme Court employed in in the *Pentagon Papers* case in rejecting the government's request to enjoin the publication of the classified and politically embarrassing material involved there. It is an extremely high standard. As a practical matter, it means that student editors of college or university newspapers (or other media) would be free to publish whatever they believe is worthy of publication in virtually every case – free, at least, from the threat of prior censorship by school authorities.

It is a different story with respect to censorship authority at the primary- and secondary-school level. There, under the terms of S.18, school administrators are given greater discretion to censor in advance material proposed for publication than are school administrators at the post-secondary level. At the primary- and secondary-school level, school administrators may censor in advance material found to be:

> "(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 the first and second sections of the bill. It is important to appreciate that, although this allows some room for the exercise of prior censorship, the list of possible justifications for censoring material is sharply limited compared to the justifications that school administrators regularly invoke in the exercise of discretion allowed under the *Hazelwood* case. Moreover, the administrator's ability to censor material in advance even at this level is dependent upon his or her "providing lawful justification without delay." That requirement does not currently exist. So there is this important procedural protection against arbitrary censorship built into the bill as well. Perhaps most importantly, the bill expressly 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 (bold supplied). This is a crucially important caveat because it eliminates one of

the most frequent invoked bases for the exercise of censorship by school administrators – a concern that the proposed publication may be controversial or potentially embarrassing.

Imposition of Subsequent Sanctions

On the other hand, student journalists and editors at both levels – both primary- and secondary-school and post-secondary levels - would not be protected under S.18 from the imposition of subsequent school-imposed sanctions for having published material that falls in one of the categories of harmful speech listed in paragraph (e) of each section. Nor, for that matter, 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 private media outlet. Not all the categories of speech listed in paragraph (e) would necessarily expose students to liability in civil courts (although some, such as liable, would). The important thing to appreciate in this respect is that, as written, S.18 would authorize school administrators at both levels to impose "school sanctions" after the fact upon student journalists 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 probably should be pointed out 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 an important caveat as a matter of general public understanding in the same way, and for much 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." And it may – "may" - 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 later found to be libelous. Whether it would be effective in providing insulation from liability would likely depend on the particular circumstances involved. One of the circumstances considered by lower courts to be relevant in this respect is whether school policy required material slated for publication to be submitted to school authorities for review in advance. In one case, a school was found to be not liable for damages for the publication of libelous material because the student editors were not required to submit material proposed for publication for review in advance. Thus the publication decision was clearly the students' decision – and not that of school authorities.

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 by Supreme Court jurisprudence. The proposed legislation falls in line in this respect with similar legislation that has been adopted in a number of other states. I urge its approval and adoption.

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