Protecting Student Free Speech and Free Press Rights: Constitutional Aspects of Proposed Senate Bill, S.18

Testimony of Professor Peter R. Teachout,
Vermont Law School, January 24, 2017

> "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 Committee. I hope that my comments may be of some help.

S.18, as I read it, is intended to amend Vermont law to provide student journalists in the state's public schools, independent schools, and "postsecondary 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 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.

I do have some questions about the meaning and intent of certain provisions in S.18, but before turning to those questions, I would like to lay out the basic constitutional context established by U.S. Supreme Court decisions regarding student free speech and free press rights.

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 arm bands 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. 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 views 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. Some Questions About the Intent and Meaning of Certain Provisions in S.18

I do, however, have some questions about the intent and meaning of certain provisions in S.18 which I would like to share with the Committee.[1]

The basic structure and approach of S.18, as I understand it, is to provide that student expression occurring in the context of school-sponsored media projects is completely protected from interference, or sanction, or censorship by school authorities unless it falls in one of the four specific exceptions listed under subsection (d) on page 3:

> "(d) This section shall not be construed to authorize or protect content of school-sponsored media that:
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> (1) is libelous or slanderous;
> (2) constitutes an unwarranted invasion of privacy;
> (3) violates federal or State law; or
> (4) creates the imminent danger of inciting students to violate the law or school rules, or to materially and substantially disrupt the orderly operations of a school."

Furthermore, a school may restrain even student expression that falls in one of these listed categories only by "providing lawful justification without undue delay." If that reading is correct, then S.18 would have the effect of significantly limiting the ability of school authorities to censor student expression occurring in this school-sponsored context above and beyond the limits established by the Supreme Court in the *Hazelwood* case. S.18 also seeks to prevent attribution to school authorities of any views expressed by students in this context and to immunize schools and school authorities from any liability for the views so expressed.

Here are my questions:

(1) Subsection (e) on page 3 provides that "[n]othing in this section shall be construed to authorize the prior restraint of any school-sponsored media, except as to content specified in section (d) . . . but where does it provide that school authorities are prohibited from subjecting school-sponsored media, other than that listed in (d), to prior restraint. To say this section "does not authorize" prior censorship is not the same as saying such censorship is prohibited. I think this is probably implicit in the whole structure and approach of S.18, but I could find nowhere where this prohibition is made explicit. Section (d) lists the types of expression that may be prohibited, but nowhere does it expressly provide that only these types of expression may be prohibited.

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[1] [S.18 would amend two distinct parts of 16 V.S.A. – it would add a provision to Chapter 42 , "Student Rights" entitled "Sec. 1623. Freedom of Expression," and it would add a Section 180 entitled "Student Rights – Freedom of Expression." Both parts of S.18 seem to adopt the same approach and language (although there may be differences of substance I failed to pick up on) so I am not sure of the need for both provisions but I assume the proponents of the bill have their reasons.]

(2) I can understand why the particular exceptions listed under subsection (d) have been included, but I am a little concerned about the potential breadth and reach of exception (4) of that subsection (page 3) which excludes from protection any student expression that would create "an imminent danger of inciting students to violate the law or school rules." My concern here derives in part from my experience – and American experience more generally – with acts of conscientious objection. I am troubled by the prospect of student journalists being censored or sanctioned for advocating peaceful acts of conscientious objection (of law violation) in situations where that advocacy in fact may bear imminent fruit.

I am also concerned about what seems to me a certain circularity in the operation of this exception: If a school rule forbids, for example, the use of bathrooms by anyone whose gender at birth does not correspond with the gender on the bathroom door, should student journalists and student media producers be censored for arguing in an editorial that that rule ought to be broken and inviting students to break it?

Keep in mind that the students wearing armbands in the *Tinker* case were doing so in violation of school policy. And there was a time not long ago when many schools in this country prohibited students from bringing dates of the same sex to the senior prom. I am not sure how to remedy this problem but I wanted to bring it to the attention of the Committee.

(3) I am less than clear about what authority student supervisors or media advisers would have under S.18 to limit or restrict the publication or dissemination on school-sponsored media of embarrassingly sloppy (inadequately researched, grammatically flawed, etc.) student work. We are told in subsection (c)(1) on the bottom of p. 2 that "student supervisors" are "responsible for determining the content of their respective media." I have two questions:

First, who are these "student supervisors"? Are these the same as "student media advisers" as defined in (4) above or are they students? I think this may be intended to refer to actual students (see below), but I don't find this term defined anywhere.

Second, what does it mean to say that "student supervisors" are "responsible <u>for determining the content</u> of their respective media"? If it means they have carte blanche discretion to review and approve, or disapprove, for publication student work without need for any justification, that would give the "supervisors" far more authority than they are allowed even under the *Hazelwood* decision. Or does it just mean they are responsible for generally determining the content of particular types of student media? I am not sure what this means.

One federal court case from Massachusetts, *Yeo v. Lexington*, suggests that leaving determinations of content to student journalists may have some advantages. In that case a

community member sued the public high school for violation of his First Amendment rights after student editors rejected advertisements he had submitted. In rejecting his claim, a federal appeals court determined that since student editors, not school officials, had made the decision to reject the advertisements, there was no First Amendment violation (no "state action"). But this leaves the question of just how much, and how unfettered, the student supervisors discretion should be.

We are told in subsection (c)(2) (top of page 3), which immediately follows, that "student media advisers" are not prohibited by S.18 "from teaching professional standards of English and journalism," but what is the range of their authority as "teachers," if any, to limit the publication or dissemination on the school media or in a school newspaper of clearly substandard work? What exactly is the scope of their authority as "teachers"?

It is something of a catch 22: If the "media advisers" have authority to prohibit publication of clearly substandard student work, no matter what the substantive thrust, does that give them too much discretion? If they don't have that authority, is that a consequence that proponents of S.18 are comfortable with?

(4) Subsection (i) on page 4 purports to exempt school authorities from liability "for any expression made or published by students in school-sponsored media." This can be done legally, if that is the intent, but it raises questions about how this provision fits into the state libel laws generally. Suppose, notwithstanding the provisions in subsection (d), student journalists in fact publish in a school-sponsored newspaper material that is clearly false and libelous. Under existing Vermont law, the person damaged would have an action against both the student and the school newspaper (the school district). Is it the intent of this subsection to immunize the school district from liability no matter what the damage done by the publication of clearly false and libelous material? In that case, should not the school bear some responsibility?

(5) Finally, coverage? According to the preamble, S.18 protects student free speech and press rights not only in public schools but also in "independent schools" and "postsecondary schools." I can understand why students in independent schools are covered, since, if the independent schools are private schools, students there have no First Amendment rights. I am curious however about the decision to include "postsecondary schools" because, to the best of my knowledge, none of the other state laws that share this same aim do so. I do not see an immediate problem with including students at the postsecondary school level, but the "school speech" cases are generally viewed as protecting the rights of students in primary and secondary public schools. The Supreme Court tends to treat the protection of the constitutional rights and responsibilities of university students as presenting distinct issues. Moreover, once one moves from the preamble to the operative provisions of S.18, "postsecondary schools" disappears as a

distinct category, and, to the extent they are covered at all, only "public" postsecondary schools are arguably covered. This too needs, I think, clearing up.

IV. Conclusion

While there are some drafting questions that probably need to be addressed (see Section III above), in basic thrust there are no constitutional problems with S.18. 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 extra measure of protection of student freedom of speech and freedom of the press that is appropriate and justified. It falls in line in this respect with similar legislation that has been adopted in a number of other states.