

**Testimony of Frank D. LoMonte, media lawyer and professor**  
**Nebraska LB 886 (Sen. Morfeld)**  
**Senate Judiciary Committee**  
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I thank Senator Morfeld for the invitation to share some information about the workings of student press-rights statutes with the committee. This testimony is drawn from my 17 years of experience as an attorney, including nine spent as executive director of the Student Press Law Center, a nonprofit legal-services organization serving the needs of student journalists and educators nationwide. I have studied and written about these laws for many years, including authoring two editions of a textbook, “Law of the Student Press,” that is the most widely used reference manual in the field of scholastic journalism. I have taught media law at the college level since 2014 with the University of Georgia and the University of Florida. In my role at the SPLC, I supervised an attorney hotline fielding some 2,500 calls for legal assistance yearly from students nationwide, many hundreds of whom are experiencing restraints on their ability to gather and publish news.

The legal protection that is afforded to student journalists today under federal law is imbalanced and is widely recognized as inadequate for the effective teaching of sound journalistic values and practices. The Supreme Court’s 1988 *Hazelwood* ruling has effectively removed all federal protection for the rights of students in journalistic media. After nearly 30 years of experience under *Hazelwood*, every leading authority in the field of journalism education – both educators and professional practitioners alike – agrees that the right amount of press freedom in educational institutions cannot be “zero.” The American Bar Association, the Society of Professional Journalists, the American Society of News Editors, the National Council of Teachers of English and many other such organizations have called on states to reform the *Hazelwood* standard, because young people are graduating unprepared to have educated conversations about the social and political issues that censorship restrains them from discussing.

This growing consensus has fueled a national movement known as “New Voices,” to enact statutes that bring the governance of student media back to the sensible middle ground that existed before *Hazelwood* was decided. Thirteen states now have laws comparable to LB 886 protecting the ability of students to publish the lawful and non-

disruptive editorial content of their choice. Pennsylvania and the District of Columbia offer the same level of protection by way of State Board of Education rule. One-third of all high-school students in America have the level of protection today that is contemplated in LB 886, so there is nothing experimental or unproven about student press freedom laws. The combined experience of these jurisdiction covers more than 180 years, and in those 180 years, no “horribles” have materialized. Indeed, there is not a single case available in any of the publicly available databases of court records dating back two centuries in which a school has been ordered to pay anyone a dollar for harmful material published by student journalists. And New Voices laws strengthen, not weaken, the liability protection for schools by clarifying that the speech of students is not the speech of their schools.

New Voices laws do not result in students prolifically suing their schools over censorship. A study published in the *Maine Law Review* in 2013 found only six documented instances in which a New Voices statute had ever been cited in a published court ruling (subsequent to 2013, there has been a seventh case, at a college in Illinois). It is our experience that New Voices statutes avoid, rather than cause, litigation because they clarify the boundaries of government authority and simplify resolving disputes.

New Voices legislation like LB 886 is rapidly advancing across the country. Last year, Nevada, Rhode Island and Vermont overwhelmingly passed legislation functionally equivalent to LB 886. Similar bills are rapidly advancing in Missouri and Washington this session. In each state, these bills have been passing with overwhelming bipartisan support, because of the growing recognition that digital-age journalism in schools and colleges can no longer be governed by 1980s-era standards.

Legislative reforms are timely because students at the high-school level regularly report being forbidden from publishing news and opinion about issues of social and political concern. In a March 2017 journal article (“Mixed Message Media: Girls’ Voices and Civic Engagement in Student Journalism”), University of Kansas researchers Peter Bobkowski and Genelle Belmas document their findings from a fall 2015 survey of 491 high-school journalism students across North Carolina. That survey found that 38 percent of students had been told that entire topics were categorically off-limits for discussion in student journalistic publications, the most common being drug or alcohol abuse. The KU study further found that female students were significantly more likely than male students

to report both direct censorship as well as “self-censorship” in anticipation of adverse reaction from authority figures. More than half (53 percent) of female students said they had refrained from even attempting to write about an issue of importance to them, expecting to be censored.

While direct acts of institutional censorship are not as commonplace at the postsecondary level, college student journalists are by no means immune. In a December 2016 study (“Threats to the Independence of Student Media”), the American Association of University Professors documented multiple cases of retaliatory discharges of college faculty to punish them for students’ journalistic work that provoked controversy or portrayed the institution in an unflattering light, including cases at Butler University, Northern Michigan University and Fairmont State University, among others.

Because this question has arisen in other states, I want to address the issue of how a state statute can “override” a U.S. Supreme Court decision. When the Supreme Court issues a ruling on the constitutional rights of individuals, the Court is setting a floor for states and not a ceiling. The *Hazelwood* ruling can be summarized as: “Students have the federally protected right to speak in ‘curricular’ student media unless the school can present a justification for censorship that is ‘reasonably related to legitimate pedagogical concerns.’” Nothing in *Hazelwood* precludes a state from offering state-protected rights that supplement federally protected rights. There is no “inconsistency” between the *Hazelwood* ruling and a state law like LB 886 that extends to students the benefit of additional state-protected press freedoms.

New Voices statutes do not put the rights of student journalists on par with those of professionals at *The Wall Street Journal*. The Supreme Court has said that nothing short of leaking military battle plans during wartime could justify restraining the distribution of a professional newspaper. New Voices protection is much more limited. New Voices statutes simply restore the protection that existed before *Hazelwood* under the legal principles set forth by the Supreme Court in *Tinker v. Des Moines*. *Tinker* has been the law of the land for 48 years. It is the standard that applies today to students’ baseball caps, T-shirts and all other personal communications. Anything that a school could lawfully stop a student from saying on a T-shirt (include gang symbols, threats, obscenity or other disruptive speech) can equally be withheld from student news media under LB 886.

In summary, *Hazelwood* is a relic of a time when it might have been possible to keep students from learning about teenage pregnancy by tearing pages out of newspapers. Of course, that is not the world we live in today. Young people are bombarded with online gossip, rumor and fabrication. By welcoming the discussion of political and social issues into the newsroom, those issues can be debated in a verified, supervised way – with fact-checking, with balance and with accountability, none of which exists if censorship pushes the discussion onto social media.

I want to conclude by encouraging the committee to read the American Bar Association's August 2017 report and resolution about the importance of a free student press to promoting a healthy climate for civic learning. The ABA report says in part: "If student journalists are to assume responsibility as the primary newsgatherers for their communities, they must be assured of independence from viewpoint-based institutional control or reprisal, as nonstudent professionals are. It is counterintuitive that the one place in which students are assured of no legally protected freedom to voice political opinions is in the pages of a newspaper. ... It is the consensus of every leading expert in journalism education that *Hazelwood* has fostered censorship for purposes of image control rather than education, and that *Hazelwood* has diminished the opportunity for students to make their voices heard. Indeed, the ability to be heard on issues of public concern is itself a matter of student safety. Students can and do use journalism to call public attention to safety hazards, when they are allowed to do so. High-quality student journalism... gives marginalized students opportunities for recognition; it sheds light on ways in which schools are performing unsatisfactorily and could be improved; and it builds healthy news readership habits. Meaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the responsible, accountable forum of journalistic media."