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CIVIL LIBERTIES *By Harvey A. Silverglate*

6th Circuit just doesn't get it

A RECENT DECISION by the U.S. Court of Appeals for the 6th Circuit gives administrators at Kentucky State University the power to censor the student-produced school yearbook. *Kincaid v. Gibson*, 1999 WL 691835 (Sept. 8, 1999).

This outcome provides ammunition to First Amendment absolutists who argue that the only real way to protect free speech is to take seriously the "no" in the First Amendment ("Congress shall make no law...abridging the freedom of speech, or of the press").

Free speech absolutists are generally given a bad rap for their supposed inflexibility. Indeed, when I was a law student at Harvard in the late '60s, it was fashionable, as it still is, to mock the late Justice Hugo L. Black as simple-minded because he asked what part of "no" would-be censors could not understand. Justice Black well understood that over time, exceptions have a way of overwhelming the rule.

It was therefore almost predictable that after the Supreme Court in 1988 established the power of public high school administrators to censor a school newspaper published by students in a journalism class, public college administrators soon would claim the same awesome power, and that some court would eventually agree. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

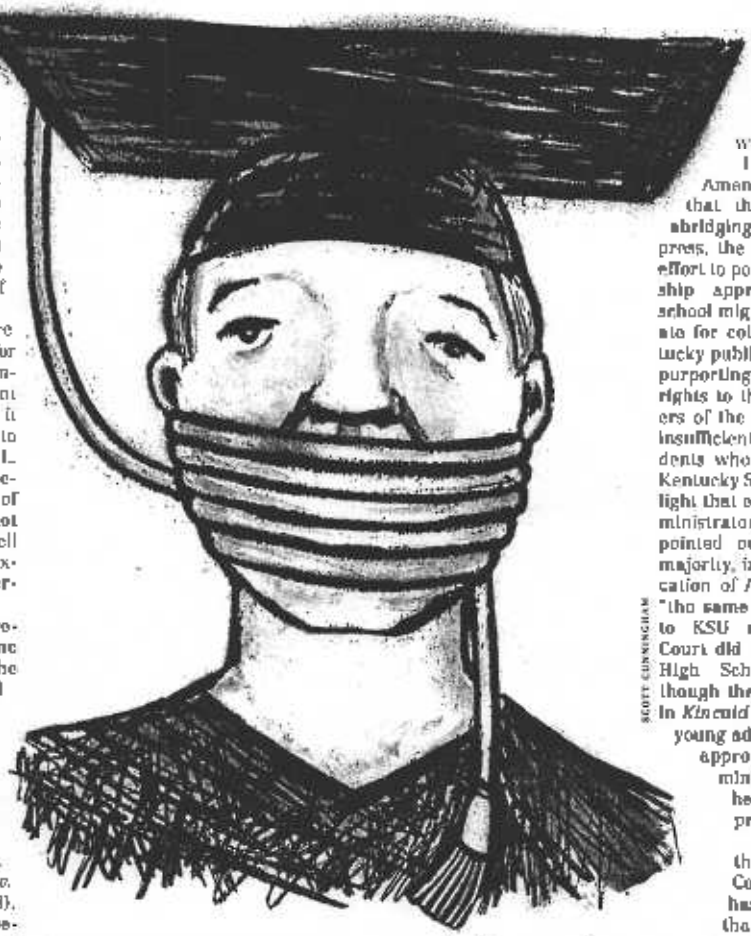
This is not necessarily because the *Hazelwood* court intended to give the same power to officials in higher education that it gave those in secondary schools. Indeed, the majority, in a footnote, cautioned that "[w]e need not decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."

However, it seems that administrators and other censors in public higher education are always looking for a chink in the First Amendment's armor, and they found it in *Hazelwood*. They based their conviction on the notion that if a school sponsors a student publication as part of the "educational mission," the administration may censor the paper in order to fulfill that mission.

(Of course, this formulation really begs the question of precisely what it is that we should be trying to teach our school children. As dissenting Justice William Brennan pointed out in *Hazelwood*, school children should be educated in an atmosphere of liberty, not in "enclaves of totalitarianism.")

It is not remarkable that the administrators at Kentucky State stopped the distribution of that edition of the yearbook—on the ground that it made the school look bad and did not convey the "image to potential students, alumni, and the general public" preferred by the powers-that-be. The remarkable part is that a federal appellate court let them get away with it.

This is precisely the situation in *Kincaid*. Two of the three panel members who heard the case held that the yearbook was not the kind of "public forum" that enjoys constitutional protection. They based their conclusion on the fact that school rules governing production of the yearbook did not contain a specific "disclaimer" making clear that the publication expressed the views of the student writers rather than of the school itself. However, the dissenting panel member, Circuit Judge R. Guy Cole Jr., noted that the rules clearly stated the intent that the yearbook "shall be as free of censorship as prevailing law dictates."



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Perhaps the most revealing line in the majority opinion in the *Kincaid* case came with the discussion of what the school's legitimate "educational mission" was and the role of the school yearbook in the furthering of that mission. "It is no doubt reasonable," wrote the panel majority, "that KSU should seek to maintain its image to potential students, alumni, and the general public."

To put it another way, the mission of the college was not to turn out educated young citizens steeped in the ways of critical and independent thinking. These values could be sacrificed to maintain the school's "image" to the outside world.

Hence, the First Amendment's command that there be "no law" abridging free speech and press, the *Hazelwood* court's effort to point out that censorship appropriate for high school might not be appropriate for college and the Kentucky public university's rules purporting to grant free press rights to the student producers of the yearbook were all insufficient to protect the students who sought to portray Kentucky State University in a light that embarrassed its administrators. As Judge Cole pointed out in dissent, the majority, in its blanket application of *Hazelwood*, applies "the same level of deference to KSU as the [Supreme] Court did to Hazelwood East High School." This, even though the students involved in *Kincaid* were emancipated young adults and it was less appropriate for the administration to take a heavy-handed approach.

Inasmuch as neither the Supreme Court nor any circuit has explicitly held that there is no difference between high school and college insofar as permissible administrative censorship is concerned, and in view of the enormous loophole that such a doctrine would create in the protection of free speech and academic freedom on our public college and university campuses, the case seems ripe for Supreme Court review.

If that should happen, it will be too bad that Justice Black will not be asking, at oral argument, which part of "no" Kentucky college administrators, and the 6th Circuit, do not understand.

Podium submissions should be sent to Josephine Novak. Please fax them to (212) 481-7923; or e-mail them to rufusn@aol.com.

Mr. Silverglate is a bimonthly NLJ columnist and a partner at the Boston firm of Silverglate & Good.

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