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Education Connection:
**Twitter Hacks, Football Field Prayers and Campus Speech Climate:
Today's First Amendment Issues in Education**

By: Meghan Keeley

INTRODUCTION

What does “free speech” mean at school? This dispute has been a powerful legal issue for decades and has brought some of the most famous media stories and United States Supreme Court cases to our country's attention.

The United States Supreme Court held in 1969 that schools can constitutionally limit student speech if it materially and substantially interferes with the school's activities, discipline, and educational processes. However, students do not shed their constitutional rights at the schoolhouse gate. In 1972, the Court upheld parents' rights to exercise their Amish religion and take their children out of school after the age of 16 in violation of state compulsory education laws. In the late 1980s, colleges adopted anti-harassment codes and the Department of Education's Office for Civil Rights expanded federal anti-discrimination law by encouraging or requiring harassment codes on campus.

This paper analyzes on-going First Amendment education law issues. Sections I and II discuss issues in elementary and high school and Section III relates to free speech issues in universities. Section I discusses a growing trend in schools monitoring students' social media accounts. Section II discusses school employees' First Amendment right to religious exercise. Section III addresses growing disputes about free speech on university campuses.

I. HELP: MY PRINCIPAL HACKED MY TWITTER.

School shootings are more frequent than ever, and the reality of 2019 communication is that social media has become a secondary means of survival. There were 27% more school-based bomb threats or incidents in the 2016-2017 year than in 2012-2013, and 95% of teens in the U.S. own or have access to a smartphone. In light of these developments, schools are embracing one to control the other.

Schools are increasingly monitoring students' social media accounts to reduce gun violence or shootings on campus. Some, like Chicago Public Schools, also focus their monitoring practices on reducing gang membership among students. Chicago Public Schools has recently started monitoring students' social media accounts with this purpose in mind. After the Stoneman Douglas High School shooting in Parkland, Florida, dozens of schools began to officially monitor students on social media.

A. What is Entailed

Monitoring student social media involves more than a scroll through Twitter. Many schools formally hire private social media monitoring companies and experts on contracts for anywhere from a few thousand dollars to \$40,000 per year. This raises a question of whether schools exhausted alternative measures, such as using that money to offer more after school programs or hiring additional social workers to work alongside students, before resorting to such expensive contracts.

The goal is for school officials to catch potential threats to other students or the student's own safety so they can interfere before the threat is actualized. Some schools track keywords mentioned on Facebook statuses, like "cutting" or "suicide." Certain schools even have keyword notifications set up so they are prompted any time the key word, like "cutting," appears on the public timeline.

Schools that practice the policy and parents who support it argue that social media monitoring is an effective means to prevent dangerous situations that threaten student safety. In some cases, monitoring has helped schools identify students they believed to be at risk of harming themselves.

B. Criticism and Concerns

Protecting students from harm is of the utmost importance. However, monitoring student social media as a vehicle to do so is still not certain to be effective and carries many risky implications. There is little evidence that monitoring social media effectively prevents school violence or caught an imminent threat to other students. When the school flags a keyword on their social media account, students are often pulled into an office with principals, social workers, and sometimes even police officers. This raises important constitutional concerns that the practice could infringe on students' rights to free speech, privacy, and due process.

At a minimum, opponents argue, monitoring social media should be limited to protecting student safety and should not extend into policing personal opinions. This caution is critical to prevent over-policing of students on their virtual accounts. For example, some schools pull students aside for posting language on social media that is not necessarily a threat to safety, but vulgar, expletive, or reflects poorly on the school.

Another concern is that most schools monitor or flag students' social media posts without advance warning to those students or their parents. This raises a due process issue because the school implicates students' First Amendment rights to free speech and Fourth Amendment rights of search and seizure without providing Fourteenth Amendment notice to them or their parents.

C. Legislative Regulation & Moving Forward

Some states have taken legislative action to limit the scope of social media monitoring in schools. California passed a law in 2014 which requires schools to: a) afford students the right to see information collected about them; b) notify students and their parents when they consider adopting a monitoring practice; and c) destroy all student data when they leave the district.

One of the primary concerns of school and student regulation is to protect the safety of students. The practice of student social media monitoring would have a stronger constitutional claim if it proved to be substantially effective in protecting student safety. In any event, if a school limits student speech by monitoring social media, it must do so in abidance with the Constitution and, at a minimum, afford students their constitutionally protected rights in the process.

II. NO “HAIL MARY”S ON THE FOOTBALL FIELD

A. The Case

In January 2019, the United States Supreme Court turned away a controversial case arising from a football coach’s rights on the field. In 2015, high school football coach Joseph Kennedy was fired for praying on the 50-yard line after games when school officials had ordered him not to. Coach Kennedy gave short motivational talks after football games and was sometimes joined by players for his post-game prayer. His school district advised him that he could continue to give inspirational talks but not prayers. After Kennedy complied for a few weeks, he sought an accommodation and was denied. The coach prayed after two more games and was subsequently terminated from his job.

Coach Kennedy took legal action in 2017. The district court upheld the school’s decision to fire Kennedy and the Ninth Circuit Court of Appeals affirmed. Kennedy appealed to the Supreme Court on the issue of whether his termination was a violation of his First Amendment right to free speech. The Court privately considered the appeal but eventually denied Kennedy’s petition.

After the denial, Justice Alito issued an opinion which significantly stated that the Court’s decision did not mean it necessarily agreed with the school district. It simply denied the case because there were unresolved questions of fact that would have made it nearly impossible to decide the case on the issue of free speech. Alito further shared that Kennedy still had “live claims” under the First Amendment’s freedom of religion clause and the ban on employment discrimination based on religion in the Civil Rights Act of 1964. Justices Thomas, Gorsuch, and Kavanaugh joined in Alito’s opinion.

B. What is to Come

Schools that restrict employees' religious expression on campus do so because of concerns they will inappropriately influence students. In other words, when teachers or coaches pray on campus, it could be seen as a public-school-endorsed religious activity.

Commentators and academics suspect the conservative justices on the Court are looking for the "right case" to decide a rule on the issue of prayer in public schools for both students and employees. The Supreme Court denial is especially significant because, until now, the Court drew a sharp line against school-sponsored prayer. In response to the Supreme Court's invitation to religious exercise claims by school employees, district courts and education lawyers can expect to see many cases arising on the issue.

III. THE EVOLVING SPEECH CLIMATE ON COLLEGE CAMPUSES

A. The Alleged Problem

Since the 2016 election, many conservative students have criticized their universities for only protecting free speech that is liberal and progressive. In fact, in 2017, 61% of college students felt their campus climate prevents them from sharing their views. This is a dramatic and quick jump from the 54% who felt this way only one year prior. Conservative students allege campus climates are making it more difficult for them to express their views.

As a general matter, students in recent years prefer campus environments that prohibit offensive, racist, or biased speech. Studies show that most political student subgroups, except for Republicans, have become statistically less supportive of open speech environments on campus over the last couple of years.

As most universities promote and try to improve diversity on campus, it makes sense that minority students would not want to attend a school where they would not be protected by hateful speech. Although most college students are legal adults, their youth and developing maturity indicate there are circumstances about living in a university campus than older adults in the real world. This raises questions of whether *Tinker* applies to universities and if universities owe conservative students a limitless bound of free speech, even if it offends minority classmates.

B. Examples of Successful Free Speech Claims

A student at Northeast Wisconsin Technical College sued her school after she was restricted from handing out Valentine's cards with Bible verses. The University of California, Berkeley, and the University of Washington settled lawsuits in 2018 for \$70,000, and \$122,500, respectively, over free speech claims brought by conservative students.

In 2018, a Christian student group at the University of Iowa challenged the university violated its First Amendment rights. The school withdrew the student group's registration after it refused to allow a gay student to become a leader. The group allegedly denied the student because he refused to sign a statement that provided "people should embrace, not reject, their God-given sex" and defined "sexual relations" as those between a man and a woman. Iowa de-registered the group because its language excluded LGBT individuals. The U.S. Department of Justice sided with the student group on the claim and stated that Iowa was enforcing its policies unequally. As a result, the school withdrew the registrations of an additional 38 student groups.

C. The Argument: Universities are Hindering Conservative Student Speech

Conservative critics argue that schools, like Iowa, ignore their legal obligations to uphold the First Amendment when they apply stricter policies on student groups whom school officials "don't like."

Groups like the Foundation for Individual Rights in Education (FIRE) zealously advocate to protect free expression on campus. FIRE criticizes the Department of Education's Office for Civil Rights' expansion of federal anti-discrimination law on college campuses. FIRE has even created a "disinvitation database" that lists instances where individuals were disinvited from speaking on campus.

D. Opponents: No Free Speech Violations on Campus

Offensive speech incidents can create actual threats to students and their safety. For example, a 2017 counter-rally at the University of Virginia between white nationalist protestors and counter-protestors resulted in one death, five critical injuries, and 14 otherwise injured people.

In response to arguments that campus climates generally cast shade on free conservative speech, the claim that most college students are "against free speech" is simply not supported and untrue. Data shows that, while young people are less tolerant of racist speech than older generations, 18-34 year olds are the most tolerant of potentially offensive speech than any other age group. Other research studies show that going to college makes people more tolerant of views that oppose their own. And, the reality is that FIRE's "disinvitation database" shows the most successful attempts to shut out speakers were actually by right-leaning groups.

Some explain the change in recent years by the fact that today's college students were raised in a generation that recognized bullying was wrong. Thus, they feel more comfortable standing up against speech they find offensive. Surely, that should not be construed as a legal violation of the First Amendment.

E. School and Governmental Responses to Free Speech Concerns

How are schools and the government addressing concerns that conservative student speech is hindered on campus?

In September of 2017, then-Attorney General Jeff Sessions warned that the DOJ would aggressively support free speech initiatives. Around the same time, Education Secretary Betsy DeVos denounced what she called an “assault on free speech” by university administrators. She specifically referenced a student who sued Arkansas State University after she was stopped from distributing conservative political literature.

Colgate University issued a formal statement that recommended guaranteed free speech if it did not cause “needless harm.” The University of Chicago issued a comparable statement which more than 50 other universities have signed onto, starting in 2015 and through December 2018.

On March 2019, President Donald Trump signed an executive order with the goal to promote free speech on college campuses. He did so in response to conservative activists. The order threatens elimination of federal research funds when universities hinder student speech.

Even so, universities still receive complaints about hindering conservative speech on campus. Universities are grappling with the balance of protecting minority students from offensive speech and respecting the right to free speech held by all.

V. CONCLUSION

The First Amendment affords a critical constitutional protection to students and teachers. Technological advancements and dramatic political elections have cast a new spin on First Amendment issues in the school setting. And yet, even traditional questions like whether school employees’ speech can be restricted, too, continue to be disputed.

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