

Navigating Free Expression in a Time of Social Unrest

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What Else
Could Possibly
Happen in
2020?

Don't Ask...

Social Unrest

- Racial equity issues
- Police brutality issues
- The Pandemic
- The 2020 election

Campus Protests

- In person demonstrations
- Boycotts
- Social media posts
- Classroom (virtual and in person) assertions of academic freedom

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University of Chicago Students End 7-Day Occupation Outside Provost's Home

Student activists from the University of Chicago ended their weeklong occupation of the 4900 block of South Greenwood Avenue in Kenwood on Friday, September 4.

The occupation, which began on the evening of Aug. 29, was intended to apply pressure to the university administration to disband the University of Chicago's Police Department, Chicago's largest private police force.

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INSIDE HIGHER ED

DID YOU SEE THIS? **INSIDE HIGHER ED** SAYS:

New Tactics, New Militancy

Protest rallies are now a public health risk, but students, TAs and unions are finding new ways to get their voices heard.

- Student protests are nothing new. Neither are union protests, for that matter, or community actions.
- COVID-19 has forced student protestors to utilize new tactics to get their voices heard
- Car caravans, online think tanks, petitions, and intercampus coalitions
 - Coalition of over 150 student body presidents has written open letters asking grad schools to accept Pass/Fail grades, and requesting telehealth expansion
 - Petitions requesting a change in the grading schemes have circulated

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But did you see this...

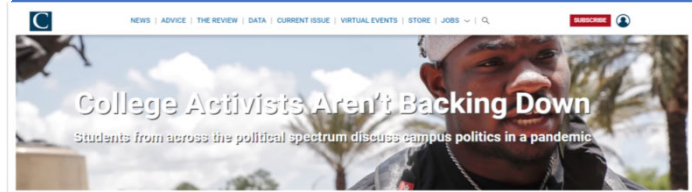
Forbes

Five Reasons 2020 Will Be The Year Of The Student Protest

Forbes says:

The year 2020 is fast shaping up to be the year where college student protests once again became a national movement. Not since the 1960s, when massive student protests - loosely organized into what was called the New Left - emerged in support of multiple causes, have we seen such a ground swell of activism among America's youth.

And the Chronicle of Higher Education says,



- Student protestors from different schools discuss their goals for the new school year;
- Student athletes fight for more consistent and stringent COVID precautions
- Some students worry that their right to assemble will be impacted by COVID-19 precautions
- Others advocate for ethnic-studies course requirements and building name changes

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First
Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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What the H*** Does That Mean?

- The First Amendment protects speech and expression from governmental interference.
- However, not all speech is protected.



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Overview of Free Speech Basic Principles

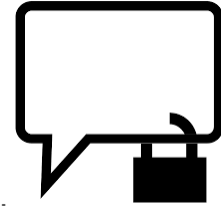
- What is First Amendment Protected Expression?
- Why is there Expression that is Not Protected?
- Can Protected Expression and Speech be Regulated by a College?
- Employee Expression and Speech Rights
- Can Colleges Regulate Employee Speech
- Social Media "Speech"
- Tips and Best Practices

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Protected Speech & Expression

General Principles



- Public colleges may not regulate speech, expression, or assembly based on the content of the speech
- Public Colleges can place reasonable time, place, and manner restrictions on speech, expression, and assembly

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Protected Expression

- Expressive activity on a variety of subjects is protected, including current events and critique of the College
- The First Amendment allows speech that many may find extreme and hateful.

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Speech & Expression Not Protected by the First Amendment



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Speech & Expression Not Afforded First Amendment Protection

- Courts have interpreted the First Amendment as not protecting the following speech or expression:
 - Obscenity
 - **Fighting Words**
 - Child Pornography
 - Defamation
 - Perjury/Blackmail/Fraud
 - **True Threats**
 - **Incitement to imminent lawless action**
 - Solicitations to commit crimes

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Speech & Expression Not Afforded First Amendment Protection

- Important Definitions:
- True Threats:
 - Communication of a serious expression of intent to commit an act of unlawful violence against a particular individual or group of individuals.
- Incitement:
 - Speech that is intended to provoke imminent lawless action, and be likely to cause such action.
- Fighting Words:
 - Generally refers to direct, face-to-face personal insults that would likely lead the recipient to respond with violence

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Regulation of Protected Speech and Expression: "Forum Analysis"



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Regulation of Protected Speech and Expression: "Forum Analysis"

- The public forum doctrine is a tool used to determine the constitutionality of speech restrictions on government property
- To decide the extent to which public Colleges may limit or regulate freedom of private expression on public property, the nature of the particular property involved must be analyzed

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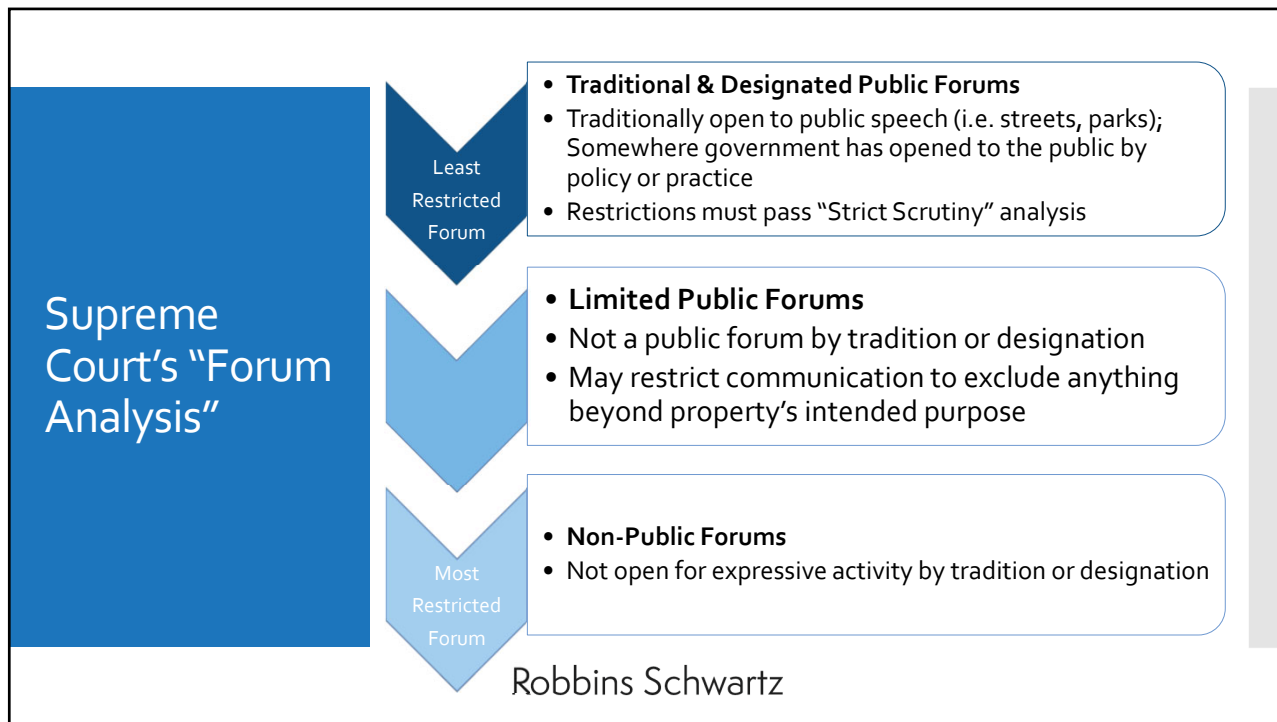
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Regulation of Protected Speech and Expression: "Forum Analysis"

- The Court looks to:
 - The property's traditional use;
 - The physical characteristics and location;
 - Actual uses made and purposes of the space or communications; and
 - The government's intent and policy regarding use of the space in question.

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Supreme Court's "Forum Analysis"

- Public college campuses possess many characteristics of a traditional public forum, but...
- Each part of the college's property and space must be analyzed to determine its "forum" character

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“Forum Analysis” Scenario

- An adjunct professor is on the campus quad over winter break for a rally urging the College to reallocate funds from Campus Security to various student mental health services.
- The Professor and other participants begin to feel cold, so they enter the Administration building.

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“Forum Analysis” Scenario

- Traditionally, students have been allowed to drop off posters for faculty club advisors to review on the bulletin board in an area of the building’s lobby, but the space is generally reserved for administrators and staff use only.
- If the rally is continued in the lobby, is it subject to regulation by the College?

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College
Employees' First
Amendment
Speech Rights



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College
Employees'
First
Amendment
Speech Rights

- Public employee speech (like students' speech) is subject to First Amendment protection.
- "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
 - *Tinker v. Des Moines Indep. Comm'ty Sch. Dist.*, 393 U.S. 503 (1969).

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Academic Freedom & Free Speech

- The concept of Academic Freedom provides faculty and instructors significant latitude in how they teach their class or conduct research on behalf of the College.
- However, Academic Freedom alone does not prohibit the College from regulating employee speech in certain circumstances



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Employee Speech: Classroom Scenario

- The College's Professor of Political Science teaches a lesson every year on racial inequities.
- This year, the Professor has decided to include a classroom discussion on the recent BLM protests and subsequent rioting and looting on Michigan Avenue.
- The discussion becomes heated, and the Professor yells, "We should all be out there protesting! I don't condone rioting or looting but if we have to get physical and break some heads, so be it!"

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Employee Speech: Classroom Scenario

“We should all be out there protesting! I don’t condone rioting or looting but if we have to get physical and break some heads, so be it!”

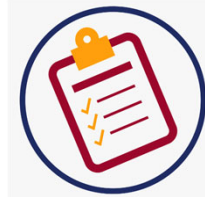
- Can the College prohibit the instructor from making such expressions? Why or why not?

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Employee Speech: Analysis

- The level of First Amendment protection for public employee speech will depend on whether the employee is speaking:
 - Pursuant to their official duties; or
 - As a private citizen on a matter of public concern.



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Employee Speech: Analysis

- If the employee is commenting in their capacity as an employee for the College, then the communication is unlikely to be protected under the First Amendment.
- Examples:
 - Airing a private complaint about a supervisor or employer
 - Responding to questions from superiors.

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Employee Speech: Analysis

- If the employee is speaking as a private citizen on a matter of public concern, use the *Pickering* balancing test.

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The *Pickering* Balancing Test

For the *Pickering* test to apply:

- 1 The employee must be addressing a matter of public concern;
- 2 The speech cannot interfere with the employee's job duties; and
- 3 The employee must be speaking as a private citizen.

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The *Pickering* Balancing Test

- Courts balance:
- The employee's interest as a citizen speaking on matters of public concern
- The government employer's interest in providing the particular public service efficiently.



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The *Pickering* Balancing Test

- If the government employer's interest outweighs the employee's interest, then the speech can be regulated or addressed by the employer.



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The *Pickering* Balancing Test

- Certain employee speech is not First Amendment protected, i.e.:
 - Comments disruptive to work environment;
 - Speech which diminishes the teacher's effectiveness in the classroom
 - An employee's public airing of his or her own private dispute with her public employer

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Back to the “Forum Analysis” Scenario

- The adjunct professor is on the campus quad over winter break for a rally urging the College to reallocate funds from Campus Security to various student mental health services.
- Is the adjunct professor speaking as an employee?
 - What if the professor was only contracted to teach a single course in the fall, and his contract has not yet been renewed?
- Does his status as an employee (or lack thereof) alter the College’s ability to regulate the rally, or his actions?

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Petition Scenario

- A petition begins circulating the College community, demanding that two staff members of the College resign because they are “racist.”
- The petition is signed by two members of the College’s faculty, Alex Smith and Adam Jones.

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Petition Scenario

Alex Smith, who comments on the petition:
"I work here & hate them.
They wrote me up for no reason!
They should be fired!"

Adam Jones:
The College's psychology professor, who has
complained of prior discrimination allegedly
by these staff members.

- Can the College discipline the professors for signing the petition?
- Can the College discipline Professor Smith for his comment?

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Regulation of Student Speech



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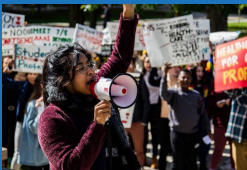
Regulation of Student Speech

- While colleges can regulate certain student speech, the threshold for demonstrating that speech falls outside constitutional protection and/or is likely to cause a substantial and material disruption is high.

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Regulation of Student Speech



- In general, courts will uphold a college's prohibition of a student's speech activity only if the college can show that the speech:
 - (a) caused (or would cause) a substantial and material disruption to the work and discipline of the school, and/or
 - (b) falls under another category of speech that is unprotected by the First Amendment.

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Regulation of Student Speech

- Educational authorities are **not** required to wait for harm or material disruption to occur before taking appropriate action.
- However, “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” or “an urgent wish to avoid the controversy which might result from the expression” are not sufficient to justify banning student speech.”

• See *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 509–10 (1969).

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Regulation of Student Speech: Best Practices

- Develop a factual record that clearly demonstrates why it was reasonable to forecast a material disruption.
 - Courts are less likely to second guess College-imposed restrictions on the expressive activity where there is a factual record
- Judicial deference is even more likely if the record also shows that the College did not opt for censorship as the first resort.

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Regulation of Student Speech: Scenario

- In the wake of recent protests of the shooting of Jacob Blake, a student uses their school-provided email to post the following message on a public forum:

“Looking 4 fire stik – gunna go 2 protest, gotta b prepared.”



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Regulation of Student Speech: Scenario

- What, if anything, can the College do about the student's speech?

“Looking 4 fire stik – gunna go 2 protest, gotta b prepared.”



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Regulation of Student Speech/ Expressive Activity: Crossing the Line

- When does speech or a demonstration on campus cross the line and require intervention from the staff or administrators?
 - Disruptive conduct
 - Safety concerns
 - Known threats
- Focus on the conduct, not the message



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Regulation of Student Speech/ Expressive Activity

- If the expressive activity at issue is not constitutionally protected, a college may disallow the speech and, if necessary or appropriate, discipline the speaker(s) consistent with the provisions of college policies.

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Student & Employee Social Media Use



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Employee Speech on Social Media

- The College may be able to address an employee's inappropriate social media if:
 - It is disruptive to the College's operations;
 - It compromises student privacy rights;
 - It violates the College's acceptable use policy; or
 - It otherwise adversely affects the College's academic or work environment.

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Employee Speech on Social Media

- If there is a nexus between the social media activity and the College, the College may have the authority to address even off-campus activity
- The College policies or lack thereof will be an important factor in addressing employees' social media posts and activity.

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Employee Speech on Social Media

- Evidence of nexus may include:
 - Student, employees, and community complaints about the social media that places the College in a bad light and/or impacts the educational environment;
 - The employee's inability to perform assigned duties due to the impact of the offensive posting; and
 - Disruption to the College's operations.



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Employee Speech on Social Media

- Additional key considerations:
 - Does the social media activity identify the employee as a College employee?
 - Can the speech at issue cause confusion as to whether the employee is representing the College's viewpoint or their own personal viewpoint?

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Employee Use of Social Media: Scenarios

Janitor Jeff

Posts a photo of himself at an Anti-Semitism rally, wearing his College t-shirt.

Jeff does not come into contact with students often, as his shift starts in the evening.

Receptionist Rachel

Shares a post from a white supremacist Facebook group, adds the caption, "blacks r taking over!"

Rachel works in the Student Aid Office. She regularly works with a diverse range of students.

- Both posts were created off-duty, on the employees' personal devices
- Can the College address either post?

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Tips & Best Practices



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Social Media: Privacy Considerations

- An employer may not request, require, or coerce an employee/applicant to:
 - Provide a username, password or other related account information.
 - Authenticate or access a personal online account in the presence of the employer.
 - Invite the employer to join a group affiliated with any personal online account of the employee or applicant.
 - Join an online account established by the employer, or add the employer to the employee's or applicant's list of contacts.

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Social Media: Privacy Considerations



- An employer may:
 - Maintain a lawful workplace policy governing the use of the employer's electronic equipment.
 - Monitor usage of the employer's electronic equipment and the employer's electronic mail.
 - Obtain information about a prospective employee or employee that it is in the public domain.
 - Request or require an employee or applicant to share specific content that has been reported to the employer.

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Tips & Best Practices: Social Media

- Make clear that employees have no expectation of privacy while using College equipment.
- Remind employees that their social media activity may be viewed by colleagues, students, and community members.
- Develop policies addressing employee social media use

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Tips & Best Practices: Social Media Policy

Social Media Policies may include:

- Acknowledgement of employees' right to comment on matters of public concern
- Cautioning against certain speech
- A reminder that, if an employee chooses to share their personal views as a private citizen, the employee should be clear that they are not acting as a representative of the College.
- But must avoid overbreadth which has the effect of "chilling" employees' potential speech

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Questions?



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