

Managing Campus Social and Political Speech Without Violating the First Amendment

Annual Legal Update for Illinois
Colleges Virtual Conference

September 17, 2021

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Managing Campus Social and Political Speech Without Violating the First Amendment

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Presented by Frank B. Garrett III & Susan E. Nicholas
Annual Legal Update for Illinois Colleges Conference
September 17, 2021

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Current Free Speech Climate



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

Critical Race Theory Debate

NEWS

WATCH NOW

U.S. NEWS

Critical race theory battles are driving frustrated, exhausted educators out of their jobs

Battles over diversity and equity initiatives in public schools have resulted in administrators and teachers being fired or resigning over discussions about race.

- Critical race theory, an academic framework usually taught in graduate schools, posits racial discrimination is embedded within U.S. laws and policies.
- Five states have passed laws limiting how teachers can address “divisive concepts.”

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Black Lives Matter Protests & Policies

THE NEW YORKER

News Books & Culture Fiction & Poetry Humor & Cartoons Magazine Puzzles & Games Video Podcasts

THE POLITICAL SCENE

HOW BLACK LIVES MATTER CAME TO THE ACADEMY

By Kristall Brent Zook
January 30, 2021

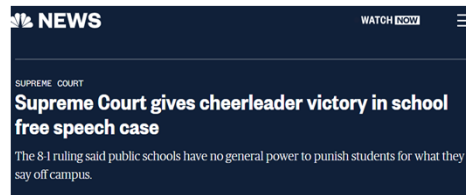


- Schools around the country have limited or prohibited teachers from expressing their beliefs in the classroom. Some teachers have even been fired for displaying a Black Lives Matter banners in their classrooms (lawsuit pending).
- In November, 780 students participated in a two-week strike at Haverford College, in response to an insensitive e-mail from the school's president, Wendy Raymond, urging students not to participate in protests after police fatally shot Walter Wallace, Jr., a twenty-seven-year-old Uber Eats driver, during a domestic dispute near the college.
- The University of Chicago announced that it would admit only Black-studies scholars into its English Ph.D. program for 2021, citing the Black Lives Matter movement.

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Off-Campus Social Media



- A ninth grader at a Pennsylvania high school was punished for a message she posted to Snapchat one Saturday off-campus after discovering that she didn't make the varsity cheerleading team.
- She used a vulgar four-letter word to write, "f--- school f--- softball f--- cheer f--- everything."
- The student was subsequently suspended from the junior varsity team for her entire sophomore year.
- The Supreme Court ruled that the student's speech was protected under the First Amendment. However, the decision did not extend this protection to all off-campus expression, but the court suggested that the exceptions, to be worked out in future cases, would be limited.

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The Legal Landscape of Free Speech and Expression



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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, court decisions interpreting the First Amendment show that not all speech is protected.

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Overview of Today's Presentation

- What is First Amendment Protected Expression?
- Why is there Expression that is Not Protected?
- Can Protected Expression and Speech be Regulated by a College?

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But First...

- What is your understanding of "Hate Speech"?
- What is your understanding of "Free Speech"?

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But First... A Quick Poll

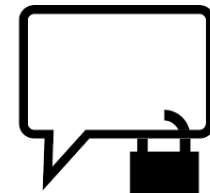
- Based on your understanding of the concept of free speech, is **“Hate Speech”** (i.e. speech that is discriminatory, promotes stereotypes, or prejudicial) **generally prohibited** on a public college campus?
 - a) Yes, always prohibited
 - b) Yes, prohibited in most circumstances
 - c) No, with a few exceptions
 - d) No, speech is always “Free”

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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 Speech & Expression

- Expressive activity on a variety of subjects is protected, including current events and critique of the College.
- The First Amendment does not prohibit 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 Protected by the First Amendment

- 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 Protected by the First Amendment

- 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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"Hate Speech": What Is It?

- Different definitions:
 - "Abusive or threatening speech or writing that expresses prejudice against a particular group, especially on the basis of race, religion, or sexual orientation." (*Oxford English Dictionary*)
 - "Speech or expression that denigrates a person or persons on the basis of (alleged) membership in a social group identified by attributes such as race, ethnicity, gender, sexual orientation, religion, age, physical or mental disability, and others." (*Britannica*)

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"Hate Speech" Scenario

- The student group, Christians for Traditional Values, expresses their belief that homosexuality is a sin.
- May they express this belief on campus?

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“Hate Speech” Scenario

- There are a number of considerations in determining whether or not the College can regulate the expression of these beliefs.
 - Type of speech (i.e. is speech/expression non-violent, or are they using obscenity and making true threats?)
 - Location of speech (on-campus vs. off, specific location on campus)
 - Disruption of speech
 - Whether the students are speaking in a manner that affiliates themselves with the College in a way that may conflate their belief with that of the College

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The Public Forum Doctrine



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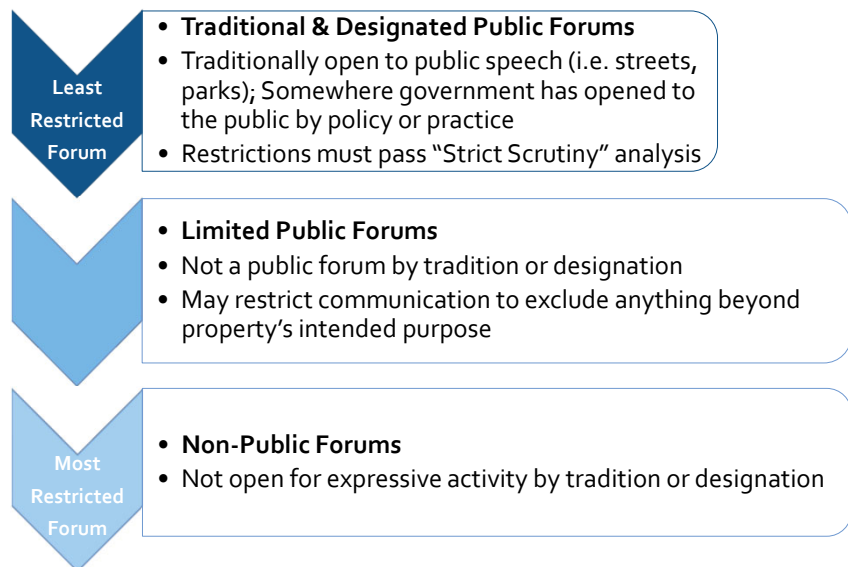
The Public Forum Doctrine

- 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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Supreme Court’s “Forum Analysis”



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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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Student Speech & Expression



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Student T-Shirt Scenario

- One of the College's student groups is designing a t-shirt for all group members to wear.
- The Group is proposing to place a College logo on the front, and an image of a confederate flag on the back of the t-shirt.
- You become aware of this plan.

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Student T-Shirt Scenario

- What rights do the students have to create the t-shirt?
- Can the Student Activities Coordinator require the students to remove either image?
 - a) Yes, the Confederate flag
 - b) Yes, the College logo
 - c) Yes, both images
 - d) No, neither image



Where is this going?

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Regulation of Student Speech

- In general, courts will uphold a college's prohibition of a student's speech or expressive 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 a category of speech that is unprotected by the First Amendment.

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Regulation of Student Speech

- While colleges can regulate certain student speech, to regulate speech on the basis that it is likely to cause a substantial and material disruption is a high standard to meet.

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Regulation of Disruptive 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 Disruptive Student Speech

- 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/ 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, procedures, and rules.

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Back to the Student T-Shirt Scenario

Now...

- Can the Student Activities Coordinator require the students remove either image?
 - a) Yes, the Confederate flag
 - b) Yes, the College logo
 - c) Yes, both images
 - d) No, neither image

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Employees' First Amendment Speech Rights



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Employees' First Amendment Speech Rights

- Public employee speech (like students' speech) is also 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: Not Necessarily Equal

- The concept of Academic Freedom provides faculty and instructors certain rights in how they teach and manage their class.
- 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!"

- Is the instructor's classroom statement entitled to protection? Why or why not?

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Classroom Banner Scenario

- Professor X decides to decorate his office with a large poster of a MAGA hat.
- His neighbor, Professor Y, sees this and becomes upset. Professor Y decides to hang a Black Lives Matter banner on the classroom door.



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Classroom Banner Scenario

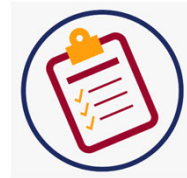
- Does either Professor's expression constitute Academic Freedom?
- Do either of the Professors need to remove their political paraphernalia?
 - Why or why not?

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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 speaking 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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The *Pickering* Balancing Test: Speech as a Private Citizen

Public Employee Speech that is First Amendment Protected:

- 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



- 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; and/or
 - An employee's public airing of his or her own private dispute with her public employer.

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Campus Rally 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 student mental health services.
- Can the College regulate the Professor's participation in the rally?

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Employee Petition Scenario

- A petition begins circulating among 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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Employee 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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Employee Speech on Social Media

- The College may address and regulate an employee's social media speech 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.
- 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.

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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 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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Important Points

- “Free Speech” means students have a right to express their views, or speak in a manner that many may find hateful or offensive, subject to some exceptions;
 - If the speech does/would meet the high threshold of causing a substantial disruption, or falls under the category of “unprotected” speech, the College can regulate it
- Academic Freedom alone does not prohibit the College from regulating employee speech in certain circumstances.
- Students and employees purporting to speak on behalf of the College are subject to stricter regulation than when they are speaking as an individual

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Questions?



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thank you!

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Frank B. Garrett III represents school districts, community colleges, local governmental bodies and public and private companies in all aspects of employment law, including complaints and charges of unlawful discrimination, wrongful termination, sexual harassment, civil rights violations, employee discipline and termination. Frank also counsels and provides training to employers in the following areas: ADA and FMLA compliance, avoiding claims of unlawful discrimination and harassment in the workplace: evaluation and discipline of employees, and diversity in the workplace.

Frank represents and defends clients in both state and federal courts, at the trial and appellate levels. He also practices before various administrative agencies such as the Illinois Educational Labor Relations Board, the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Frank is a regular speaker on employment law topics at both the state and national level.

Frank is approved by the Illinois State Board of Education to provide school board member training. He is an active member of the American Bar Association and Illinois Council of School Attorneys.

AWARDS

Illinois Leading Lawyer, Government and Regulatory-Related
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RECENT PUBLICATIONS

"Extended Medical Leave Under ADA Soundly Rejected by 7th Circuit,"
Chicago Daily Law Bulletin (2017)

"First Amendment Protections Get Broader for Government Employees,"
Chicago Daily Law Bulletin (2016)

"Big-box Employee's Attempt to 'Scam' Company Undercuts FMLA Claims,"
Chicago Daily Law Bulletin (2015)

Employers Must Rethink Employee 'Look' Policies After High Court Decision,"
Chicago Daily Law Bulletin (2015)



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J.D., DePaul University
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Supreme Court of the
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U.S. District Court for the
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U.S. District Court for the
Central District of Illinois

U.S. District Court for the
Southern District of Illinois

Supreme Court of Illinois

“Using Social Network Screening as Part of the Hiring Process: Employers Should Proceed with Caution,” *Inquiry & Analysis*, National School Boards Association’s Council of School Attorneys (2013)

Contributing author, “Employment Discrimination,” *ILLINOIS SCHOOL LAW*, IICLE (1996, 1999, Supp. 2001, 2005, 2010 and 2012)

RECENT PRESENTATIONS

Debunking Some Common Employee FMLA Leave Myths, IASPA Annual Conference (January 2020)

Legislative Update: A Review of New Laws Affecting Illinois Community Colleges, Illinois Council of Community College Presidents Retreat (September 2019)

Understanding New Changes to the Minimum Wage Law and Other Wage-Related Statutes, Illinois GFOA Annual Conference (September 2019)

ORGANIZATIONS

American Bar Association,
Section on Labor and
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Susan E. Nicholas focuses her practice on serving employers, educational entities, municipalities and other public bodies in all aspects of labor and employment law and general student matters.

Susan is the former President and Treasurer of the Decatur Bar Association's Executive Board. She also served as a Macon County Teen Court Moderator.

Prior to joining Robbins Schwartz, Susan practiced in a variety of areas including family law, criminal defense, estate planning, and civil litigation. Susan is also a former Assistant State's Attorney in the Macon County State's Attorney Office.

AWARDS

Illinois "Emerging Lawyer" by *Emerging Lawyers Magazine* (2015)

RECENT PUBLICATIONS

Contributing author, "Employment Discrimination," *Illinois School Law*, IICLE (2010, 2012 and 2014)

RECENT PRESENTATIONS

Ethics and Conflicts of Interest for Municipal Elected Officials, Illinois Municipal League Newly Elected Officials Workshop (June 2017)

Navigating the FLSA: Compliance and Avoiding Common Pitfalls, Illinois Association of School Board Administrators Workshop (October 2017)

Western Illinois Administrator's Roundtable (2016, 2017, 2018)



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