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Education, the First Amendment, and the Constitution

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EDUCATION, THE FIRST AMENDMENT, AND THE CONSTITUTION

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I. INTRODUCTION

It is a tremendous honor to be the inaugural lecturer in the Professor Ronna Greff Schneider Constitutional Issues in Education Law Speaker Series. As the dean said, Professor Schneider was a distinguished member of this faculty teaching legions of students for forty-two years. She is also one of the most important scholars in the United States regarding education, the First Amendment, and the Constitution.

The topic that I was given to speak on today is therefore so appropriate: the First Amendment in education. It is a very complicated relationship. Free speech is essential to effective education, but free speech also can undermine effective education. Take a simple example that is frequently in the news.

University of Pennsylvania law professor Amy Wax is very controversial, and she has made statements that have gained national attention. She has said publicly that there are too many Asians in the United States.[1] Professor Wax has said that she has rarely seen a Black student in the top half of the class at the University of Pennsylvania Carey Law School.[2] She also believes that women law students are not as capable as men law students.[3] Initially, the University of Pennsylvania removed her from teaching first-year classes, but since then, it has initiated a lawsuit against her that may result in the revoking of her tenure.[4] However, she is currently arguing that her actions are protected as free speech.[5]

Though her speech likely undermines effective education for many of the students at the University of Pennsylvania Carey Law School, Professor Wax claims her speech is safeguarded by academic freedom.[6]

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1. Karen Sloan, *Facing Sanctions, Penn Law Prof Amy Wax Files Grievance Against Dean*, REUTERS (Jan. 26, 2023, 5:02 PM), https://www.reuters.com/legal/legalindustry/facing-sanctions-penn-law-prof-amy-wax-files-grievance-against-dean-2023-01-26/.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

How do we go about balancing this tension between the desire to safeguard expression, which is essential to education, and the fact that sometimes this same expression can undermine effective education? That is what I want to address, and I want to look at three aspects of this issue.

First, I want to look at the First Amendment and the content of education. Second, I want to examine the First Amendment and student speech. And finally, I want to talk about the First Amendment and the ability to determine and control the environment within an educational institution. Two caveats are important at the outset. As all the lawyers and law students here know, the First Amendment itself applies only to government institutions, such as public colleges and universities.[7] Private institutions do not have to comply with the First Amendment.[8] I find that this is often a surprise to non-lawyers.

For those who are not lawyers here and to whom this might be a surprise, I have a couple of easy illustrations. Before I went to teach at the University of California, I was a professor at Duke Law School in North Carolina, which is a private university. While I was there, if I had given a speech criticizing the president of the university—I guess I should say if I *again* had given a speech criticizing the president of the university—and if he had fired me, I could not have sued him or the university for violating my free speech rights. It is a private university. The Constitution and the First Amendment do not apply. But now, I work at the University of California. If I were to give a speech criticizing its president, and was fired, I could sue the university for violating my free speech rights because the First Amendment's rights do apply.

My favorite illustration here comes from a true story of a conversation in a grocery store with my oldest two children thirty years ago when they were nine and six. At the time, Coca-Cola was giving away free baseball cards, and three cards were pictured on the outside of the package. As we went up and down the aisles of the grocery store, my two kids were fighting (as they often did at that age) about who was going to get the extra baseball card. Finally, I said, "Be quiet. I don't want to hear anything else about baseball cards until we leave the grocery store."

My then nine-year-old turned to me and said, "You can't tell me to be quiet. I've got freedom of speech."

I was ready for him. I said, "Freedom of speech means the government can't tell you to be quiet. I'm not the government, so I can."

Without missing a beat, he replied and said, "Well, you're like the government to me, so you cannot tell me to be quiet." That's when I first

7. *E.g.*, Healy v. James, 408 U.S. 169, 180 (1972).

8. *Cf. id.* (noting only that students and teachers retain their constitutional rights to freedom of speech at state universities and colleges).

knew that someday he was going to be a lawyer. Now he is a federal prosecutor in Los Angeles.

My other caveat is that when we talk about the First Amendment in education, the answer to a question will often depend on the level of education we are speaking about. It is not homogeneous when we are talking about elementaries, high schools, colleges, or universities. There are certainly common issues, and the results will sometimes be the same, but sometimes they will not be, and it is easy to see why.

Claims of academic freedom are going to get more weight when we deal with the college and university level than when we deal with lower grades. Also, the state's interest in the restriction of speech is greater when dealing with younger students.[9]

II. THE FIRST AMENDMENT AND EDUCATION CONTENT

With these caveats in mind, my first point looks at the First Amendment relative to controlling education. I am sure that all of us in this room would agree that freedom of speech is essential for effective education. And this transcends what I spoke about a moment ago in terms of only public universities being bound by the First Amendment. Even for private universities, there must be a commitment to academic freedom. Usually, a faculty or student handbook includes protection for speech and ends up being an enforceable contractual obligation.[10] Some states provide protection for speech in the private university context. California has a law called the Leonard Law that states private schools cannot punish speech if a public school violates the First Amendment by punishing the same speech.[11]

All of this reflects the belief that teachers should be able to express themselves in their classrooms and in their scholarship, and students should be able to express themselves as well. The Supreme Court most eloquently expressed this in *Keyishian v. Board of Regents*.[12] Harry Keyishian was a professor at the State University of New York at Buffalo.[13] He refused to take an oath promising that he was not and never had been a member of the Communist Party.[14] As a consequence of not

9. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

10. *See, e.g.*, Greene v. Howard Univ., 412 F.2d 1128, 1132 (D.C. Cir. 1969).

11. CAL. EDUC. CODE § 94367 (Deering 2023).

12. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our [n]ation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").

13. *Id.* at 591.

14. *Id.* at 592.

taking the oath, his contract was not renewed.[15] The Supreme Court ruled in his favor.[16]

In what is probably its strongest declaration in favor of academic freedom, the Court said that academic freedom is of transcendent value to everyone, and is not merely a teacher's concern.[17] Such freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[18] And certainly, there are instances in the Supreme Court, and in the lower courts, where they have repeated this notion of the importance of protecting freedom of speech in the classroom.[19]

And yet, as is true of all speech, this principle is not absolute. Imagine that someone was assigned to teach contracts in a law school, and the professor objected and said as a protest, "I'm just going to talk about sports in class this semester; class time will be spent discussing baseball and college basketball and the like." And imagine that that law school went on to discipline the professor. The law school would surely win. There's obviously the need for a university, or a high school, or any school to dictate its curriculum.

How then do we balance that interest—the need for a school to dictate its curriculum—with the free speech interests of the faculty who are teaching that curriculum? The Supreme Court and the lower courts have not given us clear guidance on how and where to draw the line.

The closest Supreme Court case about this is *Board of Education v. Pico*.[20] And it actually was not directly about curriculum, but was about the ability of a school to remove books from the school library.[21] But the analysis of the Court was much like that which would be applied to curriculum. The Supreme Court said that the First Amendment did apply and held that, when done to deny students access to ideas, the removal of books from school libraries denies students their First Amendment rights.[22] But on the other hand, it also said that a school has discretion to determine the books in its library so long as it does not engage in viewpoint discrimination.[23]

On the surface, there is appeal to this. We certainly object if a public school library says, "We're not going to have any books written by

15. *Id.*
16. *Id.* at 593.
17. *Id.* at 603.
18. *Id.*
19. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
20. 457 U.S. 853, 858 (1982).
21. *Id.* at 857.
22. *Id.* at 870-71.
23. *Id.* at 870-72.

liberals," or "We're not going to have books written by conservatives." But you do not have to look very hard to see that the Court's approach does not work well. What if the school library says, "We're not going to buy any books by white supremacists"? Of course, it can do that. No library can buy every book, and in choosing which books to buy or not buy, they can say that some views are so beyond the pale and not worth their money.

One of the lower court cases that I find particularly useful in this regard is *Griswold v. Driscoll*, which came out of the First Circuit about a dozen years ago and expressed a strong view that the government controls the curriculum in the classroom.[24] The Commonwealth of Massachusetts adopted curriculum guides that said each grade level, through appropriate material, would teach students about the Holocaust, the Armenian genocide, and the Irish famine.[25] A Turkish group brought a lawsuit and said that it believed the Armenian genocide did not happen and that the government was impermissibly putting forward a viewpoint that violated the First Amendment.[26]

The First Circuit ruled against the Turkish group and upheld the Massachusetts curriculum guide.[27] Justice Souter, who had retired from the Supreme Court and was sitting by designation, wrote the opinion.[28] He said that the curriculum, including the curriculum guide, was a form of government speech, and that when the government itself is the speaker, what it says cannot be challenged.[29] Thus, the Free Speech Clause of the First Amendment was not violated in the case.[30] If you follow *Griswold v. Driscoll*, schools seemingly have unlimited latitude to prescribe what is taught in the classroom.[31]

The question of how far this principle extends is arising now because a number of states have adopted laws that prohibit the teaching of critical race theory. These laws are being challenged in court, and likely because they are very broadly written. As an example, a Tennessee law prohibits teaching "an individual should feel discomfort, guilt, anguish or another form of psychological distress solely because of the individual's race or sex."[32] The Tennessee law says further that it prohibits teaching "[a]n individual, [that] by virtue of the individual's race or sex, is inherently

24. Griswold v. Driscoll, 616 F.3d 53, 58 (1st Cir. 2010).
25. *Id.* at 54.
26. *Id.* at 56.
27. *Id.* at 54.
28. *Id.*
29. *Id.* at 58.
30. *Id.*
31. *See id.* at 55.
32. TENN. CODE ANN. § 49-6-1019 (6) (2023).

privileged, racist, sexist, or oppressive, whether consciously or unconsciously."[33] Think about that language. I think if nothing else, it is unconstitutionally vague. How can you prohibit teaching that leads to a feeling? Does not teaching often lead to emotions? And how can a state prohibit that?

Indeed, under the language of the Tennessee law, is it even possible to teach about unconscious racism? Can an instructor teach about the long-lasting devastating consequences of enslaved people in the United States? But states that have adopted these laws say that they are permissible efforts to control the curriculum in their states.[34]

Or consider the Florida law, the Stop WOKE Act, which prohibits the teaching or lessons that we usually term "diversity training."[35] How are the courts going to deal with this? How will they balance the speech rights of teachers?

There is a real tension between the academic freedom announced in the *Keyishian* case and the ability of schools to control their curriculum. I can point to a couple of cases so far that lead in opposite directions. There is a case that arose not far from here. The case is *Meriwether v. Hartop* and it involved Nicholas Meriwether, a teacher at Shawnee State University who refused to call a student by her chosen gender pronouns.[36] The student was a transgender woman and Professor Meriwether refused to address her with the feminine pronouns "she" and "her."[37] He was disciplined as a result, and shortly after, he filed a lawsuit.[38] The district court dismissed his lawsuit, but the United States Court of Appeals for the Sixth Circuit reversed.[39] The Sixth Circuit did so in an opinion by Judge Thapar that used ringing language about the free speech rights of a teacher in a classroom.[40]

Yet I wonder, what if a professor, instead of not using chosen pronouns, repeatedly used a racist epithet when calling on students every time a Black student raised their hand? Or, you can pick other epithets. For example, if every time someone who identified as a Jewish student raised

33. *Id.* § 49-6-1019 (2).

34. Ryan Quinn, *Tennessee Again Targets 'Divisive Concepts,'* INSIDE HIGHER ED (Apr. 18, 2023), https://www.insidehighered.com/news/faculty-issues/diversity-equity/2023/04/18/tennessee-again-targets-divisive-concepts.

35. H.R. 7, 2022 Leg., Reg. Sess. (Fla. 2022) (Second Engrossed). The legislation's most recent update In November of 2022, when Tallahassee U.S. District Judge Mark Walker blocked the bill from taking effect in Florida's public universities. Pernell v. Fla. Bd. of Governors of the State Univ. Sys., No. 4:22cv304-MW/MAF, 2022 U.S. Dist. LEXIS 208374, at *152-55 (N.D. Fla. Nov. 17, 2022).

36. Meriwether v. Hartop, 992 F.3d 492, 499-500 (6th Cir. 2021).

37. *Id.* at 499.

38. *Id.* at 501.

39. *Id.* at 502-03.

40. *Id.*

their hand, the professor used an offensive term to call on the student. Can the professor be disciplined for that? I am convinced that every court would say yes. Does it not create a hostile environment? I am not sure why the *Meriwether* case is any different than these examples other than that the judges on that panel seemed less concerned about the rights of transgender students than students discriminated against on the basis of race.

The *Meriwether* case settled, and it was publicly reported that Meriwether was given $400,000 as a result of that accord.[41] There is another case that I would point to here. A case called *Arce v. Douglas*, and I should disclose that I argued this case in the Ninth Circuit.[42] What's involved here is that the state of Arizona prohibited the teaching of ethnic studies.[43] And specifically, the law was motivated by a desire to eliminate Mexican American studies courses in Tucson, Arizona schools.[44] A lawsuit was brought on the grounds that this violated the First Amendment rights of teachers to instruct, and the rights of students to receive information.[45] Additionally, there was an equal protection claim.[46] The district court dismissed the case, but the Ninth Circuit reversed.[47] The case ultimately went to trial and the plaintiffs won. What the Ninth Circuit said seems so important in thinking about anti-critical race theory legislation, particularly in terms of how anti-critical race theory legislation is a restriction of the speech of instructors and a limit on the ability of students to receive information.

There is one other dimension with regard to the First Amendment and education that must be recognized. In 2006, in *Garcetti v. Ceballos*, the Supreme Court held there is no First Amendment protection for the speech of government employees on the job acting within the scope of their employment duties.[48] Richard Ceballos was a deputy district attorney in Los Angeles County.[49] He believed that a witness in one of his

41. Madison Hall, *A University in Ohio Agreed to Pay a $400,000 Settlement to a Professor it Disciplined for Not Using a Trans Student's Pronouns*, BUS. INSIDER (Apr. 19, 2022, 3:14 PM), https://www.insider.com/shawnee-state-settlement-professor-who-refused-using-trans-persons-pronouns-2022-4.

42. Arce v. Douglas, 793 F.3d 968, 973 (9th Cir. 2015).

43. *Id.*

44. *Id.*

45. *Id.* at 973-74.

46. *Id.*

47. *Id.* at 974.

48. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

49. *Id.* at 413.

cases, a deputy sheriff, was lying.[50] So, he wrote a memo to the file to that effect.[51] His supervisor told him to soften that statement.[52] He did not.[53]

He gave it to the defense counsel, as he thought he was constitutionally required to do.[54] His supervisor then removed him from his position and transferred him to a much less desirable location.[55] He said that this violated his First Amendment rights.[56] The Ninth Circuit ruled in his favor, but the Supreme Court, in a five-to-four decision, reversed.[57] Justice Kennedy wrote for the conservative majority.[58] The court said that there is no First Amendment protection for the speech of government employees on the job when they are in the scope of their duties.[59]

How does this then apply to teachers, to professors in public schools? The United States appellate courts are split on this. The United States Court of Appeals for the Ninth Circuit has said that *Garcetti v. Ceballos* does not apply to professors at the college and university level.[60] The United States Court of Appeals for the Third Circuit has said the opposite, that *Garcetti v. Ceballos* means that so long as a teacher is on the job and within the scope of their employment duties, then there is no First Amendment protection.[61] If the Supreme Court applies *Garcetti v. Ceballos* to the university context, it would eviscerate any protection for professors—whether or not it is called academic freedom or free speech under the First Amendment—in the context of the classrooms.

III. THE FIRST AMENDMENT AND STUDENT SPEECH

The second topic that I want to address concerns the First Amendment and student speech. It is interesting that when it comes to the Supreme Court, there has virtually never been a case about student speech at the college or university level. There have been just a handful of cases by the Supreme Court about freedom of speech at the high school level. In fact, there are so few that I can remind you of them and then try to draw some conclusions from them. Usually, when these cases are discussed, it is forgotten that the first in this series, which I think is one of the most

50. *Id.* at 414.
51. *Id.*
52. *Id.*
53. *Id.* at 442 (Souter, J., dissenting).
54. *Id.*
55. *Id.* at 415 (majority opinion).
56. *Id.*
57. *Id.* at 415-17.
58. *Id.* at 413.
59. *Id.* at 418.
60. Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014).
61. Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009).

important Supreme Court cases ever about the First Amendment, was *West Virginia State Board of Education v. Barnette*.[62] The state of West Virginia required that students begin each day with a flag salute; if you look at pictures of the flag salute, it was stunningly like that done in Germany with the words, "Heil Hitler."[63]

The case came to the Supreme Court in 1943, in the midst of World War II when patriotic fervor was at its height. Just a short time before, the Supreme Court reached the opposite conclusion and upheld a state's ability to require flag salutes.[64] But the Supreme Court overruled that decision and declared this requirement unconstitutional in *Barnette*.[65] Justice Jackson, one of the best writers to ever serve on the Supreme Court, said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . ."[66] The court did not return to the issue of student speech until 1969.

Tinker v. Des Moines Board of Education[67] is probably the high-water mark of the Supreme Court protecting student speech.[68] Mary Beth and John Tinker were students at a public high school in Des Moines, Iowa.[69] They wore black arm bands to school to protest the Vietnam War.[70] The principal told them not to do so.[71] The principals thought that the emotional subject of the Vietnam War would be too upsetting for students in the school.[72]

John and Mary Beth Tinker refused the order to take off their arm bands and they were suspended as a result. The case went to the Supreme Court.[73] In a seven-to-two decision, the Supreme Court ruled in favor of John and Mary Beth Tinker.[74] Justice Fortas, not long before he left the bench, wrote the majority opinion.[75] Justice Fortas famously said, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[76] He

62. 319 U.S. 624 (1943).
63. *Id.* at 626-27.
64. *Id.* at 635.
65. *Id.* at 642.
66. *Id.*
67. 393 U.S. 503 (1969).
68. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007).
69. *Tinker*, 393 U.S. at 504.
70. *Id.*
71. *Id.*
72. *Id.* at 518 (Black, J., dissenting).
73. *Id.* at 504-05 (majority opinion).
74. *Id*. at 514.
75. *Id.* at 504.
76. *Id.* at 506.

said schools have to prove actual disruption of school activities in order to punish students for their speech.[77]

Yet, in the cases that followed, until very recently, the Supreme Court went the other way and allowed schools to punish student speech. The next case in the series was *Bethel School District v. Fraser*,[78] decided in 1986. Matthew Fraser was a student at a high school in Bethel, Washington state.[79] He gave a speech nominating another student for a position in student government.[80] His speech had no profanities, but was filled with sexual innuendos.[81] As a result, he was suspended from school for a few days and was kept from speaking at his graduation as scheduled.[82] Fraser sued and won in the Ninth Circuit.[83]

However, the Supreme Court reversed and ruled against him.[84] The Court said that schools are responsible for teaching civilized discourse to the youth and thus can punish profane or indecent language.[85] There is obvious tension between the students' interests and the schools'. And here, unlike in *Tinker*, the school won.[86]

The next case in this series was *Hazelwood School District v. Kuhlmeier*.[87] The case involved a high school newspaper in a town in Missouri.[88] As part of the journalism class, students produced the high school's newspaper.[89] This is common in schools across the country. There were a couple of articles in the newspaper that upset the principal, one being about teen pregnancy.[90] The article did not glorify it. It portrayed five students, identified only by pseudonyms and initials so that nothing could identify them, lamenting the choices they made leading them to their pregnancy.[91] The other article that was on the same page was about the effects of divorce on the students.[92] Again, no students were identified.[93]

77. *Id.* at 513.
78. 478 U.S. 675 (1986).
79. *Id.* at 677.
80. *Id.*
81. *Id.* at 677-78.
82. *Id.*
83. *Id.* at 679.
84. *Id.* at 680.
85. *Id.* at 683.
86. *Id.* at 680.
87. 484 U.S. 260 (1988).
88. *Id.* at 262.
89. *Id.*
90. *Id.* at 263-64.
91. *Id.* at 263.
92. *Id.*
93. *Id.*

The way the production worked in that school was that the principal would review the paper before it came out.[94] It was actually at the printer when the principal saw it and he felt those two articles were inappropriate for high school students, so he ordered that the paper be published with that page just being blank.[95] The students brought a lawsuit.[96] The suit was based in basic First Amendment principles.[97] The students argued that the censorship was a content-based restraint of speech.[98] But the Supreme Court, in an opinion by Justice White, ruled in favor of the school.[99] The Court held that a high school newspaper is a non-public forum.[100] In other words, the principal got to control the content of the newspaper and his choices did not violate the First Amendment.[101]

The next case in the sequence was not for another almost thirty years. In 2007, the Supreme Court decided *Morse v. Frederick*.[102] The Olympic torch was coming through Juneau, Alaska.[103] A school released its students to stand on the sidewalk to watch it go by.[104] A student, with his friends, unfurled a banner that said, "Bong Hits 4 Jesus."[105] (At the oral argument, Justice Souter indicated he had no idea what that meant.[106]) But the principal thought it was a message to encourage illegal drug use.[107] The principal confiscated the banner and suspended the student from school.[108] The student sued.[109]

Again, the student won in the federal court of appeals, but lost in the Supreme Court.[110] Chief Justice Roberts wrote the opinion of the Court and said that schools have an important interest in discouraging illegal drug use.[111] Therefore, schools can punish speech that they see as encouraging it.[112]

94. *Id.*
95. *Id.* at 264.
96. *Id.*
97. *Id.*
98. *See id.* at 262.
99. *Id.* at 266.
100. *Id.* at 267.
101. *Id.* at 271.
102. 551 U.S. 393 (2007).
103. *Id.* at 396.
104. *Id.*
105. *Id.* at 397.
106. Transcript of Oral Argument at 17, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-278).
107. *Morse*, 551 U.S. at 398.
108. *Id.*
109. *Id.*
110. *Id.* at 399-400.
111. *Id.* at 402.
112. *Id.* at 407.

How can the Court's decisions in *Bethel*, *Hazelwood*, and *Morse* be reconciled with the language of *Tinker* stating that students do not leave their free speech rights at the schoolhouse gate?

There is one more case to consider. A recent decision from not quite two years ago: *Mahanoy Area School District v. B.L.*[113] Brandi Levy was a rising sophomore cheerleader in a public high school in Pennsylvania.[114] She tried out for the varsity cheerleading squad and was disappointed when she learned she was assigned to the junior varsity team, and then she became angry when she found out a freshman made the varsity team ahead of her.[115] She went on a social media rant.[116] She raised both middle fingers.[117] She repeatedly used four-letter profanity.[118] The next day she did another rant, but without profanities. Both of these rants occurred over the weekend.[119]

The cheerleading coach saw her posts and said that it was inappropriate conduct for a cheerleader.[120] The coach suspended her from the cheerleading squad for a year and said she could try out the next year.[121] She and her parents sued.[122]

They won in the district court.[123] They won in the Third Circuit.[124] And they won in the Supreme Court in an eight-to-one decision.[125] Justice Breyer wrote for the Court.[126] Only Justice Thomas dissented.[127] The issue was to what extent schools can punish student speech made off-campus, over social media, during non-school hours.[128] And this, of course, is a set of issues that are enormously important today with regard to the First Amendment.[129] So much of speech occurs over social media, and First Amendment issues are often no longer about what is going on in the classroom or in the school building as much what students can put on Instagram, Snapchat, or Facebook.

113. 141 S. Ct. 2038 (2021).
114. *Id.* at 2043.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 2044.
125. *Id.* at 2048.
126. *Id.* at 2042.
127. *Id.* at 2059.
128. *Id.* at 2045.
129. *Id.* at 2046.

Justice Breyer did not articulate a bright-line rule stating that students can never be punished for such speech. But he did say that society should be reluctant to allow schools to punish students' off-campus speech.[130] He explained that society doesn't want schools to be able to punish students for what they do twenty-four hours a day, seven days a week.[131] He said that we want to teach the values of free speech, and you do not do that by punishing students for their speech.[132] The parents are the ones who are responsible when students are not in school.[133] But Justice Breyer also was clear that this is not an absolute prohibition of punishing students for their speech over social media.[134] If the student is engaged in bullying or harassing behavior or cheating, then even off-campus speech might be punished.[135]

Ultimately, the Court went back to the standard of *Tinker* and said that students can be punished for their off-campus speech only if there is an actual disruption of school activities.[136] The crucial question moving forward will be how that line is to be drawn.

The lesson that I draw from these cases is that the Supreme Court has articulated the right test, but applying that test has proven enormously difficult. The Court in *Tinker* and in *Mahanoy School District* is correct in saying that to punish students for their speech, there must be an actual disruption of school activities.[137] And yet when I look at the other Supreme Court cases, and when I look at dozens and dozens of lower court cases, the courts appear willing to give so much deference to school officials and are willing to assume a disruption even when there is no evidence of one.[138]

IV. THE FIRST AMENDMENT AND A SCHOOL'S ABILITY TO CONTROL ITS OWN ENVIRONMENT

The third area that I want to examine concerns the First Amendment and the ability of a school to control its environment. Obviously, this overlaps the first two points that I focused on, but I want to acknowledge something different here. I believe that schools, whether we are talking about elementary or high schools, colleges or universities (including law

130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 2047.
137. *See id.*; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
138. *See, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 680 (1986).

schools), have an obligation to create a learning environment that is inclusive for all students, and it is essential that school administrators be conscious of all things that might undermine the ability to have an inclusive environment for all students. But to what extent can schools regulate speech to achieve this learning environment?

In the early 1990s, over 350 colleges and universities adopted hate speech codes.[139] These were unquestionably well-intentioned. There is voluminous literature that hate speech undermines education and inflicts injuries on those who have traditionally been excluded.[140] And yet every hate speech code challenged in any court has been declared unconstitutional. Usually, the codes were declared unconstitutional on vagueness and overbreadth grounds. A typical case here is *Doe v. University of Michigan.*[141]

The University of Michigan had some very ugly racist incidents and afterward adopted a hate speech code.[142] Among other things, it prohibited speech that would stigmatize or demean on the basis of race, sex, religion, or sexual orientation.[143] It took language from laws prohibiting hate speech that exist in most European countries.[144] Among others, a sociology graduate student brought a challenge to this and said that his research was about whether there are inherent gender differences between men and women, and he was worried that what he would find could be seen as something meant to stigmatize or demean.[145] The federal district court declared the Michigan hate speech code unconstitutional on vagueness grounds.[146]

Similarly, when the University of Wisconsin adopted a hate speech code, it was deemed unconstitutional on vagueness grounds.[147] Several years ago, I taught an undergraduate seminar titled *Free Speech on Campus*, and I asked the students in the seminar to try to draft a hate speech code that was not impermissibly vague or unduly overbroad. They found it a daunting, if not impossible, challenge. Furthermore, the United States Supreme Court has made clear on many occasions that hate speech is protected by the First Amendment. I have so often been asked, "Where is the line between hate speech and free speech?" I have to answer by

139. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 82 (2017).

140. *See, e.g.*, Erin Grinshteyn et al., *High Fear of Discriminatory Violence Among Racial, Gender, and Sexual Minority College Students and Its Association with Anxiety and Depression*, 19 INT'L J. ENV'T RSCH. PUB. HEALTH (SPECIAL ISSUE) 2117 (2022).

141. 721 F. Supp. 852 (E.D. Mich. 1989).

142. *Id.* at 853.

143. *Id.* at 856.

144. *See, e.g.*, Public Order Act 1986, c. 64, § 4.

145. *Doe*, 721 F. Supp. at 859-60.

146. *Id.* at 867.

147. UMW Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991).

saying, that unless the speech rises to the level of incitement or true threat, hate speech is protected.

Think of the Supreme Court's case *R.A.V v. City of St. Paul* in 1992.[148] St. Paul, Minnesota adopted an ordinance prohibiting painting a swastika or burning a cross in a manner likely to anger, alarm, or cause resentment.[149] Swastikas and cross burnings are vile symbols of hate. But the Supreme Court unanimously declared the law unconstitutional.[150]

Some of the reasoning of course is in the vagueness of hate speech laws, but I think some of it is more profound. In the United States, the core of the First Amendment is that one can express any and all ideas and views. And hate speech, however vile, is expression of an idea or a viewpoint. And yet this still cannot be enough to absolve colleges and universities of their obligation to create a conducive learning environment. So, I contrast those cases with another more recent case, *Feminist Majority Foundation v. Hurley*.[151] And again, I have to disclose that this is a case that I argued in the Fourth Circuit.[152] It involves a public university in Virginia, the University of Mary Washington.[153] The university was debating the issue of whether to allow Greek life on campus; whether to have fraternities and sororities.[154] Three women wrote an op-ed in the campus newspaper opposing Greek life, saying that when fraternities are present, there is an increase in sexual violence.[155]

They were then targeted by other students over the social media platform Yik Yak.[156] Hundreds of ugly messages were posted. Some threatened the women with rape and murder.[157] The women went to campus administrators but were rebuffed with campus administrators saying that this was anonymous speech over social media and they could not do anything about it.[158] In fact, the campus even posted on its website that it had no responsibility for anonymous speech over social media.[159] The campus administrators offered to create a sharing circle where the women could express their feelings and share their experiences.[160]

148. R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992).
149. *Id.* at 380.
150. *Id.* at 396.
151. 911 F.3d 674 (4th Cir. 2018).
152. *Id.* at 679.
153. *Id.*
154. *Id.* at 680.
155. *Id.* at 681.
156. *Id.*
157. *Id.* at 682.
158. *Id.* at 688.
159. *Id.* at 683.
160. *Id.*

The students brought a lawsuit against the University of Mary Washington.[161] The students sued under Title IX of the Civil Rights Act, which says that educational institutions that receive federal funds cannot discriminate based on sex, and that includes not tolerating sexual harassment.[162] There cannot be deliberate indifference to sexual harassment.[163] They also sued under equal protection.[164] The university raised the First Amendment as a defense.[165]

The federal district court ruled in favor of the university.[166] I represented the students in the Feminist Majority Foundation in the Fourth Circuit. I obviously am a strong believer in free speech, but I also believe that campuses have the obligation to protect their students and the campus here did nothing. There are many things that the campus could have done short of punishing speech, but once the speech became so-called "true threats," then it was beyond the scope of the First Amendment.[167] The Fourth Circuit agreed with this and in a published opinion explained that the campus violated Title IX and there was an equal protection claim as well.[168]

But it is an enormously difficult issue that administrators at all levels have to deal with. How do we balance speech rights, even if it is ugly speech, with the need to create a conducive learning environment?

I have no doubt that the internet and social media make this ever more difficult. So, if there is anything to take from my remarks today, it is how pervasive free speech issues are and how difficult free speech issues are. And so, I thought I would conclude with a few stories of just what I have seen since coming to the University of California at Berkeley; the experiences that I have had as an administrator there with regard to free speech.

Berkeley was the home of the Free Speech Movement.[169] Regularly, I walk through Sproul Plaza, which was where it began in 1964.[170] So, the first story: something that happened in the first year that I was at Berkeley, 2017. A student group called the Berkeley Patriot decided that it was going to invite speakers to come to campus for Free Speech Week,

161. *Id.* at 684.

162. *Id.*

163. *Id.*

164. *Id.* at 685.

165. *Id.* at 683.

166. *Id.* at 685.

167. *Id.* at 691.

168. *Id.* at 696, 703.

169. Richard Gonzales, *Berkeley's Fight for Free Speech Fired Up Student Protest Movement*, NPR (Oct. 5, 2014, 7:57 AM), https://www.npr.org/2014/10/05/353849567/when-political-speech-was-banned-at-berkeley.

170. *Id.*

including Milo Yiannopoulos, Ben Shapiro, Charles Murray, and some others.

The question was how should the campus respond to this? The chancellor, Carol Christ, was very kind and asked my opinion about how to deal with it. I suggested that the campus make sure that the most controversial speakers were in an auditorium rather than out in Sproul Plaza or the open area of campus. In an auditorium it is possible to restrict who gets in and to have weapons detectors if necessary. It is possible to control the premises. When Ben Shapiro came to campus, he was given the largest auditorium on campus, but told he had to speak there and that he would be required to pay a security fee.[171] He joined with other parties and sued, and the case settled out of court.[172] The court analyzed the suit with a time, place, and manner restriction with regard to speech, and concluded that facially, the school's "Major Events Policy" provided for the restriction of speech.[173]

The campus ended up spending $4 million on security to allow these speakers to come to campus.[174] There is no clear answer to the question of how much a campus must spend for security or the point at which it can say that it cannot afford safety so it will exclude a speaker. The chancellor decided—wisely I believe—that she wanted her message to be that Berkeley is a free speech campus and she spent the $4 million. But what if instead of Free Speech Week, it was Free Speech Month, or Free Speech Semester, and what if the costs were not just $4 million but were $40 million? Or $100 million for security? There has got to be a point at which the campus can say, "We can't afford that cost and therefore we're going to restrict the speech." But no court has yet identified what that point is, yet campuses will face it all over the country.

The second incident occurred in November of 2019. Ann Coulter came to speak on campus on a Wednesday night. The next day, Thursday morning, videos were shown to me and showed that those who went to hear Ann Coulter were assaulted by others as they were walking into the auditorium. They were pushed, shoved, spit at, water was thrown at them, and the like.[175] So, I issued a statement to the law school in my role as dean that when there is speech we do not like, the response should be

171. Young America's Found. v. Napolitano, No. 17-cv-02255-MMC, 2018 U.S. Dist. LEXIS 70108, at *24 (N.D. Cal. Apr. 25, 2018).

172. Jonathan Stempel, *UC Berkeley Settles Lawsuit Over Treatment of Conservative Speakers*, REUTERS (Dec. 3, 2018, 4:15 PM), https://www.reuters.com/article/us-california-lawsuit-ucberkeley-idUSKBN1O22K4.

173. *Young America's Found.*, 2018 U.S. Dist. LEXIS 70108 at *12.

174. Jocelyn Gecker, *UC Berkeley Spent $4 Million for Free Speech Event Security*, ASSOCIATED PRESS (Feb. 5, 2018, 7:27 PM), https://apnews.com/d18252af57444822bd901dbe343ce54c.

175. *5 Arrested at Rally Against Ann Coulter Speech in Berkeley*, AP NEWS (Nov. 21, 2019, 4:20 AM), https://apnews.com/59a3c2faf85046cbae47c0b7314a04fc.

more speech. It is certainly appropriate to protest Ann Coulter, but it was not appropriate for people to engage in the assaults of those going to hear her. A university has to be a place where all ideas and views can be expressed and we as a law school had to stand up for free speech principles.

That afternoon on literally every bulletin board in the law school, this was posted, "Dean Chemerinsky defends Ann Coulter, but not our students." It was posted on the Berkeley Law website that Dean Chemerinsky "touts the intellectual acceptability of white supremacist views." And obviously I never did that. But my defense of Ann Coulter's ability to speak on campus and of others to hear her was certainly not supported by a lot of our students.

One student came up and said, "Your issuing the statement, it was like a slap in the face to me." Students said that it was violence against them to have Ann Coulter on campus. It made me worry about whether there is a waning commitment to free speech among some of our students.

One more story, and I feel comfortable telling it publicly because it made the front page of the *New York Times*, unfortunately, on December 22, 2022.[176] On the first day of the fall semester in August 2022, a student group at Berkeley Law, Berkeley Law Students for Justice in Palestine, asked all of the student groups, over 100 total, to sign a bylaw agreeing that they would not invite any speakers to any event that ever had or currently supported "Zionism, the apartheid state of Israel, or the Palestinian occupation." Not surprisingly, others in the community were very upset by this, especially Jewish students and faculty. I sent a letter to all of the leaders of student groups saying that I respect the free speech rights of students, but I found this inconsistent with our values as a community. In fact, under this bylaw, I could not be invited to speak because I support the existence of Israel. I said that I would hope that student groups, when choosing whether to adopt the bylaw, would be sensitive to the feelings of all our students in creating an inclusive community.

This all ended up going viral in the fall semester in a way I could have never imagined. There were huge tensions. The position that I took, that I continue to hold, is that student groups have the First Amendment right to choose speakers based on their viewpoint; that the school cannot compel them to have speakers of particular views or prohibit them having speakers of particular views. But I condemn the bylaw as inconsistent with our values. Not surprisingly, this pleased relatively few people. There were those who said I should ban the bylaw as creating a

176. Vimal Patel, *Speaker Ban at Berkeley Law School Incites Free Speech Fight*, N.Y. TIMES, Dec. 22, 2022, at A1.

discriminatory environment. Two lawyers, one in Florida and one in New York, have filed a complaint against me and the law school with the Office of Civil Rights of the Department of Education for creating a hostile environment against Jewish students.[177]

And on the other hand, the students from the Berkeley Law Students for Justice in Palestine were very angry. They believed I had not sufficiently supported them because I condemned the bylaw.

Now, why do I mention these three examples? They show us how difficult the issues are concerning the First Amendment and education. They also show how pervasive the issues are with regard to the First Amendment and education.

V. CONCLUSION

In this way, these issues continue to come up at all levels and all parts of the country. I know that law professors, lawyers, and judges are going to be so influenced and benefit so much for years to come from the scholarship of Ronna Greff Schneider.

177. Christine Charnosky, *Berkeley Law Facing Complaint Alleging Antisemitism*, LAW.COM (Dec. 21, 2022, 10:43 AM), https://www.law.com/2022/12/21/berkeley-law-facing-complaint-alleging-antisemitism/.