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TO THE POINT

Campus Inclusion and Freedom of Expression: Managing Social Media

Robert H. Jerry II

BACKGROUND

Recent events on college campuses—and throughout society generally—have frequently juxtaposed the values of diversity and inclusion against those of freedom of expression. The data show that college students believe in the First Amendment, but that many are willing to entertain restrictions on free speech and other rights when they perceive a conflict with other values and beliefs.[1]

This divergence creates complex challenges for college and university leaders, many of whom want to encourage robust critical thinking and the free expression of ideas, but do not want to adversely affect the student experience or diminish the learning environment. This To the Point brief provides communications and legal counsel teams and others wrestling with these issues with observations and insights—informed by the First Amendment and case law—regarding social media's implications for the tension between campus inclusion and freedom of expression.

About the author

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SOCIAL MEDIA ON CAMPUS

The presence and importance of social media in the modern higher education institution requires campus leaders to think proactively about best practices in establishing and managing these platforms—and how to respond to the problems that will arise when these platforms are misused. For public colleges and universities and for private institutions that adopt the First Amendment's requirements as their own obligations, understanding how courts are likely to apply the First Amendment to social media speech and expression is essential to effective management of this challenging terrain.

Four sections shape this brief:

1) The types of forums where government actors can regulate speech

2) Select frequently asked questions on free speech and social media use in higher education

3) Three case studies and potential implications for higher education

4) Considerations for aligning social media policies and free speech rights

FREE SPEECH AND FORUMS: THE BASICS

The First Amendment states, in part, that "Congress shall make no law . . . abridging the freedom of speech." The text's meaning is found in U.S. Supreme Court cases decided during the past 100 years or so. As interpreted by the Court, the First Amendment applies to federal, state, and local government actors, including public schools and higher education institutions. It does not apply to private entities, such as private colleges and universities. The First Amendment's free speech protections are broad, but several categories of speech—including threats of harm, incitement of imminent illegal actions, defamation, obscenity, and fighting words—are not protected. "Hate speech" is protected by the First Amendment, however, unless it has characteristics causing it to fall within one of the specific exceptions.

Speech transmitted through social media is subject to the same general First Amendment protections as any other kind of speech.[2]

When a government actor creates space—whether physical, print, or intangible—for expressive activities, the characteristics of the space determine the extent to which the government can regulate speech within it. The Supreme Court has labeled such spaces *forums*, and has recognized three kinds of forums.[3]

Speech transmitted through social media is subject to the same general First Amendment protections as any other kind of speech.[2]

A *traditional public forum* is a place owned or controlled by the government and traditionally used for public expression. Thus far, only streets, parks, and sidewalks fall within this category.[4] Reasonable, content-neutral time, place, and manner restrictions are permissible, such as limiting the use of bullhorns in a nearby park during school hours (i.e., time: school hours; place: park adjacent to a school; manner: amplified noise), provided the restrictions are "narrowly tailored to serve a compelling state interest"[5] (i.e., narrowly tailored: prohibits loud, disruptive noise instead of all noise; compelling interest: education of students in schools).

A *limited public forum* or a *designated public forum* is a space that the government intentionally opens for speech and assembly on terms set by the government.[6] For example, a public college or university can limit campus meeting rooms to use by student groups, and if the institution subsequently excludes a speaker who is not a student, a court will likely uphold the exclusion. Likewise, a public college or university can create, apply, and seek to preserve content-based restrictions that define and limit the range of subjects discussed in the forum. But to be upheld, these limitations must be viewpoint neutral and reasonable as to time, place, and manner.

A *nonpublic forum* is defined by the Supreme Court as any property owned or controlled by the government that is not by tradition or designation a forum for public communication (e.g., military bases, polling places,

light posts, and prisons). The government has broad leeway to regulate speech in nonpublic forums, but the regulations must be reasonable and must maintain viewpoint neutrality.

Thus, the First Amendment limits government regulation of private speech, and forum analysis is the framework the Supreme Court has developed to explain when the government can, and cannot, limit speech. The government speaking for itself is different; it does not follow that when the government speaks for itself that a forum is created, nor does it follow that private citizens are entitled to access space created by the government for the sole purpose of transmitting information to the public. This is known as the *government speech doctrine*. Under this principle, the government—and, by extension, a public college or university—can create a social media site for one-way communication purposes, making itself the sole speaker, and ban others from posting on the site. This is the same logic that allows a higher education institution to publish a magazine or newsletter and include only its own messaging in the medium.

FREQUENTLY ASKED QUESTIONS

Free expression is a nuanced topic, which can make it complicated to understand and therefore enact legal and effective policies and practices. This era of wide social media use only amplifies the complexity. To assist campus leaders in navigating this space, some of the most commonly asked questions about free speech and social media in the higher education setting are discussed in this section.

QUESTION: When a college or university sets up a site on a social media platform, what kind of forum is it?

ANSWER: It depends on what characteristics the institution gives the social media site.

Because colleges and universities ordinarily create social media sites for particular purposes and not as "public square-equivalents" or "virtual free speech zones," it is likely that these spaces will be categorized as designated or limited public forums whenever interactive communication is invited or allowed on these sites—and as simply an outlet for government speech (or possibly a nonpublic forum) if only one-way communications are allowed.

This conclusion is the logical extension from the results in several recent cases:

- In a 2019 Wisconsin federal district court case,[7] the court held that the interactive portions of state legislators' Twitter accounts constituted designated public forums. A 2019 California federal district court agreed,[8] holding that school board members' Twitter and Facebook accounts, which were used to post content about their official positions and were opened to the public for interactive communications without limitation, were designated public forums.

- In a 2019 Fourth Circuit case,[9] the court concluded that the Facebook page of the chair of a county board, which she used for public announcements and to solicit public comment, was a public forum for First Amendment purposes. The court explicitly declined to decide whether it was a traditional or limited public forum under the reasoning that viewpoint discrimination, which the chair was found to have done, is prohibited in all public forums.

- In a 2019 Second Circuit case,[10] the court concluded that the interactive portion of President Trump's Twitter account was a public forum, but the court did not address the category of public forum into which it fell. As those two federal circuit court decisions demonstrate, when a government official engages in viewpoint discrimination in a public forum, that conduct is unlawful regardless of the specific category attributed to the forum. Most other recent court decisions are consistent with these results.[11]

Although technically any government agency could declare by fiat any space to be a particular kind of public forum, the Supreme Court has rejected the view, as a matter of First Amendment jurisprudence,

that traditional public forums extend beyond the historic categories of streets, parks, and sidewalks.[12] Thus, government-sponsored, interactive social media sites are not traditional public forums, and until recently nothing suggested that such sites might become an additional category of traditional public forum.

In a 2017 decision,[13] however, a majority of the Court spoke in broad terms about the expansive nature of social media, describing these kinds of Internet platforms as one of "the most important places (in a spatial sense) for the exchange of views" and at one point describing social media as "the modern public square."[14] This may mean that at some point in the future, the Court will be receptive to the argument that government-owned or -controlled space on the Internet is a new kind of traditional public forum.

QUESTION: Does the First Amendment apply to social media platforms that are not owned or controlled by higher education institutions?

ANSWER: Yes.

Although the platforms themselves are not government owned (for example, Twitter is owned by a private company), when a government actor—such as a public higher education institution—creates a site on the platform, that actor exercises control over various aspects of the account. For space to constitute a *forum* for purposes of First Amendment analysis, the government must own *or control* it. Thus, when citizens speak on a higher education institution's social media site and campus officials regulate that speech, the First Amendment applies.[15]

QUESTION: Can campus officials block individual faculty, staff, or students from posting information on institutional social media accounts (such as a Facebook page)?

ANSWER: It depends on what kind of forum the campus officials created.

If the institution establishes a social media presence—for example, a Facebook page—for the sole purpose of distributing its own content (and no one else is allowed to publish content on the site), the institution is engaging in *government speech*. In that situation, the answer is yes. If, however, the institution invites interactive communication—such as by inviting comments on its own posts—courts are likely to treat the site as a *designated public forum*, and the answer is likely to depend on what limits the institution articulated when creating the site.

A 2019 federal decision in the Second Circuit[16] considered whether a public official can block a person from responding directly to the official's social media posts because the official disagrees with the views expressed. This case involved the complaints of several citizens whom President Trump (and his social media director) blocked from participating in discussions on his Twitter feed simply because the citizens disagreed with him. The court held that the president has a right to ignore these citizens' comments, but once he opened up the interactive features of the account to the public, "he is not entitled to censor selected users because they express views with which he disagrees."[17] The president's tweets themselves constitute *government speech* and the president has no obligation to create a space where others can rebut his messages. But once the interactive

space for comments and retweets is created, in *that* interactive space the government must abide by content neutrality. In several other cases, courts have reached results consistent with this decision.[18]

Campus leaders should assume that the logic of this case, and others consistent with it, is likely to be applied to a college or university social media site. These implications would follow: if campus officials open up a social media site for interactive communication, those who wish to post on the site—provided that they are within the categories of persons invited to post on the site and that their posted content is within the site's subject matter parameters—cannot be blocked simply because campus leaders oppose their viewpoints.

QUESTION: Can campus officials delete posts made to institutional social media accounts when they attack or insult other members of the college or university community?

ANSWER: Most likely the answer will be no.

Interactive social media sites created by colleges and universities are likely to be treated as designated public forums. In the higher education setting, meeting rooms that are open to all comers or to student groups, or that are identified as locations for discussion of certain topics, fall within this category. The Supreme Court has treated a college or university newspaper as a designated public forum protected under the First Amendment.[19] This shows that a designated public forum need not be physical space.

When campus officials create a designated public forum, they set reasonable rules and policies governing the site. When posts occur that violate those rules, campus officials can remove these posts from the site, although it is highly likely that a court would require the officials' decision to be viewpoint neutral. Also, any expression that falls within one of the categories of unprotected speech can be deleted. Whether the rules of a site can be expressly drafted in such as expansive manner to allow a site's moderators to delete any comment critical of the college or university or any of its constituencies has not yet been resolved in the courts. At present, campus leaders should not assume that they have this authority if they invite interactive communications in a social media forum—although a college or university that reserves the right to pick and choose what postings are allowed on the site may be able to persuade a court that the site is a vehicle for government speech. As mentioned above, certain limited types of speech are not protected by the First Amendment: these categories include obscenity, true threats of imminent harm, incitement to imminent unlawful action, defamation, fighting words, false or misleading commercial speech, and illegal speech (such as extortion, solicitation to commit a crime, or perjury). Thus, a college or university could remove postings on its interactive social media sites that fall within any of these narrow categories of unprotected speech.

"Hate speech" is not one of these narrow categories; that is, hateful words cannot be restricted simply because they are hateful. Thus, hate speech cannot be deleted from a social media account unless it has other characteristics causing it to fall within one of the categories listed above. These categories of unprotected speech are narrow, and many kinds of speech that reasonable people find to be repugnant, offensive, rude, hateful, disgusting, profane, or loathsome are protected. Most notably, the Supreme Court has ruled repeatedly that hate speech is legally protected under the First Amendment,[20] in contrast to the rules that apply in most liberal democracies elsewhere in the world. Simply because speech *disturbs* ordinary sensibilities does not render it unprotected; indeed, the point of many protests and much dissenting speech is to attract attention to the message by disturbing others.

The existence of these categories is settled law, but whether a particular expression meets the judicial test for being included within a particular category is sometimes very difficult to determine. For example, courts have generally treated offensive speech as fighting words only in face-to-face communications where the words should be expected to provoke an immediate and violent reaction and have no purpose to express ideas—but even these standards are difficult to apply.[21] Because social media communications occur at a distance, it is unlikely that what might be fighting words if uttered face-to-face will meet the current test in the social media context.

Simply because speech *disturbs* ordinary sensibilities does not render it unprotected; indeed, the point of many protests and much dissenting speech is to attract attention to the message by disturbing others.

"Harassing speech" is a particularly challenging concept. The lay understanding is that harassment is impermissible, and then logic seems to break down: all "hate speech" arguably harasses, but hate speech is protected under the First Amendment. The Supreme Court has held that harassment in the educational setting consists of unwelcome, discriminatory *conduct* that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[22] When campus speech—including social media communications—rises to the level of harassment under this definition, it is likely that a court will uphold a college or university's regulation of the conduct. But college and university leaders should assume that the circumstances are rare when social media communications are sufficiently disruptive or injurious to lose their First Amendment protection.

QUESTION: If campus officials' authority to regulate speech on its social media accounts is limited, how are campus officials to understand the boundary between what they can and cannot regulate?

ANSWER: This is challenging, but there are some basic principles that provide guidance about this boundary.

Campus leaders should understand that the law in this area is not yet fully developed, and drafting or implementing social media policies in a manner that favors one viewpoint over another could invite a challenge, which might be successful. On numerous occasions, the Court has supported inappropriate, unpopular, and critical speech in public forums, especially when the speech is viewed as contributing to public political discourse.

Campus officials can articulate policies for a forum that limit the topics discussed and who may participate (this is a "designated public forum" in the framework described above), but once the boundaries of the forum are set, the institution must respect them. Unfortunately, the case law is not firmly settled on exactly what this means in the context of social media forums, but some principles are embedded in the cases that provide guidance on how campus officials should exercise their discretion. For example, if a university creates an unmoderated site that allows public comments on any matter relating to the university, but the university deletes a post critical of the university simply because it does not like the message, a court will probably find that the university violated the First Amendment.

On the other hand, if the university announces policies when it creates a social media site, such as, only university faculty and students may communicate on the site, or that the subject matter of the site is "the

future of higher education," it is likely that a court would uphold the university's decision to block an alumnus or unaffiliated private citizen from participating on the site, or to delete the post of a student who sought to initiate an wholly unrelated conversation (e.g., abortion rights) on the site. The court would evaluate the university's action for its reasonableness in fulfilling the announced purposes and policies of the forum and for its viewpoint-neutrality—i.e., if the court decided that the university's rationale was actually a cloak for suppressing a disfavored opinion expressed by someone authorized to post to the site, the fact that the university has greater power over expressions in a designated public forum would not protect the university's action in these circumstances.

What happens if the university, when establishing the site, announced that the purpose of the site is to promote the interests of the university, that the site will be moderated at all times, and that it explicitly reserves the right to remove any post for any reason? It may be that a court would allow the university to enforce these boundaries in managing the designated public forum under the reasoning that the forum was established for the purpose of *government speech*—in effect, analogizing this situation to the university's authority to choose what content appears in letters to the editor in an alumni magazine. The logic would be that in this kind of site, the government—in this instance, the higher education institution—speaks through its selection of private speech that it allows to remain on the site. One lower court decision provides some support for this logic.[23] Even a very clear social media policy, however, may not eliminate all constitutional concerns, and the possibility exists that a court would declare the limits set by the institution, if challenged, incompatible with the First Amendment.

QUESTION: Can campus officials at public colleges and universities discipline students for speech posted on their personal social media accounts?

ANSWER: It depends.

Speech that is constitutionally protected on campus is protected off campus as well. If the student's on-campus speech falls into the category of unprotected speech that can be restricted by campus officials, can these same restrictions be imposed on the student's speech if it occurs off-campus or on personal, non-university social media accounts? In other words, does where the speech occurs affect the university's ability to regulate it? Although the answer is not yet settled in the case law, it is likely that off-campus speech (including social media speech) that materially and substantially disrupts campus order or is so severe as to deprive other students of the benefits of their educational experience can be disciplined.

Generally speaking, universities and colleges may discipline students for off-campus *conduct* that impacts the mission of the school or substantially disrupts the school or its students. Under the logic of this principle, speech that lacks First Amendment protection on campus should not gain protection simply because it occurs off campus. In the K–12 setting, lower courts have upheld discipline for off-campus student speech, including speech on social media, when it materially and substantially disrupts the school or reasonably leads school officials to forecast such disruption,[24] and have struck down discipline for off-campus speech when it has not met that test.[25] In these cases, courts have required that the speech in question be intentionally directed at the school or members of the school community, or be of a nature that it would reasonably be understood as likely to reach the school.[26] But courts have not addressed this question in the higher education setting.[27]

CASE STUDIES AND THEIR IMPLICATIONS

The fact patterns in which First Amendment disputes can arise are virtually limitless, but reviewing a few actual cases can help bridge the gap between the abstract nature of constitutional law and its impact on individuals and institutions.

A State Actor Removes a Post from a Public Facebook Page

THE FACTS: A county resident alleged that an attorney acting as an officer of the state violated his First Amendment rights when the attorney deleted the resident's critical comment from the county's Facebook page and blocked the resident from making other comments for several months. The published policies of the site stated that the purpose of the site is to "present matters of public interest" in the county and encourage the submission of "questions, comments, and concerns," but that the county reserved the right to delete submissions that violate enumerated rules, including comments that are "clearly off topic."

THE CASE: *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017).[28]

THE RESULT: The court concluded that the Facebook page was a limited public forum "created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." The government, once opening the limited forum, must respect its boundaries but could also police those boundaries. The court agreed that the resident's post was clearly off topic and did not comport with the purpose of the forum, and that the website restriction justifying the removal was both viewpoint neutral and reasonably related to the purpose of the forum. Thus, the resident's First Amendment rights were not violated.

A college or university, like a county government, can create social media pages with limited purposes or for the use of particular groups, or both.

IMPLICATIONS: A college or university, like a county government, can create social media pages with limited purposes or for the use of particular groups, or both. Campus officials must comply with their own rules, but can also enforce the rules against those who fall outside the groups designated to use the site or who speak on topics beyond the scope of the site. The rules themselves must be viewpoint neutral, and they must be enforced in a manner that does not discriminate against particular viewpoints.

A State Actor Denies Citizen Access to His Facebook and Twitter Account

THE FACTS: A state governor maintained official Facebook and Twitter accounts and blocked two citizens from these accounts after they made comments on them critical of the governor. The governor set up the Facebook page so that members of the public could not post on their own to his timeline, but could only respond to postings he made. He also deployed filters that disallowed posts using designated key words for the purpose of intercepting obscene, abusive, or clearly off-topic posts. The citizens claimed that their being blocked from the governor's accounts violated their First Amendment free speech rights.

THE CASE: *Morgan v. Bevin*, 298 F. Supp. 1003 (E.D. Ky. 2018).

THE RESULT: The court concluded that the governor's postings on his "privately owned" Facebook pages and Twitter pages were personal speech, where he was speaking on his own behalf (albeit as a public official). Therefore, his speech constituted "government speech," which meant the governor could control the discourse on those pages. In banning the citizens from those accounts, the governor was not suppressing speech, but was simply culling his accounts to present the image he desired. The citizens could speak on their own accounts or their friends' accounts, and could say anything they wanted about the governor in those places. As a result, the citizens' motion for a preliminary injunction striking down the bans was denied.

IMPLICATIONS: Colleges and universities are entitled, as government actors, to engage in government speech. Thus, higher education institutions can create newsletters, magazines, and social media sites where, through one-way communications, they share their stories with their audiences. Further, the institutions can prohibit members of the public or the college or university communities from contributing to the newsletters, writing letters to the editor or op-ed essays, or posting on social media sites—provided these constraints are applied in a viewpoint-neutral manner.

The result in the *Morgan* case is unusual because the governor allowed interactive communication on his social media accounts, and the existence of this fact has led most other courts to conclude that a public forum was created, and usually a designated public forum. Thus, if a college or university creates a social media account with one-way communication, its speech within that account will probably be treated as government speech. If interactive communication is allowed in some facet of the account, the institution should assume that this space will be treated as a public forum—and most likely a designated public forum, especially if boundaries on subject matter and participation are announced at the inception—and that the university's efforts to restrict speech in that forum will fail, notwithstanding the outcome in *Morgan*.

A Student Posts on His Personal Account

THE FACTS: A nursing student posted several messages on his personal Facebook page that a fellow student believed related to the classroom and were threatening. In one message, the student threatened to use an electric pencil sharpener to give an unidentified person in the class a physical injury; other posts referred to his anger and made several offensive and troubling statements. In a meeting with the director of the nursing program, the student claimed that the statements were jokes, his page had been hacked, and he did not know the posts were public. The director concluded that the student did not understand the seriousness of the problem, lacked

remorse, and did not possess, nor could develop, the professionalism needed to practice as a registered nurse. Based on these assessments, the director dismissed the student from the nursing program. The student brought a lawsuit challenging the dismissal on multiple grounds, including violation of his First Amendment rights.

THE CASE: *Keefe v. Adams*, 44 F.Supp.3d 874 (U.S.D.C. Minn. 2014), aff'd, 840 F.3d 523 (8th Cir. 2016).

THE RESULT: The Eighth Circuit appellate court affirmed the district court's finding that the student's First Amendment free speech rights were not violated. The court reasoned that the student's social media statements were fully protected by the First Amendment, but this was separate from the question of whether the First Amendment permitted the university to regulate the protected speech at issue. [29]

Referring to the extensive line of cases upholding the enforcement of academic requirements for fitness and professionalism, especially in programs training licensed health care professionals, the court explained that "[g]iven the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics . . . do not, at least on their face, run afoul of the First Amendment . . . [and] can be cited to restrict protected speech." Using such a code, for example, to punish a student's religious or political views expressed in speech would not be viewpoint-neutral and may violate the First Amendment, but school officials did not use the nursing code of ethics as a "pretext for viewpoint, or any other kind of discrimination."

The court rejected the student's argument that the First Amendment protected his unprofessional speech because the messages were off-campus Facebook postings and that the school could only regulate speech if it were within one of the existing categories of unprotected speech. The court reasoned that a student's demonstration of "an unacceptable lack of professionalism" can occur off campus or in the classroom, and through either speech or conduct. Thus, the court concluded that the school did not violate the student's First Amendment rights when it required compliance with professional standards "reasonably related to legitimate pedagogical concerns," even when the speech showing lack of compliance occurred off campus.

IMPLICATIONS: Repugnant, offensive, or hateful speech protected by the First Amendment might violate the norms or standards of conduct in a profession, including conduct in an educational program preparing students for that profession. When this occurs, the college or university has the ability to regulate that speech and discipline the speaker, provided this occurs in a viewpoint-neutral manner. Also, the fact that the speech occurs off-campus does not, in and of itself, make it immune to regulation by campus officials—but regulation is unlikely to be permitted in the absence of implicating an established norm of the academic program (like the professionalism requirement of the nursing program in *Keefe*) or causing a material and substantial disruption of the college or university's programs.

CONSIDERATIONS FOR CAMPUS LEADERSHIP

When establishing a social media site, campus leaders should clearly formulate their objectives, carefully evaluate the risks and rewards, and articulate and publicize policies that will govern communications on the site. This section lists some considerations to help guide that effort.

Crafting Social Media Policies

- Know and state the reasons the institution is using social media. As part of the college or university's overarching communication plan, articulate how social media is used to reinforce institutional messaging and disseminate information about the institution's values.
- Prepare clear, accessible, and legally defensible written policies on social media use and participation.
- When drafting these policies, provide opportunities for students and other campus constituencies to provide input and involve legal counsel.
- Any takedown or removal procedures for information placed on the site should be carefully drafted and clearly articulated. The policies should contain clearly stated mechanisms for reporting inappropriate content on the site.
- Policies should contain appropriate disclaimers of liability to users of the site, to third parties, and to any downstream users who might link to the site or use information placed on the site. Once information is posted on the Internet, it is impossible to control all possible uses of that information, or how the information may be forwarded or linked, or how the information might be altered when used, forwarded, or linked.
- Create internal policies that provide for secure passwords and authentication for employees responsible for the content and maintenance of the social media site, procedures for keeping any associated software and hardware updated, implementation of security against attacks on the site, and steps for responding to any security breach or attack.
- Disseminate the policies widely across campus, with sufficient publicity to create high awareness of their existence and the essence of their content.
- Provide training for those who must apply the policies, either as administrators, compliance staff, or staff who create and administer social media sites, to ensure understanding of the policies' content.
- On most campuses, social media sites have proliferated across central campus divisions, schools and

colleges, departments, and nonacademic units. Engage in a concerted effort to ensure that all sites conform to the institution's best-practice standards.

- Create a timetable for periodic review of these policies and the effectiveness of their implementation.

Preparation and Response Considerations

- As part of the college or university's overarching communication plan, articulate how social media will be used to respond to false or disruptive information (whether posted on social media or communicated in other ways).
- Create, presumably under the direction of the office responsible for campus communications, a social media team that monitors the college or university's social media sites.
- Consider how the institution will deploy resources to monitor its interactive social media sites. *When doing so, be aware of the following*:
    - If an institution is aware, or should have been aware, of a threat to student safety, failing to investigate and remedy the threat can expose the institution to claims for negligence and possible liability. Threats manifested on social media are almost certainly within the scope of this principle; thus, if interactive communications are invited on an institution's social media site, a court or jury might deem the institution's failure to monitor the site to be unreasonable.
    - If an individual or entity acts in a manner that is interpreted as voluntarily assuming a duty, the duty must be performed in a non-negligent matter. Although an institution likely has no duty to monitor the private social media accounts of its students, a university that undertakes to do so could be held to have voluntarily assumed a duty to conduct the monitoring with due care, and failing to do so could expose it to a liability claim.[30]
- Identify a team that will meet to evaluate and formulate response strategies to disruptive or crisis-producing social media activity.
    - Have the team meet periodically to discuss how the university should respond to hypothetical scenarios or situations faced by other universities.
    - Clearly identify roles and responsibilities within the team and make sure they are understood. Create a clear incident response procedure.
- Keep records of reported problems on each social media site and of how the problem was addressed and resolved.

ADDITIONAL RESOURCES ON SOCIAL MEDIA POLICY BEST PRACTICES

CASE (Council for Advancement and Support of Education). n.d. "Sample Collection: Social Media Policies." (CASE membership is needed to access this web page.)

Caylor, Bart. 2019. "10 Useful Tips for Higher Education Social Media." *Caylor Solutions Blog*, April 15, 2019.

Ferrell, Gill. n.d. *Social Media Toolkit: A Practical Guide to Achieving Benefits and Managing Risks*. Universities and Colleges Information Systems Association.

Major, Mia. 2018. "Creating Your School's Social Media Plan: A 10 Step Guide." *The Finalsite Blog*, July 24, 2018.

Pasquini, Laura A. 2016. "Setting the Course: Strategies for Writing Digital and Social Guidelines." *New Directions for Student Services* 2016 (155): 91–104.

Tappendorf, Julie A. n.d. "Checklist for Drafting a Social Media Policy." In *Social Media & Governments —Legal and Ethical Issues*.

Vaast, Emmanuelle, and Evgeny Kaganer. 2013. "Social Media Affordances and Governance in the Workplace: An Examination of Organizational Policies." *Journal of Computer-Mediated Communication* 19 (2013): 78–101.

Notes

1 *Free Expression on College Campuses*, May 2019 (College Pulse study commissioned by Knight Foundation).

2 See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"); *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952): "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears").

3 For a thorough discussion of the Supreme Court's jurisprudence on public forums, see Lyrissa Barnett Lidsky, "Public Forum 2.0," *Boston University Law Review* 91 (2011): 1975–20281975.

4 See *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677-78 (1998); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992); Lidsky, supra note 3, at 1981-83.

5 See *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015); *McCullen v. Coakley*, 573 U.S. 464 (2014). The compelling state interest prong involves a normative judgment as to whether the purpose of the restriction is sufficiently important to justify the restriction on speech. For example, a restriction on the placement of a sign to protect public safety at an intersection would probably meet this test, but a restriction for the sole purpose of aesthetics probably would not. Avoiding offense and limiting bad ideas, absent something else (such as, for example, a threat of imminent harm) are not compelling state interests. The narrowly tailored prong requires the government's manner of restriction to be "a close fit between ends and means," *McCullen*, 573 U.S. at 486, so that the restriction does not create burdens unnecessary to preserving the state's interest.

6 The Supreme Court's jurisprudence can be read as drawing a distinction between designated and limited public forums, but the distinction appears to lack significance as a matter of substance. For more discussion, see Alissa Ardito, "Social Media, Administrative Agencies, and the First Amendment," *Administrative Law Review* 65, no. 2 (2013): 301–384.

7 *One Wisconsin Now v. Kremer*, 354 F.Supp.3d 940 (W.D.Wis. 2019).

8 *Garnier v. Poway Unified School District*, 2019 WL 4736208 (S.D.Cal. September 26, 2019). The Garnier court drew a distinction between designated and limited public forums, holding that the social media sites in question were designated public forums but not limited public forums.

9 *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019). Davison was followed in *Windom v. Harshbarger*, 396 F.Supp.3d 675 (N.D.W.Va. 2019) when the court denied a state representative's motion to dismiss plaintiff's claim that his First Amendment rights were violated when the representative blocked plaintiff's access to defendant's social media site.

10 *Knight First Amendment Institute v. Trump*, 928 F.3d 226 (2d Cir. 2019).

11 See, e.g., *Robinson v. Hunt City, Texas*, 921 F.3d 440, 447-48 (5th Cir. 2019) (county sheriff office's Facebook page is a designated or limited public forum); *Campbell v. Reisch*, 367 F.Supp.3d 987, 991-92 (W.D.Mo. 2019) (interactive portion of state representative's Twitter account subject to forum analysis); *Garnier v. Poway Unified School District*, 2019 WL 4736208 (S.D.Cal., Sept. 26, 2019) (public Facebook pages of two school board members held to be designated public forums*); Leuthy v. LePage*, 2018 WL 4134628, at *14-15 (D. Me. 2018) (denying governor's motion to dismiss plaintiffs' claims of violation of First Amendment rights when governor blocked their access to his Facebook page, reasoning that regardless of type of forum, viewpoint discrimination is impermissible); but see *McKercher v. Morrison*, 2019 WL 1098935 (S.D. Cal., Mar. 8, 2019) (dismissing plaintiff's claim that he was blocked from accessing mayor's personal Facebook page, allegedly used for public purposes, on grounds of mootness and defendant's qualified immunity; court concludes that current state of the law on public officials' use of Facebook pages is unsettled and does not clearly establish the existence of a constitutional right in this setting).

12 Some states have enacted statutes that declare all outdoor spaces at universities to be "traditional public forums." This is an example of government by fiat creating a particular kind of forum in public space. In states with this kind of statute, university lawns, parking lots, outdoor athletic fields, botanical gardens, agricultural research lands, etc., are traditional public forums, and the university has the burden to articulate narrowly tailored rules that support a compelling interest in restricting speech activities in these locations. These rights are based on *statute* and not the U.S. Constitution, as the First Amendment, as interpreted by the Supreme Court, does not extend traditional public forums this far.

13 *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).

14 Id. at 1735-36.

15 Case law aligns strongly with this answer. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 801 (1985) (forum analysis applies "to private property dedicated to public use"); *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661, 679 (2010) (forum analysis applies to "property in [the government's] charge"); *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019) (even if Facebook page is private property, it is controlled by government actor, which renders it a public forum). Some commentators disagree with this view. *Smolla and Nimmer on Freedom of Speech* § 8:33.25

(October 2019 update) (discussing social media accounts of public office-holders); Noah Feldman, "≠≠," *Bloomberg*, July 9, 2019. Thus, it is likely that this question will continue to be contested in jurisdictions that have not decided it, at least until the Supreme Court has an occasion to settle it.

16 *Knight First Amendment Institute v. Trump*, 928 F.2d 226 (2nd Cir. 2019).

17 928 F.3d at 238.

18 See cases cited at n. 11, supra.

19 *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

20 See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that city ordinance prohibiting bias-motivated disorderly conduct was facially invalid under First Amendment); see generally Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (Yale University Press, 2017).

21 The "fighting words" exception to the First Amendment was first articulated in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), where the Court declared, when upholding an arrest for defendant's cursing at a town marshal, that the Constitution does not protect words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. at 572. Exactly when that standard is satisfied is not obvious, and subsequent Supreme Court and lower court cases have attempted to provide more clarity to the test. The trajectory of these cases has been to narrow the exception, thereby protecting a large swath of obnoxious, offensive, and provocative speech. For more discussion, see Stephen W. Gard, "Fighting Words as Free Speech," *Washington University Law Review* 58, no. 3 (1980): 531–581.

22 *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999).

23 See *Morgan v. Bevin*, 298 F. Supp. 1003 (E.D. Ky. 2018) (holding that governor's Facebook and Twitter accounts are government speech to which forum analysis does not apply, because government officials can choose to which citizens it will listen, and because citizens have no right to speak on the governor's own account, blocking some citizens from interacting with government speech does not violate those citizens' First Amendment rights).

24 See, e.g., *Kowalski v. Berkeley City Schools*, 652 F.3d 565 (4th Cir. 2011) (school administrators did not violate high school student's First Amendment free speech rights by suspending her for defamatory accusations and ridicule of a fellow student on MySpace page).

25 See, e.g., *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (eighth grader's vulgar, profane, and sexually explicit profile of principal on social media neither disrupted nor could be reasonably foreseen as disrupting the school, and was protected under the First Amendment); *B.L. ex rel. Levy v. Mahanoy Area School District*, 376 F.Supp.3d 429 (M.D.Pa. 2019) (holding that school's dismissal of student from cheerleading squad for off-campus profanity in a social media post violated student's First Amendment rights).

26 See *C.R. v. Eugene School District 4J*, 835 F.3d 1142, 1149-51 (9th Cir. 2016) (suspension of seventh grader for off-campus, sexually harassing speech did not violate student's First Amendment free speech rights).

27 See *Hunt v. Board of Regents of University of New Mexico*, 338 F.Supp.3d 1251, 1262-64 (D. N.Mex. 2018) (holding that lack of clear controlling authority on university's ability to regulate medical student's First Amendment right to post political speech on off-campus social media site gave qualified immunity to university against student's § 1983 claim for violation of First Amendment rights). In *Yeasin v Durham*, 2018 WL 300553 (10th Cir., Jan. 5, 2018), a case involving a student expelled for off-campus tweets derogatory to his ex-girlfriend, the court reviewed the cases allowing for restriction of student off-campus speech, and concluded that the plaintiff-student could not show a clearly established right that the university violated—but the court specifically declined to decide whether the student had a First Amendment right to post his tweets without being disciplined by the university.

28 In a different case involving the same plaintiff, the Fourth Circuit applied forum analysis, concluding that the interactive portion of a county official's Facebook page was a public forum, and that in denying the plaintiff access to that forum, the official engaged in unconstitutional viewpoint discrimination. See *Davison v. Randall*, 912 F.3d 666, 681-88 (4th Cir. 2019). But see *Morgan v. Bevin*, 298 F. Supp. 1003 (E.D. Ky. 2018) (holding that governor's Facebook and Twitter accounts are government speech to which forum analysis does not apply, because government officials can choose to which citizens it will listen, and because citizens have no right to speak on the governor's own account, blocking some citizens from interacting with government speech does not violate those citizens' First Amendment rights).

29 See also *Tatro v. University of Minnesota*, 816 N.W.2d 509 (Minn. 2012) (university did not violate free speech rights of student enrolled in mortuary science program when student was disciplined for Facebook posts showing disrespect to a cadaver).

30 See Gregory L. Demers et al., "The Antisocial Effects of Social Media and How Colleges and Universities Can Manage Related Litigation Risks," *The Pittsburgh Journal of Technology Law and Policy* 18, no. 1 (2018): 10–13; Sheldon Steinbach and Lynn Deavers, "The Brave New World of MySpace and Facebook," *Inside Higher Ed*, April 3, 2007.