Chapter 16
Forging the Path Forward from Censorship

ABSTRACT

This chapter presents the conclusions to the book. It discusses ideas for the future of the off-campus student-speech jurisprudence. This discussion includes guidance for school officials and students on how to navigate the jurisprudence. The discussion urges school officials to exercise censorship restraint when confronted with off-campus student speech unless the speech constitutes a true threat. It also implores school officials and lower courts to treat students as citizens entitled to the right to free speech under the United States Constitution. Consonantly, the chapter recommends that school officials leave censorship of off-campus speech to law enforcement as well as the civil and criminal judicial processes as obtains for the citizenry at large. The goal of the chapter is to recommend ideas that students, school officials and lower courts can consider in order to minimize the abridgement of students’ right to speech in off-campus settings.

INTRODUCTION

This chapter concludes the book’s examination of the off-campus student speech jurisprudence. As evident in the analysis in prior chapters, the jurisprudence is in disarray because the United States Supreme Court has thus far chosen silence rather than a clear and conclusive articulation of the First Amendment right of students to speak off-campus. Lower courts have tried to fill the void through inconsistent and conflicting decisions as highlighted in chapters eleven, twelve and thirteen. The lower courts have based their decisions on application of the material and substantial disruption test, the infringement-of-rights test, the Bethel test and the Morse test from their on-campus context to the context of off-campus speech. Some courts have also relied upon the true-threat doctrine, the Miller test, the fighting-words doctrine and defamation law. The variety of tests and doctrines used by different courts has created contrariant interpretations of the scope of students’ off-campus speech rights and a clouded jurisprudence. Amidst the incongruent jurisprudence, school officials have a prime opportunity to censor as much off-campus speech as possible without imperative and decisive judicial pushback. This chapter proposes that school officials exercise caution when encountering off-campus speech.
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officials not censor off-campus student speech despite this opportunity. It presents ideas for lower courts, school officials and students to ensure that students enjoy the citizenship right to free speech as guaranteed under the First Amendment. Ultimately, it proposes that lower courts and school officials should confine school-censorship authority inside the schoolhouse gate unless a true threat is present.

MAIN FOCUS OF THE CHAPTER

This chapter is designed to provide recommendations for navigating the off-campus student-speech jurisprudence. It argues that school officials should not censor off-campus student speech if the speech does not constitute a true threat. Additionally, censorship of off-campus student speech should be left to the jurisdiction of law enforcement, parents and the judiciary. The chapter also argues that lower courts should arrest the current jurisprudence’s inclination toward censorship in order to preserve the opportunity for students to develop as active participants in our constitutional democracy. Further, it argues that, once students exit the schoolhouse gate, they should be treated as part of the citizenry entitled to First Amendment protection under the United States Constitution. It also argues that, in light of the unsettled and inconsistent nature of the off-campus student-speech jurisprudence, school officials should be precluded from making censorship decisions about off-campus speech since they are not schooled in First Amendment niceties. Instead, schools should educate students on the civil use of speech and adopt policies that are protective of students’ rights to speak off-campus. The chapter also discusses the Erase Bill in California as an opportunity for students to avoid school censorship.

The Extant Fragmented Off-Campus Student-Speech Jurisprudence

As shown in this book, the current off-campus student-speech jurisprudence is unsettled and fragmented. This is evident in the motley of approaches that courts have taken to off-campus student speech in both online and offline settings. The uncertainty in the jurisprudence arises from the fact that the United States Supreme Court has never ruled on an off-campus student speech case. While a number of courts believe that the material and substantial disruption test from Tinker v. Des Moines Independent Community School District (1969) is applicable to off-campus speech, others believe this test is inapplicable because this test was created in the context of on-campus speech. Further, while a few courts have recognized an infringement-of-rights test, based on the Supreme Court’s language in the Tinker case, most courts have never recognized the test. Even when courts recognize the infringement-of-rights test, most choose simply to acknowledge the test without defining or applying it. Besides, the Supreme Court itself has never applied this test or explicitly recognized it as a test. This further muddles the jurisprudence.

An exiguous number of courts have applied the Bethel test to off-campus speech. Many courts have, however, declined to extend this test off-campus because of the on-campus context of the Bethel School District No. 403 v. Fraser (1986) case. The perplexing thing is that a few of these courts inconsistently used context as rationale. Specifically, these courts relied on context in rejecting the application of the Bethel test to off-campus speech. Yet these same courts disregarded the on-campus context of Tinker v. Des Moines Independent Community School District (1969) when deciding to extend the material and substantial disruption test to off-campus speech. This is quite bewildering as it says context matters until it does not matter. Some other courts declined to apply the Bethel test to off-campus speech because of
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