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Free Speech, Social Media, and Public Universities: How the First Amendment Limits University Sanctions for Online Expression and Empowers Students, Staff, and Faculty

Eric T. Kasper

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FREE SPEECH, SOCIAL MEDIA, AND PUBLIC UNIVERSITIES: HOW THE FIRST AMENDMENT LIMITS UNIVERSITY SANCTIONS FOR ONLINE EXPRESSION AND EMPOWERS STUDENTS, STAFF, AND FACULTY

Eric T. Kasper[‡]

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I. INTRODUCTION

News stories in recent years have regularly appeared where students, staff, or faculty members at public institutions of higher education are investigated, rebuked, or reprimanded by their college or university for online expression. Such cases have the potential to raise First Amendment questions. In particular, there are several instances of students being scrutinized for their social media expression, with the content and context of that speech varying widely.

In July 2015, the former president of Valdosta State University settled a $900,000 lawsuit for expelling a student who posted on Facebook a "satirical environmentalist collage" that showed pictures of the university president and parking deck construction.[1] The student was punished after the university president interpreted this criticism of the campus's decision to build additional parking structures as threatening.[2]

In January 2017, Cooper Medical School of Rowan University filed a "Professionalism Intervention Report" against a medical student after she posted on Instagram a topless photo of herself at a nude beach in Europe

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[‡] Professor of Political Science and Director of the Menard Center for Constitutional Studies, University of Wisconsin-Eau Claire; Municipal Judge, City of Rice Lake, Wisconsin; J.D., University of Wisconsin Law School, 2007; Ph.D., University of Wisconsin-Madison, 2007.

[1] Adam Floyd, *Former VSU Student Gets $900,000 Payment*, VALDOSTA DAILY TIMES (July 25, 2015), https://www.valdostadailytimes.com/news/local_news/former-vsu-student-gets-900-000-payment/article_4e77ad88-3272-11e5-94b7-e7007ee5804d.html [https://perma.cc/HV8T-KWHL].

[2] *Id.*

that included "#freethenipple."[3] Although the student's nipples were blurred to conform to Instagram policies, administrators told the student to remove pictures from her account that a "reasonable person" would interpret as "sexually explicit."[4]

In February 2017, a University of Central Florida student was suspended after posting on Twitter pictures of a break-up letter from his ex-girlfriend, with the student negatively "grading" the letter's grammar in a series of posts.[5] The student's suspension was later overturned.[6]

In November 2017, a University of North Florida student was suspended after allegedly posting a photo of himself shirtless, with a swastika tattoo on his chest, and holding a semi-automatic rifle.[7] The Facebook photo was accompanied by the following statement: "[I]t is okay to be WHITE!!!!! Let SDS and the other clowns come at me, I will shut them down. Fuck the BLM BS!!! I am WHITE and PROUD, and these queer balls have yet to confront me on campus."[8]

In January 2018, a University of Alabama student posted racist videos on Instagram where she repeatedly used the N-word, including in a post made on Martin Luther King Day.[9] The university expelled the student.[10]

In March 2019, at the University of Wisconsin-Oshkosh, a photo was shared on Snapchat by white candidates for student body president and vice president, stating, "Vote for these guys today unless you want a lesbian or a hmong [sic] to win."[11] The post was widely denounced, including by university officials, but it does not appear any sanctions were imposed

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[3] Sarah McLaughlin, *Cooper Medical School of Rowan University Revises Social Media Policy After Letter from FIRE*, FOUND. FOR INDIVIDUAL RTS. IN EDUC.: NEWSDESK (Oct. 6, 2017), https://www.thefire.org/cooper-medical-school-of-rowan-university-revises-social-media-policy-after-letter-from-fire/ [https://perma.cc/H9K4-TNZB].

[4] *Id.*

[5] Nick Roll, *A Tweet with Consequences*, INSIDE HIGHER ED. (July 19, 2017), https://www.insidehighered.com/news/2017/07/19/student-suspended-after-tweeting-about-ex-girlfriend [https://perma.cc/P7RF-VCLA].

[6] Nick Roll, *On Second Thought…*, INSIDE HIGHER ED. (July 20, 2017), https://www.insidehighered.com/news/2017/07/20/u-central-florida-reinstates-student-suspended-over-tweet [https://perma.cc/FWN9-WR78].

[7] Tiffany Salameh & Pierce Turner, *Student and Former KKK Member Suspended After Posting Photo with a Gun*, U.N. FLA. SPINNAKER (Nov. 14, 2017), https://unfspinnaker.com/62848/news/student-and-former-kkk-member-suspended-after-posting-photo-with-a-gun/ [https://perma.cc/2B7W-HCC2].

[8] *Id.*

[9] TRIB. MEDIA WIRE, *University of Alabama Student Expelled After Racist Instagram Rants Surface*, WREG-TV (Jan. 18, 2018), https://wreg.com/news/university-of-alabama-student-expelled-after-racist-instagram-rants-surface/ [https://perma.cc/C9C4-KY6G].

[10] *Id.*

[11] Devi Shastri, *Offensive Image During UW-Oshkosh Student Elections Leads to Deeper Look at Campus Climate*, MILW. J. SENTINEL (Mar. 19, 2019), https://www.jsonline.com/story/news/education/2019/03/19/racist-homophobic-snapchat-sparks-frustration-anger-uw-oshkosh/3202560002/ [https://perma.cc/3VPB-E6RP].

against the students who made the post.[12]

In February 2020, students at the State University of New York at Albany posted on Instagram a video of a coronavirus-themed party, where participants wore surgical masks, drank Corona beer, and displayed a white sheet with a biohazard symbol.[13] The university responded by characterizing the party as distasteful, announcing that "any allegations of conduct violations will be investigated and addressed through the university's disciplinary process."[14]

A U.S. Naval Academy student faced expulsion for posting multiple tweets in June 2020, including the following tweet made during national protests over the killing of George Floyd: "Go ahead, cut funds to the police. Community policing by building relations is expensive and timely, anyways. Bullets, on the other hand, are cheap and in ready supply."[15]

In December 2020, Utah State University blocked a student from its social media accounts after the student referred to the university as "bastards" in a tweet criticizing the campus library for not having enough exits.[16]

In February 2021, a University of Tennessee pharmacy graduate student filed a federal lawsuit in response to a disciplinary committee's decision to expel her (a decision later overturned) for Twitter posts she made using a pseudonym.[17] The university had deemed the student's posts—including one in which she exposed her cleavage while sticking out her tongue and another in which she suggested lyrics for a possible remix of the song "WAP" by Cardi B and Megan Thee Stallion—too "vulgar" and "crude" for a pharmacy graduate student.[18]

There are also ample examples of public university employees, including faculty, who draw the ire of their campuses for social media posts.

An East Stroudsburg University sociology professor was suspended after making multiple Facebook posts in 2010, with one in January joking,

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[12] *Id.*

[13] Lilah Burke, *Coronavirus-Themed Party at Albany Draws Criticism*, INSIDE HIGHER ED. (Feb. 24, 2020), https://www.insidehighered.com/quicktakes/2020/02/24/coronavirus-themed-party-albany-draws-criticism [https://perma.cc/5STC-FAQP].

[14] *Id.*

[15] Edward Ericson, Jr., *Student Sues Naval Academy over Expulsion for Social Media Posts*, COURTHOUSE NEWS SERV. (Sept. 30, 2020), https://www.courthousenews.com/student-sues-naval-academy-over-expulsion-for-social-media-posts/ [https://perma.cc/GB53-PPVK].

[16] Taylor Cripe & Sydney Dahle, *BLOCKED – USU's Social Media Policies Called into Question*, UTAH STATESMAN (Jan. 25, 2021), https://usustatesman.com/blocked-usus-social-media-policies-called-into-question/ [https://perma.cc/B58G-6VSJ].

[17] Anemona Hartocollis, *Students Punished for "Vulgar" Social Media Posts Are Fighting Back*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html [https://perma.cc/2QUU-4CVH].

[18] *Id.* In the song, "WAP" stands for "wet-ass pussy." Charles Holmes, *The Conservative Crusade Against "Wet-Ass Pussy,"* ROLLING STONE (Aug. 11, 2020), https://www.rollingstone.com/music/music-news/wet-ass-pussy-ben-shapiro-conservative-backlash-1042491/ [https://perma.cc/C9G2-LZQH].

"Does anyone know where I can find a very discrete hitman? Yes, it's been that kind of day . . . ,"[19] and another in February facetiously claiming she "had a good day today. DIDN'T want to kill even one student. :-). Now Friday was a different story."[20]

In September 2013, a University of Kansas journalism professor was put on indefinite leave after posting the following on Twitter: "#NavyYardShooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you."[21]

In August 2017, a Montclair State University adjunct instructor in gender, sexuality, and women's studies was removed from two classes he was scheduled to teach after he tweeted, "Trump is a fucking joke. this is all a sham. i [sic] wish someone would just shoot him outright."[22] After the instructor was stripped of his teaching duties, the university claimed he "ha[d] never been an employee" of the campus, although an *Inside Higher Ed* investigation concluded he had been an instructor there.[23]

In April 2018, a California State University, Fresno professor of English was investigated but ultimately not disciplined after she posted remarks on Twitter following the death of Barbara Bush, calling the former First Lady an "amazing racist who, along with her husband, raised a war criminal."[24] The university president characterized the professor's comments as "disgraceful" and "an embarrassment to the university," but assessed that they were protected by the First Amendment.[25]

In May 2018, a Rutgers University history professor posted comments on Facebook in response to white gentrification in a Harlem neighborhood, including, "OK, officially, I now hate white people," and "I am a white people, for God's sake, but can we keep them —us —us out of my neighborhood?"[26] He posted that a local restaurant was "overrun with little

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[19] Dalia Fahmy, *Professor Suspended After Joke About Killing Students on Facebook*, ABC NEWS (Mar. 2, 2010), https://abcnews.go.com/Business/PersonalFinance/facebook-firings-employees-online-vents-twitter-postings-cost/story?id=9986796 [https://perma.cc/38PE-PHNQ].

[20] *Id.*

[21] Colleen Flaherty, *Protected Tweet?*, INSIDE HIGHER ED. (Sept. 23, 2013), https://www.insidehighered.com/news/2013/09/23/u-kansas-professor-suspended-after-anti-nra-tweet [https://perma.cc/ZR2Z-8BC8].

[22] Scott Jaschik, *Twitter Blowback: Lost Job and Lost Money*, INSIDE HIGHER ED. (Aug. 2, 2017), https://www.insidehighered.com/news/2017/08/02/montclair-state-removes-courses-adjunct-whose-tweet-became-controversial [https://perma.cc/HHA8-2RLF].

[23] *Id.*

[24] Alene Tchekmedyian, *Cal State Fresno Professor Will Keep Job After "Disgraceful" Tweets About Barbara Bush, Campus President Says*, L.A. TIMES (Apr. 24, 2018), https://www.latimes.com/local/lanow/la-me-ln-fresno-professor-barbara-bush-20180424-story.html [https://perma.cc/7QDR-Z8VV].

[25] *Id.*

[26] Hannan Adely, *Rutgers Clears Professor Who Said He "Hates White People*,*"* N. JERSEY

Caucasian a-holes."[27] Although an initial investigation by Rutgers concluded that the professor's posts violated the university's discrimination and harassment policy, the university later reversed that decision.[28]

In November 2019, Indiana University publicly condemned, but took no disciplinary action against, a professor of business economics whose tweets were characterized by the university as "stunningly ignorant" posts that included "racist, sexist and homophobic views."[29] One of the professor's posts rhetorically asked if "Democratic women have sex with anyone," and another tweet was a link to an article titled, "Are Women Destroying Academia? Probably."[30] In defense of not disciplining the professor, the university declared that it could not fire him "for his posts as a private citizen, as vile and stupid as they are, because the First Amendment of the U.S. Constitution forbids us to do so."[31] However, the university announced that no student would be required to take a class with the professor, who also would be required to use double-blind grading on assignments.[32]

A criminal justice professor who tweeted in May 2020 about national protests over race and policing claimed that Weber State University forced him to resign in response.[33] In one post, reacting to a tweet from a reporter who had been injured by police during a protest, the professor proclaimed, "Excellent. If I was the cop, you wouldn't be able to tweet."[34] Upon seeing the CNN building being vandalized, the professor tweeted, "Nothing about this makes me happy but there's this tiny sense of rightness in the burning of the CNN headquarters."[35] The university condemned the comments but claimed no pressure was put on the professor to resign.[36]

In September 2020, a Midwestern State University philosophy professor wrote the following on Facebook: "I want the entire world to burn until the last cop is strangled with the intestines of the last capitalist, who is

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(Nov. 15, 2018), https://www.northjersey.com/story/news/2018/11/15/no-punishment-rutgers-university-professor-over-white-people-comments-facebook/2016377002/ [https://perma.cc/A7FL-U4PM].

[27] *Id.*

[28] *Id.*

[29] Colleen Flaherty, *Bigoted Views vs. Bigoted Teaching*, INSIDE HIGHER ED. (Nov. 22, 2019), https://www.insidehighered.com/news/2019/11/22/indiana-university-condemns-professors-racist-and-misogynistic-tweets-strongest [https://perma.cc/XC9B-3ZA6].

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Colleen Flaherty, *Saying the Wrong Thing*, INSIDE HIGHER ED. (June 4, 2020), https://www.insidehighered.com/news/2020/06/04/professor-resigns-after-criticizing-protesters-and-another-faces-calls-his?utm_content=buffercfbeb&utm_medium=social&utm_source=facebook&utm_campaign=IHEbuffer [https://perma.cc/BDR8-QHHG].

[34] *Id.*

[35] *Id.*

[36] *Id.*

strangled in turn with the intestines of the last politician."[37] The university's president denounced the post and announced the following after conferring with the state attorney general's office: "We are committed to monitoring this situation with their guidance and will take decisive action if a line is crossed beyond that of speech protected by the First Amendment."[38]

In October 2020, while watching the vice presidential debate, a Collin College history professor tweeted, "The moderator needs to talk over Mike Pence until he shuts his little demon mouth up."[39] In response, her employer publicly apologized for the "hateful, vile and ill-considered" statement and emailed the professor an "Employee Coaching Form" that included "Constructive Feedback."[40] The college prohibited the professor from using her work email for personal communications, even though college policy permits work email for "incidental personal use."[41] After the same professor criticized the Collin College COVID-19 reopening plan, including tweeting in January 2021 how "[a]nother @collincollege professor has died of COVID," her contract was terminated in February 2021.[42] The former professor filed a lawsuit against the college in October 2021, alleging First Amendment violations.[43] Without admitting liability, in January 2022 the college agreed to pay the former professor $70,000 plus attorney's fees.[44]

In December 2020, the University of Mississippi fired a history professor after he made a series of tweets criticizing his employer for refusing to accept a grant for education on immigrant detention and mass

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[37] Colleen Flaherty, *University Seeks State AG's Advice on Professor's Facebook Post*, INSIDE HIGHER ED. (Oct. 5, 2020), https://www.insidehighered.com/quicktakes/2020/10/05/university-seeks-state-ags-advice-professors-facebook-post [https://perma.cc/BEH7-DY63].

[38] *Id.*

[39] Simone Carter, *Professor's Tweet About Pence's "Little Demon Mouth" Sparks Collin College Controversy*, DALLAS OBSERVER (Oct. 19, 2020), https://www.dallasobserver.com/news/collin-college-professors-political-tweets-11955945 [https://perma.cc/CB96-NKER].

[40] *Id.*

[41] *Id.*

[42] Michael Vasquez, *Fired for Tweeting? A Professor Says She Was Cut Loose in Retaliation*, CHRON. OF HIGHER EDUC. (Feb. 25, 2021), https://www.chronicle.com/article/fired-for-tweeting-a-professor-says-she-was-cut-loose-in-retaliation?cid2=gen_login_refresh&cid=gen_sign_in [https://perma.cc/8YAW-2LSS].

[43] Simone Carter, *Another Former Professor Sues Collin College Over Alleged First Amendment Violations*, DALLAS OBSERVER (Oct. 27, 2021), https://www.dallasobserver.com/news/another-professor-has-sued-collin-college-alleging-free-speech-violations-12689856 [https://perma.cc/3JQZ-KRKM].

[44] Colleen Flaherty, *Collin College Will Pay $70K to Ousted Professor Who Tweeted*, INSIDE HIGHER ED. (Jan. 26, 2022), https://www.insidehighered.com/quicktakes/2022/01/26/collin-college-will-pay-70k-ousted-professor-who-tweeted#:~:text=Collin%20College%20in%20Texas%20will,Rights%20in%20Education%20announced%20Tuesday [https://perma.cc/RHR6-2GPM].

incarceration.[45] The professor tweeted, "The real issue is that (UM) prioritizes racist donors over all else. So it's not some mythic politics v. history binary, but that this antiracist program threatens racist donor money. And racism is the brand. It's in the name."[46]

In January 2021, the University of Tennessee at Chattanooga fired an assistant football coach after he tweeted the following about former Georgia gubernatorial candidate Stacey Abrams, who had organized in two Georgia senate run-off elections:

> Congratulations to the state of GA and Fat Albert @staceyabrams because you have truly shown America the true works of cheating in an election again!!! Enjoy the buffet Big Girl! You earned it!!! Hope the money was good, still not governor![47]

In April 2021, the coach filed a lawsuit against the university, claiming he was fired as retaliation for exercising his First Amendment rights.[48]

In February 2021, a University of Alabama at Birmingham archeology professor tweeted the following in reaction to the death of Rush Limbaugh: "When a terrible piece of scum who caused immeasurable harm to millions dies, there is no sympathy. Only a desire that they suffered until their last breath."[49] The university's president proclaimed the campus was "disgusted and extremely troubled" by "something so unprofessional and blindly inhumane and cruel" and announced that the matter was under review.[50]

Clearly, there have been numerous cases of public universities punishing, criticizing, or investigating students, staff, and faculty for social media posts in recent years. Relevant university actions were initiated against persons expressing a variety of viewpoints across the ideological spectrum. The number of incidents expanded during the COVID-19 pandemic,

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[45] Christian Middleton, *UM Fires History Professor Who Criticizes "Powerful, Racist Donors" And "Carceral State,"* MISS. FREE PRESS (Dec. 15, 2020), https://www.mississippifreepress.org/7518/um-fires-history-professor-who-criticizes-powerful-racist-donors-and-carceral-state/ [https://perma.cc/J6BX-6PNS].

[46] *Id.*

[47] Adam Rittenberg, *Tennessee-Chattanooga Mocs Fire Assistant Football Coach Chris Malone After Racist Tweet*, ESPN (Jan. 7, 2021), https://www.espn.com/college-football/story/_/id/30668106/tennessee-chattanooga-mocs-fire-assistant-football-coach-chris-malone-racist-tweet [https://perma.cc/4L7P-7SBG].

[48] Adam Rittenberg, *Former Tennessee-Chattanooga Assistant Coach Chris Malone, Fired Over Tweet, Sues School for First Amendment Retaliation*, ESPN (Apr. 28, 2021), https://www.espn.com/college-football/story/_/id/31352564/former-tennessee-chattanooga-assistant-coach-chris-malone-fired-tweet-sues-school-first-amendment-retaliation [https://perma.cc/L2NB-XRAP].

[49] Ruth Serven Smith, *Legal Experts: Sarah Parcak's Tweet About Rush Limbaugh Protected by First Amendment*, AL.COM (Feb. 23, 2021), https://www.al.com/news/2021/02/legal-experts-uab-professors-tweet-about-rush-limbaugh-protected-by-first-amendment.html [https://perma.cc/P8TZ-L2ZN].

[50] *Id.*

which reduced in-person interaction and increased communication on social media.[51] COVID-19 has particularly affected institutions of higher education, as many universities moved classes online,[52] thus allowing less face-to-face communication among students, staff, and faculty. Nevertheless, modern attempts by public universities to police speech are continuations of a centuries-long struggle over what expression can and should be permitted at institutions of higher education.[53] Were the actions of the colleges and universities above constitutional? All of the cases above were from public colleges and universities.[54] Although it is arguable as a policy matter that private colleges *should* follow the same constitutional standards that are required for public universities, private higher educational institutions are *not* generally bound by the First Amendment.[55] Thus, this article will focus exclusively on what the Free Speech Clause requires for public institutions of higher education.

This article will proceed as follows. Part II discusses the background of relevant First Amendment case law on expression on the Internet, explaining how constitutional protections for the freedom of speech apply to government regulation of this medium of communication generally, and to social media specifically.[56] The next three parts examine, in turn, what the application of First Amendment jurisprudence distinctly means for students, staff, and faculty. Part III explores what this means specifically for students, concluding that, generally, student expression on social media cannot be punished by public universities if that expression is otherwise protected for adults in public forums.[57] Part IV explains First Amendment rights for campus staff as public employees on social media.[58] The relevant test here is from the *Pickering-Connick-Garcetti* line of cases, which requires balancing public employee speech made on matters of public concern when speaking as citizens against employer interests in effectiveness

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[51] *See* Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html [https://perma.cc/4RZF-AHCG]; Rani Molla, *Posting Less, Posting More, and Tired of It All: How the Pandemic Has Changed Social Media*, VOX (Mar. 1, 2021), https://www.vox.com/recode/22295131/social-media-use-pandemic-covid-19-instagram-tiktok [https://perma.cc/223E-N33G].

[52] Lilah Burke, *Moving into the Long Term*, INSIDE HIGHER ED. (Oct. 27, 2020), https://www.insidehighered.com/digital-learning/article/2020/10/27/long-term-online-learning-pandemic-may-impact-students-well [https://perma.cc/P8XD-F4GT].

[53] *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 49–81 (2017).

[54] Hereafter, this article will frequently refer to "public universities," but those remarks will generally apply to any public institutions of higher education, including public four-year colleges, community colleges, and technical colleges.

[55] CHEMERINSKY & GILLMAN, *supra* note 53, at 8.

[56] *See infra* Part II.

[57] *See infra* Part III.

[58] *See infra* Part IV.

and efficiency. As will be argued below, the First Amendment mandates that what it means to be speaking on matters of public concern should be interpreted broadly, while official job duties and employer interests should be interpreted narrowly. Part V focuses on the special considerations for faculty and academic freedom at public universities, finding that the official work duty requirement from *Garcetti* should not be applied to faculty.[59] Finally, Part VI will conclude how these First Amendment protections ensure that members of each of these three groups can freely use social media to organize and express themselves, regardless of the viewpoints they are expressing.[60]

All told, outside of a small number of narrowly defined exceptions, speech by students, staff, and faculty is protected against reprisal by public universities. In each of the examples above, the speech was at least partially—if not fully—protected by the First Amendment (although some of the speech uttered by students might not have been protected if it had been said by faculty or staff). Public universities can achieve essential societal values of equality, diversity, and inclusivity and promote civility in discourse while also respecting the dictates of the First Amendment. Universities have tremendous institutional academic freedom to set curricula, build programming, engage in out-of-class educational opportunities, and determine whom they will hire and admit. Public universities need to promote essential societal values in ways that guarantee they are not engaging in viewpoint discrimination or compelling expression of ideological beliefs, ensuring these institutions are held accountable constitutionally and do not impose punishments that fall disproportionately on groups that have been traditionally, and continue to be, marginalized.

II. THE FREEDOM OF SPEECH ONLINE

The First Amendment to the U.S. Constitution commands that "Congress shall make no law . . . abridging the freedom of speech."[61] For nearly a century, the U.S. Supreme Court has incorporated this right to apply it to the states.[62] Thus, the First Amendment is relevant to both federal and state regulations on the Internet as well as state and federal regulations of public universities.[63]

The Court has held for decades that the First Amendment provides

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[59] *See infra* Part V.
[60] *See infra* Part VI.
[61] U.S. CONST. amend. I.
[62] Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").
[63] *See infra* Parts III–V for extended discussion of the First Amendment's applicability to state institutions of higher education.

strong protection for online speech.[64] Historically, when a new medium of communication has arisen, the Court has evaluated the First Amendment's applicability to it,[65] as "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[66] This protection has sometimes grown over time. For instance, after initially finding no First Amendment safeguard for films in 1915,[67] the Court eventually concluded in *Joseph Burstyn v. Wilson* (1952) that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[68]

For broadcast radio and television, the Court upheld federal regulatory licensing in *Red Lion Broadcasting Co. v. FCC* (1969):[69]

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.[70]

In addition to bandwidth scarcity, the Court reasoned in *Red Lion* that more rule-making power existed for this medium because of the long history of government regulation.[71] The Court later found in *FCC v. Pacifica Foundation* (1978) that more regulation was warranted for broadcast media because of its "uniquely pervasive presence in the lives of all Americans,"[72] in that it "confronts the citizen, not only in public, but also in the privacy of the home."[73] However, the Court later went on to conclude that "the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."[74] Thus, unlike its decision in *Pacifica* to permit higher levels of regulation of broadcast media, the Court offered more protection

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[64] Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 43 (2012).
[65] Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1640 (2015).
[66] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).
[67] Mut. Film Corp. v. Indus. Com. of Ohio, 236 U.S. 230, 247 (1915).
[68] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[69] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400–01 (1969).
[70] *Id.* at 390.
[71] *Id.* at 375.
[72] FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).
[73] *Id.*
[74] Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74 (1983).

for dial-a-porn services in *Sable Communications v. FCC* (1989).[75] In *Sable*, the Court reasoned that "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."[76]

The principal case for speech protections on the Internet is *Reno v. ACLU* (1997).[77] The case reviewed the constitutionality of the Communications Decency Act ("CDA"), a law that prohibited "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age" and "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[78] In overturning this law,[79] the Court declined to apply a lower level of scrutiny to government regulation of speech online like it had for broadcast radio and television.[80] The Court recalled in *Reno* that "some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers," including "the history of extensive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its 'invasive' nature."[81] However, the Court went on to proclaim that

> Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. . . . "[C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[82]

Additionally, the Court explained that there are no scarcity concerns with the Internet as there were when Congress began regulating broadcast media:

[75] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
[76] *Id. at* 128.
[77] Reno v. ACLU, 521 U.S. 844 (1997).
[78] *Id.* at 859.
[79] *Id.* at 882.
[80] Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 270 (2003).
[81] *Reno*, 521 U.S. at 868 (internal citations omitted).
[82] *Id.* at 868–69 (internal citations omitted) (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)). Some have questioned the characterization of the Internet as not invasive. *See, e.g.*, Julian Baumrin, *Internet Hate Speech and the First Amendment, Revisited*, 37 RUTGERS COMPUT. & TECH. L.J. 223, 258–62 (2011). Nevertheless, the U.S. Supreme Court has not indicated in its contemporary First Amendment jurisprudence that it views the Internet as more invasive today.

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.[83]

These analogies compare the Internet to forms of pure speech (made in person or reproduced by audio, visual, or pictorial means) or printed expression, providing the government with less power to regulate expression online than broadcast speech.[84]

The Court described the Internet positively throughout the *Reno* decision, including characterizing it as "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers."[85] The Court underscored the importance of the Internet for the freedom of expression: "Any person or organization with a computer connected to the Internet can 'publish' information."[86] For these reasons, the Court concluded that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[87]

After *Reno*, the Court has applied the First Amendment to the Internet with continued vigor. In *Ashcroft v. ACLU* (2004), the Court upheld an injunction against the enforcement of the Child Online Protection Act ("COPA"), a law passed by Congress in response to the Court's decision striking down the CDA in *Reno*.[88] COPA "impose[d] criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'"[89] Since COPA was a content-based restriction on expression, the Court applied strict scrutiny: "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat, the Constitution demands that content-based restrictions on speech be presumed invalid . . . ."[90] The Court found that COPA was not the least

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[83] *Reno*, 521 U.S. at 870.
[84] Maureen E. Browne, *Play It Again Uncle Sam: Another Attempt by Congress to Regulate Internet Content. How Will They Fare This Time?*, 12 COMMLAW CONSPECTUS 79, 84 (2004).
[85] *Reno*, 521 U.S. at 853.
[86] *Id.*
[87] *Id.* at 870.
[88] Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 660–61 (2004).
[89] *Id.* at 661.
[90] *Id.* at 660.

restrictive way to protect children from pornographic material online, as "[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them."[91] The Court affirmed its approach from *Reno* to give a strong level of protection to speech online, interpreting the First Amendment to safeguard a free market of ideas on the Internet.[92]

Similarly, in *Ashcroft v. Free Speech Coalition* (2002), the Court struck down a portion of the Child Pornography Prevention Act ("CPPA").[93] The CPPA amended the federal ban on child pornography to include the possession or distribution of sexually explicit images that appear to depict minors but were produced without using real children.[94] Such images include those of adults who look like children or those created using computer imaging.[95] Although the law applied to images distributed through means other than the Internet, the CPPA had significant implications for online expression.[96] The Court found the law to be overbroad, running the risk of "chill[ing] speech within the First Amendment's vast and privileged sphere," because "[a]s a general rule, pornography can be banned only if obscene" according to the test in *Miller v. California* (1973).[97] *Miller* strictly limits what constitutes obscenity, requiring all of the following to be true for expression to be outside of First Amendment protection:

> (a) . . . "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[98]

New York v. Ferber (1982) created an exception to that general rule, permitting the government to criminalize child pornography if "the images are themselves the product of child sexual abuse," because the government has "an interest in stamping it out without regard to any judgment about its

[91] *Id.* at 666–67.
[92] Mark S. Kende, *Filtering Out Children: The First Amendment and Internet Porn in the U.S. Supreme Court*, 3 MICH. ST. L. REV. 843, 844 (2005).
[93] Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).
[94] *Id.* at 239.
[95] *Id.* at 239–40.
[96] *See generally* Maria Markova, Ashcroft v. Free Speech Coalition*: The Constitutionality of Congressional Efforts to Ban Computer-Generated Pornography*, 24 WHITTIER L. REV. 985, 985–86 (2003) (noting that the CPPA prohibited "knowing transportation (by any means, including computer)" of the images subject to regulation).
[97] *Free Speech Coal.*, 535 U.S. at 240, 244.
[98] Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

content."[99] However, since the CPPA banned non-obscene "speech that records no crime and creates no victims by its production," the Court ruled the law was unconstitutional.[100] Put more succinctly, the Court explained that its "First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."[101] Thus, the Court in *Free Speech Coalition* continued to apply traditional First Amendment standards to speech online in the same way it had been applied to expression in other non-broadcasting formats.[102]

This approach continued in *Packingham v. North Carolina* (2017).[103] In that case, the Court reviewed a state law making it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."[104] Lester Packingham was convicted in 2002 of "taking indecent liberties with a child," which required him to register as a sex offender, meaning that the relevant statute barred him from accessing social media.[105] In 2010, after a court dismissed a traffic citation against Packingham, he posted on Facebook to express his happiness at the decision.[106] A law enforcement officer discovered the post, leading to Packingham's conviction for violating the law, even though prosecutors never alleged that he contacted a minor or engaged in any other illicit activity online.[107] Although the Court assumed that the law was content-neutral—requiring the law to pass intermediate scrutiny—the Court held that the statute was not narrowly tailored because it restricted a significant amount of online speech.[108]

According to the Court in *Packingham*, a "fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[109] Although historically this meant traditional public forums like parks and sidewalks,[110] the Court proclaimed that the most vital place for

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[99] *Free Speech Coal.*, 535 U.S. at 249.
[100] *Id.* at 250.
[101] *Id.* at 253.
[102] Ryan P. Kennedy, *Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating "Virtual" Child Pornography?*, 37 AKRON L. REV. 379, 397–400 (2004).
[103] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
[104] *Id. at* 1733 (quoting N.C. GEN. STAT. ANN. §§14-202.5(a), (e) (West 2015)).
[105] *Id.* at 1734.
[106] *Id.* Packingham's statement on Facebook was as follows: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent...... Praise be to GOD, WOW! Thanks JESUS!" *Id.*
[107] *Id.*
[108] *Id.* at 1736–37.
[109] *Id.* at 1735.
[110] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("[S]treets and parks . . .

expression today is online: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."[111] This powerful statement about the need to protect expression online was followed by the Court noting that approximately seventy percent of American adults use social media.[112] The Court reasoned that it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium," since "[s]ocial media allows users to gain access to information and communicate with one another about it on any subject that might come to mind."[113] The Court found constitutional fault with a law that "with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[114] The Justices in *Packingham* ruled that social media receives as much First Amendment protection as the Court in *Reno* found for the Internet generally.[115]

Expression on social media is shielded by the First Amendment to the same high degree as spoken word and traditional print media, and government restrictions on online speech are *not* judged by the more lenient approaches used for broadcast media regulations.[116] Even more to the point, many of the restrictions on Internet speech that the Court has struck down for not being narrowly tailored have dealt with the vital government functions of protecting children from abuse or exposure to sexually explicit materials.[117] Thus, there are no additional regulatory powers over this medium that would be relevant to restricting expression rights beyond what public universities may impose generally for members of the campus community. Unlike campus radio or television stations, which are subject to Federal Communications Commission ("FCC") licensing and regulations,[118]

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have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

[111] *Packingham*, 137 S. Ct. at 1735 (internal citation omitted).

[112] *Id.*

[113] *Id.* at 1736–37.

[114] *Id.* at 1737.

[115] Katherine A. Ferry, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 742 (2018).

[116] Rebecca Jakubcin, Reno v. ACLU*: Establishing a First Amendment Level of Protection for the Internet*, 9 U. FLA. J.L. & PUB. POL'Y 287, 292–93 (1998).

[117] Mason C. Shefa, *First Amendment 2.0: Revisiting* Marsh *and the Quasi-Public Forum in the Age of Social Media*, 41 U. HAW. L. REV. 159, 177–80 (2018).

[118] *See The Public and Broadcasting*, FCC (Sept. 2021), https://www.fcc.gov/media/radio/public-and-broadcasting#NCECOMM [https://perma.cc/C37L-ER2B].

expression online by members of the university community cannot be regulated to a greater degree simply because it is online. As Parts III–V demonstrate, there are three different categories of persons at issue regarding social media expression at public universities: students, non-instructional staff, and teaching faculty. Consequently, there are three sets of different, but at times overlapping, considerations for what the First Amendment protects for these three groups on social media.

III. THE FIRST AMENDMENT RIGHTS OF PUBLIC UNIVERSITY STUDENTS ON SOCIAL MEDIA

The Court has specifically outlined the First Amendment rights of public university students only within the last fifty years.[119] Earlier Court decisions on public students' First Amendment rights focused on K–12 students. For instance, in *West Virginia v. Barnette* (1943), the Court ruled unconstitutional the expulsion of a student who refused to recite the Pledge of Allegiance and salute the U.S. flag.[120] In doing so, the Court found that the First Amendment prohibited compelled speech, proclaiming, "[t]hat [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[121] Similarly, *Tinker v. Des Moines Independent Community School District* (1969) overturned the suspension of public school students wearing black armbands with peace symbols in protest of the Vietnam War.[122] According to the Court, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[123] Although the case dealt with students in K–12 public schools, one could easily apply the Court's reasoning to the rights of adult students at public universities.[124]

Any doubt about this proposition was removed in *Healy v. James* (1972).[125] In *Healy*, the Central Connecticut State College had denied official organization recognition to a campus chapter of Students for a Democratic Society ("SDS").[126] Due to concerns about the national SDS's "reputation for campus disruption," the college president stated that the college would not officially recognize an organization that "openly

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[119] *See* Eric T. Kasper, *Public Universities and the First Amendment: Controversial Speakers, Protests, and Free Speech Policies*, 47 CAP. U. L. REV. 529, 535–37 (2019).
[120] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[121] *Id.* at 634, 637.
[122] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
[123] *Id.* at 506.
[124] Kasper, *supra* note 119, at 534.
[125] Healy v. James, 408 U.S. 169 (1972).
[126] *Id.* at 170–71.

repudiates" the college's commitment to academic freedom.[127] However, the Court overturned this decision, quoting the line above from *Tinker* while declaring that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[128] Accordingly, the Court held that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[129] The Court ruled that the freedom of expression needs to be particularly secured at public universities: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[130]

The following year, *Papish v. Board of Curators of University of Missouri* (1973), a case dealing with the expulsion of a journalism graduate student for engaging in what the university characterized as "indecent speech," tested the Constitution's protection of public university students' free expression rights.[131] Papish's expulsion was based on his on-campus distribution of a student newspaper that contained two relevant items.[132] First, the front cover of the newspaper displayed a political cartoon portraying police officers sexually assaulting the State of Liberty and the Goddess of Justice, with the caption reading, "With Liberty and Justice for All."[133] Second, the newspaper included an article titled "Motherfucker Acquitted" that discussed the assault trial and acquittal of a defendant who was a member of an organization called "Up Against the Wall, Motherfucker."[134] In overturning the expulsion, the Court held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency."[135] The Court declared in *Papish* that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[136]

In these early cases, the Court's decisions reflect the view that public university students possess the same First Amendment rights as adults generally.[137] This interpretation was confirmed in later cases. For instance, in *Widmar v. Vincent* (1981), the Court overturned a University of Missouri

[127] *Id.* at 172, 175–76.
[128] *Id.* at 180, 194.
[129] *Id.* at 180.
[130] *Id.* at 180–81.
[131] Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 667 (1973).
[132] *Id.*
[133] *Id.*
[134] *Id.* at 667–68.
[135] *Id.* at 670.
[136] *Id.* at 671.
[137] Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1829 (2017).

at Kansas City ban on religious student groups using university facilities that were available to other student organizations on free speech grounds.[138] As explained by the Court, "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices" if "the forum is available to a broad class of nonreligious as well as religious speakers."[139] Per the Court, this content-based restriction on student expression was subject to strict scrutiny, requiring the university to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[140] The Court followed a similar approach in *Rosenberger v. University of Virginia* (1995), holding that if a public university funds student organizations, it cannot deny funding to a publication based on views expressed in the publication.[141] The Court reasoned that, at public universities, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," particularly "[i]n the realm of private speech or expression."[142] A public university's obligation to be viewpoint neutral, regarding student speech outside of the classroom, was affirmed in *Board of Regents v. Southworth* (2000).[143] Some decisions for students in K–12 public schools show that the Court has found exceptions to First Amendment protections beyond what the Court articulated in *Tinker*,[144] which will be explored below. However, no subsequent Supreme Court cases have weakened the protection of free expression rights for public university students.[145] Furthermore, reducing protections for public university students on social media platforms would create incomprehensible difficulties for First Amendment jurisprudence.

When discussing the free expression rights of students at public universities, it is important to distinguish between regulations that are

[138] Widmar v. Vincent, 454 U.S. 263, 277 (1981).
[139] *Id.* at 274.
[140] *Id.* at 270.
[141] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845–46 (1995).
[142] *Id.* at 828. It is noteworthy that the Court in *Rosenberger* did affirm that when creating a limited public forum, a public university may need to restrict content (assuming that strict scrutiny is met), but it may not discriminate based on viewpoint: "Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 829–30. However, for present purposes, this would apply only if a university acted against a student for posting a comment on the university's social media account.
[143] Bd. of Regents Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000).
[144] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *see also* Morse v. Frederick, 551 U.S. 393 (2007).
[145] *See* Papandrea, *supra* note 137, at 1834 ("Despite the deep chasm between the liberal and conservative Justices in [*Christian Legal Society v.*] *Martinez*, all of them agreed that the right of the students to express any discriminatory views they wanted remained.").

permissible in different contexts. Although there is limited purview for the government to regulate student expression in the classroom and on campus,[146] the rights of university students on campus are more extensive than they are for students in K–12 public schools. Granted, the applicable standard for public universities is the same that *Tinker* applied to K–12 public schools. The *Tinker* Court ruled that schools may not restrict student speech unless those expressive "activities would materially and substantially disrupt the work and discipline of the school."[147] *Healy* explained regarding public universities, "[i]n the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. Also prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.'"[148] As the Court further clarified in *Healy*, activities involving First Amendment rights "need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[149]

This having been said, there are two important considerations regarding the application of the material and substantial disruptive standard to students at public universities. First, even if this standard should be applied to public university student expression on social media, what constitutes a material and substantial disruption is understood by the Court differently in higher education schools than in K-12 public schools.[150] Comparing several K–12 public school cases after *Tinker* to the Court's higher education cases proves this.

In *Bethel School District v. Fraser* (1986), the Court upheld the suspension of a high school student who used sexual innuendo to describe a fellow classmate campaigning for a student government office.[151] The student said at a school assembly, "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm . . . Jeff Kuhlman is a man who takes his point and pounds it in . . . Jeff is a man who will go to the very end—even the climax, for each and every one of you."[152] The Court ruled that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission" because "freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[153] The Court, though,

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[146] Kasper, *supra* note 119, at 560.
[147] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
[148] Healy v. James, 408 U.S. 169, 189 (1972) (quoting *Tinker*, 393 U.S. at 513).
[149] *Id.*
[150] Kasper, *supra* note 119 at 558–59.
[151] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986).
[152] *Id.* at 687 (Brennan, J., concurring).
[153] *Id.* at 681, 685.

emphasized in *Bethel* how "the constitutional rights of students in public school are not automatically coextensive with the rights of *adults* in other settings."[154]

Similarly, in *Hazelwood School District v. Kulhmeier* (1988), the Court upheld a principal's decision to remove stories about divorce and teen pregnancy from the school's newspaper.[155] The Court explained that such editorial control over press content (which could never be sustained if the government tried to similarly prohibit truthful media stories created by adults on matters of public concern[156]) was constitutional in the K–12 setting, even in the absence of a finding of material and substantial disruption.[157] The Court found that a public school has editorial control over student newspaper content because it ensures "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[158] Put another way by the *Hazelwood* Court, a K–12 public school is permitted to "disassociate itself . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for *immature audiences*."[159]

In *Morse v. Frederick* (2007), the Court ruled that a public school could constitutionally suspend a student who unfurled, and refused to take down, a banner reading "BONG HiTS 4 JESUS" at a school-sponsored event.[160] The Court in *Morse* created another exception to the general rule in *Tinker* by finding it constitutional for a public to impose greater restrictions on expression advocating illegal drug use.[161] According to the Court, prior cases "recognize that deterring drug use by *schoolchildren* is an 'important—indeed, perhaps compelling' interest."[162]

The expression that the Court ruled K–12 school officials could restrict in these cases—using sexual innuendos, writing newspaper stories about divorce and teenage pregnancy, and advocating illegal drug use—pale in comparison to what the Court has judged as protected expression at public universities. As described in *Healy*, when the SDS chapter was denied official recognition at Central Connecticut State College (1969–70),

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[154] *Id.* at 682 (emphasis added).
[155] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988).
[156] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.").
[157] C. Eric Wood, *Learning on Razor's Edge: Re-Examining the Constitutionality of School District Policies Restricting Educationally Disruptive Student Speech*, 15 TEX. J. ON C.L. & C.R. 101, 114 (2009).
[158] *Hazelwood*, 484 U.S. at 271.
[159] *Id.* (emphasis added) (internal quotations omitted) (citation omitted).
[160] Morse v. Frederick, 551 U.S. 393, 397, 410 (2007).
[161] Wood, *supra* note 157, at 116.
[162] *Morse*, 551 US. at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)) (emphasis added).

institutions of higher education were in a state of upheaval, and the SDS was a group that was driving some of that turmoil:

> A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period.[163]

Furthermore, when the students applying for official recognition were questioned about the SDS's "reputation for campus disruption," they responded in ways suggesting they could become disorderly.[164] Consider these questions to the SDS applicants and their answers:

> Q. How would you respond to issues of violence as other S.D.S. chapters have?
>
> A. Our action would have to be dependent upon each issue.
>
> Q. Would you use any means possible?
>
> A. No I can't say that; would not know until we know what the issues are.
>
> Q. Could you envision the S.D.S. interrupting a class?
>
> A. Impossible for me to say.[165]

Nevertheless, the Court in *Healy* reversed the lower court decision that had upheld the college's denial of organizational approval.[166] In doing so, the Court affirmed in *Healy* that "[t]hough we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded."[167]

Similarly, *Papish* involved expression that would clearly be punishable if it were uttered by a student on the grounds of a K–12 public school, as it entailed a student disseminating copies of a publication using profanity and illustrating a sexual assault in a political cartoon.[168] The Court could use the material and substantial disruption standard in *Healy* and *Papish* to reach conclusions that were very different from *Bethel*, *Hazelwood*, and *Morse* because there are significant differences between high school and university

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[163] Healy v. James, 408 U.S. 169, 171 (1972).
[164] *Id.* at 172–73.
[165] *Id.* at 173 (internal quotations omitted).
[166] *Id.* at 194.
[167] *Id.*
[168] Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670–71 (1973).

students that demonstrate why the exceptions in those K–12 cases cannot apply to higher education. Although almost all students in K–12 public schools are minors under the age of eighteen, almost all public university students are adults with greater emotional maturity.[169] While compulsory attendance laws require K–12 students to attend school,[170] university students are under no such legal requirements. Although high school students generally go home at the end of the school day, a substantial number of university students live on campus, thus potentially subjecting them to any university speech restrictions 24-7.[171] Finally, what constitutes a material and substantial disruption of university education is different from a high school education because these institutions have different missions: universities have an underlying purpose of encouraging inquiry into all subjects and challenging assumptions in all fields, while K–12 schools are primarily designed to inculcate values.[172] As illuminated in *Papish*, "the mere dissemination of ideas—no matter how offensive to good taste," is protected on public university campuses if they fail to create a material and substantial disruption.[173]

Second, and more importantly, there is no reason to believe that student speech on social media can constitute a material and substantial disruption on campus, short of expression that is unprotected for adults generally (categories of unprotected speech are discussed below). Since university students are typically adults, and universities are designed as adult institutions, university students need to be subjected to rules that apply to adults.[174] Although some types of offensive expression online could more easily infuriate or disturb a juvenile, adults are expected to behave rationally and be more likely to respond appropriately.[175] Furthermore, the speech that

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[169] *See* McCauley v. Univ. of the V.I., 618 F.3d 232, 246–47 (3d Cir. 2010).

[170] *See Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT. (2017), https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/89TJ-Q3H9].

[171] *McCauley*, 618 F.3d at 247 ("[U]niversity students, unlike public elementary and high school students, often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day.").

[172] *Id.* at 243.

[173] *Papish*, 410 U.S. at 670. The Court concluded in *Papish* that there was an "absence of any disruption of campus order or interference with the rights of others." *Id.* at 670 n.6.

[174] Meggen Lindsay, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1482–83 (2012).

[175] *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) ("[A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.") (internal quotations omitted). *See also* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006) ("As young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years.").

students post on social media might be done when students are off campus or in the privacy of a dorm room on campus. This is situationally different from *Tinker* (wearing an armband in class and between classes in school hallways),[176] *Bethel* (speaking to a schoolwide assembly),[177] *Hazelwood* (writing for the school newspaper as part of a class),[178] and *Morse* (engaging in expression at a school-sanctioned and school-supervised event).[179]

If other students on campus happen to see social media posts, they cannot "bring" those posts into the classroom or on campus generally to make it punishable as a material and substantial disruption if the First Amendment otherwise protects that speech. If it were, anything a student posts every day they are enrolled at a university (or even before they enroll), regardless of where they post it, would be subject to university discipline, meaning that a student would have forfeited their freedom of expression rights as an adult until graduation.[180] Furthermore, it would imply that students could be punished for offensive expression contained in letters, journals/diaries, student-generated newspapers, or any verbal expressions that students use if another member of the campus community sees or hears it, even if those observations occur off campus. Such an approach would be untenable for adults, even for offensive expression.

Instructive here is the Court's recent decision at the K–12 level in *Mahanoy Area School District v. B.L.* (2021).[181] *Mahanoy* involved a public high school that suspended a fourteen-year-old cheerleader from the cheer team for one year for posting on Snapchat a picture of herself and a friend with their middle fingers raised and the accompanying caption: "Fuck school fuck softball fuck cheer fuck everything."[182] In overturning this suspension, the *Mahanoy* Court emphasized how "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all."[183] If such First Amendment protections apply to a minor student's online speech in relation to a public high school, they are even stronger for an adult student's expression online in relation to a public university. More to the point, as

[176] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
[177] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986).
[178] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
[179] Morse v. Frederick, 551 U.S. 393, 396 (2007).
[180] *See* McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2010) ("The concept of the 'schoolhouse gate,' and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse.") (internal citations omitted).
[181] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
[182] *Id.* at 2043.
[183] *Id.* at 2046.

explained in *Mahanoy*, public high schools, as "the nurseries of democracy," have "an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."[184] Since public universities have an important societal role in fostering inquiry and challenging existing ideas, they have an even greater interest in protecting unpopular expression (which would certainly include offensive speech) uttered by adult students.[185]

Papish and *Healy* are just two in a long line of Court cases affirming that adults generally have the right to engage in offensive expression in public forums, prohibiting the government from engaging in content or viewpoint discrimination when regulating that expression.[186] Perhaps the most foundational case regarding offensive expression is *Cohen v. California* (1971), where the Justices overturned a thirty-day jail sentence for wearing a jacket with the words "Fuck the Draft" written on it while Cohen was walking the corridors of the Los Angeles County Courthouse.[187] As explained by the Court, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."[188] This is true because "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech" unless there is a "showing that substantial privacy interests are being invaded in an essentially intolerable manner."[189] Applying this reasoning to social media, as long as a user can unfriend or block someone, it would prevent them from seeing unwanted, offensive comments posted by a student online.[190] The First Amendment prohibits the government from determining that certain expression may be banned simply because it is offensive to some. As explained by the Court in *Cohen*, in a large, diverse, pluralistic society, "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us" because "one man's vulgarity is another's lyric."[191] Even punishing just the most particularly offensive words would be unconstitutional:

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[184] *Id.*

[185] *McCauley*, 618 F.3d at 243.

[186] *See* Clay Calvert, Iancu v. Brunetti's *Impact on First Amendment Law: Viewpoint Discrimination, Modes of Offensive Expression, Proportionality and Profanity*, 43 COLUM. J.L. & ARTS 37, 42–49 (2019).

[187] *See* Cohen v. California, 403 U.S. 15, 16–17 (1971).

[188] *Id.* at 21.

[189] *Id.* (internal citations omitted).

[190] Blocking or unfriending someone on social media is relatively easy to do. For instance, a 2020 poll by the University of South Florida found that during a three-month period, over half of Facebook users in Florida unfriended, unfollowed, or snoozed someone due to the politics of their posts. Christine Stapleton, *Survey: Over Half Floridians on Facebook Have Unfriended, Unfollowed or Blocked Someone over Politics*, PALM BEACH POST (Oct. 27, 2020), https://www.palmbeachpost.com/story/news/2020/10/27/survey-political-posts-lead-unfriending-blocking-facebook/3746255001/ [https://perma.cc/9S2Z-S2F6].

[191] *Cohen*, 403 U.S. at 25.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[192]

The Court reasoned in *Cohen* that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[193] This reasoning can easily be applied to online expression. What constitutes offensive expression may vary widely in a diverse university community made up of thousands or tens of thousands of persons,[194] so punishing students for what is deemed offensive expression on social media may either be targeting a way of communicating (e.g., using emotion), or it may be attempting to banish certain ideas altogether.

The Court has reaffirmed numerous times that the First Amendment protects the expression of what some find offensive. In *Texas v. Johnson* (1989), the Court struck down a law prohibiting flag desecration, proclaiming the following: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[195] In *R.A.V. v. St. Paul* (1992), the Court invalidated a bias-motivated ordinance that banned the display of "a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[196] The Court in *R.A.V.* explained that the "First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.

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[192] *Id.* at 26.
[193] *Id.*
[194] *See* Grant Suneson, *Looking for an Inclusive Student Body?: These Colleges Are Among the Most Diverse*, USA TODAY (Feb. 13, 2020), https://www.usatoday.com/story/money/2020/02/13/these-colleges-have-the-most-diverse-student-bodies/41152233/ [https://perma.cc/4LZL-Q3LZ].
[195] Texas v. Johnson, 491 U.S. 397, 414 (1989).
[196] R.A.V. v. City of St. Paul, 505 U.S. 377, 380, 381 (1992) (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

Content-based regulations are presumptively invalid."[197] In *Snyder v. Phelps* (2011), the Court overturned a civil suit for intentional infliction of emotional distress against the Westboro Baptist Church for picketing a military funeral with signs stating anti-LGBTQ slurs and anti-Catholic rhetoric.[198] Silencing this hateful speech through civil suit is unconstitutional, as speech "at a public place on a matter of public concern . . . is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."[199] The Court held this interpretation of the First Amendment in *Snyder* because speech "can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker."[200] Instead, the Court reasoned that "[a]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[201]

The Court has even affirmed the right to engage in offensive commercial speech. In *Matal v. Tam* (2017), the Court overturned a decision by the Patent and Trademark Office ("PTO") refusing to process an application to trademark the name "The Slants" by a band made up of Asian-American members who were trying to reclaim this offensive term.[202] The PTO's justification was that the name violated the Lanham Act, which prohibits trademarks that "disparage" any persons.[203] However, the Court ruled that the band had a First Amendment right to obtain the trademark for that name, explaining that "[g]iving offense is a viewpoint, and that discrimination on the basis of viewpoint triggers First Amendment scrutiny.[204] Similarly, in *Iancu v. Brunetti* (2019), the Court overturned a PTO decision to deny a trademark to a clothing line called "FUCT" after the PTO found the name violated the Lanham Act's prohibition on trademarks that are "immoral" or "scandalous."[205] In finding this trademark

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[197] *Id.* at 382 (citations omitted).

[198] Snyder v. Phelps, 562 U.S. 443, 447–48, 461 (2011). According to the Court, the signs used included the following: "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates F__s' [letters omitted], 'You're Going to Hell,' and 'God Hates You.'" *Id.* at 448.

[199] *Id.* at 458.

[200] *Id.* at 460–61.

[201] *Id.* at 461.

[202] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

[203] *Id.*

[204] *Id.* at 1763. The Court did not determine if the PTO's denial of trademark failed to meet strict scrutiny because the Court determined that even under the more deferential level of scrutiny given to government regulations of commercial speech, the denial violated the First Amendment. *Id.* at 1763–64.

[205] Iancu v. Brunetti, 139 S. Ct. 2294, 2297–98 (2019). Although Brunetti claimed that the name of the clothing line was pronounced by spelling out the four letters as F-U-C-T, the

denial to be unconstitutional, the Court in *Iancu* held that the PTO's decision "disfavors certain ideas,"[206] and that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys."[207]

Both *Matal*[208] and *Iancu*[209] favorably cited the public university case *Rosenberger*, which explicitly stated a presumption against the constitutionality of viewpoint discrimination: "Discrimination against speech because of its message is presumed to be unconstitutional."[210] Indeed, in *Rosenberger*, the Court specified that "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[211] The Court's bold statement in *Packingham* that social media websites are now "the most important places (in a spatial sense) for the exchange of views"[212] clarifies that traditional First Amendment rules for how public universities must treat students apply to online expression. This means that constitutionally protected speech punished due to viewpoint or content is presumptively unconstitutional,[213] or requires the government to pass strict scrutiny: "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[214] Government regulations have long been expected typically to fail strict scrutiny.[215]

This does *not* mean that public universities have no power to punish *any* student expression on social media. Instead, universities are prohibited

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Court reasoned that "you might read it differently and, if so, you would hardly be alone." *Id.* at 2297.

[206] *Id.*

[207] *Id.* at 2299.

[208] Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) ("Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.,* . . . Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995) . . . . When government creates such a forum, in either a literal or 'metaphysical' sense, see Rosenberger, 515 U.S., at 830, 115 S. Ct. 2510 some content- and speaker-based restrictions may be allowed, see id., at 830–831, 115 S. Ct. 2510. However, even in such cases, what we have termed 'viewpoint discrimination' is forbidden. Id., at 831, 115 S. Ct. 2510.").

[209] *Iancu*, 139 S. Ct. at 2299 ("The government may not discriminate against speech based on the ideas or opinions it conveys. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829–830, 115 S. Ct. 2510, 132 L.Ed.2d 700 (1995). . .").

[210] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995).

[211] *Id.* at 836.

[212] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

[213] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[214] Sable Commc'n. of Cal. v. FCC, 492 U.S. 115, 126 (1989).

[215] *See generally* Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (famously characterizing strict scrutiny as "'strict' in theory and fatal in fact").

only from sanctioning students for *protected* speech online.[216] If expression falls into one of limited number of narrow exceptions outside of First Amendment protection,[217] public universities may take action against those students. This is particularly the case if that expression on social media targets individual members of the university community.[218] To take a line from *R.A.V.*, a public university has "sufficient means at its disposal . . . without adding the First Amendment to the fire."[219]

For instance, public universities may impose sanctions against students who engage in defamation on social media. In *Gertz v. Robert Welch, Inc.* (1974), the Court held, "[S]tates should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," "so long as they do not impose liability without fault."[220] Generally, that means there is no First Amendment protection for false statements that harm someone's reputation.[221] However, that limitation on student free speech rights applies merely to statements made about private persons.[222] If the expression is false speech harming the reputation of public officials[223] or public figures,[224] then "actual malice" must also be shown, defined in *New York Times Co. v. Sullivan* (1964) as expression made "with knowledge that it was false or with reckless disregard of whether it was false or not."[225] The First Amendment requires this because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . it

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[216] Lindsay, *supra* note 174, at 1510 ("Tatro's posts on Facebook were inappropriate, in bad taste, and most certainly offen[sive] . . . . But the posts, however offensive, were protected speech. A hallmark of the First Amendment is that speech does not lose its protection merely for offense and discomfiture. The standard remains that all speech is protected unless its content falls within an exception that removes free-speech safeguards.").

[217] United States v. Stevens, 559 U.S. 460, 468 (2010) ("From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations.") (internal quotations omitted).

[218] *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 574 (4th Cir. 2011) ("Given the targeted, defamatory nature of Kowalski's [online] speech, aimed at a fellow classmate, it created 'actual or nascent' substantial disorder and disruption in the school.").

[219] R.A.V. v. City of St. Paul, 505 U.S. 377, 396.

[220] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–47 (1974).

[221] Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81, 81 (2005–2006).

[222] *See Gertz*, 418 U.S. at 332–39.

[223] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[224] *See Gertz*, 418 U.S. at 335–36 ("Three years after *New York Times* [*v. Sullivan*], a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of 'public figures.' This extension was announced in Curtis Publishing Co. v. Butts and its companion, Associated Press v. Walker, 388 U.S. 130, 162, 87 S. Ct. 1975, 1995, 18 L.Ed.2d 1094 (1967).").

[225] *Sullivan*, 376 U.S. at 280.

may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[226] Thus, a student's defamatory comment on social media about a fellow student could be more easily punished than a similar comment about a university dean,[227] a basketball coach,[228] or the director of a major university program.[229]

Parodies, which include statements that "could not reasonably be understood as describing actual facts about [someone] or actual events in which [one] participated," or that constitute humor that is "not reasonably believable,"[230] are protected expression. In *Hustler Magazine v. Falwell* (1988), the Justices found constitutional protection for a parody ad depicting Reverend Jerry Falwell Sr. as having an incestuous relationship with his mother while drunk in an outhouse,[231] declaring that "even though falsehoods have little value in and of themselves, they are nevertheless inevitable in free debate."[232] The Court even held that false statements a person makes about oneself receive constitutional protection in *United States v. Alvarez* (2012), where the justices overturned a conviction for falsely claiming to have won the Congressional Medal of Honor where Alvarez was not lying to secure employment, financial benefits, or other privileges reserved for recipients of the Medal.[233] Thus, just because a student's statement on social media is false, that alone does not deprive it of First Amendment protection.

Student expression online that invades others' privacy or that reveals confidential information may fall outside First Amendment protection.[234] As the Court noted in *Snyder*, "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."[235] However, this applies to information that is

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[226] *Id.* at 270.

[227] *See generally* Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862 (W.D. Va. 2016) (noting that an associate dean of a public university was found to be a limited-purpose public figure required to prove actual malice in a defamation lawsuit.).

[228] *See* Barry v. Time, Inc., 584 F. Supp. 1110, 1118 (N.D. Cal. 1984) (recognizing one's "voluntary decision to become [a public university's] head basketball coach is a sufficient 'thrust' within the meaning of *Gertz* to create limited public figure status. . . .").

[229] *See generally* Fiacco v. Sigma Alpha Epsilon Fraternity, 484 F. Supp. 2d 158 (D. Me. 2007) (explaining that a public university's director of judicial affairs was deemed to be a limited-purpose public figure required to show actual malice in an intentional infliction of emotional distress lawsuit.).

[230] Hustler Mag. v. Falwell, 485 U.S. 46, 57 (1988) (internal quotations omitted).

[231] *Id.* at 48, 57.

[232] *Id.* at 52 (internal quotations omitted).

[233] *See* United States v. Alvarez, 567 U.S. 709, 714–15 (2012).

[234] *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (explaining the First Amendment permits recovery of civil damages for a newspaper's breach of a promise of confidentiality to an informant). *See also* Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937) (explaining under the First Amendment, there is "no special privilege to invade the rights and liberties of others").

[235] Snyder v. Phelps, 562 U.S. 443, 452 (2011).

truly private, as "the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."[236]

Student expression on social media that constitutes peer-on-peer harassment would appear to be outside of First Amendment protection. *Davis v. Monroe County Board of Education* (1999) indicates that liability exists if there is "sexual harassment of students 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."[237] Thus, expression that harasses members of the university community to this degree can be punished.[238] This standard for harassment is a high one for adults (like university students), though, and typically would have to be ongoing, as one comment is highly unlikely to rise to this level without corresponding conduct.[239] As explained by the *Davis* Court, whether expression constitutes peer-on-peer harassment that is actionable "depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."[240] Furthermore, not all sexually explicit material that a student might post online would rise to the level of harassment, particularly if it is not directed at another person.[241]

Similar to harassment, students can face sanctions from public universities for threatening other persons, as "the First Amendment . . . permits a State to ban a 'true threat.'"[242] In *Virginia v. Black* (2003), the Court ruled that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[243] This includes situations "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of

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[236] Cox Broad Corp. v. Cohn, 420 U.S. 469, 494–95. *See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (concluding information on a person's "credit report concerns no public issue").

[237] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999). While a judge on the Court of Appeals, Justice Samuel Alito used this framework in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205–11 (3d Cir. 2001). *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (giving an example of sexual harassment in the workplace).

[238] *See* Brett A. Sokolow, Daniel Kast & Timothy J. Dunn, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RTS. 19, 20 (2011).

[239] *See* George S. Scoville III, *Purged by Press Release: First Responders, Free Speech, and Public Employment Retaliation in the Digital Age*, 97 OR. L. REV. 477, 540 (2019).

[240] *Davis*, 526 U.S. at 651 (internal citations and quotations omitted).

[241] Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 782–83 n.3 (2013).

[242] Virginia v. Black, 538 U.S. 343, 359 (2003).

[243] *Id.*

bodily harm or death."[244] Much expression that may seem threatening, though, still receives constitutional protection, as a *true* threat includes only expression where the speaker expresses intent to explicitly cause immediate harm.[245] For instance, in *Watts v. United States* (1969), the Court overturned the conviction of a Vietnam War-era draftee for saying, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[246] The context of this statement showed that it was merely "political hyperbole," which is protected by the First Amendment because "[t]he language of the political arena . . . is often vituperative, abusive, and inexact."[247] Nevertheless, as the Court ruled in *Black*, a "speaker need not actually intend to carry out the threat" for it to be unprotected expression, because "a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[248]

Inciting others to commit imminent, lawless action also falls outside of First Amendment protection. *Brandenburg v. Ohio* (1969) held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[249] However, like other unprotected categories, this one is narrowly drawn, as the Court overturned the conviction of Brandenburg, who led a Ku Klux Klan rally where a cross was burned, for a speech that included a racial slur, anti-Semitic rhetoric, and advocacy of "revengeance" [sic] against the President, Congress, and Supreme Court.[250] Thus, "the mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[251] Furthermore, the Court has found protection for incitement if the lawlessness being advocated by a speaker is not imminent. In *Hess v. Indiana* (1973), while law enforcement dispersed a crowd from the street during an anti-Vietnam War protest, Hess stated to the sheriff, "We'll take the fucking street later [or again]."[252] In overturning Hess's conviction, the Court reasoned the following: "At best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than

[244] *Id.* at 360.
[245] Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1348 (2005).
[246] Watts v. United States, 394 U.S. 705, 706 (1969) (internal quotation omitted).
[247] *Id.* at 708.
[248] Virginia v. Black, 538 U.S. 343, 360 (2003) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).
[249] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[250] *Id.* at 445–47, 449.
[251] Noto v. United States, 367 U.S. 290, 297–98 (1961).
[252] Hess v. Indiana, 414 U.S. 105, 106–07 (1973).

advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech."[253]

Public universities are limited in restricting student expression beyond these types of narrowly defined categories that fall outside of First Amendment protection. Otherwise, banning specific types of additional expression risks viewpoint discrimination.[254] Likewise, trying to impose bans on speech that go beyond these narrow categories of unprotected expression creates problems of overbreadth,[255] or such bans will fail to be specific enough, thus creating vagueness problems that lead to a chilling effect on expression.[256]

The examples from the introduction reveal a great deal of student speech that is protected. For instance, posting a break-up letter that was "graded" for grammar appears protected by the First Amendment, as it merely embarrassed—and did not threaten—the student who wrote the letter.[257] The letter was "private," but the communication in question was not confidential, like a student record.[258] This perhaps explains why the university later overturned that student's suspension.[259] The same was true of a student's "satirical environmentalist collage"[260] that merely sought to call attention to conservation concerns and embarrass the university president.

Students posting videos of a coronavirus-themed party in the early stages of the COVID-19 pandemic (including the symbolic use of surgical masks and biohazard symbols) may have been shocking to some, but that alone leaves a public university no recourse to punish the views expressed in those videos.[261] However, if the underlying non-expressive conduct violated university policies or public health requirements, the video could be used as evidence that eventually leads to sanctions.[262]

A university blocking a student from social media accounts for

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[253] *Id.* at 108.

[254] R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (stating the government "has no . . . authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

[255] United States v. *Stevens*, 559 U.S. 460, 473 (2010) ("In the First Amendment context . . . a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional.") (internal quotations and citations omitted).

[256] Reno v. ACLU, 521 U.S. 844, 871–72 (1997) ("The vagueness of . . . a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.").

[257] Roll, *A Tweet with Consequences*, *supra* note 5.

[258] *Id.*

[259] Roll, *On Second Thought...*, *supra* note 6.

[260] Floyd, *supra* note 1.

[261] Burke, *Coronavirus-Themed Party at Albany Draws Criticism, supra* note 13.

[262] *See* Texas v. Johnson, 491 U.S. 397, 403 (1989) (determining if Gregory Johnson's flag burning was constitutionally protected by reasoning that "[w]e must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment . . . ."). *See also* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (concluding non-expressive conduct receives no protection under the Free Speech Clause).

referring to the university as "bastards" when criticizing the sufficiency of library exits violates a student's expressive rights.[263] Such action by the university discriminates on the basis of viewpoint, or tries to punish a student for using offensive language, either of which is unconstitutional unless the expression was repeated serially or aimed at someone in a harassing manner.[264]

Expelling a pharmacy graduate student for posting photos with exposed cleavage and sticking out her tongue, and for suggesting additional lyrics for the song "WAP,"[265] also runs afoul of the First Amendment, as sexually explicit expression cannot be deemed obscene without meeting requirements of the *Miller* Test. These photos certainly would not rise to the standard from *Miller*, as they clearly have artistic value.[266] The same would be true of the medical student posting a topless photo of herself at a nude beach in Europe, that included "#freethenipple," as this constitutes expression with political value, especially with the picture blurred.[267] However, as explained below, graduate or professional students who are university employees could be subject to more restrictions on their online expression in their capacities as employees.

Some of the examples of student social media speech in the introduction involve more hateful speech, such as with students who repeatedly used the N-word,[268] promoted white supremacy with a photo of a firearm,[269] or posted that one should not vote for a candidate due to a candidate's sexual orientation or race.[270] These are closer cases constitutionally, as they involve repeated postings, or the use of more hostile imagery, or statements about other specific students.[271] As offensive and reprehensible as the expression is in each of these examples, since it was private student expression that did not involve ongoing harassment of others, did not threaten specific persons, and did not incite others to engage in imminent lawless action, the speech in each case appears to be protected by the First Amendment.[272] This is true because a public university's punishment of a student for the private expression of ideas is discrimination on the basis of viewpoint that is unconstitutional generally.[273] As explained

[263] Cripe & Dahle, *supra* note 16.
[264] *Id.*
[265] Hartocollis, *supra* note 17.
[266] Miller v. California, 413 U.S. 15, 24 (1973).
[267] McLaughlin, *supra* note 3.
[268] TRIB. MEDIA WIRE, *supra* note 9.
[269] Salameh & Turner, *supra* note 7.
[270] Shastri, *supra* note 11.
[271] *See* TRIB. MEDIA WIRE, *supra* note 9; Salameh & Turner, *supra* note 7; Shastri, *supra* note 11.
[272] *Id.*
[273] The comments in this section refer to admitted students who are registered for classes. There may be other considerations regarding public universities' responses to prospective

in *Tinker*, "to justify prohibition of a particular expression of opinion, [a public educational institution] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[274] This was affirmed in *Mahanoy*, where the Court reasoned that public educational institutions that teach young people how to engage in open dialogue with others in a democratic society, "have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[275] Put differently by the Court in *Christian Legal Society v. Martinez* (2010), "a public educational institution exceeds constitutional bounds . . . when it restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent."[276] Given *Packingham*, this reasoning applies to student expression on social media. However, as explained in Part VI below, there are constitutional actions that universities can take to combat the very real problems of bias based on race, ethnicity, sex, sexual orientation, religion, age, and disability.

Finally, for students there is the question of remedies when online speech falls outside of First Amendment protection. Public universities should be careful regarding the use of student suspension or expulsion for expression not protected by the First Amendment as it can create a dangerous chilling effect on student expression.[277] Even official

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students or admitted students who have not yet registered for classes. *See* Clay Calvert, *Rescinding Admission Offers in Higher Education: The Clash Between Free Speech and Institutional Academic Freedom When Prospective Students' Racist Posts Are Exposed*, 68 UCLA L. REV. DISCOURSE 282, 296 (2020) ("[N]onenrolled prospective student[s] . . . arguably have fewer First Amendment speech rights against the actions of a public university, . . . particularly in light of the conditional nature of [admissions] offers . . . Currently enrolled students, in contrast, possess the full panoply of First Amendment protections. As Evan Gertsmann recently explained, '[a]n admissions committee can reject a student whose application essay contains racist tropes even if the school couldn't expel the student for expressing the same tropes once she is attending the school.'"). Likewise, there may be other considerations universities have with student athlete speech—including team chemistry concerns and that student athletes represent the university—if the sanctions are limited to participation with the team, although a substantial amount of First Amendment protection would apply here too. *See* Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 47 (2014) ("[A]n athlete attending a state institution should have considerable First Amendment protection against content-based punishment for off-campus speech on personal time, or against broad-based restrictions that place entire methods of communication off-limits. State institutions will have, at the very most, the ability to regulate and punish speech that presents the imminent risk of substantially disrupting their operations or breaking the law.").

[274] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[275] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

[276] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 683–84 (2010) (internal quotations omitted).

[277] Kasper, *supra* note 119, at 572–73.

investigations, with threats of harsh penalties that are ultimately not imposed, can have a negative effect on the free exchange of ideas. As stated by the Court, "First Amendment freedoms . . . are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[278] Certainly, there are rare situations where unprotected expression warrants these heavy penalties, particularly if the relevant activity violates the criminal law, but the overuse of harsh penalties for student expression that is just over-the-line risks frightening students from engaging in constitutionally protected expression. As an educational institution, the university does have other means at its disposal besides punishments, and those will be discussed in Part VI as they apply to students as well as to staff and faculty.

IV. THE FIRST AMENDMENT RIGHTS OF PUBLIC UNIVERSITY STAFF ON SOCIAL MEDIA

Like public university students, there is no question today that substantial First Amendment free expression rights attach to public employees, including faculty, because as explained by the Court in *Rankin v. McPherson* (1987), "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[279] The Court in *City of San Diego v. Roe* (2004) clarified that these protections are not just to foster the personal autonomy of public employees, as they promote a public good as well:

> [P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.[280]

Yet, similar to students, public university employees are subject to reprimand for engaging in forms of expression on social media that are in narrow categories falling outside of First Amendment protection, such as true threats, incitement, harassment, and revealing confidential information.[281] In addition, further narrowly defined restrictions can be

[278] NAACP v. Button, 371 U.S. 415, 433 (1963).
[279] Rankin v. McPherson, 483 U.S. 378, 384 (1987).
[280] City of San Diego v. Roe, 543 U.S. 77, 82 (2004).
[281] *See* Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[R]estricting speech on purely private

placed on public employee speech, because, as the Court explained in *Garcetti v. Ceballos* (2006), "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[282]

Early Court decisions provided no First Amendment protections for public employees. Before the 1960s, the Court instead applied the "doctrine of privilege" to public employees, finding that since public employment was a privilege, significant restrictions could be imposed on such employees.[283] For instance, the Justices upheld the Hatch Act in *United Public Workers v. Mitchell* (1947), which at the time prohibited federal civil servants from being actively involved in political campaigns.[284] Instead of finding First Amendment protections for federal employees, the Court in *Mitchell* deferred to the other two branches of the federal government: "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."[285] In *Adler v. Board of Education* (1952), the Court upheld a New York law prohibiting anyone from being a public school employee if they taught or advocated, or was a knowing member of an organization that taught or advocated, the overthrow of the government by force or violence.[286] The Court in *Adler* dismissed the notion that the appellants had First Amendment rights that protected them as public employees:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.[287]

The Court's crabbed view of public employee expressive rights in *Adler* was a continuation of the doctrine of privilege expressed in *Mitchell*.[288]

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matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.").

[282] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[283] Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workspace*, 61 S. CAL. L. REV. 3, 8 (1987).

[284] United Pub. Workers v. Mitchell, 330 U.S. 75, 103–04 (1947).

[285] *Id.* at 99.

[286] Adler v. Bd. of Educ., 342 U.S. 485, 496 (1952).

[287] *Id.* at 492 (internal citations omitted).

[288] Massaro, *supra* note 283, at 8–9.

In the late 1960s the Court began expanding First Amendment rights for public employees in cases that have continuing significance today. In *Pickering v. Board of Education* (1968), the Court reviewed the dismissal of a public school teacher for writing a letter to the editor criticizing the school district's management of bond issue proposals and its fund allocations between athletics and the classroom.[289] Perhaps the most pointed statement in Pickering's letter was when he reviewed district spending on sports before declaring, "These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse."[290] The *Pickering* Court announced a test for public employee expression rights, declaring that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[291] Accordingly, the Court held that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."[292] The Court found Pickering's statements were protected expression because "the question whether a school system requires additional funds is a matter of legitimate public concern . . . in a society that leaves such questions to popular vote," and "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."[293]

The Court's approach to public employee free speech rights was further explored in *Connick v. Myers* (1983), where the Justices explained that "[speech] concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[294] The Court clarified that public employees have protection to discuss broadly defined subject matter, as the "First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with smaller ones, are guarded."[295] However, the Court in *Connick* illuminated that short of "fixed tenure or applicable statute or regulation, . . . [w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to

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[289] Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1968).
[290] *Id.* at 577.
[291] *Id.* at 568.
[292] *Id.* at 574.
[293] *Id.* at 571–72.
[294] Connick v. Myers, 461 U.S. 138, 145 (1983) (internal citations and quotations omitted).
[295] *Id.* at 147 (internal quotations omitted).

the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[296] In discerning if expression is of public concern or purely private concern, the Court determined that it would examine "the content, form, and context of a given statement, as revealed by the whole record."[297] As described by the *Connick* Court, the *Pickering* balancing test requires "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public," including "the government's legitimate purpose in '[promoting] efficiency and integrity in the discharge of official duties, and [in] [maintaining] proper discipline in the public service.'"[298] *Connick* developed what was a two-prong test for examining freedom of expression claims for public employees, often referred to as the *Pickering-Connick* balancing test: (1) ask if a public employee was speaking on a matter of public concern, and (a) if it was *not* a matter of public concern, then the claim will be denied, but (b) if the speech was on matters of public concern, then (2) ask if the employee's free speech interests carry more weight than the employer's reason(s) for restricting expression.[299]

The *Pickering-Connick* test was modified by the Court in *Garcetti v. Ceballos* (2006). There, the Court narrowed the protections for public employees, emphasizing that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[300] Nevertheless, the Court in *Garcetti* affirmed that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression,"[301] and the Court underscored "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."[302] Furthermore, the Court clarified that if "employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively,"[303] and the "First Amendment protects some expressions related to the speaker's job."[304]

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[296] *Id.* at 146.
[297] *Id.* at 147–48.
[298] *Id.* at 150–51 (quoting *Ex parte* Curtis, 106 U.S. 371, 373 (1882)).
[299] *Id.* at 146–50; *see also* Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 82 (2008). If the threshold question is answered in the negative (e.g., an employee is *not* speaking on a matter of public concern), then the First Amendment claim fails. *Id.*
[300] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).
[301] *Id.* at 413 (quoting *Connick*, 461 U.S. at 142).
[302] *Id.* at 419.
[303] *Id.*
[304] *Id.* at 421.

However, the Court concluded in *Garcetti* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[305] According to the *Garcetti* Court, this modification to the *Pickering-Connick* test was necessary because "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen," and "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity."[306] In sum, if "an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences," but if "the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny."[307] Thus, after *Garcetti*, for public employee expression to be protected speech, one must be (1) speaking as a citizen (not pursuant to official work duties), (2) on matters of public concern, and (3) the speech must outweigh the employer's interests in efficiency and effectiveness.[308] Although *Garcetti* made it slightly more difficult for public employees to prevail on free speech claims,[309] the Court affirmed that public employee job duties cannot be purposely fashioned to overtly limit First Amendment rights: "We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."[310]

Overall, the *Pickering-Connick-Garcetti* line of cases establishes that a public employee can be disciplined consistent with the First Amendment if one is speaking pursuant to official work duties, if one is speaking on a matter of private concern, or if one's speech as a citizen on a matter of public concern is outweighed by relevant employer interests.[311] However, outside of these situations, speech by public employees is protected by the First Amendment. Since public employees learn information in their employment that gives them special awareness and even wisdom that the public may find important to know, it is imperative that what constitutes "matters of public concern" is interpreted broadly, while official work duties and employer interests should both be interpreted narrowly.[312] Much Supreme Court jurisprudence reflects this understanding.

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[305] *Id.*

[306] *Id.* at 421–22.

[307] *Id.* at 423.

[308] Waldman, *supra* note 299, at 82.

[309] Susan L. Wynne & Michael S. Vaughn, *Silencing Matters of Public Concern: An Analysis of State Legislative Protection of Whistleblowers in Light of the Supreme Court's Ruling in* Garcetti v. Ceballos, 8 ALA. C.R. & C.L. L. REV. 239, 243 (2017).

[310] *Garcetti*, 547 U.S. at 424.

[311] Waldman, *supra* note 299, at 82.

[312] *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 8 SUP. CT. REV. 301, 301–02 (2015).

Although speech falling into unprotected categories (e.g., obscenity, libel, harassment, incitement, etc.) would not be speech on matters of public concern,[313] outside of those categories, a great deal of expression would be on matters of public concern. The most foundational Court decision on public employee speech rights, *Pickering*, offered a very broad view of protected speech for public employees, making it almost coterminous with that of the general public: "[T]he interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[314] The Court in *Pickering* went on to state that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[315] As explained by the Court in *Connick*, relevant expression includes anything that can "be fairly considered as relating to any matter of political, social, or other concern to the community."[316] Using this approach, the *Connick* Court determined that an internal office questionnaire asking other employees to evaluate how the office was run "concerned only internal office matters and . . . such speech is not upon a matter of 'public concern.'"[317]

Other Court cases confirm that "public concern" should be understood broadly. In *Madison Joint School District v. Wisconsin Employment Relations Commission* (1976), the Court struck down a state order banning teachers who were not union representatives from speaking at an open meeting of the elected school board.[318] In a case that involved a teacher speaking to the school board on a matter at issue in union contract negotiations,[319] the Court reasoned that such expression was protected because the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government."[320]

Beyond communicating directly with governing bodies, speaking on issues of public concern has been held to encompass speaking with other citizens, and even co-workers, including in controversial ways. In *Rankin*,

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[313] *See* Natalie Rieland, *Government Employees' Freedom of Expression Is Limited: The Expression Must Touch on Matters of "Public Concern" or Be Intended to Educate or Inform the Public About the Employer to Warrant First Amendment Protection*, 44 DUQ. L. REV. 185, 202–03 (2005).

[314] Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

[315] *Id.* at 574.

[316] Connick v. Myers, 461 U.S. 138, 146 (1983).

[317] *Id.* at 143.

[318] Madison Joint School Dist. v. Wis. Emp. Rels. Comm'n, 429 U.S. 167, 169, 177 (1976).

[319] Deborah A. Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 VA. L. REV. 91, 93 (1986).

[320] *Madison Joint School Dist.*, 429 U.S. at 175.

the Court reversed the discharge of a clerical employee in a Texas county constable's office for responding as follows to a co-worker upon hearing about the attempted assassination of President Ronald Reagan: "If they go for him again, I hope they get him."[321] The Court in *Rankin* found that this statement "plainly dealt with a matter of public concern," when examining the whole record, because it "was made in the course of a conversation addressing the policies of the President's administration" and "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President."[322] Importantly, the Court reasoned that "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[323]

In *San Diego v. Roe*, the Court explained that "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication," including "certain private remarks."[324] The Court clarified that protected speech on matters of public concern can include "when government employees speak or write on their own time on topics unrelated to their employment . . . absent some governmental justification 'far stronger than mere speculation' in regulating it."[325] However, applying the *Pickering-Connick* standard, the Court in *Roe* found that a police officer was not expressing himself on matters of public concern when he sold videotapes of himself engaging in sexually explicit acts that included stripping off a police uniform and masturbating.[326]

Lane v. Franks (2014) reaffirms the principle that "public employees do not renounce their citizenship when they accept employment, and . . . public employers may not condition employment on the relinquishment of constitutional rights."[327] In *Lane*, the Court found truthful testimony given under oath outside of ordinary job duties constitutes speech on matters of public concern, even if it relates to a public employee's job or was learned during the course of employment.[328] Lane, an employee of the Central Alabama Community College, uncovered evidence that another employee engaged in financial crimes;[329] after Lane testified at that former employee's criminal trial, he was fired.[330] As explained by the Court in *Lane*, "corruption in a public program and misuse of state funds . . . obviously involves a matter

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[321] Rankin v. McPherson, 483 U.S. 378, 392 (1987).
[322] *Id.* at 386.
[323] *Id.* at 387.
[324] City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004).
[325] *Id.* at 80 (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465, 475 (1995)).
[326] *Id.* at 78, 84.
[327] Lane v. Franks, 573 U.S. 228, 236 (2014).
[328] *Id.* at 238.
[329] *Id.* at 231–32.
[330] *Id.* at 232–34.

of significant public concern."[331] The *Lane* Court illuminated that what constitutes a matter of public concern remains broadly defined, including information learned during the course of employment.[332]

Conversely, *Garcetti*'s additional requirement, regarding public employee expression not being protected if made pursuant to official duties, must be understood narrowly. In both *Pickering* and *Madison Joint School District*, speaking on matters of public concern was still protected, even though they dealt with the "operation of the public schools in which they work," as it was communicated more broadly than internally at the place of employment.[333] *Garcetti* clarified that writing an internal memo was part of official duties (hence outside of First Amendment protection), while a letter to a newspaper was outside of official duties (hence protected).[334] Even *Garcetti* explained that official duties should be read narrowly and job duties cannot be written excessively broadly,[335] meaning that most expression by public employees will continue to be spoken as citizens, not pursuant to official duties.[336] As described by the *Garcetti* Court, speech is pursuant to official job duties only if "there is no relevant analogue to speech by citizens who are not government employees."[337]

Lane is instructive on defining "official duties." The Court offered that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[338] In particular, since *Lane* involved testimony in a "public corruption scandal,"[339] the Court resolved the following: "It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim."[340] The *Lane* Court placed an emphasis on needing to protect truthful employee speech, particularly if given under oath.[341] This suggests again that what is considered official duties should be read narrowly, and that *Garcetti*'s "official duties" apply merely

[331] *Id.* at 241.
[332] R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 423 n.389 (2019).
[333] Madison Joint School Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 (1976) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
[334] Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).
[335] *Id.* at 424.
[336] Kelso, *supra* note 332.
[337] *Garcetti*, 547 U.S. at 424.
[338] Lane v. Franks, 573 U.S. 228, 238 (2014).
[339] *Id.* at 240.
[340] *Id.* at 240–41.
[341] *Id.* at 239.

to employer work assignments to employees.[342]

If a public employee is speaking on matters of public concern outside of official duties, courts will balance speech rights against employer interests.[343] However, it is of paramount importance to understand that employer interests have been defined narrowly by the Court, as "the First Amendment creates a strong presumption against punishing protected speech even inadvertently."[344] When balancing speech on public concern against employer interests, "[t]he State bears a burden of justifying the discharge on legitimate grounds."[345] If disciplining a public employee for expressive activity, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[346] For employers, "pertinent considerations [include] whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[347] Employer interests that may outweigh employee speech rights also include "testimony [that is] false or erroneous," or if one "unnecessarily disclosed any sensitive, confidential, or privileged information."[348] Although expression that would not be protected for anyone—such as true threats, harassment, or incitement—would clearly meet these criteria, not a great deal else does. For example, employee speech rights outweighed employer concerns in *Rankin*, which involved a crude comment by an employee expressing hope that the president would be killed.[349]

Applying *Packingham* to these relevant precedents leads to the conclusion that public university employees have a substantial amount of First Amendment protection in their use of social media.[350] Short of online

[342] Frank D. LoMonte, *Putting the "Public" Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1, 29 (2019).

[343] David L. Hudson, Jr., *Public Employees*, MIDDLE TENN. STATE UNIV.: FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/925/public-employees [https://perma.cc/V6VY-8A34].

[344] Waters v. Churchill, 511 U.S. 661, 670 (1994).

[345] Rankin v. McPherson, 483 U.S. 378, 388 (1987).

[346] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1995) (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994)).

[347] *Rankin*, 483 U.S. at 388.

[348] Lane v. Franks, 573 U.S. 228, 242 (2014).

[349] *Rankin*, 483 U.S. at 389.

[350] *See* Alexis Martinez, *The Right to Be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media*, 27 AM. U. J. GENDER SOC. POL'Y & L. 285, 306–07 (2019) ("The First Amendment enshrines a hallmark of American citizenship, which is the ability to criticize without fear of reprisal. The Court in *Pickering*, reiterated the established doctrine that the government as an employer cannot

expression that actually, not just conjecturally, harms co-worker relationships, prevents one from completing duties, or involves false testimony under oath or the disclosure of confidential or sensitive information, expression on matters of public concern is generally protected. The interests of a public university as employer should be specifically understood this way, as universities are tasked with fostering the free exchange of ideas and challenging existing orthodoxies.[351] More than other institutions, the freedom of expression is essential to the operation of universities because they are primarily charged with producing and disseminating knowledge.[352] More broadly, a university's mission includes the pursuit of truth.[353] Thus, if the employer interests in the context of a public university include fostering the free expression of ideas, then there is relatively less to consider in the balancing against employee free speech interests compared to other public employers.

Revisiting the examples from the introduction reveals expression of public university employees is offered significant protection. The professor who said there was blood on the hands of the National Rifle Association for a mass shooting[354] was commenting on a matter of public concern. It was also a comment about a national organization, not someone not affiliated with the university, raising little relevant employer interest.

Similarly, comments by a faculty member alleging that a recently deceased former First Lady was a racist who helped to raise a war criminal,[355] although offensive, are clearly related to matters of public concern and about multiple public figures. The same was true of a comment by an instructor criticizing a sitting president and wishing, hyperbolically, that someone would assassinate him,[356] as this bore striking resemblance to the facts in *Rankin*, where the expression at issue was protected. Likewise, a professor who tweeted about how a debate moderator should respond to

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condition employment on the forfeiture of individual rights. . . . The prohibition against a government employer compelling behavior extends into the realm of social media use and employee speech through the rejection of broad social media policies. The Supreme Court in *Packingham* held that the government cannot deny access to social media platforms to citizens based on their status as sex offenders. Although *Packingham* addressed a general restriction on access to social media, the Court's reasoning still applies to broad restrictions on social media use and access.").

[351] McCauley v. Univ. of the V.I., 618 F.3d 232, 243 (3d Cir. 2010) ("The pedagogical mission[] of public universities . . . encourages inquiry and challenging *a priori* assumptions . . . The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education.").

[352] KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 6, 13 (2018).

[353] DONALD ALEXANDER DOWNS, FREE SPEECH AND LIBERAL EDUCATION: A PLEA FOR INTELLECTUAL DIVERSITY AND TOLERANCE 31 (2020).

[354] Flaherty, *Protected Tweet?*, *supra* note 21.

[355] Tchekmedyian, *supra* note 24.

[356] Jaschik, *supra* note 22.

answers from the vice president, including characterizing the vice president as having a "little demon mouth,"[357] was speaking hyperbolically about a public official and on a matter of public concern. A professor who used disparaging language when complaining of white gentrification[358] was also commenting on a matter of public concern.

Closer cases are raised, even when the comments are on matters of public concern, if the posts could create a detrimental impact on working relationships with students or co-workers. Such questions arise with the example of what a university characterized as a professor's racist, sexist, and homophobic views.[359] However, these comments ultimately related to discourse on matters of gender and sexuality or the structure of academia,[360] and they did not relate to any specific co-worker or student. This suggests that these comments, as offensive as they were, deserved First Amendment protection, something the university concluded as well.[361] The same was true of an assistant football coach who, in the process of tweeting about a public figure's involvement in an election, made what were characterized as racist, fat-shaming comments,[362] or the professor who tweeted that she hoped a public figure suffered when he died.[363] While more egregious cases may, depending on the entire record, rise to the level of the university offering, or even requiring, sensitivity education or restorative conferencing, harsher penalties (such as firing or demotion) for citizen expression on matters of public concern run afoul of the First Amendment. If a public employee can be protected from being fired for wishing for the assassination of a public figure,[364] then these comments about public figures are clearly protected.

Another closer case was the professor who posted about finding a "hitman" after a difficult day at work, and later, on a "good day," commenting that she did not "want to kill even one student" after previously holding different sentiments on the matter.[365] If these were true threats, instead of being made in jest, they clearly would not be on a matter of public concern. Likewise, if these comments identified specific students, they would be on matters of private concern. However, viewed in their totality, this professor's comments, while blowing off steam, were ultimately inarticulate commentary on the difficulties of working in academia, a matter of public concern. The same was true of the professor who wrote

[357] Carter, *Professor's Tweet About Pence's "Little Demon Mouth" Sparks Collin College Controversy, supra* note 39.
[358] Adely, *supra* note 26.
[359] Flaherty, *Bigoted Views vs. Bigoted Teaching, supra* note 29.
[360] *Id.*
[361] *Id.*
[362] Rittenberg, *Tennessee-Chattanooga Mocs Fire assistant Football Coach Chris Malone After Racist Tweet, supra* note 47.
[363] Smith, *supra* note 49.
[364] Rankin v. McPherson, 483 U.S. 378, 379–80, 392 (1987).
[365] Fahmy, *supra* note 19.

inflammatory invective about police, "capitalists," and politicians,[366] as that post was speaking hyperbolically about entire professions, not making a true threat against a specific person or imminently inciting followers to commit acts of violence.

Context matters. Like the other examples above, if specific members of the university community were targets of the expression, or if that expression was occurring at work and said in person (while one is acting in one's capacity as a public employee) rather than online, then the expression may no longer receive First Amendment protection. Furthermore, there were multiple examples above of student expression on social media, including repeatedly using racial slurs,[367] or explicitly promoting white supremacy with the use of a firearm,[368] which could fall outside of First Amendment protection if stated in the same way by public employees. In other words, public employee expression—following the *Pickering*, *Connick*, and *Garcetti* precedents—is protected to a slightly lower degree than public university student expression. Again, though, context matters, as the use of epithets or photos of firearms could be speech on matters of public concern that do not conflict with employer interests if, for example, epithets are being explored in the context of when it is legal to utter them (as opposed to directing them at another person) or if a photo or video of a firearm is exhibited for educational purposes (as opposed to threatening another person).[369]

Finally, as with students, the gravity of the punishment matters for First Amendment rights of public employees. Even when expression is not protected, public universities must be careful not to impose a greater penalty than is warranted, as severe penalties risk creating a chilling effect on expression.[370] Furthermore, the Court's jurisprudence makes clear that even administrative investigations raise significant First Amendment concerns: "Speech can be chilled and punished by administrative action as much as by judicial processes."[371] Thus, in Part VI, like for students, ideas to promote relevant university values outside of punitive actions will be explored.

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[366] Flaherty, *University Seeks State AG's Advice on Professor's Facebook Post*, *supra* note 37.

[367] TRIB. MEDIA WIRE, *supra* note 9.

[368] Salameh & Turner, *supra* note 7.

[369] *See, e.g.,* Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U.L. REV. 1 (2021).

[370] *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 696–97 (1978).

[371] Waters v. Churchill, 511 U.S. 661, 669 (1994).

V. THE FIRST AMENDMENT RIGHTS OF PUBLIC UNIVERSITY FACULTY ON SOCIAL MEDIA

Public university faculty's First Amendment rights have overlap with both public university students and staff. Like students and staff, faculty can be reprimanded for social media statements that fall outside of First Amendment protection entirely, like true threats, incitement, and harassment. Like other public employees, faculty statements on matters of public concern are protected if they outbalance relevant university interests. However, with faculty, there is another First Amendment concern to be explored: academic freedom. This makes *Garcetti*'s distinction between citizen speech and speaking pursuant to job duties inapplicable to faculty.

Historically, the Justices started finding greater First Amendment rights for employees at public universities in the 1950s, before it began finding those protections for public employees in other settings.[372] In *Wieman v. Updegraff* (1952), the Justices struck down as arbitrary a mandatory state loyalty oath as applied to faculty and staff at the Oklahoma Agricultural and Mechanical College.[373] The Court's applying constitutional rights to public employees began slowly in *Wieman*, affirming that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[374] Although *Wieman* spoke in terms of First Amendment protections for faculty *and* staff at public universities, soon thereafter the Court began emphasizing special constitutional concerns for faculty.[375]

Sweezy v. New Hampshire (1957) reviewed the case of a professor who was found in contempt for refusing to answer questions by the state attorney general about a lecture he gave, his involvement with the Progressive Party, and his advocacy of socialism.[376] The *Sweezy* Court overturned this contempt conviction, affirming that "the exercise of the power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community."[377] The Court in *Sweezy* likewise proclaimed that a faculty member possesses a "right to lecture and [a] right to associate with others," and that these are

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[372] Joseph O. Oluwole, *On the Road to* Garcetti*: "Unpick"erring* Pickering *and Its Progeny*, 36 CAP. U. L. REV. 967, 969 (2008).
[373] Wieman v. Updegraff, 344 U.S. 183, 192 (1952).
[374] *Id.*
[375] Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 969–70 (2009).
[376] Sweezy v. New Hampshire, 354 U.S. 234, 238–45 (1957).
[377] *Id.* at 245.

"constitutionally protected freedoms."[378] Denying them to public university faculty "was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[379] The Court then gave an impassioned defense for constitutionally protected academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[380]

The *Sweezy* Court emphasized that the First Amendment protects academic freedom for teaching faculty, as this helps prepare students for democratic citizenship, placing academic freedom on par with political speech.[381] Academic freedom ensures faculty can teach students about and debate a variety of other subjects beyond politics and public policy, assisting students in achieving new understandings of the universe.[382] This passage likewise connects university faculty's academic freedom to do research outside of the classroom and make new discoveries in various fields in pursuit to truth.[383] Anything short of strong protection of freedom to teach, and to conduct and disseminate research, risks creating a chilling effect on what the Court characterized as essential and vital work. Suggesting that the alternative would be the stagnation and death of our entire society underscores the importance of academic freedom constitutionally.

The Court reaffirmed these principles in *Shelton v. Tucker* (1960).[384] An Arkansas statute required public school and university educators and administrators to annually submit an affidavit listing all organizations to which the employee belonged.[385] Both a University of Arkansas professor

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[378] *Id.* at 249–50.
[379] *Id.* at 250.
[380] *Id.*
[381] Charles Aside III, *Replay that Tune: Defending* Bakke *on Stare Decisis Grounds*, 64 CLEV. ST. L. REV. 519, 536 (2016).
[382] *Id.*
[383] Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 483 (2005).
[384] *See* Shelton v. Tucker, 364 U.S. 479 (1960).
[385] *Id.* at 480.

and two Little Rock public school teachers filed suit alleging the requirement was unconstitutional.[386] Quoting *Wieman* and *Sweezy*, the Court found that the law violated the freedom of association, stating that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[387]

The Court again emphasized academic freedom as an individual right of faculty members in *Baggett v. Bullitt* (1964).[388] *Baggett* involved two different Washington State statutes that required all state employees (including faculty) to take loyalty oaths to the constitutions, laws, and flags of the United States and Washington State, and the oath required each person to swear or affirm that one was neither a Communist Party member nor a "subversive person."[389] The *Baggett* Court found the oath requirement unconstitutionally vague under the First and Fourteenth Amendments.[390] The Justices chided the state for not making it clear if, for example, it was subversive to "attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries"[391] or for the editor of a scholarly journal to analyze and criticize manuscripts of communist scholars.[392]

First Amendment rights of faculty at public universities were confirmed in strong terms in *Keyishian v. Board of Regents* (1967), where the Court struck down a requirement of State University of New York faculty to sign a certificate affirming they were not communists.[393] The Court reasserted its bold protections of expressive and associational rights for university faculty:

> Our Nation 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.[394]

As explained by the Justices, "[t]he classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."[395] According to the Court, with the law, "the stifling

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[386] *Id.* at 482–84.
[387] *Id.* at 487.
[388] Baggett v. Bullitt, 377 U.S. 360, 372 (1964).
[389] *Id.* at 361–62.
[390] *Id.* at 369.
[391] *Id.*
[392] *Id.*
[393] Keyishian v. Bd. of Regents, 385 U.S. 589, 592, 609–10 (1967).
[394] *Id.* at 603.
[395] *Id.* (internal citation omitted).

effect on the academic mind from curtailing freedom of association in such manner is manifest."[396] Like *Sweezy*, the *Keyishian* Court staked the country's very future on university faculty's constitutional right to academic freedom.[397]

The same year as *Keyishian*, the Court stressed individual instructors' rights in *Whitehill v. Elkins*.[398] This was another anti-subversive oath requirement at a state university, requiring each faculty member to state in writing that one was "not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence," and that falsely swearing such was subject to the penalties of perjury.[399] As in other loyalty oath cases applied to public university faculty, the Court found this one unconstitutional.[400] The Court noted, "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom."[401] One of the Court's concerns in *Whitehill* was overbreadth: "[W]e find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat . . . may deter the flowering of academic freedom as much as successive suits for perjury."[402]

Following *Pickering*'s protection for public employees to critique employers on matters of public concern, *Perry v. Sindermann* (1972) clarified that public university faculty have a right to engage in this type of criticism, even if they lack tenure.[403] Robert Sindermann was a professor of government and social science employed via one-year contracts at Odessa Junior College.[404] Sindermann testified before committees of the Texas Legislature, advocating that the state convert the two-year college to a four-year college, a change opposed by the college's board of regents.[405] Sindermann also publicly criticized the regents.[406] The regents voted not to offer Sindermann another teaching contract, due to what they characterized as insubordination.[407] In finding that Sindermann had relevant constitutional rights even though he lacked tenure, the Court cited multiple cases in other contexts to demonstrate that "the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First

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[396] *Id.* at 607.
[397] Aside, *supra* note 381, at 529.
[398] *See* Whitehill v. Elkins, 389 U.S. 54 (1967).
[399] *Id.* at 55–56.
[400] *Id.* at 62.
[401] *Id.* at 59–60.
[402] *Id.* at 62.
[403] Perry v. Sindermann, 408 U.S. 593, 598–99 (1972).
[404] *Id.* at 594.
[405] *Id.* at 594–95.
[406] *Id.* at 595.
[407] *Id.*

and Fourteenth Amendment rights."[408] Thus, if instructional faculty at a public university can show that a teaching contract was not renewed for the exercise of constitutionally protected expression, the instructor has a valid claim against one's employer.[409] This decision ensures that faculty without official tenure at public universities have First Amendment protection in their capacity as faculty.[410]

More recent court cases dealing with admissions standards (not university or state restrictions on individual faculty) have continued the trend of underscoring constitutionally protected academic freedom. Consider *Regents v. Bakke* (1978): "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[411] In *Grutter v. Bollinger* (2003), the Court declared, "[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[412] In *Fisher v. University of Texas* (2013), the Court affirmed that the "academic mission of a university is a special concern of the First Amendment."[413] In *Fisher v. University of Texas* (2016), the Court explained that the Constitution should not hinder universities' pursuit of "a reputation for academic excellence."[414]

These cases since *Bakke* have emphasized academic freedom as an institutional protection for public universities.[415] Undeniably, academic freedom protects a university's right to hire and fire based on its educational mission, which is why public universities may impose professional obligations regarding official duties for faculty.[416] Expression of ideas is protected in the classroom and in research, but responsible discourse and conduct can—and should—be required in these formal settings.[417] Thus, cases like *Bakke*, *Grutter*, *Fisher* (2013), and *Fisher* (2016) do not downplay individual instructors' right to academic freedom with regard to universities. Instead, they elevate universities' academic freedom in relation to state legislatures and other governmental bodies. This institutional protection for public universities adds to, and does not displace, individual faculty

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[408] *Id.* at 597–98.
[409] *Id.* at 598.
[410] Keith L. Sachs, Comment, Waters v. Churchill*: Personal Grievance or Protected Speech, Only a Reasonable Investigation Can Tell—The Termination of At-Will Government Employees*, 30 NEW ENG. L. REV. 779, 790–91 (1996).
[411] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).
[412] Grutter v. Bollinger, 539 U.S. 306, 329 (2003).
[413] Fisher v. Univ. of Tex. (*Univ. of Tex. I*), 570 U.S. 297, 308 (2013).
[414] Fisher v. Univ. of Tex. (*Univ. of Tex. II*), 136 S. Ct. 2198, 2213 (2016).
[415] Horwitz, *supra* note 383, at 465.
[416] CHEMERINSKY & GILLMAN, *supra* note 53, at 77.
[417] *Id.*

members' academic freedom from cases like *Sweezy* and *Keyishian*.[418] Although the Court has not considered individual instructors' academic freedom and the implications for the First Amendment in recent years, the Court has indicated it remains an important constitutional concern. In *Garcetti*, a case dealing with discipline in a district attorney's office, the Court explained that since "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence," the Justices "need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[419]

In fact, several circuit courts have either questioned the application of *Garcetti* to public university faculty or have found that academic freedom protects public university faculty's First Amendment rights more than public employees generally. The Fourth Circuit deduced from *Garcetti* that "the clear language in that opinion . . . casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university."[420] The Ninth Circuit found that "teaching and academic writing are at the core of the official duties of teachers and professors."[421] This court reasoned that carrying out academic commitments of teaching, research, and service may require public university faculty to engage in expression on matters of public concern outside of normal working hours: "[P]rotected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring."[422] Thus, the Ninth Circuit held that "there is an exception to *Garcetti* for teaching and academic writing."[423] More directly, the Sixth Circuit explicitly refused to apply *Garcetti* to a professor's classroom expression: "Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship."[424]

The Supreme Court should affirm its classic emphasis on faculty members' First Amendment right to academic freedom from earlier cases like *Sweezy* and *Keyishian*. Similar to how public employees generally have something vital to share with the public based on information they learn on

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[418] Horwitz, *supra* note 379, at 491 ("*Bakke* represents perhaps the Court's most significant affirmation to that date that academic freedom was not simply an individual right, but contained a significant component of institutional autonomy for colleges and universities.").
[419] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).
[420] Adams v. Trs. of the Univ. of N. Carolina-Wilmington, 640 F.3d 550, 561 (4th Cir. 2011).
[421] Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014).
[422] *Id.* at 416.
[423] *Id.* at 418.
[424] Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021).

the job and their professional opinions about their work, public university faculty have an important role to play in informing the public about the subjects which they teach and upon which they conduct research.[425] University faculty have a unique position in our society of challenging conventional beliefs and bringing new insights to our understanding of the universe, including the natural world, society, and the humanities.[426] Therefore, in addition to the more generalized protection for public employees to speak as citizens, public university faculty need constitutional protection to speak, including on social media, about topics that relate to their roles as educators and scholars. To ensure that faculty can fulfill what the Court referred to as these essential and vital roles, the topics upon which faculty members receive protection here should be broadly defined. Although the *Pickering-Connick* balancing test still applies to public university faculty speech (even if *Garcetti*'s requirement of speaking as a citizen does not), the unique societal role played by university faculty on academic matters—matters that are clearly of public concern—means that employer interests should be understood as rarely outbalancing academic freedom for faculty. Indeed, academic freedom for faculty is one of the employers' very interests in this context.

The American Association of University Professors ("AAUP") has long explained the importance of academic freedom for institutions of higher education. The AAUP issued a report titled "Declaration of Principles on Academic Freedom and Academic Tenure" in 1915, proclaiming that academic freedom includes three elements: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."[427] According to the Declaration, these second and third "phases" of academic freedom are closely related but distinguishable, in that both of them are expressive in nature but the latter one includes "the right of university teachers to express their opinions freely outside the university or to engage in political activities in their capacity as citizens."[428] Much like students and other public university employees, faculty need to retain their rights as citizens beyond their academic freedom, so that they have rights outside of formal educational settings to speak freely like other citizens.[429] However, faculty must be able to express themselves on matters that relate directly to their

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[425] HENRY REICHMAN, THE FUTURE OF ACADEMIC FREEDOM 50 (2019).
[426] *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, http://www.aaup.org/file/1940%20Statement.pdf [https://perma.cc/97Z2-PGU4].
[427] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE, http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf [https://perma.cc/NVH3-LJB7].
[428] *Id.*
[429] CHEMERINSKY & GILLMAN, *supra* note 53, at 77.

teaching and research, even if it could be considered part of the job. Otherwise, faculty could have their expression online about what is arguably "work" related topics policed by their employers for their entire careers, thus creating a significant, chilling effect on their ability to carry out their essential constitutional function in society. Consider, for example, faculty who engage in public service by disseminating their research findings and other expertise to other academics and the public through their social media posts.[430]

The AAUP's "Statement of Principles on Academic Freedom and Tenure" in 1940 clarified that academic freedom and tenure in academia promote the public good because "[t]he common good depends upon the free search for truth and its free expression."[431] This included protections for all three areas of academic freedom proclaimed in the 1915 Declaration, including the following:

> 1. Teachers are entitled to full freedom in research and in the publication of the results . . . .
> 2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject . . . .
> 3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline . . . .[432]

These documents by the AAUP, like *Sweezy* and *Keyishian*, helped grow the concept of academic freedom in the United States, showing that faculty must be able to speak both as academics (regarding the topics they teach and research) and as citizens.[433] Accordingly, under the First Amendment, public university faculty should have broad freedom to express themselves on social media, as it furthers the search for truth, fosters

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[430] *See, e.g.*, Stefanie Pietkiewicz, *Science and Social Media: Tweets Offer Glimpse into the Lives of Faculty,* STAN. UNIV. DEP'T OF CHEMISTRY NEWS (Oct. 25, 2018), https://chemistry.stanford.edu/news/science-and-social-media-tweets-offer-glimpse-lives-faculty [https://perma.cc/X2UL-NE8A] (describing Stanford University's professors' activity on Twitter).

[431] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT, *supra* note 426, at 14.

[432] *Id.*

[433] Donna R. Euben, *Academic Freedom of Professors and Institutions: The Current Legal Landscape*, AM. ASS'N OF UNIV. PROFESSORS (May 2002) https://www.aaup.org/issues/academic-freedom/professors-and-institutions [https://perma.cc/L8Q9-PB5L].

democratic self-government for the next generation of citizens, and promotes individual autonomy.

Although many of the faculty members in the examples cited above were already speaking as citizens (outside of employee duties) on matters of public concern, sometimes faculty express themselves on social media about topics related to the classes they teach or the research they undertake.[434] The *Garcetti* analysis should not apply to these latter situations, given the difficulty of determining if an academic is engaged in a work duty when speaking about their teaching or research. This is true because faculty often have requirements that they engage in service to the public, which can include educating the public on matters a faculty member teaches or researches, evaluating policies where a faculty member has professional expertise, and publishing non-scholarly writings.[435] Thus, speaking to the general public about matters related to teaching and research cannot be a backdoor attempt to regulate protected faculty speech.

Returning to examples from the introduction, the criminal justice professor's tactless tweet about the police response to the 2020 national protests after the killing of George Floyd[436] might raise issues of academic freedom if that professor teaches or conducts research on the topic (given the context of the tweet, it raised more general questions about public employee speech). Additionally, the termination of a professor who tweeted criticism of a college's COVID-19 reopening plan[437] raised academic freedom questions related to how classroom activities need to be structured (as well as public employee speech rights as they pertain to faculty governance). Of all of these examples, the most serious concerns regarding academic freedom (and public employee speech rights) were raised with the professor who was fired after criticizing his university for what he characterized as its racist approach to accepting grants on topics that relate to what he teaches and researches.[438] All of these cases violate the First Amendment's requirements for public universities. If these faculty are speaking with academic freedom on matters related to their teaching and research, they are speaking on matters of public concern, and there are no countervailing measures by the university—such as impeding job performance or impairing harmony among co-workers—that would outweigh the expressive rights of these faculty.

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[434] *See, e.g.*, John Zittrain (@Zittrain), TWITTER, https://twitter.com/zittrain [https://perma.cc/X3YC-ZTSK].

[435] *See, e.g.*, OFFICE OF PUBLIC SERVICE AT THE UNIVERSITY OF ILLINOIS, A FACULTY GUIDE FOR RELATING PUBLIC SERVICE TO THE PROMOTION AND TENURE REVIEW PROCESS 4–5 (2000), https://provost.illinois.edu/files/2016/08/Communication_9_Attach_3_Faculty_Guide.pdf [https://perma.cc/78FS-QGB7]; *see also* Teresa A. Sullivan, *Higher Education's Role in Ensuring Freedom of Expression as a Human Right*, 55 GONZ. L. REV. 249, 250–51 (2020).

[436] Flaherty, *Saying the Wrong Thing*, *supra* note 33.

[437] Vasquez, *supra* note 42.

[438] Middleton, *supra* note 45.

VI. CONCLUSIONS: HOW TO FOSTER AN EQUITABLE, DIVERSE, AND INCLUSIVE PUBLIC UNIVERSITY THAT EMPHASIZES CIVILITY WHILE RESPECTING OPEN INQUIRY AND THE FIRST AMENDMENT

As discussed above, there are narrow categories of expression on social media that are not protected for students, staff, and faculty, respectively. Public universities can, and at times should, discipline those who engage in expression not protected by the First Amendment[439] and work with law enforcement where such activities violate the criminal law. Likewise, public universities can, and should, enforce professional standards for employees working in official capacities, which is consistent with First Amendment academic freedom afforded to public educational institutions.[440] Furthermore, administrators must adhere to obligations imposed by the Fourteenth Amendment's Equal Protection Clause, which applies to public universities.[441] Even in cases where speech exceeds constitutional protections, though, public universities should tread carefully, not imposing penalties that are so harsh that they create an undue chilling effect on expression.[442] Public universities must also ensure that punishments or required educational activities do not require compelled expression of ideological messages, as that would run afoul of the First Amendment.[443] Finally, protected speech should not be subject to unnecessary investigation, as this can create a chilling effect on expression.[444]

Again, a public university has "sufficient means at its disposal" to accomplish its goals "without adding the First Amendment to the fire."[445] Although public universities can sanction expression on social media that is not protected or is inconsistent with professional standards, they cannot do so simply because they deem it offensive. They cannot punish expression on social media that is otherwise protected by the First Amendment. Public universities need to allow for, and help promote, intellectual growth and the

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[439] CHEMERINSKY & GILLMAN, *supra* note 53, at 143.

[440] *Id.* at 131–32.

[441] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (holding that Title VI applies to only certain racial classifications that violate the Equal Protection Clause of the Fifth Amendment).

[442] *See* Schauer, *supra* note 370, at 696–97 (discussing fear of uncertainty and fallibility deterring individuals from engaging in protected speech-related activity).

[443] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."); Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

[444] *See* Speech First, Inc. v. Schlissel, 939 F.3d 756, 765 (6th Cir. 2019).

[445] R.A.V. v. St. Paul, 505 U.S. 377, 380, 396 (1992).

search for truth, especially among students, but also among staff and faculty.[446] They should also recognize that in a moment of lapsed judgment, someone may post something they quickly regret and wish they had not said. Someone may come to learn that they made an inappropriate statement after listening to someone else explain their point of view on it later. On public university campuses we should be willing to engage with speakers with whom we disagree (not simply try to cancel them), give them the benefit of the doubt, and have constructive conversations when possible; doing so promotes First Amendment values by cultivating our free speech culture. But even more to the point, what one says may contain truth, or it may be a criticism of the university, and that expression should not be punished. As emphasized by the Court in *Healy*, public universities need to protect one's ability "to participate in the intellectual give and take of campus debate."[447]

Nevertheless, public universities should not be idle when students, faculty, or staff speak on social media in ways that are protected but are offensive or inappropriate for some other reason. The Court elaborated on this in *Bakke*:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[448]

With academic freedom, public universities possess many constitutional tools to ensure that they can promote their own values, including those of open inquiry, civility, tolerance, equality, diversity, and protecting members of the campus community who may be disproportionately targeted by invective. Thus, universities can set curricula, create classes, engage in programming, admit students, and hire faculty and staff with these goals in mind. The establishment of departments, programs, and programming can help raise points of view, including lifting up the voices of historically and currently marginalized groups.[449] Furthermore, as explained in *Fisher* (2013), "[t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."[450] This reasoning extends to the hiring of more diverse staff and faculty to help promote

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[446] DOWNS, *supra* note 353, at 31.
[447] Healy v. James, 408 U.S. 169, 181 (1972).
[448] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).
[449] DOWNS, *supra* note 353, at 40–41.
[450] Fisher v. Univ. of Tex. I, 570 U.S. 297, 308 (2013).

intellectual diversity.[451] Curricular choices can, and should, emphasize universities' goals of free inquiry, civil dialogue, equality, diversity, and inclusion.[452] Since some of the most hateful and offensive expression, while protected by the First Amendment, has a more disproportionate impact on some members of the campus community compared to others,[453] universities should take action to combat it within the bounds of the Constitution. Courts are to give "judicial deference" to these decisions "that the University deems integral to its mission" because this is "an academic judgment."[454]

Fundamentally, the purpose of a university is to educate by advancing knowledge and fostering the search for truth.[455] The First Amendment assumes this and permits great reach by public universities in furtherance of this goal, while also safeguarding individual freedom of speech. In addition to required coursework, students, staff, and faculty can be provided with educational activities, including those that relate to encouraging civility and respect and to promoting equality, diversity, and inclusion; this can be either for everyone as a part of new orientation or ongoing continuing education, or it could be in specific cases in response to social media incidents involving unprotected speech. These educational opportunities should do more than train, as they can better promote free inquiry by instead challenging assumptions, teaching one how to think (as opposed to teaching one *what* to think), and acting to transform thinking about complex matters.[456] A specific response could be required if it is a remedy for unprotected expression, and it could be an optional educational opportunity presented for one who engages in offensive but protected expression.[457] Restorative

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[451] Horwitz, *supra* note 383, at 535. *See also Bakke*, 438 U.S. at 312 (emphasizing a university's authority to "to determine for itself on academic grounds who may teach").

[452] *See Bakke*, 438 U.S. at 312 (emphasizing a university's authority to decide "what may be taught" and "how it shall be taught").

[453] *See* MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7–15 (1993) (explaining how hate speech can cause psychological and other harms to people targeted by it, stifle the free exchange of ideas, and be associated with violence).

[454] *Fisher*, 570 U.S. at 310.

[455] WHITTINGTON, *supra* note 352, at 39.

[456] *See* Amna Khalid & Jeffrey Aaron Snyder, *Don't Mistake Training for Education*, INSIDE HIGHER ED. (Apr. 29, 2021), https://www.insidehighered.com/views/2021/04/29/colleges-should-focus-education-more-training-about-dei-issues-opinion [https://perma.cc/SQW2-LVWT] ("Training has its uses. It can even save lives. [Such as with CPR training.] But training is woefully inadequate when it comes to confronting social problems such as poverty, discrimination and racism. These are long-standing, knotty and complex issues that defy ready-made solutions. Any serious effort to address them must start with education, a process for which there are no shortcuts.").

[457] *See, e.g.,* Rittenberg, *Tennessee-Chattanooga Mocs Fire Assistant Football Coach Chris Malone After Racist Tweet*, *supra* note 47 (describing how a school employee lost his job after issuing a racist tweet).

justice practices could likewise be used—either mandated for unprotected expression or presented as an educational option for offensive but protected speech. Thus, instead of trying to expel students or fire staff and faculty, a public university can respond by providing more educational experiences that improve the university community and its members. Even more proactively, universities can ensure resources for groups that are most likely to be targeted by offensive expression, especially expression based on race, sex, sexual orientation, religion, age, disability, and other immutable characteristics. This can be done most notably by teaching students, faculty, and staff about their own First Amendment rights and how to use them effectively to engage in debate, respond to offensive expression, and call for policy change. In this vein, administrators—as well as faculty, other staff, and students—can use their freedom of expression to speak out against offensive expression and educate the larger community. Those who are free speech advocates should be especially forthright in using their own freedom of speech to denounce hateful expression.[458] They can also use their own expressive associational rights to decide not to associate privately with persons who use offensive speech or communicate abhorrent ideas, or they can engage in discourse with those posting such messages on social media, explaining why they think it is inappropriate or wrong. Indeed, members of the university community can employ their First Amendment rights to civilly promote equality, diversity, and inclusivity while encouraging free inquiry.

Of course, part of the reason why universities must strictly adhere to the requirements of the First Amendment is to avoid viewpoint discrimination in expression made in one's capacity as a private citizen. Not all expression on social media investigated and punished by public universities has been uncivil, racist, sexist, or anti-LGBTQ speech. As examples in Part I demonstrate, some expression sanctioned by universities includes online critiques *in favor* of equality, criticizing public universities for not doing enough to promote equality,[459] and others were critical of universities for not doing enough to protect the health and safety of the campus community.[460] These examples demonstrate the danger of thinking a university should have the power to censor the expression of ideas, particularly on matters of public affairs that are critical of the functioning of the university. This viewpoint neutral principle protecting hateful speech ensures that students, staff, and faculty who use social media to organize a pro-equality, anti-racist, social justice rally on campus—or use social media to express their ideas about such topics—cannot be punished by administrators or boards of governors who disapprove. It protects persons

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[458] SUZANNE NOSSEL, DARE TO SPEAK: DEFENDING FREE SPEECH FOR ALL 52 (2020).

[459] *See* Middleton, *supra* note 45 (describing how a professor was fired after calling out his university for what he characterized as racist and catering to "racist donors").

[460] *See* Cripe & Dahle, *supra* note 16 (blocking a student from campus social media accounts after criticizing a lack of exits at the campus library); Vasquez, *supra* note 42 (firing a faculty member after criticizing the campus' reopening plan during the COVID-19 pandemic).

espousing progressive views or conservative views; it guarantees members of a majority religion, members of minority religions, agnostics, and atheists the freedom to speak their minds. Vigorous protection of the freedom of speech was key to the success of the civil rights movement of the 1950s and 1960s,[461] and it ensures that advocacy in support of social movements of all types on campus is protected by the First Amendment today. Public universities should not view the First Amendment as a straitjacket, but instead as a form of empowerment for the university and for members of the university community to communicate their own messages.

As reasoned by the Court in *Alvarez*, the First Amendment assumes that the normal solution for expression one finds disagreeable is counter-speech: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[462] Even more to the point, the Court in *Cohen* proclaimed the following:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.[463]

Particularly at a public university, the protection of different points of view and fostering the expression of them is of paramount importance. Public universities can adhere to the freedom of expression while also meeting their other goals. The First Amendment requires nothing less.

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[461] TIMOTHY C. SHIELL, AFRICAN AMERICANS AND THE FIRST AMENDMENT ix (2019).
[462] United States v. Alvarez, 567 U.S. 709, 727 (2012).
[463] Cohen v. California, 403 U.S. 15, 24–25 (1971).