

THE TWEET HEREAFTER:
SOCIAL MEDIA AND THE FREE SPEECH RIGHTS OF
KANSAS PUBLIC UNIVERSITY EMPLOYEES

*Richard E. Levy**

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.¹

I. INTRODUCTION

With these words, tweeted in response to the Navy Yard shooting in Washington D.C. that killed 13 people on September 16, 2013,² University of Kansas Journalism Professor David Guth touched off a firestorm of controversy.³ The gun-rights lobby, “right-wing” media outlets, and conservative politicians picked up on the tweet and characterized it as wishing death upon the children of National Rifle Association members.⁴ It was retweeted, posted and reposted on line; Guth was condemned in the blogosphere and pilloried on the airwaves. The University and Guth were flooded with angry emails and phone calls, concerns about disruption and

* J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law. In the interests of full disclosure, I want to acknowledge my involvement with this process as it unfolded, which included providing analysis and advice to the Board of Regents Workgroup, participation in discussions among faculty and administrators at the University of Kansas, and presentations on the issues to various audiences. Throughout that process and in this article, the views I express are mine alone, and do not represent the views of the University of Kansas, the

1. As quoted in various news accounts. *See, e.g.,* Valerie Strauss, *Is professor's #NRA tweet a firing offense or protected speech? University of Kansas academic was put on leave. Here's why.*, WASH. POST, Sept. 29, 2013, available at 2013 WLNR 24354513.

2. *See* Michael D. Shear & Michael S. Schmidt, *Gunman and 12 Victims Killed in Shooting at D.C. Navy Yard*, N.Y. TIMES, Sept. 16, 2013, available at http://www.nytimes.com/2013/09/17/us/shooting-reported-at-washington-navy-yard.html?pagewanted=all&_r=0. Guth's tweet appeared later that day.

3. *See, e.g.,* Roxana Hegeman, *KU professor takes heat over Twitter comment*, ASSOCIATED PRESS, Sept. 20, 2013, available at <http://bigstory.ap.org/article/ku-professor-takes-heat-over-twitter-comment>; Christopher Lamb, *KU Prof's Tweet Attacking NRA Was Misguided, but Response to the Tweet Was Offensive*, HUFFINGTON POST (Sept. 22, 2013), http://www.huffingtonpost.com/christopher-lamb/kansas-professor-nra-tweet_b_3972295; Strauss, *supra* note 1.

4. *See, e.g.,* John Hawkins, *Journalism Teacher Calls For Children of NRA Members To Be Murdered*, RIGHT WING NEWS (Sept. 20, 2013), available at 2013 WLNR 23552410.

security mounted, and there were public demands that Guth be fired, including threats of budgetary retaliation from some legislators.⁵

Both the University and the Kansas Board of Regents took action in response to the swirling controversy. Citing potential disruption of Guth's classes and University operations, the Chancellor announced that Guth had been placed on administrative leave and his classes were being taught by someone else, a move that was criticized by some as a violation of his rights, but which Guth apparently accepted as necessary.⁶ The Board of Regents response came in the form of a new "Social Media Policy" that authorized the chief executive officer of a state university to take disciplinary action, including the termination of tenured faculty, against employees who made "improper" use of social media.⁷

5. See generally Brad Cooper, *KU case shows how backlash from professors' remarks can inflame politicians*, KAN. CITY STAR, Sept. 28, 2013, available at <http://www.kansascity.com/news/local/article328451/KU-case-shows-how-backlash-from-professors'-remarks-can-inflame-politicians.html> (discussing increasing political pressure placed on universities when faculty make controversial statements).

6. See Scott Rothschild, *KU journalism professor Guth placed on leave as school reviews comment he made on Twitter on shootings*, LAWRENCE J.-WORLD, Sept. 20, 2013, available at <http://www2.ljworld.com/news/2013/sep/20/ku-journalism-professor-guth-placed-leave-school-r/> ("In an email to the Lawrence Journal-World on Friday, Guth said he had met earlier with university officials and agreed to take administrative leave 'in light of the abusive email threats I and others have received.'").

7. As further discussed *infra* Part IV.B.1, the original policy, adopted in December 2013, was substantially revised in May 2014 in response to widespread criticism of the original policy and the recommendations of a Workgroup appointed by the Board of Regents. See *infra* notes 180–208 and accompanying text (describing revision of the Original Policy). To understand fully the issues raised by the policy, it is important to track that history with some care. For the convenience of readers and to facilitate the discussion throughout this article, I have gathered four versions of the policy together in an appendix at the end of the article: (A) the "Original Policy"; (B) the "Workgroup Proposal"; (C) the "Initial Governance Committee Draft"; and (D) the "Final Policy." Citations for each version of the policy are provided here. Discussion of the policy throughout the remainder of the article will be referenced using these terms and without further citation. The Original Policy was included in the Board of Regents Policy Manual's provisions on "Suspensions, Terminations and Dismissal." See BOARD OF REGENTS POLICY MANUAL II.C.6.b, available at http://www.kansasregents.org/board_policy_manual [hereinafter cited as Policy Manual]. Because the Board adopted the Final Policy, however, the Original Policy is no longer included in the Policy Manual. A copy of the Original Policy is available from various sources, including the Board of Regents website, where it was included in the official agenda for the Board of Regents meeting on May 14-15, 2014, at which the Final Policy was approved. See *Meeting Agenda for May 14-15, 2014*, KAN. BD. OF REGENTS, at 37–38, (May 15, 2014), <http://www.kansasregents.org/resources/PDF/2969-AgendaMay14-15,2014FinalReader.pdf>. The Workgroup Proposal was contained in a report it submitted to the Board of Regents that is available online on various websites. See Memorandum from the Soc. Media Workgroup to Kan. Bd. Of Regents 2–3 (Apr. 8, 2014), available at http://www.insidehighered.com/sites/default/server_files/files/social-media-final-report.pdf; and <http://www2.ljworld.com/documents/2014/apr/08/social-media-report/> [hereinafter cited as Workgroup Report]. The Workgroup Report was considered by the Board's Governance Committee, which posted the Initial Governance Committee Draft for public comment. See Press Release, Kan. Bd. Of Regents, Kansas Board of Regents to Consider Substantial Changes to Social Media Policy (Apr. 9, 2014),

These events provide a useful case study of the challenges presented when public university employees express themselves in controversial ways using social media. Social media emphasizes immediacy, brevity, and informality, so people typically speak and write casually—as if they were talking only to their friends. But statements made using social media are not private and have a persistence that stupid statements in casual conversation lack. What people say or write—like the Guth tweet—can be copied, forwarded, and posted, becoming very public very quickly, until a few ill-chosen words have blown up into a major controversy.⁸

Emerging technologies have made it easy to use controversy to silence opposing viewpoints and it has become an all too common tactic used by both the left and the right. In First Amendment terms, it is the modern manifestation of the “heckler’s veto,” in which the audience’s hostile reaction becomes a justification for silencing the speaker. Traditionally, the heckler’s veto arises when authorities use breach of peace laws to stop or punish a speaker because a hostile crowd may or has become unruly.⁹ In the modern era, the audience is online or tuned in (not gathered around), and the hostile

available at http://www.kansasregents.org/kansas_board_of_regents_to_consider_substantial_changes_to_social_media_policyhttp://www.kansasregents.org/kansas_board_of_regents_to_consider_substantial_changes_to_social_media_policy. Although the release includes a link to the proposed revisions, those revisions are no longer included on the linked site. The Initial Governance Committee Draft is no longer available, but a copy is on file with the author. For the official version of the Final Policy, see Policy Manual *supra* II.F.6.

8. Another controversy sparked by a university professor’s use of social media involves Steven Salaita, whose offer of employment was rescinded at the last minute by the University of Illinois on the basis of incendiary tweets he made concerning Israeli actions in Gaza. See Peter Schmidt, *What’s Next in the Steven Salaita Dispute?*, CHRON. HIGHER EDUC., Sept. 12, 2014, *available at* <http://chronicle.com/article/What-s-Next-in-the-Steven/148773/>. In addition to First Amendment and academic freedom issues, the Salaita case also presents the issue of whether there was as yet a contract between the University and Salaita. These are not isolated incidents. Most readers will be able to think of several other examples of public figures whose ill-chosen words produced public reactions that forced employers or sponsors to punish or disavow them. For the average member of a university faculty or staff, it may seem unlikely that something we say or tweet might get this sort of national attention, but even obscure academics may be tempting targets for critics of the academy. See Cooper, *supra* note 5.

9. See *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (invalidating ordinance allowing fee for parade or meetings to vary based on controversy created by speech); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965) (holding that conviction for breach of peace could not be sustained for peaceful civil rights demonstration that attracted a hostile crowd, necessitating police protection); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (overturning conviction for disorderly conduct based on audience reaction); see also *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (concluding that federal indecency statute was overbroad in part because “[i]t would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech”). But see *Feiner v. New York*, 340 U.S. 315, 320–21 (1951) (“We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. . . . [but] when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are [not] powerless to prevent a breach of the peace.”).

audience reaction is not disorder or violence, but rather threats of economic or political retaliation against employers or others who do not take action against the speaker. The circumstances are different, but the essential First Amendment problem is the same.

The heckler's veto is a special concern for universities because an atmosphere of free inquiry and open debate is central to their teaching and research mission.¹⁰ When academics say or write ideas that challenge conventions—when they “think outside the box”—they are apt to provoke an outraged response.¹¹ The principle of academic freedom developed for precisely this reason; it creates an environment in which people are free to think and speak outrageous things without fear of retribution.¹² Most of these outrageous thoughts and statements are quickly rejected in the marketplace of ideas, but some of them (like the idea that the earth is not the center of the universe) advance our thinking in critical ways. On the other hand, when faculty members say outrageous things, the public response may have very real consequences for a university, including the possibility that classes will be disrupted, legislators will retaliate, or fundraising efforts will be damaged.¹³

In balancing these competing considerations, moreover, public universities must comply with the First Amendment, which limits their ability to take adverse employment actions on the basis of their employees' speech.¹⁴ Although academic freedom and freedom of speech share similar values and premises, they have different origins, functions, and status.¹⁵ Academic

10. See, e.g., AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, available at <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [hereinafter AAUP Statement]. Thus, for example, protection of academic freedom is a condition for university accreditation. See *Policy Title: Criteria for Accreditation*, HIGHER LEARNING COMM'N, <http://policy.ncahlc.org/Policies/criteria-for-accreditation.html> (last revised June 2014). While principles of academic freedom apply to all universities, only public universities are state actors subject to the protections of the First Amendment. See *infra* note 27 and accompanying text.

11. See Thomas Sullivan & Lawrence White, *For Faculty Free Speech, the Tide Is Turning*, CHRON. HIGHER EDUC., Sept. 13, 2013, available at <http://chronicle.com/article/For-Faculty-Free-Speech-the/141951/> (“Faculty members sometimes say intemperate things. Their tendency to express themselves forcefully and, on occasion, provocatively is one of the defining characteristics of university culture.”).

12. See Ailsa Chang, Comment, *Resuscitating the Constitutional ‘Theory’ of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915 (2001).

13. Another prominent example is Ward Churchill, a tenured faculty member at the University of Colorado, who published an inflammatory essay concerning 9/11 and was eventually fired for plagiarism. See *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986 (Colo. 2012) (upholding termination for cause). A critical feature of *Churchill* was that the university initially declined to take action on the basis of the essay, but the controversy prompted an investigation of Professor Churchill's work, which eventually led to plagiarism charges that provided the basis for dismissal. *Id.*

14. See *generally* *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't. of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008) (upholding treasury regulations tightening restrictions on educational programs offered in Cuba against challenges based on free speech and academic freedom).

15. See *generally* *Urofsky v. Gilmore*, 216 F.3d 401, 409–15 (4th Cir. 2000) (rejecting

freedom was asserted in the Renaissance to protect universities from interference by religious and governmental officials and institutions so as to create a realm of free and open inquiry.¹⁶ Over time, it was also understood as a protection from the university for individual faculty members and students. Thus, for example, the American Association of University Professors (AAUP) Statement on Tenure and Academic Freedom incorporates this individual rights conception of academic freedom.¹⁷ A number of Supreme Court opinions, many of which arose in the McCarthy Era, suggest that academic freedom is protected by the First Amendment.¹⁸ Nonetheless, the cases fall short of incorporating the principle of academic freedom, as defined by AAUP and academic customs, into the First Amendment.¹⁹

Thus, free speech rights and academic freedom overlap, but the two concepts are not congruent. On the one hand, the First Amendment protects employees even when their speech, like the Guth tweet, is unrelated to academic activities like teaching and scholarship and might therefore be outside the scope of academic freedom.²⁰ On the other hand, academic freedom offers protections that go beyond the requirements of the First Amendment. While a public university should, as a matter of policy, protect academic freedom even when it is not legally required to do so,²¹ from a

claim that state law prohibiting employees from accessing indecent material on the internet violated constitutionally protected right of academic freedom).

16. See generally RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955) (discussing how the concept of academic freedom originated in the German universities, where it protected the freedom to teach and conduct research without outside interference from the government or the church); Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, in *ACADEMIC FREEDOM: THE SCHOLAR'S PLACE IN MODERN SOCIETY* 431, 431–46 (Hans W. Baade & Robinson O. Everett eds., 1964). For this reason, it is sometimes suggested that academic freedom protects only the university and not the individual faculty member. See *infra* note 131.

17. See AAUP statement, *supra* note 10.

18. See, e.g., *Bd. of Regents of University of Wis. Sys. v. Southworth*, 529 U.S. 217, 237–39 (2000) (concurring opinion); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

19. The concept of tenure is closely related to academic freedom, as reflected in the AAUP Statement, *supra* note 10, which combines the two principles. One essential function of tenure is to protect academic freedom. As a legal matter, however, tenure is a matter of contract and applies even if academic freedom and freedom of speech is not implicated. This article does not address issues of tenure that might be raised by disciplinary action based on the use of social media.

20. The extent to which this sort of speech is within the scope of academic freedom is unclear. See MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 127–48 (2009) (arguing that academic freedom protects “extramural” speech on matters of public concern because such protection is necessary to provide an environment of free and open inquiry).

21. Thus, for example, private universities protect academic freedom even though the First Amendment does not apply to them. See *infra* note 27 and accompanying text (discussing state action requirement).

constitutional perspective, it is the requirements of the First Amendment that matter.

This article analyzes the First Amendment issues raised by the University's and Regents' responses to the Guth tweet. It describes the legal principles and their application to the case in the hope of promoting informed discussion of these issues.²² Part II provides a brief overview of First Amendment doctrine to lay foundations for the analysis and frame the issues raised by (1) the University's decision to place Guth on administrative leave and (2) the Board of Regents adoption of a Social Media Policy with a disciplinary component.

Part III focuses on the University's decision to place Guth on administrative leave, which is a paradigmatic case for the application of the *Pickering* balancing test for adverse employment action based on a public employee's private speech on matters of public concern.²³ Part II concludes that a constitutional challenge to the University's decision to place Guth on administrative leave is unlikely to be successful even if such a challenge has not been waived and the decision qualifies as adverse employment action, because the burden on free speech rights would not be regarded as severe and the University could likely document substantial disruption as a result of the tweet.

Part IV analyzes the Board of Regents Social Media Policy, in both its original and final form. It concludes that the original policy was vulnerable to a constitutional challenge because its definition of incitement was overbroad, because it did not recognize that academic speech is likely protected by the First Amendment even when it is made pursuant to official duties, and because it improperly used the *Pickering* balancing test as a general rule restricting speech. Part III also concludes that while revisions to the social media policy corrected most of these constitutional deficiencies, they introduced a fundamental ambiguity as to the scope and application of the policy, which is therefore likely unconstitutional unless it is construed narrowly.

Finally, Part V is a concluding section that considers some of the broader implications of the incident. First, it assesses the impact of the social media policy on the political context of controversial speech by university employees, concluding that the policy will make it more difficult for universities in the Regents system to protect faculty and staff who make controversial statements in the future. Second, it draws a connection between the protection of academic speech by public university employees and the Supreme Court's recent decisions on government funded speech, concluding that the rationale of those cases supports the protection of academic speech made pursuant to

22. I do not take a position on the content or civility of the Guth tweet or the wisdom, as a policy matter, of either the University's or Regents' responses.

23. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). See *infra* notes 87–90 and accompanying text (discussing *Pickering* and its application in lower courts).

official duties. Third, it highlights the difficulties of communication between the world of academia and the world of politics, as well as the need for academics to do a better job of communicating their core values.

II. OVERVIEW OF FIRST AMENDMENT CONCEPTS

The First Amendment specifies that “Congress shall make no law . . . abridging the freedom of speech”²⁴ This seemingly simple proposition has produced endless difficulties as the courts have struggled to balance the protection of free speech against legitimate and important governmental interests in protecting the health, safety, and welfare of society. Over the years, the Supreme Court’s free speech jurisprudence has evolved into a complex set of doctrinal principles, concepts, and tests that depend on the nature and extent of the burdens on speech, the kinds of speech involved, the context in which the speech is made, and various other considerations. Understanding the issues raised by the Guth incident must begin with an understanding of basic First Amendment principles and the doctrine that applies to public employees.²⁵

A. General Principles

This section discusses several underlying principles of First Amendment doctrine. First, freedom of speech is a fundamental right that limits state action—including the actions of the University of Kansas and the Kansas Board of Regents. Second, restrictions based on the content of speech are contrary to core First Amendment values and are constitutional only in narrow circumstances. Third, the government may target some categories of speech because of its “proscribable content,” but such regulations must be carefully drawn to avoid constitutional problems. Fourth, even if speech is proscribable, laws regulating it may not be substantially overbroad or unconstitutionally vague, because overbroad or vague laws “chill” protected speech. An overview of these principles provides the necessary foundation to focus more specifically on the free speech rights of public employees.

1. Speech as a Fundamental Right that Limits State Action

Although it is phrased as an absolute prohibition on Congress, in practice the First Amendment applies broadly to any government institution (but not to private parties) and its prohibitions are not treated as absolute. Of particular relevance for the Guth tweet, the First Amendment applies to the states because it has been “incorporated” into the “liberty” protected by the Due Process Clause of the Fourteenth Amendment, which prohibits states from

24. U.S. CONST. amend. I.

25. The overview that follows considers only those basic concepts and specific doctrines that are essential for understanding the issues raised in the Guth case. Some important doctrines, such as the rule against prior restraints or the public forum doctrine, are omitted because they are not essential for the analysis.

depriving any person of “life, *liberty*, or property” without due process of law.²⁶ For this purpose, a state includes any political subdivision, agency, or public officer, including the University of Kansas and the Kansas Board of Regents.²⁷

The language of the First Amendment seems absolute, but the government may restrict speech in some circumstances. As Justice Oliver Wendell Holmes famously proclaimed, “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”²⁸ Over the years, the Supreme Court has addressed many different kinds of government regulations and policies, developing an elaborate doctrine that involves various levels of ends-means scrutiny,²⁹ recognizes a number of categories of speech that may be regulated for some purposes, and uses special rules that allow facial challenges to laws that are overbroad or vague.³⁰

This doctrinal edifice starts with the principle that freedom of speech is a fundamental right entitled to the highest degree of constitutional protection.³¹ As explained by Justices Holmes and Brandeis in a series of influential concurring and dissenting opinions, freedom of speech is essential to the search for truth and to democratic self-government.³² It is essential to the search for truth because the truth is most likely to emerge from the “marketplace of ideas,” in which opposing theories compete for acceptance.³³ Many widely held and popular beliefs prove false over time, and when government attempts to prescribe social orthodoxy it impedes the search for truth and the

26. See *Gitlow v. New York*, 268 U.S. 652 (1925).

27. Because the Fourteenth Amendment applies only to states, under the statue action doctrine, private colleges and universities are not subject to First Amendment constraints. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (rejecting private school teacher’s procedural due process claim because private school was not a state actor for purposes of the Fourteenth Amendment).

28. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

29. Ends-means scrutiny refers to the judicial examination of the purposes of a law or other state action (the ends) and the extent to which the law or other state action furthers those purposes. Ordinarily, ends-means scrutiny is very deferential under the baseline “rational basis” test that applies unless the law or other state action burdens a fundamental right or interferes with other fundamental constitutional values. Under the rational basis test, a law will be upheld if (1) the ends are legitimate and (2) the means are reasonably related to the ends. In applying the test, the courts consider any plausible purpose for the law and it is enough if the state had a “rational basis” for thinking that the law furthers that purpose.

30. For further elaboration of First Amendment doctrine, see, e.g., RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH (2014).

31. See *Gitlow*, 268 U.S. at 666 (1925) (“For present purposes we 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.”).

32. See *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., joined by Holmes, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., joined by Brandeis, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

33. See *Abrams*, 250 U.S. at 630.

advancement of knowledge.³⁴ Free speech is essential to democracy because self-government requires an informed citizenry, and an informed citizenry requires that people must be free to criticize the government.³⁵ Of course, those in power have a natural incentive to use the law to suppress criticism and dissent.

2. Content-Based and Content-Neutral Restrictions on Speech

The doctrine draws an essential distinction between “content-based” restrictions that turn on what the speaker says and “content-neutral” restrictions that do not. Although both kinds of restrictions limit speech, restrictions that turn on what the speaker says are more threatening to First Amendment values than restrictions that do not. Accordingly, although both kinds of restrictions on speech are subject to heightened ends-means scrutiny,³⁶ content-based restrictions are subject to “strict” scrutiny, while content-neutral restrictions are subject to “intermediate” scrutiny.

Content-based restrictions on speech are subject to strict scrutiny because they are especially likely to distort the marketplace of ideas, suppress unpopular opinions, and stifle democracy.³⁷ Under strict scrutiny, the state must prove that a restriction on speech serves a “compelling governmental interest” (the ends) and that the restriction (the means) is “necessary” or “narrowly tailored” to meet that interest.³⁸ To satisfy the ends component of this test, the interest must not only be especially important, but also well documented.³⁹ To satisfy the means component, a regulation of speech must meet two requirements. First, a regulation is not necessary if there is a “less restrictive alternative”; i.e., a means of furthering the government’s purpose that is less burdensome on speech.⁴⁰ Second, a regulation is not narrowly tailored if it is “overinclusive” or “underinclusive.” A regulation is

34. This rationale has an obvious connection to the rationale for academic freedom, which helps to explain why academic freedom is said to receive special First Amendment Protection. See *supra* note 20 and accompanying text.

35. See *Whitney*, 274 U.S. at 377.

36. Heightened ends-means scrutiny is used as a generic term that comprises various levels of ends-means scrutiny, including strict and intermediate scrutiny, that are more rigorous than the baseline “rational basis” test. See *supra* note 29.

37. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (invalidating regulation of violent video games).

38. See, e.g., *id.* at 2738 (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”).

39. See, e.g., *id.* at 2738–39 (rejecting state’s justification for restricting minors access to violent video games because the evidence it offered of a link between those game and harm to minors was not “compelling”).

40. Ordinarily, a regulation will fail the means test even if the alternative means is not proven or may be less effective. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”).

overinclusive if it applies to some speech that does not cause the harm the regulation seeks to prevent.⁴¹ A regulation is underinclusive if it does not apply to some speech that causes the harm the regulation seeks to prevent.⁴² Although strict scrutiny is nearly always “fatal in fact,”⁴³ some content-based laws have survived it.⁴⁴

A content-neutral restriction typically involves regulation of the “time, place, or manner” of speech (e.g., a noise ordinance)⁴⁵ or regulation of expressive conduct (e.g., draft card burning).⁴⁶ Because they apply without regard to what is said, content neutral restrictions are less likely to target particular viewpoints, distort the marketplace of ideas, or suppress dissent, but they do impose burdens on speech and (as the draft card example suggests) can be drawn in ways that effectively target some speakers.⁴⁷ Accordingly, content-neutral restrictions receive heightened scrutiny and must serve “important” governmental interests that are unrelated to the suppression of ideas and may not restrict more speech than necessary to meet their purposes.⁴⁸

41. See, e.g., *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991) (invalidating New York “Son of Sam Law” requiring that income from works by perpetrator describing crime be deposited in escrow in part because it was overinclusive as to the state’s asserted purposes).

42. See *Brown*, 131 S. Ct. at 2740 (concluding that California regulation of violent video games was underinclusive because state did not regulate other forms of media violence to which children are exposed).

43. In a famous law review article, Professor Gerald Gunther observed that strict scrutiny was strict in theory but fatal in fact. 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, 18–20 (1972).

44. See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding ban on material support for terrorist organizations as applied to speech activities); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding restriction on election-day campaigning near polling places); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding limits on campaign contributions to candidates, but invalidating limits on independent expenditures); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (conducting empirical analysis and concluding that “[o]verall, 30 percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld”).

45. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (applying intermediate scrutiny to regulation of sound amplification for outdoor concerts); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (applying intermediate scrutiny to restriction on camping in public park as applied to group seeking to sleep in park as a means of protest).

46. See, e.g., *United States v. O’Brien*, 391 U.S. 367 (1968) (applying intermediate scrutiny to law prohibiting mutilation of draft cards as applied to individual who burned card as a means of protest).

47. In *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014), for example, the Court unanimously invalidated a Massachusetts law creating a buffer zone around abortion clinics. The majority reasoned that the law was a content neutral place restriction and applied intermediate strict scrutiny, concluding that the law burdened substantially more speech than necessary to accomplish the government’s objectives. Four concurring Justices, however, concluded that the purpose and effect of the law was to target anti-abortion protesters and accordingly treated the law as content-based. See *id.* at 2541–49 (Scalia, J., joined by Kennedy, J., and Thomas, J., concurring); *id.* at 2549–50 (Alito, J., concurring).

48. See *Clark*, 468 U.S. at 293 (“Expression, whether oral or written or symbolized by

This intermediate form of scrutiny still requires the government to establish the importance of its purposes and less restrictive alternatives and over or underinclusiveness may be a problem, but this test is easier to satisfy than strict scrutiny.

In the context of the Guth tweet, both the University's decision to place Guth on administrative leave and the Board of Regent's Social Media Policy turn on the content of speech. Even if the University did not take action based on its own objections to what Guth said and was instead responding to the threat of disruption and student concerns about security, Guth was placed on administrative leave because of the content of his speech. The Supreme Court has expressly stated that "[l]isteners' reaction to speech is not a content-neutral basis for regulation."⁴⁹ Likewise, the Regents' policy is content-based because whether a use of social media is "improper" depends on what is being said.⁵⁰

Although the content-based character of the University's and Regents' actions would ordinarily trigger strict scrutiny, special rules apply when the government acts as an employer (rather than a regulator).⁵¹ Nonetheless, the idea that content-based restrictions are especially inconsistent with First Amendment values is pervasive in the doctrine, and the Social Media Policy would have to overcome the strong presumption against such regulations. Before discussing the rules that apply to public employee speech, however, it is necessary to discuss some other basic concepts that provide essential context.

3. Low-Value, Unprotected, or Proscribable Speech

Some forms of content-based regulation are not subject to strict scrutiny because they restrict "low-value," "unprotected," or "proscribable" speech.⁵² As the Supreme Court proclaimed in *Chaplinsky v. New Hampshire*, there are certain "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

49. *Forsyth Cnty., Georgia. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). *Forsyth* and other audience reaction cases treating state action as content based would seem to foreclose any argument that the University's decision was content neutral because it was addressing the "secondary effects" of Guth's tweet. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (applying intermediate scrutiny to zoning of adult business); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (same); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (analogizing regulation of proscribable speech to content neutral regulations of conduct and time, place, or manner restrictions).

50. *See* Final Policy app. II.F.6.b.

51. *See infra* part II.B.

52. These three terms represent different ways of referring to the same categories of speech. As reflected in the discussion that follows, the choice of terms is fraught with doctrinal implications. To avoid any such implications, I use these terms collectively.

problem.”⁵³ *Chaplinsky* explained that these classes of speech, which included “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words,” “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁵⁴

This language implies that these classes of speech are unprotected because they are outside the scope of the First Amendment altogether, but the doctrine has shifted in two important ways since *Chaplinsky*. First, throughout the 1960s and 1970s, the Court has extended some protections to these types of speech, although it continued to treat them as having low value. The Court defined the traditional categories narrowly (e.g., obscenity⁵⁵) and rejected some of them altogether (e.g., profanity⁵⁶). It used the overbreadth and vagueness doctrine to strike down laws addressing other categories of low-value speech, such as the fighting words doctrine.⁵⁷ And the Court provided some protection to previously unprotected speech, such as defamation⁵⁸ and commercial speech.⁵⁹

Second, in *R.A.V. v. St. Paul*,⁶⁰ the Court appeared to reorient the entire *Chaplinsky* line of cases. Acknowledging that it had in the past referred to these categories of speech as “unprotected,” the Court invalidated a municipal hate speech ordinance even though it applied only to “fighting words.”⁶¹ In reaching this result, *R.A.V.* indicated that this sort of speech is not “invisible” to the First Amendment, but rather that it may be restricted because there are

53. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

54. *Id.* at 572.

55. *Miller v. California*, 413 U.S. 15 (1973).

56. *Cohen v. California*, 403 U.S. 15 (1971).

57. *See, e.g., Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (invalidating breach of peace statute on vagueness and overbreadth grounds); *Gooding v. Wilson*, 405 U.S. 518 (1972) (same).

58. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (concluding that First Amendment protected against liability for defamation of public figure unless the plaintiff could show actual malice); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (applying lesser First Amendment protections for alleged defamation of non-public figure in speech on matters of public concern); *cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (holding that First Amendment prevented assertion of intentional infliction of emotional distress claim against funeral protesters).

59. Although commercial speech was not mentioned in *Chaplinsky*, it was long regarded as unprotected. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). In *Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court held that truthful advertising receives some First Amendment protection. In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980), the Court adopted a form of intermediate scrutiny as the test for commercial speech regulations, although that approach is currently contested within the Court. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (decision by fragmented Court invalidating ban on price advertising for alcoholic beverages); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011) (downplaying reliance on *Central Hudson* test).

60. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

61. *Id.* The ordinance prohibiting face-to-face use of epithets based on race, ethnicity, gender, and the like.

good reasons, unrelated to the suppression of ideas, for regulating it.⁶² Thus, these classes of speech are “proscribable” for some reasons, but they are still protected against other kinds of content-based regulation.⁶³

Notwithstanding decisions extending protection to some types of previously unprotected speech and uncertainty about the underlying rationale for this doctrine, the Court continues to recognize certain categories of speech as subject to regulation under *Chaplinsky*. This catalog of unprotected, low-value, or proscribable speech is stated in various ways depending on the context and has been modified to reflect some of the doctrinal changes discussed above. As stated in *United States v. Alvarez*,⁶⁴ content-based restrictions on proscribable speech are permissible in the following categories:

[1] advocacy intended, and likely, to incite imminent lawless action; [2] obscenity; [3] defamation; [4] speech integral to criminal conduct; [5] so-called “fighting words”; [6] child pornography; [7] fraud; [8] true threats; and [9] speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.⁶⁵

None of these categories would appear to apply to the Guth tweet, which— notwithstanding efforts to characterize it in extreme terms—would not rise to the level of an incitement, fighting words, or true threats. As will be discussed more fully in Part III, the Board of Regents Social Media Policy addresses some uses of social media that might qualify as proscribable speech.

4. Overbreadth and Vagueness

A special concern in the area of First Amendment doctrine is the possibility that government restrictions on speech will have a “chilling” effect, in the sense that people who have a right to speak will self-censor rather than risk prosecution or liability.⁶⁶ One response to this concern has been to allow

62. *Id.* at 383–84.

63. The extent to which the *R.A.V.* approach is transforming the doctrine in other contexts remains unclear. In many areas, the traditional approach to unprotected or low value speech remains dominant, but some Justices have taken a similar approach to commercial speech, rejecting the *Central Hudson Gas* test and arguing that commercial speech may only be regulated if it is false or misleading. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575–77 (2001) (Thomas, J., concurring) (relying on *R.A.V.* to argue that power to proscribe false or misleading commercial speech does not include power to regulate content of commercial speech for other reasons).

64. *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (invalidating Stolen Valor Act, making false claims of military honors a federal crime).

65. *Id.* at 2544 (citations omitted and bracketed numbers added). This list reflects some of the underlying tensions concerning the doctrine in this area. For example, the Court in *Alvarez* referenced “fraud” rather than commercial speech. See *supra* notes 59, 63.

66. See, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“When speech is involved, rigorous adherence to [the requirements of the vagueness doctrine] is necessary to ensure that ambiguity does not chill protected speech.”); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (“The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”).

facial challenges to laws that are overbroad or vague.⁶⁷ Ordinarily, a party whose conduct may be prohibited has no standing to argue that a law is unconstitutional as applied to someone else's conduct. In the First Amendment context, however, the courts may permit a party whose speech is unprotected and clearly prohibited to argue that the law is invalid "on its face" because it applies to a substantial amount of protected speech; i.e., it is "overbroad," or because it is impermissibly vague as applied to other people's speech.⁶⁸

A law is overbroad even though it targets unprotected or proscribable speech if the law also restricts a substantial amount of protected speech.⁶⁹ A facial challenge is permitted because "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas."⁷⁰ Nonetheless, the Court is reluctant to invalidate a law on its face unless the law is "substantially" overbroad, both in an absolute sense (i.e., it prohibits a lot of protected speech), and in a relative sense (i.e., in proportion to the unprotected speech it prohibits).⁷¹ Thus, facial challenges remain the exception and the preferred approach is to examine particular applications of the law—upholding the application of the law to unprotected speech and invalidating the application to protected speech.

Under the "void for vagueness" doctrine, due process requires that people be given fair notice of what conduct is permitted and what is prohibited and that laws contain standards that protect against arbitrary and discriminatory enforcement.⁷² This principle has special force in the context of free speech because people will steer clear of potential violations and because vague rules may be enforced in a discriminatory manner that targets unpopular ideas.⁷³ Under the vagueness doctrine, any policy regulating the use of social media

67. See *Kolander v. Lawson*, 461 U.S. 352, 358 & n.8 (1983) (analogizing vagueness and overbreadth doctrines for purposes of this point).

68. *Id.*

69. Although the two concepts are closely related and often apply on the same facts, the overbreadth doctrine should not be confused with the concept of overinclusiveness. See *supra* note 42 and accompanying text. From a doctrinal perspective, overbreadth doctrine arises in connection with the regulation of unprotected, low value, or proscribable speech, while overinclusiveness is pertinent to the application of strict or intermediate scrutiny of restrictions on protected speech.

70. *United States v. Williams*, 553 U.S. 285, 292 (2008) (rejecting overbreadth and vagueness challenges to statute prohibiting pandering of child pornography).

71. *Id.*

72. See, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.' ") (quoting *Williams*, 553 U.S. at 304).

73. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

must clearly define what speech is prohibited so as to provide fair notice and prevent discriminatory enforcement.

In practice, certain types of laws are more likely to be unconstitutionally vague. First, laws that depend on the subjective perceptions of someone other than the speaker are often void for vagueness because it is impossible for a speaker to know in advance how another person will react.⁷⁴ Under the original Social Media Policy, for example, university employees trying to determine whether private speech on matters of public concern would constitute an “improper use” of social media would have to speculate not only about its disruptive effects, but also about whether university officials would consider those effects to be severe enough to outweigh on their free speech rights. Second, the absence of a scienter requirement limiting punishment to knowing or intentional violations (or at the very least, in “reckless disregard” of the consequences) are problematic because violations may be inadvertent.⁷⁵

When confronted with overbreadth or vagueness problems, one common approach for the courts is to construe provisions narrowly so as to avoid the problem.⁷⁶ As will be discussed more fully below, the chilling effect of the Board of Regents Social Media Policy presents some significant concerns, especially under the vagueness doctrine.⁷⁷

74. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (concluding that statute prohibiting groups of people to congregate so as to “annoy” others specified “no standard of conduct . . . at all” insofar as “[c]onduct that annoys some people does not annoy others.”).

75. These principles are illustrated in a pair of Kansas cases dealing with the state’s anti-stalking statute. In *State v. Bryan*, the Kansas Supreme Court invalidated a Kansas anti-stalking statute that defined “stalking” as “following” that “seriously alarms, annoys or harasses the person.” 910 P.2d 212 (Kan. 1996). This statute was unconstitutionally vague because whether conduct “alarms, annoys, or harasses” depended on “the particular sensibilities of the individual victim.” *Id.* at 220. The statute was amended to add a scienter requirement and incorporate an objective standard, prohibiting “an intentional, malicious and repeated following or harassment of another . . . which would cause a reasonable person to suffer substantial emotional distress.” KAN. STAT. ANN. § 21-3438 (1995) (repealed 2010). In *State v. Rucker*, the Kansas Supreme Court concluded that these changes solved the vagueness problem and upheld the law. 987 P.2d 1080, 1092 (Kan. 1999).

76. In *Buckley v. Valeo*, for example, the United States Supreme Court construed provisions of the Federal Election Campaign Act regulating “any expenditure . . . relative to a clearly identified candidate” as applying only to expenditures for advertisements that “expressly advocate” the nomination, election, or defeat of a candidate. 424 U.S. 1 (1976); see 18 U.S.C. § 608(e) (1976). The Court reasoned that the construction was necessary because the statute might otherwise be unconstitutionally vague. *Buckley*, 424 U.S. at 40; see also *Skilling v. United States*, 561 U.S. 358 (2010) (concluding that statute proscribing fraudulent deprivations of “the intangible right of honest services,” 18 U.S.C. § 1346, was limited to schemes to defraud involving bribes and kickbacks because “[c]onstruing the honest-services statute to extend beyond that core meaning . . . would encounter a vagueness shoal.”).

77. The original Social Media Policy was arguably overbroad in some respects, see *infra* notes 136–38; 141–45 and accompanying text, and vague in others, see *infra* notes 176–79 and accompanying text. The revisions pretty much eliminated the overbreadth issues, see *infra* notes 209–16 and accompanying text, but may have exacerbated the vagueness problems. See *infra* notes 226–38 and accompanying text.

B. Free Speech Rights of Public Employees

Special rules apply to disciplinary actions against public employees based on their speech. Traditionally, government employment was seen as a “mere privilege” and not a right. Accordingly, being fired because of what you said as a private citizen did not impose any burdens on your free speech.⁷⁸ The traditional right-privilege distinction eroded substantially in the 1960s, however, as the Court sought to protect people against the denial or termination of government benefits in ways that interfered with individual rights.⁷⁹ Of particular relevance here is the Court’s decision in *Pickering v. Board of Education*,⁸⁰ which held that a school teacher could not be fired for writing a letter to the editor that criticized certain board of education policies.

1. Pickering Balancing for Private Speech on Matters of Public Concern

While *Pickering* recognized that adverse employment actions based on the private speech of government employees burdened their First Amendment rights, the Court also recognized that the government, as employer, had important interests at stake. Thus, instead of applying strict scrutiny, the Court adopted what has come to be known as the *Pickering* balancing test, under which courts must strike a “balance between the interests of the [employee], 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.”⁸¹ Because Guth was tweeting as a private citizen on a matter of public concern, adverse employment action based on the tweet would be subject to the balancing test adopted in *Pickering*.

78. See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (“[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”).

79. Most prominently, the Court extended procedural due process protections to various kinds of government benefits to which there is a legitimate claim of entitlement. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); see generally Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 107 (2005) (discussing application of due process safeguards to government benefits). Under these principles, due process would protect tenured faculty against dismissal without notice and an opportunity to be heard. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (recognizing position of tenured faculty as property interest but rejecting due process claim of untenured faculty member). Even for untenured faculty and staff, if they have a contract for a specified term, the deprivation of rights under the contract would likely be sufficient to trigger due process protections, although nonrenewal or non-reappointment would not.

80. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

81. *Id.* at 568. The *Pickering* balancing test is used to evaluate adverse employment actions in individual cases, but a more stringent test would apply to the Social Media Policy. See *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 467 (1995) [hereinafter *United States v. NTEU*] (distinguishing between “a post hoc analysis of one employee’s speech and its impact on that employee’s public responsibilities” and “wholesale deterrent to a broad category of expression by a massive number of potential speakers.”). For further discussion, see *infra* notes 162–75.

As a threshold matter, *Pickering* only protects speech on matters of “public concern.”⁸² In *Connick v. Myers*,⁸³ the Court held that, to the extent a public employee’s speech was focused on internal workplace complaints that did not implicate the public interest, it did not address matters of public concern and was not protected by the First Amendment. Likewise, the use of social media to post personal matters, pictures, or comments would be unprotected.⁸⁴ Under *Connick*, if the speech is not on a matter of public concern, there is no need to apply the *Pickering* balancing test because the speech is not entitled to protection.⁸⁵ If the speech is on a matter of public concern, however, the First Amendment interest is ordinarily very weighty, especially when the speech concerns political or policy issues (as would be the case for the Guth tweet).⁸⁶

The *Pickering* balancing test has been applied in hundreds of lower court cases involving a variety of public employees such as school teachers, police and firefighters, municipal clerks, and in some cases University faculty and staff, fleshing out both sides of the balance.⁸⁷ These cases recognize a variety of concerns of the state, as an employer, which may be sufficient to justify adverse employment actions, including preservation of workplace harmony (especially in positions of trust), prevention or punishment of insubordination, protection of confidentiality, maintenance of client or customer relations, and ensuring effective performance.⁸⁸ Ordinarily, these interests must be specific

82. *Pickering*, 391 U.S. at 568.

83. *Connick v. Myers*, 461 U.S. 138 (1983). *Connick* recognized, however, that internal workplace issues might be matters of public concern if they implicated the proper performance of official duties, such as whistleblowing on issues of fraud or corruption. *See id.* at 149 (concluding that issue of whether public employees were pressured to work on political campaigns addressed a matter of public concern).

84. *See, e.g.*, *City of San Diego v. Roe*, 543 U.S. 77 (2004) (upholding disciplinary action against policemen who posted sexually explicit pictures of himself on social media because it was not speech on a matter of public concern).

85. *See, e.g.*, *Leverington v. City of Colorado Springs*, 643 F.3d 719 (10th Cir. 2011) (concluding that *Pickering* did not apply because nurse’s allegedly threatening statements to police officer who gave her a speeding ticket were personal matters, not matters of public concern).

86. *See Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999) (“The more the employee’s speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown.”).

87. *See generally* C. R. McCorkle, *Governmental Control of Actions or Speech of Public Officers or Employees in Respect of Matters Outside the Actual Performance of Their Duties*, 163 A.L.R. 1358 (originally published in 1946) (collecting cases); Joseph O. Oluwole, *The Pickering Balancing Test And Public Employment-Free Speech Jurisprudence: The Approaches Of Federal Circuit Courts Of Appeals*, 46 DUQ. L. REV. 133 (2008) (discussing cases).

88. *See, e.g.*, *Hemminghaus v. Missouri*, 756 F.3d 1100, 1112 (8th Cir. 2014) (“Employee acts of insubordination may tip the balancing process in favor of the employer’s interests in the efficient promotion of its services.”) (quoting *Barnard v. Jackson Cnty.*, Missouri, 43 F.3d 1218, 1224 (8th Cir. 1995)). *Bonds v. Milwaukee County*, 207 F.3d 969, 977 (7th Cir. 2000) (upholding decision not to hire employee based on interest in workplace harmony, which was heightened by prospective employee’s policy making functions); *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999) (“[T]he more the employee’s job requires confidentiality, policymaking, or public contact,

and documented in order to be considered weighty.⁸⁹ The cases also recognize that not all workplaces are created equal and that the state, as employer, may be expected to be more tolerant in the context of a university setting than in a police department or elementary school. In other words, the level and nature of acceptable restrictions may be based on the mission of the agency.⁹⁰

2. The *Garcetti* Exception for Employment-Related Speech

Recently, in *Garcetti v. Ceballos*,⁹¹ the Supreme Court recognized another exception to *Pickering*, concluding that the First Amendment does not protect the speech of public employees made in the performance of their duties.⁹² *Garcetti* reasoned that when public employees speak in the course of their duties, they are speaking on behalf of the state and the state has the right to control the content of that speech.⁹³ The Court in *Garcetti* recognized, however, that this rule would have profound implications for the academic freedoms of faculty and staff at public universities. Accordingly, the Court stated that “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”⁹⁴

This reference to “scholarship and teaching” responded to the dissent’s argument that the majority’s rule might undermine First Amendment protection for academic freedom.⁹⁵ In other words, the Court in *Garcetti* left open the possibility that *Pickering* may still apply to speech pursuant to official duties if that speech is within the scope of academic freedom. *Garcetti*’s ambiguous treatment of this issue highlights the uncertain relationship between academic freedom and the First Amendment.⁹⁶

the greater the state’s interest in firing her for expression that offends her employer.”) (quoting *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997); *Lytle v. City of Haysville*, 138 F.3d 857, 863–64 (10th Cir. 1998) (upholding dismissal for breach of confidentiality policy).

89. *Sexton v. Martin*, 210 F.3d 905, 912–13 (8th Cir. 2000) (“Martin’s vague and conclusory statements do not demonstrate with any specificity that the speech created disharmony in the workplace, impeded the plaintiffs’ ability to perform their duties, or impaired working relationships with other employees.”).

90. See, e.g., ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 11–12 (2012) (distinguishing between ordinary public employees and those whose mission is to develop expert knowledge).

91. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

92. This exception applies even if the employee’s speech is on a matter of public concern and would be entitled to protection if made as a private person.

93. See *infra* notes 247–55 and accompanying text (discussing implications of this rationale).

94. *Garcetti*, 547 U.S. at 425. See generally Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405 (2013).

95. See *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (“This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”).

96. See, e.g., *Heublein v. Wefald*, 784 F. Supp. 2d 1186 (D. Kan. 2011) (holding that a

The events surrounding the Guth tweet raise a number of issues under the First Amendment doctrine described above. The University's employment-related actions provide a relatively straightforward illustration of how the *Pickering* doctrine applies, although there are a few wrinkles. The Board of Regents Social Media Policy implicates a much broader range of concerns, including proscribable speech, the *Garcetti* exception and academic speech, whether *Pickering* applies to employment-related rules (as opposed to specific instances of discipline), and the vagueness doctrine.

III. THE UNIVERSITY RESPONSE AND *PICKERING* BALANCING

Analyzing the University's response to the Guth tweet involves a relatively straightforward application of the *Pickering* balancing test. It is clear that Guth was speaking on a matter of public concern—the Navy Yard shooting and the issues surrounding gun control—and so his tweet would be entitled to protection under *Connick*. Likewise, it is also clear that Guth's tweet was private speech; he was not speaking on behalf of the University or in the performance of responsibilities as a journalism professor, so *Garcetti* would not apply.⁹⁷ Nonetheless, there are a couple of threshold questions to address, and the outcome of the *Pickering* balancing test is unclear because of its open-ended character.

A. *Threshold Questions*

The University would have two potential arguments against the application of *Pickering*. First, the University might argue that because Guth voluntarily consented to being placed on administrative leave, he has waived any constitutional objections. Second, the University might argue that *Pickering* should not apply because its action was not disciplinary in character.

1. **Waiver**

It is difficult to analyze the waiver issue fully without being privy to all the facts. To the extent that Guth freely and voluntarily consented to being

challenge to disciplinary action against professor for sexual harassment based in part on derogatory statements about women did not state a claim for violation of academic freedom and expressing skepticism “that such a claim even exists”); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 252 (1989) (“Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion.”); see also *supra* notes 10–22 (discussing differences between academic freedom and freedom of speech).

97. It is true that Guth did not include a disclaimer that distanced himself from the University, but neither did he identify himself as a member of the University faculty on the tweet itself. Nonetheless, in the resulting firestorm, his affiliation was clearly known. It seems unlikely, however, that public knowledge of his affiliation would be sufficient to call the tweet “pursuant to official duties” so as to fall within the *Garcetti* exception. Instead, this sort of public affiliation would be relevant to the assessment, under the *Pickering* test, of the University's interest in placing him on administrative leave. See *infra* notes 118–26 and accompanying text.

placed on administrative leave,⁹⁸ the waiver argument would likely succeed. Nonetheless, there may be arguments against waiver on the facts. In the employment context it is not always clear that consent is truly voluntary, as employees may fear the loss of a job or other disciplinary action if they do not go along. Thus, for example, the law has generally rejected the traditional view that employees voluntarily accept risks associated with unsafe working conditions.⁹⁹ Likewise, the doctrine of constructive discharge posits that an employee's decision to quit may not be voluntary because the employer made it impossible for the employee to continue.¹⁰⁰ I certainly do not mean to suggest that the University coerced Guth into accepting administrative leave or otherwise acted improperly, and I am not aware of any evidence that it did. But such an argument is a possibility that must be considered when analyzing the issues.

A related point is the possibility that the University might have had the duty to protect Guth rather than allow the threat of disruption to silence him. This is ordinarily the rule in traditional heckler's veto cases.¹⁰¹ A court might conclude that the University should have provided increased security rather than forcing Guth to choose between administrative leave or risking disruption of his classes. In any event, the extent of the University's duty to provide security under these circumstances is unclear and the University may have offered protection or concluded that it was simply impossible to do so.

On balance, it appears that, should Guth seek to challenge the University's action, a waiver argument would be difficult to overcome. I will nonetheless analyze the issues raised by the University's decision to place Guth on administrative leave without regard to any potential waiver.

2. Adverse Employment Action

The University might also plausibly argue that *Pickering* should not apply because its action was not disciplinary or punitive in character. In public statements on the matter, the University emphasized that Guth was placed on administrative leave out of concern that his classes would be disrupted and that

98. See *supra* note 6.

99. See, e.g., *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58–59 (1943) (discussing abrogation of assumption of the risk defense under the Federal Employers' Liability Act).

100. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984) (recognizing constructive discharge under the National Labor Relations Act based on NLRB finding that the employer created "working conditions so intolerable that the employee has no option but to resign").

101. E.g. *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (holding that conviction for breach of peace could not be sustained where evidence "showed no more than that the opinions which [the students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." (quoting *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963); *Ovadal v. City of Madison, Wisconsin*, 416 F.3d 531, 537 (7th Cir. 2005) ("The police must preserve order when unpopular speech disrupts it; '[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.'") (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)).

the safety of students might be at risk.¹⁰² Likewise, Guth continued to receive his salary, the decision did not follow disciplinary procedures, and there was no finding of misconduct, censure, or other sanction.¹⁰³ This potential argument raises both legal and factual questions.

The legal question is whether *Pickering* applies to employment related actions that are not, strictly speaking, disciplinary in character. The typical *Pickering*-type case involves an action that is clearly punitive—usually termination or demotion.¹⁰⁴ Nonetheless, it seems reasonably clear that the courts will take a functional approach, applying *Pickering* broadly to any employment action that is “adverse.” Thus, for example, in *Dahlia v. Rodriguez*,¹⁰⁵ the court stated that “the proper inquiry is whether the action is ‘reasonably likely to deter employees from engaging in protected activity.’”¹⁰⁶ Applying this test, the court in *Dahlia* concluded that a police officer’s allegations that being placed on administrative leave “prevented him from taking the sergeant’s exam, required him to forfeit on-call and holiday pay, and prevented him from furthering his investigative experience” were sufficient (if proved) to establish adverse employment action.¹⁰⁷

Whether administrative leave in this case constituted adverse employment action would thus depend on a factual question: did the action impose burdens or deny opportunities in a manner that would deter protected speech? Placing Guth on administrative leave prevented him from teaching his classes, but it may be debatable whether this result, standing alone, constitutes much of a burden or is likely to deter speech.¹⁰⁸ Although it is unclear whether administrative leave will have any other concrete effects on Guth’s employment, it might be taken into account in his annual evaluations or other employment related decisions.¹⁰⁹ Guth might also allege damage to his

102. See, e.g., Rothschild, *supra* note 7.

103. See, e.g., UNIV. OF KANSAS OFFICE OF THE PROVOST, UNIV. CODE OF FACULTY RIGHTS, RESPONSIBILITIES, AND CONDUCT, art. III, ¶ IV (1971), available at <https://policy.drupal.ku.edu/provost/faculty-code#six> (“No disciplinary sanctions . . . may be imposed upon a faculty member without notice of the charges against him or her and the opportunity for a hearing before the Judicial Board or before the Faculty Senate Faculty Rights Board.”).

104. See *United States v. NTEU*, 513 U.S. 454, 466 (1995) (observing that *Pickering* cases “usually have involved disciplinary actions taken in response to a government employee’s speech”).

105. *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013).

106. *Id.* at 1078 (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003)).

107. *Id.* at 1079 (“Dahlia’s assertions—that administrative leave prevented him from taking the sergeant’s exam, required him to forfeit on-call and holiday pay, and prevented him from furthering his investigative experience—if proved, would constitute an adverse employment action.”).

108. For some faculty, at least, release from teaching responsibilities would be a benefit. Nonetheless, for many of us, teaching is not only a responsibility, but also something on which we place great value, so that the denial of this opportunity would be a substantial deterrent.

109. Note that any adverse action in these matters might be based on the incident itself, as opposed to the administrative leave. If so, these employment actions, if adverse, could also be challenged directly under *Pickering*.

reputation, insofar as being placed on administrative leave was perceived as form of public rebuke or censure.¹¹⁰

Ultimately, there is a substantial possibility that a court would conclude that there was adverse employment action so as to trigger *Pickering* balancing. Nonetheless, the limited impact of the University's action would likely affect the assessment of the burden on his free speech rights under that test.¹¹¹

B. Applying the Balance

Assuming that a challenge to the University's actions could go forward notwithstanding these threshold questions, *Pickering* would require the Court to weigh Guth's First Amendment rights against the University's interests as an employer. It seems reasonably clear that the University could not have fired Guth (or imposed other serious punishments, such as suspension without pay) without violating the First Amendment, but the decision to place him on administrative leave would be easier to defend because it is a more limited and targeted response.

1. First Amendment Interests

Guth's tweet was clearly speech made as a private citizen on a matter of public concern that is protected under *Pickering*. Indeed, because it addressed an important issue of public policy, it is political speech that is entitled to the highest levels of First Amendment protection. The fact that the speech may have been offensive to many people would not diminish this protection.¹¹² Thus, the First Amendment interests at stake are weighty, and the key issue would be the extent of the burden on those interests.

Although Guth's statements may have been intemperate or offensive, they do not fall within any of the categories of proscribable speech. They do not rise to the level of incitement because they were neither directed at producing imminent unlawful conduct nor likely to produce it.¹¹³ They are not fighting words because they are not face-to-face communications likely to provoke an immediate violent response.¹¹⁴ And they are not true threats, even if (as suggested by his critics) Guth was in fact wishing death upon the children of

110. One factor that complicates these assessments is determining whether a particular burden or deterrent on speech was caused by the University's action, as opposed to the incident itself. For example, it might be difficult to separate the damage to reputation from the University's action from the reputational damage caused by the tweet itself or the public criticism of it by many others.

111. See *infra* note 117 and accompanying text (discussing burden on speech).

112. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (stating that speech "at a public place on a matter of public concern . . . cannot be restricted simply because it is upsetting or arouses contempt."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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.").

113. See *infra* notes 140–43 (discussing incitement provision in the Social Media Policy in relation to First Amendment doctrine).

114. See *infra* note 146.

NRA members, because he did not even remotely suggest an intent to cause that harm himself.¹¹⁵

The University could seek to minimize the free speech interest, however, by arguing that placing Guth on administrative leave imposed only a minor burden on his speech. As noted above,¹¹⁶ most *Pickering*-type cases involve terminations, demotions, or other serious sanctions. In contrast, Guth retained his tenured position, suffered no loss of income, and was not censured in any formal way.¹¹⁷ Thus, although the decision did impose some burdens—denying him the right to teach his classes and operating as a kind of de facto censure—those burdens are less than in the typical case and therefore may be outweighed by the University's interest as an employer in the effective fulfillment of its educational mission.

2. The Interests of the University as Employer

To assess whether the University's interests outweigh the burden on Guth's free speech rights, it is necessary first to identify what those interests are. In *Pickering*, as in most other public employee speech cases, the employee's speech was critical of a superior or of the agency for which the employee worked, and the interest asserted by the employer was one of workplace harmony, loyalty, or confidentiality.¹¹⁸ Such claims may be self-serving, however, and the courts are often skeptical unless the employee has a position of trust or confidence that is undermined by public criticism of a superior.¹¹⁹ The Guth tweet, however, presents a different set of interests.

The reasons identified by the University relate to disruption of classes and the security of students.¹²⁰ These interests are clearly legitimate and important

115. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“‘True 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.”).

116. See *supra* notes 96–101 and accompanying text (discussing whether being placed on administrative leave is an adverse employment action).

117. The formal statement issued by Chancellor Gray-Little indicated that Guth was placed on administrative leave “[i]n order to prevent disruptions to the learning environment for students, the School of Journalism and the university.” Press Release, Univ. of Kansas, Guth placed on administrative leave (September 20, 2013), available at <http://news.ku.edu/2013/09/20/guth-placed-administrative-leave#> [hereinafter Press Release, Guth placed on administrative leave]. In earlier statements, University officials denounced Guth's tweet, but did not propose any disciplinary action against him. See Press Release, Univ. of Kansas, University of Kansas decries offensive comments (Sept. 19, 2013), available at <https://news.ku.edu/2013/09/19/university-kansas-decries-offensive-comments> [hereinafter Press Release, University of Kansas decries offensive comments].

118. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–69 (1968); see also *supra* notes 73–77 (discussing application of *Pickering* by lower courts).

119. See *supra* notes 23, 73–77 and accompanying text (discussing application of the *Pickering* test by lower courts).

120. See Press Release, Guth placed on administrative leave, *supra* note 117 (stating that Guth was placed on administrative leave “[i]n order to prevent disruptions to the learning environment for students, the School of Journalism and the university.”). Guth himself referred to “abusive email threats I and others have received” and to the “peace of mind of our students.”

interests that, if established, would likely be sufficient to support the relatively minor burden imposed by placing Guth on administrative leave with pay.¹²¹ Without access to all of the information before the University, it is impossible to assess the legitimacy of such claims, but in light of the firestorm of controversy, there is no reason to doubt that the University's publicly expressed concerns are sufficiently specific and documented to be considered weighty by the courts.¹²² Even so, however, there may be room to argue under the heckler's veto cases that the University has an obligation to protect against these threats rather than allow them to silence one of its teachers.¹²³

Alternatively, it might be possible to argue that concerns about disruption or security were a mere pretext for other motives, such as averting funding cuts or minimizing damage to the University's public image.¹²⁴ It is not entirely clear whether these other concerns are legitimate and weighty, but the cases do suggest that public employers may legitimately discipline employees for private speech that affects the agency's ability to work with the public it serves.¹²⁵ In any event, it would be very difficult to establish that these other reasons were the real motivation behind the University's actions.¹²⁶

In assessing the weight of the University's concerns, however, a court would take into account the nature and function of a university and the role of academic freedom. The mission of the University demands an environment that tolerates dissent and the ability of employees to express themselves freely without fear of retribution. Accordingly, the University as an employer would be expected to tolerate more controversy and disruption than some other public employers (like law enforcement or firefighters) who have a particularly strong

Rothschild, *supra* note 6.

121. See, e.g., *Melzer v. Bd. of Educ.*, 336 F.3d 185 (2d Cir. 2003) (upholding termination of public school teacher due to controversy surrounding his advocacy, as a private speaker, of sexual relations between men and boys).

122. See *supra* note 89 and accompanying text (discussing the need for a public employers asserted concerns to be specific and documented).

123. See *supra* note 101.

124. In the Salaita case, see *supra* note 8, for example, the University of Illinois may have been responding to wealthy donors. See Jonathan H. Adler, *Did the University of Illinois rescind Steven Salaita's appointment to appease donors?*, WASH. POST, Sept. 3, 2014, available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/03/did-the-university-of-illinois-rescind-steven-salaitas-appointment-to-appease-donors/>. It is unclear whether such a concern would be considered a legitimate, employment-related interest for purposes of *Pickering*, although the Court's treatment of the heckler's veto problem in other contexts may suggest that it would not. See cases cited *supra* note 9.

125. See *Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110 (7th Cir. 2013) (upholding dismissal of school counselor whose self-published book might deter female students from consulting him); *Locurto v. Giuliani*, 447 F.3d 159, 174 (2d Cir. 2006) (upholding disciplinary action against police officer who participated in racist parade float because of adverse impact on police department's relations with minority communities).

126. Of course, discovery requests might produce some sort of "smoking gun" email or other document that establishes an improper motive or purpose, but in the absence of that sort of evidence, the court is unlikely to attribute improper motives to the University.

interest in internal discipline or for whom controversy might pose problems. Thus, the interests asserted by the University might be seen as less important unless there was a demonstrable risk of actual disruption or threats to student safety.

On balance, given the circumstances with which the University was confronted and the limited action it took, the University's decision to place Guth on administrative leave with pay would probably survive the *Pickering* balancing test. On the other hand, more serious disciplinary actions, such as termination, would probably have violated Guth's First Amendment rights. Although the outcome of the balancing test cannot be predicted with certainty, the issues raised by the University's response to the Guth tweet are relatively straightforward, especially in comparison with those presented by the Board of Regents Social Media Policy, which are discussed in the next section.

IV. BOARD OF REGENTS POLICY

Although the Kansas Board of Regents left employment-related actions regarding Guth himself to the University, it responded to the tweet by adopting a new Social Media Policy authorizing disciplinary action against faculty and staff for the improper use of social media.¹²⁷ The policy provoked strong criticism from the faculty and staff of the Regents' universities, the local and national media, and the broader academic world.¹²⁸ Reacting to this criticism, the Board created a Workgroup that studied the issues and filed a report with recommended revisions.¹²⁹ The Board revised the policy in response to the Workgroup's report, incorporating many of its suggested amendments (with some changes) but rejecting its core recommendation that the policy be advisory rather than disciplinary. Although the final policy addressed some of the issues raised by the original policy, it created some new problems of its own.

127. Original Policy app. II.C.6.b.

128. See, e.g., *AAUP Statement on the Kansas Board of Regents Social Media Policy*, AM. ASS'N. OF UNIV. PROFESSORS (Dec. 20, 2013), <http://www.aaup.org/file/KansasStatement.pdf>; Brad Cooper, *Critics challenge Kansas Board of Regents' new social media policy*, KANSAS CITY STAR, Dec. 24, 2013, available at <http://www.kansascity.com/news/local/article334653/Critics-challenge-Kansas-Board-of-Regents%E2%80%99-new-social-media-policy.html>; *Kansas Universities Faculty & Staff Against Regents' Speech Policy* (Facebook Community) <https://www.facebook.com/KansansAgainstRegentsPolicy>; Scott Jaschik, *Fireable Tweets*, INSIDE HIGHER EDUC. (Dec. 19, 2013), <http://www.insidehighered.com/news/2013/12/19/kansas-regents-adopt-policy-when-social-media-use-can-get-faculty-fired#ixzz37k3zhmSO>; Frank D. LoMonte, *Tweet Police: Kansas' ability to fire professors for posting on social media is bad news for academic freedom—and may not even be legal*, SLATE (Jan. 3, 2014) http://www.slate.com/articles/life/inside_higher_ed/2014/01/kansas_board_of_regents_social_media_policy_imperils_academic_freedom.html.

129. See *infra* notes 185–95 (discussing formation and recommendations of the Workgroup).

A. *The Original Policy*

The original Social Media Policy was incorporated into Chapter II.C.6.b. of the Board of Regents Policy Manual, along with other grounds for “Suspensions, Terminations and Dismissals.” It specified that “[t]he chief executive officer of a state university has the authority to suspend, dismiss or terminate from employment any faculty or staff member who makes improper use of social media”¹³⁰ and defined improper use to include (i) incitement of violence;¹³¹ (ii) speech pursuant to official duties that was contrary to the best interest of the University;¹³² (iii) disclosure of confidential information;¹³³ and (iv) impairment of the University’s effective operations, subject to the *Pickering* test.¹³⁴ Although the policy was vetted by the Kansas Attorney General’s Office, which apparently concluded that it was consistent with the First Amendment,¹³⁵ there were a number of serious First Amendment problems with the original policy.

1. **Proscribable Speech: Grounds (i) and (iii)**

As discussed above,¹³⁶ certain categories of speech have traditionally been “proscribable” because of their low value and harmful effects. Two of the Social Media Policy’s four categories of improper use—incitement and

130. Original Policy app. II.C.6.b.

131. *Id.*, II.C.6.b.i (defining improper use of social media to include any use that “directly incites violence or other immediate breach of the peace”).

132. *Id.* II.C.6.b.ii (defining improper use of social media to include any use that “when made pursuant to (i.e. in furtherance of) the employee’s official duties, is contrary to the best interest of the university”).

133. *Id.* II.C.6.b.iii (defining improper use of social media to include any use that “discloses without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data”).

134. *Id.* II.C.6.b.iv (defining improper use of social media to include any use that “subject to the balancing analysis required by the following paragraph, 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, impedes the performance of the speaker’s official duties, interferes with the regular operation of the university, or otherwise adversely affects the university’s ability to efficiently provide services.”); *see also id.* II.C.6.b. (“In determining whether the employee’s communication constitutes an improper use of social media under paragraph (iv), the chief executive officer shall balance the interest of the university in promoting the efficiency of the public services it performs through its employees against the employee’s right as a citizen to speak on matters of public concern, and may consider the employee’s position within the university and whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university. The chief executive officer may also consider whether the communication was made during the employee’s working hours or the communication was transmitted utilizing university systems or equipment.”).

135. *See Meeting Agenda for December 18-19, 2013*, KAN. BD. OF REGENTS, 84 (Dec. 19, 2013), <http://www.kansasregents.org/resources/PDF/2722-AgendaDec18-19,2013FinalReader.pdf>. (“We have worked with the Attorney General’s Office and it has advised that it they believe it is constitutionally sound from a First Amendment and procedural due process perspective.”).

136. *See supra* notes 52–65 and accompanying text.

disclosure—might be defended on that ground.¹³⁷ To the extent that the Social Media Policy prohibits proscribable speech, it presents few First Amendment problems and applies to uses that would likely be subject to discipline under other policies. On the other hand, even regulation of proscribable speech may not incorporate unrelated content-based distinctions and may not be overbroad or vague.

There does not appear to be a problem with the provision in the Board of Regents policy prohibiting use of social media that “discloses without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data.”¹³⁸ Although disclosure of confidential information is not among the categories of speech ordinarily included on the list of proscribable speech, and some kinds of confidentiality requirements may be unconstitutional,¹³⁹ it is clear that the government may require that personal records remain confidential. The restriction on disclosure of confidential research information is potentially problematic if the underlying confidentiality requirements are excessive, but such concerns would not be likely to render the provision facially invalid.¹⁴⁰

Another provision in the original Social Media Policy prohibited use of social media that “directly incites violence or other immediate breach of the peace.”¹⁴¹ Although this provision referenced a well-established category of unprotected speech, as originally adopted it was imprecise and might have been unconstitutionally overbroad. The incitement category relates to the quintessential free speech problem—illegal advocacy—which gave rise to some of the earliest Supreme Court decisions on free speech, including the

137. Thus, the Regents could presumably discipline university faculty or staff for the use of social media to disseminate obscenity or child pornography, or to make true threats. To the extent that such uses violate other laws or policies, however, they could be punished without the Social Media Policy.

138. Original Policy app. II.C.6.b.iii.

139. See, e.g., Nat'l Fed'n of Fed. Emps. v. United States, 695 F. Supp. 1196 (D.D.C. 1988) (invalidating provisions of nondisclosure agreement that were insufficiently narrow); cf. *Snepp v. United States*, 444 U.S. 507 (1980) (enforcing nondisclosure agreement against former CIA employee who violated nondisclosure agreement); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (upholding right of New York Times to publish classified documents).

140. Some confidentiality requirements that protect research subjects are similar to other confidentiality requirements that protect personal privacy. Such restrictions are valid for the same reasons that other confidentiality requirements to protect personal privacy are permissible. Increasingly, however, research grants come with confidentiality requirements that may be used to control the dissemination of the research results. See, e.g., Leslie Gielow Jacobs, *A Troubling Equation in Contracts for Government Funded Scientific Research: "Sensitive But Unclassified" = Secret But Unconstitutional*, 1 J. NAT'L SECURITY L. & POL'Y 113, 114 (2005) (“Contract clauses that restrict the ability of funded scientists to disseminate information related to government-sponsored research occupy an ambiguous middle ground in constitutional doctrine.”). The issues raised by this practice are beyond the scope of this article.

141. Original Policy app. II.C.6.b.i.

Holmes and Brandeis decisions that launched modern First Amendment analysis.¹⁴²

The modern version of the clear and present danger test for illegal advocacy was articulated in *Brandenburg v. Ohio*,¹⁴³ in which the Court 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.” Under the *Brandenburg* test, incitement may only be prohibited if a breach of the peace (or other illegal conduct) is (1) intended, (2) likely, and (3) imminent.¹⁴⁴

The original policy did not meet all of these requirements—it applied only to incitement of imminent (“immediate”) violence or breach of the peace, but did not require the incitement to be intended or likely. It is clear that the policy could not have been applied to incitement unless all three requirements were met, but it is less clear whether it would have been susceptible to a facial challenge on overbreadth grounds. Application of the overbreadth doctrine requires a judgment about whether the policy is “substantially” overbroad (in both an absolute and relative sense).¹⁴⁵ This judgment might depend on the perspectives of the judges and whether the facts of the case are sympathetic. It is also possible that a court might interpret the policy narrowly to avoid constitutional difficulties. For example, a court might interpret the phrase “directly incites” as requiring violence or a breach of the peace to be intended and likely.

These issues were rendered moot by the revisions to the Social Media Policy, which aligned its language with the language of *Brandenburg*. In practice, moreover, it seems highly unlikely that a use of social media—which is not face-to-face—would ever constitute the kind of incitement that would meet *Brandenburg* test.¹⁴⁶ Thus, it is difficult to imagine a case in which this provision would have been applicable by its own terms.

142. See *supra* notes 32–35 and accompanying text (describing Holmes and Brandeis opinions).

143. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *Hess v. Indiana*, 414 U.S. 105 (1973) (overturning conviction of protestor because incitement was not imminent).

144. See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing “advocacy intended, and likely, to incite imminent lawless action” as a category of proscribable speech).

145. See *supra* notes 69–70 and accompanying text.

146. For similar reasons, the Regents were wise not to address another category of unprotected speech that might be addressed by a social media policy—“fighting words” which were the subject of the *Chaplinsky* case. See generally *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* defined “fighting words” as words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 572. Although *Chaplinsky* might seem to suggest that insulting or offensive speech is unprotected, the Court has construed the fighting words doctrine narrowly and consistently rejected efforts to regulate speech that is merely insulting or offensive. See *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949). These cases

On balance, then, neither the first nor the third categories of improper use in the Board of Regents Policy presented significant First Amendment problems (especially after revision). Neither policy made unrelated content-based restrictions that would run afoul of *R.A.V. v. St. Paul*.¹⁴⁷ Indeed, neither provision received much attention at the time. Instead, criticism of the Board's policy was directed primarily at the second and fourth categories of improper use.

2. Speech Pursuant to Official Duties: Ground (ii)

The second category of improper use of social media authorized disciplinary action for speech that “when made pursuant to (i.e. in furtherance of) the employee’s official duties, is contrary to the best interest of the university.”¹⁴⁸ This provision caused serious concern, especially among faculty, because it seems directly contrary to the principles of academic freedom.¹⁴⁹ It also relied on the *Garcetti* exception for employment related speech without regard to the Court’s acknowledgement in *Garcetti* itself that the exception might not apply to academic speech.¹⁵⁰

Insofar as this category of improper use authorized the University to take action against any speech it deemed contrary to its best interests, this standard assumed that speech made pursuant to official duties is unprotected by the First Amendment.¹⁵¹ For many faculty and staff, however, teaching and research are within the scope of their official duties. By its terms then, the original policy would have authorized disciplinary action based on teaching, scholarship, and service activities using social media anytime University officials decided that it was not in the University’s best interest.

Thus, for example, the original Social Media Policy would appear to authorize the University to revoke my tenure and dismiss me for the publication of this article using social media if it determined that my analysis or conclusions are contrary to its interests.¹⁵² This sort of authority is, of

emphasize that fighting words must be likely to provoke an immediate violent response, which means that the doctrine is ordinarily limited to face-to-face communications and would not seem to apply to social media at all.

147. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (invalidating hate speech ordinance that applied to fighting words but contained unrelated viewpoint discrimination); *see supra* notes 60–63 and accompanying text (discussing *R.A.V.* and its implications).

148. Original Policy app. II.C.6.b.ii.

149. *See supra* note 7 (citing sources criticizing original policy).

150. *See supra* note 92 and accompanying text.

151. It would also be inconsistent with tenure if the policy were to be interpreted as authorizing dismissal of tenured faculty on the basis of such a finding. The policy did not speak directly to the question whether it would be a basis for revoking tenure and thus might be read as either (1) subject to existing tenure rights; or (2) establishing a new ground for dismissal of tenured faculty. The latter reading would be especially troubling.

152. Given the broad definition of social media in the policy—which extends to “any online tool or service through which virtual communities are created allowing users to publish commentary and other content, including but not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube” Final Policy app.

course, directly contrary to the principles of academic freedom and tenure. Thus, it is not surprising that the concerns of faculty and staff at the Regents universities were not alleviated by the assurances of the Board's leaders that the policy was narrowly drawn and would not burden academic freedom.

This provision of the policy was also vulnerable to a First Amendment challenge. As noted previously, although *Garcetti* held that the speech of public employees in their capacity as employees was not protected by the First Amendment, the Court expressly indicated that this rule might not apply to speech protected by academic freedom:

There 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. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.¹⁵³

Although the Supreme Court did not resolve the issue, a number of lower court cases have addressed speech pursuant to official duties in public universities after *Garcetti*.¹⁵⁴ On the whole, these cases suggest that academic speech is protected notwithstanding *Garcetti*, but that academic speech may be narrowly defined.¹⁵⁵

At least two federal court of appeals decisions, *Demers v. Austin*¹⁵⁶ and *Adams v. Trustees of Univ. of N. Carolina-Wilmington*,¹⁵⁷ have explicitly held

II.F.6.b.1—it is likely that this article would come within its scope.

153. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

154. The AAUP website contains a pretty comprehensive listing of cases with brief descriptions. See *Legal Cases Affecting Academic Free Speech*, AM. ASS'N OF UNIV. PROFESSORS (Oct. 2013), <http://www.aaup.org/get-involved/issue-campaigns/speak-speak-out-protect-faculty-voice/legal-cases-affecting-academic>. Most courts have distinguished higher education from elementary and secondary schools, suggesting that the principles of academic freedom do not apply, or apply in a much more limited way, in the public schools. See, e.g., *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 n.12 (9th Cir. 2011) (stating that *Garcetti*'s "'academic freedom' carve-out . . . applied to teachers at 'public colleges and universities,' not primary and secondary school teachers"); *Evans-Marshall v. Bd. of Educ. of Tipp City*, 624 F.3d 332, 342–44 (6th Cir. 2010) ("Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside of the classroom.").

155. In other contexts, some decisions and judges have questioned whether academic freedom protects individual faculty members at all, suggesting that it protects only the university as an institution. See *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) ("[T]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors."); see also *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (4th Cir. 2005) (quoting *Urofsky*). Notwithstanding such statements, the academic setting of the speech would inform the First Amendment analysis, and would likely render *Garcetti* inapplicable.

156. *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014) (revising and withdrawing prior opinion, 729 F.3d 1011 (9th Cir. 2013), on denial of petition for rehearing and rehearing en banc)

that *Garcetti* does not apply to academic speech by university employees.¹⁵⁸ Although many other cases have concluded that speech by public university employees was not protected under *Garcetti*, those cases have generally concluded that the employee speech in question was not within the scope of academic freedom, and thus found it unnecessary to determine whether academic speech is an exception from the *Garcetti* rule.¹⁵⁹ These cases suggest that the concept of academic freedom may be defined narrowly for the First Amendment. For example, a number of courts have concluded that speech related to departmental matters or internal governance is not within the scope

(“We hold that *Garcetti* does not apply to “speech related to scholarship or teaching.” Rather, such speech is governed by *Pickering*”) (quoting *Garcetti*, 547 U.S. at 425).

157. *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (“We are also persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case.”).

158. *See also Kerr v. Hurd*, 694 F. Supp. 2d 817, 843–44 (S.D. Ohio 2010) (concluding that medical school faculty members advocacy of forceps delivery over unnecessary caesarian deliveries was protected even if made pursuant to teaching duties); *van Heerden v. Bd. of Supervisors of La. State Univ. & Agr. & Mech. Coll.*, No. 3:10-CV-155-JJB-CN, 2011 WL 5008410, at *6 (M.D. La. Oct. 20, 2011) (unpublished decision) (expressing support for academic freedom exception to *Garcetti* but finding it unnecessary to resolve the issue because speech was not in the course of employment).

159. *See, e.g., Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012) (reasoning that because a faculty member’s role as a committee member commenting on a book recommendation “was not related to classroom instruction and was only loosely, if at all, related to academic scholarship,” it “does not fall within the realm of speech that might fall outside of *Garcetti*’s reach”); *Abcarian v. McDonald*, 617 F.3d 931, 938 n.5 (7th Cir. 2010) (rejecting reliance on academic freedom because faculty member’s speech related to administrative matters that were not within its scope); *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009) (recognizing that “expression related to academic scholarship or classroom” may implicate additional constitutional concerns, but applying *Garcetti* because professor’s “actions so clearly were not ‘speech related to scholarship or teaching,’” (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)); *Huang v. Rector & Visitors of Univ. of Va.*, 896 F. Supp. 2d 524, 542 n.12 (W.D. Va. 2012) (concluding that “[a]lthough the instant matter tangentially relates to academia, it does not represent an instance in which *Garcetti* is inapplicable” because it concerned “an administrative issue that happened to take place in an academic setting by virtue of [the faculty member’s] dual position as a researcher and a member of the School of Medicine’s faculty”); *Alberti v. University of Puerto Rico*, 818 F. Supp. 2d 452, 475 (D.P.R. 2011) (concluding that faculty member’s statements “were not related to academic freedom” but rather directly related to his duties as director). *But see Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to statements concerning the administration of grants without discussing possible exception for speech related to teaching and scholarship); *Capeheart v. Hahs*, No. 08 CV 1423, 2011 WL 657848, at *4 (N.D. Ill. Feb. 14, 2011), *vacated sub nom. on ripeness grounds*, *Capeheart v. Terrell*, 695 F.3d 681 (7th Cir. 2012) (stating that courts have routinely applied *Garcetti* in the university setting).

of academic freedom,¹⁶⁰ although *Demers* concluded that this sort of speech was protected.¹⁶¹

The original policy applied to all uses of social media pursuant to official duties and made no exceptions for speech that is squarely within the scope of academic freedom, such as published research. Under *Demers* and *Adams*, however, this sort of speech would be constitutionally protected and the original policy would be vulnerable to an overbreadth challenge on that basis.

3. *Pickering* Balancing: Ground (iv)

The final ground for disciplinary action under the original Social Media Policy was based on the *Pickering* balancing test. It defined improper use of social media to include a use of social media that:

subject to the balancing analysis required by the following paragraph, 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, impedes the performance of the speaker's official duties, interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services.¹⁶²

Although this language reflected only the University's interests as employer, it also specified that disciplinary action based on the listed considerations was "subject to the balancing analysis required by the following paragraph."¹⁶³ That paragraph, in turn, specified that:

In determining whether the employee's communication constitutes an improper use of social media under paragraph (iv), the chief executive officer shall balance the interest of the university in promoting the efficiency of the public services it performs through its employees against the employee's right as a citizen to speak on matters of public concern, and may consider the employee's position within the university and whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university. The chief executive officer may also consider whether the communication was made during the employee's working hours or the communication

160. This was the case, for example, in both *Savage*, 665 F.3d 732, and *Abcarian*, 617 F.3d 931; *accord* *Sadid v. Vailas*, 936 F. Supp. 2d 1207 (D. Id. 2013) (holding speech by faculty member at faculty meeting was not within the scope of academic freedom for purposes of the exception to *Garcetti*); *Sadid v. Idaho State Univ.*, 294 P.3d 1100 (Idaho 2013) (same); *see also* *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (applying *Garcetti* rule to faculty member who advised students in disciplinary proceedings).

161. *See Demers*, 746 F.3d at 410 (indicating that faculty member's plan for restructuring communications department was sufficiently related to academic teaching and scholarship to fall within academic speech exception to *Garcetti*).

162. Original Policy app. II.C.6.b.iv.

163. *Id.*

was transmitted utilizing university systems or equipment.¹⁶⁴

These provisions, taken together, closely tracked the *Pickering* test as developed by the lower courts, but this ground for disciplinary action nonetheless presented significant First Amendment problems because it used *Pickering* in the wrong way.

Pickering was developed as a judicial test for the assessment of individual employment actions by public employers, not as a rule for the regulation of employee speech. As the United States Supreme Court explained in *United States v. National Treasury Employees Union (NTEU)*,¹⁶⁵ there is a critical difference between “a post hoc analysis of one employee’s speech and its impact on that employee’s public responsibilities” and “wholesale deterrent to a broad category of expression by a massive number of potential speakers.”¹⁶⁶ In *NTEU*, the Court invalidated a statutory restriction on the honoraria that federal employees could receive for speaking engagements, stating that “the Government’s burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action” and that it “must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.”¹⁶⁷

As the United States Court of Appeals for the Seventh Circuit explained in *Milwaukee Police Ass’n v. Jones*:¹⁶⁸

[i]n addressing . . . a situation of *post-hoc* discipline, the government action is more closely contained to the individual or individuals involved, and a court can readily ascertain the effect of the speech on the workplace. The *Pickering* test on its face cannot be easily applied to a situation of a preemptive ban on certain speech.¹⁶⁹

Accordingly, the cases impose a higher burden of justification for policies and rules that restrict employee speech and the government must demonstrate that “the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s necessary impact on the actual operation’ of the Government.”¹⁷⁰

The United States District Court for the District of Kansas recognized this difference in *Erickson v. City of Topeka*,¹⁷¹ which invalidated a city policy

164. *Id.*, II.C.6.b.

165. *United States v. NTEU*, 513 U.S. 454 (1995) (invalidating limitations on honoraria received for speaking engagements by federal employees).

166. *Id.* at 467.

167. *Id.* at 468.

168. *Milwaukee Police Ass’n v. Jones*, 192 F.3d 742 (7th Cir.1999) (invalidating directives restricting discussion of charges against police officers by officers who made those charges).

169. *Id.* at 749.

170. *Id.* at 750 (quoting *United States v. NTEU*, 513 U.S. 454, 468 (1995)).

171. *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131 (D. Kan. 2002).

providing that “no car with a racially or sexually insensitive marking will be allowed to be parked on city work sites or employee parking lots.”¹⁷² In *Erickson*, the court concluded that a stricter test applies under *NTEU*:

If traditional *Pickering* applies, the government need only prove that its interest, as an employer, in promoting the efficiency of the public services it performs through its employees, outweighs plaintiff’s interest in speaking. If, however, *NTEU* applies, the government must show that its restriction on speech is necessary to prevent actual disruption of its operations as an employer.¹⁷³

In *Erickson*, the court applied the more stringent test from *NTEU* to a directive whose operation was similar to the Social Media Policy.¹⁷⁴ Thus, the incorporation of the *Pickering* test does not insulate this ground from First Amendment challenge. To the contrary, the policy would have to be defended under the more stringent version of the test from *NTEU*, which closely resembles strict scrutiny because the government must prove that the regulation is “necessary to prevent actual disruption.”¹⁷⁵

4. Vagueness Issues

The “pursuant to official duties” and “*Pickering* balancing” grounds were also potentially vulnerable to a void for vagueness challenge.¹⁷⁶ As discussed above, due process requires that rules proscribing conduct be sufficiently clear and precise to provide notice of the prohibited conduct and prevent arbitrary or discriminatory enforcement.¹⁷⁷ These concerns are heightened in the First Amendment context because vague rules chill speech, especially when the violation of the rule depends on subjective standards and there is no “scienter” requirement.¹⁷⁸

The “pursuant to official duties” and *Pickering* balancing grounds in the original policy exhibited both of these problems. Whether speech is contrary

172. *Id.* at 1135. The plaintiff’s car displayed the confederate flag.

173. *Id.* at 1141.

174. Although *Erickson* referred to the directive as a prior restraint, *id.*, it was not and neither was the law invalidated in *NTEU*, 513 U.S. 454. Prior restraints include requirements for a license or permit and injunctions against speech, but not ordinary rules and regulations prohibiting speech and subjecting violators to potential sanctions. *See generally* *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (discussing prior restraints). The critical feature of the restriction in *NTEU* was that they were general rules prohibiting speech before it occurred, not that they were prior restraints as a term of art for purposes of First Amendment analysis—indeed the Supreme Court in *NTEU* did not even reference the concept of prior restraints. Thus, while some of the cases involve true prior restraints, *see, e.g.*, *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998) (invalidating policy requiring employees to seek permission before speaking to the media), the heightened standard of *NTEU* is not limited to policies that impose prior restraints.

175. *See supra* note 38–44, and accompanying text (discussing strict scrutiny).

176. Other provisions, such as the definition of social media, might also be considered vague, but I will focus here on the grounds for disciplinary action.

177. *See supra* notes 72–74.

178. *Id.*

to the interests of the University depends on a complex weighing of factors within the judgment and discretion of the University administration. So does the assessment of whether the employee's free speech interests outweigh the interests of the University as employer. Critically, moreover, these grounds reference the subjective judgment of the CEO, not an objective reasonable person standard.¹⁷⁹ Likewise, neither standard limited discipline to cases where a violation was intentional, knowing, or reckless, or indeed even negligent. The lack of any such "scienter" requirement exacerbated the use of a subjective standard. Accordingly both standards were highly likely to chill protected speech because employees would steer clear of any potentially controversial use of social media.

Thus, even though these grounds may apply only to speech that is unprotected under *Pickering* and *Garcetti*, those standards may be inadequate to prevent a void for vagueness problem. *Pickering* and *Garcetti* were crafted to conduct a post hoc judicial assessment of a specific employment action, not as a rule of conduct that prohibits certain types of speech. While it is impossible to say with certainty that a reviewing court would invalidate the policy as unconstitutionally vague, the original policy was potentially vulnerable to a vagueness challenge.

B. The Final Policy

As noted above, the original Social Media Policy was widely criticized as inconsistent with the First Amendment and academic freedom.¹⁸⁰ Although the Board insisted the policy was a narrow one that did not interfere with free speech or academic freedom, it appointed a Workgroup to review the policy and recommend changes,¹⁸¹ thus initiating a process that ultimately led to substantial revisions.¹⁸² The final policy fixed some of the First Amendment problems with the original policy and explicitly endorsed academic freedom, but it did not satisfy the critics or completely resolve the First Amendment

179. See *supra* note 75 (discussing this distinction in connection with Kansas anti-stalking statute).

180. See *supra* note 111.

181. See Press Release, Kan. Bd. of Regents, Workgroup Named to Create Recommendations Regarding Board Policy on Improper Use of Social Media (Jan. 17, 2014), available at http://www.kansasregents.org/workgroup_named_to_create_recommendations_regarding_board_policy_on_improper_use_of_social_media). The Board, however, declined the requests of faculty governance leaders to suspend the policy while it was under review by the Workgroup. See *Minutes of Meeting, January 15-16, 2014*, KAN. BD. OF REGENTS, at 2 (Jan. 16, 2014), available at <http://www.kansasregents.org/resources/PDF/2835-AJan15-16,2014Minutes.pdf>.

182. See *Minutes of Meeting on May 14-15, 2014*, KAN. BD. OF REGENTS (May 15, 2014), available at <http://www.kansasregents.org/resources/PDF/3073-EMay14-15,2014Minutes.pdf> (approving Final Policy).

issues.¹⁸³ Indeed, one subtle change raises fundamental questions about the meaning and constitutionality of the final policy.

1. Revising the Social Media Policy

The initial decision to adopt a Social Media Policy was made quickly, with little advance notice and almost no opportunity for input from university administrators, faculty, or staff.¹⁸⁴ In view of the negative response, the Regents established a process to seek input on the policy and make revisions to address concerns. This process included three critical phases. First, from January to April of 2014, the Workgroup met periodically in public sessions to review the policy, study the issues, and prepare its recommendations, accompanied by a comprehensive report, which were submitted to the Board.¹⁸⁵ Second, in April of 2014, the Board's Governance Committee received the Workgroup's recommendations and report, incorporated substantial changes into a draft posted for public comment, modified the draft

183. For reaction to the final policy, see, e.g., Nick DeSantis, *Kansas Board Adopts Policy Allowing Discipline for Misuse of Social Media*, CHRON. HIGHER EDUC., May 15, 2014 available at <http://chronicle.com/blogs/ticker/kansas-board-adopts-revised-policy-allowing-discipline-for-improper-social-media-use/77807>; Susan Kruth, *Kansas Board of Regents Approves Self-Contradictory, Unclear Social Media Policy*, THEFIRE.ORG (May 15, 2014), available at <http://www.thefire.org/kansas-board-of-regents-approves-self-contradictory-unclear-social-media-policy/>; Bryan Lowry, *Kansas regents adopt revised social media policy*, WICHITA EAGLE, May 14, 2014, available at <http://www.kansas.com/2014/05/14/3456358/kansas-regents-adopt-revised-social.html>.

184. The first public mention of a Social Media Policy was in the agenda for the Regents' meeting on December 18, 2013, at which it was adopted. See *Meeting Agenda for December 18-19, 2013*, supra note 135, at 84-86. The term "social media" does not appear in either the agenda or the minutes for the prior meeting in November. See *Meeting Agenda for November 20-21, 2013*, KAN. BD. OF REGENTS (Nov. 21, 2013), available at <http://www.kansasregents.org/resources/PDF/2692-AgendaNov20-21,2013Finalreader.pdf>; KAN. *Minutes of Meeting on November 20-21, 2013*, BD. OF REGENTS (Nov. 21, 2013), available at <http://www.kansasregents.org/resources/PDF/2735-KNov20-21,2013Minutes.pdf>. The lack of process for consideration of the original policy was part of the problem, as the Regents were apparently caught off guard by the strength of the negative reaction and did not have the opportunity to consider these concerns in formulating the policy. Given the problems with the final outcome, the experience tends to suggest that it is better to seek input first so as to craft a well-designed policy from the outset rather than retrofit a policy adopted without input to accommodate the concerns of affected parties.

185. See *Minutes of Governance Committee Meeting, April 16, 2014*, KAN. BD. OF REGENTS, at 1 (April 16, 2014), available at http://www.kansasregents.org/resources/PDF/3002-DApril162014GovernanceCommitteeMinutes_2_2_2_.pdf [hereinafter *Governance Committee Minutes*] (stating that "[t]he workgroup met four times, for four to five hours each time, to discuss the policy and craft recommended revisions," drafted revisions "that advise university employees of their roles and responsibilities when using social media technologies" and that "were made available for public comment before the workgroup finalized them"). The final recommendations, accompanied by an extensive and scholarly report, were posted on the Board of Regents Web Site during the discussion of the issue, but that document is no longer there. It remains available online at a number of other locations. See Memorandum from the Soc. Media Workgroup to Kan. Bd. Of Regents (Apr. 8, 2014), available at http://www.insidehighered.com/sites/default/server_files/files/social-media-final-report.pdf [hereinafter *Workgroup Report*].

in some respects, and then presented a revised policy to the Board for final approval.¹⁸⁶ Third, the Board unanimously approved the changes recommended by the Governance committee.¹⁸⁷

The Workgroup Proposal contemplated a fundamental change in the policy, eliminating its disciplinary component and focusing on guidelines to promote effective use of social media.¹⁸⁸ The accompanying report emphasized the importance of academic freedom as essential to the educational mission of universities, concluding that the disciplinary policy adopted by the Board was insufficiently protective of academic freedom and the free speech rights of university faculty and staff.¹⁸⁹ Under the Workgroup's proposal, each university would be required to "adopt guidelines to advise all university employees on use of social media," including the need to use social media responsibly.¹⁹⁰ Although these policies would "remind" faculty and staff that they can be disciplined for any use of social media that violates existing policies, such as policies on harassment or confidentiality,¹⁹¹ "improper use of social media" would no longer be an independent ground for disciplinary action.

The Workgroup Proposal also included several other changes to enhance protection for academic freedom and freedom of speech, including (1) a provision expressly endorsing freedom of speech and academic freedom;¹⁹² (2) a provision requiring university policy to protect speech related to teaching, scholarship, and internal governance;¹⁹³ and (3) the relocation of the policy

186. *See infra* notes 197–203 and accompanying text (describing Governance Committee's response to the Workgroup Report).

187. *See infra* notes 205–208 and accompanying text (describing approval of the final policy).

188. *See* Workgroup Proposal app. (proposing that Universities be directed to adopt "guidelines" that "shall remind employees that their authorship of content on social media may violate existing law or policy" but eliminating the disciplinary component of the Original Policy).

189. *See id.* at 7–13.

190. *Id.* at 2.

191. *Id.* at 2–3 ("The guidelines shall remind employees that their authorship of content on social media may violate existing law or policy and may be addressed through university disciplinary processes if, for example, it:

- i. is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action;
- ii. violates existing university or Board of Regents policies;
- iii. discloses without lawful authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data.").

192. *Id.* at 2 ("In keeping with the Kansas Board of Regents' commitment to the principles of academic freedom, the Board supports the responsible use of existing and emerging communications technologies, including social media, to serve the teaching, research, and public service missions of Kansas universities.").

193. *See id.* (specifying that Universities shall adopt guidelines that "strive to assure all employees that existing protections for academic freedom and other expression remain in place" for "the content of any academic research and other scholarly activities," "the content of any academic instruction," and "statements, debate, or expressions made as part of shared

from the Regents Policy Manual section on “Suspensions, Terminations and Dismissals”¹⁹⁴ to a section entitled “Other.”¹⁹⁵ Critics of the original policy, including faculty and staff at the universities, generally supported the Workgroup’s recommendations.¹⁹⁶

The Workgroup Report received mixed reviews from the Board’s Governance Committee, however. Some committee members described the report as a serious and thoughtful contribution and the committee incorporated a number of the Workgroup’s recommendations.¹⁹⁷ Nonetheless, Regent Tim Emert was openly critical of the Workgroup for disregarding its charge,¹⁹⁸ and Fred Logan, the Regents Chair, insisted that the policy was a narrow one that did not restrict freedom of speech or academic freedom.¹⁹⁹ Thus, the core recommendation of the Workgroup to eliminate the disciplinary aspects of the original policy was, to use the colloquial term, “dead on arrival.”

Nonetheless, the Governance Committee did approve a number of changes in response to the Workgroup’s recommendations and report.²⁰⁰ The committee drew on language from the Workgroup’s proposal to incorporate an endorsement of academic freedom, exclude academic speech from the scope of the policy, and relocate the policy from the disciplinary section of the Policy Manual.²⁰¹ In addition, the committee added language to confirm that

governance”).

194. Final Policy app. II.C.6.b.

195. See Workgroup Proposal app. (recommending located chapter II.F in Policy Manual app.). In addition to the Social Media Policy this section includes the following policies: Interaction with Legislature and Other State Agencies; Interference with Conduct of Institution; Statement on Diversity and Multiculturalism; Affirmative Action and Equal Opportunity; Racial, Sexual and Other Unlawful Harassment; Use of Controversial Material, Including the use of Sexually Explicit Materials, in Instruction; and Sustainability and Implementation Principles.

196. For example, the Council of Faculty Senate Presidents urged the Board of Regents to adopt the Workgroup’s proposal “in its entirety.” See *Minutes of Meeting on May 14-15, 2014*, *supra* note 182, at 2.

197. Naturally, the press emphasized the critical comments and did not report the positive ones. See Scott Rothschild, *Regents leaders remain committed to disciplinary aspects of social media policy*, LAWRENCE J. WORLD, Apr. 16, 2014, available at <http://www2.ljworld.com/news/2014/apr/16/regents-leaders-remain-committed-disciplinary-asp/>. The minutes of the Governance Committee Meeting do not reflect the positive comments either. See Governance Committee Minutes, *supra* note 185, at 1–2. Accordingly, I have no authoritative source for this statement, and rely on first-hand accounts of others who were present at the meeting.

198. See Rothschild, *supra* note 197 (“‘Some place this train got off the tracks,’ Emert said. ‘If any professor gave an assignment and the student came back with something completely different, the grade would not be very good.’”).

199. See *id.* (“‘I don’t agree this restricts expression,’ said Regents Chairman Fred Logan.”).

200. The committee approved these changes in principle, and directed the staff to draft appropriate language. See Governance Committee Minutes, *supra* note 185, at 1–2.

201. Although these changes drew on committee recommendations, the language was not identical. For example, the language of the Workgroup Proposal required universities policies to assure protection for academic speech related to teaching, scholarship, and governance, while the Initial Governance Committee Draft excluded academic speech from the scope of the policy’s disciplinary elements. In addition, the Governance Committee version defined these exclusions

disciplinary action under the policy was subject to procedural safeguards.²⁰² Finally, the committee also approved some changes to the language defining the four categories of improper use, such as revisions in the language on incitement to align that provision more closely with United States Supreme Court precedent.²⁰³

A draft of the committee revisions was posted for public comment,²⁰⁴ and further changes were made before the revisions were presented to the Board for approval at its meeting in May.²⁰⁵ Most of these further changes responded to specific concerns about the wording of the provisions in the original committee draft exempting speech related to teaching, scholarship and governance.²⁰⁶ One change, however, involved a seemingly minor tweak in the introductory language to paragraph 3 that has potentially fundamental implications for the entire policy.²⁰⁷

The Board unanimously approved the recommended revisions.²⁰⁸ The revised version is now the official Board policy, and will be the focus of the analysis that follows.

2. Issues Raised by the Final Policy

The final policy changes the original policy in three ways: (1) it incorporates specific First Amendment fixes; (2) it expressly acknowledges and gives weight to academic freedom and First Amendment rights; and (3) it alters the definition of “improper use of social media.” While these changes have solved some problems with original policy, they do not fully address the problems with using the *Pickering* balancing test as a broad restriction on speech. In addition, the change to the definition of improper use has created a fundamental ambiguity with profound implications for the meaning and constitutionality of the policy.

in ways that narrowed their scope. *Compare* Workgroup Proposal app. (specifying that protection is to be assured for “the content of any academic research and other scholarly activities,” “the content of any academic instruction,” and “statements, debate, or expressions made as part of shared governance”); *with* Final Policy app. II.F.6.b.2 (specifying that “[a]uthorship of content on social media in accordance with commonly accepted professional standards and in compliance with all applicable laws and university and Board policies shall not be considered an improper use of social media” in the context of “academic research or other scholarly activity,” academic instruction within the instructor’s area of expertise,” and “statements, debate, or expressions made as part of shared governance and in accordance with university policies and processes, whether made by a group or individual employee.”).

202. *See* Initial Governance Committee Draft app. II.F.6.b.4.

203. *See id.* app. II.F.6.b.3.1

204. *See supra* note 7.

205. *See Meeting Agenda for May 14-15, 2014, supra* note 7, at 33–36.

206. For example, the Initial Governance Committee Draft excluded “academic research or other scholarly activity *within the creator’s area of expertise*,” but the highlighted language was deleted from the final version approved by the Board, thus extending protection to a broader range of research and scholarly activity. *See* Final Policy app. II.F.6.b.2.i (emphasis added).

207. *See infra* notes 226–45 and accompanying text.

208. *Minutes of Meeting on May 14-15, 2014, supra* note 182, at 6–8.

a. First Amendment Fixes

As discussed above, there were several potential First Amendment issues under the original policy. First, the language regarding incitement was potentially overbroad because it was not limited to incitements that were intentional and likely to occur.²⁰⁹ That problem was addressed by the revisions and does not require further discussion.²¹⁰ Second, the original policy applied the *Garcetti* rule to any use of social media made pursuant to official duties without regard to whether such speech was within the scope of academic freedom.²¹¹ The final policy addresses this problem by excluding academic speech from its scope,²¹² although the policy's language may be problematic in some respects. Third, the original policy used the *Pickering* balancing test as a broad rule regulating speech, which arguably would not pass muster under the stricter test that applies to such rules²¹³ and also would likely be unconstitutionally vague.²¹⁴ The final policy does not directly address this problem.

The final policy addresses the *Garcetti* issue by expressly excluding most speech that is within the scope of academic freedom. Under new paragraph II.F.6.b.2:

Authorship of content on social media in accordance with commonly accepted professional standards and in compliance with all applicable laws and university and Board policies shall not be considered an improper use of social media in the following contexts:

- i. academic research or other scholarly activity;
- ii. academic instruction within the instructor's area of expertise;
- and
- iii. statements, debate, or expressions made as part of shared governance and in accordance with university policies and processes, whether made by a group or individual employee.²¹⁵

This exclusion covers most speech made pursuant to official duties that may be protected by the First Amendment notwithstanding *Garcetti* because it is within the scope of academic freedom. In view of the language of this exclusion, however, it may not be coextensive with the scope of First Amendment protections or academic freedom.

209. See *supra* notes 140–45 and accompanying text.

210. See Final Policy app. II.F.6.b.3.i (referring to the use of social media that “is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action”).

211. See *supra* notes 152–54 and accompanying text.

212. See Final Policy app. II.F.6.b.2 (excluding most academic speech from the scope of the policy).

213. See *supra* notes 165–75 and accompanying text.

214. See *supra* notes 176–78 and accompanying text.

215. Final Policy app. II.F.6.b.2.

First, academic speech is excluded only if it is “in accordance with commonly accepted professional standards and in compliance with all applicable laws and university and Board policies.”²¹⁶ It is not entirely clear what those professional standards are. To the extent that this language refers to a limited range of unprofessional conduct, such as plagiarism, it presents relatively few First Amendment concerns. If, on the other hand, it incorporates a broader range of less clearly defined standards, such as concepts of civility, this language is unclear and might be vague or overbroad, at least as applied in a particular case.

Second, some of the exclusions from the policy are defined narrowly. Instruction is protected only if it is “academic” and “within the instructor’s area of expertise,” and would therefore not appear to encompass other kinds of instruction, such as continuing education programs. Likewise, speech related to governance is protected only if it is made “in accordance with university policies and processes,”²¹⁷ which would seem to leave speech that is made outside of official governance channels unprotected.

Notwithstanding these questions, the exclusion of academic speech is likely sufficient to prevent a facial challenge to the policy based on an exception to *Garcetti* for academic speech.²¹⁸ Although the policy might still be applied to some protected academic speech, it is probably not substantially overbroad, insofar as lower courts have generally defined the scope of any academic freedom “carve out” from *Garcetti* narrowly.²¹⁹ Likewise, because the exclusion is only vague as to a relatively narrow category of speech, a facial challenge on vagueness grounds would probably not be successful. Nonetheless, application of the policy in a particular case might be challenged if the speech in question is within the scope of academic freedom and entitled to protection under the First Amendment.

The final policy did not directly address the third First Amendment issue raised by the original policy—its use of the *Pickering* balancing test as a broad rule for regulating employee speech. Nonetheless, the revisions giving weight to free speech and academic freedom and changing the language defining improper use may have a bearing on this issue. First, as discussed in the next

216. *Id.* In the original draft of the committee revisions, this language referred to commonly accepted “academic freedom principles,” which was problematic because, to the extent there are any commonly accepted principles of academic freedom (a debatable proposition in view of the uncertainty concerning its scope and meaning), they do not establish threshold requirements for protection. The AAUP statement on Tenure and Academic Freedom recognizes the need for academics to speak responsibly, but that is not the same thing as establishing a requirement that academic speech must meet in order to fall within the scope of academic freedom. See AAUP Statement, *supra* note 10. The final version of the revision makes more sense.

217. Final Policy app. II.F.6.b.2.iii.

218. See *supra* notes 66–77 and accompanying text (discussing overbreadth and vagueness doctrines).

219. See *supra* notes 154–59 and accompanying text (discussing application of *Garcetti* in higher education).

section, by increasing the weight to be accorded academic freedom, the final policy makes it less likely that disciplinary action will be taken in a manner that violates the First Amendment. This change might have a marginal effect on the constitutionality of the policy, but it probably is not enough to satisfy the heightened requirements for broad regulations of employee speech or solve the vagueness problems raised by relying on a subjective balancing test without any scienter requirement. Second, as discussed in the section thereafter, the last-minute revision changing the language of the definition of “improper” creates a fundamental ambiguity and the resolution of this ambiguity has critical implications for the meaning and constitutionality of the policy.

b. Increased Weight for Academic Freedom

In addition to specific First Amendment fixes, the final policy contains various provisions that acknowledge the principle of academic freedom and give it increased weight in the balancing process. The extent to which these changes would have any legal or practical impact is unclear, but they should make it more difficult to justify disciplinary action unless it is a use of social media that has caused or will cause substantial harm to the operations of the University. Clarifying that disciplinary action under the policy is subject to procedural requirements provides a further safeguard that these considerations will be taken seriously.²²⁰

The final policy begins with a new paragraph II.F.6.a, which emphasizes the value of free speech and academic freedom. It begins with an express statement that the Board of Regents “strongly supports” academic freedom, “highly values” the work of the faculty, and acknowledges that “academic freedom protects their work” and “enhances the valuable service they provide . . .”²²¹ The paragraph then endorses a statement from the AAUP’s Statement on Tenure and Academic Freedom.²²² Finally, it recognizes the First Amendment rights of faculty and staff to speak on matters of public concern using social media, specifies that “any communication . . . protected by the First Amendment and . . . otherwise permissible under the law is not precluded

220. See Final Policy app. II.F.6.b.5 (providing that “[e]xisting university grievance and review processes shall apply” to any disciplinary action taken under the policy).

221. *Id.* II.F.6.a. (“The Kansas Board of Regents strongly supports principles of academic freedom. It highly values the work of state university faculty members. Academic freedom protects their work and enhances the valuable service they provide to the people of Kansas.”)

222. *Id.* (expressing support for “this statement from the 1940 Statement of Principles of the American Association of University Professors”). The quoted language reads:

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, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

by this policy,” and directs that the policy “shall be construed and applied in a manner that is consistent with the First Amendment and academic freedom principles.”²²³

Another revision explicitly directs the University to consider academic freedom before taking any disciplinary action under the policy. New paragraph II.F.6.b.4 directs the University to take various considerations into account “[w]hen determining whether a particular use of social media constitutes an improper use,” including:

[A]cademic freedom principles referenced in subsection b.2., the employee’s position within the university, whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university, whether the communication was made during the employee’s working hours and whether the communication was transmitted utilizing university systems or equipment.²²⁴

These considerations, including academic freedom, are not limited to the application of the *Pickering* balancing test, but rather are now part of any disciplinary action under the policy. This paragraph clarifies the obligation to consider academic freedom when applying the policy, but it leaves the ultimate decision to the University and does alter the standard itself.

Taken together, the provisions change the tone of the policy, expressly acknowledge academic freedom, and recognize that the policy cannot be applied to violate First Amendment rights. Nonetheless, the policy still stands as a broad regulation of speech and its application still depends on the subjective judgments of the University. Thus, even if these changes do have an effect on how the policy is applied in practice, they do not solve the First Amendment problems raised by the use of the *Pickering* balancing test as the basis for a disciplinary rule. The policy is still unlikely to survive the more stringent test that applies to broad prohibitions on employee speech, under which the policy is valid only if the restriction on speech is “necessary to prevent actual disruption” of the University’s operations as an employer.²²⁵ Likewise, the policy is still vague, insofar as whether a use of social media would be considered improper is still based on the subjective judgment of the University and is not limited by any scienter requirement.

The assessment of these issues, moreover, is complicated by the change in the language that defines improper use of social media. As discussed in the following section, this change introduced a critical ambiguity that has profound implications for the meaning, operation, and constitutionality of the policy.

223. *Id.*

224. *Id.* II.F.6.b.4.

225. *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131, 1141 (D. Kan. 2002).

c. The Definition of Improper Use

Paragraph II.F.6.b.5 of the final policy reaffirms the authority of the University to make “use of progressive discipline measures pursuant to Board or university policy, up to and including suspension, dismissal and termination, with respect to any faculty or non-student staff member who is found to have made an improper use of social media.” Since this disciplinary authority is attached to the “improper use of social media,” the scope and impact of the policy depend upon how improper use is defined. Changes to the language in the original policy that defined improper use raise fundamental questions about this critical issue.

The original policy explicitly defined improper use. It introduced the four grounds for disciplinary action with the prefatory phrase “ ‘[i]mproper use of social media’ means making a communication through social media that [falls into one of four categories].”²²⁶ The final policy retains the four categories (with some changes in language) in new paragraph II.F.6.b.3, but the prefatory language has been amended to read “[t]he United States Supreme Court has held that public employers generally have authority to discipline their employees for speech in a number of circumstances, including but not limited to speech that [falls into one of four categories].”²²⁷ Throughout the paragraph, moreover, the revisions replace the term “university” (or universities) with the term “employer.”²²⁸

The clear effect of this change in language is to alter the meaning and function of the four subparagraphs that defined improper use in the original policy. As explained by the Governance Committee, this change was intended to “[r]eplace the definition of ‘improper use of social media’ with language clarifying that romanettes i-iv are instances in which the United States Supreme Court has determined that public employers generally have authority to discipline employees for speech.”²²⁹ Thus, the four “romanettes” in paragraph II.F.6.b.3 no longer define categories of “improper use of social media,” but rather provide “guidance to university administrators and others by citing types of instances in which the U.S. Supreme Court has ruled public employers have authority to act on employees’ speech.”²³⁰

Aside from questions about what prompted this change and whether the description of First Amendment precedents is accurate,²³¹ the change raises the

226. Original Policy app. II.C.6; *see supra* notes 130–34 and accompanying text (discussing language of the Original Policy).

227. Final Policy app. II.F.6.b.3.

228. *Id.* II.F.6.b.3. i–iv.

229. *See Meeting Agenda for May 14-15, 2014, supra* note 7, at 33.

230. *Minutes of Meeting on May 14-15, 2014, supra* note 182, at 5.

231. *See Meeting Agenda for May 14-15, 2014, supra* note 7, at 33. For example, the description says the Supreme Court has held that “public employers generally have authority to discipline” their employees for certain kinds of speech. But that statement is somewhat misleading, insofar as all of the cases concern First Amendment limits on preexisting authority.

more fundamental question of what “improper use of social media” means. The final policy contains no explicit replacement definition. Paragraph b.4, quoted above,²³² requires consideration of various factors, but these factors do not define improper use in the first instance. In the absence of any explicit definition in the policy, there appear to be three options, none of which is very satisfactory:

- (1) the final policy retains the prior definition of improper use notwithstanding the change in language;
- (2) the improper use of social media is not further defined; or
- (3) the use of social media is only improper if it violates some other policy.

The public reaction to the final policy assumed that the changes in paragraph b.3 were purely cosmetic and that the final policy retained the original policy’s definition of improper use.²³³ This interpretation, however, is contrary to the language of the final policy and would negate the expressed intention of the Board. Indeed, under this interpretation the changes in the definitional language would have no force or effect.²³⁴ In light of these considerations, it is unlikely that this is the correct interpretation of the policy or that it would be adopted by the courts in the event of litigation.

If paragraph b.3 no longer defines improper use of social media, then the final policy leaves that term undefined. Without further elaboration, however, “improper use” has almost no content; it conveys the concept that some uses of social media are prohibited because they are “[i]ncorrect,” “unsuitable” or “irregular,”²³⁵ but says very little about what makes a use improper. Ultimately, disciplinary action would depend on the CEO’s discretionary judgment that a use of social media was, for some reason, improper.

This interpretation would have serious First Amendment problems. Most directly, if improper use is not further defined, the policy would almost certainly violate the void for vagueness doctrine. A general prohibition against

Put differently, the underlying authority of the employer to take disciplinary action was assumed as a given in those cases and the issue was whether the particular uses of the existing authority to take action violated free speech. To the extent that the policy implies that these Supreme Court cases say anything about the inherent authority of government employers to take disciplinary action, it is inaccurate.

232. *See supra* text at note 224.

233. *See Minutes of Meeting on May 14-15, 2014, supra* note 182, at 6 (citing reactions to the final policy).

234. Courts ordinarily presume that changes in language are intended to reflect a change in meaning, although the presumption may be rebutted if there is an alternative explanation, such as the intent to clarify the meaning of a previous provision. *See, e.g., DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (stating that “changes in statutory language ‘generally indicat[e] an intent [of Congress] to change the meaning of the statute’”) (quoting *United States v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991)).

235. BLACK’S LAW DICTIONARY 875 (10th ed. 2014) (defining “improper” as “1. Incorrect; unsuitable or irregular. 2. Fraudulent or otherwise wrongful”).

improper use, even with guidance from Supreme Court precedents and consideration of factors required by the policy, leaves faculty and staff to guess what kinds of uses might be considered improper.²³⁶ It also seems highly unlikely that this standard could survive the more rigorous balancing test that applies to broad regulations of employee speech. If the use of the *Pickering* test as a standard was constitutionally suspect because of its chilling effect, a general authority to impose discipline for improper use of social media is even worse.

In view of these difficulties, some further definition of improper use is probably essential to the constitutionality of the policy. One possibility that might avoid constitutional difficulties would be to say that a use is “improper” if it violates some other policy, such as the use of social media to engage in sexual harassment or to publish plagiarized work. Paragraph b.5, which authorizes progressive discipline “pursuant to Board or university policy,”²³⁷ lends some support to interpretation.²³⁸

Under this approach, the authority to discipline employee speech made using social media would be defined by the substantive content of existing policies. This interpretation thus solves the First Amendment and academic freedom problems with the Social Media Policy itself, because any First Amendment or academic freedom issues would depend on whether the other policy violated by the use of social media was constitutional as applied to speech.²³⁹ But if that is what the policy means, then it does not grant any new authority to take disciplinary action because existing policies are generally applicable and thus presumably already applied to social media.²⁴⁰ Indeed, this interpretation would actually further constrain existing authority by requiring consideration of academic freedom and First Amendment rights before it is exercised.

236. Although the description of Supreme Court authority provides some guidance, it is does not limit the grounds for disciplinary action, or prevent the CEO from deciding that a use is improper for other reasons. *See Meeting Agenda for May 14-15, 2014, supra* note 7, at 33.

237. Final Policy app. II.F.6.b.5 (“The chief executive officer of a state university . . . has the authority to make use of progressive discipline measures pursuant to Board or university policy, up to and including suspension, dismissal and termination, with respect to any faculty or non-student staff member who is found to have made an improper use of social media.”).

238. Although the language might incorporate such other policies by reference, it seems more likely that this language refers to disciplinary procedures.

239. *See, e.g., Heublein v. Wefald*, 784 F. Supp. 2d 1186 (D. Kan. 2011) (rejecting challenge to disciplinary action against professor for sexual harassment based in part on derogatory statements about women); *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986 (Colo. 2012) (upholding termination for cause based on plagiarism).

240. *See, e.g., UNIV. OF KANSAS, UNIV. SENATE RULES AND REGULATIONS* § 9.1.1 (1970), available at <http://policy.drupal.ku.edu/governance/USRR#art9sect1> (defining scholarly misconduct as “fabrication, falsification, or plagiarism or other practices that seriously deviate from those commonly accepted in the scholarly community, when such misconduct occurs in the context of scholarly activities . . .”).

Whether this approach is consistent with the language and history of the policy is debatable, in part because the Board has sent mixed signals concerning the intent of the policy.²⁴¹ On the one hand, the original policy was adopted in response to the Guth tweet and therefore presumably is intended to provide the universities with the authority to respond to such a case going forward. Likewise, the result of this interpretation would be effectively to adopt the Workgroup's recommendation that disciplinary action be limited to violations of other policies, which the governance committee apparently rejected.²⁴² On the other hand, the Regents have also maintained that it was not the intent of the policy to restrict academic freedom or deny First Amendment rights and this interpretation is the one that is consistent with that statement. In addition, the change in paragraph b.3 appears to reflect the recognition that the prior definition of improper use of social media was problematic, and this is the interpretation that solves those problems.

As this analysis suggests, none of these three interpretive choices is very attractive. The first option retains the disciplinary character of the policy, but essentially ignores the Board's choice to eliminate the definition of improper use and leaves the policy vulnerable to a challenge based on its use of *Pickering* as a broad-based regulation of speech. The second option honors the change in introductory language to paragraph b.3 and retains the policy's disciplinary character, but is even more vague and open-ended and highly likely to be ruled unconstitutional. The third option avoids serious First Amendment problems, but seems inconsistent with the Board's intent to establish a disciplinary policy and its rejection of the Workgroup's recommendation to limit disciplinary actions to uses of social media that violate other policies. Nonetheless, as a First Amendment scholar and a member of the University faculty, I prefer the narrow reading.

Ultimately, the constitutional validity of the policy will depend on the resolution of this interpretative question. The universities will have the first opportunity to interpret the Board's policy, because they have to develop internal policies to implement it. These policies could provide further specifics on what constitutes improper use. While the universities lack the authority to disregard or defy Regent's policy, they have to interpret ambiguous provisions in order to implement them and they may prescribe rules and standards for the exercise of authority granted by the Regents. For a variety of reasons, however, the universities may be reluctant to attempt any further definition of improper use.²⁴³

241. These mixed signals may be the result of the fact that the Board was speaking to two different audiences—the Legislature and the faculty and staff of the universities. *See infra* text following note 256.

242. *See supra* note 197 and accompanying text.

243. Among other things, it is hard to imagine a definition that would satisfy the First Amendment, the Board of Regents, and faculty and staff.

Ultimately, the courts may also be called upon to interpret the policy in the context of litigation, the possibility of which cannot be discounted.²⁴⁴ In view of the chilling effect of the current ambiguous policy, a facial challenge may be possible. Even if no facial challenge is forthcoming, if disciplinary action is ever taken under the policy, a constitutional claim might provide a viable defense. In the event of a legal challenge, a court might well adopt the narrow interpretation in order to avoid serious constitutional problems.²⁴⁵

V. BROADER IMPLICATIONS

To this point, I have focused on the specific First Amendment issues raised by the University and Board of Regents responses to the Guth tweet. In this concluding section I will offer some observations on the broader implications of the incident for the political context of controversial speech by university employees, the connection between the *Garcetti* problem and other First Amendment issues, and the difficulties of communication between the world of academia and the world of politics.

The adoption of a Social Media Policy was a political response to a political controversy. As a matter of politics, the Regents adoption of a Social Media Policy was a signal to the Legislature that the Regents had addressed the Guth case and further legislative action was unnecessary.²⁴⁶ While the policy may have helped to smooth over relations between the Legislature and the universities in the short term, its long-term implications for the political dynamic between the Legislature and the universities are problematic.

To illustrate this point, we may consider what would have happened if the policy had been in place at the time of the Guth tweet. To avoid First Amendment problems and protect academic freedom, the university might be reluctant to take disciplinary actions against Guth, but this choice would be more difficult to justify politically because the policy would appear to authorize disciplinary action. Indeed, if the new policy does not cover Guth's case, it is hard to see what kind of social media use it was intended to cover. Thus, the policy would make it more difficult for the Universities and the Regents to resist political pressure to take action against faculty and staff who say controversial things using social media.

244. A number of organizations that might support litigation challenging the policy have been involved, including the Foundation for Individual Rights in Education, the American Association of University Professors, and the American Civil Liberties Union. See Susan Kruth, *FIRE, AAUP Express Alarm Over New Kansas Social Media Policy*, FIRE (Dec. 20, 2013), <http://www.thefire.org/fire-aaup-express-alarm-over-new-kansas-social-media-policy/>.

245. See *supra* notes 66–75 and accompanying text.

246. A similar controversy involving a Kansas University sociology Professor who used sexually explicit materials, with the informed consent of students, in a course on human sexuality, was resolved in a similar way after the Governor vetoed a proposed funding restriction and the legislature instead directed to the Regents to adopt a policy. See John Milburn, *Harassment, class content policies approved*, TOPEKA CAPITAL-J., Dec. 18, 2003, available at http://cjonline.com/stories/121803/bre_regents.shtml. The policy is now located in the Policy Manual, app. II.F.7.

Academic freedom protects against precisely this sort of political pressure so as to create an environment in which faculty, staff, and students are free to explore ideas without fear of retribution. This view of the university setting as a specialized “marketplace of ideas,”²⁴⁷ constrained by professional and academic standards, suggests another way of understanding why *Garcetti* may not apply to academic speech. From this perspective, the protection of academic speech is connected to recent First Amendment decisions using the “public forum” doctrine to analyze content-based limits on government funding for speech. Insofar as government employment and public funding are both a form of government benefit, speech-related restrictions on employees and funding recipients present similar issues under the doctrine of “unconstitutional conditions.”²⁴⁸

As the Court explained in *Garcetti*, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.”²⁴⁹ In support of this rationale, *Garcetti* cited *Rosenberger v. Rector and Visitors of Univ. of Va.*,²⁵⁰ which dealt with public funding for speech. *Rosenberger* is one of a series of public funding cases in which the Court has distinguished between government speech and funding that creates a “public forum” for speech.²⁵¹

The First Amendment does not apply to government speech and the government may choose to send a message without regard to the usual limitations on content-based restrictions or the usual requirements of viewpoint neutrality. Thus, the government is free to choose to fund only the message it

247. Some proponents of academic freedom resist the marketplace of ideas metaphor to the extent that it ignores the role of expertise, specialized knowledge, and the scientific method in academic debate. See POST, *supra* note 90 (emphasizing the role of expertise in the protection of academic speech).

248. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

249. *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

250. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”) (cited in *Garcetti*, 547 U.S. at 422).

251. A public forum is public property, such as the streets and parks, that has been set aside for speech. See *Hague v. Comm. for Indust. Org.*, 307 U.S. 496, 515, 516 (1939) (stating that the “streets and parks . . . 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.”). Although the government has no obligation to set aside other public property for speech, once it does so, the First Amendment applies. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983). Some government property is a public forum for limited purposes, and is treated as a public forum if speech falls within the scope of the forum, but as a nonpublic forum if it does not. See *id.* In recent years, the Court has often treated government funding under the public forum precedents. See, e.g., *Christian Legal Soc. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (applying public forum analysis to recognition of student groups).

wishes to convey, although it may not condition such funding in a manner that restricts speech outside the program being funded.²⁵²

But when government funding is intended to promote private expression, it may create a public forum or a limited public forum, in which case First Amendment principles apply.²⁵³ When dealing with such a limited public forum, the government may restrict access (i.e., limit funding) so as to preserve the forum for its intended use, but unreasonable restrictions or viewpoint discrimination violate the First Amendment.²⁵⁴

This understanding may offer an alternative way of analyzing the limitations of *Garcetti* in the academic context. Unlike the assistant attorney in *Garcetti*, who was engaged in government speech (i.e., he was paid to promote the government's prosecutorial message), faculty and staff at a university are employed to engage in teaching and scholarship that offers a variety of ideas and viewpoints on diverse subjects. From this perspective, the principle of academic freedom is another way of saying that the University is, in effect, a limited public forum for the exchange of academic ideas.²⁵⁵

This connection may be important for a couple of reasons. First, it uses the rationale of *Garcetti* itself to explain why the rule does not apply to teaching and research at public universities (rather than referencing an uncertain connection between academic freedom and the First Amendment). Second, it may provide guidance as to the proper scope of protection for the speech of university faculty and staff by focusing on the critical question—whether the faculty or staff member's employment related duty in a particular case is to promote the university's message (in which case the *Garcetti* rationale applies) or to participate in an academic exchange of ideas (in which case it does not).

252. See, e.g., *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321 (2013) (upholding limits on use of funds but invalidating requirements that restricted recipient's speech outside of government funded program); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding ban on use of government funding for family planning to provide abortion counseling and referrals); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) (upholding limitation of tax exemption to charitable organizations that did not engage in political advocacy).

253. *Martinez*, 561 U.S. 661 (concluding that funding for student groups created a limited public forum but upholding requirement that groups be open to all students as a reasonable and viewpoint neutral requirement); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (invalidating limitations on advocacy by recipients of legal aid funding); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger*, 515 U.S. 819 (invalidating denial of funding to students groups for printing and dissemination of religious materials).

254. See *Rosenburger*, 515 U.S. at 829 (observing that in a limited public forum, the state may neither "exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum'" nor "discriminate against speech on the basis of its viewpoint").

255. This conclusion would not imply that students have a right to say anything they want in class, since speech in a limited public forum must relate to the purposes of the forum to receive protection. Likewise, academic teaching and research would be protected because it is within the scope of the forum, but that would not give faculty carte blanche to say anything they want in class without regard to subject matter or established disciplinary principles.

The connection between *Garcetti*, public funding, and public forum doctrine also highlights the fundamental divide between the world of politics and the world of academia. As a close observer of this process, I was repeatedly struck by the difficulties of communication between the inhabitants of these entirely different worlds, because their views on the subject rested on entirely different premises.²⁵⁶ Although many factors contribute to this failure to communicate, one important factor may be that the two worlds begin with fundamentally different premises about public universities.

For political actors, the state funds public education because it produces social and economic benefits. Like other programs, the state has the concomitant right to control the content of that education. From the perspective of university faculty and staff, however, they are engaged in a larger search for truth, the benefits of which transcend the specific education received by individual students. This search for truth requires the freedom to think, and speak, and write in accordance with academic and professional standards without regard to the political consequences.

In the same way, communications between the Board of Regents and the faculty and staff who objected to the Social Media Policy were also fraught with difficulty. Faculty and staff had difficulty appreciating the purposes of policy, which may have been intended to protect the universities from legislative retaliation, not as a broad tool for reining in outspoken faculty. Thus, faculty members were not satisfied with the Regents' assurances that the policy would not be applied in manner that restricted speech or academic freedom.

Conversely, notwithstanding the Regents' expressions of support for academic freedom that were eventually incorporated into the policy, faculty and staff were unable to communicate effectively to the Regents why they considered the policy to be such a threat to core principles. In this respect, I think the lesson for faculty and staff is that we need to do a better job communicating and explaining our core values on an ongoing basis in a manner that resonates with the Board of Regents, our political leaders, and the public at large.

If we wait until the tweet hereafter, it may be too late.

256. This clash was, of course, most immediately obvious in the tweet itself and the political response. The tweet was surely intended to be provocative and to express Guth's strong views, but he was apparently caught off guard by the vehemence of the response. Conversely, while academics might seek to discern the underlying meaning of a statement like this and understanding it context, the hyperpartisan world of politics characterized the tweet in extreme ways that distorted its meaning.

2014]

LEVY: THE TWEET HEREAFTER

129

APPENDIX: FOUR VERSIONS OF THE REGENTS' SOCIAL MEDIA POLICY***A. Original Policy***

Board of Regents Policy Manual

Chapter II: Governance – State Universities

Part C: CHIEF EXECUTIVE OFFICER, FACULTY AND STAFF

Section 6: Suspensions, Terminations and Dismissals.

Paragraph b

. . . The chief executive officer of a state university has the authority to suspend, dismiss or terminate from employment any faculty or staff member who makes improper use of social media. “Social media” means any facility for online publication and commentary, including but not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube. “Improper use of social media” means making a communication through social media that:

- i. directly incites violence or other immediate breach of the peace;
- ii. when made pursuant to (i.e. in furtherance of) the employee’s official duties, is contrary to the best interest of the university;
- iii. discloses without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data; or
- iv. subject to the balancing analysis required by the following paragraph, 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, impedes the performance of the speaker’s official duties, interferes with the regular operation of the university, or otherwise adversely affects the university’s ability to efficiently provide services.

In determining whether the employee’s communication constitutes an improper use of social media under paragraph (iv), the chief executive officer shall balance the interest of the university in promoting the efficiency of the public services it performs through its employees against the employee’s right as a citizen to speak on matters of public concern, and may consider the employee’s position within the university and whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university. The chief executive officer may also consider whether the communication was made during the employee’s working hours or the communication was transmitted utilizing university systems or equipment. This policy on improper use of social media shall apply prospectively from its date of adoption by the Kansas Board of Regents.

B. Workgroup Proposal

Chapter II: Governance – State Universities

F. OTHER

7. Social Media Policy

In keeping with the Kansas Board of Regents' commitment to the principles of academic freedom, the Board supports the responsible use of existing and emerging communications technologies, including social media, to serve the teaching, research, and public service missions of Kansas universities. Each university shall adopt guidelines to advise all university employees on use of social media. The guidelines shall encourage the responsible use of social media by all employees.

Social media means any facility for online publication and commentary.

The guidelines shall suggest ways in which social media technologies may be used to serve the university's mission and shall encourage these uses. In doing so, the guidelines shall strive to assure all employees that existing protections for academic freedom and other expression remain in place in the following:

- i the content of any academic research and other scholarly activities;
- ii the content of any academic instruction;
- iii the content of any statements, debate, or expressions made as part of shared governance at a university whether made by a group or employee; or,
- iv in general, any communication via social media that is consistent with First Amendment protections and that is otherwise permissible under the law.

The guidelines shall remind employees that their authorship of content on social media may violate existing law or policy and may be addressed through university disciplinary processes if, for example, it:

- i is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action;
- ii violates existing university or Board of Regents policies;
- iii discloses without lawful authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data.

The guidelines also shall advise employees that when using social media to speak as a citizen they should be mindful of the balance struck by the 1940 Statement of Principles of the American Association of University Professors:

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, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their

2014]

LEVY: THE TWEET HEREAFTER

131

profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

These guidelines shall recognize the rights and responsibilities of all employees, including faculty and staff, to speak on matters of public concern as private citizens, if they choose to do so.

This policy on use of social media shall apply prospectively from its date of adoption by the Kansas Board of Regents.

C. Initial Governance Committee Draft

Chapter II: Governance – State Universities

F. OTHER

6. Social Media Policy

a. Commitment to Academic Freedom and First Amendment

The Kansas Board of Regents strongly supports principles of academic freedom. It highly values the work of state university faculty members. Academic freedom protects their work and enhances the valuable service they provide to the people of Kansas.

The Board also supports this statement from the 1940 Statement of Principles of the American Association of University Professors:

“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, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.”

Further, the Kansas Board of Regents recognizes the First Amendment rights as well as the responsibilities of all employees, including faculty and staff, to speak on matters of public concern as private citizens, if they choose to do so, including through social media. In general, for both faculty and staff, any communication via social media that is protected by the First Amendment and that is otherwise permissible under the law is not precluded by this policy.

This policy shall be construed and applied in a manner that is consistent with the First Amendment and academic freedom principles.

b. Social Media Policy

In keeping with the Kansas Board of Regents’ commitment to the First Amendment and principles of academic freedom, the Board supports the

responsible use of existing and emerging communications technologies, including social media, to serve the teaching, research, and public service missions of the state universities. These communications technologies are powerful tools for advancing state university missions, but at the same time pose risks of substantial harm to personal reputations and to the efficient operation of the higher education system. The Board therefore believes it is prudent to adopt this policy on the proper – and improper – use of social media.

- 1 For purposes of this policy: “Social media” means any online tool or service through which virtual communities are created allowing users to publish commentary and other content, including but not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube; “social media” does not include e-mail sent to a known and finite number of individuals, or non-social sharing or networking platforms such as Listserv and group or team collaboration worksites.
- 2 Authorship of content on social media in accordance with commonly accepted academic freedom principles and in compliance with all applicable laws and university and Board policies shall not be considered an improper use of social media in the following contexts:
 - i academic research or other scholarly activity within the creator’s area of expertise;
 - ii academic instruction related to the subject being taught; and
 - iii statements, debate, or expressions made as part of shared governance and in accordance with university policies and processes, whether made by a group or individual employee.
- 3 “Improper use of social media” means making a communication through social media that:
 - i is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action;
 - ii when made pursuant to (i.e. in furtherance of) the employee’s official duties, is contrary to the best interests of the university;
 - iii discloses without lawful authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data; or
 - iv subject to the balancing analysis required by the following paragraph, 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, impedes the performance of the speaker’s official duties, interferes with the regular operation of the university, or otherwise adversely affects the university’s ability to efficiently provide services.

2014]

LEVY: THE TWEET HEREAFTER

133

In determining whether the employee's communication constitutes an improper use of social media under subparagraph iv, the chief executive officer shall balance the interest of the university in promoting the efficiency of the public services it performs through its employees against the employee's right as a citizen to speak on matters of public concern, and may shall consider the employee's position within the university and whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university. The chief executive officer shall also consider whether the communication was made during the employee's working hours or the communication was transmitted utilizing university systems or equipment.

- 4 The chief executive officer of a state university has the authority to make use of progressive discipline measures pursuant to Board or university policy, up to and including suspension, dismissal and termination, with respect to any faculty or non-student staff member who makes improper use of social media. Existing university grievance and review processes shall apply to any such action by the chief executive officer.

c. Application of policy

This policy on the use of social media shall apply prospectively from the date of its original adoption by the Kansas Board of Regents on December 18, 2013.

D. Final Policy

Chapter II: Governance – State Universities

F. OTHER

6. USE OF SOCIAL MEDIA BY FACULTY AND STAFF

a. Commitment to Academic Freedom and First Amendment

The Kansas Board of Regents strongly supports principles of academic freedom. It highly values the work of state university faculty members. Academic freedom protects their work and enhances the valuable service they provide to the people of Kansas.

The Board also supports this statement from the 1940 Statement of Principles of the American Association of University Professors:

“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, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should

show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.”

Further, the Kansas Board of Regents recognizes the First Amendment rights as well as the responsibilities of all employees, including faculty and staff, to speak on matters of public concern as private citizens, if they choose to do so, including through social media. In general, for both faculty and staff, any communication via social media that is protected by the First Amendment and that is otherwise permissible under the law is not precluded by this policy.

This policy shall be construed and applied in a manner that is consistent with the First Amendment and academic freedom principles.

b. Social Media Policy

In keeping with the Kansas Board of Regents' commitment to the First Amendment and principles of academic freedom, the Board supports the responsible use of existing and emerging communications technologies, including social media, to serve the teaching, research, and public service missions of the state universities. These communications technologies are powerful tools for advancing state university missions, but at the same time pose risks of substantial harm to personal reputations and to the efficient operation of the higher education system. The Board therefore believes it is prudent to adopt this policy on the proper – and improper – use of social media.

1. For purposes of this policy: “Social media” means any online tool or service through which virtual communities are created allowing users to publish commentary and other content, including but not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube; “social media” does not include e-mail sent to a known and finite number of individuals, or non-social sharing or networking platforms such as Listserv and group or team collaboration worksites.
2. Authorship of content on social media in accordance with commonly accepted professional standards and in compliance with all applicable laws and university and Board policies shall not be considered an improper use of social media in the following contexts:
 - i. academic research or other scholarly activity;
 - ii. academic instruction within the instructor's area of expertise; and
 - iii. statements, debate, or expressions made as part of shared governance and in accordance with university policies and processes, whether made by a group or individual employee.
3. The United States Supreme Court has held that public employers generally have authority to discipline their employees for speech in a number of circumstances, including but not limited to speech that:

2014]

LEVY: THE TWEET HEREAFTER

135

- i. is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action;
- ii. when made pursuant to (i.e. in furtherance of) the employee's official duties, is contrary to the best interests of the employer;
- iii. discloses without lawful authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data; or
- iv. subject to the balancing analysis required by the following paragraph, 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, impedes the performance of the speaker's official duties, interferes with the regular operation of the employer, or otherwise adversely affects the employer's ability to efficiently provide services.

In determining whether an employee's communication is actionable under subparagraph iv, the interest of the employer in promoting the efficiency of the public services it performs through its employees must be balanced against the employee's right as a citizen to speak on matters of public concern.

4. When determining whether a particular use of social media constitutes an improper use, the following shall be considered: academic freedom principles referenced in subsection b.2., the employee's position within the university, whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university, whether the communication was made during the employee's working hours and whether the communication was transmitted utilizing university systems or equipment.
5. The chief executive officer of a state university, or the chief executive officer's delegate, has the authority to make use of progressive discipline measures pursuant to Board or university policy, up to and including suspension, dismissal and termination, with respect to any faculty or non-student staff member who is found to have made an improper use of social media. Existing university grievance and review processes shall apply to any such action.

c. Application of policy

This policy on the use of social media shall be construed and applied in a manner that is consistent with the First Amendment and academic freedom principles and shall apply prospectively from the date of its original adoption by the Kansas Board of Regents on December 18, 2013.