

ADMISSIONS AGAINST PINTEREST: THE FIRST AMENDMENT IMPLICATIONS OF REVIEWING COLLEGE APPLICANTS’ SOCIAL MEDIA SPEECH

Frank D. LoMonte & Courtney Shannon***

I. INTRODUCTION

“Archie” is a straight-A, high school graduate with superlative standardized test scores and extracurricular activities—well in excess of the average credentials at his first-choice college, Riverdale State University. “Betty,” who works in Riverdale State’s admissions office, is about to put Archie’s application into the “yes” pile when she decides to perform one final check: running Archie’s name through an internet search engine. The top result is Archie’s personal Facebook page, which is publicly viewable.

Visiting the Facebook profile, Betty discovers that Archie has “liked” the Facebook page belonging to rap artist Jughed Jonzz, who is notorious for violent and misogynistic lyrics that glamorize drug trafficking.¹ Betty is alarmed. She notes that, in a recent post to his

* Professor & Director of the Joseph L. Brechner Center for Freedom of Information at the University of Florida in Gainesville, Fla. B.A., 1992, Political Science, Georgia State University; J.D. (Order of the Coif), 2000, University of Georgia School of Law.

** Legal Researcher, Joseph L. Brechner Center for Freedom of Information, J.D., 2022 (anticipated), University of Florida Levin College of Law.

1. As explained by the Fourth Circuit:

‘Liking’ on Facebook is a way for Facebook users to share information with each other. The ‘like’ button, which is represented by a thumbs-up icon, and the word ‘like’ appear next to different types of Facebook content. Liking something on Facebook is an easy way to let someone know that you enjoy it.

Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013) (internal citation omitted). In *Bland*, the Fourth Circuit became the first federal appellate court to explicitly say that the act of clicking “like” to show affinity for a Facebook page (such as a page belonging to a cause or a candidate) is an act of expression that the First Amendment protects. *See id.* at 386 (“[L]iking a political candidate’s campaign page communicates the user’s approval of the candidate and supports the campaign by associating the user with it.”).

Facebook wall, Archie shared a news article about Jonzz's arrest for a gang-related homicide, appending a comment: "Free Jughed! He was framed!" Betty is concerned that, despite his stellar academic credentials, Archie will be a poor fit for Riverdale State because his affinity for Jonzz indicates poor character. His application goes in Betty's "no" pile.

It seems undeniable in this fictional scenario that Archie has all of the essential ingredients traditionally required for a First Amendment case: Archie was eligible for a state benefit, which he would have received if not for the content of his speech. Yet it is far from clear—either legally or practically—that Archie will have a First Amendment claim. The question is: Why? Why do state colleges widely behave as if they are free to disregard generally applicable First Amendment principles in making admissions decisions when no other speech-based government decisions are immune from constitutional scrutiny?

As a legal matter, courts have shown extraordinary deference to the decisions of higher educational institutions, particularly where the decision can be regarded as academic as opposed to punitive.² For instance, in a 2017 case, the Fourth Circuit found no constitutional redress for an applicant who was docked points during a community college admissions interview for bringing up his religious beliefs.³

As a practical matter, legal challenges to admissions decisions are rare and unlikely, with the notable exception of race-discrimination claims. A rejected college applicant seldom receives an explanation that connects the decision to constitutionally protected activity; admissions offices do not typically notify unsuccessful candidates that a particular Twitter post was the disqualifying factor. Accordingly, even a flagrant constitutional violation is likely to go undetected and uncontested.

This Article suggests that there is no doctrinal grounding for the notion that public higher education admissions is a "First Amendment-free zone."⁴ In no other area of government can a benefit—even a wholly discretionary one—be withheld or rescinded on the basis of constitutionally protected speech.⁵ The question should not be

2. See Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J. COLL. & U.L. 619, 619 (2003) (explaining that "[a]cademic sanctions have occasioned greater deference from the courts" and that judges "have accorded universities great leeway in determining both the need for and the extent of any sanction" once the decision is categorized as an academic one).

3. *Buxton v. Kurtinitis*, 862 F.3d 423, 430-33 (4th Cir. 2017).

4. See *infra* note 176 and accompanying text.

5. See, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213-15 (2013) (holding that discretionary federal grant could not be denied to a nonprofit organization because its principals refused to sign a blanket waiver of First Amendment rights).

whether a state institution has total discretion to withhold admission because of an applicant's speech—that answer indisputably should be “no”—but at what point the withholding decision becomes an actionable violation of the applicant's constitutional rights.⁶

The impetus for this Article was the annual survey of college admissions officers by Kaplan Test Prep, which since 2015 has indicated that somewhere between twenty-five and forty percent of admissions employees say that they look at applicants' social media profiles to learn more about them.⁷ Given that at least some of the surveyed admissions officers will necessarily come from public institutions where the First Amendment applies,⁸ the survey results raise profound questions about whether speech extrinsic to the application process can be the basis for withholding college admission. It is not at all clear that universities are observing First Amendment boundaries in assessing what applicants write and share. For instance, admissions officers told Kaplan that one red flag indicator that can diminish an applicant's odds of acceptance is “vulgarity in blogs,” which under any ordinary understanding of the Constitution is beyond the government's authority to regulate.⁹

Social media profiles can be a revealing window into the lives of their creators, and perhaps, in the case of admissions decisions, too revealing. An admissions officer viewing a Facebook or Instagram account may learn all manner of information about a candidate that

6. See *infra* Part V.

7. See Kaplan Survey: *Percentage of College Admissions Officers Who Visit Applicants' Social Media Pages on the Rise Again*, KAPLAN (Jan. 13, 2020), <https://www.kaptest.com/blog/press/2020/01/13/kaplan-survey-percentage-of-college-admissions-officers-who-visit-applicants-social-media-pages-on-the-rise-again> [hereinafter *Kaplan*] (reporting that 36% of 300 college admissions officers surveyed looked at social media profiles as part of the admissions decision, up from the previous year's 25%).

8. See AM. ASS'N OF COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS, SOCIAL MEDIA MONITORING AND THE ADMISSIONS PROCESS 3-4, 14 (2017), https://www.aacrao.org/docs/default-source/research-docs/social-media-monitoring-and-the-admissions-process--july-60-second-survey.pdf?Status=Temp&sfvrsn=4dd22026_4 [hereinafter AACRAO SURVEY]; *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) (“[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”).

9. See Kashmir Hill, *What College Admission Officers Don't Like Seeing on Facebook: Vulgarity, Drinking Photos & 'Illegal Activities,'* FORBES (Oct. 12, 2012, 11:11 AM), <https://www.forbes.com/sites/kashmirhill/2012/10/12/what-college-admission-officers-dont-like-seeing-on-facebook-profiles-vulgarity-drinking-photos-and-illegal-activities/?sh=68b87c402170#156353812170> (reporting on results of the 2012 Kaplan survey of admissions officers, which found that thirty-five percent of those who checked applicants' social media pages found “something that negatively impacted an applicant's chances of getting into the school”); Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 495 (2009) (“A publicly told offensive joke or the use of vulgar or indecent language . . . would not come close to meeting any of the carved-out exceptions to the First Amendment.”).

cannot legitimately be considered as part of the admissions decision.¹⁰ For instance, the admissions officer might see photos indicating that the applicant is engaged to someone of the same sex or of a different race—information that a public university could not require the applicant to disclose—which might trigger the admissions officer’s personal biases.¹¹ As one commentator has noted, incorporating social media into the admissions process “could be used as a way around antidiscrimination laws entirely.”¹² For this reason, it matters whether universities have standards confining what (if anything) admissions officers may view and consider from the realm of social media.

The question of constitutional rights and college admissions gained new salience in 2020, as the nation roiled with racial tension provoked by excessive police force directed disproportionately against Black people.¹³ As the public focused greater attention on the online discourse about issues of race and equity, incoming first-year college students found themselves publicly called to account for offensive social media posts written during their high school years.¹⁴ In response to high-profile controversies, many colleges (including some public ones) responded by

10. See Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J. COLL. & U.L. 583, 614-15 (2004).

The Internet has lifted the veil of individual privacy, so that information about factors like race, class, gender, sexual orientation, obesity, physical handicaps, unpopular opinions, and nonmainstream clothing styles become easily visible to employers, potential employers, college admissions personnel, law enforcement officials, welfare providers, loan companies, landlords, merchants, and many other societal decision makers.

Thomas H. Koenig & Michael L. Rustad, *Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done*, 93 NEB. L. REV. 592, 596 (2015).

11. See, e.g., Koenig & Rustad, *supra* note 10, at 614; Felicia O. Kaloydis et al., *Sharing Political and Religious Information on Facebook: Coworker Reactions*, 6 J. SOC. MEDIA SOC’Y, no. 2, 2017, at 239, 260-63.

12. Katherine Pankow, *Friend Request Denied: Chapter 619 Prohibits Colleges from Requesting Access to Social Media Accounts*, 44 MCGEORGE L. REV. 620, 625 (2013) (describing enactment of a California statute that forbids colleges from demanding social media login credentials from current or prospective students); see *infra* Part III.B (discussing similar statutes protecting applicants from social media intrusion).

13. See Andrea Januta et al., *Challenging Police Violence . . . While Black*, REUTERS (Dec. 23, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-race>; Tatiana Navarro, *Students, Others Forwarding Racist Online Posts for Public Shaming, Real-World Consequences*, WUFT (June 17, 2020), <https://www.wuft.org/news/2020/06/17/students-others-forwarding-racist-online-posts-for-public-shaming-real-world-consequences>.

14. See Navarro, *supra* note 13 (describing a string of firings and other consequences imposed after social media users publicly called out students for racially offensive online behavior).

rescinding offers of admission.¹⁵ In many of these instances, the speech at issue would be well within the broad boundaries of what the First Amendment protects in contexts outside of higher education.¹⁶

Once a student has enrolled in a state institution, it is well-established that constitutional protections attach and that enrollment may not be taken away without due process or for viewpoint-discriminatory reasons.¹⁷ So the decision to reject an applicant, or to withdraw acceptance, raises questions about the breadth of the Due Process Clause, as well as the First Amendment, if the decision is based on speech.

This Article attempts to clarify unsettled questions about when a public educational institution may consider an applicant's speech in making an initial admissions decision, and what recourse should be available to students whose lost opportunity to attend their chosen college is based on speech extrinsic to the admissions process.¹⁸ In Part II, the Article sets out the known limits of government agencies' authority—both within the university setting and beyond—to award or withhold benefits based on the content of a speaker's speech.¹⁹ Part III focuses specifically on the evolving and uncertain law governing student speech on social media, what the courts have said about a university's authority to police students' online expression, and how recent controversies over offensive posts have brought to the fore questions over the legal limits of campus punitive authority.²⁰ Part IV describes the findings of the annual Kaplan Test Prep survey of admissions officers,

15. Greta Anderson, *Universities Revoke Admissions Offers*, INSIDE HIGHER ED (June 8, 2020), <https://www.insidehighered.com/admissions/article/2020/06/08/universities-revoke-admissions-offers-over-hateful-speech>; see also Morgan Gstalter, *LSU Says Admitted Student Who Posted Racist Rant on Social Media Won't be Enrolled*, HILL (June 16, 2020, 3:16 PM), <https://thehill.com/blogs/blog-briefing-room/news/502999-lsu-says-admitted-student-who-filmed-his-racist-rant-wont-be> (reporting on recent controversies at Louisiana State University and the University of Florida involving racially offensive online speech by students admitted but not yet enrolled).

16. See, e.g., Anderson, *supra* note 15 (noting that the Foundation for Individual Rights in Education, a free speech watchdog, claimed that “‘controversial speech,’ especially at public universities, [is] . . . subject to the First Amendment”); Navarro, *supra* note 13 (“Efforts to invoke consequences even for racist posts can collide with First Amendment protections, especially at state universities, which are also governed by state constitutional protections.”).

17. See Mark P. Strasser, *Student Dismissals from Professional Programs and the Constitution*, 68 CASE W. RESV. L. REV. 97, 114-18 (2017) (analyzing case law holding that due process protections adhere to expulsion decisions at public institutions); see also *Papish v. Bd. of Curators*, 410 U.S. 667, 669-71 (1973) (per curiam) (ordering the reinstatement of a college student who was expelled for using harsh language in anti-police articles and illustrations in student-produced newspaper).

18. See *infra* Part V.

19. See *infra* Part II.

20. See *infra* Part III.

and how they use social media in the admissions process, and then turns to the results of a Joseph L. Brechner Center for Freedom of Information (“Brechner Center”) survey of public universities, finding that essentially none of them provide any training or guardrails to limit the discretion of admissions officers in considering applicants’ online speech.²¹ Part V analyzes the constitutional implications, under the First Amendment and Due Process Clause, of denying an applicant admission to college based on the content of online speech.²² Finally, Part VI recommends a way forward for public higher-educational institutions, suggesting: (1) that if social media is to be part of the admissions screening process at all, stringent guidelines must constrain the ability to make subjective, viewpoint-based decisions; and (2) that rejected applicants should have at least minimal process assuring them of an opportunity to explain what may be a harmless contextual or cultural misunderstanding, so that a life-altering decision does not turn on a miscommunication.²³

II. THE FIRST AMENDMENT, ON AND OFF CAMPUS

A. *Content-Based Regulations and the “Rights-Privileges” Distinction*

The First Amendment protects free speech against government infringement, but although the text of the amendment speaks in absolute terms, courts have never interpreted the right to be limitless.²⁴ In general, First Amendment free speech protections prohibit the government from either restraining speech from being heard, or imposing punitive consequences after the fact, if the motivation is the content or viewpoint of the speaker’s message.²⁵ The courts have recognized narrow categories of unprotected speech where the value of the speech is regarded as especially minimal in light of the countervailing societal interest in avoiding harm.²⁶ For example, speech that is obscene, a “true

21. *See infra* Part IV.

22. *See infra* Part V.

23. *See infra* Part VI.

24. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-72 (1942).

25. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (“[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.”).

26. *R.A.V.*, 505 U.S. at 382-83.

threat,” or an intentional incitement to imminent violence can be proscribed and penalized, even criminally.²⁷

The government cannot censor speech based purely on disagreement with its sentiment. As the Supreme Court has emphatically stated, the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²⁸ Viewpoint discrimination is an especially disfavored subspecies of content-based discrimination.²⁹ A law found to prefer or disadvantage particular viewpoints is an “egregious form of content discrimination,” which is “presumptively unconstitutional.”³⁰ Content-based or viewpoint-based restrictions on speech are subject to strict scrutiny review, which requires the government to justify incursions on fundamental rights by showing that the restriction is necessary to achieve a compelling government interest and is narrowly tailored to achieve that interest, a nearly insurmountable burden.³¹

In *Watts v. United States*,³² the Supreme Court reasoned that regulations that penalize “pure” speech (as opposed to conduct incidental to speech) “must be interpreted with the commands of the First Amendment clearly in mind,” recognizing the freedom of the public to comment and debate on political issues in an “uninhibited, robust, and wide-open” way that can include speech that is “vehement, caustic, and sometimes unpleasantly sharp.”³³ The *Watts* case illustrates how high the Court has set the bar for speech to qualify as categorically unprotected, and how the context of the speech is often the decisive consideration. Thus, the Court refused to find that speech constituted a criminally punishable threat even where the speaker referred wishfully to shooting President Lyndon Johnson, because the remark was phrased conditionally and was delivered in the larger context of an anti-war political speech, so the audience recognized the comment as figurative.³⁴

The Supreme Court did not recognize the First Amendment as a constraint on state and local government until 1925, in the landmark case

27. See *Chaplinsky*, 315 U.S. at 571-72 (holding that fighting words are within the realm of unprotected speech when the words “by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

28. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

29. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 829 (1995).

30. *Id.* at 829-30.

31. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 4-6 (2014).

32. 394 U.S. 705 (1969).

33. *Id.* at 707-08 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

34. *Id.* at 705-08.

of *Gitlow v. New York*.³⁵ In that case, the Court, for the first time, recognized freedom of speech as among the fundamental freedoms that the Due Process Clause of the Fourteenth Amendment protects from infringement by all levels of government.³⁶ Today, it is firmly established that all agencies of federal, state, and local government—including public institutions of higher education—are subject to First Amendment constraints,³⁷ although (as we shall see) the level of latitude afforded to regulators varies with the setting and context.³⁸

When the government imposes consequences on a speaker with the objective of inhibiting constitutionally protected speech, the First Amendment is implicated.³⁹ But for decades, federal courts took a narrow view of what could constitute an actionable deprivation sufficient to sustain a First Amendment case. Early First Amendment case law made a decisive distinction between the loss of a right or entitlement, versus the loss of a merely discretionary “privilege.”⁴⁰ Only the former, it was believed, could give rise to a First Amendment claim.⁴¹ But during the latter half of the twentieth century, courts came to recognize that any loss of a valuable benefit—even a wholly discretionary benefit—could be enough to chill a speaker from exercising legally protected rights.⁴²

The erosion of the rights-privileges distinction began with Justice William O. Douglas’s majority opinion for the Supreme Court in a 1946 case, *Hannegan v. Esquire, Inc.*⁴³ There, the Court held that the Postmaster General could not use his congressionally delegated discretion over the mailing rates for periodicals to deny preferential second-class postage privileges to *Esquire* magazine merely because he

35. 268 U.S. 652, 666 (1925).

36. *See id.* (“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.”).

37. *See id.*; *see also* *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981).

38. *See infra* Part II.B.

39. *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1031-32 (2012) (explaining that “governments ‘chill’ protected speech by restricting some other form of speech that, while unprotected, is similar to the speech getting chilled”).

40. *See* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 71-72 (1982).

41. *See* Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1465-66 (2007) (explaining origins of the “rights-privileges distinction” in constitutional law).

42. *See id.* at 1466-67.

43. 327 U.S. 146 (1946).

found the magazine's content to be "morally improper and not for the public welfare and the public good."⁴⁴ Justice Douglas wrote:

[G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated.⁴⁵

In 1958, the Court cited *Hannegan* and ruled that California could not condition receipt of a property tax break for veterans on executing an oath pledging loyalty to state and U.S. governments.⁴⁶ "[T]he denial of a tax exemption for engaging in certain speech," the Court wrote, "necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."⁴⁷

The Court had historically treated public employment as a privilege that could be withheld or revoked at will. But that began changing with Justice Tom C. Clark's 1952 opinion in *Wieman v. Updegraff*,⁴⁸ which found that the State of Oklahoma could not force state employees to forswear involvement in any "communist front or subversive organization" as a condition of employment.⁴⁹ Because the oath statute contained no requirement of scienter—a state employee could be fired for having innocently joined a harmless group that took a turn into subversive activity—the Court found that the statute violated employees' due process rights.⁵⁰ The *Wieman* Court rejected the notion that there can be no constitutional violation in withdrawing a benefit, like a government job, that the holder has no vested right in retaining, holding: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."⁵¹

In a case analogous to college admissions screening, the Court decided in 1971 that a state bar association could not constitutionally reject an applicant for refusing to answer an eligibility questionnaire asking about past involvement with the Communist Party.⁵² The Court

44. *Id.* at 149, 158-59.

45. *Id.* at 156.

46. *Speiser v. Randall*, 357 U.S. 513, 518, 528-29 (1958).

47. *Id.* at 519.

48. 344 U.S. 183 (1952).

49. *Id.* at 184-86, 192.

50. *Id.* at 189-91.

51. *Id.* at 191-92.

52. *Baird v. State Bar of Ariz.*, 401 U.S. 1, 4-5, 8 (1971).

observed that the First Amendment prohibits state actors from inquiring into people's beliefs in a way that discourages them from exercising constitutionally protected rights.⁵³ "[W]hatever justification may be offered," Justice Hugo Black wrote for the Court, "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."⁵⁴

In a 1972 decision, *Perry v. Sindermann*,⁵⁵ the Court made its most explicit declaration that, for purposes of a constitutional claim, "privilege" is no longer a concept of significance:

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.⁵⁶

The Court swept away any remaining remnants of the rights-privileges doctrine in the 2013 case of *Agency for International Development v. Alliance for Open Society International, Inc.*,⁵⁷ holding that even a discretionary government grant to which the grantee has no claim of entitlement cannot be conditioned on a broad waiver of First Amendment rights beyond what is necessary for the effective operation of the grant program.⁵⁸ For college applicants, the implications of this doctrinal evolution are profound. Being rejected from the college of one's choice can carry life-altering consequences.⁵⁹ A loss of such magnitude unquestionably would be enough to motivate people of reasonable firmness to modify their behavior, including refraining from speech.⁶⁰ Being denied admission to college, then, is a deprivation that can support a First Amendment claim, even if acceptance is regarded as a wholly discretionary privilege that a state institution would otherwise be free to withhold.⁶¹

53. *Id.* at 6.

54. *Id.* at 7.

55. 408 U.S. 593 (1972).

56. *Id.* at 597.

57. 570 U.S. 205 (2013).

58. *Id.* at 218-21.

59. *See infra* Part VI.B.

60. *See* Coenen, *supra* note 39, at 1031-32.

61. *See* Clay Calvert, *Rescinding Admission Offers in Higher Education: The Clash Between Free Speech and Institutional Academic Freedom When Prospective Students' Racist Posts Are Exposed*, 68 UCLA L. REV. DISCOURSE 282, 291-92 (2020).

B. *The Constitution and the Campus*

When the speaker is a student and the regulator is a school, courts apply considerable deference to regulatory and punitive decisions.⁶² While First Amendment freedoms still exist, they have been relaxed in light of what the Supreme Court has called “the special characteristics of the school environment.”⁶³ The Court has occasionally spoken to the rights of students in the postsecondary setting, but its signature pronouncement on the state of student rights took place in the context of K-12 education in *Tinker v. Des Moines Independent Community School District*.⁶⁴ In *Tinker*, when students were punished for silently protesting the Vietnam War by wearing black armbands to school, the Supreme Court held that schoolchildren have free speech rights that are not automatically shed when they cross the threshold of the campus.⁶⁵ In analyzing the Des Moines school district’s decision to punish the protesters, the Court coined an enduring half-measure First Amendment standard that enables schools to restrict speech if there is a concrete factual basis to anticipate “substantial disruption of or material interference with school activities.”⁶⁶ This is a meaningful level of constitutional protection, but it is nowhere near the level recognized by the courts in the off-campus world.

Beginning in the 1980s, a more conservative Supreme Court began rolling back the *Tinker* standard by carving out contextual exceptions.⁶⁷ The Court gave schools license to punish sexually explicit speech in front of a student audience, without the burden of demonstrating a material or substantial disruption, in *Bethel School District No. 403 v. Fraser*.⁶⁸ In *Hazelwood School District v. Kuhlmeier*,⁶⁹ the Court held that the *Tinker* level of protection ceases to apply when a student seeks to use a school-provided curricular platform to disseminate a message.⁷⁰ When speech bears the “imprimatur” of the school, unlike the *Tinker* students’ armbands, the school has a free hand to censor, so long as its justification is “reasonably related to legitimate pedagogical concerns.”⁷¹

62. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07 (1969).

63. *Id.* at 506.

64. 393 U.S. 503, 504 (1969); see Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1828 (2017).

65. *Tinker*, 393 U.S. at 504-06.

66. *Id.* at 514.

67. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988).

68. 478 U.S. 675, 685-86 (1986).

69. 484 U.S. 260 (1988).

70. *Id.* at 271-73, 276.

71. *Id.* at 271-73.

For the first time, the Court dealt with the extension of school punitive authority beyond school premises in *Morse v. Frederick*.⁷² There, the Court decided that an Alaska school did not offend the First Amendment by suspending a student who stood across the street from the school during the nationally televised ceremonial running of the Olympic torch, holding up a homemade sign that read “BONG HiTS 4 JESUS.”⁷³ The Court once again created a doctrinal exception to *Tinker*, finding that speech promoting the use of dangerous illegal drugs is categorically unprotected from school discipline, even if no disruption occurs.⁷⁴ The Court chose not to deal with the arguably out-of-school context of the speech by likening the Olympic relay event to a school-supervised field trip, where school authority continues to apply even beyond school walls.⁷⁵ Quoting the school principal’s brief, the Court’s majority wrote that a student “cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”⁷⁶ By treating the speech as occurring at school, the Court avoided confronting the more difficult issue—at that early age of social media and smartphones, still a nascent issue—of a school’s ability to regulate truly off-campus speech.

Whether the standards that apply to public K-12 institutions also apply to public colleges and universities remains unsettled. The *Hazelwood* Court explicitly reserved judgment on whether adult-age college students would have a greater degree of censorship protection in light of the very different context of a college campus.⁷⁷ Nevertheless, lacking explicit guidance from the Supreme Court, lower courts have, at times, reached into the K-12 toolkit to resolve disputes in the college setting.⁷⁸ The Supreme Court has recognized universities as “peculiarly

72. 551 U.S. 393 (2007).

73. *Id.* at 397, 409-10.

74. *Id.* at 403-04, 408.

75. *Id.* at 400-01.

76. *Id.* at 401 (internal quotation marks omitted).

77. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 n.7 (1988).

78. *See, e.g., Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (stating that, although *Hazelwood* was coined in the K-12 context, the standard “works for students who have graduated from high school”); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011) (stating that “*Hazelwood* informs our analysis” of a college’s decision to penalize a graduate student for speech made in the context of a school-supervised practicum); *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc) (holding that *Hazelwood* provides the analytical framework for claims of censorship by college students prevented from distributing a college-subsidized newspaper); *see also Papandrea, supra* note 64, at 1828 (noting that the Supreme Court has left important questions about college free speech rights unresolved and that “some lower courts have used the [C]ourts’ decisions relating to K-12 public education to provide this missing guidance”).

the marketplace for ideas,”⁷⁹ and has never held that speech receives diminished protection against government sanction just because the speaker is a student and the government agency is a university.⁸⁰ Time and again, the Court has protected students against action by public university administrators that would chill constitutionally protected expression, most notably in the case of a University of Missouri student who was disciplined for an underground newspaper containing articles and illustrations presaging the modern Black Lives Matter movement.⁸¹ In that 1973 case, the Justices held that a state university could not constitutionally discipline a student even for grossly offensive speech—one political cartoon vividly depicted police officers raping the Statue of Liberty and Lady Justice—because “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech.”⁸²

While the Supreme Court has long indicated that First Amendment standards apply with full force in the university setting, which suggests that *Tinker* is an insufficiently protective standard, the Court has also drawn on *Tinker* in the higher-education setting for the proposition that free speech rights must be applied in light of “the special characteristics of the school environment.”⁸³ Thus, the Court has given sanction to a relatively deferential review of speech-restrictive decisions by campus policymakers, which other courts have embraced more explicitly.⁸⁴

79. See, e.g., *Healy v. James*, 408 U.S. 169, 180-81 (1972) (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.” (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian*, 385 U.S. at 603); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (quoting *Healy*, 408 U.S. at 180-81).

80. See *Healy*, 408 U.S. at 180.

81. See *Papish v. Bd. of Curators*, 410 U.S. 667, 667-68, 671 (1973) (per curiam); see also *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 834-37 (1995); *Widmar*, 454 U.S. at 264-66, 269, 276-77. The Black Lives Matter movement is a modern movement aimed at protesting contemporary, systemic issues regarding Black Americans. See generally Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America’s View on Race*, NBC News (Dec. 29, 2020, 10:04 AM), <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434> (describing the history and impact of the Black Lives Matter movement).

82. *Papish*, 410 U.S. at 667, 671.

83. *Widmar*, 454 U.S. at 268 n.5 (quoting *Tinker*, 393 U.S. at 506); see also *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 685-86 (2010) (quoting *Widmar*, 454 U.S. at 268 n.5).

84. William E. Thro, *No Angels in Academe: Ending the Constitutional Deference to Public Higher Education*, BELMONT L. REV., 2018, at 27, 31 (“In the view of the judiciary, higher education administrators are ‘angels’—entitled to greater deference than constitutional actors in other spheres.”); see also *Stoner & Showalter*, *supra* note 10, at 584 (“Administrators in higher education enjoy unique judicial deference, recognized by the Supreme Court, when they are applying their educational judgment in situations involving college students . . . [C]ourts

Relevant to the question of what speech on a social media account can be the basis for an adverse admissions decision, courts have overwhelmingly struck down campus disciplinary codes that penalize offensive speech.⁸⁵ The First Amendment forbids enforcing “overbroad” government policies that sweep in benign speech in an attempt to penalize threats and harassment.⁸⁶ The Due Process Clause forbids enforcing vague government policies that fail to give fair notice of what conduct is punishable.⁸⁷ Plaintiffs have successfully challenged campus speech codes on both bases. In *DeJohn v. Temple University*,⁸⁸ the Third Circuit invalidated a policy proscribing “hostile,” “offensive,” and “gender-motivated” speech on overbreadth grounds, observing that “overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination.”⁸⁹ Similarly, the Sixth Circuit found that a policy proscribing speech that is “offensive” or “demeaning” on the basis of race or ethnicity, even if “unintentional,” was unconstitutionally overbroad.⁹⁰

Adding to the complexity of speech in the higher-education setting, universities may have affirmative legal duties, enforceable by way of sanctions under the Title IX gender-discrimination statute, to protect students against speech that rises to the level of harassment.⁹¹ In one closely watched case, a federal appeals court held that the University of Mary Washington in Virginia could be legally responsible for failing to respond to complaints about a pervasive level of harassing speech transmitted via the (now-defunct) social chat app Yik Yak, where

historically have been loathe to interfere with most decisions involving the application of educational judgment at the university level.”).

85. See Majeed, *supra* note 9, at 484, 494 (stating that federal case law “is remarkable for its uniform rejection of speech codes and consistent upholding and protection of students’ speech rights”). For examples of cases declaring campus speech prohibitions unconstitutional, see *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1023 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 372-73 (M.D. Pa. 2003).

86. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3rd Cir. 2008). “A statute is unconstitutional on its face on overbreadth grounds if there is ‘a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [C]ourt.’” *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

87. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”).

88. 537 F.3d 301 (3rd Cir. 2008).

89. *Id.* at 314.

90. *Dambrot*, 55 F.3d at 1182-83.

91. See *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685-86, 693 (4th Cir. 2018).

campus-specific discussion boards often devolved into juvenile insults.⁹² Understandably, college administrators may feel whipsawed by seemingly conflicting legal obligations.⁹³ For this reason, it is important for the Supreme Court to conclusively say whether—and if so, by how much—First Amendment rights diminish in the higher-educational setting, particularly when the speech is online.

C. Whose “Academic Freedom” Is It, Anyway?

Academic freedom is a “special concern of the First Amendment.”⁹⁴ Universities are bastions of free thought and expression, and courts have recognized that exposure to “widely diverse people, cultures, ideas, and viewpoints” is an essential part of creating an intellectually productive campus environment.⁹⁵

Judicial recognition of academic freedom as a principle with legal force had its headwaters in the Supreme Court’s 1957 ruling in *Sweezy v. New Hampshire*.⁹⁶ The *Sweezy* case arose when a University of New Hampshire professor was jailed for contempt after he refused to fully answer questions when called before a state attorney general’s inquest seeking to root out communists in state government.⁹⁷ The professor challenged a state statute that compelled him to be interrogated about his political beliefs, and the Supreme Court agreed that being forced to disclose past political associations violated his constitutional rights, holding: “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.”⁹⁸ Thus, from its inception, academic freedom was interpreted to protect not just academic institutions, but the people who teach there.

92. *Id.* at 682-83, 693.

93. In an especially revealing case, *Yeasin v. Univ. of Kan.*, two sister universities arrived at opposite interpretations of their authority over what students say on social media during their off-hours. 360 P.3d 423, 430 (Kan. Ct. App. 2015). The University of Kansas, defending against a student’s First Amendment case, told the Kansas courts that Title IX compelled universities to exercise authority over interpersonal disputes on social media, while Kansas State University filed an amicus brief disagreeing that Title IX requires universities to police off campus, online expression. *Id.* at 429-30.

94. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

95. *Grutter v. Bollinger*, 539 U.S. 306, 329-30 (2003).

96. 354 U.S. 234 (1957).

97. *Id.* at 238-40, 242-45.

98. *Id.* at 236, 248, 250.

The boundaries and contours of academic freedom as a legal doctrine have never been firmly established.⁹⁹ The doctrine has come to mean that certain decisions are so uniquely the province of scholars that courts and external policymakers should tread lightly in second-guessing them.¹⁰⁰ Thus, universities enjoy a measure of judicial solicitude for managerial decisions that implicate the use of academic expertise. As the Supreme Court said in rejecting the claims of a former medical student who asserted a due process right to retake a crucial qualifying exam:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.¹⁰¹

In the view of at least some courts, academic freedom also means that professors at public universities have heightened free speech protections beyond what other government employees enjoy.¹⁰² While ordinary public employees receive no First Amendment protection for speech that is made pursuant to official job assignments under the standard set by the Supreme Court in *Garcetti v. Ceballos*,¹⁰³ some courts have cited academic freedom in affording college educators a measure of legally protected freedom to choose what and how they teach, and to speak and publish on controversial matters that put them at odds with their employers.¹⁰⁴ Not all courts, however, subscribe to this view. The Fourth Circuit, for instance, rejected faculty members' academic-freedom-based argument that their scholarly work should be off limits to public inspection under the Virginia Freedom of Information Act, holding: "Our review of the law . . . leads us to conclude that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to

99. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 253 (1989) ("Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles.").

100. See *id.* at 296-98.

101. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

102. See *id.* at 225-27; Byrne, *supra* note 99, at 273, 313-14, 336-38.

103. 547 U.S. 410, 421 (2006).

104. See *Demers v. Austin*, 746 F.3d 402, 411-12 (9th Cir. 2014) ("We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that is performed 'pursuant to the official duties' of a teacher and professor."); see also *Wagner v. Jones*, 664 F.3d 259, 268-71 (8th Cir. 2011) (concluding that an applicant for a law school faculty position could proceed on a First Amendment failure-to-hire claim against a state university that, she alleged, penalized her for her conservative political beliefs).

which every citizen is entitled, the right inheres in the University, not in individual professors.”¹⁰⁵

A university’s academic freedom is understood to include deciding who is a suitable candidate for admission.¹⁰⁶ The interplay of academic freedom and admissions is rooted in the Supreme Court’s landmark decision in *Regents of the University of California v. Bakke*,¹⁰⁷ involving a challenge to the use of race as a consideration in medical school admissions at public universities in California.¹⁰⁸ Although no rationale garnered a five-vote majority, Justice Lewis F. Powell, Jr.’s influential and oft-cited plurality opinion observed: “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.”¹⁰⁹

Courts and commentators have recognized the inherent paradox that academic freedom can protect both the managerial autonomy of the institution and also the interests of instructors that come into conflict with their employers.¹¹⁰ This apparent conflict is reconciled if academic freedom is understood not as protection for *parties* but for *processes*. The seminal *Sweezy* decision, which is credited with codifying academic freedom, says nothing about protecting university administrative decisions, but quite a bit about protecting free inquiry: “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”¹¹¹ Sometimes, university administrators will be

105. *Urofsky v. Gilmore*, 216 F.3d 401, 409-12 (4th Cir. 2000).

106. The connection between university academic freedom and admissions appears to be rooted in Justice Frankfurter’s influential concurrence in *Sweezy*, in which he referenced “the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); see also Byrne, *supra* note 99, at 311-12 (calling it anomalous that a university’s autonomy in admissions has been regarded as a concern of the First Amendment, which “rarely protects institutional decision-making so indirectly related to expression as student admissions or faculty hiring”).

107. 438 U.S. 265 (1978).

108. *Id.* at 269-70, 312.

109. *Id.* at 312-13.

110. “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citations omitted); see also J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J. COLL. & U.L. 79, 89 (2004) (observing that “courts and scholars began to see conflict between individual and institutional conceptions of constitutional academic freedom”).

111. *Sweezy*, 354 U.S. at 250.

exercising academic freedom, but at other times, they will be *trampling* academic freedom.¹¹² On those latter occasions, it makes no sense to apply judicial deference in the name of protecting a “freedom” that the defendant institution itself is accused of violating. Academic freedom deference properly belongs to the institution when the conflict is between the university and a government regulator (e.g., a legislative enactment that requires purging ideologically disfavored professors), but not when the university is itself the regulator imposing a freedom-restricting policy.¹¹³ Understood in this way, academic freedom can, at times, belong to the *student* in a dispute that implicates fundamental freedoms.

The Supreme Court said as much in *Healy v. James*,¹¹⁴ a case pitting the First Amendment rights of students against a censorious institution that refused to extend official recognition to a chapter of Students for a Democratic Society (“SDS”).¹¹⁵ The President of Central Connecticut State College invoked the University’s academic freedom as a justification for rejecting the group, claiming that SDS stood for violence and disruption that would interfere with the rights of others.¹¹⁶ But the Court turned the tables on the President, finding that academic freedom pointed in the student speakers’ favor: “The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”¹¹⁷ Concurring, Justice Douglas went even further:

The present case is minuscule in the events of the 60’s and 70’s. But the fact that it has to come here for ultimate resolution indicates the sickness of our academic world, measured by First Amendment standards. Students as well as faculty are entitled to credentials in their search for truth.¹¹⁸

The Fifth Circuit applied the *Healy* academic freedom passage in recognizing the right of students at the University of Mississippi to distribute a literary magazine over the objection of college

112. See Byrne, *supra* note 110, at 88-89.

113. Professor Byrne, who has deeply analyzed the judicial evolution of academic freedom, makes the point in a slightly different way: “[G]overnment legitimately can regulate those aspects of a university’s work that promote democratic values.” Byrne, *supra* note 99, at 333.

114. 408 U.S. 169 (1972).

115. See *id.* at 172-74.

116. *Id.* at 174-76 (stating that the president decided “approval should not be granted to any group that ‘openly repudiates’ the College’s dedication to academic freedom”).

117. *Id.* at 180-81 (internal quotation marks and citation omitted).

118. *Id.* at 197 (Douglas, J., concurring).

administrators, who disapproved of stories with themes of Black pride and interracial romance.¹¹⁹ The University chancellor offered a variety of justifications for seeking to restrain the publication, including his belief that distributing a magazine containing strong profanity “would endanger the current public confidence and good will which the University of Mississippi now enjoys.”¹²⁰ The court found none of the proffered rationales sufficient to override the students’ First Amendment interests, citing “the historical role of the University in expressing opinions which may well not make favor with the majority of society and in serving in the vanguard in the fight for freedom of expression and opinion.”¹²¹

As these cases demonstrate, universities do not have the authority to burn down academic freedom in order to save it.¹²² Where the interests of academic freedom and of the university administration align, and the university is acting to preserve academic freedom, judicial deference makes sense. But “academic freedom” is not properly understood as a synonym for “university decision-making freedom.” Courts have been unhesitant to say so in the context of discipline of professors,¹²³ and should be equally unhesitant in any case where the effect of the university’s use of authority is to diminish the exchange of ideas—even where the plaintiff is a student applicant.

III. DRAWING THE LINE, ONLINE

A. *Social Media Tests Courts’ First Amendment Convictions*

The advent of social media has tested courts’ adherence to long-established First Amendment principles.¹²⁴ Some have been willing to fashion workarounds, enabling universities to regulate social media

119. *Bazaar v. Fortune*, 476 F.2d 570, 572, 580-81 (5th Cir.), *aff’d as modified*, 489 F.2d 225 (5th Cir. 1973) (en banc) (per curiam).

120. *Id.* at 575-76, 579.

121. *Id.* at 580-81; *see also* *Thonen v. Jenkins*, 491 F.2d 722, 723-24 (4th Cir. 1973) (citing *Healy’s* concern for safeguarding academic freedom and finding that a public university could not constitutionally expel two students responsible for a letter-to-the-editor of the campus newspaper that referred to the University President using a profanity).

122. While the saying has become blurred by time and repetition, the phrase “destroy the town to save it” was popularized by famed Vietnam War correspondent, Peter Arnett, who attributed the remark to an unnamed U.S. Army major. Stephen L. Carter, *Destroying a Quote’s History in Order to Save It*, BLOOMBERG (Feb. 9, 2018, 2:50 PM), <https://www.bloomberg.com/opinion/articles/2018-02-09/destroying-a-quote-s-history-in-order-to-save-it> (discussing the evolution of the phrase).

123. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

124. *See* LoMonte, *supra* note 31, at 10-12.

speech that would otherwise be constitutionally protected outside the campus setting.¹²⁵ In an illustrative recent case, a New Mexico graduate student lost his First Amendment challenge to disciplinary action based on a profane Facebook rant in which he bemoaned President Obama's reelection as a victory for abortion advocates, whom he called "sick, disgusting people" comparable to Nazis during World War II.¹²⁶ Although the student did not reference the University or anyone attending it, the post was reported to the Dean of Students at the University of New Mexico College of Medicine ("UNM"), who punished the student, Paul Hunt, for violating university policies that require social media speech to be "respectful."¹²⁷ Hunt challenged the disciplinary action as a violation of his First Amendment rights, but the United States District Court dismissed his claims against UNM administrators on the grounds of qualified immunity, finding no clearly settled law that prohibits a public university from punishing a student for off-campus political speech that is uncivil and inflammatory.¹²⁸ The Tenth Circuit affirmed, citing the muddle of cases at both the K-12 and college level in which educational institutions have extended their disciplinary reach into students' off-hours speech with mixed outcomes.¹²⁹

The *Hunt* court was influenced by a handful of rulings in which lower courts have been willing to entertain that students enrolled in pre-professional programs have diminished free speech rights—less protection, even, than K-12 students—because of their universities' gatekeeping role in keeping unsuitable people out of highly regulated professions.¹³⁰ For instance, in one influential ruling early in the history of "social media discipline" cases, the Minnesota Supreme Court found that a public university could punish a mortuary science student for alarming her Facebook followers with jokes of questionable taste about the cadaver she was assigned to dissect, so long as the discipline was consistent with "established professional conduct standards" for her intended field.¹³¹

125. *See id.* at 12-13.

126. *See* *Hunt v. Bd. of Regents*, 792 F. App'x 595, 598, 606 (10th Cir. 2019) (affirming dismissal of the student's First Amendment claims on qualified immunity grounds).

127. *Id.* at 597-99.

128. *Id.* at 599-600.

129. *Id.* at 605-06. The Supreme Court declined certiorari and allowed the dismissal of Hunt's claims to stand. *Hunt v. Bd. of Regents*, No. 19-1225, 2020 WL 6829148, at *1 (U.S. Nov. 23, 2020).

130. *See, e.g.*, *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012).

131. *Id.* at 512-13, 521; *see also* *Keefe v. Adams*, 840 F.3d 523, 526-27, 531 (8th Cir. 2014) (holding that the college did not violate the student's First Amendment rights by removing him for

Colleges have been especially assertive about policing online speech by a visible subcategory of students: competitive intercollegiate athletes.¹³² It has become common practice for athletic departments to limit, and in some instances ban, athletes from using certain social media platforms, or to require that athletes who use privacy settings on their social media accounts allow the athletic department staff to view posts that are not visible to the general public.¹³³ Entire businesses are built around monitoring-for-hire services, reviewing posts shared by athletes and reporting back to the athletic department if certain “red-flagged” words or images appear, such as references to drugs or the names of sports agents.¹³⁴ At least some coaches extend this controlling approach to the initial admissions process as well.¹³⁵ One college football coach told *The Los Angeles Times* that he had broken off recruiting high school athletes after seeing that they had used coarse language in the “handle” of their Twitter accounts.¹³⁶

insulting a classmate during a series of dueling Facebook posts because the discipline was based on professional standards for the nursing industry); *Yeasin v. Durham*, 224 F. Supp. 3d 1194, 1199-1200, 1203-04 (D. Kan. 2016) (granting qualified immunity to university defendants for the decision to expel a student on the basis of Twitter posts regarded as violating a “No Contact Letter” against a fellow student because “circuit courts have come to conflicting conclusions on whether a school can regulate off-campus, online student speech where such speech could foreseeably cause a material disruption to the administration of the school”).

132. See LoMonte, *supra* note 31, at 23-25.

133. See Michelle Poore, *A Call for Uncle Sam to Get Big Brother out of Our Knickers: Protecting Privacy and Freedom of Speech Interests in Social Media Accounts*, 40 N. KY. L. REV. 507, 513-14 (2013).

134. Jamie P. Hopkins et al., *Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes' Social Media*, PITT. J. TECH. L. & POL'Y, Spring 2013, at 1, 38-40; see also John Browning, *Universities Monitoring Social Media Accounts of Student-Athletes: A Recipe for Disaster*, 75 TEX. BAR J. 840, 842 (2012) (observing that colleges have instructed social media monitoring companies to alert them not just when athletes mention bribery, cheating, or other wrongdoing, but also words like “Arab,” “Muslim,” and “gay”).

135. See, e.g., Matt Wilhalme, *Tweet at Your Own Risk: Coach Rejects Recruits Based on Twitter Handle*, L.A. TIMES (July 16, 2015, 11:32 AM), <https://www.latimes.com/sports/sportsnow/la-sp-sn-college-recruits-rejected-based-on-twitter-handle-20150716-story.html> (noting that one coach “can’t possibly be the first coach to vet his players through social media, but his comment about digging into a person’s online profiles to look for red flags is a clear warning for potential college recruits”).

136. *Id.* A Twitter account held by an assistant football coach at Arkansas Tech University posted this cautionary tweet in 2019: “Recruits: social media matters. I have now dropped 15 recruits this year because of their twitter posts, likes, or retweets. Explicit images, racist words, and demeaning posts are unacceptable. Your thumbs are killing your opportunities.” Coach Lawson (@jwlawson1), TWITTER (July 20, 2019, 7:55 AM), <https://twitter.com/jwlawson1/status/1152547572738924544>.

B. *Unfriending Big Brother: The Legislative Response*

In response to concerns that employers were unduly intruding into current or prospective employees' lives by demanding access to social media login information as a condition of employment, states across the country began enacting privacy laws restricting what employers can demand to see and under what circumstances.¹³⁷ According to the National Conference of State Legislatures ("NCSL"), twenty-six states now have statutes protecting the right of employees to refuse demands for nonpublic account information that would enable supervisors to read their private communications.¹³⁸ Impelled by the same privacy concerns, legislative sponsors added protection for current or prospective college students to many of the bills; the NCSL reports that, as of 2020, sixteen states had statutes forbidding postsecondary educational institutions from insisting that students or applicants divulge social media login credentials.¹³⁹ Outside of sports, there is no documentation of a widespread practice of requiring rank-and-file students or applicants to share their login credentials, although one attorney whose practice focuses on social media privacy told NBC News that he has received complaints from applicants who were told during face-to-face interviews to show the interviewers the non-public content posted to their social media accounts.¹⁴⁰

In a typical example of how these privacy laws work, New Jersey's 2012 statute provides that no higher education institution, whether public or private, may ask whether a student or applicant has accounts on social media platforms, demand access to a non-publicly viewable account, or retaliate against a student or applicant for refusing to provide access.¹⁴¹

137. See Brittany Dancel, Comment, *The Password Requirement: State Legislation and Social Media Access*, 9 FIU L. REV. 119, 123-25 (2013) (explaining that Maryland was the first state, in 2012, to enact an employee social media privacy law, prompted by the case of an applicant for a job with the state prison system who was told to turn over his social media login information as a precondition of employment).

138. See *State Social Media Privacy Laws*, NAT'L CONF. STATE LEGISLATURES (July 27, 2020), <https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx>.

139. See *id.*

140. Bob Sullivan, *Govt. Agencies, Colleges Demand Applicants' Facebook Passwords*, NBC NEWS (Mar. 6, 2012, 6:13 AM), <https://www.nbcnews.com/technolog/govt-agencies-colleges-demand-applicants-facebook-passwords-328791>. The same attorney, Bradley Shear, told the *ABA Journal* of an "epidemic" of colleges insisting that students install "spying software" on personal electronic devices so their movements could be tracked, a practice that social media privacy legislation also outlaws. David L. Hudson, Jr., *Site Unseen: Schools, Bosses Barred from Eyeing Students; Workers' Social Media*, A.B.A. J. (Nov. 1, 2012, 8:10 AM), https://www.abajournal.com/magazine/article/site_unseen_schools_bosses_barred_from_eyeing_students_workers_social_media.

141. N.J. STAT. ANN. § 18A:3-30 (West 2020) (effective Dec. 3, 2012).

Some also go further, and outlaw requiring students to change their account setting from “private” to “public” so that their posts can be more easily monitored, or adding university officials as authorized viewers of their non-public, secured accounts.¹⁴² Others also forbid a practice known as “shoulder surfing,” which requires that a student login to a secured account in the presence of a university employee so that the employee can peek at the non-public contents.¹⁴³ Privacy protection is not absolute, however; the statutes typically provide a workaround if college administrators need access to investigate certain types of wrongdoing, such as unlawful use of university computers.¹⁴⁴ The growing adoption of these statutory protections represents a public policy consensus that both current and prospective students enjoy some zone of privacy beyond which their educational institutions may not reach, even if the information accessible through social media profiles might be of interest to college authorities and relevant to an admissions decision.

IV. SOCIAL MEDIA AND COLLEGE ADMISSIONS

A. *Surveying the Landscape*

Since 2008, Kaplan Test Prep, a leading worldwide provider of training services and materials for a wide range of standardized tests, has been surveying college admissions officers about whether prospective students’ social media activity plays a part in decisions to accept or reject.¹⁴⁵ That initial 2008 survey found that just 10% of admissions employees ever looked at applicants’ social media accounts in the course of making a decision, but the numbers quickly shot up in succeeding

142. See, e.g., ARK. CODE ANN. § 6-60-104(b)(2) (Lexis through 2020 First Extraordinary Sess. and 2020 Fiscal Sess.); DEL. CODE ANN. tit. 14, § 8103(d) (2020), <https://delcode.delaware.gov/title14/title14.pdf>.

143. Dancel, *supra* note 137, at 138-39 (citing CAL. EDUC. CODE § 99121 (West 2012)).

144. See, e.g., OR. REV. STAT. § 350.272(2)(a) (2019), https://www.oregonlegislature.gov/bills_laws/ors/ors350.html (providing an exception to social media privacy, if access is demanded “for the purpose of ensuring compliance with applicable law, regulatory requirements or prohibitions against student misconduct, that is based on the receipt of specific information about activity associated with a personal social media account”).

145. *Kaplan Test Prep Survey: Percentage of College Admissions Officers Who Check Out Applicants’ Social Media Profiles Hits New High; Triggers Include Special Talents, Competitive Sabotage*, BUSINESSWIRE (Jan. 13, 2016, 10:07 AM), <https://www.businesswire.com/news/home/20160113005780/en/Kaplan-Test-Prep-Survey-Percentage-of-College-Admissions-Officers-Who-Check-Out-Applicants%E2%80%99-Social-Media-Profiles-Hits-New-High-Triggers-Include-Special-Talents-Competitive-Sabotage> [hereinafter *Kaplan Test Prep Survey*].

years.¹⁴⁶ In 2015, a high of 40% of admissions officers acknowledged that, at least some of the time, they reviewed social media as a factor in evaluating an applicant.¹⁴⁷ In that year, the survey respondents told Kaplan that they check social media for a variety of reasons, including to verify claims of leadership positions or awards, or to check for evidence of criminal activity or “inappropriate behavior.”¹⁴⁸ A solid majority of admissions officers told Kaplan that it is “fair game” to review applicants’ social media accounts, even if they do not do so themselves.¹⁴⁹

Interviewees told Kaplan that they flagged a wide variety of content as troublesome, including some that indicated constitutionally unprotected activity (such as underage drinking or drug abuse), and other content that might well have qualified as constitutionally protected, such as “vulgarity.”¹⁵⁰ However, the survey did not go as far as to ask exactly what types of online speech would be regarded as disqualifying, or how often a candidate’s social media activity was decisive to the fate of the application.

In its most recent survey (2019-20), Kaplan reported that 36% of the 288 admissions officers surveyed say they look at applicants’ social media profiles to learn more about them; of those who acknowledge having looked, 19% say they do so “often.”¹⁵¹ Of those who check, 38% told Kaplan that the contents of social media worked in the applicants’ favors, while 32% said the contents had adverse effects.¹⁵²

There are 1,626 accredited public colleges and universities in America and 1,687 private, nonprofit institutions.¹⁵³ Assuming that the practice of checking social media accounts occurs with comparable frequency among public and private institutions alike, that would mean (by Kaplan’s most recent survey results) 585 public institutions at least

146. Hill, *supra* note 9.

147. Kaplan *Test Prep Survey*, *supra* note 145.

148. *Id.*

149. See Scott Jaschik, *Social Media as ‘Fair Game’ in Admissions*, INSIDE HIGHER ED (Apr. 23, 2018), <https://www.insidehighered.com/admissions/article/2018/04/23/new-data-how-college-admissions-officers-view-social-media-applicants> (citing 2018 Kaplan findings that “admissions officials at more than two-thirds of colleges (68 percent) say it’s ‘fair game’ for them to review applicants’ social media profiles on sites like Facebook, Instagram and Twitter to help them decide who gets in”).

150. See Hill, *supra* note 9.

151. Kaplan, *supra* note 7.

152. *Id.*

153. *Number of Degree-Granting Postsecondary Institutions and Enrollment in These Institutions, by Enrollment Size, Control, and Classification of Institution: Fall 2017*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d18/tables/dt18_317.40.asp (last visited Apr. 1, 2021) [hereinafter *Postsecondary Institutions*].

sometimes review applicants' online profiles as part of the admissions decision.¹⁵⁴ Even if public institutions may be somewhat less likely to rely on social media as a factor in the admissions decision, the Kaplan findings suggest that hundreds of state colleges do consider applicants' online speech in deciding who gets admitted.

Bolstering the Kaplan findings, the American Association of Collegiate Registrars and Admissions Officers ("AACRAO") surveyed member institutions in July 2017 and found that the use of social media as part of the admissions process was widespread and increasingly accepted as legitimate.¹⁵⁵ Specifically, 11% of respondents said they had refused to admit an applicant based on social media content.¹⁵⁶ This includes 8% of those employed by public institutions, where the First Amendment applies, although private institutions were somewhat more likely to report making an adverse admissions decision based on personal social media activity.¹⁵⁷ The AACRAO survey found that 30% of institutions acknowledged reviewing the personal social media accounts of applicants at least some of the time.¹⁵⁸

B. Profiled for Rejection: Are Social Media Pages "Fair Game" for Review?

Knowing that a substantial share of college admissions officers considers applicants' online speech as part of the decision process, the logical questions become: Is there any stopping point to their discretion? Are admissions officers told that any category of speech—political, religious, artistic—is off limits for consideration? Is it possible that applicants are losing a chance at admission to a state college for no reason other than political, religious, or artistic speech?

154. Compare *id.*, with Kaplan, *supra* note 7 (showing findings from both surveys used to determine the number of public institutions which sometimes review the online profiles of applicants).

155. AACRAO SURVEY, *supra* note 8, at 1-3.

156. *Id.* at 2. Interestingly, this was somewhat greater than the seven percent who responded that their institutions had rescinded an offer to an already-admitted student. See *id.* This reaffirms the concern that, while considerable attention is being paid to the use of social media in revoking admission after a public controversy, the role of social media in the initial admissions decision is underappreciated and worthy of greater consideration. See Jaschik, *supra* note 149.

157. See AACRAO SURVEY, *supra* note 8, at 13-14.

158. *Id.* at 9. The AACRAO approach somewhat differs from the Kaplan approach, in that the Association also looked at whether colleges review *their own* social media accounts as part of the admissions process, to see whether applicants are interacting with the accounts (for instance, leaving comments on an institutional Facebook page, or referencing the institution's Twitter handle). Compare *id.* at 11, with Kaplan, *supra* note 7. This is not a concerning practice, as a person who consciously interacts with the college's official accounts is knowingly attracting the college's attention (and, indeed, may be purposefully seeking to do so).

Researchers from the Brechner Center surveyed 119 public colleges and universities during the spring and summer of 2020, asking for copies of any policies, standards, or regulations governing whether, and to what extent, applicants' social media accounts may be taken into consideration in the admissions process.¹⁵⁹ The colleges were chosen to reflect geographic diversity; the pool included institutions in forty states. Of the 119 that received standardized requests under the applicable state freedom-of-information statute, 46 of them (38.6%) failed to respond entirely,¹⁶⁰ and the remaining 73 (61.4%) all provided a variation of the same response: no such policy or regulation exists. In no instance did any university furnish any handbook, manual, or directive to guide the exercise of discretion in considering applicants' online speech. Of the 73 institutions that responded, 13 of them (17.8% percent of those responding) stated affirmatively in their responses that they did not consider social media profiles as part of the application process, while 60 (82.2% percent of those responding) simply stated that no policy exists. Only one institution, Kansas State University, volunteered any level of detail as to how social media figures into the admissions decision; a Kansas State spokesperson stated that admissions officers "often" will run Google searches and/or seek out applicants' social media pages if the applicant is known to have a prior criminal or disciplinary history.¹⁶¹

The Brechner Center's findings align with, but are more pronounced than, the findings of the AACRAO in its July 2017 survey. The AACRAO found that just 12% of institutions that acknowledge looking at applicants' social media pages have a formal policy governing how social media figures into the admissions decision, meaning that 88% have no formal policy.¹⁶² The AACRAO reported that 10% of public institutions claimed to have a formal policy, as compared with

159. The surveyors obtained their information through responses to FOIA requests sent to each of the institutions. All materials and responses remain on file with the authors.

160. The research project began during March 2020, just as workplaces across the country were shuttering out of concern for spreading COVID-19, which likely accounts for the low rate of compliance with legally compulsory requests. See Nate Jones, *Public Records Requests Fall Victim to the Coronavirus Pandemic*, WASH. POST (Oct. 1, 2020, 9:01 AM), https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a_story.html (reporting that "the disclosure of public records by many federal agencies and local government offices nationwide has worsened or even ground to a halt" as employees were sent to work from home during the pandemic).

161. E-mail from Hanna L. Manning, Univ. Open Recs. Custodian, Kansas State Univ., to Frank D. LoMonte, Dir., Brechner Ctr. for Freedom of Info. (July 16, 2020) (on file with author).

162. AACRAO SURVEY, *supra* note 8, at 15.

14% of private nonprofit institutions and 11% of private for-profit colleges.¹⁶³

The lack of any intelligible standard by which state employees pass judgment on applicants' speech raises significant constitutional concerns.¹⁶⁴ The Supreme Court has cautioned that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."¹⁶⁵ If applicants to state colleges are led to believe that anything they say can and will be used against them, without limitation, the chilling effect on expression will be far-reaching.¹⁶⁶

V. DRAWING THE LINE: WHAT PUBLIC INSTITUTIONS CAN AND CANNOT CONSIDER

A. *When Admissions Decisions Are Susceptible to Challenge*

While there is no published legal authority addressing whether an applicant rejected on the grounds of social media speech has a constitutional claim against the institution, admissions decisions are regularly challenged in a different (and potentially instructive) context: when a rejected applicant claims to be a victim of racial discrimination.¹⁶⁷ In those situations, a justiciable claim exists, although university policies are reviewed relatively deferentially.¹⁶⁸ Racial discrimination in college admissions implicates the Equal Protection Clause of the Fourteenth Amendment when the decision maker is a state institution.¹⁶⁹ Indeed, the Supreme Court has determined that reliance on race as a consideration in the admissions decision is subject to strict scrutiny review, although it is possible for an institution to satisfy that

163. *Id.* at 16.

164. *See infra* Part V.D (discussing due process case law that disfavors open-ended speech restrictions vesting government decision makers with "unbridled discretion").

165. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

166. *See id.* at 432-33 ("The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.").

167. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 251-52 (2003) (involving rejected applicants who claimed racial discrimination violations against the University of Michigan).

168. *See* Vikram David Amar & Jason Mazzone, *How Much Deference Will Be Given to Affirmative Action Plans Fashioned by Students, and to Affirmative Action Plans More Generally? Part Three in a Series on the Challenge to Harvard Law Review's Diversity Program*, VERDICT (Mar. 8, 2019), <https://verdict.justia.com/2019/03/08/how-much-deference-will-be-given-to-affirmative-action-plans-fashioned-by-students-and-to-affirmative-action-plans-more-generally>.

169. *See Gratz*, 539 U.S. at 276 (finding that the University of Michigan's freshman admissions policy was applied in a manner contravening applicants' right to equal protection under the Fourteenth Amendment).

demanding standard by reference to higher education's compelling interest in diversity.¹⁷⁰

In a pair of companion 2003 cases against the University of Michigan, the Supreme Court held that Michigan's law school had demonstrated that its race-conscious admissions program was constitutional, but that the consideration of race in Michigan's undergraduate admissions was not.¹⁷¹ In the law school case, *Grutter v. Bollinger*,¹⁷² the Justices recognized that college admissions decisions traditionally receive deferential review, stating: "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."¹⁷³ But in the accompanying *Gratz v. Bollinger*¹⁷⁴ decision involving undergraduate admissions, the Court did not mention the concept of deference at all. The Court simply concluded that Michigan's policy of awarding a "decisive" number of bonus points to "virtually every minimally qualified underrepresented minority applicant" flunked strict scrutiny, because it did not reflect individualized consideration of the diversity benefits that any particular applicant might bring to the first-year class.¹⁷⁵ The takeaway from these cases is that "universities are allowed to make determinations about who may be admitted to study, including using race as one of many factors, but only if those determinations are based upon careful and deliberate exercise of educational judgment."¹⁷⁶

In other words, the question in the context of race discrimination claims is not whether the constitutional guarantee of equal protection applies, but what weight a college may assign to race as part of the array of considerations that inform the admissions decision. As these discrimination cases establish, college admissions decisions are not sacrosanct, and they do not take place in a "law-free zone" of unreviewability.¹⁷⁷ Having established that it is possible for a college admission decision to violate an applicant's constitutional rights, there is

170. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 311-15 (1978) (finding that the use of race or ethnicity in admissions decisions triggers strict scrutiny, but that student body diversity is a "compelling" governmental interest that can justify including race or ethnicity as a factor, so long as the racial classification is narrowly tailored to achieve that interest).

171. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Gratz*, 539 U.S. at 275-77.

172. 539 U.S. 306 (2003).

173. *Grutter*, 539 U.S. at 328.

174. 539 U.S. 244 (2003).

175. See *Gratz*, 539 U.S. at 271-72.

176. *Stoner & Showalter*, *supra* note 10, at 612.

177. *Id.* at 612-15.

no principled reason to deny applicants recourse under the First Amendment.

B. The Constitutional Consequences of Revoking College Admission

Racially motivated hate speech presents uncertainties in the higher-education setting. Off campus, the Supreme Court has declined to withdraw protection from speech just because it is racially offensive (the use of an ethnic slur as a federally approved trademark)¹⁷⁸ or even outright hateful (burning a cross to express white supremacist beliefs).¹⁷⁹ It is clear that “hate speech” does not exist as a categorically unprotected class of speech for purposes of the civil or criminal justice systems.¹⁸⁰ But the Court has yet to take a case involving campus discipline for speech that targets a vulnerable minority in ways that provoke severe discomfort.

While there has been little discussion of the rights of students denied admission on the grounds of social media speech, considerable attention is focusing on the related issue of colleges rescinding already-granted admission after offensive social media posts come to light.¹⁸¹ Racially insensitive speech on social media attracted heightened public concern after the May 2020 police killing of an unarmed, 46-year-old Black man, George Floyd, ignited protests worldwide, lending renewed urgency to racial justice initiatives.¹⁸² While much of the attention focused on racist online speech by police,¹⁸³ teens also found their account histories scrutinized, and, in some cases, publicly called out.¹⁸⁴

In the private sector, revocation implicates no First Amendment protections.¹⁸⁵ Harvard University has been in the news on several

178. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

179. *Virginia v. Black*, 538 U.S. 343, 347-49 (2003).

180. *See Matal*, 137 S. Ct. at 1764.

181. Dan Levin, *Colleges Rescinding Admissions Offers as Racist Social Media Posts Emerge*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/us/racism-social-media-college-admissions.html>.

182. Zack Schermele, *Racist Social Media Posts from Students Are Forcing Colleges to Respond*, TEEN VOGUE (July 6, 2020), <https://www.teenvogue.com/story/racist-social-media-posts-college-students>; Jennifer Hassan & Siobhán O’Grady, *Anger over George Floyd’s Killing Ripples Far Beyond the United States*, WASH. POST (May 29, 2020, 2:20 PM), <https://www.washingtonpost.com/world/2020/05/29/world-reacts-george-floyd-minneapolis-protests>.

183. Katie Way, *Cops Are Getting Fired over Their Racist Social Media Posts*, VICE (June 11, 2020, 4:04 PM), <https://www.vice.com/en/article/dyz7yz/cops-getting-fired-for-racist-social-media-posts>.

184. Schermele, *supra* note 182.

185. Levin, *supra* note 181.

occasions for withdrawing offers to students caught making racist, anti-Semitic, or misogynistic remarks on social media.¹⁸⁶ In 2019, a student who attained notoriety as a survivor of the mass school shooting in Parkland, Florida had his Harvard admissions offer revoked after he wrote a racial slur eleven times in a single post and shared crude comments about women.¹⁸⁷ The University of Denver publicly rescinded its admissions offer to a prospective student who posted racially offensive photos on social media, framing the decision as part of a larger effort to create a campus climate free of harassment and aggression toward nonwhite students.¹⁸⁸

But public institutions do not have the same level of discretion to regulate expression, because their acts are regarded as “state action” to which constitutional guarantees apply.¹⁸⁹ Nevertheless, amid high-profile racial unrest that gripped the nation during 2020, several public institutions rescinded admissions offers of prospective students over posting racist and offensive social media memes and comments.¹⁹⁰ A student accepted to the University of Florida was publicly “outed” as the creator of racist posts on Instagram; after an investigation, the University announced that the student “will not be joining the University of Florida community this fall,” though it was left unclear whether the student agreed to step aside or was ordered to do so.¹⁹¹ Similar cases involving racially insensitive speech on social media were reported at the College of Charleston and the University of Connecticut, among others.¹⁹²

186. See, e.g., Scott Jaschik, *Was Harvard Correct to Revoke Admissions Offers over Offensive Posts?*, INSIDE HIGHER ED (June 12, 2017), <https://www.insidehighered.com/admissions/article/2017/06/12/experts-consider-harvards-revocation-admissions-offers-those-offensive> (reporting that ten students were disinvented from attending Harvard for using racially offensive language in online chats).

187. Neal Colgrass, *Parkland Survivor Who Made Racist Remarks Gets Bad News*, NEWSER (June 17, 2019, 4:16 PM), <https://www.newser.com/story/276648/parkland-survivor-who-made-racist-remarks-gets-bad-news.html>.

188. Jeremy Haefner, *We Stand Together: A Statement by Senior Leadership at the University of Denver*, UNIV. OF DENVER (June 2, 2020), <https://www.du.edu/news/we-stand-together-statement-senior-leadership-university-denver>.

189. See Byrne, *supra* note 99, at 299.

190. See Levin, *supra* note 181.

191. Sarah Nelson, *Cape Coral Senior Who Wrote Racist Social Media Post Won't Attend UF in the Fall*, NEWS-PRESS (June 10, 2020, 10:16 AM), <https://www.newspress.com/story/news/2020/06/10/cape-coral-mariner-high-student-racist-social-media-post-wont-attend-uf-fall/5332972002>.

192. Scott Jaschik, *Colleges Reverse Admissions Offers*, INSIDE HIGHER ED (June 22, 2020, 3:00 AM), <https://www.insidehighered.com/admissions/article/2020/06/22/colleges-reverse-admissions-offers>.

Professor Clay Calvert has suggested that, because universities' academic freedom extends to the admission decision, students will have difficulty prevailing on a First Amendment claim if their admission is revoked on the grounds of later-discovered social media posts that reflect poor character.¹⁹³ Because admissions is regarded as a "holistic" evaluation of suitability, Calvert argues, a college could successfully argue that the review of social media speech is part of an academic judgment to which courts owe deference.¹⁹⁴

Regardless of whether a student has a constitutional claim for a decision to rescind acceptance, the initial admissions decision is analytically distinct for an important reason: An admitted student who becomes the target of public outcry over social media speech will know why the offer was rescinded.¹⁹⁵ An applicant who receives the standard-form "we regret to inform you" email from the admissions office will not.¹⁹⁶ Moreover, the existence of the outcry might itself arguably provide a basis for the decision to rescind.¹⁹⁷ If (as many courts believe) postsecondary institutions have the same level of authority over student speech that K-12 schools do, the *Tinker* standard permits content-based punishment where speech "would substantially interfere with the work of the school or impinge upon the rights of other students."¹⁹⁸ If enough fellow students insist that they would be fearful attending college alongside a student with abhorrent racial views, that reaction could arguably furnish the factual basis that the *Tinker* standard demands.¹⁹⁹ By contrast, when the admissions officer makes the decision unilaterally—without notice, and based on nothing but a speculative fear

193. See Calvert, *supra* note 61, at 291-92 ("[I]nstitutional academic freedom affords universities a large degree of autonomy, discretion, and deference when they decide who should be admitted to study.").

194. *Id.* at 289.

195. See Jaschik, *supra* note 192 (presenting a number of examples where universities publicly announced their reasons for rescinding admissions offers).

196. See, e.g., *College Rejection Letter (12+ Sample Letters & Examples)*, WORD TEMPLATES ONLINE, <https://www.wordtemplatesonline.net/college-rejection-letter> (last visited Apr. 1, 2021) (providing examples of standard college rejection letters).

197. Compare Taylor Lorenz & Katherine Rosman, *High School Students and Alumni Are Using Social Media to Expose Racism*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/style/blm-accounts-social-media-high-school.html> (demonstrating the massive amount of attention that racist social media speech has received), with Jaschik, *supra* note 192 (offering various statements by universities that racist posts circulating throughout social media do not align with university values of diversity and inclusion).

198. See Papandrea, *supra* note 64, at 1828 (describing some courts' use of the K-12 school speech precedent in the context of higher education); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

199. See *Tinker*, 393 U.S. at 508 (stating that the administrators' speculative fear of a potential disturbance could not override the plaintiffs' free speech interests because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

of future adverse reaction—neither the constitutional minima of due process, nor of the First Amendment, are satisfied. Such a decision, then, can be valid only if there is zero level of constitutional protection in the admissions process. Because of this distinction, even settling the unsettled question of whether a student has a constitutional claim after losing acceptance in response to public outrage over speech does not also conclusively settle the question of whether a student has a claim for wrongfully being denied admission based on online speech.

C. *The First Amendment and Admissions*

When the federal courts began retreating from the now-discredited “rights-privileges distinction” that formerly gave government decision makers a free hand to withhold discretionary benefits on the basis of constitutionally protected activity, among the principal beneficiaries were college professors.²⁰⁰ In 1964, the Supreme Court considered the case of University of Washington faculty members challenging the constitutionality of a state mandate requiring them to execute a pair of oaths, under penalty of perjury, affirming that they would “promote respect” for the United States and refrain from assisting “subversive” activity.²⁰¹ The Court found the oaths facially unenforceable on vagueness grounds, implicating both the First Amendment and the Due Process Clause.²⁰² The Court noted that both the oath against promoting subversive activity and the oath requiring “undivided allegiance” to the U.S. government could penalize or deter a good deal of constitutionally protected expression, such as refusing to salute the American flag on religious grounds.²⁰³ Then in 1972, the Court took up the case of four Buffalo University professors who balked at signing an oath affirming that they were not associated with the Communist Party and would report any past Communist involvement to the University.²⁰⁴ Again, the Court found the requirement unconstitutional.²⁰⁵

Professor Scott A. Moss has opined that the judiciary is unduly deferential to university administrative expertise in the context of faculty

200. *See, e.g.,* *Baggett v. Bullitt*, 377 U.S. 360, 361-62, 366 (1964); *see also* Smolla, *supra* note 40, at 71-72 (explaining the rights-privilege distinction).

201. *Baggett*, 377 U.S. at 361-62, 364-65.

202. *Id.* at 366.

203. *Id.* at 369-71.

204. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 591-92 (1967).

205. *See id.* at 592-93.

hiring and promotion.²⁰⁶ As Moss observes, it could be argued that faculty personnel decisions warrant *reduced* deference, because the subjectivity of tenure decisions can easily mask discrimination, “and because educational diversity and equal opportunity are of such great importance to society.”²⁰⁷ Similar arguments apply to student admissions decisions as well.²⁰⁸

Because it is now well established that professors may not be prevented from teaching at public universities just because they hold politically extreme views,²⁰⁹ at least the same level of protection must logically apply to aspiring undergraduate enrollees. A public institution’s interest in regulating the speech of its faculty employees is of a qualitatively greater magnitude than its interest in regulating the speech of its students.²¹⁰ An employee is an “agent” of the institution, for whose behavior the employer is liable; students are patrons of university educational services and do not have any authority (real or apparent) to act on their institution’s behalf.²¹¹ A professor with abhorrent views is in a position to do exponentially more harm than an ordinary rank-and-file student.²¹² If a professor cannot be denied a job teaching at a state university because the professor has publicly identified as Communist or Socialist, then neither can a student be denied a seat in that professor’s class for making the same political declaration.²¹³ It follows from the well-established line of university employment cases that, just as a rejected faculty applicant would have a First Amendment claim if denied employment based on politically controversial views, so would a rejected applicant for admission.²¹⁴ It is

206. Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 8-9 (2006).

207. *Id.* at 9-10. Moss cites an employment case outside of academia, *Patrick v. Ridge*, in which the court found that an employer could not rebut evidence of hiring discrimination merely by saying that the candidate would not “fit in” or was not “sufficiently suited” for the job because such a subjective reason “is at least as consistent with discriminatory intent as it is with nondiscriminatory intent.” *Id.* at 13-14 (citing *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004)).

208. See Thro, *supra* note 84, at 42-44.

209. See, e.g., *Keyishian*, 385 U.S. at 591-93, 602-04; *Wagner v. Jones*, 664 F.3d 259, 269-71 (8th Cir. 2011).

210. See Estlund, *supra* note 41, at 1466.

211. See *Respondeat Superior*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/respondeat_superior (last visited Apr. 1, 2021); LoMonte, *supra* note 31, at 36-37.

212. See Marianne M. Jennings, *The Role of the Teaching Scholar in Politically Charged Times*, 3 U. PA. J.L. & PUB. AFFS. 191, 195, 199-200, 207-08, 210 (2018).

213. See, e.g., *Keyishian*, 385 U.S. at 591-93, 602-04.

214. See, e.g., *Wagner v. Jones*, 664 F.3d 259, 269-71 (8th Cir. 2011).

a fallacy, then, to assume that colleges have total discretion to turn away students based on their social media speech.²¹⁵

In 2017, the Fourth Circuit decided a rare First Amendment case contesting a college's denial of admission based on the applicant's speech. In *Buxton v. Kurtinitis*,²¹⁶ the court declined to find a First Amendment violation when a plaintiff was refused admission to a community college's radiation therapy program based on comments he made about his religious beliefs during an admissions interview.²¹⁷ While the case involved remarks made directly to college employees on campus—and not remarks made on social media before becoming a candidate for admission—the Fourth Circuit's analysis is instructive in anticipating how a court might adjudicate a free speech claim implicating online speech.

In 2013, Dustin Buxton applied to a competitive radiation therapy program that admitted around fifteen students annually.²¹⁸ While Buxton was invited to participate in the clinical observation and interview phases of the application process, he scored thirty-sixth out of forty-four applicants, which was below the cutoff for the available slots.²¹⁹ The program director who wrote up her notes of Buxton's interview observed that he "brought up religion a great deal during the interview" and added that "religion cannot be brought up in the clinic by therapist . . . or students."²²⁰ The notes also referenced other shortcomings in his interview style: "His answers to several of the questions were very textbook and lacked interpersonal skills."²²¹ Buxton was not admitted, and although he was provided with some suggestions to increase his competitive standing and improve his chances of gaining admission, he failed to gain admission upon reapplying in 2014.²²² Buxton sued, arguing that the director's notes evidenced that his religious speech was held against him, in violation of both the Free Speech Clause and Establishment Clause of the First Amendment, as well as the Equal

215. The fact that an applicant does not yet have a concrete "interest" in college enrollment may be relevant for purposes of a due process claim, but it is not applicable in a First Amendment analysis. *See infra* Part V.D. As has long been held in the hiring context, being denied appointment to a job on the basis of speech is actionable just as being fired on the basis of speech would be. *See, e.g.,* *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C. Cir. 1991) ("There can be no serious question that even individuals without property interests in their jobs cannot be discriminated against on the basis of their speech.")

216. 862 F.3d 423 (4th Cir. 2017).

217. *Id.* at 424-25.

218. *Id.* at 425.

219. *Id.*

220. *Id.* at 426.

221. *Id.*

222. *Id.*

Protection Clause of the Fourteenth Amendment.²²³ The trial court granted summary dismissal of all claims, and the Fourth Circuit affirmed.²²⁴

The *Buxton* court's discussion of the proper framework by which to analyze a failure-to-admit claim is instructive because it illustrates that no preexisting line of cases is a perfect fit. First, the court declined to apply public employment case law to the setting of college admissions.²²⁵ Next, the court rejected Buxton's contention that public forum doctrine should govern the case, because public forum case law is about being denied access to property to engage in expression, not about after-the-fact retaliation for the speaker's choice of words.²²⁶ Ultimately, the court found that the closest analog to college admissions was the Supreme Court's ruling in *National Endowment for the Arts v. Finley*,²²⁷ which rejected a facial First Amendment challenge to the National Endowment for the Arts' implementation of congressionally mandated "decency" standards in allocating federal arts grants.²²⁸ The *Buxton* court decided that the college admissions process, like the process of evaluating applications for arts grants, inherently requires making speech-based distinctions, so that the usual skepticism of content-based decision-making is inapplicable: "[F]or an interview process to have any efficacy at all, distinctions based on the content, and even the viewpoint, of the interviewee's speech during the interview is required."²²⁹ The court concluded that the Free Speech Clause of the First Amendment is simply "not implicated" in the context of an admissions interview, holding: "[T]he Free Speech Clause does not protect speech expressed in an admissions interview from admissions consequences in a competitive process."²³⁰ But the court added that "constitutional protections against discrimination remain in full force even in a competitive application and interview process," so that the lack of First Amendment recourse does not leave future college applicants defenseless.²³¹

The court then dispensed with Buxton's alternative theory that the college violated the Establishment Clause by preferring non-religiousness in a context in which religiousness is not a legitimate

223. *Id.*

224. *Id.* at 426-27, 433.

225. *See id.* at 427 ("Buxton was not a public employee, nor was he interviewing to be one. As such, the district court properly found that this line of cases was inapplicable to the present case.")

226. *Id.* at 427-28.

227. 524 U.S. 569 (1998).

228. *Buxton*, 862 F.3d at 429-30; *Nat'l Endowment for the Arts*, 524 U.S. at 572-73.

229. *Buxton*, 862 F.3d at 430.

230. *Id.* at 431.

231. *Id.*

consideration.²³² The college had a legitimate secular purpose for considering Buxton's decision to interject his religious faith into the conversation, the court held, because college officials reasonably believed that Buxton might also bring up religion with patients, contrary to professional protocols: "Whether an individual brings up religion, politics, their sex life, or their love of the New York Yankees, the topics broached by an interviewee are fair, secular metrics for determining that person's interpersonal skills."²³³

A federal district court in New York applied the *Buxton* decision in the case of an applicant who claimed she was rejected from a graduate program at the City University of New York ("CUNY") because of her Hasidic Jewish identity in *Weiss v. City University of New York*.²³⁴ The applicant claimed that CUNY penalized her for disclosing her religious upbringing in her personal statement and mentioning that Yiddish was her first language.²³⁵ The court, relying solely on *Buxton*, found no actionable First Amendment retaliation claim.²³⁶ But the court did allow the plaintiff to proceed on an alternative Establishment Clause theory, crediting her allegation that the University used the interview process to "weed out applicants based on religion."²³⁷

While instructive to illustrate the deference paid to admission decisions, both the *Buxton* and *Weiss* cases notably involve universities' assessment of speech that the applicants themselves volunteered through, respectively, an interview and an essay.²³⁸ What the applicant chooses to emphasize to the admissions office may legitimately factor into the assessment of the applicant's "people skills" and judgment.²³⁹ Indeed, the *Buxton* ruling was expressly couched as rejecting First Amendment scrutiny of "speech expressed in an admissions interview."²⁴⁰ But a post on a Twitter account that might have been written two years earlier is a categorically different matter.

To believe that state universities have free rein to consider online speech in admissions decisions, without limitation, would make the admissions office the only place on campus where the First Amendment ceases to apply. Once a student has enrolled, the First Amendment

232. *Id.* at 431-32.

233. *Id.* at 432.

234. No. 17-CV-3557, 2019 WL 1244508, at *1-2, *9 (S.D.N.Y. Mar. 18, 2019).

235. *Id.* at *1-2.

236. *Id.* at *9.

237. *Id.* at *8-9.

238. *See Buxton*, 862 F.3d at 432; *Weiss*, 2019 WL 1244508, at *1.

239. *Buxton*, 862 F.3d at 432.

240. *Id.* at 431.

forcefully protects against speech-motivated removals.²⁴¹ For example, during the Vietnam War era, a Nebraska student won reinstatement after his college blocked him from reregistering because he was violating a newly enacted prohibition against long hairstyles,²⁴² and a Virginia student gained readmission after being excluded because he took part in an anti-war demonstration.²⁴³

Even inside the classroom during class time, where the college's discretion is at its highest and the student's interest in individual expression is at its lowest, some degree of First Amendment protection applies.²⁴⁴ For instance, the Tenth Circuit found that a student who was compelled to recite a profane monologue as part of a drama class assignment, despite voicing religious-based objections, stated triable claims for violating her First Amendment rights.²⁴⁵ Although the court determined that the University's burden was only to show the reasonable "pedagogical" justification required to satisfy the Supreme Court's *Hazelwood* standard, the student nevertheless was allowed to proceed on a theory that the University singled her out for unfavorable treatment based on anti-Mormon bias, which, in the court's view, would not be a reasonable pedagogical justification.²⁴⁶

For these reasons, a student who can demonstrate a cause-and-effect between constitutionally protected speech, and an adverse admissions decision from a state institution should have recourse under the First Amendment. The only unanswered questions—and they are substantial questions—are, first, at what point the applicant's choice of words will cease being constitutionally protected (the *Tinker* "disruption" point, or somewhere else), and, second, what burden the state will have to surmount to justify a rejection based on speech (the strict scrutiny that applies to other content-based government decisions, or a more deferential level of scrutiny).²⁴⁷

241. See, e.g., *Saunders v. Va. Polytechnic Inst.*, 417 F.2d 1127, 1128 (4th Cir. 1969); *Reichenberg v. Nelson*, 310 F. Supp. 248, 250, 254 (D. Neb. 1970).

242. See *Reichenberg*, 310 F. Supp. at 252, 254 (finding that, even though university decisions are normally reviewed deferentially, the personal freedom to choose a hairstyle is a "fundamental right" that a state university bears a "substantial burden" to overcome).

243. *Saunders*, 417 F.2d at 1130-31 (citing the Supreme Court's newly decided *Tinker* decision and finding that the ability to engage in peaceful political protests on campus is a fundamental right that a state university cannot penalize without satisfying strict scrutiny).

244. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284-85 (10th Cir. 2004).

245. *Id.* at 1280, 1293.

246. *Id.* at 1292-93.

247. See *supra* Part II.B.

D. Due Process and Admissions

Government punishment for speech often implicates due process as well as the First Amendment, either because the speaker claims to have received inadequate opportunity to contest the charges, or because the applicant claims that the rule under which punishment was imposed is itself defective.²⁴⁸ While an applicant who loses out on state college admission because of speech has all of the essentials for a First Amendment claim, one essential for a due process claim may be missing: a protectable property or liberty interest.

It is well accepted that due process applies to the decision to take away any government benefit, including a college student's continued ability to attend a public higher-education institution.²⁴⁹ Courts have recognized a right to some level of process—notice and an opportunity to be heard, though perhaps not a formal hearing—even when the student has not yet begun attending, but has been accepted.²⁵⁰ The question in any due process case is what quantum of process is owed, which varies based on the nature of the deprivation and the burden on the government to provide pre-deprivation process.²⁵¹

When punishment is based on behaviors that equate to personal misconduct in violation of disciplinary rules, the individual is entitled to due process.²⁵² The case law concerning due process in disciplinary dismissals of enrolled students is clear: Disciplinary dismissals require the institution to afford the student notice and opportunity to be heard.²⁵³ Academic dismissals do not require the same level of due process for enrolled students.²⁵⁴ Once a removal is characterized as academic, little

248. See Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243, 251-53, 265 (2001).

249. See *id.* at 246-48 (describing the Supreme Court's due process jurisprudence in the context of higher education); see also Calvert, *supra* note 61, at 297.

250. See *Martin v. Helstad*, 578 F. Supp. 1473, 1482 (W.D. Wis. 1983) ("While an accepted applicant has only a slight property interest in admission prior to matriculation . . . there is a sufficient interest so as to require some procedural due process" to resolve a factual dispute over whether the candidate lied on his application); see also Dutile, *supra* note 248, at 245.

251. See *Martin*, 578 F. Supp. at 1482 (explaining the Supreme Court's *Mathews* factors for determining what level of procedural formality is required for varying types of deprivations).

252. See *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961).

253. See *id.* at 157 ("In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the . . . [college] from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense.").

254. See *Monroe v. Ark. State Univ.*, 495 F.3d 591, 595 (8th Cir. 2007) (stating that a student's dismissal was appropriately categorized as academic when the student failed to complete assigned coursework); see also *Richmond v. Fowlkes*, 228 F.3d 854, 858 (8th Cir. 2000) (holding that a college's decision to remove a student who failed exams, came late to class, and engaged in inappropriate classroom behavior was appropriately categorized as academic).

formal process is required and the removal decision is reviewed with extra-strength deference.²⁵⁵ Although the line between an academic versus disciplinary action is not ironclad, one court has helpfully explained: “Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct.”²⁵⁶ The primary rationale for applying reduced scrutiny to an academically based removal is that academic decisions require specialized subject-matter expertise that judges lack (e.g., who is a satisfactory performer in a pre-med program and who is not).²⁵⁷ Seen in this light, disqualifying an applicant because of offensive online speech—a decision made by non-faculty admissions employees—does not seem to qualify for academic deference by the judiciary.²⁵⁸ Indeed, the very same judgment calls are being made every day in *non*-academic workplaces by supervisors who must decide whether to punish employees for offensive online speech.²⁵⁹

The Supreme Court’s seminal pronouncement came in *Board of Curators v. Horowitz*,²⁶⁰ involving the dismissal of a medical student after unfavorable reviews of her performance in a clinical program.²⁶¹ Even assuming a due process right to continued attendance, the Court concluded that the student received all of the process to which she was entitled—a “careful and deliberate” assessment—and was not owed a

255. See Dutile, *supra* note 248, at 290 (“With regard to academic cases, the courts have taken an essentially *hands-off* approach, deferring to the academic expertise of campus officials.”); Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct Sanctions*, 39 J. COLL. & U.L. 511, 523-24 (2013) (writing that “students are overwhelmingly unsuccessful in their quests to overturn the colleges’ judgments” once a disciplinary case is categorized as academic); *Henderson v. Engstrom*, No. 10-4116, 2012 WL 4009108, at *7 (D.S.D. Sept. 12, 2012) (“There is even more flexibility granted to schools when a student is dismissed for academic rather than disciplinary reasons.”).

256. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 931 (Tex. 1995); see also *Henderson*, 2012 WL 4009108, at *8 (“Academic dismissals usually occur when there are problems with the student’s grades, an inability to perform the work, poor class attendance, or other academic failings.”).

257. See Dutile, *supra* note 248, at 247-50.

258. See Emily Deyring, Comment, “Professional Standards” in Public University Programs: *Must the Court Defer to the University on First Amendment Concerns?*, 50 SETON HALL L. REV. 237, 247 (2019) (“Academic evaluation should not extend to student speech made in a private capacity off campus, which is otherwise protected by the First Amendment.”); see also *Martin v. Helstad*, 578 F. Supp. 1473, 1483 (W.D. Wis. 1983) (concluding that a factfinding determination as to whether a law school applicant made false or misleading statements on his application is not an academic decision committed solely to the university’s discretion).

259. See Donald Carrington Davis, *MySpace Isn’t Your Space: Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Networking Services*, 16 KAN. J.L. & PUB. POL’Y 237, 241-45 (2007).

260. 435 U.S. 78 (1978).

261. *Id.* at 79-81.

formal hearing: “The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.”²⁶² Following the Court’s lead, lower courts are increasingly deferring to the institution’s characterization of the decision as academic, even when it bears all the hallmarks of a disciplinary action.²⁶³

In *Keefe v. Adams*,²⁶⁴ a Minnesota community college student was summarily removed from the nursing program, effectively ending his enrollment, because he insulted a classmate in a series of Facebook posts that included a hyperbolic reference to violence.²⁶⁵ The college classified the decision as an academic one because it was conveyed to Keefe by the supervisor of his academic program, even though the speech took place off campus, on personal time.²⁶⁶ Keefe argued that, because the speech took place outside the context of university activities, he should have the same level of constitutional protection that would apply to any other speaker in the off-campus world, not a diminished “student” level of rights.²⁶⁷ But the trial court, and then the Eighth Circuit, disagreed and upheld the University’s decision, applying deferential scrutiny.²⁶⁸

In a rare, and perhaps unique, case applying a due process analysis to an initial admissions decision, rather than to the decision to remove an already-enrolled student, a federal district court in Ohio found that some due process protections adhere to college admissions, but that the adequacy of that process is reviewed deferentially.²⁶⁹ Jack Grove claimed that he was unfairly denied admission to the veterinary medicine graduate program at The Ohio State University based on an unduly subjective interview process, in violation of his Fourteenth Amendment

262. *Id.* at 84-86.

263. *See, e.g.*, *Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001) (noting that while plaintiff’s “intransigence might suggest that her dismissal was disciplinary, her refusal to acknowledge and deal with her problems furnished a sound academic basis for her dismissal”); *Davis v. Mann*, 721 F. Supp. 796, 799-800 (S.D. Miss. 1988) (stating that plaintiff “contends that the complaints lodged against him charged instances of personal misconduct rather than academic shortcomings. It is the court’s opinion, however, that the reasons for plaintiff’s dismissal are correctly characterized as academic.”).

264. 840 F.3d 523 (8th Cir. 2016).

265. *Id.* at 526-27.

266. *See id.* at 526-27, 529.

267. *Id.* at 531.

268. *Id.* at 531, 533, 537.

269. *Grove v. Ohio State Univ. Coll. of Vet. Med.*, 424 F. Supp. 377, 384 (S.D. Ohio 1976).

right to due process.²⁷⁰ The court did find a sufficiently substantive interest to entitle the plaintiff to due process: the liberty interest in preparing to enter his chosen profession.²⁷¹ But the court concluded that the application and interview process was not “so vague and arbitrary as to deny a fair opportunity to meet the admission requirements,” which is all that the court’s deferential notion of due process required.²⁷² Instructively, by contrast to the “social media rejection” scenario, the court premised its evaluation on the many checks and balances in Ohio State’s review process, which afforded Grove ample opportunity to be heard: Grove had three chances to meet with members of the admissions committee to present information in favor of his candidacy and explain any shortcomings in his record.²⁷³

This decision, however, is a relative outlier among the handful of known due process challenges to a lost chance to attend college.²⁷⁴ More commonly, courts find that there is neither a liberty nor a property interest in competing for college admission, and in the absence of a concrete interest, there is no entitlement to any particular degree of process before deprivation.²⁷⁵ But even the lack of a recognized property or liberty interest does not settle the due process question entirely.²⁷⁶ In the context of regulations on speech, due process also is implicated when a speech-prohibitive regulation is unduly vague or confers unbridled discretion on government decision makers.²⁷⁷ That almost no higher-educational institutions appear to have formal policies

270. *Id.* at 379, 381.

271. *Id.* at 382-83.

272. *Id.* at 384-85.

273. *Id.* at 386.

274. *Compare id.* at 383 (finding that the plaintiff had a liberty interest that was infringed upon by the defendant’s denial of admission to the plaintiff), *with* *Tobin v. Univ. of Me. Sys.*, 59 F. Supp. 2d 87, 90 (D. Me. 1999) (holding that the plaintiff’s “unilateral expectation” of admission was insufficient to demonstrate the existence of a property interest).

275. *See, e.g., Tobin*, 59 F. Supp. 2d at 90 (stating that a “unilateral expectation” of admission to law school is too immaterial to give rise to due process protection); *Szejner v. Univ. of Alaska*, 944 P.2d 481, 486 (Alaska 1997) (“A person does not have a property interest in admission to graduate school.”).

276. *See, e.g., Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1016, 1023 (C.D. Cal. 2002) (finding a due process violation where decision makers had unrestrained discretion in decision-making regarding speech rather than where a property or liberty interest was lacking).

277. *See* *Hall v. Bd. of Sch. Comm’rs*, 681 F.2d 965, 966, 969 (5th Cir. 1982) (holding that a public school’s rules against distributing literature on campus were facially overbroad and unconstitutional because “they do not furnish sufficient guidance to prohibit the unbridled discretion that is proscribed by the Constitution”); *Khademi*, 194 F. Supp. 2d at 1023 (striking down the college district’s procedures for obtaining a permit for expressive activity on campus grounds because “these provisions provide the presidents with absolutely no standards to guide their decisions,” opening the door to content-based suppression).

constraining the exercise of admissions officers' discretion is itself a red flag of unconstitutionality.²⁷⁸ Courts have long disfavored open-ended policies that enable government decision makers to exercise unfettered discretion over speech.²⁷⁹ The Supreme Court has repeatedly struck down statutes and ordinances that confer unbridled discretion to silence speech in arbitrary or discriminatory ways.²⁸⁰ The First Amendment requires neutral, objective standards to guard against the abuse of discretion to penalize disfavored speakers or unpopular viewpoints.²⁸¹

While the use of social media in admissions may get a highly deferential review for arbitrariness, it is not even clear that universities would be able to surmount that legally minimal hurdle, given that the decision to review (or not review), and for what type of content, appears to be entirely left up to each admissions employee. For instance, one admissions director told *Consumer Reports* that she is normally too busy to check applicants' social media profiles, but "there certainly have been times where I've looked up a student just out of curiosity."²⁸² A disqualified applicant who could show that her profile was singled out for scrutiny for no reason—"just out of curiosity"—would have little difficulty establishing arbitrariness.²⁸³

A university predictably would argue that the disappointed applicant deserves less process—or none at all—because there has been no detrimental reliance. A student who is expelled after having enrolled is, arguably, suffering a more serious deprivation, having invested in changing residences and having turned down other offers of admission. But that is not decisively the case. No court has ever said that a

278. See *supra* Part IV.B.

279. David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1359 (2005); Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 286-89 (2003).

280. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-57 (1988) (observing that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused").

281. See *id.* at 760 ("[T]he Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 809 (1989) (Marshall, J., dissenting) ("The city must establish neutral criteria embodied in 'narrowly drawn, reasonable and definite standards,' in order to ensure that discretion is not exercised based on the content of speech.").

282. Prachi Bhardwaj, *Yes, Colleges Check Applicants' Social Media Posts*, CONSUMER REPS. (Aug. 18, 2017), <https://www.consumerreports.org/social-media/colleges-check-applicants-social-media-posts>.

283. See *id.*; see also Dutile, *supra* note 248, at 283 n.293 ("'Arbitrary or capricious' means an institutional decision lacking a rational basis or motivated by bad faith or ill will unrelated to academic performance.").

university is free to expel a student without process if the student is living at home with his parents and attending the local commuter college, or if the student did not reject any competing acceptance offers. Such questions do not seem to arise at all in due process challenges to expulsions. The entitlement to process, then, is not solely a product of detrimental reliance, and it is not the student plaintiff's burden to establish detrimental reliance to recover for a denial of process.²⁸⁴

Consider a different type of government-issued privilege: a license to drive. Let us suppose that a state Department of Motor Vehicles ("DMV") decided to penalize a particularly outspoken critic of the DMV (let us call him "Reggie") by denying him the privilege of driving on account of his caustic views. It seems farfetched that a reviewing court would find a decisive difference between revoking Reggie's license after he had been driving for one week versus denying him the opportunity to take the driver's test at all. If, in each instance, the decision was equally motivated by Reggie's political speech, Reggie assuredly would have a constitutional claim. It seems comparably farfetched that, having established that a student who is expelled from college after attending for one week is entitled to a due process hearing, a court would conclude that no constitutional protections adhere when a student is refused admission on a constitutionally infirm basis. Just as no one is assured of passing the driver's exam, no one is assured of gaining admission upon applying to a university. But the lost opportunity to be considered for admission is a meaningful loss, whether conceived as a denial of due process or as a First Amendment retaliation claim.

VI. CONCLUSION

In a probing, inside look at college admissions, author Jeffrey Selingo characterizes the decision process as "confusing and nonstandard."²⁸⁵ Competitive colleges, he explains, receive far more applicants with outstanding high school grades and standardized test scores than they can possibly enroll; hence, they must make judgment calls on intangible qualities such as leadership potential and intellectual curiosity.²⁸⁶ As Selingo explains, the process has gotten even more subjective in recent years as competitive colleges attempt to reward applicants who have overcome adversity or demonstrated unusual

284. See Dutile, *supra* note 248, at 279; Calvert, *supra* note 61, at 292-93.

285. JEFFREY SELINGO, WHO GETS IN AND WHY: A YEAR INSIDE COLLEGE ADMISSIONS 96 (2020).

286. See *id.* at 96, 103, 106.

tenacity, hoping for a class that reflects a diverse mix of life experiences.²⁸⁷

Colleges zealously protect their ability to make subjective judgments about which applicants are suitable, and have convinced courts to afford substantial deference to discretionary judgment calls.²⁸⁸ Still, even courts that recognize the general rule of deference are careful to caveat that deference ceases to apply when there is an allegation of illegality.²⁸⁹ As one court explained, in ruling in favor of a spurned law school applicant: “That the courts will not interfere with the discretion of school officials in matters which the law has conferred to their judgment, unless there is a clear abuse of that discretion, or arbitrary *or unlawful* action, seems to be the unanimous holding of the authorities.”²⁹⁰ Principles of academic deference and academic freedom, then, do not excuse compliance with fundamental constitutional principles.

Reviewing social media profiles as a factor in state university admissions decisions poses three related concerns. First, admissions officers may be prejudiced (consciously or subconsciously) by learning personal characteristics that cannot legitimately be part of the acceptance decision.²⁹¹ Second, admissions officers may draw erroneous conclusions from viewing sarcasm or “inside jokes” devoid of context—or from posts that are not actually the handiwork of the applicants at all.²⁹² Third, admissions officers may disqualify or downgrade applicants for expressing strong views on political and social issues, inhibiting young people from engaging in political discourse in the only medium readily accessible to them.²⁹³

As we have seen, constitutional rights apply with some force on the campus of state colleges and universities, including in the decision of whether to remove a student or to rescind an offer of enrollment.²⁹⁴ And, as we have seen, state colleges and universities widely incorporate a

287. *See id.* at 106.

288. Stoner & Showalter, *supra* note 10, at 586-87.

289. *State ex rel. Bartlett v. Pantzer*, 489 P.2d 375, 378-79 (Mont. 1971) (per curiam).

290. *Id.* (emphasis added) (quoting *State ex rel. Ingersoll v. Clapp*, 263 P. 433, 437 (Mont. 1928)).

291. *See Levin, supra* note 181; Koenig & Rustad, *supra* note 10, at 611; Natasha Singer, *They Loved Your G.P.A. Then They Saw Your Tweets.*, N.Y. TIMES (Nov. 9, 2013), <https://www.nytimes.com/2013/11/10/business/they-loved-your-gpa-then-they-saw-your-tweets.html>.

292. *See Singer, supra* note 291.

293. *See id.*; *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-14 (3rd Cir. 2008) (noting that “overbroad . . . policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination . . . in student free speech cases”).

294. *See supra* Parts II.B, V.A.

review of social media speech into the admissions decision without the type of cautionary standards that one would expect to find when a governmental decision is imbued with constitutional significance.²⁹⁵ Leaving aside whether there is a clear legal pathway for a rejected applicant to sue under a First Amendment or due process theory, relying on social media in making admissions decisions is fraught with peril. We cannot say for certain that turning loose admissions officers to apply their own subjective standards and judgments to social media profiles is unconstitutional, but we can say that it is a bad idea.

A. *Why It Is a Bad Idea: Online Speech Poses Unique Mistranslation Risks*

Social media pages can be a revealing window into the lives of their creators. The Facebook platform is built to elicit profile information that includes one's relationship status, favorite forms of entertainment, family photos, and other disclosures that could influence the opinions of others who view the profile page. Even when personal characteristics are not overtly listed as part of a personal biography, social media users share so much about their habits, affiliations, and beliefs that most people—probably correctly—believe that their political and religious views can readily be inferred from their profile pages.²⁹⁶ That impression is fortified by research. One 2013 study concluded that, just by looking at the Facebook pages and groups “liked” by accountholders, relatively accurate conclusions could be made about their sexual identity, drug use, political beliefs, and other personal qualities.²⁹⁷ A 2017 study of 155 Facebook users concluded that people hold less favorable views of coworkers who frequently post political material to Facebook, and that those unfavorable impressions can spill over into the workplace and

295. See *supra* Part IV.A–B. In a 2008 article, the then Dean of Stetson Law School advocated that, if postsecondary institutions elect to conduct criminal background checks as part of the admissions screening process, they should only do so with the guidance of a written policy that includes considering what problem(s) the screening exists to solve and what outcome(s) the policy intends to produce. Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J. COLL. & U.L. 419, 489-90 (2008). The same could be equally said of social media screening.

296. See Paul Hitlin & Lee Rainie, *Facebook Algorithms and Personal Data*, PEW RSCH. CTR. (Jan. 16, 2019), <https://www.pewresearch.org/internet/2019/01/16/facebook-algorithms-and-personal-data> (reporting results of a survey in which sixty-five percent of Facebook users said it would be easy to discern their religious beliefs and seventy-one percent said it would be easy to identify their political beliefs based on what they share to Facebook).

297. Josh Halliday, *Facebook Users Unwittingly Revealing Intimate Secrets, Study Finds*, GUARDIAN (Mar. 11, 2013, 3:00 PM), <https://www.theguardian.com/technology/2013/mar/11/facebook-users-reveal-intimate-secrets>.

limit career advancement opportunities for the “over-sharers.”²⁹⁸ So it is clear that people who view social media pages form impressions and draw conclusions about the proprietors of those pages. And this includes conclusions with no legitimate place in the admissions process.

But even though it can be a mirror that candidly reveals warts and blemishes, social media sometimes more closely resembles a funhouse mirror, reflecting a distorted image. During the spring 2020 worldwide lockdown that accompanied the onset of the COVID-19 pandemic, images circulated throughout social media that appeared to expose people engaging in unsafe behavior, but which often turned out to be deceptive because of selective cropping, lack of visual perspective, or use of telephoto lenses.²⁹⁹ Visual editing and filtering has fueled a generation of body anxiety problems as young women compare themselves against idealized images of impossibly thin Instagram fitness models.³⁰⁰ Because of its spontaneity and informality, social media is especially susceptible to misinterpretation by people who see posts unmoored from context. In one especially tragic case, a Texas teenager spent more than four months in jail after an arrest on felony threat speech charges because a Facebook chat in which he discussed a graphically violent video game was shared with a person unaware of the backstory, who assumed that the teen was plotting a real shooting.³⁰¹

Even social media companies themselves, with armies of trained moderators, experience contextual misunderstandings that can result in harmless or well-intentioned posts being taken down. In December 2020, Facebook announced that its recently appointed “appeals court” of outside experts had identified its first six cases to adjudicate, and five of the six fell into the category of, according to the post authors, contextual misreadings—posts that the creators shared to call attention to abhorrent news events, which Facebook mistook for endorsement of the

298. Kaloydis et al., *supra* note 11, at 249, 260-63.

299. Joey D’Urso, *Here’s Why Some Pictures of People Supposedly Breaking Coronavirus Social Distancing Rules Can Be Misleading*, BUZZFEED NEWS (Apr. 28, 2020), <https://www.buzzfeed.com/joeydurso/coronavirus-social-distancing-lockdown-photos>.

300. Marika Tiggemann & Isabella Anderberg, *Social Media Is Not Real: The Effect of ‘Instagram vs Reality’ Images on Women’s Social Comparison and Body Image*, 22 NEW MEDIA & SOC’Y 2183, 2184-85 (2020); *see also* Kelly Oakes, *The Complicated Truth About Social Media and Body Image*, BBC FUTURE (Mar. 12, 2019), <https://www.bbc.com/future/article/20190311-how-social-media-affects-body-image> (citing research concluding that viewing online images of “beautiful people doing exercise, or at least pretending to—might make you harsher on yourself”).

301. *See* Eli Siems, *Jailed for a Facebook Post: 19-Year-Old Justin Carter, State Sensitivity and the Half-Million-Dollar Bail*, NAT’L COAL. AGAINST CENSORSHIP (July 10, 2013), <https://ncac.org/news/blog/jailed-for-a-facebook-post-19-year-old-justin-carter-state-sensitivity-and-the-half-million-dollar-bail>.

underlying abhorrent behavior.³⁰² For instance, one appellant shared a quote from Nazi propagandist Joseph Goebbels, but explained that the quote was used unflatteringly to suggest parallels between the tactics of German Nazis and the tactics of the Trump Administration.³⁰³ If Facebook, with its vast assets, cannot reliably distinguish between posts *expressing* hateful sentiments and posts *calling out* hateful sentiments, it is hard to be confident that a graduate student assigned to review 125 admissions applications a week will fare any better.³⁰⁴

The facts behind a Minnesota Supreme Court case amply illustrate the dangers of taking social media posts at face value. In the *Tatro v. University of Minnesota*³⁰⁵ case, mortuary science student Amanda Tatro was disciplined for a series of Facebook posts in which she provided gallows humor commentary about her assignment to dissect a cadaver.³⁰⁶ In one post, she wrote that she planned to spend the evening “updating my ‘Death List #5,’” and in another, she bid farewell to her assigned cadaver with the comment, “Lock of hair in my pocket.”³⁰⁷ While the posts may have seemed alarming to those unacquainted with Tatro, they were actually cultural reference points, as the “death list” comment was a line from one of her favorite films, *Kill Bill*, and the “lock of hair” comment was based on a line from a popular Black Crowes song.³⁰⁸ Neither was meant literally to indicate that Tatro was contemplating homicide or that she had defiled a corpse.³⁰⁹ Yet because the posts caused at least one classmate to complain to the instructor, who then summoned the police, the posts were treated as a punishable offense.³¹⁰

When it comes to humor, context is everything. A good deal of contemporary humor obliterates boundaries of good taste. Take, for example, the long-running Broadway musical, *The Book of Mormon*, by the co-creators of the transgressive *South Park* television cartoon series. The musical debuted in 2011 to rave reviews and won nine Tony awards, including Best Musical, and its soundtrack sold so many copies

302. See Whitney Tesi, *Facebook's Oversight Board Has Announced Its First Six Cases*, SLATE (Dec. 2, 2020, 12:46 PM), <https://slate.com/technology/2020/12/facebook-oversight-board-released-cases.html> (describing facts of cases accepted by the Facebook Oversight Board from among 20,000 submissions).

303. *Id.*

304. See SELINGO, *supra* note 285, at 95 (explaining that most large public universities have abandoned screening by full-time admissions staffers because of the overwhelming volume of applications and have, instead, turned to graduate students to perform most of the reviews).

305. 816 N.W.2d 509 (Minn. 2012)

306. *Id.* at 511.

307. *Id.* at 512-13.

308. *Id.* at 513.

309. *See id.* at 514.

310. *Id.* at 512-13.

that it cracked the Billboard pop charts.³¹¹ The play and soundtrack revel in outrageous humor, with no subject—religion, AIDS, famine in Africa—too sensitive, even directing strong profanities at God.³¹² Such language is now within the accepted boundaries of mainstream entertainment—but if a high school drama student tweeted her favorite lines from the musical upon leaving the theatre, there is every chance that her tweets would be taken to indicate malignant racism, homophobia, and anti-Christian prejudice.

A growing body of research demonstrates that people’s interactions with social media cannot safely be oversimplified. For instance, the fact that a Twitter user clicks the “like” or “retweet” button on a tweet posted by another user might indicate agreement with the sentiment—or it might not. One 2014 study found that people regularly use the “like” button on Twitter as a bookmarking function, to retrieve an item for later viewing rather than to indicate that they actually approve of its content.³¹³ Nor can it be inferred that someone “following” a celebrity, cause, or organization on social media is doing so to indicate affinity; the “hate-follow” is a well-documented phenomenon.³¹⁴

311. Jeff Lunden, *How ‘The Book Of Mormon’ Cast Album Cracked the ‘Billboard’ Top 10*, NPR (Sept. 15, 2011, 2:28 PM), <https://www.npr.org/sections/therecord/2011/09/15/140509256/how-the-book-of-mormon-soundtrack-cracked-the-billboard-top-10>; Peter Marks, *‘The Book of Mormon’ Wins Big at Tony Awards*, WASH. POST (June 12, 2011), https://www.washingtonpost.com/lifestyle/style/the-book-of-mormon-wins-big-at-tony-awards/2011/06/12/AGGXgRSH_story.html.

312. See Geoff Griffin, *Review: The Book of Mormon Musical*, SALT LAKE CITY WKLY. (Mar. 23, 2011), <https://www.cityweekly.net/utah/review-the-book-of-mormon-musical/Content?oid=2153423> (commenting that “parts of the musical push Broadway to new levels of obscenity, blasphemy and outrageousness”); Adam Markovitz, *‘Book of Mormon’ Bows on Broadway: How Offensive Is It?*, ENT. WKLY. (Feb. 25, 2011, 5:22 PM), <https://ew.com/article/2011/02/25/book-of-mormon> (describing the play as “jam-packed with foul language . . . sexually explicit jokes, and enough blasphemy to knock your church-going grandma right out of her seat”).

313. See Florian Meier et al., *More than Liking and Bookmarking? Towards Understanding Twitter Favouriting Behaviour*, in PROCEEDINGS OF THE EIGHTH INTERNATIONAL AAAI CONFERENCE ON BLOGS AND SOCIAL MEDIA 348, 350-52 (2014) (reporting that, in a survey of 606 Twitter users, one of the most common reasons volunteered for clicking the “favorite” button—which has since been renamed as the “like” feature—was to bookmark the post for future reading, second only to an actual desire to indicate enthusiasm for the post or its author).

314. See Sarah Weldon, *Why It Feels So Deeply Good to Follow Your Mortal Enemies on Instagram*, COSMOPOLITAN (Nov. 24, 2020), <https://www.cosmopolitan.com/lifestyle/a34773113/hate-following-social-media> (quoting a clinical psychologist’s observation that people who channel their anger into following social media accounts they dislike can reduce stress and anxiety); Katie Way, *‘Why Do I Need to Hate-Follow, Hate-Read, and Hate-Watch?’*, VICE (Nov. 2, 2020, 7:30 AM), <https://www.vice.com/en/article/4addam/why-do-i-follow-people-i-hate-on-social-media> (quoting researchers who liken the experience of following an unlikable person’s social media feed to the emotional release of watching a horror film, and adding that “we’re socially hardwired to look at other people’s lives, even other people we dislike”); Joel Golby, *Hate-Following People on Social Media Is Therapeutic, Says Science*, VICE (Oct. 23, 2014, 11:00 AM), <https://www.vice.com/en/article/gq8kkj/joel-golby-hate-follow-is-good-for-you> (citing researchers’

Unlike other forms of speech, social media is also uniquely susceptible to error, misattribution, or outright fraud. No one “accidentally” writes a book or publishes a column in *The New York Times*, but it is widely documented that people accidentally click on social media posts for which they never intended to indicate support.³¹⁵ Famously, the singer Courtney Love prevailed in what has been called the world’s first “libel-by-tweet” case, in part because she convinced a jury that a Twitter post accusing a former attorney of misconduct was meant to be a private message and was made publicly visible by mistake.³¹⁶ Nor is it difficult to create a social media account that purports deceptively to belong to another person; *The New York Times* estimates that “millions” of impersonation accounts exist, and that once an impostor account is established, it can be difficult to get a social media platform operator to deactivate it.³¹⁷ High school athletes have been targeted by scammers impersonating college coaches on Twitter, sometimes asking for money in exchange for reviewing the athlete’s highlight films.³¹⁸ Anyone who has ever walked away from a shared computer without logging off, or had a smartphone stolen, is aware that people with an agenda to play pranks, or worse, can readily gain access

findings that “when people are in a bad mood, they’re more likely to linger on the social media profiles of people who are worse off than them”).

315. See Robert Burns, *Pentagon: Retweet of Call for Trump to Resign Was Accidental*, BLOOMBERG (Nov. 16, 2017, 3:21 PM), <https://www.bloomberg.com/news/articles/2017-11-16/pentagon-retweet-of-call-for-trump-to-resign-was-accidental> (explaining that the operator of an official United States Defense Department Twitter account accidentally hit the “retweet” button on a post calling on President Trump to resign); Chloe Bryan, *The Accidental Super Like: Tinder’s Most Awkward Phenomenon*, MASHABLE (Aug. 16, 2018), <https://mashable.com/article/tinder-super-likes-accidental> (describing embarrassment of dating app users who have accidentally clicked a button or swiped a phone screen in a way that conveys interest in a potential partner).

316. Maria Elena Fernandez, *Courtney Love Wins First Twitter Libel Trial*, NBC NEWS (Jan. 24, 2014, 8:22 PM), <https://www.nbcnews.com/news/world/courtney-love-wins-first-twitter-libel-trial-flna2D11988969>.

317. See Nicholas Confessore & Gabriel J.X. Dance, *On Social Media, Lax Enforcement Lets Impostor Accounts Thrive*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/technology/social-media-impostor-accounts.html> (reporting that “social media companies often fail to vigorously enforce their own policies against impersonation”); see also JoBeth McDaniel, *How I (Digitally) Killed My Twitter Impostor*, DAILY BEAST, <https://www.thedailybeast.com/how-i-digitally-killed-my-twitter-impostor> (Apr. 14, 2017, 3:22 PM) (chronicling a journalist’s difficulty in getting Twitter to deactivate an impersonator account that was tweeting profane rants “rife with bad grammar and misspellings” using her name, stating specifically that “[e]xecutives and editors were likely doing Google searches of my name, checking me out. I had no way of knowing—or even asking—if they had mistaken this monkey-faced avatar for me.”).

318. Geoff Preston & Kennington Lloyd Smith III, *Spotting the Fake: How to Find Counterfeit College Recruiting Twitter Accounts*, GREENVILLE NEWS (June 23, 2020), <https://www.greenvilleonline.com/story/sports/high-school/2020/06/22/how-spot-fake-college-sports-coaches-recruiters-pop-up-twitter-social-media/5288479002>.

to other people's accounts.³¹⁹ On social media, then, there is a real risk not just of misunderstanding the speaker's sentiment, but of misattributing a sentiment to an unwitting "speaker."³²⁰

The risk of unfairly stigmatizing people based on social media posts falls disproportionately on the people who are already at a competitive disadvantage in the admissions process.³²¹ As Professors Koenig and Rustad have written: "Digital marks of shame, resulting from naive online postings, are particularly indelible, deep, and far-reaching for members of already devalued groups."³²² For instance, they write, a college admissions officer might reach stereotypical conclusions about an applicant who is photographed wearing a backwards baseball cap, sagging pants, or other fashion items popular with Black teens.³²³ And affluent White families are the most likely to have the aid of admissions counselors who advise them in sanitizing their online personas, amplifying the risk that social media will work to the disadvantage of Black and Brown young people.³²⁴ The risk is greater still for students who express non-majoritarian views that challenge mainstream conventions—exactly the students that an institution devoted to the exploration of ideas should want most.³²⁵

We need not speculate whether, in the absence of an opportunity for redress, some applicants will be victimized by cultural mistranslations of innocent online speech—because there is evidence of such decision-making on campus already. Take the case of Francis Schmidt, a professor at New Jersey's Bergen Community College, who was suspended and ordered to undergo counseling because he posted a photo

319. See, e.g., Ken Belson et al., *For Laremy Tunsil and N.F.L., Combustion When a Bong and Social Media Mix*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/sports/football/laremy-tunsil-at-nfl-draft-combustion-when-a-bong-a-gas-mask-and-social-media-mix.html> (reporting that star University of Mississippi football player was downgraded as an NFL prospect when, just before the professional football draft, a video purporting to show him inhaling marijuana smoke was posted to his Twitter account without his authorization).

320. See Singer, *supra* note 291 (noting concern that "colleges might erroneously identify the account of a person with the same name as a prospective student—or even mistake an impostor's account—as belonging to the applicant, potentially leading to unfair treatment").

321. Koenig & Rustad, *supra* note 10, at 611-13.

322. *Id.* at 596-97.

323. *Id.* at 595-96; see also *id.* at 598 ("College admissions officials may view wearing a [t-shirt] with a suggestive logo not as trendy fashion statement, but as an indication of undesirable deviancy.").

324. See *id.* at 613 ("While sophisticated parents and high school teachers warn middle class students that indiscreet postings may be harmful, lower class youth are often unaware of the risks created by unwanted viewers.").

325. See Deyring, *supra* note 258, at 251-52 (making this observation in the context of disciplinary action against already-enrolled students, stating that "sanctions against students can encourage viewpoint discrimination by empowering universities to quiet students who express unpopular opinions but have no other academic performance problems").

of his seven-year-old daughter wearing an oversized *Game of Thrones* t-shirt bearing one of the HBO drama's signature lines: "I will take what is mine with fire and blood."³²⁶ Based on a single social media post, an overly literal college administration made the leap from fandom of violent entertainment to a proclivity to commit violence.³²⁷ But Schmidt was able to summon public support and challenge the decision—because he had notice.³²⁸ Instead, imagine that an applicant to Bergen Community College playfully changed her Instagram or Twitter biography line to read, "I will take what is mine with fire and blood," while enjoying a *Game of Thrones* binge-watch, and elicited the same overreaction by the College. Because the applicant would have no clue why she received the "we regret to inform you" email, the decision would go unchallenged.

B. Why It Is a Really Bad Idea: Admissions Misjudgments Can Be Life Altering

The benefits of a college education go beyond intrinsic reward and personal accomplishment. In 2011, a Pew Research Center study estimated work life earnings over a period of forty years to be \$1.6 million for those who earn a bachelor's degree or higher, compared to \$800,000 for individuals with only a high school diploma.³²⁹ Earning a four-year degree also correlates to increased employment stability, better health, lower jobless rates, and lower poverty rates compared with non-degree holders.³³⁰ While it may once have been regarded as a "luxury good" accessible to a minority of the population, a college education is becoming the default rite of passage into the adult working world. In 1960, 45.1% of all high school graduates went on to college; by 2019, the figure was 66.2%.³³¹ Being denied acceptance to college, then, is a life-altering event.

326. See James Kleimann, *College Admits It 'May' Have Violated Art Professor's Civil Rights over Game of Thrones T-shirt*, NJ.COM (Oct. 30, 2014), https://www.nj.com/bergen/2014/10/college_admits_it_may_have_violated_art_professors_civil_rights_over_game_of_thrones_t-shirt.html.

327. See *id.*

328. See *id.*

329. *Chapter 5: The Monetary Value of a College Education*, PEW RSCH. CTR. (May 15, 2011), <https://www.pewsocialtrends.org/2011/05/15/chapter-5-the-monetary-value-of-a-college-education>.

330. See *How Does a College Degree Improve Graduates' Employment and Earnings Potential?*, ASS'N PUB. & LAND-GRANT UNIVS., <https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicvalues/employment-earnings.html> (last visited Apr. 1, 2021).

331. *College Enrollment Rates of High School Graduates, by Sex: 1960 to 1998*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/programs/digest/d99/d99t187.asp> (last visited Apr. 1, 2021); *College Enrollment and Work Activity of Recent High School and College Graduates Summary*,

While the loss of admission to any one college may seem like a minimal injury to someone with a dozen different choices, not everyone is fortunate enough to have a range of options. Federal financial aid data suggests that as many as sixty-eight percent of candidates apply to just one college,³³² and an array of personal and family considerations may limit students' mobility. A student may, for instance, be limited to the hometown college because of inability to pay rent or because of family caregiving responsibilities.³³³ For such students, rejection by "only" one college potentially sets them up for a lifetime of limited professional and financial opportunities. It would be tragic for such a decision to turn on a misreading of a benign casual statement, negating a student's twelve years of educational preparation.

Notably, the debate about social media speech as a potentially disqualifying factor in college admissions is taking place against the backdrop of a nationwide movement—known as "Ban the Box"—to give people with criminal records an opportunity to attend college.³³⁴ The movement originated in the context of employment screening, and thirty-five states now have statutes limiting employers' ability to ask about criminal history as part of the selection process.³³⁵ Louisiana became the first state to protect state college applicants against being asked about their criminal backgrounds in 2017, and universities in California and New York have voluntarily agreed to refrain from asking for criminal history information.³³⁶ Social justice organizations have called on other states to follow suit. In a 2010 report, the Center for Community Alternatives, a nonprofit organization, concluded that: "Because broad access to higher education is good for public safety and the economic growth and well-being of the country as a whole, colleges

U.S. BUREAU LAB. STATS. (Apr. 28, 2020, 10:00 AM), <https://www.bls.gov/news.release/hsgc.nr0.htm#:~:text=Following%20are%20some%20highlights%20from,percent%20and%2069.8%20percent%2C%20respectively>.

332. Lauren Camera, *A Whole Lot of Students Don't Have a Safety School*, U.S. NEWS & WORLD REP. (Nov. 20, 2015, 1:53 PM), <https://www.usnews.com/news/articles/2015/11/20/majority-of-students-apply-to-only-one-college>.

333. See Abigail Wozniak, *Going Away to College? School Distance as a Barrier to Higher Education*, ECONOFACT, <http://econofact.org/going-away-to-college-school-distance-as-a-barrier-to-higher-education> (last visited Apr. 1, 2021).

334. See Josh Moody, *Ban the Box: Opening the Door to College for Felons*, U.S. NEWS & WORLD REP. (Jan. 17, 2020, 1:42 PM), <https://www.usnews.com/education/best-colleges/articles/ban-the-box-opening-the-door-to-college-for-felons>.

335. See Casey Leins, *More Data Needed to Determine Whether 'Ban the Box' Laws Work*, U.S. NEWS & WORLD REP. (Sept. 10, 2019, 12:20 AM), <https://www.usnews.com/news/best-states/articles/2019-09-10/ban-the-box-laws-could-negatively-impact-minorities>.

336. Anya Kamenetz, *Louisiana Is First State to Ban Public Colleges from Asking About Criminal History*, NPR (June 22, 2017, 8:39 AM), <https://www.npr.org/sections/ed/2017/06/22/533833428/louisiana-is-first-state-to-ban-public-colleges-from-asking-about-criminal-histo>.

and universities should refrain from engaging in [criminal background] screening.”³³⁷

Given the growing consensus that people should be able to take advantage of higher education for self-improvement despite past transgressions, it is counterintuitive for admission policies to move in the direction of *less* forgiveness when the transgression is not a bank robbery, but a tweet. If we believe that state higher education institutions should offer people “second chances” to better their lives—even if some others on campus might feel initial discomfort studying alongside them³³⁸—then a “one bad teenage tweet and you’re out” policy is difficult to reconcile.

C. *A Better Idea: Teaching, and Practicing, Fair Play*

We are living in a period of extraordinary political polarization.³³⁹ Many people have come to believe that those holding opposing political views are not just wrong, but are dangerous, evil, and un-American.³⁴⁰ In this climate, it is foreseeable that admissions employees who detect that an applicant is a fan of a polarizing politician may extrapolate that fandom into concluding that the applicant is of bad character and undeserving of admission. Social media pages are so replete with information that cannot legitimately be considered in the admissions decision that, if colleges insist on viewing the pages at all, there must be objective and visible guardrails to prevent personal biases from tainting the process.

Congress has already enacted a variation of the “notice and opportunity to correct” model as part of the 1974 Family Educational Rights and Privacy Act (“FERPA”).³⁴¹ FERPA provides, in part, that a parent (or, at the college level, a student) has the right to inspect “education records” maintained by a school or college, to insert corrective information if the records are incomplete or misleading, and

337. CTR. FOR CMTY. ALTS., THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED 32 (2010), <http://www.communityalternatives.org/wp-content/uploads/2020/02/use-of-criminal-history-records-reconsidered.pdf>.

338. See Lauren Camera, *When #MeToo and ‘Ban the Box’ Collide*, U.S. NEWS & WORLD REP. (Jan. 16, 2019), <https://www.usnews.com/news/education-news/articles/2019-01-16/when-metoo-and-ban-the-box-collide> (discussing the tension between the renewed concern for protecting women against sexual assault on campus versus admitting people for rehabilitative purposes regardless of their criminal histories).

339. See Christie Aschwanden, *Why Hatred and ‘Othering’ of Political Foes Has Spiked to Extreme Levels*, SCI. AM. (Oct. 29, 2020), <https://www.scientificamerican.com/article/why-hatred-and-othering-of-political-foes-has-spiked-to-extreme-levels>.

340. See *id.*

341. See 20 U.S.C. § 1232g(a)(2).

to have a hearing if the corrective measures are denied.³⁴² Exercising these FERPA access rights, scores of students have reviewed their own college admission files to see what recommenders and reviewers said about them.³⁴³ Congress, then, has already recognized that students and parents have a legitimate interest in making sure that critical educational decisions are not made on the basis of inaccurate information, even if colleges would prefer not to have their decisions scrutinized.³⁴⁴ It would not represent a drastic departure for Congress to synthesize two existing bodies of law—FERPA, and the increasingly recognized state statutory right of “social media privacy”³⁴⁵—to require that colleges disclose their reliance on social media posts and make any outcome-determinative posts available for inspection and correction. If colleges find it too burdensome to notify applicants when their online speech has been a decisive consideration in a rejection, they can simply do what the majority of colleges say they already do: refrain from looking at social media at all.

Congress has a readily adaptable framework in the form of the Fair Credit Reporting Act (“FCRA”), and its companion, the Equal Credit Opportunity Act (“ECOA”), and their implementing regulations.³⁴⁶ The FCRA allows a person who has had a derogatory credit report that provokes an adverse credit decision to know what was reported in the file and to dispute incomplete and inaccurate information.³⁴⁷ The ECOA provides that, when an application for credit is rejected, the lender must furnish a legitimate, non-discriminatory explanation with reasonable specificity, such as low income.³⁴⁸ Most analogously to the college admissions setting, the FCRA requires employers to obtain the consent of an applicant before performing a pre-employment credit check for screening purposes, and requires giving applicants notice and a

342. *Id.*

343. Molly Hensley-Clancy, *Here's How to See What College Admissions Officers Wrote About You*, BUZZFEED NEWS (Jan. 16, 2015, 4:56 PM), <https://www.buzzfeednews.com/article/mollyhensleyclancy/heres-how-to-see-what-college-admissions-officers-wrote-abou>.

344. See Aleksandra Lifshits, *FERPA Requests Yield Limited Access to Files*, BROWN DAILY HERALD (Apr. 22, 2015), <https://www.browndailyherald.com/2015/04/22/ferpa-requests-yield-limited-access-files> (reporting that, after publicity surrounding Ivy League students invoking the Family Educational Rights and Privacy Act to view their own files arose, the University of Pennsylvania removed reviewer comments from student files while Yale University began systematically destroying the files).

345. See *supra* Part III.B.

346. 15 U.S.C. § 1681; *Id.* § 1691; see also FED. TRADE COMM’N, A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT 1-2, <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>.

347. FED. TRADE COMM’N, *supra* note 346, at 1-2.

348. § 1691.

reasonable opportunity to contest the accuracy of the information if the credit report is used in making an adverse hiring decision.³⁴⁹ Several commentators have already advocated extending FCRA/ECOA rights to the analogous context of pre-employment social media screening, or enacting comparable protections inspired by the credit reporting framework.³⁵⁰ One veteran law school dean has recommended that colleges adopt the FCRA model of providing notification and an opportunity for correction if they make adverse decisions about students based on criminal background checks.³⁵¹

With the FCRA and the ECOA, Congress has already recognized the need for disclosure and an opportunity for correction to equalize a power imbalance in contractual transactions where one side holds all of the information and can use that information to the detriment of the less-powerful party.³⁵² As with the relationship between a borrower and a lender, the relationship between a student and a higher educational institution is understood to be contractual in nature.³⁵³ The opportunity to correct misunderstandings in college admissions becomes even more essential as highly competitive institutions are inundated with applications, spending—by one estimate—an average of just eight minutes reviewing each one.³⁵⁴ If the decision to deny someone a credit card is important enough for Congress to legislate transparency, it is no stretch to apply the same rationale to the decision to deny college admission.

Young people want and deserve to be heard on the pressing social and political issues of the day, and much contemporary political discourse is heated and caustic—including, at times, discourse from the

349. § 1681b(b)(2).

350. See Cara R. Sronce, Comment, *The References of the Twenty-First Century: Regulating Employers' Use of Social Networking Sites as an Applicant Screening Tool*, 35 S. ILL. U. L.J. 499, 505-06, 514 (2011). As Sronce stated: "With the benefits of employers' ability to verify that the way applicants present themselves to their own networks matches up with the way they presented themselves in an interview or on paper, comes the danger of using that ability for illegal or improper hiring purposes." *Id.* at 515-16; see also Davis, *supra* note 259, at 255 ("Because searches of online social networking services only stand to become more prevalent and popular among employers, Congress should expand the Fair Credit Reporting Act to ensure employees that use these websites adequate protection from unfair, illegal or arbitrary employment decisions.").

351. Dickerson, *supra* note 295, at 461.

352. See § 1681b(b)(2); § 1691.

353. See *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) ("It is held generally in the United States that the basic legal relation between a student and a private university or college is contractual in nature." (internal quotation marks omitted)); *Gagne v. Trs. of Ind. Univ.*, 692 N.E.2d 489, 495 (Ind. Ct. App. 1998) ("The relationship between a university and its students is considered contractual in nature.").

354. See SELINGO, *supra* note 285, at 95.

highest seats of power.³⁵⁵ Teenagers are at the forefront of movements to force U.S. policymakers to address climate change, gun violence, and police brutality, often harnessing the power of social media for organizing and awareness-building.³⁵⁶ But at the same time, fear of the admissions process is causing young people to delete their social media accounts, hide them from public view, maintain them under assumed names, or purge anything sharply worded or controversial—all of which mutes their voices and diminishes their effectiveness as advocates.³⁵⁷ Colleges say that they value outspoken citizenship, but—without clear assurances that online political speech will carry no negative weight in the admissions office—their practices are working against that objective.³⁵⁸

Ultimately, the use of social media as a screening tool poses philosophical and pedagogical, as well as legal, considerations. The mentality that social media profiles are “fair game” for consideration in admissions is rooted, to some degree, in a view of higher education as preparation for the vagaries of the workforce, where supervisors may make snap decisions based on a single ill-considered (or misunderstood) post. But colleges are not just preparing future *employees*; they are preparing future *employers*. Regardless of whether it is constitutional, making decisive, career-altering decisions on the basis of social media speech without giving the speaker an opportunity to explain would be a shortsighted management practice for an employer. By acculturating

355. See Peter Baker, *The Profanity President: Trump's Four-Letter Vocabulary*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/us/politics/trump-language.html> (observing that, as President, Donald Trump trafficked in “four-letter denunciations of his enemies,” causing mainstream news organizations to begin publishing verbatim profanities as part of their political coverage).

356. See Erin Richards, *These Activists Are Too Young to Vote in 2020 Election, but Climate Change Has Them Fed Up*, USA TODAY (Feb. 7, 2020, 5:00 AM), <https://www.usatoday.com/story/news/education/2020/02/07/black-history-month-climate-change-nyc-doe-gun-control-segregation/4648485002> (“Fed-up youth are agitating for movement on a variety of causes, from a cleaner environment and stricter gun control to more social and educational equality.”); Nicole Javorsky, *The Year of the Affected Generation*, BLOOMBERG CITYLAB (Dec. 31, 2018, 10:13 AM), <https://www.bloomberg.com/news/articles/2018-12-31/on-climate-change-and-gun-violence-the-young-speak-up> (reporting on “growing political might” of young voters motivated by concern over inaction on gun violence and climate change, and adding that “[i]ncreasingly, lawmakers ignore the voices of the young at their own peril”).

357. See Taylor Lorenz, *From Finstas to 'Ghost Posts': Teens Clean Up Their Online Footprints for College Admissions*, MASHABLE (June 13, 2017), <https://mashable.com/2017/06/13/high-school-college-students-online-profiles-clean-up> (“Scrubbing social media accounts—or preemptively making sure their online presences can’t be tracked—has become a common move for students entering their senior year of high school.”).

358. See Scott Jaschik, *Activist Generation Searches for Colleges*, INSIDE HIGHER ED (Nov. 5, 2018), <https://www.insidehighered.com/admissions/article/2018/11/05/survey-shows-role-activism-and-politics-college-decision-process>.

employers-in-training that it is standard operating procedure to make decisions on people's character because of the pictures they share on social networking pages, our educational institutions normalize this shortsightedness. It is not "educational" to be denied admission to college for unexplained reasons.³⁵⁹ To stay true to their core mission, higher educational institutions should, first, engage in the same critical inquiry that they expect of their students without leaping to conclusions based on superficial impressions, and, second, provide the opportunity for explanation and context that should be afforded in a well-managed workplace run by the sensible employers that a university education should aspire to produce.

359. The Alaska Supreme Court made this observation in the context of a dispute over whether a graduate student's removal qualified as an academic decision or a disciplinary one, holding: "If the University's interests are truly academic rather than disciplinary in nature, its emphasis should be on correcting behavior through faculty suggestion, coercion, and forewarning rather than punishing behavior after the fact." *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 53 (Alaska 1999).