# Constructing Students' Speech Rights, from College Admissions to Professional Schools

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ABSTRACT

*In a closely watched 2021 ruling concerning a high school student's profane post on Snapchat, the Supreme Court declined to shed significant light on the murky First Amendment status of speech that K-12 students produce off campus, whether on social media or elsewhere. Legal uncertainties concerning such speech afflict higher education, as well. I focus on two dimensions of that uncertainty here. First, many admissions officers say they look at college and university applicants' social-media posts when making their admissions decisions. Yet only one federal appellate court has said anything at all about whether the First Amendment restricts public postsecondary institutions' ability to reject applicants because of their speech, and the court in that case only addressed speech that applicants produce as part of the admissions process. Second, there recently has been a spate of efforts by professional schools (in pharmacy, medicine, dentistry, and the like) to discipline students for speech that school officials believe violates professional standards. Yet only a few federal courts have grappled with the thorny First Amendment issues that such cases raise, and those courts have not always agreed on how the constitutional analysis should proceed.*

*In this Article, I tackle those and related matters by drawing lessons from the comparatively well-developed First Amendment law of public employment. Public employment and postsecondary education are importantly different in some ways but usefully similar in others. Building on the similarities, I provide analytic frameworks for determining when the First Amendment bars admissions officers from rejecting applicants because of their speech and when it bars professional schools from disciplining students for speech that falls short of professional standards. I also provide a lens for more deeply understanding the speech rights of postsecondary students in curricular settings of all kinds.*

## I. INTRODUCTION

In June 2021's *Mahanoy Area School District v. B.L.*,[1] the United States Supreme Court considered whether a Pennsylvania high school violated the First Amendment rights of one of its students—B.L.—when it punished her for a weekend Snapchat post in which she profanely criticized the

1. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

school's cheerleading program.[2] The Third Circuit had held in B.L.'s favor, reasoning that the rule famously announced in *Tinker v. Des Moines Independent Community School District*[3]—allowing schools to restrict student expression that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"[4]—does not apply to speech uttered off school property.[5]

2. The student was Brandi Levy. Adam Liptak, *Supreme Court Rules for Cheerleader Punished for Vulgar Snapchat Message*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/supreme-court-free-speech-cheerleader.html [https://perma.cc/W926-4NYY]. Shortly after being denied a position on her school's varsity cheerleading squad (as well as her preferred position on a private softball team), Levy took to Snapchat to vent her frustration. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2043. From a local convenience store, she posted a photo of herself and a friend raising their middle fingers, with the caption "Fuck school fuck softball fuck cheer fuck everything." *Id.* School officials responded by suspending Levy from the junior-varsity cheerleading squad for the coming year. *Id.*

3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

4. *Id.* at 513.

5. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020) ("We hold today that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."), *aff'd*, 141 S. Ct. 2038 (2021). School officials had "argu[ed] that B.L.'s [social-media post] was likely to substantially disrupt the cheerleading program." *Id.* at 183. Because *Tinker* does not relate directly to the admissions- and professionalism-related controversies that provoked this Article, I do not focus on it here. Readers should be advised, however, that there is a continuing debate about whether *Tinker*'s substantial-disruption standard applies in college and university settings. Some courts have found that *Tinker*'s standard does apply, such that postsecondary schools may discipline students for speech that violates it. *See, e.g.*, Radwan v. Univ. of Conn. Bd. of Trs., 465 F. Supp. 3d 75, 110 (D. Conn. 2020) (stating that "the principles of *Tinker* [apply] to the college and university setting"). Other courts have been more skeptical. *See, e.g.*, Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 626 n.26 (E.D. Va. 2016) (stating that "the Supreme Court's post-*Tinker* jurisprudence casts some doubt on whether *Tinker* and its progeny apply to post-secondary schools"). *See generally* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 44–49 (2008) (describing courts' disagreement about such matters). My own view is that the Third Circuit probably hit close to the mark when it said that "the teachings of *Tinker* . . . cannot be taken as gospel in cases involving public universities" and that "[a]ny application of free speech doctrine derived from [*Tinker*] to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied." McCauley v. Univ. of the V.I., 618 F.3d 232, 247 (3d Cir. 2010).

The Court affirmed B.L.'s victory,[6] but on less categorical grounds. Led by Justice Breyer, the Court found that schools do have reduced latitude under *Tinker* to regulate speech that students produce away from school premises,[7] but it rejected the notion that "the special characteristics that give schools additional license to regulate student speech *always* disappear when a school regulates speech that takes place off campus."[8] To the consternation of anyone who had hoped for significantly more guidance than that,[9] Justice Breyer "le[ft] for future cases to decide where, when, and how . . . the speaker's off-campus location will make the critical difference."[10] The Court simply found that, taken together, the particulars of B.L.'s case revealed a First Amendment violation.[11]

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6. Justice Thomas was the lone dissenter. He argued that, under the law in place at the time of the Fourteenth Amendment's ratification, "[a] school can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2061 (Thomas, J., dissenting) (citing Lander v. Seaver, 32 Vt. 114 (1859)).

7. Justice Breyer identified three reasons why this is so: (1) "a school, in relation to off-campus speech, will rarely stand *in loco parentis*"; (2) students would lose significant speech freedom if they were under schools' discipline-backed supervision twenty-four hours per day; and (3) schools should be teaching students that our constitutional system ordinarily protects the expression of "unpopular ideas." *Id.* at 2046 (majority opinion).

8. *Id.* at 2045 (emphasis added).

9. *Cf. id.* at 2059 (Thomas, J., dissenting) ("[T]he majority omits important detail. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?"); *id.* at 2063 ("[C]ourts (and schools) will almost certainly be at a loss as to what exactly the Court's opinion today means."); *id.* at 2059 (Alito, J., concurring) ("If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.").

10. *Id.* at 2046 (majority opinion). In a concurrence joined by Justice Gorsuch, Justice Alito endeavored to begin filling this jurisprudential gap. *See id.* at 2048–59 (Alito, J., concurring). For a discussion and application of Justice Alito's useful concurrence, see *infra* notes 262–68 and accompanying text.

11. The Court cited numerous reasons for ruling in B.L.'s favor: her speech would be protected if uttered by an adult; she spoke "outside of school hours from a location outside the school"; she did not identify the school in her speech; she did not direct her speech to school officials or any other particular members of the school community; she spoke "through a personal cellphone, to an audience consisting of her private circle of Snapchat friends"; she "spoke under circumstances where the school did not stand *in loco parentis*"; the discipline imposed on B.L. was not part of "any general effort to prevent students from using vulgarity outside the classroom"; and there was no evidence that the speech substantially interfered with the cheerleading program or any other school activity. *Id.* at 2047–48.

The constitutional landscape concerning students' off-campus speech —and even some varieties of on-campus speech—is no less hazy when one shifts from K-12 settings to public higher education.[12] Suppose B.L. applies to a public college or university, for example, hoping to begin her undergraduate studies there. And suppose admissions officers deny her application because they learn about her profane Snapchat post and conclude that she probably does not have the temperament of those they hope to enroll. If B.L. discovered the reason for the officers' decision, would she have a viable First Amendment claim? In a 2017 ruling, the Fourth Circuit held that the First Amendment gives applicants to public colleges and universities no protection for statements they make in their admissions interviews.[13] But the court did not say whether the same rule would apply for statements that applicants make outside the admissions process. In any event, this remains the only federal appellate ruling on a question close to the one raised by B.L.'s hypothetical application.

The First Amendment uncertainties are almost as stark when it comes to postsecondary programs that train students for professions whose practitioners are expected to adhere to specified ethical standards. Suppose, for example, that B.L. had been a student in a program such as law, medicine, or dentistry and that she publicly conveyed a comparably intemperate message about that program or some other aspect of her life. And suppose school officials disciplined B.L. because, in their judgment, her speech violated the professionalism standards that govern those in the field for which B.L. was training. How should the First Amendment analysis proceed? The question is far from fanciful. In 2019 and 2020, for example, Kimberly Diei ran into trouble with a disciplinary committee at the University of Tennessee's College of Pharmacy for her sexually provocative posts on

12. The *Mahanoy* Court said nothing about the free-speech rights of college and university students. *Cf. id.* at 2049 n.2 (Alito, J., concurring) ("This case does not involve speech by a student at a public college or university. For several reasons, including the age, independence, and living arrangements of such students, regulation of their speech may raise very different questions from those presented here. I do not understand the decision in this case to apply to such students.").

13. *See* Buxton v. Kurtinitis, 862 F.3d 423, 430 (4th Cir. 2017); *see also infra* notes 40–56 and accompanying text (discussing *Buxton*).

Instagram and Twitter.[14] In 2020, Michael Brase—a student at the University of Iowa's College of Dentistry—was briefly slated for an appearance before a disciplinary committee after he sent college-wide emails challenging his dean's condemnation of President Donald Trump's ban on certain forms of diversity training.[15] In 2018, a disciplinary committee at the University of Virginia's School of Medicine voted to suspend a student based in large

14. *See* Matt Bruce, *'Why Is the Attack on Me?' Anonymous Complaints Lead to University of Tennessee Grad Student Being Temporarily Expelled for Posting Rap Lyrics, Lawsuit Ensues*, ATLANTA BLACK STAR (Feb. 15, 2021), https://atlantablackstar.com/2021/02/15/why-is-the-attack-on-me-anonymous-complaints-lead-to-university-of-tennessee-grad-student-being-temporarily-expelled-for-posting-rap-lyrics-lawsuit-ensues/ [https://perma.cc/Y23W-643J] (describing Diei's allegations and explaining that two of the posts that got her into trouble concerned the sexually explicit song "WAP," by Cardi B featuring Megan Thee Stallion); Found. for Individual Rts. in Educ., *Student to University of Tennessee: 'Leave Me Alone,'* YOUTUBE (Feb. 5, 2021), https://www.youtube.com/watch?v=AexHQ15qi9w [https://perma.cc/E2JQ-MDNT] (interviewing Diei about why she filed a lawsuit against her institution); Anemona Hartocollis, *Students Punished for 'Vulgar' Social Media Posts Are Fighting Back*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html [https://perma.cc/AH5C-VTFY] (reporting on Diei's lawsuit).

15. *See* Chris Quintana, *Trump's Controversial Diversity Training Order Is Dead - or Is It? Colleges Are Still Feeling Its Effects*, USA TODAY (Feb. 6, 2021, 1:15 PM), https://www.usatoday.com/story/news/education/2021/02/06/biden-undid-trumps-diversity-training-ban-but-its-alive-colleges/4380342001/ [https://perma.cc/7QAT-92BE] (recounting the incident); Alexandra Skores, *Email Thread Within the College of Dentistry Community Sparks Debate*, DAILY IOWAN (Oct. 26, 2020), https://dailyiowan.com/2020/10/27/email-thread-within-the-college-of-dentistry-community-sparks-debate/ [https://perma.cc/5FDH-KL4P] (recounting the same); *see also* Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020) (banning certain forms of diversity training by federal contractors and other specified entities). The incident proved to be consequential. The state legislature held hearings and ultimately produced legislation partly inspired by Brase's experience. *See* Cleo Krejci, *'Unsafe Just Because They Disagree': University of Iowa Dean Apologizes for Infringing on Rights of Conservatives on Campus*, DES MOINES REG. (Feb. 4, 2021, 10:58 AM), https://www.desmoinesregister.com/story/news/education/2021/02/03/university-iowa-dentistry-dean-testifies-government-oversight-committee-apologizes-conservatives/4353532001 [https://perma.cc/BRM2-7XK4] (reporting on the hearings); Vanessa Miller, *Iowa Universities Apologize for 'Egregious' Free Speech Errors*, GAZETTE (Feb. 2, 2021, 6:26 PM), https://www.thegazette.com/education/iowa-universities-apologize-for-egregious-free-speech-errors [https://perma.cc/6YY7-ZPXD] (reporting the same). The college's dean opted to retire one year earlier than he had planned. *See* Vanessa Miller, *After Uproar, University of Iowa Dentistry Dean Stepping Down Early*, GAZETTE (Feb. 25, 2021, 8:47 PM), https://www.thegazette.com/education/after-uproar-university-of-iowa-dentistry-dean-stepping-down-early/ [https://perma.cc/BWU9-T79E].

part on the fact that he persisted with pointed questions during a schoolwide faculty presentation about microaggressions.[16]

The nation's courts have not yet coalesced around a roadmap for navigating such terrain.[17] The Tenth Circuit made precisely that point in its 2019 disposition of a claim brought by a student at the University of New Mexico's School of Medicine.[18] Paul Hunt had gotten into trouble with his school's professionalism committee for declaring on Facebook that Democrats are "sick, disgusting people" and "Moloch worshipping assholes," "WORSE than the Germans during WW2," because they "support[] the genocide against the unborn."[19] When Hunt filed suit alleging a violation of his First Amendment rights, the defendants claimed qualified immunity.[20] A qualified-immunity defense succeeds if either of two things is true: the plaintiff's factual allegations do not describe a violation of the plaintiff's rights or the rights claimed by the plaintiff were not "clearly established . . . rights of which a reasonable person would have known."[21] Courts can take those two questions up in whichever order they think appropriate, and they need not address the question they slot second if the defense succeeds on the question they slot first.[22] The Tenth Circuit

16. Bhattacharya v. Murray, 515 F. Supp. 3d 436, 444–50 (W.D. Va. 2021). The district court concluded that further development of the record was needed to determine whether university officials truly had professionalism concerns chiefly in mind when they expelled a medical student because he had verbally sparred with professors at a faculty panel discussion and elsewhere. *Id.* at 458–59.

17. *See* Mark P. Strasser, *Student Dismissals from Professional Programs and the Constitution*, 68 CASE W. RSRV. L. REV. 97, 157 (2017) ("Courts simply do not know what standard to use when judging whether dismissals of university students from professional programs pass muster, which means that relevantly similar cases will be decided in light of different First Amendment tests depending upon the circuit.").

18. Hunt v. Bd. of Regents, 792 F. App'x 595 (10th Cir. 2019).

19. *Id.* at 598.

20. *See id.* at 599–600.

21. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (explaining the two-step process of "resolving government officials' qualified immunity claims").

22. *See Pearson*, 555 U.S. at 236–42 (finding that the sequence of the two-step process "should no longer be regarded as mandatory" and that judges should have "discretion in deciding which of the two prongs . . . should be addressed first"); *id.* at 237 ("There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right."); *see also* Camreta v. Greene, 563 U.S. 692, 705 (2011) ("[A] court can often avoid ruling on the plaintiff's claim that a particular right

chose to steer clear of trying to determine whether Hunt's allegations described a First Amendment violation. "Off-campus, online speech by university students, particularly those in professional schools, involves an emerging area of constitutional law," the court wrote.[23] Rather than venture into that uncertain territory, the court ruled for the defendants on the grounds that existing case law had not "sent sufficiently clear signals to reasonable medical school administrators that sanctioning a student's off-campus, online speech for the purpose of instilling professional norms is unconstitutional."[24]

In this Article, I aim to bring greater clarity to the First Amendment's requirements in these higher-education settings. For guidance, I turn to well-established First Amendment principles that govern the realm of public employment. Let me emphasize at the outset that there are important differences between ordinary governmental employers and public institutions of higher education, on the one hand, and between public employees and postsecondary students, on the other. Most significantly, broad freedom of expression is plainly central to the missions of colleges and universities in ways that it is not in ordinary governmental offices.[25] I do not argue that the First Amendment gives public employees and postsecondary students equal measures of free-speech protection. But I do contend that thinking about how courts have resolved free-speech controversies in public-employment settings can help us think more clearly about how to define the First Amendment speech rights of aspiring and enrolled postsecondary students at important steps in their educational careers.

I proceed as follows: In Part II, I first discuss what courts have said about whether the First Amendment constrains the ability of public undergraduate, graduate, and professional programs to deny applications for admission because of the applicants' speech. I then examine what courts have said about two doctrinally interrelated matters: the circumstances in which the Speech Clause permits public postsecondary schools to regulate student speech in curricular settings of any kind and the degree to which it allows public professional schools to regulate student speech that school leaders deem unprofessional. In Part III, drawing insights from courts' construction of the First Amendment doctrines that define public employees' speech rights, I propose ways courts should build out the First Amendment principles that apply in several postsecondary domains. Those domains are each

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exists. If prior case law has not clearly settled the right, . . . [t]he court need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit.").

23. *Hunt*, 792 F. App'x at 601.

24. *Id.* at 605.

25. *See infra* notes 199–204 and accompanying text.

unique in some ways but, when we view them through the public-employment lens that I deploy here, we find analytic threads that usefully join them. Part IV briefly wraps up the discussion by enumerating the Article's chief conclusions.

## II. THE CURRENT LAY OF THE LAND

In 1957, Justice Frankfurter wrote that there are "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."[26] Justice Powell repeated that formulation in his influential opinion in *Regents of the University of California v. Bakke*[27]—adding that these four freedoms are "a special concern of the First Amendment"[28]—and he invoked it again when writing for the Court in *Widmar v. Vincent*.[29] When it comes to resolving First Amendment disputes between public institutions of higher education and their students, however, these four freedoms certainly do not tell the whole story. Students, after all, are "a special concern of the First Amendment" too.[30] The trick is to determine how to reconcile one set of interests with the other.

Here in Part II, I describe the current state of the law regarding three different occasions when the interests of public postsecondary schools collide with the interests of those schools' prospective or current students: when a college or university denies admission to an applicant because of

26. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (quoting CONF. OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (1957)).

27. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., announcing the judgment of the Court); *see also* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("[W]e endorse Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

28. *Bakke*, 438 U.S. at 312 (Powell, J., announcing the judgment of the Court).

29. Widmar v. Vincent, 454 U.S. 263, 276 (1981) (quoting *Sweezy*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)). *Widmar* held that a public university violated the Speech Clause when it barred a religious student group from conducting meetings in university facilities. *See id.* at 276–77.

30. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

his or her speech; when a college or university responds adversely to student speech in a curricular setting; and when a student in a professional-degree program is disciplined for speech—even if not uttered in a conventional curricular setting—because program leaders deem the speech unprofessional. The second of those three is important in its own right, of course, but I cover it here because of the foundation it lays for thinking about the speech-regulating powers of professional schools.

### *A. Responding Adversely to Applicants' Speech*

Imagine two individuals, *X* and *Y*, who apply for admission to a public university. In her application materials, *X* makes statements that university officials find socially objectionable, so they reject her application. *Y* applies to the same school and submits materials that officials find satisfactory. But then those officials look at *Y*'s Facebook page, where *Y* has posted statements that the officials find socially objectionable, so they deny his bid for admission as well. Do *X* and *Y* have viable Speech Clause claims?

The Supreme Court's closest brush with such questions came in 2004's *Locke v. Davey*.[31] Joshua Davey's primary claim was that the State of Washington violated his rights under the First Amendment's Free Exercise Clause when it declared him ineligible for a state scholarship program because he was majoring in pastoral ministries.[32] Although that is the claim for which the case is best known, it was not Davey's sole constitutional contention. Relying on *Rosenberger v. Rectors & Visitors of the University of Virginia*,[33] he also argued that the state's refusal to help pay for his ministerial studies amounted to unconstitutional viewpoint discrimination.[34] *Rosenberger* held that the University of Virginia (UVA) created a limited public forum when it established a fund to help pay costs incurred by student organizations, and that school officials violated the Speech Clause when they refused to use money from that fund to help pay the costs of printing a Christian student group's publication.[35] Speech restrictions in limited public forums are permissible only if they are reasonable and

31. Locke v. Davey, 540 U.S. 712 (2004).

32. *Id.* at 717–18. The Court rejected Davey's claim and reasoned that "[the Court] . . . cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725.

33. Rosenberger v. Rectors of Univ. of Va., 515 U.S. 819 (1995).

34. *Davey*, 540 U.S. at 720 n.3. He also advanced an equal-protection argument, which the Court rejected. *Id.*

35. *See Rosenberger*, 515 U.S. at 828–37.

viewpoint neutral,[36] and UVA officials had discriminated against the Christian group precisely because of the religious viewpoint it wished to express.[37]

Davey believed his case presented the same First Amendment problem, but the Court swiftly rejected that argument. Government property—whether tangible like a conference room or intangible like a scholarship fund—becomes a limited public forum for free expression only if that is what the government intends to create.[38] Therein lay the defect in Davey's Speech Clause claim:

> [Washington's] Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to "encourage a diversity of views from private speakers." Our cases dealing with speech forums are simply inapplicable.[39]

If a student's free-speech complaint today is that a public institution regards certain kinds of expressive activities or viewpoints as ineligible for financial aid, *Locke* thus leaves the student with little ground to stand on, absent evidence that the government created the given funding source for the purpose of facilitating student expression. But what if Washington officials had rejected Davey's request for scholarship assistance because he made statements—either in his scholarship application or out in the larger world—that state officials found objectionable? Or suppose Davey had applied for admission to the University of Washington but was rejected

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36. *See id.* at 829–30.

37. *See id.* at 831.

38. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) ("We have held that a government entity may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is *intentionally* opened up for that purpose." (emphasis added)); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998) ("[W]ith the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers."); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 803 (1985) ("Not every instrumentality used for communication . . . is a traditional public forum or a public forum by designation . . . . We will not find that a public forum has been created in the face of clear evidence of a contrary intent.") (citing United States Postal Serv. v. Council of Greenburgh Civil Ass'ns., 453 U.S. 114, 129, 130 n.6 (1981))).

39. *Davey*, 540 U.S. at 720 n.3 (quoting United States v. Am. Libr. Ass'n., 539 U.S. 194, 206 (2003) (plurality opinion)).

due to university officials' objection to his statements, whether made in his application materials (like our *X*) or elsewhere (like our *Y*). Would Davey have a plausible free-speech claim then?

The only federal appellate ruling that speaks squarely to a factual scenario of that sort is the Fourth Circuit's 2017 decision in *Buxton v. Kurtinitis*.[40] Dustin Buxton applied for admission to the radiation therapy program at the Community College of Baltimore County, and as part of the application process he was interviewed by school officials.[41] In his interview, Buxton reportedly expressed some of his religious beliefs about death, prompting at least one member of the interview committee to worry that Buxton would inappropriately speak about religion in clinical settings.[42] After the school denied Buxton's application, he filed a lawsuit alleging First Amendment retaliation.[43]

To prevail on a retaliation claim, Buxton was required to prove that "(1) [he] 'engaged in protected First Amendment activity,' (2) 'the defendants took some action that adversely affected [his] First Amendment rights,' and (3) 'there was a causal relationship between [his] protected activity and the defendants' conduct.'"[44] Could Buxton get past the first of those three elements by showing that the Speech Clause protected his statements in the interview? The Supreme Court's ruling in *Locke* foreclosed any finding that the interview was a limited public forum: the interview's purpose was to help college officials evaluate Buxton's fitness for the radiation therapy program, rather than to provide Buxton with a venue for free

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40. Buxton v. Kurtinitis, 862 F.3d 423 (4th Cir. 2017). The Southern District of New York embraced Buxton's reasoning in *Weiss v. City University of New York*, No. 17-CV-3557, 2019 WL 1244508 (S.D.N.Y. Mar. 18, 2019); *see infra* note 53. Remarkably, the same college and program whose officials were sued in Buxton had previously been sued by a different plaintiff on precisely the same grounds—namely, that officials denied the plaintiff's application for admission by unconstitutionally relying upon statements made by the plaintiff about religion in his admissions interview. *See* Jenkins v. Kurtinitis, No. ELH-14-01346, 2015 WL 1285355 (D. Md. Mar. 20, 2015). In *Jenkins*, the plaintiff told his interviewers that he was pursuing a career in radiation therapy because he believed that is what God wanted him to do. *Id.* at *3–4. The *Jenkins* court rejected the plaintiff's free-speech claim on grounds that closely resemble those later invoked by the Fourth Circuit in *Buxton*. *See id.* at *12–25.

41. *See Buxton*, 862 F.3d at 425.

42. *See id.* at 426.

43. *Id.*

44. *Id.* at 427 (quoting Constantine v. Rectors of George Mason Univ., 411 F.3d 474, 499 (4th Cir. 2005)).

expression.[45] Were there other reasons to conclude that Buxton enjoyed the Speech Clause's protection when he spoke to the interview committee?

The Fourth Circuit concluded that the best fit for answering that question was a line of Supreme Court cases involving "situations where the competitive nature of the process in question inherently requires the government to make speech-based distinctions."[46] In *National Endowment for the Arts v. Finley*, the Court determined that, when allocating scarce financial resources for artistic projects, the government must have wide latitude to make content-based judgments about grant applicants' artistic merits.[47] In *Arkansas Educational Television Commission v. Forbes*,[48] the Court observed that "[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."[49] And in *United States v. American Library Association*,[50] a plurality of the Court found

45. *See id.* at 428 (noting *Locke*'s irrelevance); *see also id.* (finding that forum analysis was inapt because "the public forum cases deal with the government restricting access to a forum—i.e., preventing the speech from happening altogether"); *supra* notes 31–39 and accompanying text (discussing *Locke*).

46. *Buxton*, 862 F.3d at 428. The Ninth Circuit relied on the same line of cases in *Association of Christian Schools International v. Stearns*, 362 F. App'x 640, 643 (9th Cir. 2010). The *Stearns* court rejected a Speech Clause claim brought by religious high schools who objected to California officials' refusal to treat certain religious courses as ones that prepared students for admission to a University of California institution. *See id.* ("The Supreme Court has rejected heightened scrutiny where, as here, the government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech."). The district court had relied upon that same rationale, concluding that there was no free-speech violation so long as California officials' course-screening policy was "rationally related to the goal of selecting the most qualified students for admission. . . ." Ass'n of Christian Schs. Int'l v. Stearns, 679 F. Supp. 2d 1083, 1098 (C.D. Cal. 2008), *aff'd*, 362 F. App'x 640 (9th Cir. 2010).

47. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585–86 (1998); *see also id.* at 585 ("The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and absolute neutrality is simply 'inconceivable.'" (quoting Advocates for the Arts v. Thomson, 532 F.2d 792, 796 (1st Cir. 1976))).

48. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

49. *Id.* at 673; *see also id.* ("As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination.").

50. United States v. Am. Libr. Ass'n., 539 U.S. 194 (2003).

that the First Amendment gives public libraries "broad discretion" to make content-based decisions about what to include in their collections.[51]

The Fourth Circuit found that the same discretion is essential when a public college or university uses competitive interviews to narrow the pool of applicants eligible for one of its academic programs.

> As is inherent in any competitive interview process, this narrowing requires distinctions to be made based on the speech—including the content and viewpoint—of the interviewee. Indeed, for 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.[52]

The court thus drew a bright-line conclusion: when it comes to statements made in competitive interviews for seats in postsecondary programs, the Speech Clause gives applicants no protection whatsoever.[53] The Constitution does not leave admissions officers free to invidiously discriminate against interviewees, the court said, but those constitutional constraints come from texts other than the Speech Clause.[54] So far as the Speech Clause and statements made by applicants as part of the admissions process are concerned, a public postsecondary institution's freedom "to determine for

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51. *Id.* at 205 (plurality opinion). The plurality thus found that Congress had not impermissibly induced public libraries to violate the First Amendment when it said that public libraries could receive federal funds to help pay the costs of providing internet services only if they installed software that blocked their internet terminals from giving patrons access to obscenity and child pornography. *See id.* at 214.

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

53. *Id.* Finding *Buxton* persuasive, the Southern District of New York reached the same conclusion in *Weiss v. City Univ. of N.Y.*, No. 17-CV-3557, 2019 WL 1244508, at *9 (S.D.N.Y. Mar. 18, 2019). After being denied admission to a program at Hunter College, Faigy Rachel Weiss alleged that admissions officials had impermissibly relied on statements she made during her admissions interview. *Id.* at *8. Relying squarely on *Buxton*, the district court held that "speech made in connection with a college admissions application is not protected under the First Amendment." *Id.* at *9. Although the Fourth Circuit and the Southern District of New York both categorically rejected the possibility of Speech Clause claims in this context, the District of Maryland in earlier litigation left open the possibility that the Speech Clause might provide at least some measure of protection for admissions-interview statements on matters of public concern. *See* Jenkins v. Kurtinitis, No. ELH-14-01346, 2015 WL 1285355, at *23–24 (D. Md. Mar. 20, 2015), *aff'd sub nom.* Buxton v. Kurtinitis, 862 F.3d 423 (4th Cir. 2017); *see also supra* note 40 (noting the *Jenkins* litigation).

54. *See Buxton*, 862 F.3d at 430–31 (citing the Equal Protection Clause as a source of constitutional protection against invidious discrimination).

itself . . . who may be admitted to study"[55] is absolute. Buxton's claim failed accordingly.[56]

For our *X*, therefore—the applicant who is denied admission because of something she said in her application materials—the Fourth Circuit's approach leaves her with no recourse under the Speech Clause. But what about *Y*? Does the clause constrain school officials' ability to make an adverse admissions decision based on statements *Y* made *outside* the application process, whether on Facebook, on Twitter, or elsewhere?

Courts have not yet spoken to that question—a fact that is not altogether surprising, since schools do not routinely tell unsuccessful applicants all the reasons for their rejections.[57] The inquiry, however, is not an idle one. Across the country, many admissions officers say they examine applicants' social media posts and sometimes reject applicants based on what they find there.[58] In those instances, the *Finley*-inspired rationale on which the

55. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (quoting CONF. OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (1957)); *see also supra* note 26 and accompanying text (discussing this influential passage from Justice Frankfurter's opinion in *Sweezy*).

56. *See Buxton*, 862 F.3d at 431.

57. One university president indicated that he believed rejecting an applicant on these grounds would violate the First Amendment. In curious tension with that conclusion, however, he also indicated that he would admit applicants who had produced troubling speech only if they agreed to obtain "additional education and special training to assist them in both understanding the impact of their actions and in developing cultural competence." *See* Clif Smart, *Balancing Rights and Responsibilities When Our Values Are Offended*, MO. STATE: PRESIDENTIAL UPDATES (June 2, 2020), https://blogs.missouristate.edu/president/2020/06/02/balancing-rights-and-responsibilities-when-our-values-are-offended/ [https://perma.cc/V84W-UWGK].

58. *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, 289–90 (2020) (citing Scott Jaschik, *Admissions Offers Revoked Over Racist Comments*, INSIDE HIGHER ED (June 22, 2020), https://www.insidehighered.com/admissions/article/2020/06/22/colleges-reverse-admissions-offers [https://perma.cc/PYP2-P3QT]) ("27 percent of admission directors at public universities surveyed agreed that it was appropriate to consider social media posts when making admissions decisions.")); Frank D. LoMonte & Courtney Shannon, *Admissions Against Pinterest: The First Amendment Implications of Reviewing College Applicants' Social Media Speech*, 49 HOFSTRA L. REV. 773, 796 (2021) (citing *Kaplan Test Prep Survey: Percentage of College Admissions Officers Who Check Out Applicants' Social Media Profiles Hits New High; Triggers Including Special Talents, Competitive Sabotage*,

*Buxton* court relied weakens greatly and might even vanish entirely. True, the government is still allocating a limited number of seats and must identify winners and losers in a competitive applicant pool. Reviewing applicants' social-media posts might even help school officials identify the qualities that applicants would bring to the campus community. But in circumstances like *Y*'s, applicants are not making their statements for the purpose of winning a seat in a school's program. And examining statements that prospective students make outside their application materials is not an inescapable part of the selection process: admissions staff could simply limit their review to the materials that applicants competitively submit for evaluation. Where courts will draw the First Amendment lines in circumstances like these remains an open question.

### *B. Regulating Students' Curricular Speech*

Unlike our *X* and *Y*, of course, many people successfully run the admissions gauntlet and enroll in public institutions' academic programs. Those students bring robust First Amendment protection with them to campus. As the Supreme Court explained half a century ago, its "precedents . . . leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[59] But no one's speech rights are absolute. Public postsecondary schools need not tolerate speech that amounts to incitement, threats, or other established species of unprotected expression, for example, any more than the government must tolerate those forms of speech beyond academia's walls.[60] The question, for our purposes, is

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BUSINESSWARE (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'-Social-Media-Profiles-Hits-New-High-Triggers-Include-Special-Talents-Competitive-Sabotage [https://perma.cc/RJ8J-TYKL]). LoMonte and Shannon stop short of taking a constitutional position on the practice, but they do argue "that it is a bad idea." *Id.* at 817.

59. Healy v. James, 408 U.S. 169, 180 (1972); *see also* Papish v. Univ. of Mo. Curators, 410 U.S. 667, 667–68, 671 (1973) (per curiam) (stating that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech" and overturning a state university's expulsion of a journalism student who distributed a newspaper containing the word "mother-fucker" and depicting police officers raping the Statue of Liberty and the Goddess of Justice); *infra* notes 199–204 and accompanying text (elaborating on the importance of free expression in college communities).

60. *See* Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1820–23 (2017) (discussing categories of unprotected expression).

how courts have defined the circumstances in which the government has broad latitude to regulate college and university students' curricular speech. That question is clearly significant in its own right, but my chief aim in covering it here is to set the stage for the ensuing discussion of the speech rights of students in professional schools.

Courts' prevailing answer to the curricular-speech question begins with *Hazelwood School District v. Kuhlmeier*,[61] a well-known K-12 ruling that has cast a long shadow in the postsecondary realm. In *Hazelwood*, the student authors of a high school newspaper alleged a violation of the First Amendment when their principal refused to let them publish stories profiling classmates who were pregnant or whose parents were divorced.[62] The Court rejected the students' claim.[63] Writing for the majority, Justice White explained that the First Amendment gives K-12 school officials exceptionally broad authority to regulate student speech in curricular contexts.[64] This includes not only speech "in a traditional classroom setting," but also speech in faculty-supervised "publications, theatrical productions, and other expressive activities" that are designed to teach knowledge or skills and that a person "might reasonably perceive to bear the imprimatur of the school."[65] The Court concluded that, to satisfy the First Amendment, schools' treatment of student speech in these curricular contexts need only be "reasonably related to legitimate pedagogical concerns."[66] That is, the First Amendment permits courts to intervene only

61. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

62. *Id.* at 262–63.

63. In the first part of its analysis, the Court found that the newspaper was not a public forum. *Id.* at 267–70. Lower courts have sometimes distinguished college newspapers and yearbooks on these grounds. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 354 (6th Cir. 2001) (en banc) (concluding that Kentucky State University's yearbook was a limited public forum); *id.* at 346 n.5 (distinguishing *Hazelwood* on these grounds); Student Gov't Ass'n v. Bd. of Trs., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (distinguishing college newspapers from the newspaper in *Hazelwood* on forum grounds).

64. *See Hazelwood Sch. Dist.*, 484 U.S. at 272–73 ("[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."); *see also supra* notes 3–5 and accompanying text (noting the *Tinker* standard).

65. *Hazelwood Sch. Dist.*, 484 U.S. at 271. For a discussion of the Court's use of the term "imprimatur," see *infra* note 234.

66. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

when a school's curricular speech regulations serve "no valid educational purpose."[67] Giving school personnel such broad authority is necessary, Justice White wrote, to ensure that students "learn whatever lessons the activity is designed to teach," students "are not exposed to material that may be inappropriate for their level of maturity," and "the views of the individual speaker are not erroneously attributed to the school."[68]

Because teachers supervised the students who worked on the school newspaper in *Hazelwood*, and because students performed that work as part of their duties in one of the school's journalism courses, the Court found that the students' articles fell easily within the curricular realm.[69] The First Amendment thus permitted school officials to regulate the contents of those articles "in any reasonable manner."[70] The Court had no difficulty finding that the principal met that permissive standard when he refused to let his students publish their stories on pregnancy and divorce.[71]

The *Hazelwood* Court reserved judgment on whether the standard it set for K-12 students' curricular speech is also "appropriate with respect to school-sponsored expressive activities at the college and university level."[72] The justices have not yet returned to that question. Among lower courts, there initially was some disagreement about the appropriate answer, but an apparent consensus has now emerged.

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67. *Id.*

68. *Id.* at 271.

69. *See id.* at 268–70.

70. *Id.* at 270; *see also id.* at 273 (stating that the principal's censorship of the student authors' curricular speech would be impermissible only if it served "no valid educational purpose").

71. The school principal feared that the identity of the students anonymously profiled in the disputed articles would become known and was worried that the stories would invade the privacy of the profiled students' families. *Id.* at 274–76. The principal believed the stories were inappropriate for some of the school's young freshmen and for some students' even younger siblings who might read the stories at home. *Id.* at 274–75.

72. *Id.* at 273 n.7. The Court distinguished its ruling in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) (per curiam). In *Papish*, the Court ruled that the University of Missouri could not bar a graduate student from distributing on campus a newspaper containing (among other things) "a political cartoon . . . depicting policemen raping the Statute of Liberty and the Goddess of Justice." *Id.* at 667; *see also id.* at 670 ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"). The *Hazelwood* Court pointed out that the newspaper in *Papish* was "an off-campus 'underground' newspaper," not one "sponsored by the school." *Hazelwood Sch. Dist.*, 484 U.S. at 271 n.3.

The Ninth Circuit's 2002 ruling in *Brown v. Li*[73] illustrates the early disagreement. When filing his master's thesis at the University of California at Santa Barbara, Christopher Brown insisted on including a "Disacknowledgements" section in which he "offer[ed] special *Fuck You's*" to the dean and other university employees he regarded as "degenerates" and "an ever-present hindrance during [his] graduate career."[74] He sued on First Amendment grounds after university officials—breaking from their usual practice—refused to file the completed thesis in the school library.[75] The Ninth Circuit panel split on whether the case should be deemed governed by *Hazelwood*. Announcing the judgment of the court, Judge Graber contended that *Hazelwood* did provide the proper "standard of review for reviewing a university's assessment of a student's academic work,"[76] and that the university's refusal to file Brown's thesis in the library "was reasonably related to a legitimate pedagogical objective: teaching [Brown] the proper format for a scientific paper."[77] Judge Reinhardt rejected that line of thinking, arguing that applying *Hazelwood* would give university officials far more power than is suitable for a domain in which students are more mature and "academic freedom and vigorous debate are supposed to flourish."[78] Although stopping short of committing to an alternative standard,[79] he suggested that "an intermediate level of scrutiny" might be appropriate.[80]

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73. Brown v. Li, 308 F.3d 939 (9th Cir. 2002).

74. *Id.* at 943.

75. *Id.* at 945–46.

76. *Id.* at 949 (opinion of Graber, J.).

77. *Id.* at 952.

78. *Id.* at 957 (Reinhardt, J., concurring in part and dissenting in part); *cf.* Bd. of Regents v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring in the judgment) ("Our . . . cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." (citations omitted)).

79. Judge Reinhardt did not have to commit to a particular test because he believed that, even if *Hazelwood* provided the appropriate standard, there was a trial-necessitating "question of material fact about whether the university was motivated, not by its asserted pedagogical purposes, but by a desire to punish Brown for the viewpoint he sought to express." *Brown*, 308 F.3d at 965 (Reinhardt, J., concurring in part and dissenting in part); *see also infra* notes 91–94 and accompanying text (discussing pretext cases).

80. *Brown*, 308 F.3d at 964 (Reinhardt, J., concurring in part and dissenting in part).

The divide between Judge Graber's and Judge Reinhardt's approaches is not as wide as it might first appear. A court can say that *Hazelwood* applies in postsecondary settings yet take account of the students' ages and the overall curricular context when determining whether a speech regulation is "*reasonably* related to *legitimate* pedagogical concerns."[81] Perhaps for that reason, most courts addressing the issue have concluded that, for public colleges and universities, *Hazelwood* does indeed provide the proper framework for evaluating curricular speech regulations aimed at achieving pedagogical goals. In *Hosty v. Carter*,[82] for example, the Seventh Circuit concluded "that *Hazelwood*'s framework applies to subsidized student newspapers at colleges," but explained that the students' ages should "come into play" when evaluating "the reasonableness of the asserted pedagogical justification."[83] The Tenth Circuit reasoned similarly in *Axson-Flynn v. Johnson*, a case in which faculty members in the University of Utah's Actor Training Program insisted that, during classroom acting exercises, a student set aside her objections to uttering words like "fuck" and "Christ."[84] The court said the classroom requirement was permissible under the Speech Clause if it was reasonably related to legitimate teaching objectives, understanding that the "[a]ge, maturity, and sophistication level of the students" should be considered when deciding whether that standard has been met.[85]

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81. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (emphases added); Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012) ("By requiring restrictions on student speech to be 'reasonably related to legitimate pedagogical concerns,' *Hazelwood* allows teachers and administrators to account for the 'level of maturity' of the student. Although it may be reasonable for a principal to delete a story about teenage pregnancy from a high school newspaper, the same could not (likely) be said about a college newspaper." (quoting *Hazelwood*, 484 U.S. at 271, 274–75)); Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) ("It stands to reason that whether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation.").

82. Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005), *superseded by statute*, College Campus Press Act, 110 ILL. COMP. STAT. 13/1–13/97 (2008).

83. *Id.* at 734–35; *see also id.* at 734 ("To the extent that the justification for editorial control [over a student newspaper] depends on the audience's maturity, the difference between high school and university students may be important.").

84. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004).

85. *Id.* at 1289; *see also id.* ("[W]e hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum."). The Tenth Circuit continued its reliance on *Hazelwood* in *Pompeo v. Board of Regents of the University of New Mexico*, 852 F.3d 973 (10th Cir. 2017), holding that *Hazelwood* provided the proper standard for determining whether a professor violated a university

Even when courts take account of students' maturity and other differences between K-12 and postsecondary schools, however, there is no doubt that *Hazelwood*'s standard remains deferential. In *Collins v. Putt*,[86] for example, the Second Circuit applied *Hazelwood* when evaluating a college professor's decision to remove comments that a student had posted on a college-hosted message board as part of a class assignment. The court said it had "no doubt" that the professor made a reasonable pedagogical decision when she concluded that the student's post inappropriately focused on critiquing, rather than completing, the assignment.[87] In *O'Neal v. Falcon*,[88] the Western District of Texas applied *Hazelwood* to a college student's complaint that her communications professor would not let her choose abortion as the topic for her required class speech. The court readily found that the professor had a legitimate pedagogical reason for deeming that topic out of bounds.[89] Deference in cases such as these is precisely what the Supreme Court (in a different context) has indicated we should expect: "When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."[90]

But because not all faculty decisions are "genuinely *academic* decision[s],"[91] deference is not automatic. Courts sometimes probe beneath the surface of educators' asserted pedagogical justifications to see whether those justifications are merely smokescreens for something else.[92] In *Axson-*

student's First Amendment rights by demanding that she avoid calling lesbianism "perverse" in a paper unless she provided support for that claim. *Id.* at 985.

86. Collins v. Putt, 979 F.3d 128 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1465 (2021).

87. *Id.* at 134.

88. O'Neal v. Falcon, 668 F. Supp. 2d 979 (W.D. Tex. 2009).

89. *Id.* at 985–87. The court said the professor could reasonably fear that the topic of abortion would be so controversial that students would be distracted from learning how to give effective speeches. *See id.* at 986.

90. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (citing Bd. of Curators v. Horowitz, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)) (adjudicating a substantive due process dispute); *cf.* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 115 (2013) (arguing that courts should leave universities free to judge the merits of students' speech).

91. *Ewing*, 474 U.S. at 225 (emphasis added).

92. The path that courts take in these instances depends on the reasons for the government's speech-restricting actions. If a court finds that instructors restricted a student's speech because they were hostile to his or her religion, for example, the court will apply

*Flynn*, for example, the Tenth Circuit remanded for trial because there was evidence indicating that perhaps hostility to the plaintiff's religion—rather than a desire to achieve pedagogical goals—lay beneath the theater professors' insistence that the student set aside her objection to uttering certain words during classroom acting exercises.[93] In 2019's *Felkner v. Rhode Island College*, the Supreme Court of Rhode Island said a trial was necessary to determine whether faculty members in a social-work program treated a master's student adversely in order to achieve pedagogical ends (as they claimed) or whether their proffered explanation was merely a pretext for discriminating against the student because of his politically conservative views.[94]

### *C. Responding Adversely to Students' Unprofessional Speech*

Bearing *Hazelwood*'s broad influence in mind, we can turn now to what courts have said about the First Amendment's requirements when public professional schools discipline students on the grounds that their speech is unprofessional. As the Tenth Circuit noted when adjudicating Paul Hunt's dispute with officials at the University of New Mexico's School of Medicine,[95] the law here remains uncertain. But the slate is not blank. I describe the

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the analysis required by the Free Exercise Clause. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1292–93 (10th Cir. 2004) (finding that it was premature to defer to the instructors pursuant to *Hazelwood*, because further factual development could reveal a violation of the Free Exercise Clause); *see also supra* notes 84–85 and accompanying text (discussing *Axson-Flynn*). If a school's adverse response to student speech is especially severe, it can be a sign that a school's proffered pedagogical justifications for restricting the speech are indeed pretextual and that non-pedagogical objectives are at play. *See, e.g.*, Brown v. Li, 308 F.3d 939, 958 (9th Cir. 2002) (Reinhardt, J., concurring in part and dissenting in part) ("The university's extreme actions in response to Brown's speech . . . raises [sic] a genuine question of material fact as to whether the university punished him because of the viewpoint he sought to express or whether . . . it simply desired to further a legitimate pedagogical concern.").

93. *Axson-Flynn*, 356 F.3d at 1293; *see also id.* at 1292–93 ("Although we do not second-guess the *pedagogical* wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was *pretextual*." (footnote omitted)).

94. *See* Felkner v. R.I. Coll., 203 A.3d 433, 441, 449–50 (R.I. 2019); *see also id.* at 450 ("[G]enuine issues of material fact exist as to whether defendants' justifications for their actions were truly pedagogical or whether they were pretextual."). William Felkner, a "conservative libertarian," had frequently butted heads with faculty in Rhode Island College's School of Social Work. *See id.* at 433–44.

95. *See supra* notes 18–24 and accompanying text (discussing Hunt v. Bd. of Regents, 792 F. App'x 595 (10th Cir. 2019)).

leading cases in two groups: those involving speech in conventional curricular settings and those involving speech in the larger world.

### *1. Speech in Conventional Curricular Settings*

When it comes to speech in the classroom and other conventional curricular contexts, courts have readily applied *Hazelwood*'s framework to disputes about student speech and professionalism, finding no reason to treat schools' professionalism-focused pedagogical objectives any differently than they treat the teaching objectives of other academic units on campus. The Eleventh Circuit's ruling in *Keeton v. Anderson-Wiley*[96] illustrates the point. Faculty in a counseling program at Augusta State University grew concerned that Jennifer Keeton, one of their master's students, might violate the American Counseling Association's ethics code, because—both in and out of the classroom—she had told professors and classmates that she would try to convert her homosexual clients to heterosexuality.[97] Keeton filed a First Amendment claim after school officials told her she could not remain in the program unless she attended cultural-competency sessions and took a variety of other remedial steps.[98] The Eleventh Circuit rejected Keeton's free-speech claim, finding that school officials had a legitimate pedagogical goal: teaching Keeton to comply with the counseling profession's ethical requirements.[99]

The Sixth Circuit deployed the same analytic strategy when facing a factually comparable dispute the following year in *Ward v. Polite*.[100] In a counseling practicum course at Eastern Michigan University, master's student Julea Ward asked an instructor to assign a gay client to another student because she (Ward) could not affirm the client's interest in same-sex relationships.[101] School officials expelled Ward from the program, finding that her stance violated the American Counseling Association's ethics code.[102] Writing for the Sixth Circuit panel, Judge Sutton found that *Hazelwood*

96. Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011).
97. *Id.* at 868–69.
98. *Id.* at 869–71.
99. *See id.* at 876.
100. Ward v. Polite, 667 F.3d 727, 741 (6th Cir. 2012).
101. *Id.* at 729–30.
102. *Id.* at 730–32.

provided the appropriate starting point because it "respects the latitude [that] educational institutions—at any level—must have to further legitimate curricular objectives."[103]

If professionalism-focused speech restrictions are not grounded in pedagogical justifications, however, courts might apply a more demanding standard of review, depending on the nature of the reasons underlying the restrictions. Consider, for example, the Ninth Circuit's 2015 ruling in *Oyama v. University of Hawaii*.[104] Mark Oyama was a graduate student seeking a degree in secondary education at the University of Hawaii.[105] The school refused to allow him to become a student teacher—an essential part of the program—because in various writing assignments he had said adults should be permitted to have consensual sex with children; children with severe mental difficulties should not be placed in classrooms with non-disabled children; teachers ordinarily should not be expected to teach children with learning disabilities; and most kids in special-education programs are "fakers."[106] Oyama filed suit, alleging a violation of his free-speech rights.

The district court rejected Oyama's claim, finding that school officials' decision was constitutionally permissible because it was reasonably related to legitimate teaching goals.[107] The Ninth Circuit affirmed, but on different grounds. *Hazelwood* was irrelevant, the appellate court said, because pedagogical objectives did not underlie the school's refusal to let Oyama become a student teacher. "The University's purpose," the court wrote, "was not to teach Oyama any lesson; rather, it was to fulfill the University's *own* mandate of limiting certification recommendations to students who meet the standards for the teaching profession."[108] Hawaii had "entrust[ed] the University with the task of verifying a candidate's ability to 'function effectively' as an educator in public schools," and school officials were simply carrying out that task when they took the actions challenged here.[109]

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103. *Id.* at 733. The Sixth Circuit remanded for trial, finding that some of the evidence in the case suggested that the school ordinarily did not forbid students from referring clients to other counselors and that the only reason the school did not afford Ward the same prerogative was because they did not like her religious objections to same-sex marriage. *See id.* at 735–38, 741–42; *see also id.* at 734 (stating that discriminating against students because of their religious beliefs is never "a legitimate end of a public school").

104. Oyama v. Univ. of Haw., 813 F.3d 850 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2520 (2016).

105. *Id.* at 855.

106. *Id.* at 856–58.

107. *Id.* at 860–61.

108. *Id.* at 863.

109. *Id.*

Drawing from a line of "certification cases," the court applied a form of heightened scrutiny to evaluate the propriety of the school's actions and found those actions permissible.[110]

### *2. Speech in the Larger World*

When it comes to the speech of professional-school students in non-curricular settings—settings akin to B.L.'s weekend Snapchat post after she was denied a position on her high school's varsity cheerleading squad[111]—the cases are scarce and in conflict. Courts have taken two different approaches: one that embraces *Hazelwood* and one that does not.

In 2016's *Keefe v. Adams*, Craig Keefe—a nursing student at Central Lakes College—stated in a series of Facebook posts that there was "[n]ot enough whiskey to control [his] anger" at a classmate who altered a group project late at night, that he was going to "take this electric pencil sharpener in this class" and puncture someone's lung with it, and that a classmate who complained about his Facebook posts was a "stupid bitch" who was going to fail out of the program.[112] When the program director spoke with Keefe about the posts, she judged him to be unremorseful and "not receptive to her concern that the posts were unprofessional."[113] Concluding that she and her colleagues could not successfully teach Keefe the necessary professional skills, the director expelled him from the program.[114]

Invoking *Hazelwood*, the Eighth Circuit upheld Keefe's expulsion.[115] The court found that "teaching and enforcing viewpoint-neutral professional

110. The court asked three primary questions: (1) whether "[t]he University's decision was directly related to defined and established professional standards," *id.* at 868; (2) "whether the University's decision was narrowly tailored to serve the University's purpose of evaluating Oyama's suitability for the teaching profession," *id.* at 871, an inquiry that included asking whether "the University based its decision only upon statements Oyama made in the context of the certification program," rather than statements he made out in the larger world, *id.* at 872; and (3) "whether the University's decision reflects reasonable professional judgment about Oyama's suitability for the teaching profession," *id.* Having touched all those bases, the court found no First Amendment violation. *Id.* at 874, 876.

111. *See supra* notes 1–11 and accompanying text (discussing Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021)).

112. Keefe v. Adams, 840 F.3d 523, 526–27 (8th Cir. 2016).

113. *Id.* at 527.

114. *Id.*

115. *See id.* at 525–26.

codes of ethics are a legitimate part of a professional school's curriculum."[116] Professional schools thus may require their students to comply with such ethics codes, so long as they do so in a manner that is "reasonably related to legitimate pedagogical concerns."[117] The court concluded that the nursing program's director had stayed within those boundaries.[118] The program's student handbook stated that all students were obliged to "uphold and adhere to" the American Nursing Association's code of ethics and that anyone who failed to do so would not be "eligible to progress in the nursing program."[119] The American Nursing Association's code of ethics declared, in turn, that nurses must maintain "respect[ful]," "compassionate and caring relationships with colleagues and others" and must not engage in "any form of harassment or threatening behavior."[120] The court found no reason to overturn the program director's conclusion that the school would not be able to teach Keefe to obey those professionalism requirements.[121]

Keefe had insisted that his speech was insulated from school discipline because he uttered it in off-campus Facebook posts and those posts were "unrelated to any course assignment or requirements."[122] The panel majority rejected both of those arguments. The court pointed out that a "student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom."[123] As for the speech's relationship to curricular concerns, the court did not concede that it mattered whether the unprofessional speech was uttered in connection with curricular activities.[124] Rather, the court simply said that the premise of Keefe's argument was factually mistaken. His "posts were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies"; the posts "had a direct impact on [his classmates'] educational experience"; and the posts "had the potential to impact patient

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116. *Id.* at 530; *see also id.* ("[C]ompliance with professional ethical standards is a permissible academic requirement . . . ."). The court said that judges "should be particularly cautious before interfering with the 'degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession.'" *Id.* at 533 (quoting Doherty v. S. Coll. of Optometry, 862 F.2d 570, 576 (6th Cir. 1988)).

117. *Id.* at 531 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

118. *Id.* at 532.

119. *Id.* at 528.

120. *Id.*

121. *Id.* at 532–33.

122. *Id.* at 531–32.

123. *Id.* at 531.

124. *Id.* at 532.

care" by undermining students' ability to work together collaboratively when trying to meet patients' needs.[125]

Judge Kelly dissented, embracing much of Keefe's argument. She contended that *Hazelwood* was irrelevant because the Facebook posts occurred off campus, they "were not made as part of fulfilling a program requirement[, and they] did not express an intention to break specific curricular rules."[126] In her view, a trial was necessary because "[g]enuine issues of material fact remain[ed] concerning whether the administrators could permissibly restrict the speech at issue . . . in the manner that they did."[127]

The Minnesota Supreme Court charted a different course in *Tatro v. University of Minnesota*.[128] Amanda Tatro was an undergraduate in the University of Minnesota's Mortuary Science Program. On her Facebook page, she joked about the human cadaver she had been assigned for an anatomy course, and she talked about using "a trocar" to vent her aggressions and to "stab a certain someone in the throat."[129] School officials determined that Tatro had violated program rules, including the Mortuary Science Student Code of Professional Conduct.[130] As discipline, school officials gave her a failing grade in the anatomy course and said that, to continue in the program, she would need to undergo a psychiatric evaluation and take other remedial steps.[131]

Tatro filed suit, alleging a violation of her First Amendment rights.[132] She contended that her Facebook posts were exempt from school officials' professionalism scrutiny because she did not utter them pursuant to her curricular responsibilities.[133] University leaders took the contrary view, arguing that Tatro's Facebook posts were well within their disciplinary reach so long as—per *Hazelwood*—they were "enforc[ing] academic program

125. *Id.*
126. *Id.* at 543 (Kelly, J., concurring in part and dissenting in part).
127. *Id.* at 545.
128. Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).
129. *Id.* at 512. A trocar is a sharply pointed medical device. *See id.* at 513 n.2.
130. *See id.* at 511, 514–16.
131. *See id.* at 514–15.
132. *Id.* at 511.
133. *Id.* at 517–18.

rules that are reasonably related to the legitimate pedagogical objective of training Mortuary Science students to enter the funeral director profession."[134]

The Minnesota Supreme Court rejected Tatro's First Amendment claim,[135] but not on *Hazelwood* grounds. *Hazelwood* was inapposite, the court said, because no one could reasonably perceive that Tatro's Facebook posts bore the "imprimatur" of the school,[136] one of the factors that the *Hazelwood* Court cited when describing the circumstances for which its deferential standard was intended.[137] Moreover, the Minnesota court reasoned, applying *Hazelwood*'s standard in professional-school settings would give school authorities unacceptably broad authority, since so much speech can reasonably be deemed related to professionalism concerns like "courtesy" and "respect."[138] But the court also rejected Tatro's contention that her Facebook comments were entirely beyond program officials' regulatory reach.[139] The court held that school officials could discipline Tatro for her online posts, so long as the discipline was "narrowly tailored and directly related to established professional conduct standards."[140] The court found that this standard had been met: Tatro violated an established professional obligation to treat human cadavers with respect, and the school's speech regulations were not "substantially broader than necessary" to ensure students met that obligation.[141]

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Putting the case law's pieces together, we find that courts have constructed the following partial picture: Applicants to public colleges and universities do not enjoy the Speech Clause's protection for what they say in their application materials or in their admissions interviews, but courts have not yet determined whether the Speech Clause is similarly silent when school

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134. *Id.* at 518 (internal quotation marks omitted).

135. The Minnesota Court of Appeals had similarly rejected Tatro's claim and found that Tatro's "Facebook posts materially and substantially disrupted the work and discipline of the university." Tatro v. Univ. of Minn., 800 N.W.2d 811, 822 (Minn. Ct. App. 2011), *aff'd*, 816 N.W.2d 509 (Minn. 2012). The court said virtually nothing about *Hazelwood* and instead relied primarily on *Tinker*'s "material disruption" standard. *Id.* at 820–21; *see also supra* notes 3–5 and accompanying text (noting the *Tinker* standard).

136. *Tatro*, 816 N.W.2d at 518.

137. *See supra* notes 61–72 and accompanying text (discussing *Hazelwood*); *see also infra* note 234 (discussing *Hazelwood*'s use of the term "imprimatur").

138. *Tatro*, 816 N.W.2d at 518.

139. *Id.* at 520–21.

140. *Id.* at 521.

141. *Id.* at 522–23 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)).

officials base adverse admissions decisions on statements that applicants have uttered out in the larger world.[142] For enrolled students in all academic units on public campuses, teachers and administrators enjoy broad latitude to regulate curricular speech, such as statements that students make in assigned essays and class presentations. School officials may regulate such speech in any manner that is reasonably related to legitimate pedagogical goals, bearing in mind that students' adulthood and the overall educational context have roles to play when determining whether pedagogical goals are indeed legitimate.[143] Faculty and administrators who train students for professions with ethical requirements can include professionalism training among their pedagogical objectives and can reasonably regulate their students' speech in conventional curricular settings accordingly.[144] But when those educators extend their professionalism-driven speech regulations to speech that students utter out in the larger world, courts have taken conflicting approaches: one has applied the same deferential standard that applies to ordinary curricular speech, while another has devised a heightened standard of review.[145]

## III. VIEWING STUDENTS' SPEECH RIGHTS THROUGH A PUBLIC-EMPLOYMENT LENS

On their points of agreement, have courts found the best reading of the First Amendment's requirements? Where they have disagreed or been silent, how should the First Amendment analysis proceed? There are many ways one could try to answer those questions, and I do not purport to canvass all of them here.[146] I focus instead on the insights we can glean from courts'

142. *See supra* Section II.A.

143. *See supra* Section II.B. For a discussion of how best to determine whether speech is "curricular" in nature, see *infra* Section III.B.1.

144. *See supra* Section II.C.1.

145. *See supra* Section II.C.2.

146. An originalist, for example, would explore the meaning of the First Amendment at the time of its ratification and at the time of its application to the states. *See generally* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) (discussing originalists' commitment to the proposition that the meanings of constitutional texts are fixed at particular moments in time). For a discussion of originalism's notable lack of influence in Speech Clause jurisprudence, see

construction of the First Amendment principles that define public employees' speech rights. As I acknowledged at the outset and will briefly say more about in a moment,[147] there is at least one key difference between the work of public institutions of higher education and the work of most governmental employers: broad freedom of expression is essential to the former but typically not essential to the latter. There nevertheless are features of First Amendment public-employment law that are instructive for postsecondary settings. Because I do not discuss all the competing analytic possibilities, I cannot claim that the approach I propose here is the only one that courts could reasonably take. I do contend, however, that the proposed approach holds great appeal because it builds on relevant lessons learned from courts' intensive activity in another free-speech domain to which useful analogies can be drawn.

Using courts' approach to the rights of public employees as a point of methodological comparison, I begin with the speech rights of college applicants and then proceed to two interrelated matters—the rights of all postsecondary students when facing curricular speech restrictions of any kind and the rights of professional-degree students when facing speech regulations driven by concerns about professionalism.

### *A. The Speech Rights of Applicants*

When it comes to statements that job applicants and college applicants make in their respective application materials and interviews, courts have deployed different rationales but reached the same conclusion: the Speech Clause does not constrain the government's ability to reject applications that contain statements the government finds objectionable. But for statements that college applicants make *outside* the application process—a matter that courts have not yet addressed[148]—public-employment law suggests a different answer. Cases from the employment arena suggest by analogy that the Speech Clause does not permit a public postsecondary school to deny an application based on statements that the applicant made outside the application process unless the Speech Clause would permit the school to expel an enrolled student for producing the same expression. I discuss

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Todd E. Pettys, *Hostile Learning Environments, the First Amendment, and Public Higher Education*, 54 CONN. L. REV. 1, 23–37 (2022).

147. *See supra* note 25 and accompanying text; *infra* notes 199–204 and accompanying text.

148. *See supra* Section II.A.

those matters here, after briefly setting the stage by describing the core principles that define the First Amendment speech rights of public employees.

### *1. The First Amendment Framework for Public Employees*

In 1977's *Mt. Healthy City School District Board of Education v. Doyle*,[149] the Supreme Court reminded readers that an unsuccessful applicant for government employment has a First Amendment claim only "if the decision not to [hire] him was made by reason of his exercise of constitutionally protected First Amendment freedoms."[150] As that phrasing makes clear (and as one would expect in any event), an unsuccessful job applicant does not have a federal free-speech claim against a public employer unless the applicant enjoys the Speech Clause's protection for the statements that allegedly have drawn the employer's disapproval.

To determine whether a job applicant's speech is indeed constitutionally protected, courts ask whether the First Amendment would permit the employer to take adverse action against one of its existing employees for the same kind of speech.[151] In other words, when it comes to rights under

149. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

150. *Id.* at 283–84 (citing Perry v. Sindermann, 408 U.S. 593 (1972)); *accord Perry*, 408 U.S. at 597 (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech," and this includes "denials of public employment"). In the early twentieth century, the Court took a far narrower view of the First Amendment protections enjoyed by those wishing to obtain or retain government employment. *See* Connick v. Myers, 461 U.S. 138, 143–44 (1983) (describing the law's evolution).

151. *See* Oscar Renda Contracting, Inc. v. City of Lubbock, 463 F.3d 378, 383–86 (5th Cir. 2006) (holding that a contractor need not have a preexisting relationship with a government employer to be able to assert a First Amendment retaliation claim concerning the contractor's speech, and applying key portions of the analysis that governs First Amendment retaliation claims brought by government employees); Worrell v. Henry, 219 F.3d 1197, 1207 (10th Cir. 2000) ("This circuit has applied the *Pickering* balancing [that applies when determining employees' First Amendment free-speech rights] to hiring decisions. . . . Other circuits have taken the same approach."); Shahar v. Bowers, 114 F.3d 1097, 1103 (11th Cir. 1997) ("We conclude that the appropriate test for evaluating the constitutional implications of the State of Georgia's decision . . . to withdraw Shahar's job offer . . . is the same test as the test for evaluating the constitutional implications of a government employer's decision based on an employee's exercise of her right to free speech, that is, the *Pickering* balancing test."); Bonds v. Milwaukee County, 207 F.3d 969, 973 (7th Cir. 2000) (applying *Pickering* to determine whether a county could rescind a job

the Speech Clause, applicants get what employees get. The speech rights that employees get, in turn, are largely determined by the analytic framework that the Supreme Court announced in its 1968 ruling in *Pickering v. Board of Education*.[152] The *Pickering* Court explained that, when a government employee says his or her employer violated the First Amendment by treating the employee adversely because of his or her speech, courts must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[153] Although public employees' expressive freedoms are thus not as robust as those of "the citizenry in general,"[154] employees do enjoy a significant measure of freedom to participate in public discourse without fear of retribution in the workplace.

There are occasions, however, when the Speech Clause gives government employees no protection at all. As I will discuss in a later subsection, employees get no Speech Clause protection for statements they utter pursuant to their job duties.[155] The Speech Clause also does little or nothing to protect them when they speak on matters of mere private concern.[156] The distinction

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offer to an applicant based on something he said while working for a different governmental employer); Morrison v. City of Reading, No. 02-7788, 2007 WL 764034, at *6 (E.D. Pa. Mar. 9, 2007) (stating that "[p]rospective government employees and applicants for volunteer positions as well as persons already employed in government positions enjoy First Amendment protection" and that First Amendment retaliation claims brought by applicants are governed by the same test that governs retaliation claims brought by government employees).

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

153. *Id.* at 568. On the employee's side of the balance, courts should consider the employee's interest in contributing to society's "free and open debate" on matters of public significance, as well as the public's interest in hearing what knowledgeable public employees have to say on those matters. *See id.* at 573. On the employer's side of the balance, courts should consider whether the speech impeded the employee's ability to do his or her job, undermined important working relationships, or otherwise disrupted the employer's ordinary operations. *See id.* at 572–73.

154. *Id.* at 568.

155. *See infra* Section III.B.1 (discussing and drawing analogies to *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

156. *See* Schwamberger v. Marion Cnty. Bd. of Elections, 988 F.3d 851, 856 (6th Cir. 2021) (explaining that, to state a claim of First Amendment retaliation, a public employee "must show that her speech touched on a matter of public concern" (citing Rose v. Stephens, 291 F.3d 917, 920 (6th Cir. 2002))); Falco v. Zimmer, 767 F. App'x 288, 302 (3d Cir. 2019) ("Whereas a public employee's speech involving matters of public concern are protected, speech involving matters of private concern are not protected."); Sherrod v. Bd. of St. Lucie Cnty., 635 F. App'x 667, 672 (11th Cir. 2015) ("A public employee's speech is not protected by the First Amendment when the employee 'speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal

between matters of public and private concern is often outcome determinative: speech on the former gets as much protection as *Pickering*'s balancing test affords, while speech on the latter typically gets no Speech Clause protection at all. To distinguish between the two, courts examine the "content, form, and context of" the speech[157] and ask whether it was "on a subject of legitimate news interest"[158]—that is, they ask whether the speech can "be fairly considered as relating to any matter of political, social, or other concern to the community."[159] Speech about one's employment status or other internal workplace matters typically falls on the private, unprotected side of the line.[160]

Courts use those principles to assess the First Amendment status of statements individuals make when applying for government employment.[161] For analytic purposes, I divide those cases into two groups: those involving statements made in application documents and job interviews and those involving statements made outside the application process. I consider each in turn and explain how courts' methodologies in those settings can deepen our understanding of the speech rights of prospective postsecondary students.

### *2. Statements Made in the Application Process*

When it comes to statements that those seeking government employment make in their application materials and job interviews, numerous courts have held that applicants typically get no First Amendment protection at

interest.'" (quoting Connick v. Myers, 461 U.S. 138, 146 (1983))); Sousa v. Roque, 578 F.3d 164, 170 (2d Cir. 2009) ("If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, 'the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.'") (quoting Garcetti v. Ceballos, 546 U.S. 410, 418 (2006))). In *Connick*, the Court indicated in dictum that, in "the most unusual circumstances," the First Amendment will protect public employees' speech on "matters of only personal interest." *See Connick*, 461 U.S. at 147. But the *Connick* Court did not elaborate upon the kinds of circumstances that would trigger First Amendment protection for such speech, nor has the Court since had occasion to return to the issue. *See id.*

157. *Connick*, 461 U.S. at 145, 147–50.
158. City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004).
159. *Connick*, 461 U.S. at 146.
160. *See Roe*, 543 U.S. at 83 (discussing *Connick*).
161. *See supra* note 151 (citing authorities).

all.[162] Whether explicitly or implicitly, these courts reason as follows. When people speak in an effort to land a government job, they are speaking to advance their personal interests, rather than to contribute to discourse about matters of public concern;[163] statements that applicants make in the

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162. *See, e.g.*, Wetherbe v. Smith, 593 F. App'x 323, 328 (5th Cir. 2014) (finding that, when speaking in a job interview about his belief that the faculty tenure system harms higher education, the plaintiff "was not speaking as a private citizen on a matter of public concern" and so could not state a claim of First Amendment retaliation); Owen v. City of Decatur, No. 5:06-CV-366-VEH, 2006 WL 8437419, at *5 (N.D. Ala. June 14, 2006) (noting that, when commenting on the fact that she believed a government employer's interview process was biased against women, the plaintiff had spoken in a job interview "as an employee during her quest for professional advancement" and thus the speech was aimed at "further[ing] private interests" rather than discussing matters of public significance). The purpose of the individual's speech, and not merely the speech's subject matter, plays a large role in these cases. Some cases concerning the speech rights of actual employees take a similar approach. *See* Myles v. Richmond Cnty. Bd. of Educ., 267 F. App'x 898, 900 (11th Cir. 2008) ("Though her speech did touch on a matter of public interest, the true purpose behind Appellant's various complaints was not to raise an issue of public concern, but rather to further her own private interest in improving her employment position."); White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1059 (2d Cir. 1993) ("Even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight in the balancing analysis."); Rao v. N.Y. City Health & Hosps. Corp., 905 F. Supp. 1236, 1243 (S.D.N.Y. 1995) ("The fundamental question is whether the employee is seeking to vindicate personal interests or to bring to light a 'matter of political, social, or other concern to the community.'" (quoting *Connick*, 461 U.S. at 146)). Some courts have cautioned about allowing the speaker's motive to play too dominant a role when determining whether speech was on a matter of public or private concern. *See, e.g.*, Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1, 131 F.3d 564, 574 (6th Cir. 1997) ("[T]he argument that an individual's *personal* motives for speaking may dispositively determine whether that individual's speech addresses a matter of *public* concern is plainly illogical and contrary to the broader purposes of the First Amendment." (emphases added)); *see also* Banks v. Wolfe Cnty. Bd. of Educ., 330 F.3d 888, 894 (6th Cir. 2003) ("Since *Chappel*, this court has held that the subjective intent of the speaker, while relevant, is not a controlling factor."); *cf.* Alison Steinbach, *Black ASU Professor Who Claimed Retaliation for Statements on Diversity Wins Jury Verdict*, AZCENTRAL (Aug. 26, 2021, 6:00 AM), https://www.azcentral.com/story/news/local/arizona-education/2021/08/26/asu-professor-nicholas-alozie-wins-jury-verdict-against-university-retaliation/8251561002/ [https://perma.cc/G4F7-SXRV] (reporting on the win at trial of a university professor who claimed he was the target of discrimination "for stating his opinions on diversity and criticizing hiring during a job interview"). For my purposes here, I do not reject the possibility that, in unusual circumstances, speech in job-application materials and job interviews might receive First Amendment protection. I merely point out that the cases suggest such circumstances would indeed be unusual.

163. *See, e.g.*, *Owen*, 2006 WL 8437419, at *5.

application process are thus statements on matters of mere private concern;[164] applicants get the same First Amendment protection that employees get;[165] the Speech Clause allows government employers to treat employees adversely for speech on matters of mere private concern;[166] so the Speech Clause permits public employers to reject job applicants because of statements they make in the application process.[167]

In *Crawford v. Columbus State Community College*,[168] for example, Thomas Crawford alleged that he was unconstitutionally denied a tenured teaching position in retaliation for statements he made in his application materials regarding students' desire to see him get such a post.[169] The Fifth Circuit held that Crawford failed to state a First Amendment claim because statements he made "in his own application" fell "outside the ambit of addressing matters of public concern."[170] In *Blitzer v. Potter*,[171] Andrew Blitzer alleged that officials at the United States Postal Service violated his First Amendment rights by refusing to hire him because, on his job application forms and in his job interview, he criticized one of his former employers.[172] After explaining that free-speech claims brought by applicants and employees are governed by the same legal standard, the Southern District of New York found that Blitzer had "failed to make out even a prima facie case of retaliation in violation of the First Amendment."[173]

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164. *See, e.g.*, *Myles*, 267 F. App'x at 900.
165. *See supra* note 151 (citing authorities).
166. *See supra* note 156 and accompanying text.
167. *See supra* note 162.
168. Crawford v. Columbus State Cmty. Coll., 196 F. Supp. 3d 766 (S.D. Ohio 2016).
169. *See id.* at 774.
170. *Id.* The Fifth Circuit relied heavily on the Supreme Court's description of the difference between matters of public and private concern in *Connick v. Myers*, 461 U.S. 138 (1983). In that case, an assistant district attorney in New Orleans had drawn the ire of her supervisor when she circulated a questionnaire among her coworkers. *Id.* at 141. The Court found that most of the questionnaire concerned only private matters—and thus did not require further First Amendment analysis—because the questions only concerned the employees' own welfare. *See id.* at 148–49. The Court found that one inquiry on the questionnaire did amount to speech on a matter of public concern necessitating *Pickering* balancing—a question about whether assistant district attorneys felt workplace pressure to work on election campaigns. *See id.* at 149–54.
171. Blitzer v. Potter, No. 03 Civ. 6124, 2005 WL 1107064 (S.D.N.Y. May 6, 2005).
172. *See id.* at *14.
173. *Id.* at *15.

He had uttered the problematic statements in his application materials, the court said, so he was speaking "only as an applicant on matters of personal interest."[174]

So far as ultimate outcomes go, that approach dovetails nicely with what the Fourth Circuit said in *Buxton v. Kurtinitis* about the speech rights of individuals who apply for seats in academic programs. Recall that Dustin Buxton alleged that college admissions officials rejected his application for a seat in a radiation therapy program because, during his admissions interview, he expressed some of his religious beliefs about death.[175] Recall, too, that the Fourth Circuit relied on the logic of *Finley* and other Supreme Court cases involving instances in which government officials must make content-based speech distinctions to allocate scarce resources in competitive programs.[176] Based on *Finley* and similar precedents, the Fourth Circuit held that the Speech Clause gave Buxton no protection whatsoever for the statements he made in his interview.[177] Buxton thus found himself in exactly the same position as job applicants who complain that statements they made during their job interviews or in their application documents were held against them. Indeed, the Fourth Circuit made that very comparison, observing that if Buxton had been interviewing for a job with the school rather than for a seat in its entering class, his First Amendment claim would fail because his "speech in the interview room was [on] a matter of personal interest: his admittance to the [program]."[178]

Despite that similarity in outcomes, there is an important methodological difference between the way the Fourth Circuit resolved Buxton's dispute and the way courts adjudicate job applicants' free-speech claims. Indeed, so far as expressed analytic principles are concerned, the harmony between the outcomes in the two sets of cases is largely coincidental. In the public-employment setting, courts use the rights of existing employees as the benchmark for measuring the rights of applicants.[179] When evaluating Buxton's speech rights, however, the Fourth Circuit did not ask whether the Speech Clause would permit college officials to discipline or expel an enrolled student for making statements comparable to Buxton's. If it had, the court almost certainly would have reached a different result. The Speech

174. *Id.*

175. *See* Buxton v. Kurtinitis, 862 F.3d 423, 425–26 (4th Cir. 2017); *supra* notes 40–58 and accompanying text (discussing *Buxton*).

176. *See Buxton*, 862 F.3d at 428–31.

177. *See id.* at 431.

178. *Id.* at 427.

179. *See supra* notes 151–74 and accompanying text.

Clause ordinarily would not permit a public college to treat a radiation therapy student disadvantageously simply because, in a non-clinical setting, he told a faculty member about his religious beliefs regarding death.[180]

In cases like Buxton's, the decision to rely upon the *Finley* line of cases—emphasizing the role that interviews can play in narrowing the pool of contenders for seats in competitive academic programs—makes good sense.[181] Schools have a strong interest in trying to discern which of their applicants are most likely to thrive in, and contribute to, their academic programs and communities—or, as Justice Frankfurter concisely put it, to decide "who may be admitted to study."[182] Whether on application forms or in admissions interviews, asking applicants to speak in response to questions is a sensible part of that screening process. But doing so has value only if the institutions are free to make content-based distinctions among the statements that applicants submit for evaluation.[183] That remains

180. If the student uttered the statement in performance of curricular duties, the college's disciplinary actions would need to be reasonably related to a legitimate pedagogical objective. *See infra* Section III.B.1. Although that standard is deferential, our hypothetical plainly tests deference's limits. And if the student made the statement in a setting where that deferential standard did not apply, the college's actions would be "presumptively invalid" because they would amount to a content-based regulation of speech. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations [of speech] are presumptively invalid.").

181. *See supra* notes 40–58 and accompanying text (discussing the *Buxton* court's reasoning).

182. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result); *see also supra* notes 26–30 and accompanying text (noting Justice Frankfurter's influential declaration).

183. Jamal Greene makes a similar point:

> A typical college or university does not choose students randomly or indiscriminately. Rather, it makes a judgment about which students are prepared for the school's curriculum, have the potential to succeed within it, are likely to donate to the school or generate revenue through athletics or other extracurricular activities, or will contribute to the educational experiences of other students. . . . [T]his last factor in particular incorporates judgments about the perspectives students will bring to discussion both inside and outside the classroom. In other words, universities engage in viewpoint discrimination in admitting students, and they do so pervasively. . . . [T]hey are attentive to the mix of perspectives students offer and the likely quality of their contribution to the classroom.

Jamal Greene, *Constitutional Moral Hazard and Campus Speech*, 61 WM. & MARY L. REV. 223, 242–43 (2019) (footnotes omitted); *cf.* HORWITZ, *supra* note 90, at 126 (arguing that the Supreme Court has "recognized that universities have unique institutional needs, practices, and traditions, and should be trusted to make their own admissions decisions

true even if the First Amendment would not give school officials the same latitude to respond disadvantageously to the speech of individuals who have already successfully passed through the admissions screening process and thus are no longer subjects of the school's pool-narrowing evaluation.

But what should happen in applicant-speech cases for which the *Finley* rationale is ill-suited?

### *3. Statements Made Outside the Application Process*

As I noted earlier,[184] the *Finley* rationale weakens significantly or disappears altogether when the statements on which admissions officials adversely rely were not submitted for evaluation by the applicant, but rather were uttered out in the larger world. When the *Finley* rationale is indeed not in play, public-employment law suggests a sensible approach. Just as the speech rights of employees provide the relevant benchmark for determining the speech rights of job applicants when it comes to statements they make outside the application process,[185] we can look to the speech rights of enrolled students to determine whether the Speech Clause shields college and university applicants from rejection based on statements they make outside the admissions process. If the First Amendment would not permit a school to expel a student for an outrageous tweet or a transgressive Facebook post, for example, why would it permit the school to reject a person's

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with minimal judicial interference"). So far as applicants' statements are concerned, other constitutional texts and principles protect applicants against arbitrary decision-making. *See, e.g.*, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923))). Texts such as the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause protect against invidious discrimination. There is, however, one important role that the Speech Clause *can* play: undergirding applicants' constitutional right not to be discriminated against based on their political beliefs or associations. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990) (holding that the First Amendment bars the government from refusing to hire individuals for "low-level" positions because of their political affiliations); NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). *See generally* Wagner v. Jones, 664 F.3d 259, 269 (8th Cir. 2011) (distinguishing between First Amendment retaliation claims and First Amendment claims of political discrimination).

184. *See supra* notes 57–58 and accompanying text.

185. *See supra* note 151 and accompanying text.

bid for admission based on the same expression? In both instances, the government is refusing to allow the speaker to be a member of its student community because of the contents of his or her speech, and in both instances the government's justification for that refusal either is or is not constitutionally sufficient. If the Speech Clause would not permit a school to expel a student based on a given rationale, that rationale should find no greater traction when the school is deciding whether to allow the speaker to join the student body in the first place.

Discussing every circumstance in which the Speech Clause would permit the expulsion of students because of their speech is beyond the scope of this Article, though examples are not hard to imagine. Neither an applicant nor an enrolled student would have a winning free-speech claim, for example, if the reason for the school's adverse decision was that the student had threatened another member of the campus community within the meaning of the Court's "true threats" doctrine.[186] Rather than try to catalogue every such circumstance, my aim here is to propose a methodological premise that involves all of them—namely, that the First Amendment fates of applicants and enrolled students should be analytically linked when evaluating statements that applicants have made outside the application process.

One crucial point of caution is in order, however, concerning the public/private distinction that looms so large in the public-employment setting. Recall that, when determining the First Amendment protection that public employees receive, courts rely heavily upon *Pickering*'s distinction between speech on public and private matters, and they use that distinction when determining the First Amendment rights of job applicants.[187] That is true even for speech that applicants utter outside the application process. In *MacFarlane v. Grasso*, for example, James MacFarlane alleged that Connecticut officials denied his application for a job with the Connecticut Army National Guard because, in the months prior to filing his application, he had vocally complained about the manner in which some of his prior interactions with state figures were handled.[188] Turning to *Pickering* and

186. Virginia v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

187. *See supra* Sections III.A.1, III.A.2.

188. *See* MacFarlane v. Grasso, 696 F.2d 217, 219–20 (2d Cir. 1982).

the speech rights of current government employees for direction, the Second Circuit remanded so that the district court could determine whether MacFarlane's pre-application complaints had been on a public or private matter.[189]

Deploying the public/private distinction is a non-starter when it comes to determining the speech rights of postsecondary students and applicants. Although it is true that "[s]peech on matters of public concern is at the heart of the First Amendment's protection,"[190] it is primarily in the public-employment context that courts routinely give the public/private distinction such highly consequential weight.[191] Indeed, courts have disclaimed reliance on that distinction when adjudicating the speech rights of college and university students. The case that set that ball in motion was the Supreme Court's 1973 ruling in *Papish v. Board of Curators of the University of Missouri*.[192] In *Papish*, the Court vindicated a graduate student's First Amendment right to distribute a newspaper that depicted police officers "raping the Statue of Liberty and the Goddess of Justice" and that used profane language to describe an individual's criminal trial.[193] This undoubtedly was speech on matters of public concern, and the Court did indeed rule in the student's favor, but the Court said nothing at all about the public/private distinction it had drawn five years earlier in *Pickering*. Instead, the Court simply found that campus officials had impermissibly discriminated against the student based on the contents of her speech.[194]

Lower tribunals have attached great significance to the *Papish* Court's decision to forego any reliance on *Pickering*. In *Qvyjt v. Lin*,[195] for example, a graduate student brought a First Amendment retaliation claim against a group of faculty members, who in turn argued that they were entitled to qualified immunity because the student's speech had been on a private matter

189. *See id.* at 219; *see also supra* notes 153–54 and accompanying text (discussing *Pickering*). Or imagine that a public employer refuses to hire an applicant because it has discovered that the applicant posted nude photos of herself online. The applicant has no claim under the Speech Clause, because her speech was on a matter of mere personal interest. *See* DIANE M. JUFFRAS, UNIV. OF N.C. SCH. OF GOV., USING THE INTERNET TO CONDUCT BACKGROUND CHECKS ON APPLICANTS FOR EMPLOYMENT 11–12 (2010).

190. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion)).

191. *See, e.g.*, *McFarlane*, 696 F.2d at 223–24.

192. Papish v. Bd. of Curators, 410 U.S. 667 (1973) (per curiam).

193. *Id.* at 668. The story about the trial and acquittal bore the headline "Motherfucker Acquitted." *Id.*

194. *See id.* at 670–71.

195. Qvyjt v. Lin, 953 F. Supp. 244 (N.D. Ill. 1997).

and so fell outside the First Amendment's protection.[196] The Northern District of Illinois rejected that defense, finding that it "was clearly established by no later than 1973, when the Supreme Court decided *Papish*, that state university officials cannot retaliate [against] or punish a graduate student for the content of his speech, regardless of whether that speech touches matters of public or private concern."[197] Other courts have similarly concluded that the public/private distinction does not drive the outcome in cases involving the speech rights of college and university students.[198]

That surely is the right conclusion. As I have stressed,[199] broad rights of free expression are essential to the missions of institutions of higher education.[200] The authors of the University of Chicago's influential statement on free speech put it well when they explained that colleges and universities today "should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the questioning of stubborn assumptions, can flourish in an environment of the greatest freedom."[201] The Court has similarly recognized that "[t]he

196. *Id.* at 245; *see also supra* notes 20–22 and accompanying text (discussing qualified immunity).

197. *Qvyjt*, 953 F. Supp. at 249; *see also id.* at 247–48 ("[T]he governmental interests present in a governmental employer-employee relationship . . . are simply not present in the state university-student relationship before this court.").

198. *See, e.g.*, Guse v. Univ. of S.D., No. CIV. 08-4119-KES, 2011 WL 1256727, at *16 (D.S.D. Mar. 30, 2011) ("[I]n the context of public university students, the Supreme Court has not applied the public concern test."); Castle v. Appalachian Tech. Coll., No. 2:07-CV-0104-WCO, 2008 U.S. Dist. LEXIS 127106, at *8 (N.D. Ga. Jan. 16, 2008) ("Defendants have not presented to the court a single authority that stands for the proposition that the free speech claims of students should be held to the same standard as those of public employees, and if there is a good reason for equating the claims, it is lost on the court.").

199. *See supra* notes 25, 147 and accompanying text.

200. *See* DONALD ALEXANDER DOWNS, FREE SPEECH AND LIBERAL EDUCATION: A PLEA FOR INTELLECTUAL DIVERSITY AND TOLERANCE 29–80 (2020) (explaining why freedom of expression is central to the mission of modern American universities); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 9–27 (2018).

201. GEOFFREY R. STONE ET AL., UNIV. OF CHI. OFF. OF THE PROVOST, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION 1 (2015). The authors of the Chicago Statement elaborate on the importance of uninhibited inquiry in higher-education communities:

> Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations

Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection,'"[202] and that "[t]eachers 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."[203] Introducing *Pickering*'s public/private distinction in that setting would chill vast swaths of valuable student expression.[204] When students talk to one another in the cafeteria about issues of politics or religious faith, for example, their speech might sometimes be more about expressing crises of self-understanding than about discussing matters of public interest. We would inflict enormous damage on schools' ability to serve some of their most important social functions if we required risk-averse students to sort through the public/private distinction before saying things that others might find upsetting, and if campus officials

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> on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community "to discuss any problem that presents itself."
>
> Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

*Id.* at 1–2 (quoting former University of Chicago President Robert M. Hutchins). Dozens of institutions have adopted the Chicago Statement. *Chicago Statement: University and Faculty Body Support*, FIRE (Sept. 23, 2021), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/ [https://perma.cc/P86W-7TGX]. For elaboration on the Chicago Statement by one of its principal authors, see Geoffrey R. Stone, *Free Speech on Campus: A Challenge of Our Times*, *in* SPEECH FREEDOM ON CAMPUS: PAST, PRESENT, AND FUTURE 5, 5–19 (Joseph Russomanno ed., 2021).

202. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

203. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

204. *See* Qvyjt v. Lin, 932 F. Supp. 1100, 1109 (N.D. Ill. 1996) ("It would be incredulous to think that the university has carte blanche to retaliate against any student as long as the speech was of a private concern or was made to vindicate the student's private interest. Defendants' position, if adopted, would have a significant chilling effect upon students' ability to express their opinions, beliefs and ideas."); *see also* Connick v. Myers, 461 U.S. 138, 147 (1983) ("We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.").

could discipline students for speech whenever it falls on the private side of the line. When using the speech rights of enrolled students to determine when prospective students can speak freely outside the admissions process without fear of admissions repercussions, we thus must look past the public/private distinction and focus on other, more broadly applicable First Amendment principles.

### *B. The Speech Rights of Students Facing Professionalism Restrictions*

I noted earlier that there are some types of speech that the First Amendment does not require the government to tolerate, regardless of whether the utterances occur on a public campus or in society at large—incitement and true threats are examples.[205] And, as we saw when examining *Hazelwood*'s influence in postsecondary settings, numerous courts have concluded that the First Amendment permits the government to pedagogically regulate students' curricular speech when it is acting in the role of postsecondary educator.[206] I now return to *Hazelwood* in order to think further about when students' speech is indeed curricular in nature and about why educators' regulation of curricular speech deserves deference. Traveling through this important terrain sets essential context for discussing First Amendment limits on professional schools' ability to respond adversely to student speech on professionalism grounds. Once again, I start by looking to the First Amendment law of public employment for guidance.

#### *1. The Nature of Curricular Speech and the Grounds for Its Regulation*

The analogous public-employment principle of greatest use to us here flows from the Supreme Court's 2006 ruling in *Garcetti v. Ceballos*.[207] The *Garcetti* Court held that the First Amendment does not protect speech that government employees utter "pursuant to their official [job] duties."[208] The Court pointed out that the *Pickering* formulation was expressly crafted to protect a public employee's First Amendment right to speak "*as*

205. *See supra* note 60 and accompanying text.
206. *See supra* Section II.B (discussing *Hazelwood*'s influence in collegiate settings).
207. Garcetti v. Ceballos, 547 U.S. 410 (2006).
208. *Id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

*a citizen*" about public matters.[209] When employees speak instead to carry out the work that the government has hired them to perform, they are speaking as employees and not as citizens, and so the government enjoys all the speech-regulating prerogatives of an ordinary employer.[210] The government, in short, is entitled to get the speech it is paying for. This rule can lead to startling outcomes when employees are punished for speech that seems desirable in the grand scheme of things.[211] But it is, indeed, the rule. In *Garcetti* itself, for example, government supervisors were free to take adverse action against Richard Ceballos for reporting his belief that law enforcement officers filed a false affidavit to obtain a search warrant.[212] Ceballos made those statements pursuant to his duties as a prosecutor, so the Speech Clause did not shield him from any disadvantageous actions his employer took against him in response.[213]

Because so much rides on determining whether public workers are speaking as citizens or as employees, *Garcetti* requires courts to take great care when determining what an employee's job duties genuinely entail.[214] The *Garcetti* Court pointed out, for example, that employers cannot extend the reach of their speech-regulating powers by writing artificially broad

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209. *See id.* at 417–18 (emphasis added); *see also supra* notes 152–54 and accompanying text (discussing *Pickering*).

210. *See Garcetti*, 547 U.S. at 418 (stating that, when an employee does not speak as a citizen, he or she "has no First Amendment cause of action based on his or her employer's reaction to the speech"); *id.* ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."); *id.* at 422–23 ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. . . . Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."); *id.* at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

211. *See, e.g.*, Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 344 (6th Cir. 2010) (holding that the First Amendment allowed a high school to refuse to renew the contract of a teacher who had assigned her students the task of writing a report on why certain books were regarded as controversial), *cert. denied*, 564 U.S. 1038 (2011); Bradley v. James, 479 F.3d 536 (8th Cir. 2007) (holding that the First Amendment allowed a campus police officer to be fired after he told investigators that the campus chief of police might have been drunk when responding to an incident on campus); Battle v. Bd. of Regents, 468 F.3d 755 (11th Cir. 2006) (holding that the First Amendment allowed a university to refuse to renew a financial aid officer's contract after she told the university president that the officer's supervisor might have been committing fraud).

212. *See Garcetti*, 547 U.S. at 420–21.

213. *Id.*

214. *See id.* at 424–25.

job descriptions.[215] What matters, the Court said, are "the duties an employee actually is expected to perform."[216] Public employers' speech-regulating authority thereby remains tethered to its underlying rationale: courts should allow supervisors to ensure that employees do their jobs in whatever ways supervisors think best.

Similarly, as the Court later explained in *Lane v. Franks*,[217] there is a critical difference between speech one utters to carry out one's job responsibilities and speech one utters *about* one's job or about information obtained while doing one's job. Edward Lane had testified in the criminal trial of a state lawmaker regarding possible wrongdoing Lane discovered when auditing the expenses of a government program he directed.[218] After Lane was subsequently fired, he filed a First Amendment retaliation claim.[219] The Eleventh Circuit held that the Speech Clause did not protect Lane's testimony because it concerned matters Lane had discovered in the course of his employment.[220] The Supreme Court, however, unanimously reversed. "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment," Justice Sotomayor wrote for the Court.[221] "The critical question under *Garcetti* is whether the speech at issue *is itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[222] Finding that Lane was speaking as a citizen on a matter of public concern when he testified, the Court deployed *Pickering*'s balancing test and found his speech constitutionally protected.[223]

There are illuminating parallels between the *Garcetti*/*Lane* regime and lower courts' finding under *Hazelwood* that the First Amendment permits instructors at public colleges and universities to wield broad power over their students' curricular speech.[224] In both settings, individuals voluntarily

215. *Id.* at 424.
216. *Id.* at 424–25.
217. Lane v. Franks, 573 U.S. 228 (2014).
218. *Id.* at 231–33.
219. *Id.* at 233–34.
220. *Id.* at 235.
221. *Id.* at 239.
222. *Id.* at 240 (emphasis added).
223. *Id.* at 242.
224. *See supra* Section II.B (discussing *Hazelwood*).

enter relationships with the government, relationships in which (a) the government sets much of the agenda; (b) individuals agree to play specified roles in executing that agenda; and (c) some portions of the government's agenda can be achieved only if the government is permitted to regulate speech that individuals produce when executing their role-based duties. Just as public employers decide what their employees' job duties will include, public educators decide what their students' programmatic learning activities will be. And just as public employers need the authority to regulate employees' job-performing speech in order to make sure the job gets done right, public educators need the authority to supervise "expressive activities" that can "fairly be characterized as part of the school curriculum"[225] in order to make sure students "learn whatever lessons the activity is designed to teach."[226]

In both the public-employment and postsecondary-education settings, moreover, individuals retain substantial freedom to speak outside their roles: employees have as much expressive freedom as *Pickering*'s balancing test affords when they speak as citizens on matters of public concern,[227] while students enjoy the full range of ordinary First Amendment protections when they speak in circumstances to which *Hazelwood*'s deferential standard does not apply.[228] When determining whether employees and students are speaking pursuant to their role-based duties, therefore, the First Amendment stakes can be enormous.

When students challenge their instructors' pedagogical responses to speech that they produced pursuant to their duties as students, it is virtually inconceivable that courts would apply anything other than a highly

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225. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

226. *Id.*; *see also id.* (stating that deference to teachers' pedagogically motivated speech restrictions is appropriate when the speech is uttered in activities that are "designed to impart particular knowledge or skills"). Two rationales offered by the *Hazelwood* Court for deferring to school officials' judgments about student speech will rarely be relevant on college campuses. First, the Court said that school officials should be permitted to ensure that students "are not exposed to material that may be inappropriate for their level of maturity." *Id.* But the Court has never permitted concerns about adults' immaturity to justify speech restrictions in society at large, and there is no reason to proceed differently when the restrictions are imposed in campus communities. Second, the Court said schools need to ensure that students' speech is "not erroneously attributed to the school." *Id.* This might occasionally be relevant in postsecondary settings—perhaps when dealing with a school's yearbook, for example—but not often. When a student is writing a seminar paper, talking with classmates in a study group, or posting messages on Facebook, for example, suspicions of institutional authorship will not reasonably arise.

227. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

228. *Hazelwood Sch. Dist.*, 484 U.S. at 266–67.

deferential standard of review. As *Hazelwood* pointed out, education is primarily the business of educators, "not of federal judges."[229] The Court made a similar point in *Garcetti*, emphasizing that the First Amendment does not "empower [public employees] to 'constitutionalize the employee grievance.'"[230] The *Garcetti* Court refused to adopt a rule that

> would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents.[231]

Just as "there would be little chance for the efficient provision of public services" if government employers did not have "a significant degree of control over their employees' words and actions,"[232] teachers at public colleges and universities could not effectively perform their teaching functions if students could bring plausible First Amendment free-speech claims each time they were disappointed with a grade or felt an instructor had not given their curricular expression its due.[233]

Taking public-employment cases as our guide, a legal standard for public colleges and universities thus comes into focus. Courts should defer to postsecondary educators' pedagogical regulation of student speech—that

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229. *Id.* at 273; *cf.* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 686 (2010) ("Cognizant that judges lack the on-the-ground expertise and experience of school administrators, . . . we have cautioned courts in various contexts to resist 'substituting their own notions of sound educational policy for those of the school authorities which they review.'" (quoting Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 206 (1982), *superseded by statute*, Individuals with Disabilities Education Act Amendments, 20 U.S.C. §§ 1400–1500 (original version at ch. 30, §§ 1400–1487, 111 Stat. 37–157 (1997))). The 1997 amendments to the Individuals with Disabilities Education Act (IDEA) overruled *Rowley*'s "some benefit" standard and required "an [individual education plan] to confer 'meaningful educational benefit' gauged in relation to the potential of the child at issue." Deal v. Hamilton Cnty. Bd. Of Educ., 392 F.3d 840, 862 (6th Cir. 2004).

230. Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)).

231. *Id.* at 423.

232. *Id.* at 418.

233. *Cf.* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 100 (2008) ("[I]nstitutions of higher education must necessarily evaluate the content and quality of speech in order to perform their function.").

is, student speech is genuinely *curricular* in nature—only when students produced that speech to carry out their duties in faculty-prescribed learning activities. If that is the capacity in which students have spoken on a given occasion, then judicial deference to instructors' pedagogical responses is likely appropriate because it enables instructors to execute the school's educational agenda, an agenda that students embraced when they voluntarily enrolled in the academic program. If that is *not* the capacity in which students have spoken, then *Hazelwood* deference is inappropriate because, for First Amendment purposes, students have spoken simply as citizens, akin to public employees who have spoken outside the scope of their job duties.

Some student speech is easily classified. When students give class presentations, contribute to classroom discussions, or write answers to examination questions, for example, they clearly are speaking pursuant to their responsibilities as students in faculty-prescribed learning activities. Instructors ask students to speak in these ways to help them learn—and to determine whether they have indeed learned—whatever the instructors aim to teach them.[234] So long as instructors' responses to the speech are (as

234. We might even say that, if faculty do not respond to the student speech with a message of correction or disapproval in these instances, the speech "bear[s] the imprimatur of the school." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988). *Hazelwood*'s use of the word "imprimatur" has created some confusion in important quarters. I take it as clear, when read in context, that the Court used that term in two complementary senses: it encompasses speech that some might reasonably perceive to be the school's own expression and it also encompasses speech that some might reasonably perceive to be student-authored expression that enjoys the school's approval. *See id.* at 271–72 (speaking of a school's need to ensure that "the views of the individual speaker are not erroneously attributed to the school" as well as a school's need "to set high standards for the student speech that is disseminated under its auspices"); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1137 (Philip Babcock Gove ed., 2002) (defining imprimatur as "a sign or mark of approval"). It is the second of those two senses that I have in mind here. Before his elevation from the Third Circuit to the Supreme Court, however, then-Judge Alito wrote an opinion taking a narrower view of *Hazelwood*'s use of the term "imprimatur." He wrote that *Hazelwood*'s deferential standard is appropriate only when the speech at issue could be perceived as the school's own speech. *See* Saxe v. State Area Coll. Sch. Dist., 240 F.3d 200, 213–14 (3d Cir. 2001) (stating that "*Hazelwood*'s permissive 'legitimate pedagogical concern' test governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself"); *see also id.* at 214 ("Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern."). Judge Alito drew that interpretation from remarks the Court made in *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995). *See Saxe*, 240 F.3d at 213–14 (quoting *Rosenberger*, 515 U.S. at 833–34). In the *Rosenberger* passage that Judge Alito quoted, however, the Court was merely contrasting the government's own speech and private individuals' speech in limited public forums; the

the *Hazelwood* Court put it) "reasonably related to legitimate pedagogical concerns,"[235] judicial deference to those responses is appropriate.

The standard proposed here helps us sort through other scenarios, as well. Suppose, for example, that students gather in the hallway after class one day to talk about the course material, or they meet in a coffee shop later that night for the same purpose. And suppose their instructor later finds out that one of the students made certain statements during the conversation—statements that, in the instructor's judgment, present a good teaching opportunity. If the instructor takes adverse action against the student for pedagogical purposes and the student responds with a First Amendment retaliation claim, *Hazelwood* deference to the instructor's action is improper. Even though the instructor may have acted based on reasonable pedagogical concerns, the student did not utter the speech pursuant to faculty-prescribed course requirements. The instructor did not ask students to conduct the conversation in which the student made his or her statements. The speech is thus akin to that of a government employee who speaks about her job or about information she obtained while doing her job, but who nevertheless is not executing the duties of her job when she speaks. Like that employee, our student here is speaking simply as a citizen. The student's First Amendment retaliation claim might or might not have merit, but *Hazelwood* deference should not play into the analysis.

Other scenarios will require a more fact-intensive examination akin to the analysis courts sometimes conduct to determine what a public employee's duties actually are. Suppose, for example, that an instructor divides her students into groups and assigns each group the task of making a class presentation. The students in one of the groups meet over the weekend to discuss their presentation plans, and during that discussion one of the students makes a statement that the group's other members relay to the

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Court did not purport to describe the extent of *Hazelwood*'s reach. Nor does *Hazelwood* itself clearly invite Judge Alito's interpretation: readers of the student newspaper in that case might have believed that the school approved of the newspaper's contents—and that the newspaper was thus an unobjectionable product of the school's curriculum—but they likely would not have believed that stories attributed to student authors were really the speech of the school itself. I proceed here under the broader reading of *Hazelwood*—one that sees the possibility of school approval as a factor indicating that *Hazelwood*'s deferential standard is appropriate.

235. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

instructor. Can the instructor respond to the speech adversely for pedagogical purposes, confident that she is proceeding within the bounds of *Hazelwood* deference? It depends.

Just as it is up to employers to define the job duties to which *Garcetti*'s deference regime attaches, universities and their faculties have broad latitude to decide what to teach and how to teach it.[236] If instructors extend the reach of their pedagogy beyond traditional student-faculty encounters, the reach of *Hazelwood* deference should extend along with it. Perhaps our instructor here created the group assignment so that (among other things) she can use the presentation-preparation process to teach skills of teamwork and collaboration. If that is the case, the students' course duties include interacting with one another in their weekend meeting, and the instructor should have all the leeway that *Hazelwood* affords to pedagogically respond to that speech. Syllabi, published grading criteria, class announcements, mechanisms for monitoring students' performance when students interact outside the instructor's presence, and the like can all help substantiate an instructor's claim that a given expressive activity is indeed among his or her students' responsibilities.

But if those students are not obliged to engage in those interactions and their sole faculty-prescribed duty is to make the class presentation together —that is, if the instructor's teaching is focused entirely on the presentation, such that students are permitted to decide how to prepare or whether to prepare at all—then it is only the instructor's assessment of the presentation that falls within the *Hazelwood* rule. The speech that students produce during their weekend conversation is now the speech of mere citizens talking about their course obligations or about information they obtained while carrying out those course obligations. Their speech, in other words, is akin to Edward Lane's.[237]

When determining which speaking activities are duties and which are not, *Garcetti* reminds us not to mistake form for substance. Just as a public employer cannot extend its speech-regulating power by writing artificially broad job descriptions that do not fairly describe what employees are actually paid to do,[238] an instructor cannot claim that expressive activities are among his or her students' course obligations when, in fact, they are not. *Hazelwood* deference is not brought into play, for example, merely because an instructor encourages his or her students to study or prepare together or writes a syllabus

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236. *See supra* note 26 and accompanying text (noting Justice Frankfurter's description of the "four essential freedoms of a university").

237. *See supra* notes 217–23 and accompanying text (discussing *Lane*).

238. *See supra* note 215 and accompanying text (discussing this portion of *Garcetti*).

declaring that he or she may pedagogically regulate any course-related statements that a student makes on any occasion. Such declarations have no greater power to transform citizen speech into role-performing speech than does a comparable declaration in a public employee's overly broad job description. Life itself, after all, is neither a job obligation nor a faculty-prescribed learning opportunity. The focus belongs on activities that schools and instructors say students must complete in order to meet the requirements of their courses and academic programs. Even if acting with the best pedagogical intentions, instructors who adversely regulate student speech outside those parameters are properly at risk of having their actions judicially evaluated without the benefits of *Hazelwood* deference.[239]

Might it nevertheless be possible for the leaders of at least some academic programs to conclude that the knowledge and skills they aim to teach pervade so many life activities that, in some ways, life itself *is* a learning opportunity,[240] and school officials should have broad leeway to regulate students' on- and off-campus speech accordingly? That question takes us to the speech-regulating power of professional schools.

### *2. Students in Professional-Degree Programs*

When the Supreme Court rejected a public high school's effort to punish B.L. for her profane Snapchat post about cheerleading,[241] one of the reasons it cited concerned the implications of allowing K-12 schools to regulate their students' speech twenty-four hours a day, seven days a week. "From the student speaker's perspective," Justice Breyer wrote for the Court,

239. *Cf. supra* notes 91–94 and accompanying text (discussing pretextual justifications).

240. *Cf.* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 686 (2010) ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.").

241. *See supra* notes 1–11 and accompanying text (discussing Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021)).

> regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.[242]

Concerns about non-stop surveillance are certainly no less acute when the students are adults—adults immersed, no less, in academic programs that encourage deeper engagement with the surrounding world. As the Supreme Court put it more than half a century ago, "First Amendment freedoms need breathing space to survive."[243] That is at least as true among college and university students as it is among other segments of society.[244] Yet breathing space is scarce indeed if student expression is under instructors' ceaseless supervision.

But some academic programs might be unusually suitable for a wide-ranging pedagogical approach. To spark one's thinking about such matters, consider a private school that trains students for religious vocations. The First Amendment does not apply here, of course, but that does not prevent us from making an important observation about the nature of the program. We can readily imagine ways in which the program's leaders might expect their students to conduct themselves, no matter what the occasion or circumstances. The Duke Divinity School, for example, has a "Code of Ethics for Social Media," which states in pertinent part:

> We, the faculty and students in the Divinity School of Duke University, commit to maintain a code of ethics concerning our speech and activity on social media networks. We commit to tell the truth, to be honest and fair, to be accurate, and to be respectful. We also commit to be accountable for any mistakes and correct them promptly. We will be cognizant of the fact that social media exists in a public forum, and hence we will be cautious and responsible about what we put out in the public sphere.[245]

Public colleges and universities do not have programs aimed at training students for ministerial careers,[246] but they do often have programs that prepare students for professions whose practitioners are expected to carry

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

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

244. *See supra* notes 25, 199–204 and accompanying text (discussing the importance of free expression in college communities).

245. *Conduct Covenant*, DUKE DIVINITY SCH., https://divinity.duke.edu/for-students/academic-resources/conduct-covenant [https://perma.cc/8ZQ7-79L9].

246. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); Everson v. Bd. of Educ., 330 U.S. 1, 8, 14–16 (1947) (finding that states are bound by the Establishment Clause).

out their work under broad, speech-related ethical constraints. In its official commentary on the Model Rules of Professional Conduct, for example, the American Bar Association states that, when "participating in bar association, business or social activities in connection with the practice of law," lawyers must not engage in "harmful verbal . . . conduct that manifests bias or prejudice towards others."[247] In its Principles of Ethics and Code of Professional Conduct, the American Dental Association states that dentists have an "obligation to provide a workplace environment that supports respectful and collaborative relationships for all those involved in oral health care."[248] The American Nurses Association's Code of Ethics declares that "[t]he nurse creates an ethical environment and culture of civility and kindness, treating colleagues, coworkers, employees, students, and others with dignity and respect."[249]

Suppose a professional school decides that, to educate students about those or other ethical standards, it will regulate students' on- and off-campus speech in various relevant ways.[250] A nursing or dental school, for example, might require its students to speak to one another with "respect" no matter where or when they find themselves in communication with one another, while a law school might monitor its students' in- and out-of-class interactions for signs of "bias or prejudice." So that we can focus specifically on issues concerning *Hazelwood* deference, assume that a school manages to express those sorts of expectations in a manner that is sufficiently clear and well-tailored to avoid problems of vagueness and overbreadth.[251] If a student

247. MODEL RULES OF PRO. CONDUCT r. 8.4 cmts. 3–4 (AM. BAR ASS'N 1983). This rule raises substantial First Amendment concerns that I do not address here. *See, e.g.*, Greenberg v. Haggerty, 491 F. Supp. 3d 12, 30 (E.D. Pa. 2020) ("The Court finds that the Amendments, Rule 8.4(g) and Comments 3 and 4, are viewpoint-based discrimination in violation of the First Amendment.").

248. PRINCIPLES OF ETHICS & CODE OF PRO. CONDUCT r. 3.F (AM. DENTAL ASS'N 2020).

249. CODE OF ETHICS FOR NURSES r. 1.5 (AM. NURSES ASS'N 2015).

250. *See supra* Section II.C (discussing cases involving such regulations).

251. The assumption I ask readers to make here is a large one. *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 543 (2009) ("Speech codes facing constitutional challenges have been uniformly struck down in recognition of the fact that they violate the fundamental expressive rights of students. As these cases have demonstrated, speech codes are constitutionally infirm on the grounds of overbreadth, vagueness, content-based and viewpoint-based discrimination, or a combination thereof."). *See generally* United

violates those expectations on Facebook, on Twitter, or elsewhere, does the First Amendment permit school officials to respond adversely so long as the response is—as the *Hazelwood* Court put it—"reasonably related to legitimate pedagogical concerns"?[252]

Taking guidance from *Garcetti* and *Lane*, I have argued that courts should defer to postsecondary educators' pedagogical regulation of student speech only when students produced that speech to carry out their duties in faculty-prescribed learning activities.[253] When learning activities are ones that instructors have created and assigned—such as a seminar paper, a class presentation, or a group project for which the instructors announce that they will pedagogically evaluate the students' interactions—it is clear that the instructors can include professionalism standards among the things they aim to teach and can pedagogically respond on professionalism grounds to speech that the students produce when carrying out the activity. As the Eleventh Circuit found in *Keeton v. Anderson-Wiley*,[254] teaching students to comply with a profession's ethical requirements is undoubtedly a legitimate pedagogical goal.[255]

The harder cases are those in which schools seek to impose professionalism standards for speech that students produce *outside* activities that instructors themselves have created and assigned.[256] Recognizing that "[a] student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom,"[257] can schools wishing to teach students relevant ethical standards designate wide swaths of out-of-class interactions as learning

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States v. Williams, 553 U.S. 285, 292 (2008) ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech."); *id.* at 304 ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (citing Hill v. Colorado, 530 U.S. 703, 732 (2000))).

252. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); *see supra* notes 61–72 and accompanying text (discussing *Hazelwood*).

253. *See supra* text following note 233 (arriving at this formulation).

254. Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011).

255. *Id.* at 876; *see also supra* notes 96–99 and accompanying text (discussing *Keeton*).

256. *See supra* Section II.C.2 (discussing such cases). Some commentators take a hard line against permitting schools to regulate such speech. *See, e.g.*, 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.").

257. Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017); *see also supra* notes 112–27 and accompanying text (discussing *Keefe*).

activities, and pedagogically charge students with the duty of obeying specified ethical standards in those interactions? Can a school, in other words, prescribe life itself as part of its curriculum, such that a large quantity of off-campus student speech is rendered curricular in nature and thus susceptible to schools' pedagogically reasonable regulation?

If we turn once again to the law of public employment for direction, we will not find this path entirely foreclosed. Some government employees, after all, can be assigned speech-related duties that cover a broad range of human encounters. A government department presumably could tell its salaried spokesperson, for example, that her job includes always presenting the department's work in a favorable light when speaking about the department in public settings.[258] Such an employee might give a wonderful performance at a press conference but nevertheless find herself out of a job if she then goes to her daughter's basketball game and tells those in the stands around her that her office is a ship of fools.[259] For pedagogical reasons, a professional school might wish to cast a similarly broad net when designating the circumstances in which students—on pain of unhappy consequences—are expected to conform their speech and behavior to the profession's ethical standards.

For help in determining whether the Speech Clause allows educators to chart such a course, let us return to where we began: the Court's 2021 ruling in *Mahanoy Area School District v. B.L.*[260] Recall that the Court in that case held that the First Amendment barred a public high school from disciplining one of its students for her profane Snapchat post regarding the school's cheerleading program.[261] Joined by Justice Gorsuch, Justice Alito filed a concurring opinion, proposing ways to close some of the jurisprudential gaps that Justice Breyer's majority opinion left open.[262] "I start,"

258. *See supra* notes 207–16, 222–26 and accompanying text (discussing *Garcetti*).

259. *Cf.* Disabato v. S.C. Ass'n of Sch. Adm'rs, 746 S.E.2d 329, 342 (S.C. 2013) ("[A] public employee speaking in the course and scope of her duties as a spokesperson for the government's message has no First Amendment right to avoid restrictions on that speech.").

260. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

261. *See supra* notes 1–11 and accompanying text (discussing *Mahanoy*).

262. *See Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2048 (Alito, J., concurring) ("I join the opinion of the Court but write separately to explain my understanding of the Court's decision and the framework within which I think cases like this should be analyzed.").

Justice Alito wrote, "with this threshold question: Why does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?"[263] He concluded that the answer "must be that by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights."[264] With respect to the facts of the case before him, Justice Alito found that, "whatever B.L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity."[265]

If adults can agree to give a public school the authority to regulate their children's speech, they certainly can agree to give a public school the authority to regulate speech of their own. Justice Alito made that very point:

> This understanding is consistent with the conditions to which an adult would implicitly consent by enrolling in an adult education class run by a unit of state or local government. If an adult signs up for, say, a French class, the adult may be required to speak French, to answer the teacher's questions, and to comply with other rules that are imposed for the sake of orderly instruction.[266]

When a professional school wishes to regard a broad range of ordinary human encounters as learning activities, thereby extending its speech-regulating power beyond activities that instructors create and assign for their own teaching purposes, Justice Alito's approach thus would have us pose the First Amendment inquiry this way: Can we reasonably say that, by enrolling in the school's academic program, students at least implicitly agreed that such regulation would be part of the curriculum?

That question, it turns out, fits nicely within our description of features that the *Garcetti*/*Lane* and *Hazelwood* regimes share. Recall that, in public-employment and postsecondary-education settings alike, individuals voluntarily enter relationships with the government—relationships in which the government sets much of the agenda, individuals agree to play specified roles in executing that agenda, and some portions of that agenda can be achieved only if the government is permitted to regulate speech that individuals produce when executing their role-based duties.[267] When a school seeks

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263. *Id.* at 2049–50.

264. *Id.* at 2051; *see also id.* at 2054 ("[T]he question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question.").

265. *Id.* at 2058.

266. *Id.* at 2051.

267. *See supra* notes 224–26 and accompanying text.

to regulate student speech beyond the scope of instructor-created learning activities, we are prodded to take a close look at the specifics of the arrangement. What, precisely, is the nature of the governmental relationship that students voluntarily entered? What agenda was the relationship formed to serve? Is the relationship one in which, for agenda-executing purposes, students' on- and off-campus speech can be broadly regulated on pedagogical grounds? Or is the school now imposing an agenda that was never part of what students signed up for in the first place?

Those, of course, are factual questions, the answers to which will vary from program to program. We cannot say as a categorical matter that all professional schools do or do not have the power to regulate out-of-class speech on professionalism grounds. At some schools, for example, the facts might show that students entered a relationship in which schools' regulatory reach extends to some of the interactions that students have with the public at large; some schools' off-campus reach might extend only to students' interactions with one another; and some schools' reach might extend no further than the learning activities that instructors have themselves created and assigned.

How do we distinguish one such program from another? Justice Alito again provides guidance. Focusing on schoolchildren and public K-12 schools, he argues that "the question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question."[268] In the cases of interest to us here, we would ask whether a reasonable student would have understood that the program in which the student speaker enrolled was one in which school officials could pedagogically regulate speech of the sort at issue in the given case. What a reasonable student would understand will depend primarily on how a school designs, markets, and implements its programs. But simply including pertinent language in a student handbook should probably never be sufficient. That is not how students ordinarily discover the instructor-created occasions on which their speech will be pedagogically evaluated, and it should not be how students are expected to discover that school officials might pedagogically respond to student speech in circumstances far removed from the classroom.

268. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2054 (Alito, J., concurring).

Because the First Amendment stakes for students here are so high—they face the prospect of having large quantities of their off-campus speech regulated by school officials—the school should carry the burden of proving that a reasonable student would have understood that the school could extend its reach to the speech in a given case, and the weight of that burden should be substantial. As the Supreme Court has explained,

> [t]he function of any standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." By informing the factfinder in this manner, the standard of proof allocates the risk of erroneous judgment between the litigants and indicates the relative importance society attaches to the ultimate decision.[269]

The "clear and convincing" standard of proof is appropriate here. Sitting on the spectrum between proof by a mere preponderance of the evidence and proof beyond a reasonable doubt, the "clear and convincing" standard requires the litigant on whom the burden is placed to show that "the truth of its factual contentions are 'highly probable.'"[270] A mere preponderance standard would be appropriate if money damages were the only thing at stake, because "application of [that standard] indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'"[271] The "clear and convincing" standard, in contrast, is appropriate "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money,'" such as when a litigant faces a significant deprivation of liberty.[272] Only a clear and convincing showing should suffice

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269. Colorado v. New Mexico, 467 U.S. 310, 315–16 (1984) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

270. *Id.* at 316.

271. Santosky v. Kramer, 455 U.S. 745, 755 (1982) (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

272. *Id.* at 756 (quoting *Addington*, 441 U.S. at 424). The *Santosky* Court concluded that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 747–48. Not all cases drawing the "clear and convincing" standard, however, concern matters as dire as that. *See, e.g.*, Nguyen v. Wash. Dep't of Health Med. Quality Assurance Comm'n, 29 P.3d 689, 689 (Wash. 2001) ("[T]he Due Process Clause of the United States Constitution requires proof by clear and convincing evidence in a medical disciplinary proceeding."). *But cf.* N.D. State Bd. of Med. Exam'rs v. Hsu, 726 N.W.2d 216, 228–30 (N.D. 2007) (noting that the appropriate standard of proof in medical disciplinary proceedings is a point of disagreement among courts, and concluding that a mere preponderance standard is appropriate).

to strip postsecondary students of their freedom to speak in ways that ordinarily would lie beyond a school's regulatory reach.

On the approach proposed here, litigation thus would proceed as follows. If a student made a prima facie showing that his or her school adversely responded to speech outside the scope of any instructor-created learning activity, the burden would shift to the school to prove it was highly probable that a reasonable student would have understood that the school could regulate student speech in circumstances like the plaintiff's. If the school carried its burden on that point, the court would then deferentially permit the school to regulate the speech in any manner reasonably related to legitimate pedagogical objectives, including objectives concerning ethical constraints individuals face in the profession for which the student-plaintiff was training. But if the school could not carry its proof burden, the student would receive all the protection that the First Amendment provides to adults in society at large, and the court would give no deference to the school's speech-regulating actions.[273]

## IV. CONCLUSION

Many had hoped the Supreme Court would use its ruling in *Mahanoy Area School District v. B.L.*[274] to clarify the First Amendment status of speech that K-12 students produce off campus, whether on social media or elsewhere.[275] Had the Court done so, we would know much more today about the constitutional principles that govern free-speech disputes in public elementary and secondary schools, and we might also be better equipped

273. Clay Calvert takes an entirely different approach to these disputes. He proposes that courts resolve them using a multifactor test involving what he calls "the Precision Principle," "the Essentiality Principle," "the Contextuality Principle," and "the Proportionality Principle." *See* Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN'S L. REV. 611, 648 (2017).

274. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

275. *See, e.g.*, Amy Howe, *Student's Snapchat Sets Up Major Ruling on School Speech*, SCOTUSBLOG (Apr. 27, 2021, 1:37 PM), https://www.scotusblog.com/2021/04/students-snapchat-sets-up-major-ruling-on-school-speech/ [https://perma.cc/ME2N-FZSP] ("In the internet era, in which cellphones and social media are omnipresent and many schools and parents worry about cyberbullying, the [C]ourt's ruling in Mahanoy Area School District v. B.L. could become a landmark decision on student speech.").

to navigate comparable areas of uncertainty in higher education. The Court nevertheless chose the path of patience, resolving the case before it on fact-intensive grounds that leave us almost as much in the dark as we were before.[276]

In this Article, I have focused on some of the First Amendment uncertainties that persist in the world of higher education. I have focused on two questions in particular. First, does the Speech Clause permit public undergraduate, graduate, and professional programs to deny applications for admission because of the applicants' speech on social media or in any other forum? Second, does the Speech Clause permit public professional schools (such as schools offering degrees in law, nursing, or dentistry) to discipline students for speech that violates those professions' ethical standards? To help lay the groundwork for my treatment of the second of those two questions, I also have inquired about the speech rights of undergraduate, graduate, and professional students in curricular settings of all kinds.

Guided in large part by the comparatively well-developed First Amendment law of public employment, the Article reaches three sets of conclusions. First, the Speech Clause does not constrain the ability of public colleges and universities to reject applicants based on things they say in their application materials and interviews. But when it comes to statements that applicants make *outside* the application process—whether on Snapchat, Facebook, or elsewhere—the Speech Clause does not allow a school to deny an application based on the applicant's speech unless the Speech Clause would permit the school to expel an enrolled student for the same expression. The speech rights of government employees are commonly used as a benchmark for determining the speech rights of applicants for government jobs, and a comparable approach for those seeking seats in public colleges' and universities' entering classes commends itself here.[277]

Second, both in the realm of public employment and in the realm of public postsecondary education, individuals have voluntarily entered relationships with the government—relationships in which the government sets much of the agenda, individuals agree to play specified roles in executing that agenda, and key portions of that agenda can be achieved only if the government is permitted to regulate speech that individuals produce when executing their role-based duties. Just as public employers need the authority to regulate employees' job-performing speech in order to make sure the job is done

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276. *See supra* notes 1–11 and accompanying text (discussing the Court's ruling in *Mahanoy*).

277. *See supra* Section III.A.

right, public educators need the authority to supervise students' curricular speech in order to make sure students learn whatever lessons the school is trying to teach. Courts should thus defer to postsecondary educators' pedagogical regulation of student speech only when students produced that speech to carry out their duties in faculty-prescribed learning activities. If that is not the capacity in which a student has spoken, then deference to educators' pedagogical judgments is inappropriate because, for First Amendment purposes, the student has spoken simply as a citizen, akin to a public employee who has spoken outside the scope of his or her job responsibilities.[278]

Third, when a professional school attempts to teach that profession's ethical standards by regulating students' on- and off-campus speech beyond the speech necessary to complete learning activities that instructors have themselves created and assigned, courts must look carefully at the nature of the relationship that students voluntarily entered when enrolling at that particular school. Is it a relationship in which, by enrolling, students have at least implicitly agreed that broad swaths of their lives will be designated as learning activities and that their speech in those activities can be pedagogically regulated accordingly? Or is the scope of the relationship narrower than that? To answer those questions, courts should ask what a reasonable student would have understood when enrolling in the program. Because the stakes for students' First Amendment freedoms are so high, a court should not defer to a school's pedagogical regulation of speech beyond the scope of instructor-assigned learning activities unless the school can show by clear and convincing evidence that a reasonable student would have understood that such regulation is part of the program. If the school carries that burden, then it should be permitted to regulate the speech in any manner reasonably calculated to achieve legitimate pedagogical goals. Those goals may include teaching students about the ethical obligations of individuals who work in the profession for which the students are training. But if the school fails to show by clear and convincing evidence that a reasonable student would have known that speech of the given sort was within the school's reach, then the student should receive all the protection that the First Amendment provides to adults in society at large.[279]

278. *See supra* Section III.B.1.
279. *See supra* Section III.B.2.