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On the Ground in Kansas: Social Media, Academic Freedom, and the Fight for Higher Education

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Abstract

This essay explores the Kansas Board of Regents' recently implemented rules addressing "Improper Use of Social Media" and faculty responses to this policy. Focusing on the moderate response that has predominated and the debates about the relationship between the First Amendment and academic freedom, the essay seeks, first, to elucidate the complexity of the issue by outlining the rules' link to the divestment of higher education and, second, to raise questions about the best tactics for resisting the erosion of academic freedom in conservative political climates. Ultimately, it contends that noncombative responses to the policy and arguments that fail to articulate academic freedom as a value distinct from "free speech" miss opportunities: the opportunity to illuminate the social forces that spawned this policy, the opportunity to defend higher education's unique social role, and the opportunity to remind the public that academic freedom is key to fulfilling this role.

I could be fired for writing this article. I probably won't. I hope I won't. But, according to the recently adopted rules of the Kansas Board of Regents (KBOR) on "Improper Use of Social Media," an article published in the AAUP *Journal of Academic Freedom* is subject to the same scrutiny as my Facebook comments and my tweets: as a "facility for online publication," this venue—and any other journal that makes articles

available online—is collapsed into the almost comically expanded category of “social media.”¹ In addition, this article is written “pursuant to [my] official duties,” because scholarly writing—including work about professional issues—is part of my job (in fact, as I write this article, I can’t avoid the irony that, as research, it increases my chances for tenure, yet it also produces a slim chance I will be suspended, dismissed, or terminated). Thus, if my university’s “chief executive officer” decides that what I write is “contrary to the best interest of the university,” I can be disciplined, up to and including termination.

Several aspects of this new policy are troubling: the power it grants to university administrators; its willful overextension of recent case law; its alternately broad and vague definitions of “best interest[s]” and “social media”; its claimed right to discipline employees whose social media use “impairs . . . harmony among coworkers”; and the simple fact that the rules appear in the “Suspensions, Terminations, and Dismissals” section of KBOR’s policy manual, alongside the consequences of “Felony Conviction” and “financial exigency.” Statements by the AAUP, the American Civil Liberties Union (ACLU), and the Foundation for Individual Rights in Education (FIRE), as well as numerous articles—like those found recently in *Inside Higher Ed* and many newspapers in Kansas—have shown that the policy is poorly conceived (and even more poorly written) and that it significantly erodes tenure, shared governance, and academic freedom. The new rules clearly disregard—perhaps even attack—the AAUP’s recommendation that “academic freedom, free inquiry, and freedom of expression . . . be limited to no greater extent in electronic format than they are in print.”² Put bluntly, the policy has been adequately excoriated by virtually every defender of free speech and academic freedom: it is irreconcilable with even the most basic understanding of these standards.

Instead of rehashing the policy’s failures, then, I hope to address our responses to it. As a faculty member at a KBOR university, I’ve had a front-row seat for many of the internal debates about how best to address the social media policy. This essay outlines two important aspects of these debates. First, the ongoing uncertainty about how to change the policy—about how to construct the most *effective* response: How aggressive should we be in both our rhetoric and our actions? As KBOR gently backedpedaled, faculty response tempered: while initially many expressed outrage, directing their ire *against* KBOR, that unrest transformed into a stolid resolve to work *with* KBOR—to fix the policy. Second, the intersections of free speech and academic freedom. Some of my colleagues insist that this issue requires only an appeal to the First Amendment—that we need not even make an argument for academic freedom, because academic freedom is merely an instance of free speech. Obviously, both of these debates circulate around tactics. Unfortunately, though, I question whether we have failed to apprehend the full complexity of recent events. The social media policy is not merely an isolated, misguided instance of overreach. Rather, it is articulated to a broader divestment—material and social—in higher education. In what follows, then, I argue that both the softening of faculty outrage and the failure to recognize the unique nature of academic freedom risk further eroding

academic freedom in Kansas. Ultimately, I contend that KBOR's social media policy calls for a response that fully recognizes the stakes of this battle, not only for academic freedom but also for higher education.

The Problem of Moderation

By most accounts, the social media policy comes as a response to University of Kansas professor David Guth's tweet, written in the wake of the September 2013 shooting at the Washington, DC, Navy Yard: "The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you." The university promptly suspended Guth. These events inspired two distinct threads of outrage. On one hand, many were disgusted by Guth's comments, reading them as at best insensitive and at worst as calling for violence against gun advocates. Some Kansas legislators called for Guth's dismissal. This punitive impulse inspired, on the other hand, a defense, not of Guth's comments, but of his right to express them: he did not claim to speak for the University of Kansas; his statement had little to do with his job; therefore the university had neither a need nor a right to discipline him.

Three months later, KBOR released a statement announcing its new "Language Regarding Improper Use of Social Media," which explained why this policy was needed: "Recognizing the Kansas Board of Regents Policy Manual currently has no provisions specifically dealing with the use of social media, today the Board approved a policy that aims to respect and protect the rights of individuals to speak freely while also addressing employees' responsibility to the university."³ In other words, Guth's tweet and its aftermath elucidated—or perhaps produced—a policy void: the social media policy scaffolds punishment for future electronic communication (that is unpopular or offensive).

Response to the new policy was swift: editorials appeared in newspapers across the country; faculty members publicly expressed their disappointment; and, poetically, there appeared a Facebook page called "Kansas Universities Faculty & Staff against Regents' Speech Policy." Within two weeks, the outcry was great enough to prompt KBOR "to form a workgroup of representatives from each state university campus to review the policy." This workgroup was charged with making "recommendations for amendments to the policy."⁴ This step back produced a pause of sorts, a sigh of relief: KBOR heard us. Cynics like me, however, noted a subsequent modulation as outrage morphed into dissatisfaction. We wondered if KBOR's "workgroup" was a half measure intended to diffuse the backlash and delay any action (until April, when the workgroup submitted—and KBOR rejected—its recommendations). To our credit, many faculty members continued to criticize the policy, and, even during winter break, the official faculty bodies worked to produce statements about it.

My university's faculty senate met in two emergency sessions to draft and pass a resolution about the social media policy. Some early proposals for this resolution were worded strongly, calling for the policy to be "condemned" and "repealed." Many of our faculty, however, wished not to be combative. Our faculty senate eventually passed a moderate resolution "requesting that the enforcement of the 'Improper Use of Social Media' policy be suspended pending elimination or amendment of the policy based upon the recommendations of the workgroup." In other words, we asked for a temporary stay so that we might work *through* the mechanism created by KBOR to fix the policy written by KBOR. In part following this resolution, the state's Council of Faculty Senate Presidents asked KBOR "to suspend [the policy] until after the appointed workgroup has put forth their recommendation." Unsurprisingly, KBOR refused.

I respect my colleagues who take a measured approach. They often see greater results than I get from agitation. In this case, however, I fear a unique confluence of factors led to an unnecessarily moderate approach (which, incidentally, has not worked thus far). First, the Guth affair created an atmosphere in which, conventional wisdom insists, *something* has to be done. As I spoke with colleagues shortly after the policy was approved, I repeatedly heard about "pressure" from the legislature: Kansas's political climate dictated that the regents could not sit idly by.⁵ The social media policy, then, was unsurprising, even if it was executed clumsily. Then, when confronted with widespread disaffection, KBOR relented just enough to allow for hope: maybe the workgroup could fix the policy. Together, the Guth affair and KBOR's seeming—yet belated—reasonableness transformed justified outrage into a much more timid reaction: "Inevitably some social media policy will be implemented, so why not use the workgroup to shape the policy into its most palatable form?"⁶

We need no such policy. Thus, we should unequivocally condemn this policy. Yes, some parts of the policy are acceptable, but these parts are already law. For instance, the policy prohibits "disclos[ing] without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data."⁷ We do not need a policy that restates the Federal Educational Rights Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) (the policy points out that one must follow these laws even on Twitter). More important, we should not accept KBOR's authority to monitor our social media usage or to discipline us for that usage; we should not tolerate any effort to abridge academic freedom, to devalue tenure, or to circumvent shared governance. Yet it is insufficient merely to suggest a different tactical or rhetorical approach. We must additionally recognize the forces structuring both the policy and the moderate responses to it—we must understand what exactly we set out to fight.

As a first step, we should analyze the nature of the policy void KBOR attempted to fill. It emerges from and is structured by the ideology of a particular group, namely those Kansas legislators (and perhaps

even a majority of Kansans) who believe Guth's comments warrant punishment. To this group, Guth's tweet confirms the almost entirely fictitious, yet politically appealing image of the college campus filled with leftist radicals who suppress conservative speech while retaining the unfettered right to their own soapbox. The pressure that spawned the social media policy comes from those who, in most cases, do not accept the value of academic freedom (as defined by the AAUP for more than seventy years now). In fact, in many cases, this ideology imagines academic freedom as a left-wing, elitist stumbling block retarding the corporatization of our universities. So, while I do not envy KBOR's role—attempting to negotiate between a radically conservative legislature and the needs of the state's public colleges and universities—any sympathy we feel for the regents should not lead us to conclude that we must accept some form of this new policy.

I fully understand why my colleagues unanimously passed our resolution: they sought to minimize the appearance of combativeness and to demonstrate their willingness to work with KBOR. This policy was not birthed by KBOR. Rather, it originated within a political climate that fundamentally distrusts academic freedom. This is why only condemnation, repudiation, and repeal make sense—there is no acceptable version of a policy designed specifically to monitor and discipline faculty speech. My position does not attack the regents but the pressure placed on them. These pressures demand not moderation and cordiality but unequivocal defense of both free speech and academic freedom.

Does Academic Freedom Derive from the First Amendment?

In their December 20, 2013, letter to KBOR, the Foundation for Individual Rights in Education (FIRE) argues that the new social media policy violates “freedom of expression.” FIRE focuses most of its attention on the body of case law that has established a relationship between academic freedom and the First Amendment.⁸ While nodding to academic freedom, FIRE's letter attacks the policy almost entirely on First Amendment grounds. The AAUP statement—released the same day as FIRE's letter—nods only briefly to the First Amendment and instead focuses on the policy's “gross violation of the fundamental principles of academic freedom that have been a cornerstone of American higher education for nearly a century.”⁹ These disparate approaches illuminate a key tactical question: To what extent should we rely on the First Amendment and relevant case law when making arguments for academic freedom? While a First Amendment argument may be appealing—and may even be a winning argument in this case—we must limit the extent to which we rely on broad constructions of “free speech.” In short, defeating this policy entirely on First Amendment grounds—without a concurrent and insistent reminder of academic freedom's centrality to higher education—risks winning the battle only to lose the war.

Most of the differences between FIRE's letter and the AAUP statement can be explained by the groups' ideological differences: the AAUP consistently has defended academic freedom, while FIRE advocates for "individual rights" in its effort to rebrand academic freedom as a conservative cause. These ideological differences should not, however, obscure a perhaps more pressing concern: the presently unsettled legal standing of the relationship between the First Amendment and academic freedom. Freedom of speech in the workplace is far from guaranteed. Courts consistently have ruled that private companies may restrict employees' speech within the workplace, because the First Amendment only protects citizens from *government* restrictions. Therefore, John Derbyshire had no legal recourse (at least on First Amendment grounds) when he was fired from the *National Review*—a private workplace—for writing a racist article, whereas a Texas schoolteacher has sufficient standing to file a free-speech-based lawsuit after being fired for making racist comments online.¹⁰ Public employees enjoy greater protection in the workplace, because their employer is the government.

Until 2006 courts relied extensively on the "matters of public concern test" to decide "whether speech by public employees—including faculty members at public institutions—was protected."¹¹ This test "considered whether the employee had uttered the challenged speech in the course of the employee's job responsibilities or as a private citizen, and whether the speech addressed a 'matter of public concern.'"¹² Case law protecting public employees' speech, however, "was developed largely in cases not related to academics," so the legal question of faculty speech has not been fully resolved. Consequently, appeals to the "matter of public concern test" by university faculty bore mixed results.¹³ Still, this test was largely consonant with the AAUP's claim that "institutions of higher education are conducted for the common good" and that this special role—something akin to the courts' "public concerns"—calls for special protections.¹⁴ The application of this test created a higher threshold for justifying speech restrictions on public employees—like faculty members—who frequently address public concerns.¹⁵

In *Garcetti v. Ceballos* (2006), the Supreme Court eliminated the need for the "matters of public concern test" for speech "pursuant to [employees'] official duties," superseding previous rulings that afforded greater protection to certain categories of speech.¹⁶ In his *Garcetti* dissent, Justice David Souter offered a word of caution: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"¹⁷ His concerns appear to be warranted as subsequent lower court applications of *Garcetti* have left a great deal of "uncertainty surrounding First Amendment protection for faculty academic freedom."¹⁸ Quite simply, *Garcetti* changed the legal landscape, making any pure First Amendment challenge a gamble.

KBOR's construction of the social media policy shows an awareness of relevant case law. In fact, the policy tries to build from both *Garcetti* and the pre-*Garcetti* "matters of public concern" test. The policy

defines “Improper Use of Social Media” in four sections. Section II attempts to follow *Garvetti*, defining “Improper Use” as communication that “when made pursuant to (i.e. in furtherance of) the employee’s official duties, is contrary to the best interest of the university.”¹⁹ Section IV extends the policy beyond “official duties,” to include any communication that “impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker’s official duties, interferes with the regular operation of the university, or otherwise adversely affects the university’s ability to efficiently provide services.”²⁰ Section IV also, however, invokes pre-*Garvetti* language, gesturing toward a “balancing analysis” detailed in the subsequent paragraph: “In determining whether the employee’s communication constitutes an improper use of social media under paragraph (iv), the chief executive officer shall balance the interest of the university in promoting the efficiency of the public services it performs through its employees against the employee’s right as a citizen to speak on matters of public concern.”²¹

It’s no stretch to read the policy’s different sections as *separate* infringements on First Amendment speech rights and on academic freedom: it overextends *Garvetti* in Section II, effectively eliminating academic freedom; and, in Section IV, it ominously adds a list of vague effects (harmony, loyalty) that might tip the balance for extra-academic speech on a matter of public concern. This dual threat seems to call for a two-pronged response: FIRE’s letter responds to the free-speech threat; the AAUP statement responds to the academic freedom threat. The question for faculty, then, is tactical: Which of these methods—or combination of them—will be most effective? The answer for some of my colleagues has been a staunchly singular appeal to the First Amendment. I admit that this approach is attractive. Were we to make a convincing free-speech argument—or to win a lawsuit—the policy would disappear and we could turn our energy to other issues. Still, the outcome of any lawsuit is far from certain. Less obvious still is the answer to another question: What effect does the shape of our argument have on academic freedom, regardless of the social media policy’s fate? In other words, if we argue *only* that the policy violates our First Amendment rights, what do we imply about academic freedom? We risk forgetting that faculty speech needs *greater* protection than the First Amendment provides. We must make visible the distinctions between free speech and academic freedom, lest we allow the latter to become merely a case of the former.

Does academic freedom derive from the First Amendment? It depends on whom you ask. If you ask the AAUP, the answer is “not entirely.” The recent AAUP statement implies the distinction: “Even if the [social media] policy is Constitutional, that hardly means it is desirable.”²² Academic freedom is desirable even if it isn’t constitutionally protected. Yes, the legal landscape has shifted away from treating academic freedom as special type of protected speech—one that derives from the faculty’s special role—but this change only

reminds us that academic freedom and free speech are not the same thing. AAUP senior counsel Rachel Levinson makes this distinction clear in her 2007 essay “Academic Freedom and the First Amendment”: “Academic freedom rights are not coextensive with First Amendment rights, although courts have recognized a relationship between the two.” Note the phrase “courts have recognized,” which suggests that academic freedom precedes the courts’ consideration of it. I’m not sure how legal scholars or federal judges would answer the question asked by this section’s subtitle, but the AAUP position provides a tactical framework: we can turn to legal precedents in some cases, so long as we never forget that “academic freedom has a number of sources,” including “academic custom.”²³ As Levinson indicates, courts sometimes recognize this custom as a sort of “academic common law.”²⁴ The intermittent legal application of academic custom does not, however, make the customs legal in nature—they are academic. They belong to the academy, to the faculty, not to the courts.

Perhaps this distinction seems overly fine or unnecessary, but the battle over KBOR’s social media policy foregrounds its importance. Let us not forget the broad divestment in Kansas higher education. As the US economy has recovered, many states have begun to restore funding to higher education. The American Association of State Colleges and Universities reports that thirty-seven states increased year-to-year funding for 2014.²⁵ Kansas is one of six states to reduce funding, cutting the higher education budget by \$33 million for FY2014 and \$32.8 million the following year. Based on the budget, higher education is not a priority in Kansas. Of course, the defunding of higher education is only one small part of the state’s shift to the right. In the last decade alone, Kansas has received national attention for its serious (politically, not scientifically serious) debate about evolution’s place in the science curriculum, and the state became a symbol for antielitist conservatism with the appearance of Thomas Frank’s *What’s the Matter with Kansas?*²⁶ This rightward movement accelerated with the 2010 Republican “Clean Sweep”—a self-conscious GOP strategy that led to their victory in every statewide and congressional election.²⁷ Governor Sam Brownback—elected in 2010—both epitomizes this shift and embraces his reputation as an archconservative. As the *New York Times* recently noted, Brownback “has overseen the largest income tax cuts in state history, an expansion of gun rights, restrictions on abortion, sharply reduced welfare rolls, increased voter-registration scrutiny and a paring of state government bureaucracy.”²⁸ Kansas is now one of the most staunchly Republican states, with 45 percent of all voters registered as Republicans and only 25 percent registered as Democrats.²⁹

While this shift may be the immediate cause of higher education’s divestment, it is more important to consider the nature of the sentiment that is precipitating Kansas’s transformation into a red-state utopia. In other words, it does little good to look at Kansas and say, “Obviously higher education budgets will be cut when fiscal conservatives dominate the state.” Instead, we must look at the more direct link between conservative politics and higher education. The divestment comes in part as a response to broad

dissatisfaction with higher education: many Kansas voters—and, in turn, Kansas legislators—want to reconceive the role of our universities. They should be centers of entrepreneurship and job preparation, charged with, as Governor Brownback recently said on my campus, “creating a highly skilled workforce.”³⁰ The drive to reshape higher education as primarily an engine for economic production can be seen in initiatives like Kansas State University’s Center for Advancement of Entrepreneurship and Wichita State University’s Center for Entrepreneurship, and in KBOR’s ten-year strategic plan, “Foresight 2020,” with its goal of “Improving Economic Alignment,” which involves “reduc[ing] workforce shortage” and “enhanc[ing] understanding of the role of university research in supporting the economy.”³¹ This impulse has become so prevalent that even advocates for increased funding shape their arguments to its mandates, as University of Kansas vice chancellor Steve Warren did when responding to the cuts: “You’re signaling to the marketplace that the state does not see higher education as an engine of economic development.”³²

This economic remodeling of higher education is complemented by the popular acceptance of the myth of a lazy, overpaid faculty. Obviously, academics everywhere face this misconception, but in Kansas it seems to be affecting funding directly.³³ In 2013 the Kansas legislature implemented a “salary cap”—thankfully vetoed by the governor—that specifically targeted faculty salaries. Legislators who supported this cap justified it by speaking of “accountability” and implicitly contrasting college professors with other Kansans: “[Universities] have continually asked for more money from families and state taxpayers every year.”³⁴ It’s hard not to interpret efforts to cut the faculty salary portions of our higher education budget as a response to this myth.³⁵ The divestment of Kansas higher education, then, should not be read simply as a political calculation, or as merely a byproduct of neoliberal economic policy, because both of these views tend to obscure the populace’s relatively direct role. It’s not that politicians are cynically deluding the voters into believing higher education isn’t a priority; they are, instead, responding in part to an inchoate, but very real, animosity toward college professors—as the caricature goes—who only work nine months a year, who make their living on the backs of “state taxpayers,” and who don’t properly train Kansas students for their future jobs. These sentiments suggest why it is so important that we make the case for higher education’s unique role—one that is not coextensive with economic impact.

The 1940 AAUP statement notes that “freedom in research is fundamental to the advancement of truth.” In a highly conservative state populated with many who disdain the academy’s ivory tower snobs, the insistence that we uniquely advance “truth” is no easy sell. While the AAUP statement has served us well for more than seventy years, its language resonates with the unfortunate, yet popular, notion that professors—and, in fact, much of higher education—are detached from the rest of our society and, thus, are not to be trusted. This distrust—or, perhaps more accurately, the misunderstanding of the role colleges and universities

play—should not discourage us from asserting higher education’s unique role: we produce knowledge; we advance thought; we teach students to do the same. And academic freedom is central to our ability to accomplish these goals. The desire—the need—to make this case in the face of crushing disinvestment shows why we should not attack the social media policy only as a free-speech issue. Please note, I do not claim KBOR’s ill-conceived and poorly executed policy could not be defeated on First Amendment grounds alone. Rather, I am concerned what that victory might look like.

Let’s imagine that we convincingly argue—either publicly or in court—that the policy violates our constitutional rights; and that we do not mention academic freedom. If we argue only that our free speech has been abridged, we miss the opportunity to articulate the unique character of academic freedom. Thus, even if we win, all we’ve accomplished is to show that faculty members possess the same rights as other citizens. Maybe this point is important, but if we are unwilling to claim not only that our faculty possesses First Amendment rights but also that meaningful higher education requires that this same faculty possess academic freedom, we risk reducing academic freedom to a subcategory of free speech. That is, we risk devaluing academic freedom by sublimating it to a broader right. Ultimately, as the AAUP has argued for decades, academic freedom is not simply a part of the First Amendment. It is a *practice*—a value—essential to the continued existence of colleges and universities. It belongs to the academic domain, not to the legal one. To pursue academic work, faculty members require more than the rights inhering in citizenship; they require the additional protections of academic freedom, shared governance, and tenure.

My position may be counterintuitive to those who set out only to eliminate KBOR’s chilling policy. But, in a state where the value of higher education itself is being questioned, we no longer have the relative luxury of focusing on immediate victory. The political climate in Kansas dictates that we must proceed with full awareness—that we must not overlook the higher-education forest as we focus on the social-media trees. I wish I could offer as my conclusion a programmatic method for eliminating KBOR’s policy while simultaneously explaining to an unsympathetic public the value of academic freedom. But I cannot. All I can offer are cautionary words born from what I see on the ground here in Kansas and a gesture toward how we might respond to erosions of academic freedom in conservative political climates. The corporatization of the university has threatened academic freedom for a long time now. Resisting that tide takes different forms in different places. In Kansas—one of the reddest red states—we face not just an immediate battle (KBOR’s social media policy) but also a crisis (the broad material and social divestment in higher education). We cannot afford to forget the latter as we fight the former. That is why I will continue to promote an unapologetic attack on the KBOR policy and the pressures that spawned it, arguing for a vigorous defense of academic freedom as a value separate from our First Amendment rights.

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His published work has appeared in Radical Teacher, Studies in American Naturalism, Philip Roth Studies, and the AAUP Journal of Academic Freedom, amongst other journals.

Appendix: Full Text of Kansas Board of Regents Policy Manual, Chapter II, Section C (as of April 18, 2014)

6. SUSPENSIONS, TERMINATIONS AND DISMISSALS

a. Felony Offenses

i. Felony Conviction. The chief executive officer of a state university has the authority to discharge any employee, including a tenured faculty member, immediately upon conviction of any felony.

ii. Felony Charge. The chief executive officer of a state university has the authority to discharge or place on leave without pay any employee, including a tenured faculty member, who has been charged with a felony offense. Prior to any such determination, the employee shall be given notice of the proposed action and an opportunity to respond.

b. Other

Faculty and staff may also be suspended, dismissed or terminated from employment for reasons of significant reduction in or elimination of the funding source supporting the position, program discontinuance, financial exigency, or for just cause related to the performance of or failure to perform the individual's duties or for violation of the reasonable directives, rules and regulations, and laws of the institution, the Board and the State of Kansas or the United States.

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

- i. directly incites violence or other immediate breach of the peace;
 - ii. when made pursuant to (i.e. in furtherance of) the employee's official duties, is contrary to the best interest of the university;
 - iii. discloses without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data;
- or
- iv. subject to the balancing analysis required by the following paragraph, impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's official duties, interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services.

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

c. Grievance Procedure

- i. Each state university shall establish and publish grievance procedures for use by faculty and staff in appealing employment decisions of the institution. The procedures shall provide the employee with notice of the action to be taken, the reasons for the action where appropriate, and an opportunity to be heard. A copy of all institutional grievance procedures shall be provided to the institution's general counsel for review prior to becoming effective.
- ii. The decision of the chief executive officer, or the chief executive officer's designee, concerning any grievance appealing employment decisions of the university shall be final and is not subject to further administrative review by any officer or committee of the university or by the Board of Regents.

Notes

- ¹ http://www.kansasregents.org/policy_chapter_ii_c_suspensions. See Appendix for full text of this policy.
- ² AAUP Committee A on Academic Freedom and Tenure, “Academic Freedom and Electronic Communications,” 2013, http://www.aaup.org/file/Academic%20Freedom%20and%20Electronic%20Communications_0.pdf.
- ³ Kansas Board of Regents, “Board Amends Policy to Include Language Regarding Improper Use of Social Media,” December 18, 2013, https://www.kansasregents.org/board_amends_policy_to_include_language_regarding_improper_use_of_social_media.
- ⁴ Kansas Board of Regents, “Board Recommends Workgroup to Review Policy,” December 31, 2013, https://www.kansasregents.org/board_recommends_workgroup_to_review_policy.
- ⁵ The consequences of refusing to bow to this pressure are unclear, though one can imagine that the three regents appointed by current governor Sam Brownback might feel particular pressure.
- ⁶ The workgroup chose to start fresh and wrote its own version of the policy. KBOR rejected the revisions and lectured the workgroup, comparing its members to students who ignore instructions: “If any professor gave an assignment and the student came back with something completely different, the grade would not be very good.” Scott Rothschild, “Regents Leaders Remain Committed to Disciplinary Aspects of Social Media Policy,” *Lawrence Journal-World*, April 16, 2014, <http://www2.ljworld.com/news/2014/apr/16/regents-leaders-remain-committed-disciplinary-aspe/>.
- ⁷ Kansas Board of Regents, *Policy Manual*, Chapter II.C.6, http://www.kansasregents.org/policy_chapter_ii_c_suspensions.
- ⁸ Foundation for Individual Rights in Education, December 20, 2013, <http://www.thefire.org/fire-aclu-letter-to-kansas-board-of-regents/>.
- ⁹ AAUP, “AAUP Statement on the Kansas Board of Regents Social Media Policy,” December 20, 2013, <http://www.aaup.org/file/KansasStatement.pdf>.
- ¹⁰ <http://www.valleycentral.com/uploadedfiles/kgbt/news/stories/rodriguez%20elementary%20lawsuit.pdf>.
- ¹¹ Rachel Levinson, “Academic Freedom and the First Amendment,” July 2007, <http://www.aaup.org/our-work/protecting-academic-freedom/academic-freedom-and-first-amendment-2007>.
- ¹² *Ibid.*
- ¹³ Levinson cites *Schrier v. University of Colorado*—in which the court ruled that Robert Schrier was “entitled . . . to no rights distinct from those of any other public employees” and “that the administration’s interest in suppressing Schrier’s speech outweighed his right to free expression”—as an unsuccessful attempt to use this test to protect faculty speech. She cites *Crue v. Aiken (University of Illinois-Champaign)* as a successful instance. Levinson, “Academic Freedom and the First Amendment.”
- ¹⁴ AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.
- ¹⁵ Nevertheless, the distinctions between citizen and employee, private and public workplaces, and public worker and public faculty member all complicate the relationship of the First Amendment to professors’ speech rights.
- ¹⁶ Levinson, “Academic Freedom and the First Amendment.”
- ¹⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 12 (2006), <http://www.supremecourt.gov/opinions/05pdf/04-473.pdf>.
- ¹⁸ Joan Delfattore, “Defending Academic Freedom in the Age of *Garcetti*,” *Academe* 97 (January–February 2011), <http://www.aaup.org/article/defending-academic-freedom-age-garcetti>.
- ¹⁹ Kansas Board of Regents, *Policy Manual*.
- ²⁰ *Ibid.*
- ²¹ *Ibid.*
- ²² AAUP, “AAUP Statement on the Kansas Board of Regents Social Media Policy.”
- ²³ Levinson, “Academic Freedom and the First Amendment.”
- ²⁴ *Ibid.*
- ²⁵ “State Outlook,” July 2013, <http://www.aascu.org/policy/publications/aascu-special-reports/StateOutlookJuly2013.pdf>.
- ²⁶ The Kansas State Board of Education’s 2005 evolution hearings were covered nationally. These hearings led to the board’s approving curriculum standards that essentially allowed for intelligent design to be taught in science classrooms. <http://web.archive.org/web/20051125163758/http://www.ksde.org/outcomes/sciencestd.pdf>.

²⁷ John Hanna, “GOP Seeks First Clean Sweep of Kansas State, Congressional Races since 1964,” *Lawrence Journal-World*, November 2, 2010, <http://www2.ljworld.com/news/2010/nov/02/gop-seeks-first-clean-sweep-kansas-state-congressi/>.

²⁸ John Eligon, “Brownback Leads Kansas in Sharp Right Turn,” *New York Times*, February 13, 2014, http://www.nytimes.com/2014/02/14/us/politics/brownback-leads-kansas-in-sharp-right-turn.html?_r=0.

²⁹ State of Kansas, Office of the Secretary of State, “2013 January 1st (Unofficial) Voter Registration Numbers,” [http://www.kssos.org/elections/13elec/2013_01_01_Voter_Registration_Numbers_by_county_\(unofficial\).xls](http://www.kssos.org/elections/13elec/2013_01_01_Voter_Registration_Numbers_by_county_(unofficial).xls). In 2013, Gallup listed Kansas as the sixth-most Republican state (<http://www.gallup.com/poll/160175/blue-states-outnumber-red-states.aspx>).

³⁰ Roy Wenzl, “Brownback at ESU,” *Emporia Gazette*, April 15, 2014, http://www.emporiagazette.com/area/news/article_1a8f0104-0f11-5cfe-ad25-af205d8d38ab.html.

³¹ Kansas Board of Regents, “Foresight 2020,” <http://www.kansasregents.org/resources/PDF/2774-Foresight2020Overview-January2014.pdf>.

³² Scott Rothschild, “Higher Education Officials Say Budget Cuts Would Hurt Research, State Economy, Students,” *Lawrence Journal-World*, March 18, 2013, <http://www2.ljworld.com/news/2013/mar/18/higher-education-officials-say-budget-cuts-will-hu/>.

³³ *Forbes* angered many with its 2013 article “The Least Stressful Jobs of 2013,” which said college professors had the least stressful occupation, because “they enjoy long breaks during the school year,” “don’t spend too many hours in the classroom,” enjoy “cozy and civilized” working conditions, and make a solidly middle-class wage (<http://www.forbes.com/sites/susanadams/2013/01/03/the-least-stressful-jobs-of-2013/>). *Inside Higher Ed* attempted to correct many of these misconceptions in Scott Jaschik’s “Least Stressful Job? Really?,” but the myth remains (<http://www.insidehighered.com/news/2013/01/07/claim-college-professor-least-stressful-job-infuriates-faculty#sthash.jansjFr8.rAR0o63R.dpbs>).

³⁴ Marc Rhoades (Kansas House Appropriations Committee chair), quoted in Roy Wenzl, “Kansas Higher Ed Dealing with Budget Cuts,” *Wichita Eagle*, June 16, 2013, <http://www.kansas.com/2013/06/16/2850037/kansas-higher-ed-dealing-with.html>.

³⁵ In fact, the disheartening online comment sections of local newspapers throughout the state are filled with this sentiment. One comment responding to a *Salina Post* story about the social media policy is indicative: “Professors are overpaid, spoiled and immune from any sort of accountability. Its [*sic*] time the taxpayers who are footing the bills (and they are BIG ones) are considered in the equation. Thank you Board of Regents.” <http://salinapost.com/2013/12/24/kansas-social-media-policy-under-fire/>.