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UNIVERSITY IMPRIMATURS ON STUDENT SPEECH: THE CERTIFICATION CASES

EMILY GOLD WALDMAN*

Consider the following situations, all from real cases:

A student enrolled in a public university's Actor Training Program is encouraged to withdraw after she repeatedly refuses, during class acting exercises, to perform lines from scenes or monologues that include the words "fuck," "Goddamn," or other phrases taking God's name in vain.¹

A student pursuing a Master of Social Work degree at a public university is dismissed from a required field practicum, which is a prerequisite for obtaining the degree, after he tells a psychiatric patient that one place she can find a bereavement support group is "church."²

A student studying in a state university's Mortuary Science Program is sanctioned after she makes several posts on her Facebook page about cadaver dissection, including "[w]ho knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though."³

These three situations obviously have some factual differences. Indeed, the courts deciding the resulting free speech claims used three different legal frameworks for evaluating them, applying the student speech standard from *Hazelwood School District v. Kuhlmeier*⁴ to the first case, the public employee speech framework created by *Pickering v. Board of Education*⁵ to the second case, and a newly-created test for speech violating established professional conduct standards to the third case.⁶ But the cases are also linked by a connective thread. In all of

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

2. See *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007).

3. See *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 512 (Minn. 2012).

4. 484 U.S. 260 (1988).

5. 391 U.S. 563 (1968).

6. *Tatro*, 816 N.W.2d at 521.

them, the student's speech—or refusal to speak—undermined the university's confidence that the student would be an appropriate member of the profession for which the university was training him or her. This Article explores the unique mix of First Amendment issues raised by such conflicts and analyzes how courts are, and should be, resolving them.

The Article begins in Part I by describing these cases and then examining what makes them a distinct category within the larger student speech landscape. As I discuss, the student speech framework was largely developed by the Supreme Court in the K-12 public school context. Conflicts over student speech in universities, in turn, have generally centered on the extent to which the K-12 framework should carry over to the higher education context, given the greater independence and maturity of university students. Recent cases about universities' ability to control student publications, for example, fall into this mold, with courts evaluating whether the same rules for high school newspapers should apply to college newspapers.⁷ This particular subset of university speech cases, however, introduces an additional consideration that is simply inapplicable in the K-12 context (and often in the university context as well, depending on the specific student speech dispute): the *certification* role that these professional-training programs are playing. Officially or unofficially, universities here—to the extent that they allow the students in their professional-training programs to complete the program and graduate—are signing off on their students' fitness to enter the profession in question. Although the students are not yet employees and their universities are not their employers, they are closer to this relationship than in the standard student speech case.

The remainder of this Article argues that this certification dynamic has three important First Amendment implications, all pointing toward significant, but not unlimited, deference to universities here. First, as I discuss in Part II, this dynamic makes particularly relevant *Hazelwood's* emphasis on giving schools broad reign to control student speech that may reasonably be seen as bearing the schools' own imprimatur. Although some aspects of *Hazelwood's* reasoning are less

7. See, e.g., *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001).

relevant in the university setting, this specific theme has new and important resonance here. Second, and more broadly, Part III situates these conflicts within the larger discussion about the appropriate level of judicial deference to universities, and argues that they are prime candidates for a very high level of deference, given the reasons articulated by courts and scholars for whether and when such deference should exist. Finally, Part IV probes the analogy between students in professional-training programs and public employees. The analogy is useful, but only goes so far, and thus simultaneously bolsters the argument for substantial deference and helps point toward where the limits on such deference should lie. Part V pulls together the *Hazelwood*, university deference, and public employment strands in connection with the certification cases, offering some guiding principles for a more unified framework. Finally, Part VI provides a brief conclusion.

I. THE "CERTIFICATION" CASES: A DISTINCT CATEGORY WITHIN THE STUDENT SPEECH LANDSCAPE

The Supreme Court has decided four student speech cases, all in the context of K-12 public education. First, the Court ruled in *Tinker v. Des Moines Independent Community School District*⁸ that schools could restrict student speech only when it was reasonably likely to either materially disrupt school operations or to invade the rights of others.⁹ Next, the Court held in *Bethel School District No. 403 v. Fraser*¹⁰ that schools were entitled to restrict student speech that was "plainly offensive," without resort to either of *Tinker*'s two prongs.¹¹ The following year, the Court held in *Hazelwood* that schools could restrict student speech communicated through a school-sponsored medium—i.e., in "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"—as long as their actions were "reasonably related to legitimate pedagogical

8. 393 U.S. 503 (1969).

9. *Id.* at 513.

10. 478 U.S. 675 (1986).

11. *Id.* at 683.

concerns.”¹² The Court thus divided the student speech universe, giving schools far greater discretion over school-sponsored speech than over student speech that just “happen[ed] to occur” at school.¹³ Finally, in 2007, the Court held in *Morse v. Frederick*¹⁴ that schools had the power to restrict student speech that could “reasonably be regarded as encouraging illegal drug use.”¹⁵

Because the Supreme Court has not decided a pure student speech case in the university context, much of the lower court action here centers on whether and how the above framework should carry over to higher education, given the differences between K-12 students and university students. The circuits have divided, for instance, as to whether *Hazelwood*’s deferential standard for high school newspapers should apply to university-subsidized student publications.¹⁶ Even those courts concluding that *Hazelwood* should still apply, however, have indicated that the ultimate *Hazelwood* analysis will often play out differently in the university setting.¹⁷ Similarly, several courts have held that university speech codes are subject to more stringent First Amendment review than that provided by the *Tinker-Fraser-Hazelwood-Morse* framework. In 2010, for instance, the Court of Appeals for the Third Circuit struck down as overbroad a student code of conduct that prohibited students from displaying “offensive” signs in places like the field house, school fields, cafeteria, and arts center.¹⁸ The court explained:

Public universities have significantly less leeway in regulating student speech than public elementary or

12. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988).

13. *Id.* at 281.

14. 551 U.S. 393 (2007).

15. *Id.* at 397.

16. Compare, e.g., *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (holding that *Hazelwood* should apply to such cases), with *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (stating, pursuant to parties’ agreement, that *Hazelwood* has “little application” to university publications). The *Hazelwood* Court itself left this issue open, stating that “[w]e need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.” *Hazelwood*, 484 U.S. at 273 n.7.

17. See, e.g., *Hosty*, 412 F.3d at 734–35 (“To the extent that the justification for editorial control depends on the audience’s maturity, the difference between high school and university students may be important.”).

18. *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010).

high schools. Admittedly, it is difficult to explain how this principle should be applied in practice and it is unlikely that any broad categorical rules will emerge from its application. At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.¹⁹

The Third Circuit's emphasis on the "underlying reasoning" of the Supreme Court's student speech decisions is logical, and supports the notion that the Court's student speech framework should function differently in the university setting. As I have elsewhere discussed, there are two main underlying justifications for the ways in which the Court's framework—comprising the four above-described cases—reduces students' First Amendment coverage below the general baseline.²⁰ First, all of the cases invoke the theme of *protection*—the need to protect students, and/or the functioning of the school as a whole, from potentially damaging speech. *Tinker*, for instance, described the importance of preventing substantial disruptions in school;²¹ *Fraser* and *Hazelwood* both discussed the need to shield immature audiences from speech that they were not emotionally ready to hear;²² and *Morse* emphasized the need to safeguard students from speech that advocated drug use (such as peer pressure).²³

Second, almost all of the cases explicitly or implicitly invoke the theme of *education*—the notion that speech restrictions themselves can

19. *Id.* at 247.

20. See Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 596–98 (2011).

21. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

22. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

23. See *Morse v. Frederick*, 551 U.S. 393, 408–10 (2007).

sometimes teach students important lessons about appropriate oral or written discourse. Such lessons might relate to civility (as in *Fraser*, where the Court specifically stated that “it was perfectly appropriate” for schools to restrict speech “to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education”²⁴) or to specific curricular lessons (as in *Hazelwood*, where the Court endorsed the possibility of restrictions on school-sponsored speech that is “poorly written” or “inadequately researched”²⁵).

Both the protective and educational justifications naturally play out differently in universities, as opposed to elementary and secondary schools. As to protection, the *Fraser* and *Hazelwood* concerns about exposing students to material that is inappropriate for their level of maturity²⁶ are basically absent in the university setting. Similarly, the worries in *Morse* about the damaging effects of verbal peer pressure²⁷ are much more salient for minors than for students who are at least eighteen years old. *Tinker*’s concerns about protecting the campus from substantial disruption²⁸ definitely remain relevant, but the maturity of university students (combined with the typically larger, more diffuse nature of university campus life) means that one student’s speech is often less likely to cause widespread unrest.

The educational rationale also has a narrower reach in the university setting. The *Hazelwood* notion that educators are “entitled to exercise greater control” over school-sponsored speech “to assure that participants learn whatever lessons the activity is designed to teach” is certainly still applicable in the university classroom setting.²⁹ If a professor wants to limit the scope of a particular assignment, or give a

24. *Fraser*, 478 U.S. at 685–86.

25. *Hazelwood*, 484 U.S. at 271–72. I have also argued that lurking in *Morse*’s subtext is an educational rationale: that schools, as part of teaching students about the gravity of drug use, should be able to convey disapproval of messages suggesting that drug use is a joking or trivial matter. See Emily Gold Waldman, *No Jokes About Dope: Morse v. Frederick’s Educational Rationale*, ___ UMKC L. REV. ___ (forthcoming ___ 2013).

26. *Hazelwood*, 484 U.S. at 271–72; *Fraser*, 478 U.S. at 683.

27. See *Morse*, 551 U.S. at 408–10.

28. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

29. *Hazelwood*, 484 U.S. at 271–72.

low grade to poorly-written or inadequately-researched work, the idea that his or her students would have a valid free speech claim is untenable.³⁰ But the broader view expressed in *Fraser*—that speech restrictions are also a valuable way of teaching students “the shared values of a civilized social order”—is out of place in the university setting.³¹ Indeed, the *Fraser* Court itself specifically described the “inculcat[ion of] the habits and manners of civility” as part of the “role and purpose” of K-12 public education.³² University students do not need to be inculcated into becoming adult citizens; they already are.

In sum, both the protective and educational rationales counsel toward limited application of the Court’s student speech framework in the university setting. Parts of it seem completely inapplicable; not surprisingly, no court has yet applied *Fraser* or *Morse* to university students. Even the potentially applicable standards from *Tinker* and *Hazelwood* are often less likely to be satisfied. Thus, as a general matter, university students receive greater First Amendment protection than do their K-12 counterparts, and this makes perfect sense.

But this generalization does not hold true—factually or normatively—with respect to one particular cluster of student speech cases in the university setting. This cluster involves situations where a university is regulating student speech *not* to protect other students from the speech, nor solely to teach students a lesson. Rather, the standard protective and educational rationales are supplemented by what I call a *certification* rationale. In these cases, the university is sanctioning a student’s speech largely because this speech has undermined the university’s confidence that this student is going to be an appropriate member of the profession for which the university is training him or her. In other words, the university is no longer comfortable letting the student proceed down the normal path that will culminate in the university’s explicit or implicit certification of fitness for a particular profession. I call these the “certification cases.”

30. See, e.g., *O’Neal v. Falcon*, 668 F. Supp. 2d 979 (W.D. Tex. 2009) (rejecting public university student’s claim that her First Amendment rights were violated when her professor did not let her write a speech about abortion for a class assignment).

31. *Fraser*, 478 U.S. at 681–83.

32. *Id.* at 681.

A. Tatro v. University of Minnesota: A Paradigmatic Certification Case

A good example of a certification case is *Tatro v. University of Minnesota*,³³ just decided in June 2012. Amanda Tatro was a college junior enrolled in the University of Minnesota's Mortuary Science Program, which has the primary purpose of preparing students to be licensed funeral directors and morticians.³⁴ As part of the program, students must take laboratory courses in anatomy, embalming, and restorative art, and these labs use human cadavers donated for teaching and research purposes.³⁵ The course syllabus for the anatomy lab included rules "set up to promote respect for the cadaver"; the rules permitted respectful conversational language about cadaver dissection, but prohibited blogging about the anatomy lab or cadaver dissection.³⁶ At the beginning of her fall junior semester, in connection with her enrollment in the lab courses, Tatro signed a form agreeing to comply with these policies.³⁷ Nonetheless, she later posted four Facebook status updates that she subsequently described as "satirical commentary and violent fantasy about her school experience."³⁸ In one such post, she commented that she "[g]ets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve"³⁹ She reflected in another post: "Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend the evening updating my 'Death List #5' and making friends with the crematory guy. I do know the code"⁴⁰ Her other two posts had similar themes.⁴¹

Near the end of the semester, the Mortuary Science Program Director learned of Tatro's posts and met with other staff members to

33. 816 N.W.2d 509 (Minn. 2012).

34. *Id.* at 511–12.

35. *Id.* at 512.

36. *Id.*

37. *Id.*

38. *Id.* at 511–13.

39. *Id.* at 512.

40. *Id.*

41. *Id.*

discuss them.⁴² According to the Director, “[t]here was a lot of fear’ surrounding Tatro’s post about stabbing someone with a trocar and hiding a scalpel in her sleeve.”⁴³ The Director told Tatro to stay away from the Mortuary Science Department while the matter was investigated by university police, who later concluded no crime had been committed.⁴⁴ In the meantime, Tatro appeared on local television to discuss her punishment for her Facebook posts, prompting some cadaver donor families (and members of the general public) to contact the Anatomy Bequest Program and raise questions about her professionalism.⁴⁵ Ultimately, although the program allowed Tatro to return to school to take her final exams, the lab instructor submitted a formal complaint about her to the University’s Office of Student Conduct and Academic Integrity.⁴⁶

At Tatro’s subsequent hearing, faculty from the Mortuary Science Program testified about the program’s “emphasis on respect, dignity, and professionalism as a foundation for later working as a funeral director or mortician,” and urged Tatro’s expulsion from the program.⁴⁷ Tatro testified that “she use[d] humor and jokes to release anxiety and to stave off depression,” explaining that she suffered from difficult circumstances.⁴⁸ She acknowledged, however, that she had known that she was restricted from writing about the details of what she did in the lab, and conceded that others might have misunderstood her sense of humor.⁴⁹ Ultimately, the Campus Committee on Student Behavior decided not to expel Tatro, but to impose significant sanctions for her speech, including giving her a grade of “F” in the course, placing

42. *Id.* at 513.

43. *Id.* (alteration in original).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 513–14.

48. *Id.* at 514. Specifically, Tatro suffered “from a debilitating central nervous system disease” and was serving as the primary caretaker for her mother, who was suffering from a traumatic brain injury. *Id.* Tatro passed away later in 2012. See Abby Simons, *U Grad in Facebook Case Dies*, STAR TRIBUNE, June 26, 2012.

49. *Tatro*, 816 N.W.2d at 514. Confusingly, although Tatro admitted that she knew she was restricted from writing about the details of what she did in the lab, including on Facebook, she also “claimed not to understand that her Facebook posts fell within the scope of the blogging prohibition.” *Id.*

her on probation for the rest of her undergraduate career, and requiring her to (1) complete a “directed study course” in clinical ethics, (2) write a letter “addressing the issue of respect within the program and the profession,” and (3) undergo a psychiatric evaluation at the student health service clinic and follow their recommendations.⁵⁰ Tatro appealed this decision within the university; after these efforts were unsuccessful, she filed suit in Minnesota state court, raising a number of claims, including a free speech argument.⁵¹ The Minnesota Supreme Court ultimately granted review on her free speech claim.⁵²

In analyzing Tatro’s case, the Minnesota Supreme Court observed that neither the *Tinker* nor *Hazelwood* standards for restricting student speech were satisfied.⁵³ Tatro’s speech did not rise to the level of causing substantial disruption under *Tinker*, and the University itself had not justified the sanction on this basis.⁵⁴ Nor could the speech be considered “school-sponsored,” which is the predicate for *Hazelwood* to apply; Tatro’s Facebook posts were entirely her own.⁵⁵ Yet the court still concluded that the University of Minnesota had not violated Tatro’s First Amendment rights by punishing her speech.⁵⁶ Stating that “we must consider the special characteristics of the academic environment of the Mortuary Science Program and its professional requirements when deciding the standard that applies,” the court adopted a new standard: “a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.”⁵⁷ The court further concluded that the Mortuary Science Program’s prohibition on blogging about cadavers had been directly related to the established professional conduct standard—codified in

50. *Id.* at 514–15.

51. *Id.* at 515.

52. *Id.*

53. *See id.* at 518–20.

54. *See id.* at 519–20.

55. *See id.* at 518.

56. *Id.* at 524.

57. *Id.* at 520–21.

Minnesota law—requiring mortuary science professionals to treat the deceased with “dignity and respect.”⁵⁸

Tatro is a paradigmatic certification case because neither the protective nor educational rationales completely explain the result. Tatro’s speech did hint at violence, but not seriously enough to prompt real concerns about protecting other individuals or the university’s functioning as a whole. Indeed, the University of Minnesota itself did not argue in court that *Tinker*’s substantial disruption standard applied here.⁵⁹ And while educational concerns were certainly relevant here, as most clearly exemplified by the portion of Tatro’s sanction that required her to take a “‘directed study course’ in clinical ethics,”⁶⁰ they do not tell the whole story either. Even in the K-12 context, where students’ free speech rights are more limited, courts have declined to hold that schools can punish students for offensive *off-campus* speech simply to teach them a lesson about the boundaries of appropriate discourse. Indeed, several courts have explicitly rejected that notion.⁶¹ If, for instance, a K-12 student wrote Facebook posts analogous to Tatro’s posts—the closest example that comes to mind, although it is not perfectly on point, is a high-schooler writing disturbing, offensive Facebook posts about a biology dissection experience—it is very unlikely that the school could constitutionally punish that speech.

What makes Tatro’s case different is that the school’s educational concerns were inextricably linked to *certification* concerns. This was not just any student posting “satirical commentary” about a lab exercise or classroom assignment. It was a student whom the University of Minnesota was preparing for a career as a funeral director or mortician, and on whom the University would ultimately bestow a Bachelor of Science degree in this field—a prerequisite for becoming licensed.⁶² Moreover, it was a student whom the University would be placing in a clinical rotation at a funeral home—an experience which

58. *Id.* at 522–23.

59. *See id.* at 518–20.

60. *Id.* at 514.

61. *See, e.g.,* *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932–33 (3d Cir. 2011) (en banc); *T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 779 (N.D. Ind. 2011); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1110 (C.D. Ca. 2011).

62. *Tatro*, 816 N.W.3d at 511–12.

would also count toward her licensing requirements.⁶³ Thus, by allowing Tatro to continue in the Mortuary Science Program, the University of Minnesota would be facilitating her entry into the profession and essentially certifying her fitness for it. Clearly, Tatro's speech undermined their confidence in doing so.⁶⁴ Indeed, as I discuss further in Part II, the certification cases link up with one of *Hazelwood*'s themes: giving schools broader reign over student speech that may be seen as bearing the schools' own imprimatur. Although no one would have reasonably perceived Tatro's posts *themselves* as bearing the University of Minnesota's imprimatur—the typical predicate for *Hazelwood* to apply—by ultimately granting Tatro a degree from the Mortuary Science Program, the University would have been placing its imprimatur on *her* as an appropriate entrant into this profession. This certification dynamic is what differentiates this cluster of cases within the student speech landscape.

In addition to *Tatro*, there have been a number of certification cases within the past decade. These cases divide into two main categories. First, the majority of such cases involve situations where, unlike in *Tatro*, the student's speech occurred in a sufficiently curricular setting to trigger courts' straightforward application of *Hazelwood*.⁶⁵ Second, two certification cases have involved situations where the student's speech occurred during an external clinical placement and prompted the external "employer" to dismiss the student from the clinic, leading to further academic ramifications.⁶⁶ In these cases, the courts have applied the public employee framework created by *Pickering* and its progeny.⁶⁷ Below, I discuss both categories of cases and then circle back to the certification cases as a whole.

63. *Id.* at 512.

64. Indeed, as the *Tatro* court observed, the "driving force" behind the University's discipline here was Tatro's failure to comply with the program's expectations regarding "respect, discretion, and confidentiality." *Id.* at 520.

65. See *infra* Part I.B.

66. See *infra* Part I.C.

67. See *infra* Part I.C.

B. The Hazelwood Certification Cases

Several recent cases have involved students who were sanctioned for their curricular speech—or refusal to speak—in the context of a professional training program. In all of these cases, the courts have applied *Hazelwood*.⁶⁸ Although some have stopped short of saying that *Hazelwood* applies to *all* school-sponsored speech in the university setting (a standard that would include many extracurricular activities), there is a growing consensus that *Hazelwood*'s “reasonably related to legitimate pedagogical concerns” standard should at least apply to university students' *curricular* speech.⁶⁹ But that does not mean that universities always win here. Outcomes generally hinge on whether courts are convinced that the university was indeed acting out of legitimate pedagogical concerns, or whether they identify a genuine factual dispute regarding this issue.

Two examples of cases where courts identified such a genuine dispute for trial are *Ward v. Polite*,⁷⁰ just decided in 2012, and *Axson-Flynn v. Johnson*.⁷¹ The plaintiff in *Ward* was a student in a graduate-level counseling program at Eastern Michigan University.⁷² She repeatedly stated that her Christian faith would prevent her from affirming clients' same-sex relationships, but the issue was not squarely presented until—four classes shy of a degree—she enrolled in the program's required practicum, in which she would counsel real clients.⁷³

68. See *Ward v. Polite*, 667 F.3d 727, 733 (7th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 951–52 (9th Cir. 2002).

69. See, e.g., *Axson-Flynn*, 356 F.3d at 1289, 1286 n.6 (holding that “the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum,” but stating that it “need not reach any analysis of university students' extracurricular speech”); *Brown*, 308 F.3d at 949 (concluding that “*Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work,” but declining to hold that it should also apply to universities' regulation of speech “in the context of *extracurricular activities*, such as yearbooks and newspapers” (emphasis added)).

70. 667 F.3d 727 (7th Cir. 2012).

71. 356 F.3d 1277 (10th Cir. 2004).

72. *Ward*, 667 F.3d at 730.

73. *Id.*

When asked to counsel a gay client, Ward asked her faculty supervisor to refer the client to another student, or to permit her to begin counseling with the understanding that she could make a referral if the counseling began to involve relationship issues.⁷⁴ The faculty supervisor referred the client, but the University commenced hearings that ultimately resulted in Ward's termination, prompting her to bring a free speech claim.⁷⁵ The University's position—expressed first to Ward and later in court—was that she had violated the American Counseling Association's code of ethics by “imposing values that are inconsistent with counseling goals” and “engaging in discrimination based on . . . sexual orientation.”⁷⁶ The University further claimed that it had a “blanket rule” prohibiting practicum students from referring any clients.⁷⁷ The Sixth Circuit, however, ruled that her claim should survive summary judgment.⁷⁸ The court pointed out that the University's own counseling expert had acknowledged that many counselors refer gay and lesbian clients for relationship counseling, that the University could not point to any evidence of its purported blanket rule against referrals, and that at least one student had previously been allowed to refer a client during the practicum.⁷⁹ The Court concluded that “[a] reasonable jury could find that the university dismissed Ward from its counseling program because of her faith-based speech, not because of any legitimate pedagogical objective.”⁸⁰

Similarly, *Axson-Flynn* involved a Mormon student who was encouraged to withdraw from the University of Utah's Actor Training Program after repeatedly refusing to say the word “fuck” or to take God's name in vain during classroom acting exercises.⁸¹ In defending

74. *Id.* at 730.

75. *Id.* at 730–32.

76. *Id.* at 731.

77. *Id.* at 736.

78. *Id.* at 738.

79. *Id.* at 736–37.

80. *Id.* at 738. Ward also brought a free exercise claim, which the court likewise held should survive summary judgment. *Id.* at 738–41. Such claims, which were also brought in several of the other cases discussed below, are beyond the scope of this Article, which is exclusively focused on the speech issues raised by these cases.

81. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280 (10th Cir. 2004). *Axson-Flynn* also brought a free exercise claim, which the court stated could have survived

itself against the student's subsequent free speech claim, the University argued that requiring students to perform acting exercises precisely as written constituted part of its "methodology for preparing students for careers in professional acting," explaining that this taught students to step outside their own persona, preserve the integrity of the author's work, and to use "true acting skills."⁸² Indeed, they noted that they specifically used text with offensive language as a "teaching tool" for students.⁸³ The Tenth Circuit, however, pointed to some professors' comments that the student should "talk to some other Mormon girls who are good Mormons, who don't have a problem with this" to find that there was a genuine issue of fact as to whether the University's articulation of the script adherence requirement was actually a pretext for religious discrimination.⁸⁴

Other courts have been more persuaded by universities' stated pedagogical reasons for sanctioning the speech of students in professional training programs. In *Keeton v. Anderson-Wiley*,⁸⁵ the Court of Appeals for the Eleventh Circuit ruled against a counseling student who withdrew from Augusta State University after being required to participate in a "remediation plan" as a prerequisite for participating in a required clinical practicum.⁸⁶ Keeton, who was seeking her master's degree in school counseling, had stated in class that she planned to try to convert students from being homosexual to heterosexual, and would tell them that homosexual behavior was morally wrong and that "it was not okay to be gay."⁸⁷ University officials concluded that she had expressed her intent to violate several provisions of the American Counseling Association's Code of Ethics, which, as

summary judgment were it not for the defendants' qualified immunity here. *Id.* at 1294-1301.

82. *Id.* at 1291.

83. *Id.* at 1292 n.10.

84. *Id.* at 1282, 1293.

85. 664 F.3d 865 (11th Cir. 2011).

86. *Id.* at 867. The Eleventh Circuit made this ruling in the context of the student's bid for a preliminary injunction. *Id.* at 868. As in *Ward* and *Axson-Flynn*, the student also brought a free exercise claim. *Id.* at 867. The court ultimately rejected that claim for reasons similar to its rejection of her free speech claim. *Id.* at 879-80.

87. *Id.* at 868-69.

noted above, prohibits discrimination based on sexual orientation.⁸⁸ They thus told her that she could not participate in the clinical practicum, in which she would be counseling a student, unless she followed a remediation plan that included requiring her to “work to increase her exposure and interaction with the [gay, lesbian, bisexual, transgender, and queer/questioning (GLBTQ)] population,” attend workshops on diversity, read articles about counseling the GLBTQ population, and submit monthly reflection statements.⁸⁹ Claiming that she would not be able to successfully complete this remediation program, Keeton withdrew and filed suit.⁹⁰ The Eleventh Circuit ruled that she was unlikely to succeed in her free speech claim, concluding that the University had imposed the remediation plan not because of her “personal religious views on homosexuality,” but due to its “legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics.”⁹¹

The Ninth Circuit likewise ruled in favor of the University of California at Santa Barbara in *Brown v. Li*,⁹² where a master’s degree candidate sued after a university committee refused to approve his thesis, which included a “Disacknowledgements” section that “offer[ed] special *Fuck You’s*” to various administrators and staff at the University.⁹³ The court reasoned that the university committee’s “decision was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper,” noting that the student had received “reasonable standards for that assignment, including a pedagogically appropriate requirement that the thesis comply with professional standards governing his discipline.”⁹⁴ The court further observed—in a passage I return to below—that “the committee members had an affirmative First Amendment right not to approve Plaintiff’s thesis,”

88. *Id.* at 869.

89. *Id.* at 869–70.

90. *Id.* at 871.

91. *Id.* at 872–76.

92. 308 F.3d 939 (9th Cir. 2002).

93. *Id.* at 943–44. The student was enrolled in the Department of Material Sciences at the University of California at Santa Barbara, and his thesis was entitled “The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape.” *Id.* at 941–43.

94. *Id.* at 952.

given that their names would appear in the thesis and could be seen as jointly responsible for its content.⁹⁵

C. *The Pickering Certification Cases*

In *Ward* and *Keeton*, university officials themselves took action when they foresaw potential problems with placing their students into clinical practice settings. But what if they had placed the students, only to receive subsequent complaints from the field? In both *Watts v. Florida International University*⁹⁶ and *Snyder v. Millersville University*,⁹⁷ that is precisely what occurred.

Watts involved a student in a Master of Social Work Program who was assigned to perform his required practicum at a psychiatric hospital, which subsequently terminated him for two incidents of “inappropriate behavior related to patients regarding religion.”⁹⁸ The nature of the first incident was unclear; in the second, he apparently told a patient that one place she could find a bereavement support group was “church.”⁹⁹ After being terminated from the hospital, he was dismissed from the related seminar in which he was enrolled; because these were requirements for receiving his degree, the student was unable to earn his master’s degree.¹⁰⁰

Similarly, *Snyder* involved a student enrolled in a Bachelor of Science in Education program who was assigned to perform her required student teaching practicum at a local high school, which ultimately decided to bar her from campus because of various concerns about her

95. *Id.* As compared to the other cases discussed in this Article, this case is less clearly a certification case, in that it is not clear precisely what profession the university was preparing this student for, nor is it clear precisely to what extent the university’s actions here stemmed from doubts about whether he would be a fit member of that profession. That said, the court’s description of these actions as stemming from concern that the student’s work did not comply with “professional standards,” as well as its further discussion of the committee members’ desire not to “approve”—essentially certify—the student’s work, arguably bring this case into the certification realm.

96. 495 F.3d 1289 (11th Cir. 2007).

97. No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008).

98. *Watts*, 495 F.3d at 1291–92.

99. *Id.* at 1292.

100. *Id.*

job performance.¹⁰¹ In particular, the school objected to various posts that she had made to her MySpace webpage, including a post that referred to her faculty supervisor and a post featuring a photograph of her wearing a pirate hat and holding a plastic cup, captioned “drunken pirate.”¹⁰² Because the student was removed from the practicum before it ended, she could not receive a passing grade in the accompanying Student Teaching course, and thus she was unable to receive her education degree.¹⁰³

Both students brought free speech claims against their universities, and in both cases, the courts looked to the same framework: the government employee speech framework created by the Supreme Court’s trilogy of *Pickering v. Board of Education*,¹⁰⁴ *Connick v. Myers*,¹⁰⁵ and *Garcetti v. Ceballos*.¹⁰⁶ Pursuant to these cases, government employees whose employer sanctions them for their speech have valid free speech claims only if they can first show that they were speaking as citizens on matters of public concern.¹⁰⁷ This is often a difficult threshold to meet, and indeed the students in both *Watts* and *Snyder* argued that they should not be subjected to it, since they were not employees suing their employers, but rather students suing their universities.¹⁰⁸ They therefore suggested that the student speech framework should instead apply to their cases.¹⁰⁹ The courts rejected their arguments, however, holding that for purposes of the clinical placements, the students had essentially been functioning as employees.¹¹⁰ Accordingly, the *Pickering* framework applied, and

101. *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *7, *17–18.

102. *Id.* at *14–22.

103. *Id.* at *22.

104. 391 U.S. 563 (1968).

105. 461 U.S. 138 (1983).

106. 547 U.S. 410 (2006).

107. *See id.* at 418.

108. *See Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1293–94 (11th Cir. 2007); *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *39–42.

109. *See Watts*, 495 F.3d at 1293–94; *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *39–42.

110. *See Watts*, 495 F.3d at 1293–94; *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *39–42.

because neither student was found to be speaking on matters of public concern, they both lost.¹¹¹

The *Watts* and *Snyder* courts did not undertake a separate inquiry into whether the universities had been motivated by a legitimate pedagogical concern in withholding the students' degrees, or even into whether the relevant university officials *agreed* that the students' performance was poor enough to warrant termination.¹¹² Instead, the courts presented the consequences as inevitable. The Eleventh Circuit wrote that "once Watts the employee was terminated from his employment in the practicum, Watts the student could not complete the course which included the practicum. Without the course he could not earn his degree."¹¹³ Similarly, the *Snyder* court observed that "[n]o one at MU had anything to do with th[e] decision [by the school district to bar Snyder from campus]. Once [the school district] did not allow Plaintiff to complete the practicum, however, MU could not award Plaintiff a BSE degree."¹¹⁴

111. See *Watts*, 495 F.3d at 1293–94; *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *39–42. The *Watts* court, however, did hold that Watts' related free exercise claim could survive the defendants' (12)(b)(6) motion to dismiss. *Watts*, 495 F.3d at 1294–1300.

112. In fact, as discussed below, the *Watts* court implied that Watts' performance had complied with the university program's guidelines. *Watts*, 495 F.3d at 1292 ("Nothing he said violated any guidelines or requirements of the MSW program."). The *Snyder* record is more mixed. On the one hand, Snyder's university supervisor during her time at the school district gave her good evaluations in certain categories, and rated her overall performance as satisfactory. *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *10. University officials also seemed to sympathize with her predicament and made efforts to ensure that she could still graduate from the university, albeit with a B.A. in English instead of a B.S.E. *Id.* at *22–24. On the other hand, her university supervisor did give her a final "unsatisfactory" rating in one category, and Snyder would have needed satisfactory ratings in all categories before the university could recommend her for a teaching certification. *Id.* at *20–21, *25. That said, by that point, the school district had already decided to bar her from campus. *Id.* at *17. In any event, it is clear that the district court did not attempt to evaluate, under *Hazelwood*, whether the University's decision here had been reasonably related to legitimate pedagogical concerns.

113. *Watts*, 495 F.3d at 1294.

114. *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *22.

* * *

To some extent, the various certification cases coalesce into a coherent (albeit somewhat ad hoc) framework. When a student's speech undermines the university's confidence that he or she will be an appropriate member of the profession for which the university is training him or her, the university can impose a sanction if either (1) the speech violated program rules that were closely tied to established professional conduct standards;¹¹⁵ (2) the speech was curricular (provided that the university's response stemmed from a legitimate pedagogical concern);¹¹⁶ or (3) the sanction flowed directly from an external entity's refusal to let the student fulfill a required part of the program (provided that the external entity's decision was not itself unlawful).¹¹⁷

Embedded within this framework, however, are some tough questions. First, to what extent does a university's disapproval of how a particular student intends to perform the profession for which the university is providing training qualify as a legitimate pedagogical concern? *Keeton* and *Ward*, which both involved universities who ejected counseling students with anti-gay views but which reached opposite conclusions, illustrate this tension. The *Keeton* court, for instance, concluded that Augusta State University had not singled out the plaintiff student "for disfavored treatment because of her point of view,"

115. See, e.g., *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 514 (Minn. 2012) (holding that sanctions against a mortuary student for posting allegedly satirical information on Facebook about her profession were valid pursuant to program rules which she had violated).

116. See, e.g., *Ward v. Polite*, 667 F.3d 727, 733 (7th Cir. 2012) (providing that educational institutions at every level must have latitude to achieve legitimate curricular objectives); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 877 (11th Cir. 2011) (emphasizing the deference that courts must show to a school's curricular choices); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 (10th Cir. 2004) (explaining that a school's methodology regarding curriculum may be "reasonably related" to pedagogical concerns); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (agreeing with the Supreme Court that a university's control over curricular speech is broader than a primary and secondary schools' control).

117. See, e.g., *Watts*, 495 F.3d at 1300 (holding that free speech rights of a graduate student were not violated when dismissed from his practicum for telling a patient about his Catholicism); *Snyder*, 2008 U.S. Dist. LEXIS 97943, at *29 (denying a prospective teacher's request for reinstatement to her practicum after being released for posting a photograph of herself on the Internet).

but rather because of concerns regarding her “ability to be a multiculturally competent counselor.”¹¹⁸ The university’s concerns about the student’s ability to be such a competent counselor, however, stemmed directly from her point of view about homosexuality. These two alternative explanations were thus in fact tightly linked. The *Ward* court likewise suggested that there were two neatly separable alternatives: either the university had ejected the plaintiff student from the counseling program “due to a policy against referrals” or “because of hostility toward her speech and faith.”¹¹⁹ But if the university had unambiguously asserted that it permitted referrals for certain reasons (such as allowing grieving students to avoid counseling grieving clients), but not for others (such as accommodating students’ disapproval of homosexuality, whether for faith-based reasons or otherwise), on which side of the line would it have fallen? Both courts reduced the cases to dichotomies that were more simplistic than the actual facts.¹²⁰

Second, many certification cases involve placements—either anticipated or actual—in clinical practicum settings. If, as in *Watts* and *Snyder*, it is the external placement supervisor who sanctions the student for her speech, and the university consequences flow directly from that punishment, should the case be viewed as an employee speech case or a student speech case? Both *Watts* and *Snyder* quickly concluded that the public employee speech framework should apply, without real discussion of whether the university should still have to justify its response under the student speech standards.

118. *Keeton*, 664 F.3d at 873–74.

119. *Ward*, 667 F.3d at 730.

120. Indeed, although these cases might seem “like polar opposites,” as the *Ward* court noted, given that *Keeton* lost her bid for a preliminary injunction while *Ward* survived summary judgment, *id.* at 741, the courts’ analytical approach for considering them was actually quite similar. *See id.* at 741. Also, as the *Ward* court took pains to point out, the student in *Keeton* had clearly taken a more aggressive stance, not merely seeking to refer gay students who were dealing with relationship issues, but insisting that she would try to convert them. *Id.* at 736. Thus, it seems likely that had the *Ward* court been faced with the facts in *Keeton*, it would have reached the same result. *Id.* at 741 (noting that *Keeton*’s proposed approach for counseling gay students, “all agree, violates the ACA code of ethics by imposing a counselor’s values on a client, a form of conduct the university is free to prohibit as part of its curriculum”).

Finally, the student speech framework generally rests on a sharp distinction between school-sponsored student speech (curricular or otherwise) and independent student speech, with a further line being drawn between whether that speech originates on or off campus. How relevant are these issues when the certification dynamic is present? If a student enrolled in a university training program utters speech that convinces university officials that he or she will not be a fit member of the profession, to what extent should it matter *where* that speech took place?

This is not intended to be an exhaustive list of questions. Rather, my intent here is to highlight some of the tricky questions that the certification dynamic raises, in order to step back, think more broadly about what the implications of this dynamic should be, and propose some principles for a more unified approach. To do this, I now turn to the three related areas of law that the certification dynamic implicates: (1) *Hazelwood's* imprimatur concept; (2) the general notion of educational deference to universities; and (3) the public employment analogy.

II. HAZELWOOD'S "IMPRIMATUR" CONCEPT

Hazelwood is an important starting point for thinking about the certification dynamic. Not only is *Hazelwood* applied in certification cases involving curricular speech, but its approach has broader relevance to *all* certification cases.

Hazelwood itself was not a certification case. It involved a principal's decision to remove two pages from a high school newspaper—which was produced by the school's "Journalism II" class and received school funding—because those pages included articles about divorce and teen pregnancy.¹²¹ The principal justified this censorship with both protective and educational rationales: he wanted to shield younger students from exposure to these topics, and believed that the student authors had not followed applicable principles of journalism.¹²² The Supreme Court ruled in favor of the school, distinguishing between "a student's personal expression that happens to occur on the school premises" from student speech disseminated through

121. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

122. *Id.* at 264–65.

“school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”¹²³ The Court concluded that “[e]ducators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”¹²⁴ It thus held that school officials’ restrictions on such school-sponsored speech would be upheld as long as they were “reasonably related to legitimate pedagogical concerns.”¹²⁵

As noted above, there is a growing trend toward applying *Hazelwood* in the university setting, at least in the context of university students’ curricular speech. Such application is not limited to the certification cases; a recent decision, for instance, applied *Hazelwood* to rule against a student who challenged a professor’s limitation of topics for a speech-writing assignment.¹²⁶ The certification cases, however, raise more difficult questions about what qualifies as a legitimate pedagogical concern. Fundamentally, these cases ask whether, when universities are training and certifying students for a particular profession, they have a legitimate pedagogical interest in weeding out students whose speech undermines the university’s confidence in them as future professionals. Although such losses of confidence do not always result from university officials’ disagreement with the student’s underlying views—in *Tatro*, for instance, the university officials seemed more concerned about the student’s judgment and maturity than about any “views” she expressed¹²⁷—they frequently do, thus implicating the larger question of whether *Hazelwood* permits viewpoint discrimination.

I have elsewhere argued that *Hazelwood* does contemplate viewpoint discrimination, as most clearly suggested by the *Hazelwood* Court’s statement that schools must retain the ability to censor school-sponsored speech that “might reasonably be perceived to advocate drug

123. *Id.* at 271.

124. *Id.*

125. *Id.* at 273.

126. See *O’Neal v. Falcon*, 668 F. Supp. 2d 979 (W.D. Tex. 2009).

127. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012).

or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”¹²⁸ Moreover, in the certification context, the argument for allowing viewpoint discrimination under *Hazelwood* is particularly strong. *Hazelwood* repeatedly emphasized that schools should have broad reign over student speech that might reasonably be seen as bearing the school’s own imprimatur.¹²⁹ Not only did *Hazelwood* initially characterize the issue as involving “educators’ authority over school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,” but it later referred to the school’s related need to ensure “that the views of the individual speaker are not erroneously attributed to the school.”¹³⁰

This “imprimatur” concept has important resonance in the certification cases, where the school is placing its imprimatur on students themselves, certifying that they are appropriate entrants into the profession for which the university has trained them. Given this high degree of imprimatur, professional-training programs have a legitimate interest in ensuring that their graduates will adhere to the programs’ *own* standards, even if viewpoint-based, of competence and professionalism. Of course, universities have no way of controlling how their graduates actually act once they depart with their university-issued degree. But when a student’s speech prompts concern while he or she is still enrolled, it is legitimate for a university to respond, even if that concern stems from disagreement with the substantive viewpoints expressed by the student.

Indeed, by facilitating professional students’ entry into the field (and often, as a precursor, facilitating their placements in clinical practice settings), the university is engaging in its own sort of speech. The Ninth Circuit made a related point in *Brown v. Li*, where, in holding that the university did not violate a graduate student’s speech rights by refusing to approve his thesis, it stated that “the committee members had an

128. Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 110 (2008) (quoting *Hazelwood*, 484 U.S. at 272).

129. *Hazelwood*, 484 U.S. at 271–73.

130. *Id.* at 271. The Court then returned to this concept again, relatedly asserting that the school should be able to avoid being associated with particular political positions. *Id.* at 272.

affirmative First Amendment right not to approve Plaintiff's thesis. That is especially true where, as here, the committee members' names appear in the thesis and where, according to the [university] Guide, they are jointly responsible for its content."¹³¹ Of course, not all certification cases involve situations where particular university officials' names are actually being listed alongside student speech. At a minimum, however, the university—by letting professional students continue down a path to graduation and ultimately granting them a degree—is approving these students as fit to enter the profession.

As such, although *Hazelwood* will usually point toward *more* speech protection in the university setting—the universe of legitimate pedagogical concerns is obviously narrower here, given the inapplicability of maturity-related concerns—the certification cases create a narrow exception where *Hazelwood* actually points toward less speech protection. In the K-12 setting, and indeed in many university settings, a student's graduation is much less suggestive of school imprimatur. It simply indicates that the student fulfilled the academic requirements of the program. Where students are receiving professional training from a university, by contrast, their ultimate degree bespeaks school approval of *them*.

Indeed, *Hazelwood*'s focus on schools' ability to preserve control over the placement and perception of their imprimatur even calls into question—for purposes of the certification cases—the relevance of the distinction between curricular and non-curricular speech. This distinction certainly makes sense in the absence of the certification dynamic. If a high school student utters purely independent speech, as opposed to speech in a school-sponsored setting, no reasonable listener would think that the school had placed its imprimatur on that speech—or on that student. But if a professional student's non-curricular speech seriously undermines a university's confidence that he or she will be an appropriate member of the profession, the university does have reason for concern about letting the student proceed down a path toward school imprimatur of his or her fitness for the profession. This is why, even though the *Tatro* court rightly concluded that *Hazelwood* did not literally apply to *Tatro*'s Facebook posts, which no one would have thought were

131. *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002).

school-sponsored, the underlying reasoning of *Hazelwood* supported the court's ruling in the university's favor.¹³²

That said, *Hazelwood* does not suggest that schools' power over school-sponsored student speech—let alone other speech by students who will receive a degree conveying school approval of their fitness for a profession—should be unlimited. *Hazelwood* makes clear that the speech sanction must result from legitimate pedagogical concerns.¹³³ Although I have argued that the viewpoint-based nature of a pedagogical concern does not automatically render it illegitimate, schools should still have to articulate the nature of their concern and explain why it was indeed legitimate in light of professional standards and expectations. Courts should make these determinations, as I discuss below, with a significant but not unlimited degree of educational deference.

III. UNIVERSITY DEFERENCE

The question of how much deference should apply in the certification cases fits into a broader discussion, in both the case law and academic commentary, about the appropriate level of judicial deference to universities in general. This literature extends far beyond student speech controversies, encompassing issues including affirmative action in admissions, tenure decisions, and accommodations for learning disabilities.¹³⁴

A central starting point, dating back several centuries, is that universities enjoy a substantial degree of autonomy. Writing that “[p]ractical autonomy from government control has characterized American colleges and universities” at least since the beginning of the nineteenth century, J. Peter Byrne explains that over the course of that century, “American law came to recognize two legal bases for university autonomy: the common law notion of academic abstention and state constitutional status for state universities.”¹³⁵ These bases, in turn,

132. See *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 518 (Minn. 2012).

133. *Hazelwood*, 484 U.S. at 273.

134. Examples of disputes in such areas include, respectively, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337 (1st Cir. 1989); *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82 (D. Mass. 1998).

135. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 321–22 (1989).

became “precursors of the modern federal constitutional protection of institutional autonomy”—namely, the “principle that regulation should not proceed so far as to deprive the university of control over its academic destiny.”¹³⁶ This notion of university autonomy over its “academic destiny” has surfaced in numerous Supreme Court cases, including *Grutter v. Bollinger*,¹³⁷ where in the course of upholding the constitutionality of University of Michigan Law School’s race-conscious admissions policy, the Court stated that

[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits. We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.¹³⁸

Such deference to universities is not absolute. As *Grutter* indicates, the Supreme Court has been less deferential to decisions that are not purely academic.¹³⁹ Subsequently, for instance, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*,¹⁴⁰ the Court did not defer to a group of schools’ argument that their anti-discrimination policies entitled them to defy the Solomon Amendment’s requirement of permitting military recruiters on their campus.¹⁴¹ Indeed, the Court did not even suggest that *Grutter*-type deference might apply here, and unanimously rejected the law schools’ various arguments that permitting the military recruiters on their campus would conflict with their own expressive interests.¹⁴² Byrne argues that *FAIR* came out the right way, asserting that “the sphere of autonomy protected by the right

136. *Id.* at 330.

137. 539 U.S. 306 (2003).

138. *Id.* at 328–29 (citations omitted).

139. *See id.*

140. 547 U.S. 47 (2006).

141. *Id.* at 69–70.

142. *Id.*

must be limited to core academic areas . . . broader claims to autonomy based on academic freedom, such as those advanced in [FAIR] for employer recruitment policies, both lack merit and may imperil the basic right.”¹⁴³

When the decision *is* academic, however, the Supreme Court has shown significant deference, as exemplified not only by *Grutter*, but in two earlier cases more factually similar to the above-described certification cases: *Board of Curators of the University of Missouri v. Horowitz*¹⁴⁴ and *Regents of the University of Michigan v. Ewing*.¹⁴⁵ In *Horowitz*, a student who was dismissed from medical school for failure to meet academic standards brought a due process claim, alleging that the university had not provided her with appropriate procedures before dismissing her.¹⁴⁶ Assuming *arguendo* that the student had a liberty or property interest in the continuation of her education, the Court ruled that the school had provided her with adequate process—namely, informing her of their dissatisfaction with her progress, obtaining reports about her from the various physicians who were supervising her, and giving her the opportunity to appeal the decision in writing—and that a formal hearing was not necessary.¹⁴⁷ The *Horowitz* Court explained:

The decision to dismiss [this student] rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision

Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing This is especially true as

143. J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms of a University,”* 77 U. COLO. L. REV. 929, 930 (2006).

144. 435 U.S. 78 (1978).

145. 474 U.S. 214 (1985).

146. *Horowitz*, 435 U.S. at 79–82.

147. *Id.* at 84–85.

one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized.¹⁴⁸

Similarly, *Ewing* involved an unsuccessful due process claim brought by a medical student who asserted that his dismissal from the program had been arbitrary.¹⁴⁹ Noting the evidence that “the faculty’s decision was made conscientiously and with careful deliberation,”¹⁵⁰ the Court opined:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.¹⁵¹

The relevance of *Horowitz* and *Ewing* to the certification-related speech claims is clear. Indeed, the Court’s language about respecting university faculty’s judgment in making academic decisions, particularly in the context of advanced, specialized educational programs, is particularly on point. The distinction, of course, is that neither *Horowitz* nor *Ewing* involved a student’s free speech challenge. The plaintiff students there were simply focused on the *process* they had received. Indeed, the facts suggest that their universities’ loss of confidence in their fitness had not stemmed from their speech. That said, the principles that emerge from *Horowitz* and *Ewing*—both their endorsement of significant academic deference, and their recognition of appropriate limitations on that deference (i.e., when the university has substantially departed from applicable norms, or has failed to engage in careful deliberations or provide the student with appropriate process)—are important guideposts in considering the certification cases.

The academic literature exploring the justifications for university autonomy and educational deference also provides useful insights into the certification cases. Paul Horwitz, a strong proponent of university

148. *Id.* at 89–90.

149. *Ewing*, 474 U.S. at 215.

150. *Id.* at 225.

151. *Id.* (internal footnote omitted).

autonomy, argues that universities—along with certain other entities—should be considered “First Amendment institutions,” which he describes as “institutions that play a significant role in contributing to public discourse, and that are both institutionally distinct and largely self-regulating according to a set of internally generated norms, practices, and traditions.”¹⁵² In exploring what the treatment of universities as First Amendment institutions would entail, Horwitz articulates three possibilities: a weak-form treatment, a medium-form treatment, and a strong-form treatment.¹⁵³ The weak-form version would “counsel a fair degree of deference on the part of courts dealing with disputes involving core academic functions,” such as “whether to discipline or expel a student” but would be somewhat less deferential to the university’s decisions in other areas.¹⁵⁴ The medium-form version would more clearly ground such deference in the “special institutional status of the university under the First Amendment.”¹⁵⁵ Finally, the strong-form version would treat universities as presumptively “legally autonomous institutions,” rather than “simply weigh[ing] their interests heavily in the balance,” such that even decisions like *FAIR* might come out differently.¹⁵⁶ Horwitz’s favored approach leans toward the stronger end of the spectrum; he concludes that “the benefits of defining a broad scope of autonomy for universities . . . outweigh the potential risks,”¹⁵⁷ both because such deference may lead to a more robust dialogue “within and between universities about their educational missions and about the meaning of academic freedom,”¹⁵⁸ and because “most universities, even if granted considerable legal autonomy, would still observe most of the civic norms . . . usually enforced through the law.”¹⁵⁹

152. Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Some Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007) [hereinafter Horwitz, *Universities as First Amendment Institutions*]. See also Paul Horwitz, *FIRST AMENDMENT INSTITUTIONS* (2012); Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005).

153. See Horwitz, *Universities as First Amendment Institutions*, *supra* note 152, at 1516.

154. *Id.* at 1516–17.

155. *Id.* at 1517–18.

156. *Id.* at 1519–20.

157. *Id.* at 1544.

158. *Id.* at 1549.

159. *Id.* at 1543.

What is notable is that even under the *weak-form* treatment of universities as First Amendment institutions—which Horwitz views as “fairly close to the law as it currently stands”—the certification cases would trigger a high degree of deference, given that they reflect academic decisions that connect up with the university’s own sense of mission and identity.¹⁶⁰ Similarly, Frederick Schauer, a major proponent of institution-specific First Amendment doctrine, endorses an institutional understanding of academic freedom, pursuant to which a university has the right “to make its own academic decisions, even if those decisions might, when made by a public college or university, constitute otherwise constitutionally problematic content-based or even viewpoint-based decisions.”¹⁶¹ This, too, points in the direction of substantial deference in the certification cases.

Indeed, even skeptics of broad claims of university autonomy tend to agree that universities should receive substantial deference in making core academic decisions. A key question, however, is the extent to which those decisions should receive protection even when they are intertwined with ideology. Although Schauer and Horwitz are less concerned by university decisions that may reflect viewpoint discrimination, Erica Goldberg and Kelly Sarabyn have argued that that “[t]here is little justification for affording *academic* protection to decisions that are not academic in nature, but rather ideological.”¹⁶² They further suggest that in cases where “it is difficult to distinguish an academic decision from an ideological one,” courts should examine “the process by which a university’s decision was made,” deferring more when assessments were conducted in accordance with “the standards of a particular academic field.”¹⁶³ This argument echoes not only the Supreme Court’s emphases on process in *Ewing* and *Horowitz*, but even

160. *Id.* at 1516.

161. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 923–24 (2006); *see also* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (arguing, generally, in favor of a more institution-specific approach to the First Amendment); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (same).

162. Erica Goldberg & Kelly Sarabyn, *Measuring a “Degree of Deference”*: *Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 239–40 (2011).

163. *Id.* at 245–46.

Horwitz's own suggestion that universities, in exchange for receiving significant deference, have their own internal obligations (even if not judicially-enforced) to "seriously consider just what their own sense of their academic mission entails and act accordingly,"¹⁶⁴ engage in good-faith deliberations, reason thoughtfully toward their conclusions, and observe a minimum level of appropriate process.¹⁶⁵

The central themes emerging from the university deference literature thus point, like *Hazelwood*, toward significant deference in the certification cases. Indeed, *Hazelwood* and the larger concept of university deference overlap in important and illuminating ways. Both *Hazelwood* and the university deference cases share the notion of deferring to school decisions that are primarily academic, provided that they meet a basic threshold of pedagogical legitimacy. Additionally, both endorse the idea that schools can make such academic decisions in connection with their own institutional definitions of their educational missions—a concept clearly implicated by the certification cases. Finally, although both lines of case law stop short of explicitly endorsing schools' authority to make viewpoint-based decisions, their reasoning arguably points in that direction.

In fact, shortly after *Hazelwood* was decided, Bruce Hafen identified the connection between *Hazelwood* and the Court's university deference cases.¹⁶⁶ Hafen observed:

This decision [in *Hazelwood*] reinforcing the institutional authority of schools also reflects the Court's developing perspective on the general role of first amendment institutions. The *Hazelwood* Court rejected students' claims to individual freedom of expression in favor of educators' broad

164. Horwitz, *Universities as First Amendment Institutions*, *supra* note 152 at 1555.

165. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1101–02 (2008). *See also* Horwitz, *FIRST AMENDMENT INSTITUTIONS*, *supra* note 152, at 117 ("A purely arbitrary decision taken by the university is not suitable for academic autonomy and judicial deference. But one that shows evidence of the exercise of academic judgment requires courts to defer to the university's institutional autonomy, even if other universities would decide differently.").

166. Bruce C. Hafen, Comment, *Hazelwood School District and The Role of First Amendment Institutions*, 1988 DUKE L.J. 685 (1988).

authority to define and supervise the educational mission of public schools both in and out of the classroom . . . *Hazelwood's* deferential approach in an area where limitations on expression have become highly suspect—newspapers—reflects the Court's emerging recognition of the affirmative role of certain intermediate institutions in first amendment theory.

The Court's new emphasis on first amendment institutions seems to arise . . . from an understanding that first amendment institutions *qua* institutions can sustain conditions that nourish such values as those associated with religion and expression.¹⁶⁷

Hafen further pointed out that "*Hazelwood* echoes the Court's highly deferential treatment of institutional academic freedom in *Regents of the University of Michigan v. Ewing*."¹⁶⁸

Hazelwood and the university deference cases thus provide important, converging insights into the university certification cases. Before proposing a more unified framework, however, I want to turn to the last key strand of law here: the Supreme Court's approach for analyzing speech claims brought by public employees.

IV. THE PUBLIC EMPLOYMENT ANALOGY

The legal framework for public employees' speech claims is relevant to the certification cases in two ways. First, as in *Watts* and *Snyder*, this standard is sometimes itself used to resolve such cases. More broadly, the reasoning behind this employment-based framework provides an additional lens for considering the certification cases as a whole, given that these cases specifically involve students who are being trained for professions.

As noted above, the framework for evaluating public employees' speech claims stems from three cases: *Pickering*, *Connick*, and *Garcetti*. Taken together, these cases create a two-pronged test. First, public

167. *Id.* at 685–86 (internal footnote omitted).

168. *Id.* at 697.

employees sanctioned by their employer for their speech must show that they were speaking as a citizen on a matter of public concern. If they were speaking pursuant to their official job duties—such as a prosecutor writing a memo about a case—their claim automatically fails.¹⁶⁹ Second, if they can satisfy that threshold, the employees' interest in the speech is then weighed against their supervisors' interest in responding to it, i.e., the extent to which the speech had the potential to affect the operations of the workplace.¹⁷⁰ In justifying this framework, the Supreme Court has explained—regarding prong one—that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”¹⁷¹ As to prong two, the Court has identified several reasons why an employer might have a genuine need—stemming from concerns about the efficient functioning of the workplace—to sanction an employee’s speech, even assuming that the employee was speaking as a citizen on a matter of public concern. One such reason, identified hypothetically in *Pickering*, is that the employee’s statements “are so without foundation as to call into question his fitness to perform his duties”—in which case the statements are serving as evidence of “general competence, or lack thereof,” rather than as “an independent basis for dismissal.”¹⁷²

Although the first prong of *Pickering-Connick-Garcetti* is what has actually been used to dismiss certification cases like *Watts* and *Snyder*—where the courts held that the students’ speech in practicum settings had been uttered in their capacity as employees—the second prong is even more relevant to the certification cases as a whole. Just as *Pickering* contemplated that an employer might be justified in sanctioning an employee for speech that undermines the employer’s confidence in the employee’s general competence and fitness for the job, the universities here are sanctioning students for speech that undermines

169. See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Garcetti* further clarified that the claim should fail at this step even if the speech was on a matter of public concern, and that the central question here is whether the employee’s speech constituted performance of his or her job. *Id.* at 421–23.

170. *Id.*

171. *Id.* at 421–22.

172. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 n.5 (1968).

the universities' confidence that the students will *ultimately* be fit for the professions in question. The *Pickering-Connick-Garcetti* framework thus suggests that—to the extent that we view students in professional training programs as akin to employees—their speech claims rest on shaky ground. Relatedly, Lawrence Rosenthal has pointed to the conceptual link between *Garcetti* and various university deference cases, noting that *Garcetti* endorses a concept of “managerial prerogative” that is similar to the “institutional approach to academic freedom” in *Ewing*.¹⁷³

That said, the students in certification cases are not yet employees, and their universities are not their employers. Although these students are adults, and universities do not have the same inculcative responsibilities toward them as K-12 public schools have toward their students, the nature of the student-university relationship is still fundamentally educational. Employers hire employees to perform jobs and assume their fitness for the profession; a university has taken on the responsibility to train its students to *become* fit for the profession. The expectations are very different here, and wholesale importation of the public employment framework into the certification cases is inappropriate.

This is true even when, as in *Watts* and *Snyder*, the university consequences for a student's speech flow directly from the sanctions imposed by outside placements. In both cases, the courts were too quick to assume that because the *Pickering-Connick-Garcetti* framework would apply had the students sued their “employers” directly, it should similarly apply to related university sanctions. Indeed, the *Snyder* court seemed to view the plaintiff student with suspicion, describing her as having made a “strategic choice”¹⁷⁴ to sue her university rather than the school district where she was a student teacher. This does “not alter

173. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 97–100 (2008). Rosenthal further observes that the “public university falls well within the scope of First Amendment managerial prerogative—institutions of higher education must necessarily evaluate the content and quality of speech in order to perform their function. Grading is the most obvious example.” *Id.* at 100. Additionally, Rosenthal briefly alludes to the links between “managerial prerogative” and *Hazelwood*. *Id.* at 94.

174. *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943, at *41 (E.D. Pa. Dec. 3, 2008).

[our] analysis,”¹⁷⁵ the court concluded. Similarly, the *Watts* court stated that “[h]ad Watts not been a student as well as a governmental employee, the state plainly would have been entitled to the greater leeway the *Pickering* test affords it.”¹⁷⁶ But had Watts not been a student, he never would have been in this clinical practicum at all. These students’ clinical practice experiences were inextricably tied to their enrollment in university professional-training programs, and they remained students throughout this time. To the extent that they suffered university sanctions for their performance in these settings, those sanctions should have been evaluated under a student speech, rather than an employee speech, framework.

That, of course, circles back to the central question of this Article: what *is* the appropriate student speech framework for the certification cases? Having explored the insights that *Hazelwood*, the university deference literature, and the public employee speech doctrine bring to bear on this question, I now turn in Section V to propose some principles for a more unified framework.

V. A UNIFIED FRAMEWORK FOR THE CERTIFICATION CASES

This Article began by identifying the certification cases as a distinct category within the student speech landscape. This category has several distinguishing features: (1) it involves a student being trained *for a profession* by a (public¹⁷⁷) university; (2) graduation from this program

175. *Id.*

176. *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007).

177. Students cannot, of course, bring First Amendment claims under the United States Constitution against private universities, although they may be able to bring related state claims under state constitutions or statutes, depending on the protection provided by their state. *See, e.g.*, *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (allowing student’s free speech claim under New Jersey Constitution against Princeton University to go forward); *see also* Cal Educ. Code § 94367 (2012) (“No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.”).

reflects the university's approval—what I refer to as its “certification”—of the student as being fit to enter the profession; (3) the student has uttered speech, whether or not in the classroom/curricular context, that undermines the university's confidence that the student will perform the profession in a way that accords with the university's conception of the profession; and (4) the university's sanction of the student has stemmed, at least in substantial part, from that concern. Fundamentally, what differentiates these cases is the presence of the certification rationale—that the universities here are not solely sanctioning student speech for protective or educational reasons, which usually cover the waterfront in student speech cases, but also because they are no longer comfortable certifying that student for the profession.

Hazelwood, the university deference cases, and the public employee speech framework all suggest that this is a legitimate concern. *Hazelwood* identifies the need for schools to control speech that might be seen as bearing the schools' own imprimatur, the educational deference

For an interesting certification case brought against a private university in New York, see *McConnell v. LeMoyne Coll.*, No. 5:05 CV 634 JFS/DEP, 2005 WL 2033485 (N.D.N.Y. Aug. 17, 2005). This case involved a student enrolled in Le Moyne College's Master of Science for Teachers program. *Id.* at *1. As part of his required coursework, the student submitted a written assignment—a “Classroom Management Plan”—in which he indicated that he disagreed with multicultural education and felt that “corporal punishment has a place in the classroom.” *Id.* His teacher gave him a grade of “A” on the assignment, but nonetheless referred him to the chair of the Education Department, who then sent him a letter expelling him from the program, stating that “I have grave concerns regarding the mismatch between your personal beliefs regarding teaching and learning and the LeMoyne College program goals.” *Id.* at *2. The student filed suit in federal court, bringing, inter alia, a free speech claim. *Id.* at *1. This claim was rejected, however, because the University was not deemed to have engaged in state action. *Id.* at *1–3. Ultimately, the student was able to obtain some relief in state court, which ordered LeMoyne College to follow its own due process procedures set forth in its rules and regulations before expelling the student. See *McConnell v. LeMoyne Coll.*, 25 A.D.3d 1066, 1068–69 (N.Y. App. Div. 2006) (holding that under New York law, “[w]hen a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion[,] that procedure must be substantially observed”) (quoting *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1306 (N.Y. 1980)). The College ultimately decided not to appeal this ruling (or, apparently, to institute formal expulsion proceedings), and the student returned to class. See Michelle York, *Back in Class After Expulsion Over Paper*, N.Y. TIMES, Feb. 22, 2006, at B6.

literature emphasizes the importance of allowing universities to define their own educational missions and make academic decisions in accord with those missions, and the *Pickering-Connick-Garcetti* framework endorses the notion that even otherwise-protected “off-duty” speech can be sanctioned when it indicates a lack of fitness for a job. Furthermore, in none of these lines of cases has the Supreme Court prohibited governmental actors from making viewpoint-based decisions, notwithstanding the First Amendment’s general disfavor toward viewpoint discrimination. Indeed, the logical underpinnings of these doctrines point toward the inevitability of viewpoint discrimination in some instances. These strands come together to suggest that universities should have significant deference here. Indeed, given the overlapping concepts in these three lines of authority, it is not surprising that scholars have pointed to some of the thematic links between them.

But such deference should not be unlimited. *Hazelwood* and the university deference cases similarly indicate that university decisions must be pedagogically legitimate, as expressed both by *Hazelwood*’s “legitimate pedagogical concerns” standard¹⁷⁸ and *Ewing*’s suggestion that courts should not overturn universities’ academic decisions unless they reflect a “substantial departure from accepted academic norms.”¹⁷⁹ Additionally, the university deference cases emphasize the importance of careful deliberation and appropriate process—concepts that, although not discussed in *Hazelwood*, arguably serve as a gloss on what it means for a decision to be “reasonably related” to a legitimate pedagogical concern, particularly in the university setting. Finally, both *Hazelwood* and the *Pickering-Connick-Garcetti* trilogy suggest that there should be a dividing line between speech sanctions that result from “on-duty” speech (or, in the school context, curricular speech) and those that result from “off-duty” speech (a.k.a. non-curricular, “independent” student speech). This does not mean that the latter category can never be regulated, but the presumptions do require some shifting here.

The above discussion points toward some concrete principles for approaching the certification cases. First, school sanctions of student speech that occurs in curricular settings—whether in the classroom, clinical practicum settings, or perhaps in certain school-sponsored

178. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

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

activities that are closely tied to professional-training programs—should be subject to *Hazelwood*'s "reasonably related to legitimate pedagogical concerns" standard, as the above-described cases held. Moreover, the viewpoint-based nature of such concerns should not render them illegitimate, provided that the university can credibly assert that these concerns genuinely stem from university officials' own standards of competence and professionalism in the field for which they are training the student. Where the student can demonstrate that this conception reflects a substantial departure from accepted professional norms, that will indicate illegitimate behavior on the university's part. But the university should not be required to show that *all* professionals in the field adhere to these standards. It is enough to show that these standards fall within the spectrum of professional norms, and that the university itself subscribes to them.

Additionally, the university should be required to demonstrate the reasonableness of the sanction itself, as well as the reasonableness of the process through which the sanction was reached. Although courts should not (and are historically reluctant to) micro-manage educators' academic decisions, both *Horowitz* and *Ewing* indicate that judicial deference to such decisions should rest on careful, deliberate decision-making. Moreover, both decisions seemed to view as relevant the fact that the plaintiff students—who were ultimately expelled—had displayed persistent problems and had been repeatedly warned about their universities' concerns.¹⁸⁰ If, for instance, a university were to immediately expel a student for his or her speech, as opposed to first imposing more limited sanctions and/or working with the student to try to address the concerns raised by his or her speech, that would strongly suggest unreasonableness (absent extraordinary circumstances).¹⁸¹

180. *See id.*; *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978).

181. Indeed, if a university failed to provide such procedures, this might violate the student's constitutional due process rights, a possibility left open by the *Horowitz* and *Ewing* Courts. It might also violate state law. *See, e.g., McConnell*, 25 A.D.3d. at 1066; *supra* note 177. My point, however, is that some basic expectation of reasonableness should be imported into the free speech analysis as well. *See also Horowitz, Universities as First Amendment Institutions, supra* note 152, at 1542 ("The argument for strong deference [to universities as First Amendment institutions] will be especially weighty in those cases in which the university, in

It is instructive to return to *Ward* with these standards in mind. There, Eastern Michigan University officials believed that a counseling student's refusal to validate clients' same-sex relationships—and corresponding request to refer such clients—was inconsistent with the American Counseling Association's Code of Ethics, which stated that counselors should “respect the diversity of clients,” “avoid imposing values that are inconsistent with counseling goals,” and not condone discrimination based on sexual orientation.¹⁸² As the *Ward* court pointed out, this was not the only reasonable reading of the ACA's Code of Ethics, which also stated that counselors could refer clients if they “determine[d] an inability to be of professional assistance” to them, and specifically allowed counselors to “choose to work or not work with terminally ill clients who wish to explore their end-of-life options.”¹⁸³ Similarly, expert witnesses and textbooks expressed conflicting views on the ethics of values-based referrals.¹⁸⁴ Given the range of views here, Eastern Michigan University's reading of the Code was certainly not a substantial departure from accepted professional norms. Indeed, the ACA's chief professional officer, while acknowledging that he knew counselors who referred gay clients seeking to discuss relationship issues, opined that “refusing to counsel someone on issues related to sexual orientation is a clear and major violation”¹⁸⁵ To be sure, the University muddled the waters somewhat by arguing that it had a “blanket rule” prohibiting practicum students to make referrals, when in fact it had once allowed a referral by a grieving student who wanted to refrain from counseling a grieving client.¹⁸⁶ This provided a basis for the court to conclude that the university's actions might have been a pretext for discrimination against Ward's faith-based speech. But had the University argued that granting a master's degree in counseling to a

reaching an academic decision, is roughly following the established norms and procedures that are in place for such questions. Those practices will have developed in light of both the general norms that govern most universities and academic disciplines, and the particular sense of that individual university as to what its academic mission requires.”).

182. *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

183. *Id.*

184. *Id.* at 736.

185. *Id.*

186. *Id.* at 736–37.

student who refused to validate same-sex relationship would conflict with its own conception of appropriate counseling behavior—and that it was uncomfortable placing its imprimatur on this student—the court should have deferred to this argument as legitimate, despite its viewpoint-based nature.

Moreover, Eastern Michigan University would have been able to demonstrate the reasonableness of its process and the ultimate sanction against Ward. University officials did not immediately expel Ward when she asked to refer the gay client to whom she had been assigned for the practicum.¹⁸⁷ Instead, her faculty supervisor met with her and agreed to refer the client, but also expressed concerns about her request, and arranged for a further “informal review,” a non-disciplinary meeting designed to “assist the student in finding ways to improve his/her performance or to explore the option of the student voluntarily leaving the program.”¹⁸⁸ At this informal review, two faculty members met with Ward to discuss their concerns, and gave her the further option of seeking a formal review, in which a faculty-student committee considers allegations of improper behavior or poor academic performance.¹⁸⁹ Before the formal review, a faculty member specifically explained to Ward why she believed that Ward’s referral request was inconsistent with the ACA’s Code of Ethics.¹⁹⁰ These issues were discussed in depth at the review hearing itself, and Ward had the opportunity to respond.¹⁹¹ Only when the university officials became convinced that the conflict was irreconcilable was Ward expelled from the program.¹⁹²

The same standards should apply, as noted above, even when the student’s speech occurs in a clinical practicum and it is the field supervisor, rather than a university official, who imposes the initial sanction. Although universities may be powerless to change the minds

187. *Ward* thus stands in contrast to *McConnell v. LeMoyne College*, No. 5:05 CV 634 JFS/DEP, 2005 WL 2033485 (N.D.N.Y. Aug. 17, 2005), in which an education graduate program immediately expelled a student who wrote that he thought corporal punishment had a place in the classroom. *See McConnell*, 2005 WL2033485, at *1; *see also supra* note 177.

188. *Ward*, 667 F.3d at 731.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 731–32.

of such supervisors—in both *Watts* and *Snyder*, it seems clear that the supervisors were unwilling to allow the students to continue in their placements—they should not be able to automatically withhold students' degrees on that basis. Rather, they should be required to show that the student's speech violated the university's own legitimate pedagogical standards, and that the ultimate university-imposed sanction was reasonable. Particularly troubling is that in *Watts*, the speech for which the student was punished—telling a patient that “church” was one place that she could find a bereavement support group, after noticing on her patient assessment form that she was Catholic—did not violate any “guidelines or requirements of the MSW program.”¹⁹³ It is entirely unclear why the University could not have taken other steps to remedy the situation, such as re-assigning the student to another clinical practicum or permitting him to re-enroll in the course. Perhaps there were complicating factual circumstances here, but the court's willingness to simply accept that once Watts was terminated, he could not complete the course, and therefore could not earn his degree, is troubling. The above principles would point toward a different result.

The calculus shifts when a student is sanctioned—pursuant to certification-related concerns—by a university for his or her non-curricular speech. Although a student's non-curricular speech can legitimately undermine a university's confidence that he or she is fit for the profession, as in *Tatro*,¹⁹⁴ students do need more autonomy in the non-curricular realm. Indeed, the *Tatro* court itself noted the “potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program.”¹⁹⁵ In this context, the “legitimate pedagogical concerns” standard should be heightened, and the burdens flipped. Rather than requiring a student to show that the university's concerns reflected a “substantial departure from professional norms,” and deferring to the university's conceptions of professionalism and competence as long as they fall within the accepted spectrum of professional norms, the

193. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1292 (11th Cir. 2007). Indeed, the district court stated that the student's speech was in fact “consistent” with the MSW program guidelines. *Watts v. Fla. Int'l Univ.*, No. 02-60199-CIV-AJ, 2005 U.S. Dist. LEXIS 40310, at *5 (S.D. Fla. June 9, 2005).

194. See generally *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012).

195. *Id.* at 521.

university should instead have to show—as *Tatro* required—that its concerns were “narrowly tailored and directly related to established professional conduct standards.”¹⁹⁶ Although such standards need not be codified in writing, as were the statutory standards for mortuary science licensees in *Tatro*,¹⁹⁷ the university should have to prove that such standards are firmly established in the field.

Additionally, the same requirement that the sanction—and the process through which it was reached—be reasonable should still apply. In many cases, this reasonableness requirement will also mean that the student should have received prior notice about engaging in the speech in question. In *Tatro*, for instance, the mortuary students had specifically been told before the anatomy lab that they could not blog about cadaver dissection, including on Facebook or Twitter.¹⁹⁸ Had *Tatro* been punished for her posts without such advance notice, the reasonableness of the University of Minnesota’s response would have been more questionable. Of course, the University still could have argued that *Tatro*’s failure to independently realize that such posts were inappropriate indicated her lack of fitness for the mortuary profession. At the very least, however, appropriate regard for students’ own personal lives would suggest that the severity of sanction for such non-curricular speech, without any advance notice prohibiting such speech, should typically be limited. In the end, this is likely to be a highly fact-specific inquiry.

VI. CONCLUSION

This Symposium’s focus on *Hazelwood*, on the occasion of its twenty-fifth anniversary, provides a wonderful opportunity to explore the implications of *Hazelwood*’s reasoning beyond the high school newspaper context. Indeed, *Hazelwood*’s “imprimatur” concept converges in illuminating ways with the broader university deference and public employee frameworks, shedding light on the growing number of student speech cases that implicate the certification rationale. By recognizing the legitimacy of universities’ interest in withholding their

196. *Id.*

197. *Id.* at 522.

198. *Id.* at 512.

imprimatur from students whose speech undermines the universities' confidence in their fitness for the profession for which the university is training them, while simultaneously limiting that deference to enforce the rights of student speakers, courts can strike a balance that appropriately protects the competing interests of students and universities.