Student Dismissals from Professional Programs and the Constitution

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Recommended Citation
Mark P. Strasser, Student Dismissals from Professional Programs and the Constitution, 68 Case W. Res. L. Rev. 94 (2017)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol68/iss1/9
INTRODUCTION

The United States Supreme Court has addressed the conditions under which students in high school can be punished for their speech and, in addition, has analyzed a couple of cases in which university students were dismissed from professional programs for academic reasons. But the Court has said relatively little about whether or how to use the high school student speech jurisprudence in the university context and about whether or how to apply the academic dismissal jurisprudence in other kinds of contexts. The Court’s reticence on these matters is unfortunate because lower courts have been forced to address the constitutionality of different kinds of university student dismissals without necessary guidance from the Court.

Several courts have addressed the conditions under which students may be dismissed from professional programs for unprofessional comments or practices. These courts’ approaches have varied with respect to both the appropriate test to use and how particular tests should be applied. The Court’s failure to give more than minimal direction on these matters has resulted in dissimilar
treatment of relevantly similar cases—a trend that will only continue until the Court provides some greatly needed guidance.

Part I of this Article discusses the Court’s student-speech and academic-dismissal jurisprudence, explaining some of the difficulties in providing a coherent account of what the Court has said. Part II discusses some of the cases arising in the lower courts, noting how those decisions do not cohere well with the approaches taken by other courts or, sometimes, by the Supreme Court. The Article concludes by predicting that the confusion and inconsistency in this area will continue to grow until the Court offers a coherent account specifying not only which principle is applicable but how that principle should be applied.

I. SUPREME COURT JURISPRUDENCE

The United States Supreme Court has discussed the conditions under which schools can punish students for their speech without thereby offending First Amendment guarantees. Regrettably, that jurisprudence is murky at best. The Court has also addressed due process concerns in university academic dismissals, but those cases offer little or no guidance with respect to First Amendment protections of students dismissed for unprofessional comments or activities. The current jurisprudence on university students’ rights in the context of dismissals from professional programs is largely unchartered, creating uncertainties and risks for students and universities alike.

A. Student Speech Rights in Secondary Schools

The Court has issued several decisions involving the First Amendment rights of high school students. At first, student-speech protections seemed relatively robust, although later decisions weakened those guarantees in not clearly defined ways. In addition, the Court has offered some limited guidance with respect to due process issues raised in the context of university student dismissals for academic reasons. Those cases provide universities and students with much too little guidance. In short, the Supreme Court has provided almost no guidance with respect to the proper approach to determining whether student dismissals from professional programs violate constitutional guarantees.

The seminal case in the Court’s student speech rights jurisprudence is Tinker v. Des Moines Independent Community School District,1 which involved students who wore black armbands to their

schools to protest the Vietnam War. The students were sent home and suspended until willing to attend school without the armbands. The schools’ actions were challenged in federal court.

The *Tinker* Court recognized that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” Wearing armbands in school is “closely akin to ‘pure speech.’” In this case, the “silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners” neither interfered “with the schools’ work” nor adversely affected “the rights of other students to be secure and to be let alone.” While a few students made hostile comments to the protesters, “there were no threats or acts of violence on school premises.”

The district court upheld the school’s actions, reasoning that “the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands.” But the Court rejected that an “undifferentiated fear or apprehension of disturbance is . . . enough to overcome the right to freedom of expression.”

The authorities’ disagreement with the message alone was not enough to justify its suppression. “In order for the State in the person

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2. *Tinker*, 393 U.S. at 504 (“On December 16, Mary Beth and Christopher [Eckhardt] wore black armbands to their schools. John Tinker wore his armband the next day.”). Other unnamed students also wore the armbands. See id. at 508 (“[F]ive students were suspended for wearing them.”).

3. *Id.* at 504.

4. *Id.*

5. *Id.* at 506.

6. *Id.* at 505.

7. *Id.* at 508.

8. *Id.*

9. *Id.* at 504–5.

10. *Id.* at 508.

11. *Id.*
of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” The Court inferred that the school authorities had “an urgent wish to avoid the controversy which might result from the expression,” but the mere desire to remain uncontroversial could not justify the limitation on political speech.

A brief examination of the school’s practices made them even more constitutionally suspect. The school had not adopted a uniform policy with respect to the expression of political views as a general matter. On the contrary, “students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism.” At least in part because the school’s prohibition did not include other political messages but, instead, “a particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was singled out for prohibition,” the Court held that the school authorities’ actions violated constitutional guarantees.

In striking down the school authorities’ actions, the Tinker Court was not thereby permitting students to prevent the schools from performing their mission. The Court expressly noted that the protesting students “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.” While leaving open how much actual or probable disruption would be required before a school suspension for student expression would be upheld, the Court nonetheless implied that the Constitution offered significant protection for students. Absent a “showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition [could not] be sustained.”

12. Id. at 509.
13. Id. at 510.
14. Id. (“[T]he school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance.”).
15. Id.
16. Id. (“The order prohibiting the wearing of armbands did not extend to these.”).
17. Id. at 510–11.
18. Id. at 514.
19. Id.
20. Id. at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
Subsequent case law suggests that protections of student speech may be less robust than the *Tinker* disruption standard implies. *Bethel School District v. Fraser*\(^\text{21}\) involved the punishment of a student for a nominating speech that, in the words of the majority, was “an elaborate, graphic, and explicit sexual metaphor.”\(^\text{22}\) Prior to its delivery, he had shown his speech to teachers who had “informed him that the speech was ‘inappropriate and that he probably should not deliver it.’”\(^\text{23}\) In addition, he had been warned that “his delivery of the speech might have ‘severe consequences.’”\(^\text{24}\) The speech included the following:

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.\(^\text{25}\)

Justice Brennan rejected that the speech was as offensive as one might have inferred from the Court’s description of it,\(^\text{26}\) although he nonetheless believed that the speech was punishable:

[I]n light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to

\(^{21}\) 478 U.S. 675 (1986).

\(^{22}\) *Id.* at 678.

\(^{23}\) *Id.*

\(^{24}\) *Id.*

\(^{25}\) *Id.* at 687 (Brennan, J., concurring).

\(^{26}\) *Id.* ("The Court, referring to these remarks as ‘obscene,’ ‘vulgar,’ ‘lewd,’ and ‘offensively lewd,’ concludes that school officials properly punished respondent for uttering the speech. Having read the full text of respondent’s remarks, I find it difficult to believe that it is the same speech the Court describes.").
conclude, under the circumstances of this case, that respondent’s remarks exceeded permissible limits.\textsuperscript{27}

A school counselor described some of the student reactions to the speech: “Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent’s speech. Other students appeared to be bewildered and embarrassed by the speech.”\textsuperscript{28} But there had been testimony that the disruption at this assembly was no greater than usual,\textsuperscript{29} and the fact that three out of the 600 attending students made sexually suggestive movements did not amount to a disruption of the educational process.\textsuperscript{30}

Both the district court and the Ninth Circuit Court of Appeals found that the \textit{Tinker} material-disruption standard had not been met.\textsuperscript{31} The Supreme Court granted certiorari to determine whether the school’s actions violated constitutional guarantees.\textsuperscript{32}

When reviewing the Ninth Circuit decision holding that Fraser’s speech was protected,\textsuperscript{33} the Court had a few options. It could have affirmed, recognizing that the \textit{Tinker} material-disruption test had not been met. If, instead, the Supreme Court was going to reverse the Ninth Circuit decision, it either had to suggest that the \textit{Tinker} disruption standard had been misapplied below and in fact had been met, or decide that student speech was not immune from punishment even if the \textit{Tinker} standard had not been met.

The \textit{Fraser} Court chose the last approach, chastising the Ninth Circuit for not recognizing the “marked distinction between the political ‘message’ of the armbands in \textit{Tinker} and the sexual content of respondent’s speech.”\textsuperscript{34} In what might be described as a lesson in civility, the Court suggested that while there must be “tolerance of divergent political and religious views, even when the views expressed may be unpopular,”\textsuperscript{35} speakers must “take into account

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 687–88.
\item \textsuperscript{28} \textit{Id.} at 678 (majority opinion).
\item \textsuperscript{29} \textit{Id.} at 694 (Stevens, J., dissenting).
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id.} at 693.
\item \textsuperscript{32} \textit{Bethel Sch. Dist. No. 403 v. Fraser}, 474 U.S. 814 (1985).
\item \textsuperscript{33} \textit{Fraser v. Bethel Sch. Dist. No. 403}, 755 F.2d 1356, 1363 (9th Cir. 1985), rev’d, 478 U.S. 675 (1986) ("[W]e hold that the First Amendment prohibited the District from punishing Fraser for making a speech that school officials considered to be ‘indecent.’").
\item \textsuperscript{34} \textit{Fraser}, 478 U.S. at 680.
\item \textsuperscript{35} \textit{Id.} at 681.
\end{itemize}
consideration . . . , in the case of a school, the sensibilities of fellow students.”

Without exploring the constitutional parameters of the announced approach, the Court explained that the “freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”

One difficulty raised by the Court’s discussion of balancing unpopular views against socially appropriate behavior is that the Court left open when that balancing should occur. One interpretation of Fraser is that this balancing only takes place when the speech involves sexual innuendo rather than political speech. But a different interpretation is that balancing is appropriate as a general matter, and Fraser simply illustrates that lewd or indecent speech will not be weighed heavily in the balance.

A separate issue involves determining what constitutes socially appropriate behavior. The Court understood that there might well be disagreement about that, and suggested that the best approach was to defer to the judgment of school authorities. “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.”

36. Id.
37. Id.
38. See Shannon L. Doering, Tinkering with School Discipline in the Name of the First Amendment: Expelling A Teacher’s Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse, 87 Neb. L. Rev. 630, 646 (2009) (“Fraser struck the balance in favor of protecting the rights of others and decorum within the school, and against affording First Amendment protection to speech of such little social value as Fraser’s speech.”); see also Kimbrilee M. Weber, Note, Banning ‘Boobies’?: A Standard for School Districts to Evaluate Plausibly Lewd, on-Campus Student Speech in Light of B.H. Ex Rel. Hawk v. Easton Area School District, 45 Seton Hall L. Rev. 647, 652 (2015) (“Fraser is significant because it limits Tinker’s broad rule of permissibility and gives more power to school districts to ban or prevent student First Amendment speech that is classified as lewd.”); Jonathan Pyle, Speech in Public Schools: Different Context or Different Rights?, 4 U. Pa. J. Const. L. 586, 618 (2002) (“Justice Burger also suggested in Fraser that a balancing test limits students’ freedom to engage in low-value speech.”).
39. See Ari Ezra Waldman, All Those Like You: Identity Aggression and Student Speech, 77 Mo. L. Rev. 653, 678 (2012) (“Bethel School District v. Fraser[] helps clarify the Court’s underlying balancing test in student speech cases.”).
40. Mark W. Cordes, Making Sense of High School Speech After Morse v. Frederick, 17 WM. & MARY BILL RTS. J. 657, 681 (2009) (“[I]t is clear that ‘lewd and indecent’ speech is not protected, as determined by Fraser.”).
41. Fraser, 478 U.S. at 683.
is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.\textsuperscript{42}

The Court did not limit the reach of its comments to speech involving “sexual innuendo,”\textsuperscript{43} suggesting that vulgar speech included more than that.\textsuperscript{44} Indeed, “offensive terms in public discourse”\textsuperscript{45} might include speech that is neither lewd nor indecent.

Years earlier, the Court noted in \textit{Street v. New York}\textsuperscript{46} that “under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”\textsuperscript{47} However, the \textit{Street} Court was not addressing offensive school speech, and the \textit{Fraser} Court rejected that “simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”\textsuperscript{48} Precisely because “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”\textsuperscript{49} the \textit{Fraser} Court suggested that the Constitution permitted a more robust limitation on student speech than merely a prohibition of sexually laden communications.

The \textit{Fraser} opinion is not a model of clarity with respect to the kind of school speech that can be prohibited.\textsuperscript{50} What made the opinion even more confusing was the Court’s repeated referrals to Fraser’s inappropriate conduct rather than speech.\textsuperscript{51} Traditionally, First

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.} at 678.

\textsuperscript{44} \textit{See id.} at 684–85 (suggesting that speech about excretory functions might also be prohibited); \textit{see also} Derek Ruzicka, \textit{It’s Political, You Can’t Be Offended! A Discussion of the Student Speech Analysis in Guiles Ex Rel. Guiles v. Marineau,} 394 U.S. 576 (1969). \textit{Id.} at 592.

\textsuperscript{45} \textit{Fraser}, 394 U.S. 576 (1969).

\textsuperscript{46} \textit{Fraser}, 478 U.S. at 682.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Fraser}, 478 U.S. at 682.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} Sean R. Nuttall, \textit{Rethinking the Narrative on Judicial Deference in Student Speech Cases}, 83 N.Y.U. L. Rev. 1282, 1302 (2008) (“Chief Justice Burger’s \textit{Fraser} opinion . . . [is] not considered a model of clarity.”); \textit{see also} Morse v. Frederick, 551 U.S. 393, 404 (2007) (“The mode of analysis employed in \textit{Fraser} is not entirely clear.”).

\textsuperscript{51} \textit{Fraser}, 478 U.S. at 678 (“Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was
Amendment speech protections are more robust than are such protections for expressive conduct, and constitutional protections for expressive conduct are more robust than are constitutional protections for non-expressive conduct. But Fraser had done nothing other than give the speech—there was no allegation, for example, that Fraser had been among the students making the sexually suggestive movements. It is unclear, then, if the Court’s reference to Fraser’s conduct had some doctrinal importance or, instead, was simply a way to capture why Fraser’s nominating speech violated the schools disruptive conduct rule.

given a chance to explain his conduct.

id. at 680 (“The Court of Appeals read [Tinker] as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly.”); id. at 683 (“The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.”); id. at 685–86 (“[I]t was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”); id. at 686 (discussing “the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process”).


53. Wesley J. Campbell, Speech-Facilitating Conduct, 68 Stan. L. Rev. 1, 12 (2016) (“[T]he distinction between expressive and non-expressive conduct is absolutely crucial; restrictions of nonexpressive conduct do not implicate the First Amendment at all.”).

54. Fraser, 478 U.S. at 678 (“During Fraser’s delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent’s speech.”).

55. See, e.g., Charles J. Russo & Floyd G. Delon, Warning: Student Expressive Activities and Assignments May Be Hazardous to Their Teachers’ Employment Health, 132 Ed. L. Rep. 595, 603 n.46 (1999) (suggesting that “Fraser focused on the authority of school officials to regulate the expressive conduct of students”).

56. See Robert Block, Students’ Shrinking First Amendment Rights in the Public Schools: Bethel School District No. 403 v. Fraser, 35 DePaul L. Rev. 739, 751 (1986) (noting that “[t]he day after the speech, the assistant principal of Bethel High School charged Fraser with violating the school’s disruptive conduct rule”).
Fraser can be read either\(^57\) as modifying Tinker in that it adopted a balancing approach to student speech\(^58\) or as providing an exception to Tinker.\(^59\) In subsequent cases, the Court made the applicable jurisprudence more confusing rather than less.

In Hazelwood School District v. Kuhlmeier,\(^60\) the Court examined a principal’s decision to excise articles from the school newspaper.\(^61\) One of the articles of concern discussed some of the high school students’ experiences with pregnancy,\(^62\) while another discussed “the impact of divorce on students at the school.”\(^63\) Reynolds, the principal, worried that the students who had been pregnant were identifiable, even though their names had not been included in the article.\(^64\) In addition, he believed that a discussion of sexual activity and birth control was inappropriate for some of the younger students.\(^65\) The article concerning divorce contained some negative

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57. Scott A. Moss, The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions—For the Law and for the Litigants, 63 FLA. L. REV. 1407, 1425 (2011) (“Fraser’s various ill-explained rationales made it a Rorschach precedent, viewable as either distinguishing or undercutting Tinker.”).

58. Andrew D. M. Miller, Balancing School Authority and Student Expression, 54 Baylor L. Rev. 623, 631 (2002) (“[T]he Court refused to apply Tinker’s substantial and material interference test and instead employed a type of balancing test.”).

59. See Joyce Dindo, The Various Interpretations of Morse v. Frederick: Just a Drug Exception or a Retraction of Student Free Speech Rights?, 37 CAP. U. L. REV. 201, 205 (2008) (“This exception permits principals and school administrators to limit student speech that is ‘vulgar and lewd.’”); Abby Marie Mollen, In Defense of the “Hazardous Freedom” of Controversial Student Speech, 102 NW. U. L. REV. 1501, 1509 (2008) (“Fraser established a distinct standard apart from Tinker.”); Piotr Banasiak, Morse v. Frederick: Why Content-Based Exceptions, Deference, and Confusion Are Swallowing Tinker, 39 SETON HALL L. REV. 1059, 1066 (2009) (“In Fraser, the Court shied away from the permissive Tinker standard and carved out an exception to Tinker based on lewd, indecent, and offensive speech.”).


61. Id. at 278 (Brennan, J., dissenting) (“The school principal, without prior consultation or explanation, excised six articles—comprising two full pages—of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would ‘materially and substantially interfere with the requirements of appropriate discipline,’ but simply because he considered two of the six ‘inappropriate, personal, sensitive, and unsuitable’ for student consumption.”).

62. Id. at 263 (majority opinion).

63. Id.

64. Id.

65. Id.
characterizations of one parent, and the parents had not been afforded an opportunity to consent or respond. The end of the school year was approaching, and Principal Reynolds believed that there simply was not enough time to both edit the articles and to print the issue. He simply decided not to print the two pages containing the worrisome articles.

Three students who had been on the newspaper subsequently sued, claiming that their First Amendment rights had been abridged. The Eighth Circuit held that because the school newspaper was a public forum and because the deleted articles, if published, would not have made the school potentially liable in tort, the students’ First Amendment rights had been abridged when those two pages were deleted.

Citing Fraser, the Supreme Court began its analysis by noting that “the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings,’” and that a “school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.” The Court cited Fraser for the proposition that schools need not tolerate speech inconsistent with the school’s mission, which seems to afford schools much greater leeway than merely the power to prohibit student use of “lewd, indecent, or offensive speech.”

The Kuhlmeier Court rejected that the newspaper was a public forum, in part because the school authorities had not “by policy or

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66. Id. (“Reynolds was concerned that a student identified by name in the divorce story had complained that her father ‘wasn’t spending enough time with my mom, my sister and I’ prior to the divorce, ‘was always out of town on business or out late playing cards with the guys,’ and ‘always argued about everything’ with her mother.”).

67. Id.

68. Id. at 263–64.

69. Id. at 264.

70. Id. at 262.


72. Id. at 1376.

73. Id. at 1370.

74. Kuhlmeier, 484 U.S. at 266 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

75. Id. (citing Fraser, 478 U.S. at 685).

76. Id. at 266–67 (citing Fraser, 478 U.S. at 683).

77. Id. at 269–70.
by practice’ opened those facilities ‘for indiscriminate use by the general public.’” 78 Because school authorities had instead “‘reserve[d] the forum for its intended purpos[e],’” as a supervised learning experience for journalism students . . . , school officials were entitled to regulate the contents of Spectrum in any reasonable manner.” 79 Given that it was reasonableness, “rather than [the Court’s] decision in Tinker, that governs this case,” 80 the Court’s holding that “no violation of First Amendment rights occurred” 81 was unsurprising.

The Kuhlmeier Court distinguished Tinker by noting that the “question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in Tinker—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.” 82 This case involved “educators’ authority over 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.” 83 The student newspaper was appropriately “characterized as part of the school curriculum . . . [because] supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” 84 But students do not have the right to say whatever they want in class, for example, offer a presentation on material unrelated to the course. Even professors do not have an unfettered First Amendment right to determine what is covered in a course. 85

After explaining that the school newspaper was more appropriately thought of as a part of the curriculum rather than a kind of public forum, the Court discussed the kind of deference that should be given to educators instead of students. “Educators are entitled to exercise greater control over . . . [the curriculum] to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may

78. Id. at 270 (citing Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 47 (1983)).
79. Id. (citing Perry Educ. Ass’n, 460 U.S. at 46).
80. Id.
81. Id. at 276.
82. Id. at 270–71.
83. Id. at 271.
84. Id.
85. See Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (‘[A] public university professor does not have a First Amendment right to decide what will be taught in the classroom.”).
be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."  

This greater control gives schools wide latitude. For example,

a school may in its capacity as publisher of a school newspaper or producer of a school play “disassociate itself,” not only from speech that would “substantially interfere with [its] work . . . or impinge upon the rights of other students,” but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.

Once again, the Court suggested that the normal rules regarding the regulation of speech in society at large are distinguishable from the rules that are appropriate in the school context. For example, a “school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the ‘real’ world—and may refuse to disseminate student speech that does not meet those standards.”

Not only are schools permitted to refuse to publish speech that does not meet their own “high standards,” but they “retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’ . . . .” The Kuhlmeier Court concluded that “the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”

Like Fraser, Kuhlmeier might be read as creating another exception to Tinker, as a modification of Tinker, or perhaps as

86. Kuhlmeier, 484 U.S. at 271.
87. Id. (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).
88. Id. at 271–72.
89. Id. at 271.
90. Id. at 272 (citing Fraser, 478 U.S. at 683).
91. Id. at 272–73.
92. See Banasiak, supra note 59, at 1060 (“The first exception, delineated in Bethel School District No. 403 v. Fraser, permits school officials to suppress speech that is ‘offensively lewd and indecent;’ the second, delineated in Hazelwood School District v. Kuhlmeier, permits the restriction of speech that bears the imprimatur of the school, so long as the regulation is related ‘to legitimate
both. Further, whether reading these cases as creating exceptions or, instead, as modifying the jurisprudence, one must decide whether to read these decisions broadly or narrowly. The language in Fraser permitting schools to prohibit student speech not in accord with the school’s basic mission seems rather broad. The language in Kuhlmeier permitting limitations on speech inconsistent with the school’s or society’s positions on a variety of issues is also rather forgiving. While Kuhlmeier might merely be read to afford discretion to a school to avoid the attribution of views that the school does not hold, the opinion need not be read in such a limited way. If the only

pedagogical concerns.”); Clay Calvert, Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing, 58 AM. U. L. REV. 1167, 1191 (2009) (“[The Supreme Court cannot continue to carve out exceptions to Tinker, as it has done now in Fraser; Kuhlmeier and Morse.”); Jeremy Jorgensen, Student Rights Up in Smoke: The Supreme Court’s Clouded Judgment in Morse v. Frederick, 25 TOURO L. REV. 739, 748 (2009) (“The second exception to Tinker emerged in Kuhlmeier, decided less than two years after Fraser, in 1988.”); Allison E. Hayes, From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age, 43 AKRON L. REV. 247, 253 (2010) (“Less than two years later, the Court added another exception to the Tinker standard when it decided Hazelwood School District v. Kuhlmeier.”).

93. See Mickey Lee Jett, The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media, 61 CATH. U. L. REV. 895, 903 (2012) (“Less than two years after Fraser, the Supreme Court decided Hazelwood School District v. Kuhlmeier—the second case that scaled back Tinker’s broad First Amendment protection.”).

94. See Caroline B. Newcombe, Morse v. Frederick One Year Later: New Limitations on Student Speech and the “Columbine Factor”, 42 SUFFOLK U. L. REV. 427, 431 (2009) (“Two years after Fraser, the Court in Hazelwood School District v. Kuhlmeier created a third approach to student speech, and a second exception to Tinker.”).


96. *Kuhlmeier*, 484 U.S. at 266 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

97. *Id.* at 272 (citing *Fraser*, 478 U.S. at 683).

98. *Id.* at 271.
evil to be avoided was a mistaken attribution of particular views to the school, then the newspaper might simply have contained a disclaimer that the views reflected therein were not necessarily endorsed by the school.99

The Court’s next decision in this line of cases did not clarify these issues very much either. Morse v. Frederick100 involved the punishment of a student carrying a banner that read “BONG HiTS 4 JESUS”101 at a school-sponsored event.102 While admitting that the “message on Frederick’s banner is cryptic,”103 the Court nonetheless suggested that the message might reasonably be understood to be promoting illegal drug use.104 As such, the message’s suppression at a school event did not violate First Amendment guarantees.105

The Morse Court did not help clarify Fraser and Kuhlmeier. With respect to Fraser, the Court expressly noted that the “mode of analysis employed in Fraser is not entirely clear,”106 and then commented that “it is enough to distill from Fraser two basic principles:”107 (1) “Fraser’s holding demonstrates that ‘the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,’”108 and (2) “Fraser established that the mode of analysis set forth in Tinker is not absolute . . . [because] Fraser . . . did not conduct the ‘substantial disruption’ analysis prescribed by Tinker.”109 Basically, the Court

99. Cf. Hon. Delissa A. Ridgway, Getting Published, 47 Fed. Law. 14, 16 (2000) (“[A] piece by a U.S. government employee often includes a note that ‘the views and opinions expressed in this article are solely those of the author and do not necessarily reflect those of the U.S. government.’”).

100. 551 U.S. 393 (2007).

101. Id. at 397.

102. Id. at 401 (“[W]e agree with the superintendent that Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.’”).

103. Id.

104. Id.

105. Id. at 403 (“The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.”).

106. Id. at 404.

107. Id.

108. Id. at 404–05 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

109. Id. at 405 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

111
suggested that Fraser establishes that the First Amendment freedoms of students in school are not as robust as the rights of adults in other settings and that a showing of a substantial disruption is not required in order for a school speech prohibition to be compatible with constitutional guarantees.

The Court’s discussion of Kuhlmeier did not limit its reach. While the Morse Court noted that “Kuhlmeier does not control this case because no one would reasonably believe that Frederick’s banner bore the school’s imprimatur,” that comment merely explained why Kuhlmeier was not dispositive. The Court’s comment did not additionally suggest that Kuhlmeier was only relevant in cases involving a mistaken imputation of imprimatur. Instead, the Court read Kuhlmeier to support Fraser’s principles: (1) Kuhlmeier “acknowledged that schools may regulate some speech ‘even though the government could not censor similar speech outside the school,’” and (2) “like Fraser, it confirms that the rule of Tinker is not the only basis for restricting student speech.”

After supporting its contention that Kuhlmeier and Fraser established that student speech could be prohibited even if the Tinker substantial-disruption standard had not been met, the Morse Court started discussing the dangers of drug use: “Drug abuse can cause severe and permanent damage to the health and well-being of young people.” Because the speech at issue occurred during a school event and because of “the governmental interest in stopping student drug abuse,” schools are permitted “to restrict student expression that they reasonably regard as promoting illegal drug use.”

Yet, the government has an interest in preventing a variety of student practices, so it is not clear what on-site speech the Fraser-Kuhlmeier-Morse analysis permits schools to regulate. For example, the state has an interest in preventing teenage pregnancy, and it is unclear whether student discussions of such issues could be prohibited even where there is no danger of a misattribution of the student’s

110. Id.
111. Id. at 405–06 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).
112. Id. at 406.
113. Id. at 407.
114. Id. at 408 (citing Tinker, 393 U.S. at 506).
115. Id.
116. See Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 472–73 (1981) (holding that a statute addressing “the problem of sexual intercourse and teenage pregnancy” is “sufficiently related to the State’s objectives to pass constitutional muster”).
stated views to the school.\textsuperscript{117} Merely because \textit{Kuhlmeier} would not be dispositive\textsuperscript{118} in a case in which there was no danger of misattribution of the views to the school would not prevent \textit{Kuhlmeier} from providing support for a particular prohibition.

The \textit{Morse} Court limited \textit{Fraser} by expressly rejecting that the “case should . . . be read to encompass any speech that could fit under some definition of ‘offensive,’”\textsuperscript{119} if only because “much political and religious speech might be perceived as offensive to some.”\textsuperscript{120} But saying that some “offensive” speech is protected is not very helpful without further specification of which speech is protected.

Justice Thomas would simply hold that the First Amendment does not afford protection to student school speech.\textsuperscript{121} Justices Alito and Kennedy joined the \textit{Morse} opinion “on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’”\textsuperscript{122} But such a qualification “practically refutes itself.”\textsuperscript{123} If indeed “a nonsense message”\textsuperscript{124} can reasonably be interpreted as advocating illegal drug use, then such a message might—instead or in addition—be viewed as commenting on a social issue, in which case the prohibition’s constitutionality should not have been upheld.

The \textit{Morse} Court did not address whether “BONG HiTS 4 JESUS” could reasonably be viewed that way, instead addressing whether it in fact was such a commentary.\textsuperscript{125} Because “not even Frederick argues that the banner conveys any sort of political or religious message,”\textsuperscript{126} the Court implied that the message could not be

\begin{itemize}
\item \textsuperscript{117} See \textit{Morse}, 551 U.S. at 446 (Stevens, J., dissenting) (“Under the Court’s reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers?”).

\item \textsuperscript{118} Id. at 405 (majority opinion).

\item \textsuperscript{119} Id. at 409 (emphasis added).

\item \textsuperscript{120} Id.

\item \textsuperscript{121} Id. at 410–11 (Thomas, J., concurring) (“[T]he First Amendment, as originally understood, does not protect student speech in public schools.”).

\item \textsuperscript{122} Id. at 422 (Alito, J., concurring) (citing id. at 445 (Stevens, J., dissenting)).

\item \textsuperscript{123} Id. at 444 (Stevens, J., dissenting).

\item \textsuperscript{124} Id.

\item \textsuperscript{125} See \textit{infra} note 126 and accompanying text (discussing the meaning of the banner).

\item \textsuperscript{126} \textit{Morse}, 551 U.S. at 403.
\end{itemize}
read that way. Frederick was arguing that the message had no meaning, so it was unsurprising that he was not claiming that it had political or social content. If the message could be read as advocating illegal drug use—his denial of that meaning notwithstanding—then it could also be read as commenting on a social issue. Indeed, the Court as much as said that itself when offering the possible interpretation “bong hits [are a good thing],” which is clearly commenting on a social issue.

B. Student Speech Rights in Universities

The student-speech jurisprudence is subject to a variety of interpretations. Some read Fraser, Kuhlmeier, and Morse as offering narrow exceptions to Tinker. However, others read the jurisprudence as vague and undefined or, perhaps, as remaining open pending further developments. Not only is the best interpretation of the student-speech jurisprudence open to debate, but

127. Id. at 402 (“The best Frederick can come up with is that the banner is ‘meaningless and funny.’”).

128. Id. (alteration in original).

129. See Lee Goldman, Student Speech and the First Amendment: A Comprehensive Approach, 63 FLA. L. REV. 395, 404 (2011) (“Fraser, Kuhlmeier, and Morse are seen as mere exceptions to Tinker’s general rule.”); see also Brandon James Hoover, The First Amendment Implications of Facebook, Myspace, and Other Online Activity of Students in Public High Schools, 18 S. CAL. INTERDISC. L.J. 309, 326 (2009) (“In Fraser, the Court carved out the exception for lewd, sexual, and profane speech. Next, in Kuhlmeier, the Court carved out the exception for school-sponsored speech, or what may also be referred to as speech that includes the school’s imprimatur on it. And, recently, the Court, in Morse, carved out a special exception stating a school may categorically prohibit speech dealing with pro-drug messages.”); Darien M. Williams, Tinker Operationalized: The Judiciary’s Practical Answer to Student Cyberspeech, 62 DePaul L. REV. 125, 134 (2012) (“[T]he most efficient and reasonable approach to student speech is to first examine whether the speech in question falls into any of the exceptions outlined by Fraser, Kuhlmeier, and Morse”).

130. See Benjamin F. Heidlage, A Relational Approach to Schools’ Regulation of Youth Online Speech, 84 N.Y.U. L. REV. 572, 579 (2009) (“In Fraser, Kuhlmeier, and Morse, the Court appears to have established exceptions to the Tinker substantial disruption test without expressly overruling it, leaving a muddled and erratic doctrine.”).

131. See Mark Strasser, Tinker Remorse: On Threats, Boobies, Bullying, and Parodies, 15 FIRST AMEND. L. REV. 1, 21 (2016) (“The Morse Court implied that both Fraser and Kuhlmeier left open how broadly the exception to Tinker should be read rather than representing limited exceptions involving perceived state endorsement or the use of sexually indecent language.”); Jorgensen, supra note 92, at 744 (“While Morse may appear as a narrow exception to the holding of Tinker, it has broad implications.”).
an additional difficulty is that the circuits are split with respect to whether this is the correct jurisprudence to apply when seeking to assess the constitutionality of dismissals of students from professional programs in college or graduate school.\footnote{132}

It is not as if the Supreme Court has never addressed the constitutionality of a student’s dismissal from a university program. In two different cases, the Court addressed whether student dismissals from professional programs violated due process guarantees.

In \textit{Board of Curators of University of Missouri v. Horowitz},\footnote{133} the Court addressed the constitutionality of the University of Missouri–Kansas City Medical School’s dismissal of a student during her final year of study.\footnote{134} Charlotte Horowitz claimed that her procedural due process rights had been violated by her dismissal.\footnote{135}

During her first year of study several faculty had noted that her “‘performance was below that of her peers in all clinical patient-oriented settings,’ that she was erratic in her attendance at clinical sessions, and that she lacked a critical concern for personal hygiene.”\footnote{136} Many members of the faculty continued to be dissatisfied the following year.\footnote{137} It was not as if the faculty failed to apprise her of their concerns—on the contrary, she was informed that the faculty believed that her skills were deficient and that the failure to improve would affect when or even whether she could graduate.\footnote{138} Because she had been on notice and because there is a “significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct,”\footnote{139} the Court held that due process guarantees had been met.\footnote{140}

The Court explained that academic and disciplinary judgments differed in important ways: “[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have

\footnote{132}{See infra note 169 and accompanying text (discussing the circuit split).}
\footnote{133}{435 U.S. 78 (1978).}
\footnote{134}{Id. at 79.}
\footnote{135}{Id. at 79–80.}
\footnote{136}{Id. at 81.}
\footnote{137}{Id.}
\footnote{138}{Id. at 85 (“The school fully informed respondent of the faculty’s dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment.”).}
\footnote{139}{Id. at 86.}
\footnote{140}{Id. at 84–85 (“Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires.”).}
traditionally attached a full-hearing requirement.” 141 Yet, by distinguish­ing in this way, the Court not only left open what would satisfy due process requirements in the University context where disciplinary action was at issue,142 but also how to distinguish between disciplinary and academic punishment. 143

The Horowitz Court characterized the “educational process [as] not by nature adversar[ial]; instead it centers around a continuing relationship between faculty and students.” 144 Teachers are likely to need to take on a variety of roles as the student “advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized.” 145 In addition, some deference is owed because “[c]ourts are particularly ill­equipped to evaluate academic performance.” 146 For all of these reasons, the Court refused to “formalize the academic dismissal process by requiring a hearing.” 147

In Regents of University of Michigan v. Ewing, 148 the Court examined whether the University of Michigan’s refusal to permit a student to retake an examination deprived that student of due process. 149 Scott Ewing was accepted into a special program at the University of Michigan whereby an individual could receive an undergraduate degree and a medical degree in six years.150 However, the program

141. Id. at 89.
142. See Mary Ann Connell & Donna Gurley, The Right of Educational Institutions to Withhold or Revoke Academic Degrees, 32 J.C. & U.L. 51, 70 n.138 (2005) (suggesting that a sliding scale is used such that more due process is required where the punishments are more severe).
143. Cf. Jack E. Byrom, To Love and Die in Dixon: An Argument for Stricter Judicial Review in Cases of Academic Misconduct, 31 Rev. Litig. 147, 170 (2012) (“In order to protect the constitutional rights of these students, it is essential for the courts to clarify what issues qualify for protection as ‘academic’ matters and what must be subject to due process analysis as ‘disciplinary’ matters.”).
144. Horowitz, 435 U.S. at 90.
145. Id.
146. Id. at 92.
147. Id. at 90.
149. Id. at 215 (“The question presented is whether the University’s action deprived Ewing of property without due process of law because its refusal to allow him to retake the examination was an arbitrary departure from the University’s past practice.”).
150. Id. (“In the fall of 1975 Ewing enrolled in a special 6-year program of study, known as ‘Inteflex,’ offered jointly by the undergraduate college and the
required the student to receive a passing score of a national exam prior to beginning the last two years.\footnote{151}{Id. at 215–16 (“The student must also pass the ‘NBME Part I’—a 2-day written test administered by the National Board of Medical Examiners.”).}

After completing the requirements of the first four years,\footnote{152}{Id. at 216 (“Ewing successfully completed the courses prescribed for the first four years of the Inteflex program and thereby qualified to take the NBME Part I.”).} Ewing took and failed the national exam, receiving a 235 score where a 345 score was required for passing.\footnote{153}{Id. (“Ewing failed five of the seven subjects on that examination . . . .”).} After considering Ewing’s record in some detail, the Promotion and Review Board dismissed Ewing from the program.\footnote{154}{Id.} Ewing wrote a letter requesting reconsideration, and the Board reconvened to reconsider its decision.\footnote{155}{Id.} Ewing personally addressed the committee, explaining why his score on the national test did not reflect his abilities.\footnote{156}{Id.} The Board again voted, reaffirming the decision to drop Ewing from the program.\footnote{157}{Id.}

Ewing appealed to the Executive Committee of the Medical school.\footnote{158}{Id.} After permitting him to speak in person, the Committee voted to deny his request for a leave of absence to give him an opportunity to retake the national exam.\footnote{159}{Id. at 216.} He appeared before that committee two more times, unsuccessfully seeking readmission to the Medical School.\footnote{160}{Id.} He then filed suit against the school, claiming that substantive due process guarantees had been violated.\footnote{161}{Id. at 217 (“As a matter of federal law, Ewing alleged that he had a property interest in his continued enrollment in the Inteflex program and that his dismissal was arbitrary and capricious, violating his ‘substantive due process rights’ guaranteed by the Fourteenth Amendment.”).}

The Supreme Court assumed for purposes of the case that Ewing did have a constitutionally protected property interest in continuation in the program.\footnote{162}{Id. at 223.} However, that right only entitled Ewing “to con-
tinued enrollment free from arbitrary state action,” and the Court accepted that the record contained no evidence of arbitrariness.163

While other students had been allowed to retake the national exam in the past and Ewing was the first to have been denied that opportunity,164 that alone did not establish that the faculty was acting arbitrarily. The Court reasoned that “the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career.”165 Further, the Court cautioned that courts should not override such a decision “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.”166

The Ewing Court noted that it might have been wiser to have permitted Ewing to take the test again, if only to avoid the costs associated with litigating this issue.167 Even so, the Court found that “his dismissal from the Inteflex program rested on an academic judgment that is not beyond the pale of reasoned academic decision-making when viewed against the background of his entire career at the University of Michigan, including his singularly low score on the NBME Part I examination.”168 Thus, even assuming that there is some substantive due process right to continuation in a university program, Ewing illustrates that such a right is rather weak because it only guards against arbitrary state action.

II. LOWER COURTS ON DISMISSAL FROM UNIVERSITY PROFESSIONAL PROGRAMS

The lower courts have addressed several cases in which the constitutionality of a university dismissal from a professional program was at issue. However, the courts cannot agree about whether the Court’s high school student speech jurisprudence is applicable in the university context169 or about how to apply the Court’s guidance when

163. Id. ("[T]he facts of record disclose no such action.").

164. Id. at 219.

165. Id. at 225.

166. Id. (citing Youngberg v. Romeo, 457 U.S. 307, 323 (1982)).

167. Id. at 227.

168. Id. at 227–28.

169. See Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005) (“We hold, therefore, that Hazelwood’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.”); Brown v. Li, 308 F.3d 939, 951–52 (9th Cir. 2002) (“In view of a university’s strong interest in setting the content of its curriculum and teaching that content, Hazelwood
it does seem applicable. Rather than coalescing, the lower courts seem to be diverging about which standards to use or how they should be applied.

A. Internet Postings

Two cases out of Minnesota illustrate some of the difficulties that can arise when individuals post comments on the internet. One factor complicating these analyses was that some of the comments at issue provides a workable standard for evaluating a university student’s First Amendment claim stemming from curricular speech.”); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (“We hold that the Hazelwood framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.”); Vanderhurst v. Colorado Mountain Coll. Dist., 208 F.3d 908, 915 (10th Cir. 2000), as amended on denial of rehe’g and rehe’g en banc (“This court will thus assume for purposes of this appeal that the analytical framework established in Kuhlmeier is indeed appropriate to this case; we need not decide definitively, however, whether that framework does in fact govern a public college or university’s control over the classroom speech of a professor or other instructor.”). But see Brown, 308 F.3d at 957 (9th Cir. 2002) (Reinhardt, C.J., concurring in part and dissenting in part) (“I disagree with Judge Graber because she would have this court adopt an erroneous First Amendment standard [Kuhlmeier] for a university’s attempts to regulate the speech of college and graduate students.”); Oyama v. Univ. of Haw., 813 F.3d 850, 862 (9th Cir. 2015), cert. denied, 136 S. Ct. 2520 (2016) (“Nor has Judge Graber’s reasoning been adopted by our precedents since.”); id. (“When the University recommends a student for certification, it communicates to the world that, in its view, that student is fit to practice the profession; as a result, the University places its ‘imprimatur’ on each student it approves to teach.”); id. at 863 (“This case presents no occasion to extend student speech doctrine to the university setting.”); Pugel v. Bd. of Tr. of Univ. of Ill., 378 F.3d 659, 667 (7th Cir. 2004) (“As a teaching assistant employed by the University, Ms. Pugel was a public employee as well as a graduate student.”); id. at 667–68 (“We therefore evaluate Ms. Pugel’s speech under the well-established Connick–Pickering framework of analysis.”); Flint v. Dennison, 488 F.3d 816, 836 (9th Cir. 2007) (“By creating a student election process, the University of Montana has opened a limited public forum dedicated to allow campaigning for and election to leadership positions in student government. The University’s purpose in opening such a forum is to provide student candidates and student voters a certain type of educational experience. We hold that imposing an expenditure limitation on student candidates is viewpoint neutral and serves to effectuate the purpose of the ASUM elections. We therefore affirm the district court’s summary judgment in favor of defendants.”); Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001) (discussing why Kuhlmeier was not appropriate to apply in university context); Student Gov’t Ass’n v. Bd. of Tr. of Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“Hazelwood School District v. Kuhlmeier . . . is not applicable to college newspapers.”). Cf. Kuhlmeier, 484 U.S. at 273 n.7 (“We 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.”).
were viewed as threatening, which might have made the speech unprotected under the First Amendment in any event. The Minnesota Supreme Court decided one of the cases while the Eighth Circuit decided the other, although both decisions were somewhat confusing in their rationales.

_Tatro v. University of Minnesota_ involved a student who was a junior in the Mortuary Science Program at the University of Minnesota. The Mortuary Science Program is a special program for upper-class students preparing them to be morticians or funeral directors. The laboratory component makes use of voluntarily donated cadavers.

Amanda Tatro was enrolled in three required laboratory classes. Prior to participating in any of those classes, she had entered into an agreement with the university that she would be respectful towards the cadavers. While the rules permitted “respectful and discreet” discussion “of cadaver dissection outside the laboratory,” they expressly “prohibited ‘blogging’ about the anatomy lab or cadaver dissection.” The anatomy lab instructor had explained that “‘blogging’ was intended to be a broad term,” and that the students had been told during their “orientation that blogging included Facebook and Twitter.”

Tatro posted statements on Facebook, which she has described in court filings as “satirical commentary and violent fantasy about her school experience.” Her posts included the following:


171. _Id._ at 509 (Minn. 2012).

172. _Id._ at 511.

173. _Id._ at 511–12.

174. _Id._ at 512.

175. _Id._

176. _Id._ (“Tatro... signed the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form, acknowledging that she understood and agreed to comply with the program rules, as well as ‘additional laboratory policies’ stated in the course syllabus.”).

177. _Id._

178. _Id._

179. _Id._

180. _Id._

181. _Id._ at 511.
Amanda Beth Tatro Gets 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 . . . [November 12, 2009]

Amanda Beth Tatro Is looking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar. [December 6, 2009]

Amanda Beth Tatro 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 . . . [December 7, 2009]

Amanda Beth Tatro Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. [Undated.]

Her postings about stabbing someone with a trocar and hiding a scalpel in her sleeve made several individuals nervous. She was told to stay away from the department and staff while her comments were investigated. Tatro—who believed that she had been suspended—reported the school’s actions and her posts to the media. She appeared on local TV channels, which resulted in the Anatomy Program receiving “letters and calls from donor families and the general public who expressed concerns about Tatro’s lack of professionalism, poor judgment, and immaturity.”

The Office of Student Conduct and Academic Integrity (“OSCAI”) began an investigation of Tatro’s conduct to see whether

182. Id. at 512–13.
183. Id. at 513 n.2 (“A trocar is a long hollow needle made of stainless steel that is typically inserted into the body during embalming to aspirate gas and fluids.”).
184. Id. at 513 (“The Director testified that ‘[t]here was a lot of fear’ surrounding Tatro’s post about stabbing someone with a trocar and hiding a scalpel in her sleeve.”).
185. Id. University police ultimately determined that no crime had been committed.” Id.
186. Id.
187. Id.
she had violated the University’s Student Conduct Code. Tatro appealed to the Campus Committee on Student Behavior (“CCSB”), challenging the OSCAI investigation. At the CCSB hearing, the director and two program instructors testified “about the program’s emphasis on respect, dignity, and professionalism as a foundation for later working as a funeral director or mortician, as well as the need for respect for the donors to the Anatomy Bequest Program.” The CCSB found Tatro “responsible for violating the Student Conduct Code provision prohibiting threatening conduct,” and also for having violated the anti-blogging rule. The CSSB recommended imposing the following sanctions:

1. Changing Tatro’s grade in MORT 3171 to an “F.”
2. Completion of a “directed study course” in clinical ethics.
3. A letter to one of the faculty members in the Mortuary Science Program addressing the issue of respect within the program and the profession.
4. A psychiatric evaluation at the student health service clinic and completion of any recommendations made by their evaluation.
5. Placement on probation for the remainder of Tatro’s undergraduate career.

Those recommendations were adopted by the Provost, and Tatro challenged the imposition of those sanctions as a violation of her First Amendment rights. The Minnesota Supreme Court rejected the application of both Kuhlmeier and Tinker. After

188. Id.
189. Id.
190. Id. at 514.
191. Id.
192. Id. (“The CCSB also found Tatro responsible for violating several University rules, . . . including . . . Anatomy Laboratory Rule # 7, which provides in part that ‘[b]logging about the anatomy lab or the cadaver dissection is not allowable’ . . .”)
193. Id. at 514–15.
194. Id. at 515.
195. Id. at 515–16.
196. See id. at 518 (concluding that University’s argument based on the Kuhlmeier case is not applicable to the case at bar).
197. Id. at 519.
noting the parties’ agreement that “a university may regulate student speech on Facebook that violates established professional conduct standards,”198 the court further elaborated on the relevant test by suggesting that “any restrictions on a student’s Facebook posts must be narrowly tailored and directly related to established professional conduct standards.”199 When doing this analysis, the court focused on whether the “University’s restrictions on the mode, manner, and place of student speech are ‘substantially broader than necessary’ to achieve the objective of ensuring that students treat human cadavers with respect and dignity.”200

Tatro complained that the University was enforcing “‘accepted unwritten social norms’—not any ‘specific standards or authorities governing professional behavior.’”201 For example, because her posts “did not reveal any personally identifiable facts, data, or information about the human cadaver she was studying,”202 she contended that the University’s claim that it was merely enforcing professional norms should be rejected and that the University was “violat[ing] her free speech rights by sanctioning her for using her ‘Facebook page as a literary device to express her emotions.’”203 But the high court disagreed, instead finding that “the academic program rules of the Mortuary Science Program, as applied, are narrowly tailored.”204 The court rejected that her discussion of the cadaver had been respectful.

Giving the human cadaver a name derived from a comedy film about a corpse and posting commentary about “playing” with the human cadaver, taking her “aggression” out on the human cadaver, and keeping a “[l]ock of hair” in her pocket are incompatible with the notions of respect and dignity for the individual who chose to donate his body to support the research and education missions of the Anatomy Bequest Program.205

198. Id. at 521.
199. Id.
200. Id. at 523 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).
201. Id. at 521.
202. Id. at 522.
203. Id.
204. Id. at 523.
205. Id.
Tatro denied that her speech constituted a true threat,\footnote{Id. at 524 (“Tatro argues that the University cannot discipline her for any speech that does not constitute a ‘true threat’ and claims that her Facebook posts do not constitute a ‘true threat.’”).} notwithstanding her admission that others unfamiliar with her sense of humor might misunderstand the nature of her comments.\footnote{Id. at 514 (“She also knew that ‘all the Mort Sci kids’ would see the post, but she never intended to incite or induce fear in anyone. Tatro conceded, however, that she could understand how others might misunderstand her sense of humor, especially when taken out of context.”).} The University argued that it could “constitutionally impose discipline for threatening speech that substantially disrupted the Mortuary Science Program.”\footnote{Id. at 524.} The court decided not to treat “the threatening speech as a stand-alone violation, particularly since the complaint and sanctions here appear to have been based on the totality of the posts.”\footnote{Id.} Perhaps that was because the court did not believe that her comments constituted a true threat,\footnote{See Meggen Lindsay, Note, Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students—Tatro v. University of Minnesota, 38 Wm. Mitchell L. Rev. 1470, 1509 (2012) (“Arguably, the court did not undertake a true-threat analysis because Tatro’s speech clearly did not constitute a true threat.”). But see Tracey Wirmani, Note, Tinker Takes on Tatro: The Minnesota Supreme Court’s Missed Opportunity, 65 Okla. L. Rev. 769, 793 (2013) (“[T]he true threat standard would have met the university’s needs.”).} although the court might instead have believed that there were so many justifiable bases for the sanctions that there was no need to examine each.

The court’s justifications for upholding the sanctions sent a variety of mixed signals. For example, the court noted that respectful treatment of cadavers “is imperative to maintaining the trust of the individuals who donate their bodies to the Anatomy Bequest Program.”\footnote{Tatro, 816 N.W.2d at 523.} There would be serious consequences if individuals lost faith in the University’s assurances of proper treatment—“there would not be a Mortuary Science Program if people were not willing to donate their bodies after death to the Anatomy Bequest Program.”\footnote{Id. at 523–24.} Yet, programs might be ended for a variety of reasons, such as a lack of adequate resources. The court noted that the university had not claimed that Tatro’s comments would result in fewer donations,\footnote{Id. at 523.} but did not explain whether such a claim, if substantiated, would have
justified the university’s actions. If so, then an individual student’s program completion might be dependent upon her not upsetting a generous donor.

The reason that the University received a variety of complaints about Tatro’s actions was that she had appeared on local TV stations,\footnote{Id. at 513 (“After Tatro appeared on local television stations, the Anatomy Bequest Program received letters and calls from donor families and the general public who expressed concerns about Tatro’s lack of professionalism, poor judgment, and immaturity.”).} which had occurred after Tatro had wrongly concluded that she had been suspended.\footnote{Id. at 513.} But this was only indirectly related to the wrongful behavior for which she was being punished. Had the investigation of her Facebook postings remained internal to the University, it seems doubtful that the University would have received many calls about Tatro’s lack of professionalism. But one cannot tell from the court’s opinion whether her punishment would have been upheld if the program had not received any complaints from the public.

Suppose that Tatro had appeared on local TV for some other reason such as explaining to the public what it was like to live with a particular disease.\footnote{Id. at 514 (“Tatro suffers from a debilitating central nervous system disease . . . .”).} If she had identified herself as participating in the Mortuary Program and had she struck the audience as being unprofessional, the audience members might still have complained to the University and, perhaps, been less willing to support the Program. Presumably, her undermining the program in that way would not have made her subject to punishment.

The Minnesota Supreme Court seemed to focus on ways that Tatro had disrupted the program, which was what the University had alleged.\footnote{Id. at 523; see also supra note 211 and accompanying text (emphasizing that the “[u]niversity’s rules and policies governing access to human cadavers are unique because respectful treatment of human cadavers is imperative to maintaining the trust of the individuals who donate their bodies to the Anatomy Bequest Program.”).} But the standard employed by the Minnesota Supreme Court was whether Tatro had violated “established professional conduct standards,”\footnote{See Tatro, 816 N.W.2d at 521.} and the focus of those standards is not on the success of a particular university program but, instead, on assuring that professionals are respectful when handling the remains of loved ones.\footnote{See Ashley C. Johnson, Note, “Narrowly Tailored” and “Directly Related”: How the Minnesota Supreme Court’s Ruling in Tatro v. University of}
By focusing on the possibility that Tatro’s comments would reduce the number of donated cadavers, the court offered no guidance about how or whether to consider the views of those who expressed fear that Tatro might have a scalpel hidden in her sleeve or that Tatro might stab someone with a trocar. The expression of such views might be disruptive in a number of ways, because both instructors and students might be wary of working with or being near someone whom they view as dangerous. One could not tell whether the Minnesota Supreme Court believed those worries unfounded or, instead, a separate basis upon which the sanctions might have been justified.

The Eighth Circuit was afforded an opportunity to clarify whether a university student having made (allegedly) threatening statements justifies his dismissal from a professional program. Keefe v. Adams involved a student, Craig Keefe, who had been removed from a Nursing Program for “behavior unbecoming of the profession and transgression of personal boundaries.”

A student had complained about some of Keefe’s Facebook posts, which she found “threatening and related to the classroom.” The complaining student said that she would be unable to function with him at the clinical site.

The Director of Nursing, Connie Frisch, set up a meeting with Keefe to express her concerns about some of his posts. Those posts included:

Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger.

Minnesota Leaves Post-Secondary Students Powerless to the Often Broad and Indirect Rules of Their Public Universities, 36 Hamline L. Rev. 311, 325 (2013) (“[T]he Minnesota Supreme Court failed to provide guidance to universities concerned about maintaining both student safety and First Amendment freedoms.”).

220. See Tatro, 816 N.W.2d at 513.

221. See Wirmani, supra note 210, at 783 (“[T]he Minnesota Supreme Court failed to provide guidance to universities concerned about maintaining both student safety and First Amendment freedoms.”).

222. 840 F.3d 523 (8th Cir. 2016).

223. Id. at 525.

224. Id. at 526.

225. Id. at 532.
Doesn’t anyone know or have heard of mechanical pencils. Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to long. I might need some anger management.

LMAO [a classmate], you keep reporting my post and get me banded. I don’t really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch. . . . And quite creeping on my page. Your not a friend of mine for a reason. If you don’t like what I have to say than don’t come and ask me, thats basically what creeping is isn’t it. Stay off my page . . . .

Frisch thought the post about giving someone a hemopneumothorax the most disconcerting. However, she was also concerned about Keefe’s self-described anger-management issues, especially when he became argumentative during his meeting with her.

Keefe explained that he jokes on his Facebook page, although he also suggested that his page might have been hacked. However, he later confirmed in a deposition that he had written the posts in question. Because of his lack of remorse and because he did not express a desire to change, Frisch decided to remove him from the program.

The Nursing Program Student Handbook stated that “all current and future students are expected to adhere to the policies and procedures of this student handbook.” Included within that handbook was the provision that “students who fail to meet the moral, ethical, or professional behavioral standards of the nursing program are not eligible to progress in the nursing program.” Behaviors that offended this policy included “transgression of professional boundaries” and “behavior unbecoming of the Nursing Profession.”

226. Id. at 526–27.
227. Id. at 527 n.3 (“Keefe testified that a hemopneumothorax is a ‘trauma’ where the lung is punctured and air and blood flood the lung cavity; it is not a medical procedure.”).
228. Id.
229. Id.
230. Id.
231. Id.
232. Id.
233. Id. at 528.
234. Id.
A separate section of the handbook described the ways that individuals should treat their colleagues. “The nurse maintains compassionate and caring relationships with colleagues and others with a commitment to the fair treatment of individuals, to integrity-preserving compromise, and to resolving conflict.”\textsuperscript{235} The handbook noted in particular that the “standard of conduct precludes any and all forms of prejudicial actions, any form of harassment or threatening behavior, or disregard for the effect of one’s actions on others.”\textsuperscript{236} Nurses are expressly told that they must “recognize[] and maintain[] boundaries that establish appropriate limits to relationships,” and that “[i]n all encounters, nurses are responsible for retaining their professional boundaries.”\textsuperscript{237}

When addressing “whether the First Amendment precludes a public university from adopting, as part of its curriculum for obtaining a graduate degree in a health care profession, the Code of Ethics adopted by a nationally recognized association of practicing professionals,”\textsuperscript{238} the Eighth Circuit began by rejecting the contention that Keefe’s postings were unprotected speech.\textsuperscript{239} This was a surprising way to begin, because comments about giving someone within the class a hemopneumothorax coupled with comments about one’s own anger-management issues might well be taken to constitute a true threat, which has already been recognized as a category of speech unprotected by the First Amendment.\textsuperscript{240} Indeed, the Eighth Circuit characterized one of the postings as “including a physical threat related to their medical studies,”\textsuperscript{241} and unsurprisingly concluded that the “First Amendment did not bar educator Frisch from making the determination that Keefe was unable to meet the professional demands of being a nurse.”\textsuperscript{242}

Keefe had claimed that because his speech was protected by the First Amendment, the College was barred from punishing his off-cam-

\begin{footnotes}
\begin{enumerate}
\item[235.] \textit{Id.}
\item[236.] \textit{Id.}
\item[237.] \textit{Id.} at 528–29.
\item[238.] \textit{Id.} at 529–30.
\item[239.] See \textit{id.} at 530 (stating that the First Amendment fully applies to Facebook postings).
\item[239.] See Virginia v. Black, 538 U.S. 343, 344 (2003) (stating that “[f]or example, the First Amendment permits a State to ban ‘true threats’ . . . .”).
\item[240.] Keefe, 840 F.3d at 532.
\item[242.] \textit{Id.} at 533.
\end{enumerate}
\end{footnotes}
pus speech. The Eighth Circuit rejected Keefe’s “categorical” approach, instead suggesting that “[a] student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct.” The court noted that two students had complained about Keefe’s comments to a professor. One said that she could not work “in the same clinical space with Keefe.” The court explained that “Keefe’s disrespectful and threatening statements toward his colleagues had a direct impact on the students’ educational experience [and] . . . also had the potential to impact patient care,” if only because those comments might make communication and collaboration difficult if not impossible. The mysterious part of the Eighth Circuit decision was not in its finding that Keefe’s expression was unprofessional, but in its suggesting that the threats were protected by the First Amendment.

The Eighth Circuit’s approach has at least two drawbacks. First, it makes unclear what would constitute threatening speech and, second, it seems to use a rather broad and ill-defined professionalism standard. Without more, one could not know what kind of off-campus speech would qualify as unprofessional and thus put an individual at risk of being dropped from a program if having made unpopular but non-threatening comments.

B. Untoward Behavior

Part of being a professional involves acting in appropriate ways and at least one issue involves which inappropriate actions will justify

243. Id. at 531 (“On appeal, Keefe framed this contention categorically, arguing that a college student may not be punished for off-campus speech unless it is speech that is unprotected by the First Amendment, such as obscenity.”).

244. Id.

245. Id. (citing Yoder v. Univ. of Louisville, 526 F. App’x 537, 545–46 (6th Cir. 2013), cert. denied, 134 S. Ct. 790 (2013); Tatro v. Univ. of Minn., 816 N.W.2d 509, 521 (Minn. 2012)).

246. Keefe, 840 F.3d at 532.

247. Id.

248. Id.

249. See id. (“As [Professor] Scott testified, ‘when [students] are in the clinical setting taking care of patients, if we are creating [a] situation where they are not obviously communicating and collaborating, that can result in poor outcomes for the patients.’”).

250. See Elissa Kerr, Note, Professional Standards on Social Media: How Colleges and Universities Have Denied Students’ Constitutional Rights and Courts Refused to Intervene, 41 J.C. & U.L. 601, 621 (2015) (“Central Lakes College could also have disciplined Keefe for the violent nature of his posts or the threats contained in them.”).
an individual’s dismissal from a professional program. *Al-Dabagh v. Case Western Reserve University* illustrates the wide range of behaviors that might be considered relevant when assessing an individual’s lack of professionalism.

Case Western Medical School includes several “core competencies” within its curriculum, including that a student manifest professionalism in the following ways:

- Consistently demonstrate ethical, honest, responsible and reliable behavior.
- Identify challenges to professionalism and develop a strategy to maintain professional behaviors when adherence to professional standards is threatened in the clinical and/or research settings.
- Engage in respectful dialogue with peers, faculty, and patients, to enhance learning and resolve differences.
- Recognize personal limitations and biases and find ways to overcome them.

Amir Al-Dabagh was a good student. However, his professionalism was another matter. For example, in one of his first-year classes, he was tardy almost thirty percent of the time, which repeatedly delayed the class. He was accused of behaving inappropriately with some female classmates, although he disputed those charges, as well as a charge that he had taken a cab and then attempted to leave without paying. His alleged conduct resulted in his having to meet with a Committee on Students at the Medical School, “which forced him to undergo ‘an intervention on professionalism’ and threatened him with ‘dismissal’ if ‘further issues’ arose.”

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252. *Id.* at 357.
253. *Id.*
254. *Id.* ("He did well academically.").
255. *Id.*
256. *Id.* at 358 ("[T]wo female students accused Al-Dabagh of behaving inappropriately at a formal dance . . .").
257. *Id.* (stating that Al-Dabagh claimed “[h]e never harassed anyone, never tried to welch on the driver”).
258. *Id.*
He allegedly did not deal well with other medical personnel or patients on occasion.259 However, he believed that some of this criticism was due to his critical attitude toward one of his supervisors—a view corroborated by an independent evaluator.260 Nonetheless, the Committee took strong action in light of these breaches, “requiring him to repeat [an] internship and enrolling him in ‘gender specific training.’”261 In addition, the Committee decided to add a negative addendum to his recommendation for residency programs, which itself was both unusual and harmful to his career.262

Despite all of these infractions, Al-Dabagh was invited to graduate.263 But he acted inappropriately again. He was convicted of driving while intoxicated in North Carolina.264 He claimed that he had not been drunk, but had hit a utility pole when swerving to avoid hitting a deer.265

The University refused to certify him for graduation and further dismissed him from the program.266 Al-Dabagh challenged his dismissal, arguing that it was based on infractions that either never occurred or had alternative explanations.267 The Sixth Circuit reasoned that deference was owed to the University both with respect to whether it credited his explanations of the events268 and with respect to whether it believed expulsion from the program the appropriate response in light of his lack of professionalism.269

259. Id. (“Nurses and hospital staffers ‘consistently complained about his demeanor;’ a patient’s family once ‘kicked him out of the room;’ and he sometimes gave patient-status presentations without first preparing.”).

260. Id.

261. Id.

262. Id. (“[A] faculty supporter described [the addendum] as ‘very permanent[y] . . . damaging’ and ‘too heavy a punishment.’”).

263. Id.

264. Id.

265. Id.

266. Id.

267. Id. at 361 (“Al-Dabagh, last of all, claims that the Committee faulted him for things that didn’t happen (for instance, the sexual harassment incidents at the Hippo Ball) and disregarded his explanations for the things that did (for instance, his poor internship performance and his driving-while-intoxicated conviction.”).

268. Id. (“It was neither arbitrary nor capricious for the Committee to credit other accounts above Al-Dabagh’s.”).

269. Id. at 359 (“Al-Dabagh’s dismissal on professionalism grounds amounts to a deference-receiving academic judgment.”).
Al-Dabagh argued that the University’s position did not make sense—it was willing to recommend him for a residency despite his tardiness, the alleged incidents of inappropriate behavior with classmates, and the alleged attempt to leave a cab without paying. It had even invited him to graduate before his car accident. It was only after he had been convicted of driving under the influence that he was expelled from the program. While drunk driving is itself a serious concern, that concern might be met by a state revoking his driver’s license rather than the university revoking his medical degree. Certainly, it would be a different story if Al–Dabagh had shown up drunk to treat patients. But there was no indication other than the one accident that Al–Dabagh had difficulties with alcohol, and the Sixth Circuit itself admitted that the University’s position was “unconvincing.” Nonetheless, when Al–Dabagh invited the court to “decide for [itself] whether he behaved in a sufficiently professional way to merit a degree,” the court demurred, explaining

270. Id. at 361.
271. Id. at 358.
272. Id.
274. See Major Frank W. Fountain, Aiding and Abetting Involuntary Manslaughter and Negligent Homicide: An Unprincipled Extension of Principal Liability, 1991 ARMY L. REV. 3, 9 (1991) (“An increasing number of states also have enacted automatic license revocation laws, providing that drivers who fail or refuse to take an alcohol breath test automatically will lose their licenses.”).
275. See Al–Dabagh, 777 F.3d at 359 (“[C]ase Western did not move for a stay. Instead, it complied with the injunction and gave Al–Dabagh a degree. Thanks to its decision, Al–Dabagh is now a practicing resident. Doesn’t that moot the case? No, because the university will revoke that degree if it wins.”).
276. Cf. Gabriel H. Teninbaum, Reforming the National Practitioner Data Bank to Promote Fair Med-Mal Outcomes, 5 WM. & MARY POL’Y REV. 1, 87-88 (2013) (discussing the creation of the NPDB board to prevent incompetent doctors, such as a “doctor [who] reported to the emergency room while drunk[,]” from jumping from state to state without repercussion).
277. But see Al–Dabagh v. Case W. Reserve Univ., 23 F. Supp. 3d 865, 870 (N.D. Ohio 2014), rev’de, 777 F.3d 355 (6th Cir. 2015) (“After the Ball, three students complained that Al–Dabagh was drunk at the dance and harassed several women with dance requests.”).
278. Al–Dabagh, 777 F.3d at 361.
279. Id.

132
that making such a judgment “goes beyond [its] job description.”\textsuperscript{280} No evidence was presented “suggest[ing] that the university had impermissible motives or acted in bad faith,”\textsuperscript{281} and the court was confident that “nothing in [its] deferential standard prevents [it] from invalidating genuinely objectionable actions when they occur.”\textsuperscript{282} While the court understood that “an expansive view of professionalism might forgive, or provide a cloak for, arbitrary or discriminatory behavior,”\textsuperscript{283} the court saw “no such problem here.”\textsuperscript{284} 

\textit{Al-Dabagh} stands for the proposition that courts must give university academic decisions considerable deference.\textsuperscript{285}

\textbf{C. Views or Practices?}

In \textit{Oyama v. University of Hawaii,}\textsuperscript{286} the Ninth Circuit issued a decision that obscured—rather than clarified—its reasoning. At issue was the refusal of the University of Hawaii to permit Mark Oyama to become a student teacher.\textsuperscript{287} Oyama was a student in a secondary-education certificate program at the University of Hawaii at Manoa,\textsuperscript{288} a program that required the completion of coursework and one semester of student teaching.\textsuperscript{289} Acceptance into the program did not guarantee a student-teaching placement.\textsuperscript{290}

In a written assignment, Oyama expressed his view that sexual relations between children and adults should be legal if consensual.\textsuperscript{291} When one of his teachers noted that Oyama would have to report a relationship between a twelve-year-old and an adult if such a relationship came to light, Oyama responded that he would follow the law and report the relationship, even though he did not believe that such

\textsuperscript{280}. \textit{Id.}
\textsuperscript{281}. \textit{Id.}
\textsuperscript{282}. \textit{Id.}
\textsuperscript{283}. \textit{Id.}
\textsuperscript{284}. \textit{Id.}
\textsuperscript{285}. \textit{Id.} at 357 (holding that the “lack-of-professionalism finding amounts to an academic judgment to which courts owe considerable deference”).
\textsuperscript{286}. 813 F.3d 850 (9th Cir. 2015).
\textsuperscript{287}. \textit{Id.} at 854 (“The University of Hawaii denied secondary education candidate Mark L. Oyama’s application to become a student teacher, a prerequisite for recommendation to the State of Hawaii’s teacher certification board.”).
\textsuperscript{288}. \textit{Id.} at 855.
\textsuperscript{289}. \textit{Id.}
\textsuperscript{290}. \textit{Id.}
\textsuperscript{291}. \textit{Id.} at 856 (“I even think that real life child predation should be legal, provided that the child is consentual [sic].”).
relationships were wrong. The teacher worried that Oyama might not be sufficiently sensitive to the needs of adolescents.

In addition, Oyama believed that many children characterized as having disabilities were “fakers”—he was ‘not convinced that many “disabilities” are actual disabilities or medically-based neurological conditions, but are rather the crude opinions of psychologists and psychiatrists.’ But such a view seemed inconsistent with “both an HTSB [Hawaii Teacher Standards Board] standard requiring teachers to ‘[p]rovide services to students in a nondiscriminatory manner’ and an NCATE [National Council for Accreditation of Teacher Education] standard requiring teachers to demonstrate professional dispositions necessary to teach ‘all students,’ including those ‘with exception-

Oyama participated in a field placement experience at a middle school where he received multiple unacceptable ratings with respect to his “ability to teach effectively, work collaboratively with colleagues, respond to suggestions from supervisors, and demonstrate the level of professionalism expected of middle school teachers.” Oyama’s supervising instructor concluded that “Mark would not do well as a middle school teacher.”

In analyzing whether Oyama’s constitutional rights had been abridged when he was denied the opportunity to do student teaching, the Ninth Circuit explained that “the University must comply with the Hawaii Teacher Standards Board’s (“HTSB”) teacher licensing and ethical standards. HTSB standards require teachers to, among other things, protect student safety, create an inclusive learning environment for all students, and demonstrate professionalism.” But Oyama’s comments allegedly undercut his ability to meet those standards. For example, “Oyama’s belief that young children can meaningfully ‘consent’ to sexual activity with adults, and failure to appreciate the lifelong impact on victims of child sexual abuse, could well impede him from recognizing signs of such abuse in his students

292. Id.
293. Id. (“Dr. Moniz . . . explain[ed] that, while she did not ‘mind that [Oyama] has opinions that are different from other people’s,’ she was concerned that Oyama ‘may not be aware of and in agreement with safety issues about the adolescents who will be in his care.’”).
294. Id. at 857.
295. Id.
296. Id. at 858.
297. Id. at 857.
298. Id.
299. Id. at 856.
or evidence of such abuse by school personnel.”

Further, the University could reasonably “regard Oyama’s insistence that most disabilities are feigned and that requiring high school teachers to educate disabled students is unreasonable as indicators that he would not make the effort to identify students with disabilities or adjust his lessons for individual students whose disabilities require special accommodations.”

At least one question presented was whether the University’s position violated First Amendment guarantees. The court rejected that the student speech doctrine, “standing alone, provides an adequate framework for evaluating Oyama’s claim.” Instead, the court created a hybrid test that drew from both school speech doctrine and public-employee speech doctrine, reasoning that the latter doctrine was applicable because “Oyama was a candidate for a certification that would allow him to work as a public school teacher.”

When discussing the school speech doctrine, the Ninth Circuit noted that “in Morse, the Court allowed the suspension of a student who held up a banner reading ‘BONG HiTS 4 JESUS’ as the Olympic torch passed by, reasoning that ‘schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.’” After noting that the University had “an institutional responsibility . . . to limit certification recommendations to individuals suitable to enter the teaching profession,” the Ninth Circuit then reasoned that “his institutional responsibility, like the ‘governmental interest in stopping student drug abuse’ in Morse, may allow the University to deny a student teaching application based on speech demonstrating that the applicant lacks the professional skills and disposition to enter a classroom, even as a student teacher.”

Yet, this analysis of Morse is, at best, incomplete. For example, in his concurrence, Justice Alito said that Morse “provides no support for any restriction of speech that can plausibly be interpreted as

300. Id. at 871.
301. Id.
302. Id. at 860.
303. Id.
304. Id.
305. Id.
306. Id. at 861 (citing Morse v. Frederick, 551 U.S. 393, 397 (2007)).
307. Id. at 862.
308. Id. (citing Morse, 551 U.S. at 408).
commenting on any political or social issue,” and it is difficult not to read Oyama’s comments as taking a position on a social issue. Certainly, if an individual does something to demonstrate that he cannot be a good teacher, then a university is justified in not certifying him. But then the question is whether the comments in a reflection piece about a video demonstrate that Oyama was unqualified. Suppose, for example, that his teachers had glowing reports about his performance in the classroom including an appropriate sensitivity to the needs and vulnerabilities of his students. Presumably, his comments would then not have demonstrated anything.

The Ninth Circuit also discussed Kuhlmeier, which “recognizes a school’s interest in managing how it ‘lend[s] its name’ or its ‘imprimatur’ to student expression.” The court noted that “[w]hen the University recommends a student for certification, it communicates to the world that, in its view, that student is fit to practice the profession; as a result, the University places its ‘imprimatur’ on each student it approves to teach.” The Oyama court then concluded that “[b]ecause the certification process necessarily implicates the University’s ‘imprimatur,’ the University is entitled to deference in determining how to ‘lend its name’ to certification candidates.” But this reading of Kuhlmeier makes it very broad—a university might be understood to be authorized to refuse to award degrees or, perhaps, revoke degrees if its current or former student expressed a view to which the University did not wish to lend its imprimatur. After offering this rather broad reading of the school speech exceptions, the Ninth Circuit noted that “[t]his case presents no occasion to extend student speech doctrine to the university setting.” The court’s discussion was regrettable for two distinct reasons: (1) it might result in a dilution of student speech rights in secondary schools, and (2) it

309. Morse, 551 U.S. at 442 (Alito, J., concurring).
310. See Oyama, 813 F.3d at 856 (discussing Oyama’s written reflection on a video entitled “Growing Up Online” in which Oyama stated, “I even think that real life child predation should be legal, provided that the child is consentual”.
311. Id. at 862 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988)).
312. Id.
313. Id. (citing Kuhlmeier, 484 U.S. at 272).
314. See supra note 275 (citing Al-Dabagh v. Case W. Reserve Univ., 777 F.3d 355, 359 (6th Cir. 2015), cert. denied, 135 S. Ct. 2817 (2015) (“[Case Western Reserve University will revoke that degree if it wins.”).
315. Oyama, 813 F.3d at 863.
might mislead other courts into applying the Court’s student speech jurisprudence in the University context, because the Oyama court devoted some time to discussing that jurisprudence in the context of a student dismissal from a university professional program.

The Oyama court next addressed the public-employee doctrine, noting that the Second Circuit, in Melzer v. Board of Education of City School District of City of New York,316 had upheld the termination of a public school teacher after his association with North American Man/Boy Love Association (“NAMBLA”) became public.317 The stated goal of NAMBLA is “to change the laws and attitudes governing sexual activity between men and boys.”318 The Second Circuit had not based its holding on a demonstrated incapacity to teach319 or on any inappropriate behavior with students.320 Instead, the teacher was fired in reaction to parent complaints when his NAMBLA membership became known.321

The Oyama court also discussed the firing of a high school counselor upheld by the Seventh Circuit in Craig v. Rich Township High School District 227,322 when that counselor had written a book advocating that women engage in promiscuous behavior before marriage.323 The Seventh Circuit suggested that the School Board had “reasonably predicted that [his book,] ‘It’s Her Fault[,]’ would interfere with the learning environment” at the school,324 and that the “[d]efendants’ interests in protecting the integrity of counseling services at Rich Central dwarfed Craig’s interest in publishing.”325

After discussing these cases, the Ninth Circuit explained that, “[h]owever useful public employee speech doctrine may appear, . . . it cannot control our analysis of Oyama’s First Amendment claim,”326

316. 336 F.3d 185 (2d Cir. 2003).
317. Oyama, 813 F.3d at 865 (discussing Melzer, 336 F.3d at 189–192, 199).
318. Id.
319. Id. at 189 (“For his school activities and teaching he received several commendations.”).
320. Id. (“The record before us reveals no evidence that plaintiff engaged in any illegal or inappropriate conduct at Bronx Science.”).
321. Id. at 191 (“Many of the 50 or 60 parents in attendance [at a parent association meeting] expressed anger at Melzer’s NAMBLA affiliation. They threatened to remove their children and conduct a sit-down strike at the school if Melzer were allowed to return.”).
322. 736 F.3d 1110 (7th Cir. 2013).
323. See Oyama, 813 F.3d at 865 (citing Craig, 736 F.3d at 1114).
324. Craig, 736 F.3d at 1120.
325. Id.
326. Oyama, 813 F.3d at 865–66.
because “Oyama was not a government employee”327 and because “public employee speech doctrine provides no basis for considering the role of academic freedom at public universities.”328 The court noted that “[a]s a student at the University of Hawaii, Oyama enjoyed greater freedom to test his ideas, critique professional conventions, and develop into a more mature professional than he would as a government employee.”329 However, this is very confusing. The court discusses a jurisprudence and then says that the jurisprudence is inapplicable, which makes it difficult to understand why the court bothered to offer that analysis at all.

The Oyama court looked at some of the school certification cases as well, noting that “these decisions lack a common doctrinal foundation.”330 Nonetheless, those decisions seemed to support the rule that “universities may consider students’ speech in making certification decisions, so long as their decisions are based on defined professional standards, and not on officials’ personal disagreement with students’ views.”331 Thus, when offering its analysis, the Ninth Circuit looked at the school speech cases, but then announced that they were not applicable; looked at the public employee speech cases, but then announced that they were not applicable; and then decided for some reason that a hybrid of the two lines of cases provided the appropriate test.332 The court then examined the school certification cases, which did not provide a helpful standard except insofar as they were in agreement that deference to “defined professional standards”333 was appropriate.

The Ninth Circuit said that “the University could look to what Oyama said as an indication of what he would do once certified.”334 Of course, Oyama did not say that he would have relations with students. On the contrary, he said that he would report such relations if they came to his attention.335 Nor did he say that he would not try

327. Id. at 866.
328. Id.
329. Id.
330. Id. at 867.
331. Id. at 867–68.
332. See id. at 860 (explaining that, because of “the mixed characteristics of Oyama’s claim,” the court decided to apply both the public employee speech and student speech doctrines).
333. Id. at 872.
334. Id. at 870 (citing Connick v. Myers, 461 U.S. 138, 152 (1983)) (emphasis added).
335. Id. at 856.
to help every student, although he did suggest that "it is not reasonable to expect secondary school teachers to have the 'extremely diverse skillset' needed to teach the range of grade levels presented in a mainstream classroom that includes students with learning disabilities." An individual should not be barred from teaching merely because she suggests that there are significant challenges when teaching students with very different abilities, and an individual who may have had limited contact with children with special needs may find that her past misconceptions, for example, that 90 percent are fakers, are in fact misconceptions when she has met more students with those needs. That said, the Ninth Circuit may well have been correct in upholding the refusal to permit Oyama to do student teaching because his performance in the classroom raised a number of red flags indicating that he would not be a good teacher. Nonetheless, the court's suggestion that "in the context of a public university's professional certification program, the university may evaluate the student's speech, made in the course of the program, in determining the student's eligibility for certification without offending the First Amendment under certain circumstances," may well chill much speech and give universities too much discretion. Further, if students are on notice that their speech could be used against them should the university decide to dismiss them from the program, then the students will be incentivized to keep those views to themselves rather than expose them to possible correction or modification by airing them. Thus, although the Ninth Circuit may have been correct to affirm the decision not to permit Oyama to do student teaching, the court's interpretation of the governing jurisprudence is likely to have regrettable consequences.

D. Dismissals and Religious Convictions

Many of the cases involving student dismissals from professional programs suggest that universities are afforded a great deal of deference, especially if a student has been dismissed for academic reasons. However, less deference is sometimes given when students

336. Id. at 856–57.
337. Id. at 857.
338. Id. ("Oyama received an 'unacceptable' rating as to the ability to teach effectively, work collaboratively with colleagues, respond to suggestions from supervisors, and demonstrate the level of professionalism expected of middle school teachers.").
339. Id. at 876.
340. See supra notes 171–339 and accompanying text (discussing Tatro, Keefe, Al-Dabagh, and Oyama, in which the courts granted deference to universities in making academic judgments regarding professionalism).
claim to have conscientious objections to performing certain tasks, although the analyses offered in at least some of these cases have not been particularly persuasive.

At issue in Axson-Flynn v. Johnson\textsuperscript{341} was a requirement imposed in the University of Utah’s Actor Training Program (“ATP”) that a student engage in behaviors to which she had religious objections.\textsuperscript{342} When Christina Axson-Flynn auditioned for the ATP and was asked “if there was anything she would feel uncomfortable doing or saying as an actor,”\textsuperscript{343} she responded that “she would not remove her clothing, ‘take the name of God in vain,’ ‘take the name of Christ in vain’ or ‘say the four-letter expletive beginning with the letter F.’”\textsuperscript{344} At one point during the audition, Axson-Flynn allegedly said, “‘I would rather not be admitted to your program than use these words’ and ‘I will not use these words.’”\textsuperscript{345}

Axson-Flynn was admitted to the program.\textsuperscript{346} During the first semester, she refused to utter the words that she found offensive even if her assignments called for her to do so, and she nonetheless did well.\textsuperscript{347} After the first semester, the faculty advised her to “get over”\textsuperscript{348} her reluctance to say those words because “not using the words would stunt her growth as an actor.”\textsuperscript{349} Rather than overcome her aversion to saying certain words, she voluntarily left the program, at least in part because she assumed that she would eventually be forced out.\textsuperscript{350} That assumption was based on a conversation that she had with the program director.\textsuperscript{351}

\textsuperscript{341}. 356 F.3d 1277 (10th Cir. 2004).
\textsuperscript{342}. See id. at 1280-82 (discussing the program’s requirement that Axson-Flynn say the words “goddamn” and “fucking” as part of a class exercise and Axson-Flynn’s refusal to say those words because of her religious beliefs).
\textsuperscript{343}. Id. at 1281.
\textsuperscript{344}. Id.
\textsuperscript{345}. Id.
\textsuperscript{346}. Id.
\textsuperscript{347}. Id. at 356 F.3d at 1282 (“For the rest of the semester, Axson-Flynn was allowed to omit any language she found offensive during class exercises.”) (citing Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1329 (D. Utah 2001), rev’d, 356 F.3d 1277 (10th Cir. 2004)).
\textsuperscript{348}. Id. at 1280.
\textsuperscript{349}. Id.
\textsuperscript{350}. Id.
\textsuperscript{351}. See id. at 1282 (“Axson-Flynn went to Sandy Shotwell, the director of the ATP. She said to Shotwell, ‘. . . If I do not—and this is what you said—modify my values by the end of the semester, I’m going to have to find another program. Is that right?’ Shotwell replied, ‘Well, yes.’”).
Axson-Flynn filed suit against the University of Utah, claiming that her being forced to say words to which she objected was compelled speech in violation of her First Amendment speech rights and her being compelled to say sinful words violated her free-exercise rights. When analyzing the constitutional issues, the Tenth Circuit began by discussing the Court’s school speech cases, noting that the ATP classroom constitutes a nonpublic forum. The court explained that it would “uphold the ATP’s decision to restrict (or compel) that speech as long as the decision was ‘reasonably related to legitimate pedagogical concerns,’” a very deferential approach. What were the pedagogical concerns? (1) “It teaches students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue;” (2) “it teaches students to preserve the integrity of the author’s work;” and (3) “it measures true acting skills to be able convincingly to portray an offensive part.”

Presumably, there are numerous ways to teach students how to step outside their own values and character, to preserve a work’s integrity, and to convincingly portray an offensive part. But if that is so, it might be thought surprising that a Program would insist that Axson-Flynn be willing to utter certain words in particular. But the court said it was not “second-guess[ing] the pedagogical wisdom or efficacy of an educator’s goal.” That said, the court was willing to “investigate whether the educational goal or pedagogical concern was pretextual” and would “override an educator’s judgment where the

352. Id. at 1283.
353. See id. at 1284 (referencing the court’s application of Tinker and Hazelwood to explain the First Amendment rights of students in public schools).
354. Id. at 1285.
355. Id. at 1290 (citing Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 926 (10th Cir. 2002)).
356. Id. at 1291.
357. Id.
358. Id.
359. See Rebecca Metz, Acting: How Do Actors Prepare for Emotional and Intense Scenes in Movies?, QUORA (Jan. 31, 2014), https://www.quora.com/Acting-How-do-actors-prepare-for-emotional-and-intense-scenes-in-movies [https://perma.cc/UMV6-RDER] (“Preparation for an emotionally demanding scene is very personal, and varies with each actor and scene or role. Some actors follow formal techniques, some have developed modifications to these ‘pure’ approaches, and others have developed techniques of their own.”).
360. Axson-Flynn, 356 F.3d at 1292 (emphasis added).
361. Id. at 1293.
proffered goal or methodology was a sham pretext for an impermissible ulterior motive.\textsuperscript{362}

Axson-Flynn claimed that she was being forced to say offensive words “because of ‘anti-Mormon sentiment.’”\textsuperscript{363} She supported that contention in two ways:

1. During her deposition, Axson-Flynn had queried, “They respect other kids’ freedom of religion that aren’t [Mormon]. Why won’t they respect mine?” Her example was that one individual had been accommodated because he was not required to come to class on a Holy Day.\textsuperscript{364}

2. Axson-Flynn’s teachers had noted that other Mormons had not objected to the requirement that they utter these offensive words, and those teachers recommended that Axson-Flynn speak to others sharing her faith to see if she could say these words without violating her religious duties.\textsuperscript{365}

Suppose that the Program had found from past experience that not punishing a student who was absent one day because of a death in the family, illness, or a religious holiday would not undermine that student’s training as an actor but that a student’s refusal to ever say particular lines would undermine that person’s training. Such a Program might permit an individual to be excused from class on Good Friday, but might not permit her to refuse to utter words that might be construed as taking the Lord’s name in vain.\textsuperscript{366} It would be difficult to construe such a policy as anti-Catholic unless the very policy of requiring a student to take the Lord’s name in vain was itself viewed as manifesting animus towards any religion prohibiting such utterances, even if there was a secular reason for such a rule.\textsuperscript{367}

\textsuperscript{362}. \textit{Id.}

\textsuperscript{363}. \textit{Id.}

\textsuperscript{364}. \textit{Id.} at 1298 (“[A] Jewish student named Jeremy Rische asked for and received permission to avoid doing an improvisational exercise on Yom Kippur without suffering adverse consequences.”).

\textsuperscript{365}. \textit{See id.} at 1293 (discussing the program’s insistence that “Axson-Flynn speak with other ‘good Mormon girls’ and that she could ‘still be a good Mormon’ and say these words”).


\textsuperscript{367}. \textit{See Bradley C. Johnson, By Its Fruits Shall Ye Know; Axson-Flynn v. Johnson: More Rotted Fruit from Employment Division v. Smith,} 80 Chi.-Kent L. Rev. 1287, 1309–10 (2005) (“[B]y joining a free exercise claim and a free speech claim, the \textit{Smith} hybrid rights exception should, in theory, be sufficient to prevent a state from constitutionally compelling someone to swear without
Certainly, Axson-Flynn might have objected to her teachers’ pointing to the views of “other ‘good Mormon girls’” and might have sincerely felt that her religion precluded her from saying these words even if others disagreed. Indeed, she might have cited *Thomas v. Review Board* for support. *Thomas* involved a Jehovah’s Witness who believed that he could not as a matter of conscience produce weapons. A co-worker told Thomas that it was not “unscriptural” to help produce weapons, but Thomas disagreed. The *Thomas* Court suggested that Thomas’s beliefs could not be second-guessed, making clear that “the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.” So too, Axson-Flynn’s beliefs should not have been second-guessed, even if others of her faith had a different view. That said, however, just as no evidence was cited in *Thomas* to establish that the Indiana workers’ compensation board had an anti-Jehovah’s Witness bias merely because it took seriously that other members of the faith did not share Thomas’s view, the professors who noted that others of Axson-Flynn’s faith had a different view did not thereby indicate animus.

Might there have been animus behind the insistence that Axson-Flynn utter words that she found religiously offensive? Perhaps. But

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368. *See Axson-Flynn*, 356 F.3d at 1293 (discussing how the program’s words certainly could raise “concern that hostility to her faith rather than a pedagogical interest in her growth as an actress was at stake in Defendants’ behavior in this case.”).


370. *Id.* at 710 (“[H]e quit, asserting that he could not work on weapons without violating the principles of his religion.”).

371. *Id.* at 711.

372. *Id.* at 715 (“Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.”).

373. *Id.* at 715–16.

374. *See id.* at 723 (Rehnquist, J., dissenting) (“[I]t cannot be said that the State discriminated against Thomas on the basis of his religious beliefs or that he was denied benefits because he was a Jehovah’s Witness.”).
the evidence cited does not suggest animus and, indeed, there was evidence to the contrary.\footnote{375}

When analyzing whether free exercise guarantees had been violated, the Tenth Circuit noted that “[n]eutral rules of general applicability ordinarily do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief.”\footnote{376} But the court explained that “[a] rule that is discriminatorily motivated and applied is not a neutral rule of general applicability.”\footnote{377} Because there allegedly was a “genuine issue of fact in the record as to whether Defendants’ requirement of script adherence was pretextual,”\footnote{378} the court remanded the case to determine “whether the script adherence requirement was discriminatorily applied to religious conduct (and thus was not generally applicable).”\footnote{379} The court warned that “[u]nless Defendants succeed in showing that the script requirement was a neutral rule of general applicability, they will face the daunting task of establishing that the requirement was narrowly tailored to advance a compelling governmental interest.”\footnote{380}

Suppose that the University had indeed applied its rule in a neutral and generally applicable way. A separate issue is whether an individual exemption should have been offered. The court noted that the University sometimes granted exemptions, stating that “a Jewish student named Jeremy Rische asked for and received permission to avoid doing an improvisational exercise on Yom Kippur without suffering adverse consequences.”\footnote{381} The court’s description is informative:

Defendant Barbara Smith, who taught First Year Acting, gave him this exemption despite the fact that, in Rische’s words, “she said it would be an exercise that couldn’t be made up, because it was one of the exercises by—an improv exercise that involved

\footnotesize{\textit{Case Western Reserve Law Review} \cdot \textbf{Volume 68} \cdot \textbf{Issue 1} \cdot 2017}

\textit{Student Dismissals from Professional Programs and the Constitution}

\footnote{375. \textit{See infra} note 386 and accompanying text (noting that Axson-Flynn’s professors previously had exempted her from the script adherence requirements).}


\footnote{377. \textit{Id.}}

\footnote{378. \textit{Id.}}

\footnote{379. \textit{Id.}}

\footnote{380. \textit{Id.}}

\footnote{381. \textit{Id. at 1298}.}
the whole class, and it would be almost impossible to make up.\footnote{382}

This was a group exercise, so there would be no way for Rische to come in at a different time to make up the class. Because Rische suffered no diminution in grade, the court implied that he was receiving preferential treatment. There was no discussion of how other students were treated if they missed one class that could not be made up; for example, whether someone who was gravely ill on an improv day would have her grade lowered.

It was not as if this student would never participate in improv exercises—he simply would not do this on a particular Holy Day.\footnote{383} So too, an individual might refuse to attend class on a Holy Day of Obligation,\footnote{384} but might be willing to perform all of the required exercises on other days. Axson-Flynn was not merely saying that she could not do the required performance on a particular day—she was never willing to perform the exercises at issue.

Ironically, the court noted a different example in which a student had been afforded an exemption—Axson-Flynn herself had been exempted from an exercise.\footnote{385} Because of that, the court wondered whether there was a “system of individualized exemptions,”\footnote{386} even though there were no policies exempting anyone on the basis of religion.\footnote{387}

\footnote{382. \textit{Id}.}

\footnote{383. Regrettably, some commentators do not see the importance of differentiating between the contents of the exemptions. \textit{See} Nicholas M. Gaunce \& Robert Luther III, \textit{Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause \& RFRA to Protect Church Property from the Grasps of Tort-Creditors}, 43 \textit{Va. L. Rev.} 641, 654 (2009) (“In addressing her claim, the court considered the application of the individualized exemption doctrine to the ATP. Specifically, it found that instructors in the program had previously granted exemptions from specific scenes to Axson-Flynn and another student on religious grounds.”).

\footnote{384. \textit{Cf.} Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 62–63 (1986) (“The tenets of the church require members to refrain from secular employment during designated holy days, a practice that has caused respondent to miss approximately six schooldays each year.”).

\footnote{385. \textit{See} Axson-Flynn, 356 F.3d at 1299 (“Defendants sometimes granted Axson-Flynn herself an exemption from their script adherence requirement . . . .”).

\footnote{386. \textit{Id}.}

\footnote{387. \textit{See} Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1334 (D. Utah 2001), \textit{rev’d}, 356 F.3d 1277 (10th Cir. 2004) (“Plaintiff has pointed to no reference in curricular policy, guidelines or course descriptions themselves where a system of exemptions are extended to students for religious or other reasons.”).}
Two points might be made about this individualized exception discussion. First, there was scant evidence of a policy of individualized exemptions—the only two who had received such exemptions were Rische and Axson-Flynn, herself. Second, if the fact that Rische was permitted to miss class without incurring a punishment indicated favoritism, then the fact that Axson-Flynn was allowed to avoid saying certain words during the first semester without incurring punishment would seem to indicate favoritism rather than unfavorable treatment. By the same token, her having been exempted from the general rules during the first semester hardly indicates anti-Mormon bias.

At the very least, the Axson-Flynn court is sending mixed messages. The court hints that the requirement that individuals speak the lines written is pretextual because (1) a different individual had been excused from attending class on a Holy Day, and (2) Axson-Flynn herself had received an exemption from being required to speak the lines one semester but not the next. But if that is enough to justify a remand for a finding of pretextual action, courts will be very busy indeed. Further, if permitting individuals to miss class on a Holy Day without punishment means that all religious beliefs must be accommodated, then public schools will either have to make no allowances or they will have to make many allowances. For example, would a school excusing attendance on a religious holiday be forced to have segregated classes if an individual was forbidden from being in close physical proximity to someone of a different sex who was not the person’s spouse?

388. See Edgar Dyer, Axson-Flynn v. Johnson: Will Students or Institutions Control Curriculum and Pedagogy at Public Universities in the U.S. Tenth Circuit?, 196 Ed. L. Rep. 745, 752 (2005) (“The Tenth Circuit was surely dissembling when it noted that the religious nature of Axson-Flynn’s claims had no bearing on their holding, because any such allegations in the Tenth Circuit with even specious claims of religious discrimination must now be played out before a jury.”).

389. Johnson, supra note 367, at 1314 (“If the government does not create a system of individualized exemptions, the exception is wholly unavailable.”).

390. Cf. Dyer, supra note 388, at 751 (“[Axson-Flynn] has established a precedent in the Tenth Circuit for students to use their religion as a pretext for not complying with the course requirements in any particular class.”).

391. Cf. Michael Paulson, When a Plane Seat Next to a Woman Is Against Orthodox Faith, N.Y. Times (April 9, 2015), https://www.nytimes.com/2015/04/10/us/aboard-flights-conflicts-over-seat-assignments-and-religion.html?_r=0 [https://perma.cc/L5QY-UJUL] (“Francesca Hogi, 40, had settled into her aisle seat for the flight from New York to London when the man assigned to the adjoining window seat arrived and refused to sit down. He said his religion prevented him from sitting beside a woman who was not his wife.”).
The difficulties for universities that are suggested by the Axson-Flynn approach are amplified when one considers how many views might qualify as religious. *Watts v. Florida International University* illustrates this point. At issue in *Watts* was the dismissal of John Watts from a practicum and then from a degree program at Florida International University (“FIU”).

Watts was enrolled in a Masters of Social Work program at FIU. Part of his coursework included a practicum. As part of the practicum, he was counseling a patient who lacked a diagnosis. After talking to her, he recommended that she “join a bereavement support group.” She “asked where she could find such a group.” Watts noticed that she self-described as Catholic, and he included a church among the possible places that she could go.

He was dismissed from the program using the *Pickering* test because of his alleged “inappropriate behavior related to patients, regarding religion.” The Eleventh Circuit explained that “[t]he *Pickering* decision recognized that government ‘has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.’” But Watts had paid his tuition and was doing the practicum as part of his coursework, so it was not clear why he should be treated as a government employee.

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392. 495 F.3d 1289 (11th Cir. 2007).
393. *Id.* at 1291.
394. *Id.*
395. *Id.*
396. *Id.* at 1292.
397. *Id.*
398. *Id.*
399. *See id.* at 1294 (“[J]udged under *Pickering*, the termination of Watts from the practicum because of what he said during the private counseling session does not violate the Free Speech Clause of the First Amendment.”).
400. *Id.* at 1292.
401. *Id.* at 1293 (citing *Pickering* v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
402. *See id.* at 1292 (“Watts registered for the course, paid his tuition, and was assigned to Fair Oaks Hospital, a private psychiatric institution affiliated with FIU for purposes of the practicum.”); *see also* Neal H. Hutchens et al., *Employee or Student?: The First Amendment and Student Speech Arising in Practica and Internships*, 306 Ed. L. Rep. 597, 601 (2014) (“Students enrolled in the practicum were required to register for course hours and pay tuition.”).
403. *See supra* note 327 and accompanying text (explaining that Oyama was not an employee and hence his speech claim should not be evaluated in light of the government employee speech jurisprudence).
The Eleventh Circuit then explained that Watts “pleaded a valid First Amendment free exercise of religion claim.”\textsuperscript{404} Watts was not a Catholic.\textsuperscript{405} Nonetheless, he claimed to have the religious belief that “a patient who professes a religion is entitled to be informed if the counselor is aware of a religious avenue within the patient’s religion that will meet the appropriate therapy protocol for the patient.”\textsuperscript{406} The issue then became whether Watts’ sincere belief was itself religious. The \textit{Watts} court explained: “Our dissenting colleague acknowledges that Watts has adequately pleaded the sincerity of his belief, but believes that he has failed to plead sufficiently that the belief is of a religious character.”\textsuperscript{407} However, the majority disagreed, in part because it was not sure how one could show that a particular belief was itself religious.\textsuperscript{408} But if that is so, then any sincerely held beliefs will have to count as religious if an individual says that they are,\textsuperscript{409} as long as the individual cannot be shown to be lying about his own view as to whether they are religious.\textsuperscript{410}

A separate question is whether an individual is compelled by those religious beliefs to act in a particular way. The \textit{Watts} court suggested that Watts would have to “plead that he believes his religion compels him to take the actions that resulted in his termination.”\textsuperscript{411} Yet, that may be overstating the requirement—it would be surprising if an individual could not be terminated for

\textsuperscript{404} Watts, 495 F.3d at 1294.

\textsuperscript{405} See id. at 1296 (quoting Amended Complaint at 8, Watts v. Fla. Int’l Univ., No. 02-60199-CIV, 2005 WL 3730879 (S.D. Fla. June 9, 2005)) (“Mr. Watts is a Christian. He is not Catholic.”).

\textsuperscript{406} Id. (quoting Amended Complaint at 8, Watts, No. 02-60199-CIV, 2005 WL 3730879).

\textsuperscript{407} Id. (citing id. at 1301 (Tjoflat, J., dissenting)).

\textsuperscript{408} See id. at 1296 (“[W]e question whether a plaintiff could ever plead or proffer ‘objective’ facts that his particular sincerely held belief is religious in nature. Religion is by its nature subjective.”).

\textsuperscript{409} In interpreting a federal statute, the \textit{Seeger} Court considered the role played by particular beliefs when deciding whether they counted as religious. See United States v. Seeger, 380 U.S. 163, 187 (1965) (“We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.”). It is simply unclear whether the role played by the beliefs is an additional criterion for constitutional purposes.

\textsuperscript{410} Watts, 495 F.3d at 1298 (“The question is not whether the plaintiff’s beliefs are religious in the objective, reasonable person’s view, but whether they are religious in the subjective, personal view of the plaintiff.”).

\textsuperscript{411} Id. at 1297.
performing legal actions required by his religion, but could be terminated for performing legal actions strongly encouraged but not required by his religion.

Certainly, a court does not get to reject religious beliefs merely because it does not agree with them. Nonetheless, combining the views suggested in Watts and Axson-Flynn might prove very challenging for any university whose professional program involved requirements that might seem to be in conflict with any religious views. Another case out of the Eleventh Circuit illustrates how such a conflict might be handled.

Keeton v. Anderson-Wiley involved Jennifer Keeton, a student in a degree program at Augusta State University to obtain a master’s degree in school counseling. After she completed her first year in the program, she was asked to “participate in a remediation plan addressing what the faculty perceived as deficiencies in her ability to be a multiculturally competent counselor, particularly with regard to working with gay, lesbian, bisexual, transgender, and queer/questioning (GLBTQ) populations.” Keeton had a number of beliefs regarding sexual orientation “arising from her Christian faith.” For example, she “believed that the GLBTQ population suffers from identity confusion, and . . . she intended to attempt to convert students from being homosexual to heterosexual.”

Keeton alleged that “officials told her that ‘you couldn’t be a teacher, let alone a counselor, with those views,’ asked her to alter some of her beliefs, and said that she had a choice of adhering to the Bible or to the ACA Code of Ethics.” However, the officials denied making those statements, and instead “testified that they never told

412. See Emp’t Div v. Smith, 494 U.S. 872, 884 (1990) (“Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”).

413. See Thomas v. Review Bd. of the Ind. Emp’t Sec. Div., 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”).

414. 664 F.3d 865 (11th Cir. 2011).

415. See id. at 867 (addressing Keeton’s request for a preliminary injunction to keep the university from dismissing her from the degree program should she fail to complete a plan addressing her inability to work successfully with GLBTQ individuals).

416. Id.

417. Id. at 868.

418. Id.

419. Id. at 870.
her that she needed to alter her beliefs or that her beliefs were wrong or unethical, and that she could continue to maintain her personal religious beliefs and still become an effective counselor.”

Further, students had testified that “professors told Keeton in class that she did not need to change her beliefs, but instead needed to be aware of her beliefs and not impose them on the client.”

The American Counseling Association’s (“ACA”) Code of Ethics included the following:

(1) Section A.1.a: “The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients”;

(2) Section A.4.b: “Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants”;

(3) Section C.2.a: “Counselors gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population”; and

(4) Section C.5: “Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law.”

The Eleventh Circuit reasoned that “if ASU’s officials imposed the remediation plan because of Keeton’s personal religious views on homosexuality, it is presumed that they violated her constitutional rights.” However, the court rejected that remediation had been imposed because of her views, instead suggesting that “the evidence shows that the remediation plan was imposed because she expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics, and that the objective of the remediation plan was to teach her how to effectively counsel GLBTQ clients in accordance with the ACA Code of Ethics.”

Keeton had explained that “as a high school counselor confronted by a sophomore student in crisis, questioning his sexual orientation,

420. Id.
421. Id. at 872.
422. Id. at 869 (quoting ACA CODE OF ETHICS §§ A.1.a, A.4.b, C.2.a, C.5 (Am. Counseling Ass’n 2014)).
423. Id. at 872.
424. Id.
she would tell the student that it was not okay to be gay.” 425 Keeton had told another student that “if a client discloses that he is gay, it was her intention to tell the client that his behavior is morally wrong and then try to change the client’s behavior, and if she were unable to help the client change his behavior, she would refer him to someone practicing conversion therapy.” 426

But Keeton’s announced intentions were not in accord the ACA’s “fundamental principles, including that counselors must support their clients’ welfare, promote their growth, respect their dignity, support their autonomy, and help them pursue their own goals for counseling.” 427 Further, the school’s “curriculum requires that all students be competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews or atheists, or that homosexuality is moral or immoral.” 428

The Eleventh Circuit reasoned that “ASU has conditioned participation in the clinical practicum and graduation on compliance with the ACA Code of Ethics.” 429 But Augusta State University did not arbitrarily decide to condition graduation on compliance with that Code. On the contrary, “ASU must adopt and follow the ACA Code of Ethics in order to offer an accredited program.” 430 Because Keeton “voluntarily enrolled in the program, [she] does not have a constitutional right to refuse to comply with those conditions.” 431

The court rejected that ASU forced “Keeton to profess a belief contrary to her own personal beliefs.” 432 Instead, “the ACA Code of Ethics ... requires those who wish to be counselors to separate their personal beliefs from their work.” 433 Suppose, for example, that a student seeks moral validation of a behavior that the counselor does not believe morally permissible. “When a GLBTQ client asks, for example, if his conduct is moral, students are taught to avoid giving advice, to explore the issue with the client, and to help the client

425. Id. at 868.
426. Id. at 869.
427. Id. at 874.
428. Id.
429. Id. at 878.
430. Id. at 876.
431. Id. at 878.
432. Id.
433. Id.
determine for himself what the answer is for him.”

The ACA Code of Ethics does not require a counselor to adopt the patient’s view as her own—“the ACA Code of Ethics requires the counselor to affirm the client, which means that the counselor must respect the dignity of the client by accepting the client’s response without judgment, not that the counselor must say that she personally believes that the client is correct.”

While the Keeton court suggested that Keeton’s announced intention to try to dissuade individuals with a same-sex orientation from living that “lifestyle” and to refer someone for “conversion therapy,” involved her intention to “impose her personal religious views on her clients,” the Keeton decision cannot plausibly be read to suggest that Keeton would have been acting in accord with the Code of Ethics had she instead said that she would simply refuse to counsel any GLBTQ students. The Code “requires the counselor to affirm the client,” although the counselor is not required to “say that she personally believes that the client is correct.”

Regrettably, the Sixth Circuit offered an interpretation of Keeton that was at best implausible.

Ward v. Polite involved a challenge by Julea Ward to her expulsion from a counseling program at Eastern Michigan University. During her three years in the program, Ward frequently said that her religious beliefs precluded her from affirming the value of same-sex relationships or the value of certain non-marital...

434. Id. at 878–79.
435. Id. at 879.
436. Id. at 868.
437. Id. at 869.
438. Id. at 872.
439. But see Ward v. Polite, 667 F.3d 727, 741 (6th Cir. 2012) (“Instead of insisting on changing her clients, Ward asked only that the university not change her—that it permit her to refer some clients in some settings.”); Curtis Schube, Catch 22: The Rising Concern of Faith Being Removed from Counseling and the First Amendment Concerns Associated, 35 N. Ill. U. L. Rev. 375, 384 (2015) (“Where Ward differs from Keeton is that Ward did not impose values, but rather just wanted to not counsel the client at all.”).
440. Keeton, 664 F.3d at 879.
441. Id.
442. 667 F.3d 727 (6th Cir. 2012)
443. Id. at 729–32 (stating Ward’s assertion that her expulsion violated her First and Fourteenth Amendment rights).
relationships. But that presented a potential difficulty, both because of national nondiscrimination standards and because of a university policy requiring counselors to be supportive of their clients.

Part of her coursework included a practicum. During the practicum, students spent at least forty hours counseling multiple clients. Ward counseled two individuals without incident. However, when she was reviewing the file of the third individual, “she noticed he sought counseling about a same-sex relationship.” She then sought advice from her counselor—she was not sure whether it would be better to refer the individual from the beginning or wait to refer until it became clear that she would have to affirm the individual’s relationship. After Ward decided to refer the individual, the University began a disciplinary hearing and eventually expelled her from the program. Ward challenged the expulsion as a violation of First Amendment guarantees.

The Sixth Circuit noted that there was no written policy preventing students from referring patients to others. Notwithstanding “the university’s claim that a no-referral policy existed for the practicum class, supported by the testimony of several professors and administrators, and in view of the reality that the purported policy arises in the context of a university’s curriculum and its counseling services,” the Sixth Circuit believed that that was ample authority to believe “that no such policy existed.” After all,

444. See id. at 729 (“In three years with the program, Julea Ward frequently expressed a conviction that her faith (Christianity) prevented her from affirming a client’s same-sex relationships as well as certain heterosexual conduct, such as extra-marital relationships.”).

445. See id. at 730 (“[S]he enrolled in a counseling practicum, a graduation prerequisite that requires students to apply what they have learned through one-on-one counseling sessions with real clients.”).

446. Id.

447. Id.

448. Id. at 730–31.

449. Id. at 731.

450. See id. at 730.

451. See id. at 732 (“Her expulsion from the program, she claimed, violated her free-speech and free-exercise rights under the First and Fourteenth Amendments.”).

452. See id. at 739 (“The university defendants, as shown, cannot point to any written policy that barred Ward from requesting this referral.”).

453. Id. at 740.

454. Id. at 739 (“Ample evidence supports the theory that no such policy existed—until Ward asked for a referral on faith-based grounds.”).
the court noted, the school permitted students to refer clients “for additional counseling services outside the Counseling Clinic.” But merely because a student is permitted to refer someone for additional counseling, it can hardly be thought to justify offering no counseling and instead telling an individual to go somewhere else, especially if one of the prime directives of the ACA policy “is to respect the dignity and to promote the welfare of clients.”

The Ward court offered an additional example in which a referral had been permitted. There was “one instance... when the school permitted a practicum referral, allowing a grieving student to refrain from counseling a grieving client.” The University described this as a single incident rather than a policy, but the court was confident that this example “calls into question the basis for the university’s actions.” After all, the fact that “the counseling department was willing to avoid unsuitable student-client matches in some instances” made the court wonder why Ward was treated differently. However, the grieving student was not saying that she would never help someone who was grieving; instead, that student was saying that she simply could not offer such counseling at that time. Unlike the grieving student, Ward was not merely saying that she could not counsel a gay student on this occasion because of some temporary affliction that Ward, herself, was suffering.

To support the position that the University was engaging in wrongdoing, the Ward court noted: “The school permits students to request certain types of clients to counsel—what you might call a yes-referral policy—and the school will honor the request.” This seemed to be a problem. “Why a school would honor student requests to counsel clients with certain types of problems but refuse requests not to counsel clients with certain types of problems is not self-evident.” Yet, students who can be especially helpful for certain kinds of clients should be permitted to assist those clients, since those students would

455. Id. at 736.
456. See Keeton, 664 F.3d at 869 (quoting ACA CODE OF ETHICS § A.1.a (AM. COUNSELING ASS’N 2014)).
457. Ward, 667 F.3d at 737 (emphasis added).
458. Id. (“The university demurs, claiming this was not a ‘referral’ but a ‘single incident of non-assignment.’”).
459. Id.
460. Id.
461. Id.
462. Id. at 736.
463. Id. at 736-37.
be fulfilling ACA goals of affirming each client. But someone who refuses to counsel a client because of her disapproval of that client is not acting in accord with the universal affirmation policy of ACA.

Perhaps the Ward court simply believed that the ACA policy was wrongheaded. The court wrote:

Surely, for example, the ban on discrimination against clients based on their religion (1) does not require a Muslim counselor to tell a Jewish client that his religious beliefs are correct if the conversation takes a turn in that direction and (2) does not require an atheist counselor to tell a person of faith that there is a God if the client is wrestling with faith-based issues. Tolerance is a two-way street.464

The court is correct that individuals are not required to affirm the truth of the religious views or other faiths. But, as the Keeton court explained, the ACA “requires the counselor to affirm the client,” even if the counselor does not subscribe to the client’s beliefs.465 The Sixth Circuit’s position went much further. One infers that the Sixth Circuit would say that just as Ward should be allowed to refer a GLBTQ person rather than offer that person counseling, an individual with conscientious objections to counseling someone of another religion should be allowed to refer that person rather than offer counseling. But this is exactly the kind of approach that the ACA principles are designed to preclude.

Permitting referrals as a general matter might not impose too great a burden on a client if there were relatively few who would invoke that privilege and if there were always enough counselors to take care of the needs of the clients. Even were that so, such a policy would seriously undermine the ACA principles. However, matters would be even worse if there weren’t enough counselors to provide needed services to disfavored communities.

Apparently, Ward had said that she could set aside certain religious values but not others. “Ward said that she could ‘set aside her religious values’ and counsel clients about things such as ‘abortion, child abuse, and murder’ but ‘could not set aside her religious values in order to effectively counsel non-heterosexual clients.’”466 But if she was distinguishing between the way that she would approach cases involving same-sex relationships from those implicating issues involving “abortion, child abuse, and murder” in that she could not affirm those in the former group, then she seemed

464. Id. at 735.
466. Ward, 667 F.3d at 737.
to be saying that she could be affirming of those in the latter group. Perhaps she was saying that she could counsel the latter group, even though she would not be affirming abortion, child abuse, or murder. But that was what she was being asked to do with “non-heterosexual clients.”

Ward denied that she was discriminating on the basis of sexual orientation. “She had no problem counseling gay and lesbian clients, so long as the university did not require her to affirm their sexual orientation.” Nevertheless, her teachers suspected that she was discriminating on the basis of orientation, itself prohibited by ACA rules, which is why they were exploring why she could set aside her religious values and counsel those who had abortions or who had committed child abuse or murder but she could not do so for GLBTQ clients.

The Ward court characterized the teachers as “suggest[ing] a distinction between secular values and spiritual ones, with a preference for the former over the latter.” But this is simply wrong. The teachers were trying to figure out why religious values were being invoked in one case and not the other. That teachers were trying to figure out what Ward was saying or doing does not establish that those teachers had a pretextual dislike of religious values as a general matter or even of Ward’s religious values in particular.

Was Ward being punished for her views? Perhaps. But the Ward court seemed almost willfully blind to non-invidious explanations of the University’s practices and seemed to ignore the very Code that governed the accreditation of this Program. The court claimed to be applying the same reasoning as was found in Keeton, but offered an account of that decision that turned the decision on its head. The court’s specious reasoning raised more questions about its own approach than that of Eastern Michigan University.

In Ward, the Sixth Circuit was anything but deferential; in Al-Dabagh it was extremely deferential. How much deference should be accorded to universities or professional standards? Both universities

467. Id.
468. Id. at 731.
469. See id. at 737 (“[Professor Duggar] offered her ‘professional opinion’ that Ward was ‘selectively using her religious beliefs in order to rationalize her discrimination against one group of people.’”).
470. See supra note 422 and accompanying text (discussing § C.5 of the ACA Code of Ethics).
471. Ward, 667 F.3d at 737.
and students might have some difficulty answering that question when considering some of the recent circuit decisions.

**Conclusion**

The Supreme Court’s student-speech jurisprudence is unclear about the extent to which it protects high school students’ First Amendment rights, which itself is a matter of concern. One additional concern is that courts cannot agree about whether the student-speech jurisprudence applies in the university context. Courts simply do not know what standard to use when judging whether dismissals of university students from professional programs pass muster, which means that relevantly similar cases will be decided in light of different First Amendment tests depending upon the circuit.

Not only is there no agreement about the correct principle, but the courts cannot even agree about whether to be deferential to universities. Instead, courts are sometimes extremely deferential to university decision-making and at other times view university policies and practices with a jaundiced eye.

It is simply unclear whether universities must adopt written, exception-less policies even when doing so would undermine legitimate pedagogical goals, or, instead, will be afforded flexibility. Some of the recent decisions suggest the following approach—universities will be given great deference unless their policy contradicts sincere religious beliefs, in which case the policy will be carefully scrutinized. But such a policy invites individuals with sincere beliefs to categorize them as religious, which would entitle those beliefs to much deference.

The current approach to student dismissals from professional programs is unsustainable. The Court must offer guidance about which principle should be applied, how it should be applied, and what universities must do when their policies are not in accord with a student’s religious beliefs. Having offered little to no guidance on these matters, the Court has almost guaranteed inconsistent application across the Circuits. The ever-increasing confusion in the circuits suggests that this will be a growing problem unless the Court clarifies these matters.