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Law Schools, Professionalism, and the First Amendment

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Abstract. After students at Stanford Law School disrupted a Federalist Society event featuring Judge Kyle Duncan in March 2023, then-Dean Jenny Martinez issued a lengthy statement recognizing that "offensive, vulgar, or provocative" expression at campus events is "perhaps constitutionally protected" but argued "it is within our educational mandate to address with students the norms of the legal profession." This Essay takes seriously Dean Martinez's appeal to professional norms and broadly examines whether and when the regulation of law students' "unprofessional" speech would be consistent with the First Amendment. This inquiry is particularly timely because the ABA has adopted a new accreditation standard requiring law schools to have policies protecting academic freedom and free expression.

In assessing the permissibility of regulating law student speech for "professionalism," this Essay will consider not just the regulation of student expression at campus events, which was the focus of the Martinez Memo, but also the full range of situations in which students might engage in unprofessional expression—from the classroom to social media. This Essay considers this question from multiple angles, from the Court's case law deferring to universities' educational decisions, to cases specifically relating to student speech. This Essay argues that the further away the university's decisions are from its core teaching functions, the less likely the Court is to be deferential to the school. This means the authority of law schools to regulate student speech can be placed on a spectrum, with the most authority in the classroom context and the least authority outside of school.

In addition, this Essay examines the lower court decisions holding that professional schools have special authority to regulate the speech of their students that demonstrates a lack of fitness for the profession. This Essay contends that this professionalism doctrine is deeply troubling, but if courts recognize it in the law school setting, they should limit its application to narrow circumstances. Specifically, it is essential for the school to identify a specific professionalism standard that would, in fact, support the speech regulation, and that standard must itself be constitutional. In order to protect vigorous advocacy, rules

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regulating the speech of attorneys are generally constitutional only when they regulate speech directly connected to the practice of law and not when they are used to protect the "dignity" and reputation of lawyers and the legal profession.

This Essay concludes with suggestions about how law schools can teach their students about professionalism and civility in the practice of law consistent with the analysis in the Essay. With respect to student-invited speakers, law schools should think hard about how such speakers contribute to the academic mission of the school. Law schools that want to receive deference to their regulation of student speech at events should consider new policies that connect these events more directly with the academic enterprise of the school.

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Introduction

Soon after students at Stanford Law School disrupted Judge Kyle Duncan's speech at a student-sponsored Federalist Society event in March 2023,[1] Dean Jenny Martinez issued a statement explaining why campus rules prohibiting the substantial disruption of a campus event are consistent with the First Amendment.[2] After an extensive analysis of the public forum doctrine, her memo also argued that "[l]ively, candid, civil, and evidence-based discourse in disagreement is not just positive for our community, constituted as it is in difference, it is a professional duty."[3] While Martinez unequivocally condemned the disruption of campus events, she gave unclear guidance about "offensive, vulgar, or provocative" expression at campus events.[4] She said that such speech is "perhaps constitutionally protected" but "it is within our educational mandate to address with students the norms of the legal profession."[5]

This Essay will take seriously Dean Martinez's appeal to professional norms and broadly examine whether and when the regulation of law students' unprofessional speech would be consistent with the First Amendment.[6] In assessing the permissibility of civility regulation, this Essay will consider not just the regulation of student expression at campus events, which was the focus of the Martinez Memo, but also the full range of situations in which students might engage in unprofessional expression—from the classroom to social media. This inquiry is particularly timely because the ABA has adopted a new accreditation standard requiring law schools to have policies protecting academic freedom and free expression.[7]

This Essay begins with an examination of the First Amendment framework for evaluating the speech rights of university students. Part I examines the Court's tendency to defer to universities when they are engaging in core curricular activities. That deference diminishes, however, as

1. David Lat, *Yale Law Is No Longer #1—For Free-Speech Debacles*, ORIGINAL JURISDICTION (Mar. 11, 2023), https://perma.cc/UM7T-5CLZ.

2. Letter from Jenny S. Martinez, Dean, Stanford L. Sch., to Stanford Law School Community (Mar. 22, 2023), https://perma.cc/B9TB-XND9 [hereinafter Martinez Memo].

3. *Id.* at 2-4, 7.

4. *Id.* at 9.

5. *Id.*

6. As a private institution, Stanford Law School is not bound by the First Amendment. But as Dean Martinez notes in her memo, "California's Leonard Law, Cal. Educ. Code § 94367, prohibits private colleges from making or enforcing rules subjecting students to discipline on the basis of speech that would be protected by the First Amendment or California Constitution if regulated by a public university." *Id.* at 2.

7. RESOLUTION ON STANDARD 208, report to the House of Delegates, 300 B.A. REP. (2024) at 2 (ABA 2024), https://perma.cc/FCA9-V5YK.

universities claim constitutional leeway when engaging in activities less tightly connected to the curriculum. Part II takes a close look at the developing "professionalism" doctrine that permits schools to regulate student expression that is inconsistent with the profession for which the student is studying. This Part contends that the professionalism doctrine is deeply troubling, but if courts continue to recognize it, they should limit its application to narrow circumstances. Specifically, it is essential that the relevant professionalism standards would, in fact, support the speech regulation and that those standards are themselves constitutional. In order to protect vigorous advocacy, these rules are generally constitutional only when they regulate speech directly connected to the practice of law and not when they are used to protect the "dignity" and reputation of lawyers and the legal profession Part III offers suggestions about how law schools can teach their students about professionalism and civility in the practice of law consistent with the analysis in the Essay.

I. Academic Freedom, Institutional Deference, and the First Amendment

A. Teaching Civility and Professionalism

Calls for more civility in the legal profession are nothing new. In 1975, then-Chief Justice Burger asked law schools to teach civility, arguing that law professors are in the best position to teach "good manners, disciplined behavior and civility."[8] In 1998, then-Justice Sandra Day O'Connor decried the decline of professionalism in legal practice, which she believed led to public dissatisfaction with and a lack of respect for lawyers, who were often compared to "skunks, snakes, and sharks."[9] In this age of polarization and social division, calls for law schools to help students develop a professional identity that prioritizes respectful disagreement continue unabated.[10]

Teaching civility and professionalism in law school can mean many different things.[11] How a school defines these conceptions can dramatically affect the legal analysis. Some aspects of civility involve only conduct (like meeting deadlines or punctuality); these sorts of requirements do not raise First Amendment issues. Likewise, some speech that a law school might regulate as

8. Warren E. Burger, *The Necessity for Civility*, 1 LITIG. J. 8, 10 (1975).

9. Sandra Day O'Connor, Opening Remarks, *Professionalism*, 76 WASH. U. L.Q. 5, 5-6 (1998).

10. *See, e.g.*, Kenneth Townsend, *Forming Good Lawyers*, 58 WAKE FOREST L. REV. 981, 1004-05 (2023).

11. *See, e.g.*, David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 139 n.11 (2019) (listing educators who have called for the incorporation of civility into the law school curriculum).

unprofessional is not protected under the First Amendment at all. For example, incitement, defamation, obscenity, and true threats are categories of unprotected speech.[12] Although the Supreme Court has not addressed this issue directly, it might also be possible to regulate speech that creates a hostile learning environment under Title VI and Title IX.[13]

Speech policies that require students to act, in the words of the current California oath for newly admitted attorneys, "at all times with dignity, courtesy and integrity,"[14] raise significant First Amendment concerns.[15] The First Amendment offers broad protection for profane, lewd, vulgar, or otherwise offensive expression that a law school might want to regulate under a civility or professionalism standard. The Court has held the First Amendment protects people who wear "Fuck the Draft" jackets in public spaces,[16] burn the American flag,[17] or express hateful messages.[18] Accordingly, law schools that wish to regulate the speech of their students will have to argue that these usual rules do not apply.[19]

It is not entirely clear what constitutional leeway universities have to regulate the speech of their students, but whatever leeway exists will likely vary depending on the context in which the regulation takes place. It is likely that law schools have the strongest arguments to regulate civility in the classroom and other academic settings; they have the weakest arguments when they try to regulate student expression that is not directly related to university-sponsored activities. The regulation of student expression at events on campus falls within the murky middle.

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12. Counterman v. Colorado, 143 S. Ct. 2106, 2113-14 (2023) (noting certain categories of unprotected expression).

13. For an extensive discussion of this issue, see Todd E. Pettys, *Hostile Learning Environments, the First Amendment, and Public Higher Education*, 54 CONN. L. REV. 1 (2022).

14. CAL. R. CT. 9.7 (West 2024).

15. The California oath is aspirational only; violations are not subject to discipline. *See* Kristen L. Yokomoto, *Will Attorneys Soon Be Subject to Discipline for Incivility?*, ORANGE CNTY. LAW., Feb. 2023, at 56, 57. A current proposal to make civility violations a disciplinary matter is limited to "significantly unprofessional conduct that is abusive or harassing" that occurs while representing a client in the practice of law. STATE BAR OF CAL., REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED AMENDMENT RULE 9.7 OF THE CALIFORNIA RULES OF COURT, AND PROPOSED AMENDED RULES 1.2 AND 8.4 AND PROPOSED NEW RULE 8.4.2 OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT 8, 30 (2023), https://perma.cc/4PW9-ZZQK.

16. Cohen v. California, 403 U.S. 15, 16, 26 (1971).

17. Texas v. Johnson, 491 U.S. 397, 418, 420 (1989).

18. Snyder v. Phelps, 562 U.S. 443, 460-61 (2011).

19. Law schools will also have to navigate vagueness, overbreadth, and due process concerns that might accompany a law school's decision to embrace professionalism policies that regulate student expression. These issues are not the focus of this Essay.

B. Academic Freedom and Institutional Deference

Law schools that discipline students for violations of professionalism standards are likely to rely on academic freedom and institutional deference arguments. They would argue universities should have constitutional leeway to have student speech policies that are consistent with their educational mission to produce lawyers ready for practice and that the courts should defer to their pedagogical decisions designed to achieve this goal.

The Court has never clearly embraced a constitutional doctrine of academic freedom.[20] And even if it exists, it can mean many different things.[21] In *Sweezy v. New Hampshire*, the plurality stated in dicta that the attempt to interrogate a professor about his political beliefs and contents of his lectures was "an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[22] In a separate opinion, Justice Frankfurter expressed concern about "the grave harm resulting from governmental intrusion into the intellectual life of a university."[23] Justice Frankfurter famously cited "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[24] Putting together the plurality and Justice Frankfurter's separate concurrence, *Sweezy* is the first time that a majority of justices agreed that academic freedom is constitutionally protected;[25] however, the case was decided on other grounds.[26] In *Keyishian v. Board of Regents*, the Court declared that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[27] *Keyishian*'s famous dicta asserts that the First Amendment "does

20. *See* Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 907-08 (2006); *see also* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) ("[T]o the extent [the Supreme Court] has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs.").

21. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 254-55 (1989).

22. 354 U.S. 234, 248, 250 (1957).

23. *Id.* at 261 (Frankfurter, J., concurring in the result).

24. *Id.* at 263 in the judgment (quoting CONF. OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & THE UNIV. OF THE WITWATERSRAND, JOHANNESBURG, THE OPEN UNIVERSITIES IN SOUTH AFRICA 14 (1957) (internal quotation marks omitted)).

25. *See* AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION 41 (2009) (making this point).

26. 354 U.S. at 251-53 (holding that the fundamental problem in the case was that the Attorney General lacked legislative authority to conduct the questioning).

27. 385 U.S. 589, 603 (1967).

not tolerate laws that cast a pall of orthodoxy over the classroom" because "[t]he classroom is peculiarly the 'marketplace of ideas.'"[28] Like *Sweezy*, however, *Keyishian* did not resolve the issue before it on academic freedom grounds; instead, the Court concluded that the challenged New York law was unconstitutionally vague.[29] These cases also involved universities challenging external interference and did not address when universities can regulate the speech of their students.

When courts feel ill-equipped to second-guess universities' educational decisions, at times they embrace what some scholars have labeled the "doctrine of academic abstention."[30] For example, in *Board of Curators v. Horowitz*, the Supreme Court rejected a procedural due process claim brought by a medical student dismissed from her program for poor clinical skills, erratic attendance, and lack of concern for personal hygiene.[31] The Court noted that university decisions concerning a student's academic performance are "not readily adapted to the procedural tools of judicial or administrative decisionmaking."[32] In his concurrence, Justice Powell added that "[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."[33] Similarly, in *Regents of the University of Michigan v. Ewing*, the Court cited both *Keyishian* and *Horowitz* when it rejected a student's claim that a public medical school had violated his substantive due process rights by dismissing him from the program after he failed a required exam.[34] The Court held that judges reviewing "the substance of a genuinely academic decision" should "show great respect for the faculty's professional judgment."[35] The Court added that federal courts are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions."[36] The Court did not entirely abdicate judicial review but said that it would not override the university's judgment "unless it is such a substantial

28. *Id.*

29. *Id.* at 603-04.

30. See GAJDA, *supra* note 25, at 46.

31. 435 U.S. 78, 80-81 (1978).

32. *Id.* at 90. The Court refused to remand the case for a determination of the student's substantive due process claim, noting that there was no showing that the school's decision was arbitrary or capricious and that in any event "[c]ourts are particularly ill-equipped to evaluate academic performance." *Id.* at 91-92.

33. *Id.* at 96 n.6 (Powell, J., concurring).

34. 474 U.S. 214, 215, 225-26, 225 & n.11 (1985).

35. *Id.* at 225.

36. *Id.* at 226.

departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[37]

Ewing and *Horowitz*, as well as dicta and concurring opinions in several other cases, suggest that the Court is not likely to question the content of the university (or, for our purposes, the law school) curriculum. In these cases, the Court has suggested that when a university and its officials are speaking, or when instructors or professors are speaking in the academic context, the government speech doctrine might apply.[38] For example, in *Rosenberger v. Rectors & Visitors of the University of Virginia*, the Court remarked: "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[39] In *Board of Regents v. Southworth*, the majority made clear that the student activity fund did not involve the university's own speech.[40] The Court noted the case does not involve "speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered."[41] Justice Souter underscored this distinction in his concurrence, where he pointed out that no one claims "that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement."[42] These cases strongly indicate that the First Amendment poses no obstacle to law schools who wish to offer professionalism and civility training as part of their curriculum. Law schools can embrace the viewpoint that civility is a positive for the practice of law.

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37. *Id.* at 225.

38. *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) (noting in dicta that if the university were responsible for the challenged speech, "the case might be evaluated on the premise that the government itself is the speaker"). The Court also noted that the "principles applicable to government speech would have to be considered" in such contexts. *Id.* at 235. This principle would apply only when the instructors are speaking within the scope of their job duties.

39. 515 U.S. 819, 833 (1995); *see also* Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources . . . ."); *id.* at 278 (Stevens, J., concurring in the judgment) ("In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. . . . [including the selection of books, professors, and courses].").

40. 529 U.S. at 229. The Court added that "[t]he University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors." *Id.*

41. *Id.* at 235.

42. *Id.* at 243 (Souter, J., concurring in the judgment).

First Amendment questions arise, however, when a law school regulates student speech. These concerns are the strongest when schools attempt to regulate student speech that is not part of the university curriculum.[43] This is not because students themselves necessarily possess academic freedom, but rather because they enjoy general free speech rights against government actors.[44] The university's claim to institutional deference is likewise at its lowest ebb in this circumstance because the regulation of such speech does not relate to the primary research and teaching mission of the school.[45]

Accordingly, in its per curiam opinion in *Papish v. Board of Curators*, the Supreme Court made clear that while content-neutral regulations on campus are permissible, "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[46] The Court held that a university could not expel a graduate journalism student for distributing a newspaper containing materials that violated the university's General Standards of Student Conduct policy prohibiting "indecent conduct or speech."[47] The Court held that a university had no special leverage to restrict the speech of its students on campus, "no matter how offensive to good taste."[48] Similarly, in *Healy v. James*, the Court did not defer to a university that refused to recognize a local chapter of Students for a Democratic Society.[49] The Court held that the university "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[50]

Papish and *Healy* make clear that students enjoy robust speech protections on campus, even in the face of arguments that schools need constitutional leeway to create a certain type of educational environment. Indeed, in *Papish*, the Court ruled in favor of the student over two dissents arguing that universities should have this leeway. Chief Justice Burger's dissent asserted that university campuses are "not merely an arena for the discussion of ideas by

43. *See* Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, *in* THE FREE SPEECH CENTURY 106, 119 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (arguing that it is more appealing to use usual free speech principles to analyze efforts to regulate "off-campus" student speech).

44. *See* Byrne, *supra* note 21, at 262-63.

45. *See id.*

46. 410 U.S. 667, 670-71 (1973) (per curiam).

47. *Id.* at 667-68, 671. The newspaper, a non-university publication, contained a political cartoon "depicting policemen raping the Statute of Liberty and the Goddess of Justice" and an article entitled "M[other]f[ucker] Acquitted," which discussed the acquittal in an assault trial. *Id.* at 667-68.

48. *Id.* at 670.

49. 408 U.S. 169, 170, 194 (1972).

50. *Id.* at 187-88.

students and faculty" but "also an institution where individuals learn to express themselves in acceptable, civil terms."[51]

To be sure, the Court has recognized the important contribution that student groups make to a school's educational mission and has more recently suggested that the regulation of student organizations may warrant some institutional deference. In *Rosenberger*, the Court mentions Virginia's assertion that offering a wide range of student organizations "tends to enhance the University environment."[52] In *Christian Legal Society v. Martinez* (*CLS*), the Court remarked that a school's "pedagogical approaches" are "not confined to the classroom"; rather, "extracurricular programs are, today, essential parts of the educational process."[53] In *Southworth*, the Court repeated the University's more detailed argument that extracurricular activities "stimulat[e] advocacy and debate on diverse points of view, enabl[e] participation in political activity, promot[e] student participation in campus administrative activity, and provid[e] opportunities to develop social skills."[54]

The Court also deferred to a university's extracurricular policy in *CLS*, where a slim majority of the Court deferred to Hastings Law School's "all comers" policy for student groups.[55] Applying a limited public forum analysis,[56] the majority held that Hastings' policy was "reasonable" and "due decent respect."[57] The majority held it was rational for Hastings to believe an all-comers policy "encourages tolerance, cooperation, and learning among students."[58] The *CLS* dissent argued this deference to the university was inconsistent with *Healy*.[59] It is worth nothing, however, that even the *CLS* majority emphasized that Hastings' all-comers policy was textbook viewpoint neutral, distinguishing *Healy*, *Widmar*, and *Rosenberger* as cases where "universities singled out organizations for disfavored treatment because of their points of view."[60]

CLS provides some support for an argument that universities should receive deference for viewpoint-neutral civility regulations at events featuring

51. *Papish*, 410 U.S. at 672 (Burger, C.J., dissenting).

52. 515 U.S. 819, 824 (1995).

53. Christian Legal Soc'y v. Martinez (*CLS*), 561 U.S. 661, 686 (2010).

54. 529 U.S. 217, 222-23 (2000) (internal quotation marks omitted).

55. 561 U.S. at 674.

56. *Id.* at 683 (concluding that "our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution").

57. *Id.* at 687, 697.

58. *Id.* at 689.

59. *Id.* at 720 (Alito, J., dissenting) (citing Healy v. James, 408 U.S. 169 (1972)).

60. *Id.* at 694 (majority opinion).

outside speakers invited by student groups. Like the "all comers" policy in that case, civility regulations are intended to promote tolerance and learning. It is possible the Court would recognize prohibitions on profanity as viewpoint-neutral.[61] But *CLS* does not support significantly broader content-based civility standards regulating "offensive, vulgar, or provocative" expression.[62] In addition, *CLS* addressed the constitutionality of the Hastings student-group recognition policy only; the case did not concern the speech rights of students attending events on campus.

Furthermore, *CLS* does not offer a robust explanation of how student-invited speakers serve a university's educational mission. Indeed, schools sometimes go out of their way to make clear that speech by student organizations is not university speech.[63] For example, in *Rosenberger*, the Court made clear that schools cannot distribute funding to student groups based on viewpoint, even if to promote its pedagogical goals.[64] The Court drew a distinction between decisions a university makes when it is the speaker, such as when it "determines the content of the education it provides," and the decisions it makes when it is funding the speech of others.[65] Student groups—and any events they host—do not carry "any imprimatur of state approval."[66] In contrast, the Court has made clear that offering students robust First Amendment rights in the context of student organization recognition and campus access does not undermine "the right of the University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[67]

The Court's refusal to defer to universities' asserted educational needs outside of the core curricular context is reflected in other decisions where the Court rejected such arguments. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Court unanimously rejected law schools' arguments that a law requiring them to host military recruiters on campus violated their free speech

61. *See* James Weinstein, *Different Strokes for Different Folks: Academic Freedom, Civility, and Educational Diversity Among Private Colleges and Universities*, 2 J. FREE SPEECH L. 385, 409 & n.111 (2022) (making this argument based on the various views set forth in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019)).

62. Martinez Memo, *supra* note 2, at 9.

63. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 849 (1995) (O'Connor, J., concurring) (observing that "student organizations, at the University's insistence, remain strictly independent of the University").

64. *See id.* at 833-34 (majority opinion).

65. *Id.*

66. Widmar v. Vincent, 454 U.S. 263, 274 (1981).

67. *Id.* at 276-77 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment)).

and association rights.[68] The Court did not even bother to address the American Association of University Professor's (AAUP) amicus brief arguments that "[a]cademic freedom extends to faculty decisionmaking beyond teaching and research construed narrowly" and included "admissions, extracurricular activities, evaluation criteria, and the academic values that universities seek to impart to their students throughout the educational environment."[69] The AAUP had specifically argued that the schools' nondiscrimination policies reflected an "attempt to instill the standards of professional conduct that law school graduates must follow upon entering the legal profession," citing rules of professional conduct that prohibited judges from engaging in discrimination on the basis of an individual's sexual orientation.[70]

Similarly, the Court has recently walked back its deferential approach to admissions. In *Grutter v. Bollinger*, the Court rejected a challenge to a law school's affirmative action admission policy, instead deferring to the "educational autonomy" of the institution "grounded in the First Amendment."[71]The Court said that in crediting the law school's assertion that a diverse student body is a compelling state interest essential to the school's institutional mission, the "'good faith' on the part of a university is 'presumed' absent a 'showing to the contrary.'"[72] *Grutter* reflected the arguments Justice Powell made in his opinion in *Bakke*, which asserted that "the attainment of a diverse student body" is "constitutionally permissible" as a matter of "[a]cademic freedom" because "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."[73]

In its recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), however, a majority of the Court rejected this deferential approach.[74] *SFFA* subjected the universities' assertions that affirmative action was essential to achieve the educational benefits of a diverse student body to rigorous strict scrutiny review.[75] The Court declared that the universities' assertions were "not sufficiently coherent for purposes of strict scrutiny."[76] While it noted *Grutter*'s statement that the Court's prior decisions

68. 547 U.S. 47, 50, 70 (2006).

69. Brief for the Am. Ass'n of Univ. Professors as Amicus Curiae Supporting Respondents at 8-9, Rumsfeld v. F. for Acad. & Inst. Rts., 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347170.

70. *Id.* at 13.

71. 539 U.S. 306, 329 (2003) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)).

72. *Id.* (quoting *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.)).

73. *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.).

74. 143 S. Ct. 2141 (2023).

75. *Id.* at 2166.

76. *Id.*

had "recognized a 'tradition of giving a degree of deference to a university's academic decisions,'" the Court argued that "any deference must exist 'within constitutionally prescribed limits' and that 'deference does not imply abandonment or abdication of judicial review.'"[77] In his concurrence, Justice Thomas pointed out that the Court did not defer to the Virginia Military Institute in a prior case when it claimed that admitting women would be too burdensome; the Court instead dismissed any needed accommodations as "manageable."[78] In *United States v. Virginia*, the Court held that "[t]he notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved."[79] *SFFA* suggests that the farther away from the academic enterprise, the less likely a university decision is to receive deference.

An open question is whether universities can assert the right to institutional deference when they regulate student speech as part of its scholarship and teaching mission. University students can play an active role in the development of knowledge and the generation of new ideas. Yet the precise scope of students' academic freedom is a topic subject to "ongoing uncertainty and debate."[80] It cannot be that the expressive autonomy of these adults must give way to the mere say-so of a university who claims that speech regulation is part of the educational enterprise. There must be limits to this deference. At the same time, it would be rank error to suggest that the classroom, or even graduate student research, is speech in a largely unregulated marketplace of ideas that will not "tolerate laws that cast a pall of orthodoxy."[81] Professors rightly exercise significant control over the speech of their students in order to make sure these students are learning the lessons of the discipline; indeed, this is the exercise of the professor's own academic freedom.

It is not clear how to reconcile the speech rights of students with the academic freedom (or institutional deference) of their professors and universities, except to recognize that there must be some limits.[82] There is a

77. *Id.* at 2168 (citation omitted) (first quoting *Grutter*, 539 U.S. at 328; and then quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).

78. *Id.* at 2190 (Thomas, J., concurring) (quoting United States v. Virginia, 518 U.S. 515, 550-51 n.19 (1996)).

79. 518 U.S. at 542 (footnote omitted).

80. *Academic Freedom of Students and Professors, and Political Discrimination*, AM. ASS'N OF UNIV. PROFESSORS, https://perma.cc/WL4B-7949 (archived May 24, 2024).

81. Byrne, *supra* note 21, at 296 (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

82. The AAUP has recognized there is no clear guidance on how to balance the academic freedom of professors with the free speech rights of students. *See Academic Freedom of Students and Professors, and Political Discrimination*, *supra* note 80.

strong argument that efforts to regulate student "professionalism" outside of the classroom or research setting exceeds these limits.

C. From Tinker to Mahanoy

Another frame of reference for analyzing universities' attempts to regulate student speech are the K-12 student speech cases. Although it might initially seem strange to consider K-12 cases in the context of university-speech regulation, it is very common for lower courts to do so.

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court famously held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[83] *Tinker* cited *Keyishian* when explaining that schools are part of the "marketplace of ideas," and that the freedom extends to "personal intercommunication among the students," whether in the classroom, "the cafeteria, or on the playing field."[84] At the same time, the Court held that the First Amendment must be "applied in light of the special characteristics of the school environment"[85] and concluded that schools can restrict speech that substantially interferes with the operation of the school or impinges on the rights of others.[86]

It is not clear whether *Tinker* applies to universities. This matters because if the standard does apply, a law school might be able to rely on this standard—rather than the "regular," more rigorous First Amendment standards—to regulate student speech anywhere it occurs.[87] The Third Circuit has offered the most extensive explanation of why K-12 cases should not be applied in the university setting, noting

> the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times.[88]

The Ninth Circuit has added that the K-12 student speech doctrine "fails to account for the vital importance of academic freedom at public colleges and universities," arguing that "the progress of our professions . . . may depend upon

83. 393 U.S. 503, 506 (1969).

84. *Id.* at 512 (quoting *Keyishian*, 385 U.S. at 603).

85. *Id.* at 506.

86. *Id.* at 513.

87. *Tinker* itself does not address whether schools can regulate student speech off campus, but in *Mahanoy Area School District v. B.L. ex rel. Levy*, the Court held that there is no rigid geographic boundary. 141 S. Ct. 2038, 2046 (2021).

88. *See* McCauley v. Univ. of the V.I., 618 F.3d 232, 242-43 (3d Cir. 2010).

the 'discord and dissent' of students training to enter them."[89] While other courts have expressed reluctance about applying these cases to university students,[90] some have cited *Healy*'s reliance on *Tinker* to support a contrary conclusion.[91]

To make things even more complicated, it is not entirely clear when K-12 schools can rely on the *Tinker* standard to regulate "off campus" student speech. In this context, "off campus" is shorthand used to refer to expression that occurs off school grounds and outside of school-sponsored or school-supervised activities. In its recent decision *Mahanoy Area School District v. B.L. ex rel. Levy*, the Court attempted to address this question and held that in some circumstances schools can rely on this test (rather than the "normal" First Amendment rules).[92] *Mahanoy* held that the special circumstances justifying the additional leeway to regulate student speech do not always disappear when the speech is off campus because in some circumstances, a "school's regulatory interests remain significant."[93] The Court expressed particular concern about targeted bullying or harassment and targeted threats but specifically did not create a complete list of "school-related off-campus activities" that schools could regulate in order to prevent "substantial disruption of learning-related activities or the protection of those who make up a school community."[94]

The Court expressed significant reservations about giving schools this power. The Court warned that courts should be mindful of "three features" of off-campus speech that "diminish" the authority of schools: (1) schools rarely are acting *in loco parentis* when they regulate off-campus speech; (2) regulating student speech 24/7 means that the student might not be able to speak at all, and that schools must satisfy "a heavy burden" to regulate political or religious speech; and (3) schools are "the nurseries of democracy" that must recognize the importance of the "marketplace of ideas," which includes "the protection of unpopular ideas."[95] The Court refused to give much more guidance, saying that "[g]iven the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent

89. Oyama v. Univ. of Haw., 813 F.3d 850, 863-64 (9th Cir. 2015) (quoting Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010)).

90. *See, e.g.*, Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022); Haughwout v. Tordenti, 211 A.3d 1, 19 n.22 (Conn. 2019).

91. *See, e.g.*, Yeasin v. Durham, 719 F. App'x 844, 851-52 (10th Cir. 2018); *see also* Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012) (holding that *Tinker* applies in the college setting but should be adjusted to consider the different levels of maturity).

92. 141 S. Ct. 2038, 2048 (2021). I have analyzed the unclear ramifications of this case elsewhere. *See generally* Mary-Rose Papandrea, Mahanoy v. B.L. *&* *First Amendment "Leeway,"* 2021 SUP. CT. REV. 53.

93. *Mahanoy*, 141 S. Ct. at 2045.

94. *Id.*

95. *Id.* at 2046.

to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more" than these three features suggest that schools have less authority to regulate off-campus speech.[96] The Court then applied this limited guidance to the facts of the case before it, where a cheerleader who did not make the varsity squad complained on Snapchat, "Fuck school fuck softball fuck cheer fuck everything."[97] The Court concluded that B.L.'s posts were protected because they were made off campus outside of school hours, did not name anyone at the school, and reflected "B.L.'s irritation with, and criticism of, the school and cheerleading communities."[98]

Mahanoy did not address whether its holding applies to universities.[99] Indeed, as mentioned above, it is not even clear that *Tinker* applies on university campuses. Furthermore, it would be gravely disconcerting and inconsistent with *Papish* to give universities broad power under *Tinker*'s disruptive standard to regulate their students' expression wherever and whenever it occurs, even when the speech is not part of a school-sponsored or school-supervised activity. *Mahanoy* recognized the dangers of giving K-12 schools authority to regulate student speech 24/7. These concerns are magnified in the university context because students are adults who often live on campus.

That said, courts are likely to embrace *Mahanoy*'s holding that a school may have a substantial interest in regulating student speech "off campus" and reject arguments restricting university authority based on the geographic location of the expression. Given the ubiquity of electronic platforms, it no longer makes sense to make school authority rise and fall on geography. Law students, for example, may take classes online and even participate in externships online. They may have assignments online. Outside of the core curricular context, courts are also likely to embrace *Mahanoy* as giving the green light to regulate targeted harassment or targeted threatening speech that happens to occur online.[100]

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96. *Id.*

97. *Id.* at 2043.

98. *Id.* at 2047. This last point suggests that the Court regarded her statements as "political" speech, but it is not clear.

99. Justice Alito's concurrence specifically questioned whether the decision should apply in the university setting. *Id.* at 2049 n.2 (Alito, J., concurring) ("For several reasons, including the age, independence, and living arrangements [of university] students, regulation of their speech may raise very different questions from those presented here. I do not understand the decision in this case to apply to such students.").

100. *See, e.g.*, Hedrick v. W. Mich. Univ., No. 22-cv-00308, 2022 WL 10301990, at *1, *6 (W.D. Mich. Oct. 17, 2022) (relying on *Mahanoy* when holding that a university could a punish student for sending a threatening video via Snapchat to another student).

On the other hand, students challenging law school speech restrictions may benefit from *Mahanoy*'s concerns about political or religious expression. For example, one district court relied on this part of *Mahanoy* to reject a motion to dismiss a First Amendment claim brought by a college volleyball player who alleges she was disciplined after posting emojis on the ESPN website suggesting that she did not agree that the *Eyes of Texas* is a racist song.[101]

Mahanoy's dicta suggests another potential avenue for law schools to regulate "off-campus" unprofessional speech. *Mahanoy* noted that the high school "ha[d] presented no evidence of any general effort to prevent students from using vulgarity outside the classroom."[102] This statement suggests that if the school *had* such a policy, the school would have been able to regulate vulgarity online.[103] This dictum potentially opens the door to a law school argument that regulating its students' expression for "professionalism" whenever and wherever it occurrs is necessary to train lawyers to be civil. Given that *Papish* remains good law, however, regulating law student speech for vulgarity, profanity, or "offensiveness" anywhere it occurs on or off campus is highly problematic, even if in the service of a pedagogical goal to train good lawyers. Civility requirements would most likely chill the speech of students engaging in controversial but protected speech. As one federal court confronted with this issue pre-*Mahanoy* explained, a civility requirement "might well require students to forsake the means of communication that are most likely to be effective."[104] Because "[c]ivility connotes calmness, control, and deference or responsiveness to the circumstances, ideas, and feelings of others," such requirements may undermine a speaker's ability to convey the "full emotional power" of their views and deprive them of the "most effective" tools to reach their audience.[105]

101. *See, e.g.*, McLaughlin v. Bd. of Regents, 566 F. Supp. 3d 1204, 1213-14 (W.D. Okla. 2021); *see also* Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) (noting that *Mahanoy* limited the application of *Tinker* to regulate off-campus speech, especially if it is political or religious speech). In addition, *Mahanoy* offers speech-protective language that some judges have embraced. *See, e.g.*, Speech First, Inc. v. Sands, 69 F.4th 184, 209 (4th Cir. 2023) (Wilkinson, J., dissenting) (quoting *Mahanoy* to support the argument that bias reporting systems violate the First Amendment).

102. *Mahanoy*, 141 S. Ct. at 2047.

103. It is also possible that the Court did not actually mean to suggest that such a thing would be constitutional, especially given that such a policy could not be justified under *Tinker*'s substantial disruption test.

104. Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1018 (N.D. Cal. 2007).

105. *Id.* at 1019.

D. The Limits of Curricular Control: *Hazelwood?*

Neither *Papish* nor *Healy* involved restrictions on student contributions to class discussions, assignments, or research assignments. The closest we can get to guidance on how to balance student free speech rights against the interests of their professors and university is the Court's decision in *Hazelwood School District v. Kuhlmeier*.[106]

The scope of *Hazelwood* is hotly debated and controversial,[107] and its application to the university setting even more so.[108] In *Hazelwood*, the Court held that a high school principal could censor certain articles the faculty-supervised newspaper intended to publish.[109] In a muddled analysis, the Court explained that the First Amendment poses no bar to the regulation of K-12 student expression in "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" as long as the regulations are "reasonably related to legitimate pedagogical concerns."[110]

Hazelwood seemed to focus on situations where a school refuses "to lend its name and resources to the dissemination of student expression,"[111] but some lower courts have embraced some of the broader language in that case suggesting that educational institutions must have "latitude . . . to further legitimate curricular objectives."[112] *Hazelwood* defined school-sponsored speech as "expressive activities" that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so

106. 484 U.S. 260 (1988).

107. *See, e.g.*, Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1951 (2017) (noting the "intrinsic ambiguity as to *Hazelwood*'s meaning").

108. *Hazelwood* specifically noted that "[w]e need not now decide" whether the decision applied outside of the K-12 setting. 484 U.S. at 274 n.7. Most lower courts to address the issue have held that *Hazelwood* applies to universities regulating student speech, especially when related to the curriculum. *See, e.g.*, Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012) (reasoning that *Hazelwood* should apply in a college setting); Axson-Flynn v. Johnson, 356 F.3d 1277, 1284 (10th Cir. 2004) (applying *Hazelwood* in a college setting); Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (en banc) (holding that *Hazelwood* applied in a non-curricular college newspaper case). *But see* Oyama v. Univ. of Haw., 813 F.3d 850, 862-63 (9th Cir. 2015) (declining to extend *Hazelwood* to the university context); Kincaid v. Gibson, 236 F.3d 342, 346 & n.5 (6th Cir. 2001) (en banc) (limiting *Hazelwood*'s application in a college yearbook case).

109. 484 U.S. at 276.

110. *Id.* at 271-73.

111. *Id.* at 272-73.

112. *Ward*, 667 F.3d at 733; *see also* Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155-56 (6th Cir. 1995) (applying *Hazelwood* in a case where the teacher did not let students write papers on their chosen topics).

long as they are supervised by faculty members and designed to impart particular knowledge or skills to students participants and audiences."[113]

Some lower courts are reluctant to apply *Hazelwood* in the higher education context. One reason for this hesitation is that *Hazelwood*'s "key rationales" are that students "are not exposed to material that may be inappropriate for their level of maturity" and that they "learn whatever lessons the activity is designed to teach."[114] Concerns about maturity cannot justify the regulation of adults' expression, and the pedagogical goals in higher education are much bigger than teaching students "lessons."[115] Ideally, university students are engaged in vigorous debate with each other and with their professors. The Court has suggested that academic freedom might be something students enjoy, too.[116] As Justice Douglas argued in his *Healy* concurrence, "students and faculties should have communal interests in which each age learns from the other."[117] Courts embracing *Hazelwood* have responded by noting the flexibility of the test to adapt to the university setting.[118]

Another major concern about allowing universities to rely on *Hazelwood* is its indeterminate scope. It is one thing to give schools broad authority over speech that they sponsor, but it is quite another to give them "wide-ranging authority to constrain offensive or controversial [student expression] by requiring only that a school's actions be 'reasonably related' to 'legitimate pedagogical concerns.'"[119] In *Tatro v. University of Minnesota*, for example, the university argued it should be able to rely on *Hazelwood* to justify mortuary student conduct rules providing that discussion of cadaver dissection outside the laboratory must be "respectful and discreet" and prohibiting all "blogging about cadaver dissection or the anatomy lab."[120] In refusing to apply *Hazelwood* to analyze the First Amendment rights of a student who violated these provisions, the Supreme Court of Minnesota also noted that "the public would not reasonably perceive Tatro's Facebook posts to bear the imprimatur of the University."[121]

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113. *Hazelwood*, 484 U.S. at 271.

114. Oyama v. Univ. of Haw., 813 F.3d 850, 863 (2015) (quoting *Hazelwood*, 484 U.S. at 271).

115. *Id.*

116. *See* GAJDA, *supra* note 25, at 47.

117. 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

118. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1289-90 (10th Cir. 2004) (citing Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993)).

119. Tatro v. Univ. of Minn., 816 N.W.2d 509, 518 (Minn. 2012) (quoting *Hazelwood*, 484 U.S. at 273).

120. *Id.* at 523.

121. *Id.* at 518.

Despite misgivings about using *Hazelwood* in the higher education context, many lower courts have done so, and not just in the context of student newspapers.[122] This may be partly due to the lack of any other guidance, but it also may be because *Hazelwood*'s rational basis standard is consistent with the deferential approach the Court took to other challenges to university curricular requirements in *Ewing* and *Horowitz*, as well as its suggestion in dicta in several other decisions that curricular decisions are government speech not subject to the usual First Amendment challenges.[123] Surely students cannot have a right to determine what courses universities offer, which casebooks their professors select, or the topics a course covers. (It is, of course, permissible and perhaps even wise for universities to consider their students' input on such subjects.) In addition, as the Ninth Circuit noted, "the First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard."[124]

At the same time, *Hazelwood*'s deferential rational basis standard does not give any weight to student's countervailing interest in free speech. In other words, while it might make sense to give universities and professors some deference, *Hazelwood* gets the balance wrong, and there is no easy way to fix this problem. Some lower courts rejecting student curricular challenges relying on *Hazelwood* have tried to alleviate these concerns by emphasizing that the speech restrictions must be "viewpoint neutral."[125] But viewpoint neutrality is inconsistent with the educational process and undermines the very purpose of a university.[126] Alternatively, *Hazelwood* suggests the outer boundary should be

122. *See, e.g.*, *Axson-Flynn*, 356 F.3d at 1285-86 (applying *Hazelwood* to a student's challenge to a university acting class that required her to use profanity); Brown v. Li, 308 F.3d 939, 943, 949 (9th Cir. 2002) (applying *Hazelwood* in a case where a university prohibited student from including a "Disacknowledgement" section in a thesis); *see also* Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991) (applying *Hazelwood* in a case brought by a professor challenging the university's regulation of his expression).

123. *See supra* notes 83-91 and accompanying text.

124. *Brown*, 308 F.3d at 949.

125. *See, e.g.*, Keefe v. Adams, 840 F.3d 523, 530 (8th Cir. 2016) (suggesting that a nursing student might have stated a claim if he had alleged viewpoint discrimination); Feine v. Parkland Coll. Bd. of Trustees, No. 09-cv-02246, 2010 WL 1524201, at *5-8 (C.D. Ill. Feb. 25, 2010) (granting a motion to dismiss a student's complaint alleging that his psychology professor violated his First Amendment rights while emphasizing that the professor's decision to punish the student for his ad hominem attacks on other students was based on the "manner" and "tone" of his expression, not his viewpoint); Harrell v. S. Or. Univ., No. 08-cv-03037, 2009 WL 3562732, at *1 (D. Or. Oct. 30, 2009) (denying a student's motion for a preliminary injunction to prohibit speech that "display[s] defiance or disrespect of others" and holding that the student "was not admonished for expressing an unpopular view"), *aff'd*, 381 F. App'x. 731 (9th Cir. 2010).

126. Amar & Brownstein, *supra* note 107, at 1948 ("Content-neutral education is an oxymoron." (footnote omitted)).

when the school's actions serve "no valid educational purpose,"[127] but that standard is so easy to meet as to be virtually no standard at all.

Some courts have suggested that students can state a First Amendment claim when the speech regulation is a "pretext for punishing the student for her race, gender, economic class, religion or political persuasion."[128] While it is disconcerting to contemplate the potential flood of litigation that could result if this became the law, especially if law students can allege discrimination based on their "political persuasion," such a flood has not yet materialized. In addition, law school professors should be able to overcome pretext allegations as long as they run their classrooms with some thoughtfulness. They should not have a hard time explaining that class discussions require careful "orchestration," that allowing students to express whatever views they wish, regardless of merit or relevance, would undermine this planning, and students who engage in ad hominem attacks or other forms of nonprofessional expression would undermine the ability of other students to learn.[129]

The further away the university's decisions are from its core teaching functions, however, the less likely the Court is to be deferential to the school. Indeed, some lower courts embracing *Hazelwood* to analyze "classroom" requirements specifically have "cast doubt" that educators receive deference when regulating student speech in the context extracurricular activities.[130] This is consistent with the Court's jurisprudence relating to university regulation of recognized student organizations discussed above.

II. Professionalism Exception

In addition to using the K-12 cases to regulate university student speech, lower courts and commentators have increasingly embraced the theory that professional schools have authority to regulate the speech of their students that demonstrates a lack of fitness for the profession. Emily Gold Waldman has helpfully labeled these cases utilizing that theory as "certification cases."[131] In these cases, courts have held that colleges and universities can regulate student

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

128. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004) (quoting Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155-56 (6th Cir. 1995)).

129. *See* Amar & Brownstein, *supra* note 107, at 1955.

130. *See Axson-Flynn*, 356 F.3d at 1286 n.6 (collecting cases).

131. Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 388 (2013) (exploring cases where universities regulate student speech because the speech "has undermined the university's confidence that this student is going to be an appropriate member of the profession for which the university is training him or her").

speech that does not conform to professionalism standards.[132] To date, there are no published decisions applying this doctrine in a law school case.

It is not clear whether the Supreme Court would recognize this additional basis for regulating the speech of higher-education students. The cases that best support the application of professionalism standards are *Horowitz*, *Ewing*, and *Martinez* because in these cases, the Court deferred to a university's academic determinations.[133] But it is hardly clear that these cases would support a professionalism standard that allowed a university to regulate student speech wherever and whenever it occurs, even outside of the curricular setting.

Furthermore, although lawyers are subject to robust professionalism standards, most of these rules focus on attorney conduct in the course of practicing law. Significant First Amendment issues arise when the rules venture to regulate attorney speech outside of that area. Law schools that rely on professionalism rules regulating speech outside of the practice of law would likewise face constitutional difficulties.

A. Professional Standards Exception

Several lower courts have held that public colleges and universities can constitutionally restrict student speech that is not professional. The facts of these cases range dramatically from the regulation of student speech that takes place under faculty supervision in a classroom or clinical setting[134] to the regulation of student speech on social media that has very little, if any, curricular connection.[135] The idea is that the student speech violates some professional standard and thereby indicates a student's lack of fitness for employment in that area.

One of the first cases to recognize a professionalism exception to the First Amendment was *Tatro v. University of Minnesota*, where the Minnesota Supreme Court upheld the punishment of a student studying mortuary science after she posted several Facebook comments about her laboratory classes in anatomy, embalming, and restorative art.[136] These comments exhibited "a certain degree of light-hearted irreverence" to the human cadaver.[137] She called her cadaver

132. *See id.* at 382-83.

133. *See supra* notes 31-38, 55-60 and accompanying text.

134. *See, e.g.*, *Axon-Flynn*, 356 F.3d at 1280, 1291, 1298 (considering a student's challenge to a requirement to use profanity in an acting class).

135. *See, e.g.*, Hunt v. Bd. of Regents of the Univ. of N.M., 792 F. App'x 595, 597, 604 (10th Cir. 2019) (analyzing the constitutionality of punishing a student for posting inflammatory political comments on social media).

136. 816 N.W.2d 509, 511, 524 (Minn. 2012).

137. R. George Wright, *Standards of Professional Conduct as Limitations on Student Speech*, 11 FIRST AMEND. L. REV. 426, 430-31 (2013).

"Bernie," and her posts included: "Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though."[138] The school was not amused, and Tatro was charged with violating the Student Conduct Code and academic program rules governing student use of cadavers.[139]

The court explained that neither *Tinker* nor *Hazelwood* offered the appropriate legal framework because the "driving force" behind the speech regulation was the concern the student expression violated program professionalism standards.[140] The court nevertheless concluded that "a university may regulate student speech on Facebook that violates established professional conduct standards."[141] The court agreed that while "a broad rule . . . allow[ing] a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason" would be problematic, such concerns could be addressed by requiring a school to demonstrate that the speech restrictions are "narrowly tailored and directly related to established professional conduct standards."[142]

Other courts have used a professionalism exception to reject student speech claims in a variety of contexts. Some have arisen in the curricular context. In *Oyama v. University of Hawaii*, for example, the Ninth Circuit rejected a student teacher's claim that his university's decision to deny him teacher certification violated the First Amendment.[143] As part of his student-teaching coursework, Oyama made statements that he did not believe relationships between adults and children were morally wrong and that most students with disabilities were "fakers."[144] The court concluded that the university's decision to deny him a teacher certification was based on "established professional standards," rather than "personal disagreement with [his] views."[145] In reaching this conclusion, the court noted that the decision rested on statements that "directly" related to teaching and that were made in the context of his certification, "in the classroom, in written assignments, and directly to the instructors responsible for evaluating his suitability for teaching."[146]

Others have concerned social media posts that included classmates in the intended audience but otherwise did not contain content relating to the professional program. In *Hunt v. Board of Regents*, a medical school student had

138. *Tatro*, 816 N.W.2d at 512.

139. *See id.* at 513.

140. *Id.* at 518-20.

141. *Id.* at 521.

142. *Id.*

143. 813 F.3d 850, 854-55 (9th Cir. 2015).

144. *Id.* at 856-57.

145. *Id.* at 868, 874.

146. *Id.* at 872.

written a heated political post on Facebook after the November 2012 presidential election.[147] The student directed his post to those "who support the Democratic candidates" and said that those who celebrated Obama's victory were "sick, disgusting people" who are "WORSE than the Germans during WW2" and "a disgrace to the name of human [sic]."[148] The post concluded: "fuck you, Moloch worshiping [sic] assholes."[149] The student was found in violation of the professionalism standards of the medical school community, as expressed in the University of New Mexico's Respectful Campus Policy.[150] This policy stated that while students had a right to express themselves in an "open and honest manner," they did not have license to make "unduly inflammatory statements or unduly personal attacks, or to harass others."[151]

These cases can be put on a spectrum based on how close—or far—the student speech was to the university's academic interests. In *Oyama*, the student teacher was not certified as a result of statements he made in his coursework to his teachers. In contrast, in *Hunt*, a medical student faced discipline for political speech that had nothing to do with his schoolwork, based on a standard that had no professional corollary. The Court should give universities much less constitutional leeway to regulate the speech of their students the farther away that speech is from the core academic enterprise. Cases like *Tatro* fall in the middle of the spectrum; she was not disciplined for speech made as part of her class, but she was accused of violating the terms of access to a cadaver. The problem with *Tatro* is that the university's argument that the professional guidelines would actually prohibit the student's social media posts was a stretch.

B. Applying Professionalism Standards in Law Schools

Several commentators have made helpful suggestions for limiting this professionalism doctrine to make sure that it is appropriately protective of student speech rights. For example, Clay Calvert has argued that when a student faces discipline for violating a professional standard, that professional standard must be a codified standard that is not vague, and the standard must be "essential" to the profession, in that failure to abide by it may jeopardize a

147. 792 F. App'x 595, 597-98 (10th Cir. 2019).

148. *Id.* at 598.

149. *Id.*

150. *Id.* at 598-99.

151. *Id.* at 598 (emphasis omitted).

student's professional success.[152] This Essay adds that any professional standard used to justify punishment must itself be constitutional.

One immediate obstacle for regulating law student speech for civility is that there is no model ABA guideline or other model rule for civility. As Justice O'Connor once aptly noted, regulating civility is hard to do because defining what is uncivil is "notoriously subjective—you know it when you see it."[153] State and federal bar associations have adopted professionalism standards that are "unique" and "idiosyncratic."[154] They are called a variety of names—"pledges," "guidelines," "creeds," "standards," and the like—and they generally encourage lawyers to "act in a civil manner" or to "treat others in a courteous and dignified manner."[155] At least 140 state and local bar associations have adopted civility codes.[156] These codes vary widely and include both uncivil speech and non-expressive conduct (like punctuality).[157] Many jurisdictions with professionalism standards make it clear that the standards cannot be used as a basis for discipline.[158] In lieu of disciplinary proceedings, jurisdictions commonly incorporate civility pledges in the attorney's oath; hold continuing lawyer education trainings on professionalism; refer those reported for unprofessional conduct to a dispute resolution board for investigation and the preparation of an advisory report; or rely on judicial sanctions.[159]

The Martinez Memo cited the oath that the California State Bar has administered to new lawyers since 2014: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."[160] This oath is aspirational only. Soon after Dean Martinez released her Memo, the California State Bar Board of Trustees approved proposed amendments to the state bar rules to require all practicing lawyers to affirm or reaffirm their commitment to the civility oath during the annual license renewal period and

152. Clay Calvert, *Professional Standards and the First Amendment in Higher Education: When Institutional Academic Freedom Collides with Student Speech Rights*, 91 ST. JOHN'S L. REV. 611, 648 (2017).

153. *See* O'Connor, *supra* note 9, at 10.

154. Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 107-08 (2011-2012).

155. Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701, 707, 723 (2015).

156. Campbell, *supra* note 154, at 141-42.

157. *See id.* at 109 (summarizing topics covered in civility provisions).

158. Preston & Lawrence, *supra* note 155, at 728 (reporting that, as of 2015, thirty-five of the forty-seven professionalism standards surveyed expressly prohibited them from being used as a bases for disciplinary actions based on their provisions).

159. *Id.* at 724, 728-34.

160. *See* Martinez Memo, *supra* note 2, at 7 (quoting CAL. R. CT. 9.7 (West 2023)).

to make incivility a basis for attorney discipline.[161] Significantly, however, the incivility covered by the proposed disciplinary rule is much narrower than the conduct in the aspirational civility oath. It does not cover any conduct that lacks "dignity," "courtesy," or "integrity," and it does not cover an attorney's conduct "at all times."[162] Instead, a lawyer would be subject to bar discipline only when "representing a client," and incivility is defined as "significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct."[163] Furthermore, the proposed rule contains another comment making clear that the rule "does not apply to speech or conduct protected by the First Amendment."[164] The California State Bar recommended a narrow civility rule limited to conduct within the practice of law to avoid First Amendment problems.[165]

This recommendation was wise. As Rodney Smolla has argued, rules of professional conduct governing speech within the courthouse or directly related to the judicial administration rest on the strongest First Amendment grounds.[166] Several model rules regulate communications with clients, opposing parties, jurors, and the tribunal during the practice of law, and most of these rules likewise do not raise significant First Amendment concerns. For example, although the Supreme Court has ruled that false statements are not a category of speech outside of the First Amendment,[167] it has also stated there is no constitutional problem with laws requiring participants in judicial proceedings to be truthful.[168]

As Smolla as argued, in evaluating the constitutionality of professional rules, it is essential to distinguish between "insiders" and "outsiders."[169] In *Gentile v. State Bar of Nevada*, the divided Court rejected a First Amendment challenge to a state bar rule prohibiting a lawyer involved in a case from

161. News Release, State Bar of Cal., State Bar of California Board of Trustees Approves Measures to Improve Civility in the Legal Profession (July 21, 2023), https://perma.cc/B9Z5-97TN.

162. *See* STATE BAR OF CAL., *supra* note 15, at 36.

163. *Id.* at 44.

164. *Id.*

165. *See id.* at 28.

166. Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 968-71 (2014).

167. United States v. Alvarez, 567 U.S. 709, 718-19 (2012) (plurality opinion); *id.* at 731-32 (Breyer, J., concurring in the judgment) (embracing a proportionality inquiry for determining the constitutionality of laws prohibiting false speech).

168. *Id.* at 720-21 (plurality opinion) (stating that false statements to a court "undermine[] the function and province of the law and threatens the integrity of judgments that are the basis of the legal system").

169. Smolla, *supra* note 166, at 967.

making extrajudicial statements about that case.[170] The Court explained the special role of lawyers participating in the case,[171] noting that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[172]

Rules that regulate attorneys' "private" speech—e.g., speech that is not directly connected to the practice of law—raise serious First Amendment concerns. During the McCarthy era, the Court held that state bars must not "impinge on the freedom of political expression or association," noting that "[i]t is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar."[173] As a result, professional rules intending to protect the "dignity" of the profession rest on shakier constitutional foundation.[174]

Sometimes the constitutionality of a professional rule will depend on how it is applied. For example, Model Rule 8.4(d) prohibits conduct "prejudicial to the administration of justice."[175] This rule is vague, and the ABA provides no guidance about its intended scope. The majority interpretation is narrow, requiring misconduct that relates "to an identifiable case or tribunal" if it "impedes or subverts the process of resolving disputes."[176] But other state bars have taken a broader approach to this rule, holding that the standard is met when the conduct "reflects negatively on the legal profession and sets a bad example for the public at large."[177] This approach does not require any showing of impact on a particular case or dispute and raises significant constitutional concerns. For example, in *In Re Hennessey*, a New York court held that a lawyer violated this rule "when he intentionally made threatening and racist telephone calls to his African-American neighbors."[178] The court explained that this "unjustified victimization of his neighbors on the sole basis of their race is a matter not to be taken lightly and represents a matter of

170. 501 U.S. 1030, 1062-63, 1074 (1991).

171. *See id.* at 1074.

172. *Id.* at 1071. Smolla correctly points out that while he believes *Gentile* was correctly decided, some other prominent First Amendment experts such as Erwin Chemerinsky disagree. *See* Smolla, *supra* note 166, at 970.

173. Konigsberg v. State Bar of Cal., 353 U.S. 252, 273 (1957).

174. Smolla, *supra* note 166, at 971.

175. MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2016).

176. Alex B. Long, *Of Prosecutors and Prejudice (Or "Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?")*, 55 U.C. DAVIS L. REV. 1717, 1730-31 (2022) (first quoting *In re* Mason, 736 A.2d 1019, 1023 (D.C. 1999); and then quoting *In re* Disciplinary Matter of Friedman, 23 P.3d 620, 628 (Alaska 2001)).

177. Att'y Grievance Comm'n of Md. v. Brady, 30 A.3d 902, 910 (Md. 2011).

178. 65 N.Y.S.3d 317, 319-20 (App. Div. 2017) (per curiam).

legitimate concern to the public, as well to the bar."[179] Notably, the court did not address whether sanctioning a lawyer for this offensive speech raised any First Amendment concerns (even if to conclude that the statements were unprotected true threats, for example). Accordingly, while it might be tempting for law schools to point to cases like *Hennessey* as offering support for broad professionalism standards, it is unlikely that such an application would survive constitutional scrutiny.

Recent controversy over the newly minted Model Rule 8.4(g) also illustrates how the ethical rules for lawyers are not immune from First Amendment scrutiny. This rule declares that it is professional misconduct for a lawyer to engage in harassment or discrimination on the basis of certain protected categories "in conduct related to the practice of law."[180] Controversially, this rule applies regardless of whether the conduct occurs in the course of representing a client. As one commentator pointed out, "there is precious little that lawyers do that is not at least 'related to' the practice of law in some arguably plausible way."[181] Indeed, the rule was intended to cover "Continuing Legal Education ('CLE') courses, bar functions, and social activities in connection with the practice of law."[182] As a result of First Amendment concerns, very few states have adopted this rule.[183]

Because professionalism standards for the legal profession are most likely unconstitutional if they extend beyond the practice of law, the application of these standards to law students must likewise respect these boundaries. Under these parameters, legal ethical rules have the most obvious application when students are participating in law school clinics and externships. They might also apply to the classroom setting, which could be analogized to the courtroom context, with the professor playing the role of a judge and students playing the roles of lawyers. But the ethical rules would not properly apply to the interactions students have outside of these settings. This includes communications they might have with each other on listservs, emails, and "GroupMe" chats, unless those electronic communication tools are used to complete curricular assignments.

179. *Id.* at 319.

180. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

181. William Hodes, *See Something; Say Something: Model Rule 8.4(g) Is Not OK*, 50 HOFSTRA L. REV. 579, 581-82 (2022).

182. Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 122 (2021).

183. *Id.* at 122-23.

III. Observations and Recommendations

As the previous Part illustrates, law schools are given some leeway under the First Amendment to regulate the speech of their students to promote civility and tolerance in the legal profession. This Part makes recommendations for law schools seeking to promote civil discourse among their students without running afoul of the First Amendment.

A. Curricular Regulations

Law schools have broad authority to teach civility and professionalism as part of the curriculum. Learning objectives that require students to engage with each other across difference on difficult, controversial topics in a respectful and dignified manner directly prepare students for the practice of law. As the interpretation of the new ABA Standard 208 recognizes, "[b]ecoming an effective advocate or counselor requires learning how to conduct candid and civil discourse in respectful disagreement with others while advancing reasoned and evidence-based arguments."[184]

Professionalism lessons most obviously have a home in courses that are part of the curriculum. Professional Responsibility courses, legal research and writing classes, and civil procedure are logical places for a discussion of professionalism rules and norms.[185] In these courses, professors can discuss not only the relevant rules requiring professionalism in the practice of law but also whether civility is consistent with zealous advocacy. Courts are likely to give law schools and law professors deference if they teach professionalism as a desirable norm in these courses, even though that is a viewpoint. It is even possible that courts will treat the decisions to include professionalism in these courses as a matter of government speech.

Law schools typically want their students to practice respectful disagreement in their classes. While constitutional law offers the most obvious opportunity for professors to teach the students how to disagree respectfully with each other, virtually all law school courses can offer an opportunity for the students to learn this skill. The difficult questions come when the students are talking to each other outside of the classroom setting. Law schools should receive leeway to regulate communications between and among the instructor and students directly related to the class activities, regardless of whether those interactions take place online or on campus. Thus civility requirements during

184. RESOLUTION ON STANDARD 208, *supra* note 7, at 1; *see also* Kevin T. Baine, *Free Speech on Campus: The Attack from Within*, 51 HOFSTRA L. REV. 397, 410 (2023) ("Law students will never become effective advocates if they don't listen carefully and understand the point of view of their adversaries.").

185. *See* Grenardo, *supra* note 11, at 142-43.

class discussion, on a course's online discussion board or "chat" feature, and during the completion of assigned group projects would all be permissible. This would not include, however, professionalism requirements demanding that students engage in civil discourse whenever they talk to or about their classmates or other members of the law school community (absent a violation of Title VI or Title IX).

In clinics and externships, professors should feel free both to teach their students that civility is consistent with zealous advocacy and to require their students to be respectful and dignified in the practice of law. They should be careful, however, to avoid course requirements that punish students who are not respectful and dignified outside of the practice of law. Schools should take care to note that some applications of these Model Rules are themselves constitutionally problematic, especially when they aim to regulate speech that is not made in connection with the representation of a client.

B. Professionalism at Events

Outside of the curricular setting, a law school's argument for deference diminishes. The strength for constitutional leeway is stronger when a law school can show that the event is part of its academic enterprise.

Law school events can take many different forms. This category can include guest lecturers invited to speak to a class and professors invited to participate in a scholarly speakers series; on the other end of the spectrum, career development offices invite practicing lawyers and judges to expose students to career options. The law school might also put together special events to address contemporary issues. Graduation speakers are another special category; these speakers might be selected by students, law school administrators, or perhaps a committee that includes faculty. To determine whether a law school should receive constitutional leeway to regulate civility at events, it is essential to take a close look at purpose of each type of event and whether the selection of the speakers for that type of event ties into the teaching and research expertise for which the Court has afforded deference. Speakers who are invited by students or staff have a weaker claim to this deference, whereas speakers invited by faculty to further the teaching and research interests of the school have a strong claim to this deference.

When the law school itself sponsors an event, such as a speaker or forum, it is arguable that these activities are an extension of the school curriculum. These arguments will be strongest when the faculty are involved in inviting the speakers, but even if staff organize the events, the school can argue that the event is designed to provide an opportunity for students to learn more about a particular legal issue or hear from scholars who are not part of the law school community. Some ceremonial speakers, such as graduation speakers, less obviously contribute to the pedagogical goals of the school. Schools are more

likely to be able to assert that these speakers contribute to their curricular mission if the speakers meet with students and faculty in a meaningful way while on campus.[186]

It is a little more complicated to justify civility requirements at student-sponsored events, even if held on campus. As Robert C. Post has perceptively noted, "The difficulty is that universities typically undertheorize the relationship between student-invited speakers and its own education and research mission."[187] Perhaps student-invited speakers expand the universe of ideas beyond what the faculty provide.[188] These events, like the Federalist Society event hosting Judge Duncan, are the result of a student group recognition policy, which is presumably based on the assumption that student groups play an important role in the educational process. But this argument can be made on a general level only; the speakers who student groups invite are not obviously connected to the core educational mission of a school without some clarification.[189] Arguments that student-invited speakers like Judge Duncan should be treated like faculty members engaged in teaching and scholarship are woefully off the mark.[190]

Schools seeking to bring events featuring student-invited speakers under their curricular expertise should consider new policies that make the academic value of these events more obvious. At a bare minimum, a school should embrace an official policy explaining why student-invited speakers serve the academic interests of the university. Another minor change to make the academic purpose more obvious would be to require all groups desiring to bring in speakers to have faculty advisors and to have those advisors be involved in the selection of speakers. A more significant change would be to rely much less (perhaps not at all) on student groups to expand the speech on campus and instead charge a faculty-led committee to select extra-curricular speakers "who can broaden students' knowledge, challenge their preconceptions, and stimulate discussion throughout the university community."[191] Such a committee could include student members. Under this

186. KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 121 (2018) (making a similar suggestion).

187. Post, *supra* note 43, at 119 (footnote omitted).

188. *Id.*

189. *Id.* (suggesting that universities could clarify "how policies that authorize students to invite speakers to campus do and do not advance institutional purposes of education and the expansion of knowledge").

190. *See, e.g.*, Aaron Sibarium, *House Republicans Ask American Bar Association to Investigate Stanford Law School Over Duncan Disruption*, WASH. FREE BEACON (Mar. 31, 2023), https://perma.cc/DP68-KKBG.

191. Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551, 584 (2019) (imagining this scenario). Magarian suggests this committee would have equal number of faculty, students, and administrators. *Id.* Under

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approach, a law school would not permit student groups to use law school facilities to host outside speakers, even if they have independent funding.[192] Regardless of whether law schools make minor or major changes to the way speakers are invited to campus, schools should also consider how to make events featuring controversial speakers a part of the broader educational purpose of the law school. For example, the school administrators could help students find channels for presenting alternative views, which might include inviting a speaker with a contrary view to participate in the same event or in a separate event held at the same time, or close in time.[193]

C. Regulating "Off-Campus" Speech

Some law schools might want to regulate their students' expression wherever and whenever it occurs in order to make sure they are fit for the profession. As Parts I and II suggest, however, the First Amendment is likely to stand in the way of efforts to define the academic enterprise of law schools broadly to include authority to regulate student expression for professionalism at all times. Law schools should feel free to teach their students to use social media wisely and to suggest that uncivil discourse is likely to tarnish their burgeoning professional reputations. Such guidance is in keeping with the educational mission of the school and does not violate the First Amendment.

As Joan Wallace Scott has persuasively argued in a related context, calls for civility on college campuses are used not only to condemn "unruly behavior" but also to label certain speakers and their ideas "unacceptable."[194] The reason why the First Amendment protects uncivil expression is that "the public sphere (of which the university is a part) is a noisy, contentious, emotionally fraught space."[195] Rules prohibiting incivility are often premised on the false assumption that it is easy to distinguish between style and substance.[196] Requiring law students to adhere to "respectful" discourse at all

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my approach, this committee could contain students and administrators, but faculty must be in the majority in order for their expertise to be the controlling factor in speaker invitation decisions.

192. *Id.* at 588-89 (recognizing the problem of independent funding).

193. *See* Robert Post, Comment, *Comment on Freedom of Expression in American Legal Education*, 51 HOFSTRA L. REV. 667, 678 (2023) (explaining a similar approach taken at Yale Law School in response to a controversial speaker).

194. *See* JOAN WALLACH SCOTT, KNOWLEDGE, POWER, AND ACADEMIC FREEDOM 73 (2019) (addressing protections for faculty extramural speech).

195. *Id.*

196. Joan W. Scott, *The New Thought Police: Why Are Campus Administrators Invoking Civility to Silence Critical Speech?*, NATION (Apr. 15, 2015), https://perma.cc/EM5M-8EWB (noting that university administrators tend to assume that "civility" standards are

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times is not consistent with professional requirements, which tend to distinguish between "inside" speech that undermines the judicial process, and "outside" speech which is part of the more general marketplace of ideas.

Conclusion

The question this Essay has explored is the authority of law schools to embrace professionalism standards to regulate student speech. Concerns about the polarization of our country and the seeming inability of citizens to engage civilly and productively across difference have understandably led to calls for professionalism standards at law schools. This Essay argues that law schools have greater authority and are less likely to run into First Amendment problems when the professionalism standards are tied tightly to the core teaching and scholarly mission of the school.

On one end of this continuum, law schools are entitled to maximum institutional deference to craft professionalism expectations as part of their curriculum. These expectations can include regulations impacting communications between and among students enrolled in that course when engaged in course-related activities. Law school clinics and externships can embrace the professionalism standards of the Model Rules of Professional Conduct, which regulate communications made as part of the practice of law but generally provide broad protection for speech made as part of an attorney's private life.

Professionalism requirements at campus events depend on the nature of the event. Law schools should be free to set civility standards at events that the law school itself sponsors because it is reasonable to assume these events are part of its core educational mission. It is not clear, however, how the events student groups sponsor serve the mission. Schools should consider reconceptualizing these sorts of events to involve more faculty involvement to make institutional deference more appropriate.

While law schools should have broad deference to set professionalism standards in connection with teaching and research, these standards should not extend to all student communications at all times, even when they are among or about law school community members. Such restrictions are not sufficiently related to the core scholarly and teaching mission of the school and inappropriately require students to forfeit their constitutional rights to receive a legal education.

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benign when in fact there is a "porous line between style and content" and such standards are often used to eliminate dissenting views).