PROFESSIONALLY CONFUSING: TACKLING FIRST AMENDMENT CLAIMS BY STUDENTS IN PROFESSIONAL PROGRAMS

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

- First Amendment to the U.S. Constitution

I. INTRODUCTION

In November 2012, Paul Hunt, a medical student at the University of New Mexico School of Medicine (UNMSOM), posted a vitriolic political rant on his personal Facebook page following the 2012 presidential election.[2] UNMSOM disciplined Hunt for the rant, citing his failure to live up to the "professionalism standard[s]" of the school in violation of both

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1. U.S. CONST. amend. I.

2. Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x 595, 598 (10th Cir. 2019). The Facebook post read:

> All right, I've had it. To all of you who support the Democratic candidates:
> The Republican Party sucks. But guess what. Your party and your candidates parade their depraved belief in legal child murder around with pride.
> Disgusting, immoral, and horrific. Don't celebrate Obama's victory tonight, you sick, disgusting people. You're abhorrent.
> Shame on you for supporting genocide against the unborn. If you think gay marriage or the economy or taxes or whatever else is more important than this, you're fucking ridiculous.
> You're WORSE than the Germans during WW2. Many of them acted from honest patriotism. Many of them turned a blind eye to the genocide against the Jews. But you're celebrating it. Supporting it. Proudly proclaiming it. You are a disgrace to the name of human.
> So, sincerely, fuck you, Moloch worshipping assholes.

Id.

its Respectful Campus Policy and Social Media Policy.[3] Hunt sued the school, raising both First Amendment and Fourteenth Amendment claims, seeking monetary damages and injunctive relief, both of which were denied.[4] The Tenth Circuit recently upheld the district court's grant of UNMSOM's motion for summary judgment for qualified immunity.[5] In so doing, the Tenth Circuit acknowledged that "[o]ff-campus, online speech by university students, particularly those in professional schools, involves an emerging area of constitutional law"[6] and pointed out the "unmistakable gaps in the case law"[7] regarding several issues involved in Hunt's First-Amendment claim, including the extent to which Supreme Court jurisprudence on high-school student free speech provides the appropriate framework for evaluating professional-level claims. The underlying issue is the confusion surrounding how courts should address First Amendment claims by professional students against their schools for speech outside of the classroom that is found to violate school conduct or professionalism codes.

This lack of a concrete analytical framework cited by the Tenth Circuit in *Hunt* is indicative of the struggle faced by public institutions of higher education across the country. Courts must keep up with the evolving landscape of student expression, especially amid the rise of social media, while balancing (1) the demands of First Amendment speech protection for their students and (2) the schools' own interests

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3. The portions of the Respectful Campus Policy cited for Hunt's discipline notes:

> (1) UNM strives to foster an environment that reflects courtesy, civility, and respectful communication because such an environment promotes learning, research, and productivity; and (2) a respectful campus environment—that is, one that exhibits and promotes professionalism, integrity, harmony, and accountability—is a necessary condition for success in teaching and learning, in research and scholarship, in patient care and public service, and in all other aspects of the University's mission and values.

Id. at 597 (internal quotations omitted). The relevant portions of the Social Media Policy

> addressed the use of sites like Facebook and cautioned students, *inter alia*, to: (1) exercise discretion, thoughtfulness and respect for your colleagues, associates and the university's supporters/community; and (2) refrain from engaging in dialogue that could disparage colleagues, competitors, or critics.

Id. (internal quotations omitted).

4. *Id.* at 599.

5. *Id.* at 606. Interestingly, this conclusion appears to create a circular conundrum: public universities raise qualified immunity defenses, which are often successful due to the lack of clarity surrounding the underlying law, which in turn rarely becomes clarified due to a lack of substantive discussion of the First Amendment claims in a qualified immunity summary judgment grant or appeal.

6. *Id.* at 601.

7. *Id.* at 606.

in controlling the educational environment. Professional schools face an even more unique challenge because they are often called to not only educate their students, but also prepare and approve them for a profession in a specific field, which may have its own professionalism and ethical requirements.

At the same time, since the turn of the 21st century, bioethics courses have been added to nearly all medical school curriculums, and many college and law school curriculums as well.[8] In fact, more than seventy universities worldwide offer graduate- and doctorate-level degrees in the field of bioethics.[9] Broadly, bioethics is "the set of values by which people make choices that affect themselves and others as biologically-grounded beings."[10] In practice, however, the bioethics field encompasses topics ranging from gene editing to global justice to robotics and artificial intelligence[11]—and the First Amendment.

Bioethical considerations intersect with free-speech concerns in a variety of ways in the medical profession, such as communicating research results to study participants.[12] As one commentator noted, "[t]he foundational principles of bioethics . . . unquestionably are broad enough to sustain an inquiry into whether it is appropriate to suppress communication among consenting adults."[13] The extent to which this communication is governed, or should be governed, by bioethical principals has not been clearly delineated.[14]

While medical *professionals* are grappling with the bioethical impact of speech restrictions, the schools training and preparing those professionals are faced with a similar question: to what extent may ethical concerns provide a basis for suppressing speech among medical (or other professional) *students*? Even outside of bioethics and the medical community, virtually all licensed professions have ethical

8. W. Noel Keyes, *Our Continued Need for Coordination of the United States Constitution of the Eighteenth Century's "Age of Enlightenment" with the Twenty-First Century's Ages of "Modern Science and Bioethics*," 27 WHITTIER L. REV. 951, 951 (2006).

9. The Center for Bioethics & Human Dignity, *Academic Degree & Certificate Programs*, BIOETHICS.COM, https://bioethics.com/academic-programs (last visited Mar. 25, 2021).

10. Barry R. Schaller, *A Legal Prescription for Bioethical Ills*, 21 QLR 183, 186 (2002) (quoting ARTHUR B. LAFRANCE, BIOETHICS: HEALTH CARE, HUMAN RIGHTS AND THE LAW xxi (1999)).

11. *See* National Institutes of Health Clinical Center, *Joint Bioethics Colloquium: List of Past Topics*, THE DEP'T OF BIOETHICS, https://www.bioethics.nih.gov/courses/joint-colloquium.shtml (last visited Mar. 25, 2021).

12. *See* Barbara J. Evans, *The First Amendment Right to Speak About the Human Genome*, 16 U. PA. CONST. L. 549, 550–52 (2014) (discussing whether voluntary participants in genetic research studies should be permitted to learn their individual results).

13. *Id.* at 568.

14. *Id.* ("The field of bioethics has never fully engaged with the question of whether it is ethical to regulate or ban communication.").

standards by which they expect their practitioners to abide. These ethical standards then often trickle down to professional program requirements imposed on their students.

One way that professional programs enforce these guidelines is by holding students accountable to codes of conduct, which require them to maintain the industry ethical standards of their respective fields.[15] For example, the Student Code of Professional Conduct at Texas Tech University College of Law explicitly holds students to a standard "different from those of other students at the University because they intend to enter a profession that has its own stated expectations of character and ethical behavior."[16] With possible sanctions up to and including expulsion from the law school for violations, the professionalism code implicates the state bar Rules of Professional Conduct and "intend[s] to parallel the expectations and professional behavior of a practicing attorney."[17] The professionalism code applies to all students admitted to the law school and holds students responsible for their conduct, which includes speech both on- and off-campus (including online), whenever the law school's "programs, activities, or reputation, the student's ability to practice law, or the professional well-being of other School of Law students, faculty, or staff are implicated."[18]

Of course, professional students sometimes violate school policies—including professionalism codes. The most common example, and a pattern seen in both news stories and case law across the country, is when a student violates a code by posting unprofessionally to his or

15. For example, the University of Nevada, Reno (UNR) has a Student Code of Conduct that applies to *all* students at the University. *See Student Code of Conduct*, U. NEV., RENO, OFF. STUDENT CONDUCT, https://www.unr.edu/student-conduct/policies/university-policies-and-guidelines/student-code-of-conduct (last visited Mar. 25, 2021). The UNR School of Medicine also has its own Code of Student Professionalism, which applies only to students enrolled in the medical school. *See Code of Student Professionalism*, U. NEV., RENO, SCH. MED., https://med.unr.edu/policy/oaa-13-005 (last visited Mar. 25, 2021).

16. *The Student Code of Professional Conduct*, TEX. TECH U. SCH. L., https://www.depts.ttu.edu/law/policies/code-of-conduct.php (last visited Mar. 25, 2021).

17. *Id.*

18. *Id.* Further examples of such professionalism codes employed by public professional schools in other industries include The University of Iowa Tippie College of Business' Full-Time MBA Program Code of Conduct, which stipulates that "[s]tudents may be disciplined for professional misconduct, which is defined as *any* activity that undermines the integrity and reputation of the [p]rogram" and the University at Buffalo Jacobs School of Medicine and Biomedical Sciences' Code of Professional Conduct, which invokes the "unique covenant of honor and integrity that binds physicians to their patients, teachers, and communities" and "serves to affirm and uphold the values that we accept as central to our role as future physicians." *Full-Time MBA Program Code of Conduct*, U. IOWA TIPPIE C. BUS., https://tippie.uiowa.edu/sites/tippie.uiowa.edu/files/documents/ftmba-code-of-conduct.pdf (last visited Mar. 25, 2021) (emphasis added); *Code of Professional Conduct,* BUFFALO JACOBS SCH. MED. AND BIOMEDICAL SCI., http://www.smbs.buffalo.edu/pcc/code_I.php (last visited Mar. 25, 2021).

her personal social media page. For example, a mortuary sciences student was disciplined for posting several updates on her personal Facebook page that included prohibited discussion of human cadavers used in a required laboratory course.[19] Similarly, a nursing student was removed from his nursing program following offensive and vaguely threatening posts made on his personal Facebook page because they violated professionalism standards of the nursing industry enumerated in the school's Code of Ethics.[20]

Courts in both cases found that the schools properly exercised their authority in disciplining each student and did not violate the First Amendment, but the analyses differed.[21] The Minnesota Supreme Court in *Tatro v. University of Minnesota*,[22] the mortuary science case, was the first to address the issue of off-campus, online speech by a professional student.[23] The court first held that the Supreme Court lower-school student-speech doctrine was not applicable to professional student-speech claims.[24] Further, the student's First Amendment rights were not violated where the professional program's rules were narrowly tailored and directly related to recognized industry standards for morticians.[25] But in *Keefe v. Adams*,[26] the nursing student case, the Eighth Circuit took an almost entirely opposite approach and applied traditional student-speech doctrines, developed in the context of primary and secondary public school students, to Keefe's claim.[27] The court found that the nursing program had not violated her First Amendment rights because the speech materially disrupted the school's legitimate pedagogical concerns.[28] Because the Supreme Court has not spoken on the specific issue of professional student speech, no clear standard has emerged. Consequently, courts have drawn from varying sources—including both student and public employee speech doctrines—in conducting their analyses.[29]

19. Tatro v. Univ. of Minn., 816 N.W.2d 509, 512–13 (Minn. 2012). *See supra* pt. IV.A.
20. Keefe v. Adams, 840 F.3d 523, 529–30 (8th Cir. 2016).
21. *See* Kai Wahrmann-Harry, *The Next Step in Student Speech Analysis? How the Eighth Circuit Further Complicates the First Amendment Rights of University Students in* Keefe v. Adams, 51 CREIGHTON L. REV. 425, 436, 441–43 (2018).
22. 816 N.W.2d 509 (Minn. 2012).
23. *Id.* at 519–20.
24. *Id.* at 523–24.
25. *Id.*
26. 840 F.3d 523 (8th Cir. 2016).
27. *Id.* at 536.
28. *Id.* at 531–33.
29. *Infra* pt. IV.

This Article addresses a narrow issue: what test should be applied where public professional schools—medical and otherwise—take disciplinary action against students for otherwise protected online speech that goes against industry professionalism or ethical standards as enumerated in the school's code of conduct? A professional school, for purposes of this Article, is an institution of higher education, which may be independent or under the umbrella of a larger university, that prepares students for a particular career or field.[30] Professional programs are most often graduate programs, which are broader courses of study that provide a more advanced education in a particular academic field, but not all graduate programs are professional programs.[31]

This Article suggests that instead of directly applying existing student-speech doctrine, the courts should employ a three-part analysis when evaluating First Amendment claims by professional students against professional schools: (1) the speech must be sufficiently proximate to the school and the profession; (2) the professionalism or conduct code requirement that was violated must be narrowly tailored and directly related to defined industry standards; and (3) the school must act with reasonable professional judgment in its discipline, with apt deference given to the school in its decisions to discipline a student, especially when a professional accreditation body or other industry group mandates that the school adequately prepare and approve students for the profession.

Part II will provide foundational background and context, exploring how speech policies are interpreted at the elementary through high school and university levels when regulating student speech that is arguably protected by the First Amendment. This part will also identify online speech specifically and its relationship to "off-campus" speech doctrines to determine whether, or where, a line is drawn between the two.

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30. *See Prospective Graduate Student Resources: Graduate School vs. Professional School*, U. WASH. LIBRARIES, https://guides.lib.uw.edu/bothell/gradschool/gradprof (last updated Jan. 22, 2021).

31. *Id.* For example, professional programs and their codes of conduct may also apply to students on professional "track[s]" at the undergraduate level, where students are enrolled in an accelerated curriculum toward a specific career path or are otherwise being trained for a career in a particular field. *See generally* Elizabeth Gardner, *College Programs Offer a Path to Professional Degrees*, U.S. NEWS & WORLD REP. (Sept. 22, 2017), https://www.usnews.com/education/best-colleges/articles/2017-09-22/consider-undergrad-programs-that-offer-a-path-to-professional-degrees (discussing different university programs that provide a streamlined track from undergraduate education to professional school).

Part III will discuss professional schools, such as medical programs, and their unique features designed to prepare students for a particular career. This section will also describe how professionals are treated differently than everyday citizens outside of the school context under the First Amendment and how those special concerns present themselves at the student level as well.

Part IV will provide a summary of professional student-speech cases, sorting them into three distinct categories: (1) cases arising out of student speech in the context of a class assignment or other curricular requirement; (2) cases arising out of student speech in a clinical or internship setting, which often employ the public employee speech doctrine instead of, or in addition to, student-speech doctrine; and (3) the focus of this Article, the fact scenarios of the two cases previewed here, *Tatro* and *Keefe*, where school discipline is in response to entirely off-campus, online speech, not as part of any class or program requirement, which violated professionalism standards but would be otherwise protected by the First Amendment.

Part V will explore proposed commentator solutions to the problems arising out of these professional student-speech cases and ultimately suggest an analytical framework for courts to apply when faced with questions of unprofessional, off-campus professional student speech.

Part VI will provide a conclusion for this Article, emphasizing the policy concerns on both sides of First Amendment claims against medical and other professional programs, the lack of clarity surrounding these cases for courts faced with such claims, and the need for a clear doctrinal way forward.

II. DIFFERENTIATING FIRST AMENDMENT DOCTRINES BY EDUCATION LEVEL AND "LOCATION" OF THE SPEECH

Although the Supreme Court has provided some foundational frameworks for analyzing student First Amendment claims, those foundations have been developed at the primary and secondary school level; courts therefore struggle with the extent to which these frameworks apply to students in higher education.[32] As a preliminary

32. *See generally* Louis M. Benedict, *The First Amendment and College Student Newspapers: Applying* Hazelwood *to Colleges and Universities*, 33 J.C. & U. L. 245 (2007) (discussing *Hazelwood*'s application, or lack thereof, to university-level newspapers); Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 66 n.20 (2008) (discussing cases and scholarship regarding the extent to which *Hazelwood* applies to a university setting).

matter, First Amendment protections only apply to students at public schools due to the well-settled requirement of First Amendment law that the state must take some action to warrant a claim.[33] Next, education level of the students is the guiding factor for how courts evaluate the protection of those students' speech. However, the exceptions to that protection have been almost exclusively developed in the context of primary and secondary school-aged students.[34] Finally, courts must establish whether online speech qualifies as "off-campus" speech such that a school's authority to discipline students for that speech is more limited.[35] The different approaches to each prong, and the policy reasons behind those differences, lay the groundwork for courts analyzing cases involving an intersection of the three.

A. How Courts Handle School Speech Restrictions of Online Speech for Students in Primary and Secondary Schools and Universities

Courts generally recognize that post-secondary (university-level and beyond) students enjoy greater speech protection than their elementary, middle, and high school counterparts due to differing roles of schools in each stage of a person's education.[36] The Third Circuit succinctly summarized several main factors accounting for this distinction:

> [T]he 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.[37]

33. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192, 195 (finding that the First Amendment does not apply to private institutions, but that "[a] state university without question is a state actor."); *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (deeming First Amendment protections to be fundamental personal rights and liberties and thus applicable to the states through the due process clause of the Fourteenth Amendment).

34. Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969).

35. *See, e.g.*, J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) ("Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that cause no substantial disruption at school.").

36. *See* Hallye Bankson, *Maintaining the Schoolhouse Gate: Why Public Universities Should Not Regulate Online, Off Campus Communications through Student Handbooks*, 43 J.L. & EDUC. 127, 132 (2014) ("First Amendment protections should, and do, apply with more force on college campuses.") (citing Healy v. James, 408 U.S. 169, 180 (1972)).

37. McCauley v. Univ. of V.I., 618 F.3d 232, 247 (3d Cir. 2010).

The interests at stake are generally the same; courts must protect the students' interest in exercising their constitutional free-speech rights while balancing the State's interests as an educator in protecting the educational environment.[38] However, the extent to which the scale is weighted in favor of either of those interests is highly dependent on the education level of the student bringing the claim.

In general, the Supreme Court's decisions regarding student speech significantly limit First Amendment speech protections for students in primary and secondary schools in the interest of protecting the educational environment in allowing schools more leeway than many other government actors to restrict speech. The two landmark Supreme Court cases most commonly applied beyond the lower-school context are *Tinker v. Des Moines Independent Community School District*[39] and *Hazelwood School District v. Kuhlmeier*.[40] These cases both dealt with free-speech claims by high school students for speech that occurred on-campus or as part of school-sponsored activities.[41] However, they have been applied in varying degrees to both off-campus, online speech and claims by post-secondary students.[42]

In *Tinker*, where high-school students were suspended for wearing black armbands to school in protest of the Vietnam War, the Supreme Court held that a school's disciplinary action against student speech or expression is only constitutionally permissible where the speech causes a "substantial disruption of or material interference with school activities."[43] The Court in *Tinker* also famously announced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[44] In *Hazelwood*, the Court found that censorship of a high-school newspaper was constitutionally permissible where the student speech fell within "the imprimatur of the school" and was "reasonably related to legitimate pedagogical concerns."[45] These standards have been applied to online speech at a pre-college level in what can be categorized as two different ways: the "foreseeable disruption" approach and the "nexus" approach.

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38. *See Tinker*, 393 U.S. at 506–07.
39. *See id.*
40. 484 U.S. 260 (1988).
41. *See id.* at 262–63; *Tinker*, 393 U.S. at 503–06.
42. *See generally* Frank D. LoMonte, *"The Key Word is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305 (2013) (exploring *Hazelwood's* applicability to post-secondary speech and comparing the *Hazelwood* and *Tinker* approaches); *supra* note 32 (discussing *Hazelwood*'s application in the university setting).
43. *Tinker*, 393 U.S. at 514.
44. *Id.* at 506.
45. *Hazelwood*, 484 U.S. at 271–73.

The foreseeable-disruption approach, adopted in the Fifth and Eighth Circuits, builds on *Tinker* to permit schools to limit or discipline students for online speech that causes a reasonably foreseeable disruption of the school's community or activities.[46] The nexus approach, adopted by the Fourth Circuit, ties into the *Hazelwood* standard and focuses on the connection between the online speech and the school environment.[47] This approach establishes that the "nexus" of the student's speech to the school's pedagogical interests must be sufficiently strong to justify the school's disciplinary actions, although the court declined to fully define the limit of the school's authority when the speech originates outside of its gates.[48]

The case law regarding online speech at the university level is less developed. This is because a majority of claims do not survive a qualified immunity defense on a motion for summary judgment, due to the very fact that the precedent surrounding online speech by university students is not sufficiently settled to show a clearly established constitutional right was violated.[49]

The Supreme Court has acknowledged a difference in First Amendment protections between lower and high schoolers compared to university students, but has not explicitly advised courts how to go about analyzing those cases differently.[50] For example, the Court acknowledged *Tinker* in *Healy v. James*,[51] a case dealing with freedom of assembly on a college campus.[52] But the Court declined to apply the

46. *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 398–99 (5th Cir. 2015) (finding that a student's rap recording made off-campus containing threatening language against school faculty reasonably could have been forecast to cause a substantial disruption of the school environment); Wilson ex rel. S.J.W. v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012) (affirming a finding that a blog created off-campus that contained offensive comments about schoolmates caused a substantial disruption).

47. Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 571, 574 (4th Cir. 2011) (finding that a high school student's webpage created to ridicule a classmate had a sufficient nexus to the school's pedagogical interests in "maintaining order in the school and protecting the well-being and educational rights of its students").

48. *Id.* at 573.

49. *See, e.g.*, Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x. 595, 606 (10th Cir. 2019) (upholding the grant of summary judgment for qualified immunity because the case law surrounding online speech at the college level did not clearly establish a constitutional right); Yeasin v. Durham, 719 F. App'x 844, 852 (10th Cir. 2018) (finding that the university's vice provost had qualified immunity from Yeasin's First Amendment claim for discipline against him for online posts about a fellow female student, in part because the doctrine on university speech and social media is "unsettled"); Yoder v. Univ. of Louisville, 526 F. App'x. 537, 549–51 (6th Cir. 2013) (affirming the grant of summary judgment for qualified immunity against a university student's First Amendment claim for discipline arising out of a blog post because a constitutional right to not be disciplined for off-campus, online speech as a university student was not clearly established).

50. *See* LoMonte, *supra* note 42, at 305–07.

51. 408 U.S. 169, 180 (1972).

52. *Id.* at 172–77.

holding in *Tinker* to the university context: "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[53] In *Hazelwood*, the Court acknowledged a difference between protections at the lower-school level versus those in a higher-education context: "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[54] As a result of a lack of specific guidance from the Supreme Court on the issue of online speech in the university context, most federal courts have used *Tinker* and *Hazelwood* as the foundations for university student-speech doctrine to some extent.[55]

B. Online Speech: The "Schoolhouse Gate" Does not Necessarily End at the Login Screen

The distinction between on-campus and off-campus speech is deceivingly simple: when a student speaks on a school campus, it falls within the purview of the school's control; and when a student speaks away from a school campus, the speech falls outside of the school's control. However, the Supreme Court first blurred this line in its famous announcement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" in warning schools that their control over students is not absolute, even when those students are exercising their right to free speech on campus.[56] The road goes both ways, though: as previously discussed, federal circuits have also extended school control to student speech outside of the schoolhouse gates in some circumstances.[57]

While the Supreme Court has not spoken on First Amendment protections for higher education students directly, it has asserted that

53. *Id.* at 180.

54. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273–74 n.7 (1988).

55. *See* Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) ("The key word is student."); Hosty v. Carter, 412 F.3d 731, 735–36 (7th Cir. 2005) (finding that *Hazelwood* applies to subsidized college newspapers in the same capacity as high school newspapers and applying its analysis to university speech directly); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (applying *Hazelwood's* "reasonably related to legitimate pedagogical concerns" standard to speech that occurred in a classroom setting as part of a class curriculum); Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002) (concluding that *Hazelwood* "articulates the standard for reviewing a university's assessment of a student's academic work"). *But see* Student Gov't Ass'n v. Board of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (finding that *Hazelwood*, a case about a high-school newspaper, was not applicable to college newspapers).

56. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

57. *See supra* pt. II.A.

there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech.[58] In line with this reasoning, lower courts evaluating student online speech generally focus on the proximity of the speech to the school environment, as opposed to the physical location where the speech was posted by the student.

Some courts have taken a more literal approach in drawing the line between on- and off-campus speech when it comes to online postings, such as the Third Circuit in *Layshock ex rel. Layshock v. Hermitage School District*.[59] There, the court rejected an argument that online speech constituted on-campus speech simply because it was accessible (and, in fact, accessed) through school computers.[60]

In general, however, the distinction between on- and off-campus speech is less important than the speech's connection to the school, regardless of "where" it was posted online.[61] In *Tatro*, for example, the Minnesota Supreme Court noted the struggle courts face in deciding whether social network postings constitute on- or off-campus speech.[62] But the court specifically declined to make a distinction between the two in its analysis of Tatro's posts, instead evaluating her claim pursuant to the speech's relationship to the school's learning environment and professional standards.[63]

Ultimately, the "location" of a student's online speech is only a factor, not a determinative fact, when analyzing a First Amendment claim arising out of that speech. Instead, as discussed below, courts analyze a school's authority to regulate student speech—online, off-campus, or otherwise—by evaluating how closely the speech implicates the school environment.[64] Some commentators have labeled two categories of speech using this criteria: "curricular" speech, which is speech within the curriculum of the school (such as a class assignment), and "extracurricular" speech, which is speech made by a student whose subject matter or forum is outside of the school environment (such as a political Facebook post by a nursing student).[65]

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58. Reno v. ACLU, 521 U.S. 844, 870 (1997).

59. 650 F.3d 205, 216 (3d Cir. 2011).

60. *Id.*

61. *See, e.g.*, Doe v. Valencia Coll., 903 F.3d 1220, 1230–31 (11th Cir. 2018) (finding that a student's harassing messages to a fellow student were not protected because the messages interfered with the fellow student's learning environment and "that *Tinker* does not foreclose a school from regulating all off-campus conduct").

62. Tatro v. Univ. of Minn., 816 N.W.2d 509, 519 n.5 (Minn. 2012).

63. *Id.*

64. Jeffrey C. Sun et al., *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49, 54–55 (2013).

65. *Id.* at 50 n.14, 51–52.

III. PROFESSIONAL PROGRAMS ARE INCREASINGLY PREVALENT AND HAVE UNIQUE EDUCATIONAL INTERESTS

Although enrollment in postsecondary education overall has declined over the past few years, graduate and professional degrees have continued to steadily attract more students.[66] Likewise, the U.S. has seen an increase in the prevalence of occupational certification and licensing, where careers require demonstration of a particular "level of skill or knowledge needed to perform a specific type of job."[67] As of 2018, 78.6% of the licensed or certified employed workforce had a professional degree.[68] With the prevalence of both occupational demands for licensing and certification, and the high percentage of the American workforce achieving those requirements through a professional degree, professional schools are held to a high standard in preparing their students for specific careers.[69] In turn, once those students graduate and successfully begin their new careers, they are similarly held to a higher standard of professionalism by the licensure.[70] These heightened expectations and requirements of both professional schools and professionals present unique challenges and considerations for courts in evaluating the degree of control that a professional program should have over the speech of its students.

A. Professional Programs Prepare Students for Specific Careers—And the Expectations that Come Along with Them

Just as the university environment and student body present different considerations for courts than their primary and secondary school counterparts, professional schools have unique concerns regarding student speech. At least one commentator has noted a "connective thread" among professionalism cases: the speech "undermined the university's confidence that the student would be an

66. *Current Term Enrollment Estimates Spring 2019*, NAT'L STUDENT CLEARINGHOUSE RES. CENTER (May 30, 2019), https://nscresearchcenter.org/wp-content/uploads/CurrentTermEnrollmentReport-Spring-2019.pdf.

67. Evan Cunningham, *Professional Certifications and Occupational Licenses: Evidence from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (June 2019), https://www.bls.gov/opub/mlr/2019/article/professional-certifications-and-occupational-licenses.htm.

68. *Id.*

69. Accreditation standards for professional programs are often more stringent, and governed by more agencies, than undergraduate programs. *See* U.S. Dep't of Homeland Sec., *The Basics of School Accreditation*, STUDY IN THE STATES, https://studyinthestates.dhs.gov/the-basics-of-school-accreditation (last visited Mar. 25, 2021).

70. *See infra* pt. III.B.

appropriate member of the profession for which the university was training him or her."[71] This point distinguishes cases involving professional schools from those of other higher-education programs (both undergraduate and graduate) because a professional program is in a position to explicitly or implicitly certify that its students are fit for a certain profession.[72] Where courts employ a *Hazelwood*-derived analysis, this unique position often strengthens the school's legitimate pedagogical concern in that schools are legitimately concerned with whether their students are prepared and suitable for their career ahead.[73]

Although not always stated explicitly, courts have acknowledged professional programs' strong interest in carefully evaluating student suitability for a profession, both in and outside of the classroom setting. For example, in *Oyama v. University of Hawaii*,[74] the Ninth Circuit noted that an education program's policies requiring teaching students to, *inter alia*, "protect student safety, create an inclusive learning environment for all students, and demonstrate professionalism" furthered its goal of "employ[ing] and prepar[ing] educators who are knowledgeable, effective, and caring [teachers]."[75] These policies stemmed directly from the regulations governing the University itself by the Hawaii Department of Education, the Hawaii Teacher Standards Board's teacher licensing and ethical standards, and the National Council for Accreditation of Teacher Education.[76] The court approved the school's choice to remove Oyama from the teaching program for expressing his beliefs that students with disabilities should be separated from other students and for condoning sexual relationships between students and teachers.[77] In so doing, the court recognized that state regulators "force[] the university to speak" for its students in approving them for the teaching profession.[78] The court gave significant weight to the fact that a driving factor for Oyama's discipline was the "[u]niversity's *own* mandate of limiting certification recommendations to students who meet the standards for the teaching profession."[79]

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71. Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 382–83 (2013) [hereinafter Waldman, *University Imprimaturs on Student Speech*].
72. *Id.* at 388.
73. *Id.* at 404–05.
74. 813 F.3d 850 (9th Cir. 2015).
75. *Id.* at 855–56.
76. *Id.*
77. *Id.* at 857, 876.
78. *Id.* at 862.
79. *Id.* at 863.

Similarly, the *Tatro* court recognized that a mortuary science program's "mission" was to "prepare students to be licensed funeral directors and morticians."[80] The Minnesota Supreme Court also upheld Tatro's discipline following Facebook posts that disrespected the human cadavers used in a laboratory class and implicated violence against fellow students using a "trocar," a tool that mortuary sciences students and professionals use.[81] The court felt that the school's interest in properly preparing its students for the profession was so persuasive that it created a new standard altogether: a university may regulate online student speech that violated established professional conduct standards, with the qualification that the restrictions must be "narrowly tailored and directly related to established professional conduct standards."[82]

These acknowledgments by the courts evaluating free-speech claims against professional schools mirror the logic applied in cases where courts approved speech restrictions in the primary and secondary school context. There, the *in loco parentis* role of elementary, middle, and high schools prompted courts to afford a higher degree of leeway in student-speech restriction.[83] Professional schools have a somewhat "parental" role too—they are much more invested in the academic *and* professional, more content-based development of their students' speech—with the added pressure from external sources, such as licensing boards, to adequately prepare and evaluate students within a specific framework. Logically, professional programs fall less into the "marketplace of ideas"[84] context that defines university-level free-speech cases under *Tinker*, and closer to the "legitimate pedagogical concerns"[85] discussion stemming from *Hazelwood*. That being said, the age, maturity level, and independence of students in professional programs demand a standard separate and apart from a direct application of *Hazelwood*, as this Article suggests.

80. Tatro v. Univ. of Minn., 816 N.W.2d 509, 511–12 (Minn. 2012).
81. *Id.* at 511–13.
82. *Id.* at 521.
83. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (recognizing the "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").
84. Healy v. James, 408 U.S. 169, 180 (1972).
85. Hazelwood Sch. Dist.v. Kuhlmeier, 484 U.S. 260, 273 (1988).

B. States May Mandate Higher Levels of Speech Restriction on Professionals than Permitted by the First Amendment

One consideration in deciding how much extracurricular speech protection to afford students enrolled in professional programs is the degree to which that same protection is extended to the professionals they will become. The Supreme Court has clearly delineated specific exceptions to traditional First Amendment protections in cases where the compelling state interest outweighs the individual right to free speech where an individual is acting in a professional capacity.[86]

The Supreme Court has refused to identify a broad category of "professional speech" that would automatically receive less First Amendment protection than everyday citizens.[87] However, the Court identified two scenarios where professional speech can constitutionally be more limited than other types of speech: commercial speech and, more relevant to this Article's discussion, when States have a right to "regulate professional conduct, even though that conduct incidentally involves speech."[88]

Two examples of this second category reveal the Court's willingness to permit states to regulate their licensed professionals. In *Ohralik v. Ohio State Bar Association*,[89] a lawyer was indefinitely suspended from practicing law for soliciting injured patients in the hospital.[90] The Court rejected Ohralik's First Amendment claim against the state bar rule prohibiting such solicitation, announcing that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language."[91] The Court found that Ohralik's behavior was "inconsistent with the profession's ideal of the attorney-client relationship" and recognized a large "potential for harm to the prospective client."[92] Further, the Court identified a special responsibility of the state to maintain standards for licensed professionals, emphasizing that the states must be able to protect the public from potential harm by professionals that it licenses.[93]

86. For an in-depth discussion of "professional speech" and its First Amendment limitations, see Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1258–64 (2016).

87. NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018).

88. *Id.* at 2372.

89. 436 U.S. 447 (1978).

90. *Id.* at 450–51.

91. *Id.* at 456. (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

92. *Id.* at 454.

93. *Id.* at 460, 465. *But see* Edenfield v. Fane, 507 U.S. 761, 774–75 (1993) (recognizing that distinctions between professions, including the identity of the parties and their training as well as

This language should sound familiar—the Ninth Circuit in *Oyama*, although drawing from student-speech doctrine and public employee speech doctrine rather than professional precedents, similarly recognized that a professional program must be able to "limit certification recommendations to individuals suitable to enter the teaching profession."[94] This parallel shows a common thread among speech restrictions of both professional students and professionals: courts are willing to recognize a more weighty state interest, contrasted with an individual interest in free speech, when protecting the public and licensing professionals.

In the bioethical context, one Supreme Court case showed a willingness to soften First Amendment speech protections for medical professionals—*Planned Parenthood of Southeastern Pennsylvania v. Casey*.[95] In *Casey*, the Court rejected the argument that physicians have a First Amendment right *not* to provide information about the risks of certain medical procedures in the manner mandated by the state.[96] The Court also acknowledged that physicians' free-speech rights were implicated, but *only* as part of their careers as medical professionals "subject to reasonable licensing and regulation by the State."[97] Ultimately, the Court found that state mandates requiring physicians to provide certain medical information to patients did not violate the First Amendment.[98]

Again, the Court's willingness to extend states' ability to regulate the conduct and speech of its licensed professionals echoes the willingness of the lower courts to recognize a professional school's role in regulating its students based on the schools' obligations to those that its future professionals will serve. It is important to recognize that there *is* a distinction, however, between professional students and professionals: students, as the name implies, are meant to learn, whereas professionals are acting on their own volition without the

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the circumstances of the solicitation, warrant differing levels of protection for solicitation efforts and declining to extend *Ohralik* to prohibit solicitation by accountants because, unlike lawyers, accountants "are not trained in the art of persuasion," emphasize objectivity over advocacy, and generally deal with more sophisticated and experienced clients than attorneys do).

94. Oyama v. Univ. of Hawaii, 813 F.3d 850, 862 (9th Cir. 2015).

95. 505 U.S. 833 (1992). For a more detailed discussion of *Casey* and its impact on bioethical legal doctrine, also see Barbara J. Evans, *Judicial Scrutiny of Legislative Action That Presents Bioethical Dilemmas*, 16 VA. J. SOC. POL'Y & L. 179 (2008); Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357 (2011).

96. *Casey*, 505 U.S. at 884.

97. *Id.*

98. *Id.*

guidance—or protection—of a learning environment. Therefore, a court evaluating professional *student* speech must balance the higher standards to which professionals are held, with the understanding that students must be able to have room to learn and grow in an educational environment.

IV. PROFESSIONAL STUDENT SPEECH: AN ACCOUNT OF CURRENT ANALYTICAL FRAMEWORKS

As mentioned in the Introduction, professional students are often held to academic conduct codes that require them to maintain the professional standards of their respective industries.[99] When a student is disciplined for violating these codes by online speech, courts grapple with how to analyze the student's First Amendment claims. Although the analyses are different, courts generally agree: professional schools have some freedom to regulate student speech under professionalism or ethical conduct codes when the schools act on clearly defined industry professionalism standards, and the codes are narrowly tailored and directly related to those established standards. This theme forms a major foundation for this Article's analytical framework suggestion in Part V.

Emily Gold Waldman identified two broad categories of "certification" cases: those that use a straightforward application of *Hazelwood* and those that employ the public employee speech doctrine developed out of *Pickering v. Board of Education of Township High School District 205*.[100] The *Hazelwood* cases arise out of "curricular" speech, referring to students' speech in the classroom or on class assignments.[101] The *Pickering* cases, on the other hand, arise out of action taken against students for speech during clinical or internship assignments, where students are acting more akin to professionals or employees than as students.[102] However, these categories are somewhat limited, as at least three major cases dealing with First Amendment claims by students challenging professionalism requirements cannot fit neatly into either category. First, *Tatro* declines to apply *Hazelwood* and instead creates a new analytical framework. Conversely, *Oyama* is evaluated under a

99. *See supra* pt. I.

100. 391 U.S. 563 (1968); Waldman, *University Imprimaturs on Student Speech*, *supra* note 71, at 394, 398.

101. *See* Ward v. Polite, 667 F.3d 727, 733 (6th Cir. 2012); Keeton v. Anderson-Wiley, 664 F.3d 865, 875 (11th Cir. 2011).

102. *See* Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1292 (11th Cir. 2007); Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140, at *3 (E.D. Pa. Dec. 3, 2008).

hybrid of both doctrines. *Keefe*, on the other hand, applies *Hazelwood*, but involves entirely online speech outside of any curricular assignment. Because these cases can be extremely fact-specific, it is helpful to discuss each in more depth to see how they all fit into the overall theme of using clearly identified professional standards to determine the extent to which a professional school may regulate a student's speech.

A. Tatro v. University of Minnesota

In *Tatro*, the Minnesota Supreme Court evaluated claims a mortuary sciences graduate's claims against the University of Minnesota for sanctions imposed against her, including a failing grade for an anatomy laboratory course, in response to posts that Tatro made on her personal Facebook page.[103] The court held that Tatro's First Amendment rights were not violated "where the academic program rules were narrowly tailored and directly related to established professional conduct standards."[104] These professional conduct standards were found in the program's rules governing the use of human cadavers and were designed to "set standards for behavior . . . that will carry into the profession."[105] In an amicus brief, the American Board of Funeral Service Education (ABFSE), the accrediting body for education in funeral services, confirmed that the rules enforced in the mortuary sciences program are in accord with the ABFSE's accreditation standards.[106]

Tatro posted several updates on her personal Facebook page that violated these standards by disrespecting the human cadavers donated to the laboratory program.[107] These updates included discussion of "aggression to be taken out with a trocar," updating her "Death List #5," and a "[l]ock of hair in [her] pocket."[108] The University disciplined Tatro in response to the posts and the subsequent public concern surrounding the program's treatment of cadavers.[109]

Tatro argued that her comments were protected by the First Amendment because "public university students are entitled to the same free speech rights as members of the general public with regard to

103. Tatro v. Univ. of Minn., 816 N.W.2d 509, 511 (Minn. 2012).
104. *Id.*
105. *Id.* at 514.
106. *Id.* at 517.
107. *Id.* at 512–13.
108. *Id*. Tatro maintained that the posts were satirical and that she uses humor to release anxiety and relieve her symptoms of depression. *Id.* at 514.
109. *Id.* at 513–14.

Facebook posts."[110] Impliedly, Tatro argued that her constitutional interests outweighed the school's authority to discipline her for off-campus speech because her posts, although in violation of the conduct code, were nonetheless protected by the First Amendment. Tatro cited the principle from *Healy* that public institutions are not "immune from the sweep of the First Amendment" and that university forums are a particularly unique "marketplace of ideas."[111] The University, on the other hand, argued that *Hazelwood* controlled: the school may "constitutionally enforce academic program rules that are 'reasonably related to the legitimate pedagogical objective of training Mortuary Science students to enter the funeral director profession'"—even if that discipline extended to off-campus speech.[112]

The court rejected both approaches: *Hazelwood*, it held, applied only to "school-sponsored" speech and would provide too expansive a standard at the university level.[113] The court also acknowledged *Tinker* and declined to apply its "substantial disruption" standard because the basis for Tatro's discipline was a violation of program rules, not a disruption on campus or within the program.[114]

The court ultimately held that the school's actions were constitutionally sound.[115] In so doing, it established a new standard for testing First Amendment claims by professional students: a university may regulate online speech that violated clearly defined professional standards where the restrictions are "narrowly tailored and directly related to established professional conduct standards."[116] The court found especially persuasive the direct relationship between Tatro's posts and the laboratory course, emphasizing the importance of mortuary science students respecting the donated human cadavers.[117]

B. *Keefe v. Adams*

Keefe presented the Eighth Circuit with the question of "whether the First Amendment precludes a public university from adopting, as part of its curriculum for obtaining a graduate degree in a health care profession, the Code of Ethics adopted by a nationally recognized

110. *Id.* at 517.
111. *Id.* at 517–18 (citing Healy v. James, 408 U.S. 169, 180 (1972)).
112. *Id.* at 518 (quoting Hazelwood Sch. Dist.v. Kuhlmeier, 484 U.S. 260, 273 (1988)).
113. *Id.*
114. *Id.* at 519–20.
115. *Id.* at 521.
116. *Id.*
117. *Id.* at 523.

association of practicing professionals."[118] In *Keefe*, like *Tatro*, a student was removed from a nursing program following offensive and vaguely threatening posts made on his personal Facebook page.[119] The school's Code of Ethics, which adopted professionalism standards from the nursing industry, served as the basis for Keefe's removal.[120] Acknowledging the "strong state interest in regulating health professions," the court found that compliance with professional ethical standards was a constitutionally permissible requirement for students enrolled in such professional schools.[121]

The court then turned to the question of "whether the First Amendment protected [Keefe's] unprofessional speech from academic disadvantage because it was made in on-line, off-campus Facebook postings."[122] The court outright rejected Keefe's categorical suggestion that a post-secondary student may not be punished for *any* off-campus speech unless it is otherwise unprotected by First Amendment speech doctrine.[123] Quoting *Hazelwood*, the court concluded that higher education officials in a professional school "have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"[124] The *Keefe* court reasoned that an institution of higher education may actually have a *stronger* interest in its curriculum and academic discipline than a high school would, especially when the college or university lays out a curriculum or class requirement "for all to see."[125] Because Keefe's Facebook posts implicated his classmates and their conduct in the nursing program, and included a physical threat related to activities pertaining to nursing

118. Keefe v. Adams, 840 F.3d 523, 529–30 (8th Cir. 2016).

119. *Id.* at 526–27. The court focused on three of Keefe's posts in its analysis, which read:

> Glad group projects are group projects. . . . [n]ot enough whiskey to control that anger. . . . Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to long. I might need some anger management.
>
> LMAO [a classmate], you keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch.

Id. (footnote omitted).

120. *Id.* at 527–29.

121. *Id.* at 530. The court also provided the caveat that these professional standards could not be used as a pretext to punish the student for otherwise-protected speech, but Keefe made no such allegations. *Id.*

122. *Id.* at 531.

123. *Id.* Note that this is the same argument that the Minnesota Supreme Court rejected in *Tatro*.

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

125. *Id.* at 531–32.

studies,[126] the court found a "direct impact on the [other] students' educational experience," thus bringing his statements within the purview of *Hazelwood*.[127] Ultimately, the court concluded that the school's actions were constitutionally permissible and upheld Keefe's dismissal from the program.[128]

C. *Oyama v. University of Hawaii*

In *Oyama*, the University of Hawaii denied a secondary education candidate's application to become a teacher.[129] The school primarily cited concerns over the candidate's statements in class assignments and internship placements condoning sexual relationships between adults and children, and advocating that students with disabilities be excluded from traditional learning environments.[130] These statements, combined with poor performance reviews, prompted the University to deny his application— effectively preventing him from teaching in Hawaii.[131]

In evaluating whether the school's actions violated the First Amendment, the Ninth Circuit first looked to student-speech doctrines developed in *Tinker* and *Hazelwood*, ultimately finding that both were inapplicable in a higher education setting directly.[132] The court reasoned that two of the key rationales for the *Hazelwood* decision distinguished it from the university setting: a desire to shelter students from materials inappropriate for their maturity level, and to learn the lessons the school is trying to teach.[133] The court noted the difference in maturity level between higher education students and high school students, pointing out that students in this post-baccalaureate teaching program were all adults, and also observed the "vital importance of academic freedom at public colleges and universities" as compared to high schools.[134] In a somewhat contradictory fashion, the court decided that *Hazelwood* provided no basis for Oyama's First Amendment claim, yet it declined to establish whether *Hazelwood* could ever apply to student speech in

126. In one of his Facebook posts, Keefe threatened to "give someone a hemopneumothorax," which is an accumulation of blood and air in the lung cavity. *Id.* at 527, 527 n.3.
127. *Id.* at 532.
128. *Id.* at 537.
129. Oyama v. Univ. of Hawaii, 813 F.3d 850, 854 (9th Cir. 2015).
130. *Id.* at 857.
131. *Id.*
132. *Id.* at 863.
133. *Id.*
134. *Id.*

higher education.[135] However, the court did not provide further guidance on when *Hazelwood* might apply.

The court next turned to Oyama's suggestion that the University acted as an employer in denying his student teaching application, which implicated the public employee speech doctrine from *Pickering*.[136] The *Pickering* test balances "'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[137] The court found the rationale behind this doctrine a slightly better fit for Oyama's claim—just as a government employer is charged with a "'particular task'"—here, the University's role in certifying teachers for state licensure is to ensure that licensed teachers are appropriately prepared and competent for the profession.[138] Eventually, however, the court declined to apply public employee speech doctrine in *Oyama* because: (1) Oyama was not yet a government employee, and extending the doctrine to those who only wish to work for the government was too large a step, and (2) holding Oyama to the same standard as public employees directly conflicted with his First Amendment rights as a public university student.[139]

Ultimately, the court applied a three-part test similar to the one applied in *Tatro*. First, the court found that Oyama's statements regarding student sexuality and education of disabled students were "directly related to defined and established professional standards" for teaching.[140] The cited standards, reflected in the school's policies, prohibited sexual relationships between students and teachers and required teachers to demonstrate "professional dispositions necessary to help all students learn."[141] The court intentionally focused on the relationship between the discipline and the professional standards of the industry rather than "squeez[ing] this case into an existing doctrinal framework that does not quite fit."[142]

Second, the court also adopted a "narrowly tailored" requirement in the context of professional certification candidates to "ensure that the University does not transform its limited discretion to evaluate a certification candidate's professional fitness into an open-ended license

135. *Id.* at 864 n.10.
136. *Id.*
137. *Id.* (quoting City of San Diego v. Roe, 543 U.S. 77, 82 (2004)).
138. *Id.* at 865.
139. *Id.* at 866.
140. *Id.* at 868.
141. *Id.*
142. *Id.* at 869.

to inhibit the free flow of ideas at public universities."[143] The court found that the standard was narrowly tailored because Oyama's statements directly related to his suitability for teaching.[144] Additionally, the University only considered curricular statements directly pertaining to teaching in making its disciplinary decision.[145]

Finally, the court considered whether the University used reasonable professional judgment, which protects against school officials using professional standards as a pretext for discipline taken against students with whom an official personally disagrees.[146] The court found that the University could reasonably conclude that Oyama's statements called into serious question his suitability for the profession, especially given the unfortunate prevalence of sexual abuse in schools, and the public interest of educating students of all abilities.[147] Thus, the court concluded that the University's actions against Oyama were proper under the First Amendment.

D. Analysis: Connecting the Certification Cases *Tatro*, *Keefe*, and *Oyama*

Oyama is easily differentiated from *Tatro* and *Keefe* because it involved only speech made during classroom assignments and a school-sponsored internship. *Tatro* and *Keefe* both involved only online speech. However, the similarities between the courts' analyses point to a larger theme across professionalism cases: giving ample deference to professional schools' authority to maintain the integrity of their certification programs.

Courts favor the school's regulatory power where the student's speech clearly evinces an inadequacy to enter his or her chosen profession: a mortuary science student who did not respect a human cadaver, a nursing student who threatened to misuse medical equipment for harm, and an education student who did not treat students equally and condoned sexual relationships between students and teachers. Of the three cases, *Keefe* is the only to apply *Hazelwood* directly, which has been subject to ample discussion and criticism.[148]

143. *Id.* at 871.
144. *Id.* at 871–72.
145. *Id.* at 872.
146. *Id.* at 873.
147. *Id.* at 873–74.
148. *See, e.g.*, Lindsie Trego, *When a Student's Speech Belongs to the University: Keefe, Hazelwood, and the Expanding Role of the Government Speech Doctrine on Campus*, 16 FIRST AMEND. L. REV. 98, 115 (2017).

Hazelwood's application in these cases—given that it was developed, and has generally been applied, where the speech occurs as part of a "school-sponsored" or mandated activity—appears inconsistent. *Keefe*, a case dealing specifically with personal online speech, was the only to apply *Hazelwood* directly; whereas *Oyama* and *Tatro*, one dealing with speech made in a classroom setting, and the other also concerned with online personal speech, found *Hazelwood* an inappropriate standard due to the maturity and education level of professional students.

The results of all three cases, however, are the same: the schools' actions were considered constitutionally sound under the First Amendment in light of the standards applied by the courts. To harmonize these cases, it is vital to look at the underlying principles each court identified. First, professional schools are responsible for preparing and approving students for specific professions that carry their own industry ethical requirements. *Keefe* considered this to satisfy *Hazelwood*'s mandate of a "legitimate pedagogical concern," whereas *Oyama* and *Tatro* categorized that preparatory role under a requirement that the school's policies be narrowly tailored and directly related to established professional standards. Both approaches acknowledge the school's obligations to concerns larger than just its own interests as an educator—both to the public and to the industry accreditation and governing boards that oversee the licensed professionals.

Additionally, professional students are inherently different from high school and elementary school students in age, maturity, independence, and educational goals. Even the *Keefe* court in applying *Hazelwood* supported its conclusion with the school's obligation to uphold nursing requirements, which hold nursing students to a specific standard: "because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Degree Nursing Program's curriculum, speech reflecting non-compliance with that Code that is related to academic activities 'materially disrupts' the Program's 'legitimate pedagogical concerns.'"[149] The *Oyama* and *Tatro* courts used more cautious language, noting that maturity considerations did not provide a basis for speech restriction since professional students are adults,[150] and the same values such as "'discipline, courtesy, and respect

149. Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016).
150. *Oyama*, 813 F.3d at 863.

for authority'" are categorically too broad to permit schools to use in restricting professional student speech.[151]

This Article suggests an adapted analytical framework below that reflects the themes the courts identified in *Tatro*, *Keefe*, and *Oyama*, but provides a consistent way for courts to ensure they are taking into account all relevant concerns pertaining to this specific niche.

V. PROFESSIONALISM AND STUDENT SPEECH: A WAY FORWARD

In establishing a way forward, this Part will begin by briefly introducing fellow commentators' approaches to addressing the issues of online student speech and professional student speech. Next, it will suggest an adapted three-factor analysis that courts may employ to ensure that they fairly balance the interests of professional schools and professional students in a way that does not diminish either and fits the unique needs of both schools and students.

First, the court must consider the content of the speech and its proximity to both the school and the profession as a hurdle a school must clear to gain a court's approval of the discipline imposed in response to that speech.

Next, schools must be required to prove that both disciplinary actions and the professionalism or conduct codes are narrowly tailored and directly related to defined professional standards, as *Tatro* and *Oyama* suggested. This requirement ensures that students are put on notice about the expectations, and that the school's efforts are truly in advancement of the professional standards of the relevant industry.

Third, schools must be required to act with reasonable professional judgment. This ensures that courts put the entire case into perspective and prevents schools from acting out of personal disagreements, rather than acting in the best interest of the student body and the profession. Courts must also keep in mind an appropriate level of deference to the school in its role and obligations in preparing students for that profession.

A. Current Approaches

At least two sets of commentators, although not necessarily focused narrowly on professional students, have addressed the issue of extra-curricular student speech regulated by schools enforcing

151. Tatro v. Univ. of Minn., 816 N.W.2d 509, 518 (Minn. 2012) (quoting Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989)).

professionalism standards: (1) Jeffrey Sun, Neal Hutchens, and James Breslin, who argue for a "curricular nexus test,"[152] and (2) Emily Gold Waldman, who establishes a two-part inquiry based on general key principles in guiding courts on how to approach the certification cases.[153]

Sun, Hutchens, and Breslin's "curricular nexus test" is designed to apply to cases where students at the university level engage in independent speech outside of the classroom that pertains or connects to the collegiate learning space.[154] The test essentially establishes a presumption that sanctioning independent student speech on academic grounds is improper unless the institution can prove a sufficient curricular nexus (which the authors define as "an underlying logic or rationale fitting for higher education students versus elementary or secondary ones"),[155] or proximity, of the speech to curricular concerns.[156] This test was developed in the context of university speech in general, as opposed to professional students specifically, but still offers a helpful framework for courts in evaluating that "nexus" connecting the speech to the educational environment. Specifically, the authors acknowledge the "enforcement of professionalism standards" as a sufficient curricular concern to permit an institution to enforce its authority on independent (such as online) speech by students.[157]

Sun, Hutchens, and Breslin assert that legitimate professionalism standards suffice to establish the requisite curricular nexus to allow professional programs to discipline students for otherwise protected out-of-classroom speech.[158] While the speech's content and its contextual proximity to defined professionalism standards is a key consideration for courts, this Article argues that simply establishing such a nexus is not a sufficiently nuanced inquiry to automatically answer the question of whether professional programs overstepped their constitutional bounds in proscribing discipline for extra-curricular professional student speech because it does not properly balance the competing interests of the school and the student.[159] Sun, Hutchens, and

152. Sun et al., *supra* note 64, at 51 (establishes "curricular nexus test" building on *Hazelwood* standard to be used on off-campus speech at the university level).

153. Waldman, *University Imprimaturs on Student Speech*, *supra* note 71, at 419–20.

154. Sun et al., *supra* note 64, at 51–52.

155. *Id.* at 93.

156. *Id.* at 91.

157. *Id.*

158. *Id.* at 93.

159. For one commentator's opinion that this inquiry actually permits institutions to systematically overstep those constitutional bounds, see Elissa Kerr, *Professional Standards on*

Breslin's method presumes that a school's status as a professional training program automatically means the school has the authority to limit student speech, even outside of the classroom. This Article takes the position that such a presumption without proof of a school's disciplinary basis relating directly to established professionalism standards would too deeply undermine a student's First Amendment right to free speech. Otherwise, any professional school would nearly always prevail on summary judgment by simply showing that it is subject to legitimate professionalism standards.

Waldman's proposal, on the other hand, addresses the certification cases head-on.[160] Waldman focuses her proposal on establishing two general principles that courts should use to evaluate professional student First Amendment claims.[161] First, Waldman argues that *Hazelwood's* "reasonably related to legitimate pedagogical concerns" standard should govern discipline of professional students for speech that occurs in curricular settings.[162] However, this standard should be "flipped," according to Waldman, when the speech occurs outside of a curricular setting.[163] In that case, the university needs to show that its concerns were narrowly tailored and directly related to established professional conduct standards.[164] Waldman's evaluation would not require those professional standards to be codified in writing, but the university would have to prove that such standards are firmly established in the industry.[165]

Second, Waldman's test imposes a reasonableness requirement on the university's sanction and the process by which it was imposed, both for cases where the speech occurred in a curricular setting and those where it occurred elsewhere.[166] Most of the time, Waldman says, this prong will require that the school provide adequate notice to each student about engaging in the speech in question.[167]

Like Waldman, this Article proposes that professional programs meet the standard announced in *Tatro* when defending their discipline against professional student speech, and prove that its actions in disciplining the student were narrowly tailored and directly related to

Social Media: How Colleges and Universities Have Denied Students' Constitutional Rights and Courts Have Refused to Intervene, 41 J.C. & U.L. 601, 622 (2015).

160. Waldman, *University Imprimaturs on Student Speech*, *supra* note 71, at 382–83.
161. *Id.* at 419–20.
162. *Id.*
163. *Id.* at 423.
164. *Id.* at 423–24 (citing Tatro v. Univ. of Minn., 816 N.W.2d 509, 521 (Minn. 2012)).
165. *Id.* at 424.
166. *Id.*
167. *Id.*

established professional conduct standards. And, like Waldman, this Article also advocates for an analysis that requires students to have been put on notice about the standards by which their speech is to be evaluated. However, this Article makes an important distinction: the professionalism standards used to discipline students for extra-curricular speech must themselves be narrowly tailored and directly related to clearly established professionalism standards to prevent the invitation of overbroad or vague codes that simply inform students they must "act professionally."

B. A New Approach: Suggesting a Three-Part Inquiry

This Article suggests a three-part inquiry for a specific factual scenario: a student enrolled in a professional program who has been disciplined by that school for off-campus speech deemed impermissible under the professionalism standards of that industry.[168] The following framework incorporates the goals, themes, and interests addressed in the cases above, especially those common threads found in *Tatro*, *Keefe*, and *Oyama*.

1. "Professional" Nexus Test to Link Speech to the School Environment

The court must first categorize the speech as it relates to the classroom. As Sun, Hutchens, and Breslin suggested, the closer in proximity the speech is to the school environment, the more authority a school has to regulate it. This Article proposes that, in the case of extra-curricular speech by a professional student, the speech must violate "legitimate and documented professional standards" to bring it within the requisite nexus of the professional school's purview. The speech must violate not only a school conduct code, but also an underlying documented professional code of the field in which the student wishes to work. This prong helps prevent schools from drafting vague conduct codes that require "professionalism" without defining the industry standards that govern that professionalism requirement.

For example, imagine a professional nursing program drafts a conduct code requiring students to uphold the American Nurses

168. Although this Article focuses on off-campus, extra-curricular speech, the analysis applies to curricular speech as well. Courts should afford professional student speech in the course of schoolwork or a school-sponsored internship placement less protection than extra-curricular speech, giving the highest level of deference to the professional school in its role as an educator and advocate for the students it is preparing for a specific field.

Association (ANA) Code of Ethics for Nurses.[169] One of the provisions of the ANA ethics code is: "The nurse practices with compassion and respect for the inherent dignity, worth, and unique attributes of every person."[170] A student enrolled in the program posts a political rant on Facebook vehemently opposing a presidential candidate, disparaging the candidate's beliefs and supporters and using language that, undoubtedly, is unbecoming of a nurse. In this scenario, the school would face a tougher challenge in proving that the speech falls under its authority to regulate, unless it shows that the speech directly violates one of the clearly articulated professionalism standards *of the nursing industry*. In this example, the school would have to successfully argue that the student's conduct falls under its purview because it goes against practicing with "compassion," "respect," or shows a lack of respect for the "inherent dignity" of every person. Because the student's post had little to do with being a "practicing" nurse, the code is only thinly related to the student's conduct.

If, however, the student's rant directly disparages a fellow student or patient from an internship who supports the political candidate, then the school has an easier time proving that speech's nexus to its pedagogy because the student comingled her profession and the school environment in the first place. This "nexus" may appear to be a fine line, but ultimately it would help balance the student's First Amendment rights when it comes to expressing an unpopular opinion on a personal page with the school's interest in preparing its students to become nurses. Sun, Hutchens, and Breslin provide another helpful example illustrating this principle:

> A law student might sign a pledge not to discuss questions on an exam that another class section is scheduled to take at a later date. If the student then goes on Facebook and posts information about the exam that runs afoul of the pledge, such as discussing information regarding specific questions, then disciplinary action might well be appropriate. At the same time, and as addressed in *Tatro*, students should not simply be able to "sign away" their constitutional rights. Thus, if the pledge for the exam had stated that students could not mention the exam at all or be critical of the quality of the exam, and the student then wrote about the terrible quality of the questions in a general sense without providing any specifics, then the institution should face a much more difficult task in trying to

169. *Code of Ethics for Nurses with Interpretive Statements*, AM. NURSES ASS'N (2015), https://www.nursingworld.org/coe-view-only.

170. *Id.* at v.

> establish some type of appropriate curricular nexus to take action against the student for such speech.[171]

The first portion of this example likely does not implicate professionalism rules, as the student would instead simply be disciplined for breaking school rules mandating basic academic principles. The second portion, on the other hand, may implicate professionalism rules. As Sun, Hutchins, and Breslin point out, the school should face a more difficult task in establishing a curricular nexus between the generalized post complaining about the exam to the school's pedagogy. If the school does not have a professionalism code that enumerates a connection to a professionalism requirement of the legal industry, then it is on thin footing to defend a First Amendment claim by the student in response to disciplinary action. Under this Article's proposal, the school's difficult burden would be to prove that it disciplined the student pursuant to a professionalism code that directly implicated a documented professional standard of being an attorney. Therefore, the difference is that the school must not only establish a close connection between this student's speech and the pledge, but also that some professional standard of being an attorney is directly implicated by the student's post.

In summary, under this prong, the speech for which the student is being disciplined must also be directly related to the professional standards being applied by the school (and the court): the speech must have some direct relationship with the profession he or she is striving to join. This may change the court's analysis in a case such as *Hunt* where a medical student posted a vitriolic political rant on his personal Facebook page.[172] There, Hunt's rant did not directly implicate the medical profession—it was an unbecoming post, but it was only directly related to Hunt's own political views.[173]

2. Narrowly Tailored and Directly Related to Industry Professionalism Standards

Next, the court must evaluate the school's disciplinary actions to ensure they are narrowly tailored and directly related to legitimate, documented industry professionalism standards. The conduct code under which discipline was brought must also be narrowly tailored to

171. Sun et al., *supra* note 64, at 93–94 (internal citations omitted).
172. Hunt v. Bd. of Regents of Univ. of N.M., 792 F. App'x 595, 598 (10th Cir. 2019).
173. *Id.*

meet the needs of the professional standards of the industry. Instead of applying the *Hazelwood* standard of "reasonably related to pedagogical concerns," courts should evaluate whether both the discipline and the relevant provisions of the school code are narrowly tailored to the professional standards of the industry and directly related to upholding those standards.

Expounding on Sun, Hutchens, and Breslin's law student example above, the school's argument would be much stronger if it had a provision in its conduct or professionalism code directly implicating some professional standard of being an attorney. For example, Rule 1.6(a) of the American Bar Association's Model Rules of Professional Conduct dictates that it is professional misconduct to "reveal information relating to the representation of a client . . . " subject to specific exceptions.[174] A school could incorporate this requirement into its conduct code with a provision such as "any student participating in a clinic or externship, whether for school credit or independently, that breaches the confidentiality of a client or other protected material will be subject to discipline, consistent with a lawyer's duty to uphold client confidentiality pursuant to the American Bar Association Model Rule 1.6(a)." In this example, the school's code and subsequent discipline is more likely to be found to be narrowly tailored to a specific requirement of an attorney and directly related to upholding that requirement.

If, on the other hand, the conduct code simply read, "students are expected to act in a professional manner at all times," then a court would be less likely to find that the code is narrowly tailored and directly related to established professionalism standards. While not an automatic bar to a university defending itself against a free-speech claim, the more specific a code is with regards to the professionalism standards it is implicating, the better. This requirement also assists in putting students on notice as to what standards they are expected to uphold, a concern shared by Waldman in her analysis.[175]

3. Reasonable Professional Judgment

Finally, courts should evaluate the reasonableness of the school's professional judgment in how it disciplined the student. The "reasonable professional judgment" standard in *Oyama* provides a solid basis for this factor, requiring that the school act reasonably in its concerns and not

174. MODEL R. PROF'L CONDUCT 1.6(a) (AM. BAR ASS'N 2019).
175. Waldman, *University Imprimaturs on Student Speech*, *supra* note 71, at 424.

discipline students simply out of personal disagreement with a student's views.[176] The *Oyama* court not only observed that "even instructors who had initially defended Oyama as 'likable' ultimately concluded that Oyama 'was unsuitable for teaching,'"[177] thus pointing to the impartiality of the University to Oyama's personal views and instead its emphasis on the professional standards of the teaching industry. The court also cited specific data regarding sexual relationships with students and teaching standards for those with disabilities to support the University's decision to dismiss Oyama.[178]

The *Oyama* court emphasized that:

> This inquiry is critical because not all inconsistencies between a candidate's statements and defined and established professional standards provide a reasonable basis to conclude that a candidate is not suitable to enter the profession. For example, the statement "I hate cleaning my office" may be in tension with a professional standard to "keep the office tidy" but may not be a reasonable basis to conclude that the speaker is not fit to enter the profession.[179]

This factor ensures that, at the end of its analysis, the court is putting the school's disciplinary actions into perspective. Even speech implying that a student is not ideally suited for a profession may not reasonably support a conclusion by the school that it has a responsibility to take action against that student under the guise of enforcing professionalism standards.

On the other hand, courts should be mindful that professional programs uniquely deserve a high level of deference in developing and enforcing standards for the student body. This deference is acknowledged by courts and commentators remarking on certification cases from every approach: student-speech doctrine,[180] public employee speech doctrine,[181] and leading hybrid approaches to certification

176. Oyama v. Univ. of Hawaii, 813 F.3d 850, 872–74 (9th Cir. 2015).
177. *Id.* at 874.
178. *Id.* at 872–73.
179. *Id.*
180. *See* Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016) (suggesting that an institution of higher education such as a nursing school may have a stronger interest in its curriculum and academic discipline than a high school would).
181. *See Oyama*, 813 F.3d at 865 (noting the university's "certification" role which charges it with the "specific task"—like a government employer—of ensuring that licensed teachers are appropriately prepared and competent for the profession).

cases.[182] In addition, this level of deference is especially warranted in the context of professional licensing, where schools are ultimately responsible for preparing and approving students for a role that requires state licensure and thus "speaks" on behalf of the student body.[183] This third inquiry is ultimately a balancing test for courts to weigh the unique interests of a professional school with a professional student's constitutional right to free speech under the First Amendment.

VI. CONCLUSION

Professional students occupy a unique niche at the crossroads of multiple free-speech doctrines, resulting in confusion surrounding what standards to apply when evaluating these claims, and to what extent principles developed at the primary- and secondary-school level translate to higher education. At the same time, those same schools have a duty (and sometimes even an obligation, as demonstrated in *Oyama*) to ensure that their students are adhering to the professionalism standards, including ethical requirements, of their industries. As graduate and professional programs continue to become more and more prevalent, the courts' analyses must keep up with the ever-changing demands of professionalism standards, social media, the First Amendment, and educational values.

Ultimately, drawing on the principles, themes, goals, and interests of the case law surrounding professionalism standards and the commentator theories thereon, this Article suggested a three-part inquiry that courts may undertake to streamline and provide consistency in analyzing these cases. Those three parts are: (1) a professional nexus test to link speech to the school environment; (2) requiring a professional school's discipline and conduct code to be directly related and narrowly tailored to documented industry professionalism standards; and (3) requiring that schools demonstrate reasonable professional judgment in their discipline of professional students for extra-curricular speech.

The ultimate goal of the framework suggested by this Article and the courts alike is to acknowledge and take into account the unique attributes and interests of professional programs without encroaching too far on a student's right to free speech. Professional programs

182. *See* Tatro v. Univ. of Minn., 816 N.W.2d 509, 521 (Minn. 2012) (acknowledging the right of a professional program at a university to regulate certain student speech in compliance with established professionalism standards).

183. *See Oyama*, 813 F.3d at 862.

prepare students for specific careers, and thus have an interest in preparing and approving students for those careers. Since states are permitted to mandate higher levels of speech restrictions on licensed professionals than other, everyday citizens, schools are in a unique position of "early intervention" if they notice that a student is not living up to those industry standards. However, students are also uniquely positioned, as evidenced by the case law discussed above that distinguishes student speech, not only as compared to professionals, but also by education level of the student based on maturity and independence.

These unique competing interests present similarly unique challenges for courts facing First Amendment claims by a professional student against his or her school. In developing a consistent framework, this Article balances those interests in a way that harmonizes the current case law on professional student First Amendment claims.