

**A (VIRTUAL) LAND OF CONFUSION WITH COLLEGE  
STUDENTS' ONLINE SPEECH: INTRODUCING THE  
CURRICULAR NEXUS TEST**

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INTRODUCTION

Online activities no longer represent a new or emerging aspect of the collegiate experience.<sup>1</sup> College students are “wired.”<sup>2</sup> They are actively engaged with social media sites such as Facebook, Instagram, and Twitter; they participate regularly in online gaming activities; and they own devices like smart phones and tablets that facilitate their online participation. According to a Pew Research Center study, the eighteen to twenty-four age group is highly wired, reporting over 80% of four-year undergraduates and graduate students as having social networking sites.<sup>3</sup> Indeed, virtual spaces now constitute an integral and common aspect of the daily lives of many college stu-

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1 Compare Steve Jones, *The Internet Goes to College: How Students Are Living in the Future with Today's Technology*, PEW INTERNET, 2–4 (Sept. 15, 2002), [http://www.pewinternet.org/~media/Files/Reports/2002/PIP\\_College\\_Report.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2002/PIP_College_Report.pdf.pdf) (concluding that college students are early adopters of the Internet, the Internet enhances their education, and their social lives have been changed by the Internet), with Aaron Smith et al., *College Students and Technology*, PEW INTERNET (July 19, 2011), <http://www.pewinternet.org/Reports/2011/College-students-and-technology/Report.aspx> (discussing the use of the Internet among college students).

2 ANA M. MARTINEZ ALEMAN & KATHERINE LYNK WARTMAN, ONLINE SOCIAL NETWORKING ON CAMPUS: UNDERSTANDING WHAT MATTERS IN STUDENT CULTURE 43–88 (2009); Tiffany A. Pempek et al., *College Students' Social Networking Experiences on Facebook*, 30 J. APPLIED DEVELOPMENTAL PSYCHOL. 227, 227–38 (2009) (analyzing the use of online social networks by college students).

3 Aaron Smith et al., *supra* note 2, at 3.

dents.<sup>4</sup> Along with personal online activity not directly connected to their academic endeavors, students' participation in online environments extends increasingly to formal instructional contexts, with many courses now taught wholly or partially online.<sup>5</sup> A study commissioned by the U.S. Department of Education reported significant increases in online education.<sup>6</sup> During the 1999–2000 academic year, only 8% of undergraduate students enrolled in at least one online course.<sup>7</sup> By the 2007–2008 academic year, that percentage rose to 20%.<sup>8</sup> Suffice it to say, virtual spaces reflect a dimensional component of higher education. Further, college professors use Internet-based capacities, such as social media, to enhance on-campus instruction.<sup>9</sup>

Even as student speech and expression have become increasingly characterized by an online dimension, colleges and the courts are struggling to “catch up” in terms of the legally permissible limits over student online speech and expression, both in and out of formal curricular settings.<sup>10</sup> For colleges, the reverberating quality of online speech can preserve and magnify harmful and negative attention re-

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4 Throughout this Article, we use the term “college” to refer to advanced postsecondary education, and it applies to both college and university.

5 Jered Borup et al., *The Influence of Asynchronous Video Communication on Learner Social Presence: A Narrative Analysis of Four Cases*, 34 DISTANCE EDUC. 48 (2013) (assessing the impact of asynchronous video communication on the learning of different types of students); Alendra Lyons et al., *Video Lecture Format, Student Technological Efficacy, and Social Presence in Online Courses*, 28 COMPUTERS IN HUM. BEHAV. 181 (2012) (assessing the effect of adding social presence cues to online video lectures); Leyla Zhuhadar et al., *The Impact of Social Multimedia Systems on Cyberlearners*, 29 COMPUTERS IN HUM. BEHAV. 378 (2013) (applying social learning analytics to assess the impact of Social Media Systems on college students taking online courses).

6 ALEXANDRIA WALTON RADFORD, U.S. DEP'T OF EDUC., LEARNING AT A DISTANCE: UNDERGRADUATE ENROLLMENT IN DISTANCE EDUCATION COURSES AND DEGREE PROGRAMS 4 (2011). In postsecondary education practice, the term “distance education” may include programs delivered in-person but off-site from the main campus. Here, the report specifically excludes that type of delivery, and it defines “distance education” as “delivered using live, interactive audio or videoconferencing, pre-recorded instructional videos, webcasts, CD-ROM or DVD, or computer-based systems delivered over the Internet.” *Id.* at 2.

7 *Id.* at 6.

8 *Id.*

9 MIKE MORAN ET AL., TEACHING, LEARNING, AND SHARING: HOW TODAY'S HIGHER EDUCATION FACULTY USE SOCIAL MEDIA 11–14 (2011), available at <http://www.babson.edu/Academics/Documents/babson-survey-research-group/teaching-learning-and-sharing.pdf>.

10 Issues with student online speech are certainly not confined to the higher education realm. Especially at the secondary level, schools and courts have struggled over the appropriate legal standards that should apply to student online speech.

sulting from online activities.<sup>11</sup> For instance, an image posted on Instagram can be passed along, re-imaged, and archived as to continue the expression beyond what the original messenger may have initially intended. Further, these social media exchanges may attract attention from individuals outside of campus, the media, and other interested parties.<sup>12</sup> The technology has presented challenges for the courts as well. A legal stumbling block encountered in online speech cases, taking place in higher education contexts, involves the judiciary's previous overreliance on legal standards largely derived from the elementary and secondary education setting in determining college students' speech rights. Several higher education online speech cases reveal legal inconsistency and disagreement on the part of courts in terms of which legal framework to use.<sup>13</sup>

In this Article, we explore the challenges facing colleges and the courts regarding student online speech and other expressive conduct that emerge within collegiate learning spaces, such as in courses or student practicums and internships. Our analysis leads us to propose a refined framework, which we call the "Curricular Nexus Test," to address this inconsistently analyzed area of law.<sup>14</sup> The proposed

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<sup>11</sup> Jack Stripling, *Panelists Debate How Far Colleges Should Go to Monitor Online Behavior*, CHRON. HIGHER EDUC., Feb. 7, 2011, <http://chronicle.com/article/Panelists-Debate-How-Far/126298>.

<sup>12</sup> See, e.g., DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 71 (2007); Kashmir Hill, *Dear College Students, Please Stop Taking Photos of Your Inappropriately-Themed Frat Parties*, FORBES (Feb. 6, 2013), <http://www.forbes.com/sites/kashmirhill/2013/02/06/dear-college-students-please-stop-taking-photos-when-you-hold-inappropriately-themed-frat-parties/>.

<sup>13</sup> See, e.g., *Feine v. Parkland Coll. Bd. of Trs.*, No. 09-2246, 2010 WL 1524201, at \*11 (C.D. Ill. Feb. 25, 2010) (holding that a professor did not violate his student's free speech rights by disciplining him for posts made to a class message board); *Harrell v. S. Or. Univ.*, No. 08-3037-CL, 2009 WL 3562732 (D. Or. Oct. 30, 2009), *aff'd*, 381 F. App'x 731 (9th Cir. 2010) (holding that the university did not violate a student's free speech rights for comments made on an online class message board); *Murakowski v. Univ. of Del.*, 575 F. Supp. 2d 571, 592 (D. Del. 2008) (holding that the university violated a student's First Amendment rights when it disciplined him for postings he made to a Web site hosted by the University).

<sup>14</sup> This test is distinguishable from the test put forth in arguments that accept *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), but do not fully contextualize and define the properties and dimensions of such acceptance. See, e.g., Jessica Golby, Note, *The Case Against Extending Hazelwood v. Kuhlmeier's Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L. REV. 1263, 1282-85 (2006) (presenting a simplified forum analysis based on distinguishing extracurricular and curricular speech, thus preserving the *Hazelwood* standard in a seemingly more defined and limited context). At the same time, our test is largely consistent with concerns about the fit between K-12 speech and higher education speech cases. See Edward L. Carter et al., *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 160 (2006) (concluding that, based on an analysis of appellate cases using

framework applies to cases within one area of college students' online speech controversies that have been marked by particular legal confusion, namely, when students engage in *independent* speech (as opposed to *school-sponsored* speech) pertaining or connected to a collegiate learning space.<sup>15</sup> That is, we focus on instances when college officials may regulate and restrict students' independent online speech on academic grounds. To that end, the Article addresses independent student speech arising from, or in direct relation to, formal instructional contexts as well as speech occurring outside of a class setting, but still connected with the collegiate learning space. For speech taking place in a formal instructional context, while believing that colleges need sufficient leeway to regulate the class environment, we contend that colleges should be required to demonstrate a legitimate curricular or pedagogical justification to restrict independent student speech. While acknowledging that standards articulated in previous cases, especially *Hazelwood School District v. Kuhlmeier*, are certainly not without application in regards to college students' independent in-class speech, we argue that courts should be more careful in defining what constitutes a legitimate curricular or pedagogical justification in a college setting versus overreliance on logic more appropriate for elementary and secondary education contexts. With speech occurring outside of an instructional setting, we argue that a sufficient curricular nexus should exist in such instances to subject student speech to institutional authority on academic grounds.

To situate our discussion in a broader legal context, Part I of the Article presents three factors that have shaped the way student free speech cases have been analyzed. These factors introduce leading legal cases and principles concerning free speech and expression that are generally associated with student speech rights in higher education. The Part also explores problems resulting from courts failing to differentiate student speech in higher education from that in elementary or secondary education contexts. In Part II, the Article examines legal decisions specifically dealing with online speech to identify the frameworks that have been applied. Building on our examination of these cases, we propose, in Part III, standards that

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*Hazelwood* in the college student speech context, principles from K-12 education cases do not fit higher education cases). However, this Article builds on prior criticisms and responds to them with a functional approach.

15 While our Article focuses on college students' independent online speech, the legal principles and standards we advocate are not confined solely to online speech in many instances.

provide legal clarification regarding when institutions may restrain or restrict college students' independent online speech on academic grounds, both in and out of class. Finally, in Part IV, the Article summarizes problems created by failing to distinguish between rights in higher education and elementary or secondary school. It also recaps the legal standards that we propose to help remedy the practical problem colleges and courts face in understanding institutional authority to regulate student speech for academically based reasons.

#### I. FACTORS SHAPING COLLEGE STUDENTS' SPEECH RIGHTS WITHIN THE COLLEGIATE LEARNING SPACE

This Part traces the contours and discusses problems that have arisen in relation to legal standards commonly applied by courts to college students' independent speech in what we have termed the "collegiate learning space." Three major factors are considered. First, Subpart A examines over-reliance by courts on the K–12 student speech cases to construct First Amendment policies that extend to higher education students. While college students should enjoy greater degrees of freedom based on age, maturity, and educational purpose, these cases make few distinctions between the K–12 and higher education case analyses. Second, Subpart B presents a limiting frame in which these college student speech cases often operate. Specifically, these cases have used physical location to construct what falls within the curricular learning space, and such a line of demarcation presents problems for online student speech. Third, Subpart C illustrates how the differences in factual scenarios in which colleges and K–12 institutions try to regulate speech regarding curricular matters are not limited to physical location. Taking these three Subparts together, the problems with analyzing college students' speech rights within the collegiate learning space, especially online speech, begin to unfold.

##### A. Courts' Over-reliance on K–12 Student Speech Cases

A complicating factor in untangling the tension between college students' independent speech rights and institutional authority over academic matters rests with the available legal frameworks and analytic approaches. Courts have drawn significantly on K–12 student speech cases as the bases for the framework for and analytic approach to college student speech cases.<sup>16</sup> In particular, two Supreme Court

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<sup>16</sup> See discussion *infra* Parts II.B and III.B.

cases dealing with secondary students, *Tinker v. Des Moines Independent Community School District*<sup>17</sup> and *Hazelwood School District v. Kuhlmeier*,<sup>18</sup> have played significant roles in shaping the legal framework for how many courts handle public college students' speech claims.

In *Tinker*, one of the foundational student speech cases, the Supreme Court denied the authority of high school officials to prohibit a group of students from wearing armbands as a form of silent protest of American military involvement in Vietnam.<sup>19</sup> The Court stated that school officials cannot restrict student speech unless it substantially interferes with the educational environment or impairs the rights of other students.<sup>20</sup> The students' expressions, via the armbands, neither substantially interfered with the educational environment nor impaired the rights of other students.<sup>21</sup> An important aspect of *Tinker* involves reliance by courts on the decision to evaluate student speech as coming independently from students, rather than deemed as school-sponsored or taking place in connection with some type of formal instructional undertaking.<sup>22</sup>

While *Tinker* presented an issue of students' independent speech, a subsequent case, *Hazelwood School District v. Kuhlmeier*, brought forward a challenge involving an instructional environment in the context of a journalism class to introduce a framework for school-sponsored speech.<sup>23</sup> In *Hazelwood*, the Court upheld a principal's authority to censor articles appearing in a student newspaper, produced as part of a journalism course.<sup>24</sup> According to the Court, the *Tinker* standards proved inapplicable to the student speech at issue in *Hazelwood* because the case dealt with speech arising from curricular matters rather than speech sprouting independently from students and not involving an instructional dimension.<sup>25</sup> The Court deemed this

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17 393 U.S. 503 (1969).

18 484 U.S. 260 (1988).

19 *Tinker*, 393 U.S. at 508–10.

20 *Id.* at 506 (“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

21 *Id.* at 509.

22 See discussion *infra* Parts II.B and III.B.

23 *Hazelwood*, 484 U.S. at 262–63.

24 *Id.* at 262–63, 266.

25 *Id.* at 270–271. The Hazelwood School Board Policy indicated that “[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.” *Id.* at 268. This policy supported the Court’s analysis that the school newspaper fell within a curricular space grounded in educational purposes and not a public forum. *Id.* at 268–69.

speech to be school-sponsored speech tied to the curriculum<sup>26</sup> and, setting a new framework, it held that school officials possessed greater authority over such school-sponsored speech.<sup>27</sup> In such instances, held the Court, school officials can limit student expression when such a restriction is reasonable—that is, when the school acts with a legitimate pedagogical purpose.<sup>28</sup> While the policy argument for this framework is grounded largely in response to the custodial responsibilities of educators in elementary and secondary schools,<sup>29</sup> importation of the *Hazelwood* standards to adults in the higher education setting has generated criticism from legal commentators<sup>30</sup> and several

<sup>26</sup> *Id.* at 272–73.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 273.

<sup>29</sup> *See id.* at 271 (“Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity.”). School administrators may weigh other factors in decision-making. For instance,

a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.

*Id.* at 272. The Court perceived education as a social institution that is responsible for a child’s development, stating that “the schools would be unduly constrained from fulfilling their role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment,’” if they were not allowed to discipline such speech. *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>30</sup> *See, e.g.*, Richard M. Goehler, Hosty Is a “Recipe for Confusion and Conflict,” 23 COMM. LAW. 21, 24 (2005) (criticizing a Seventh Circuit opinion applying *Hazelwood* to college students’ speech); Gregory C. Lisby, *Resolving the Hazelwood Conundrum: The First Amendment Rights of College Students in Kincaid v. Gibson and Beyond*, 7 COMM. L. & POL’Y 129, 156 (2002) (predicting “dire consequences” if *Hazelwood* is applied to college students’ speech); Mark J. Fiore, Comment, *Trampling the “Marketplace of Ideas”: The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1948, 1950–51, 1965 (2002) (arguing that applying *Hazelwood* to college students’ speech would reject precedent, close the distinction between college students and secondary school students, and could curb the tenor of colleges as a “marketplace of ideas”); Karyl Roberts Martin, Note, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 199 (2003) (arguing that *Hazelwood* should not be applied to college students and asserting the use of *Tinker*’s material and substantial disruption test); Chris Sanders, Note, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 160 (2006) (advocating for anti-*Hazelwood* statutes to protect student free expression in colleges, particularly student publications). *But see* Christopher N. LaVigne, Note, *Hazelwood v. Kuhlmeier and the University: Why the High School Standard Is Here to Stay*, 35 FORDHAM URB. L.J. 1191, 1197 (2008) (suggesting that federal courts will continue to apply *Hazelwood* to college students’ speech).

legal opinions.<sup>31</sup> Despite these critiques, courts routinely look to the decision in cases involving college students.<sup>32</sup>

### B. Importance of Physical Location

In many instances, First Amendment speech protections available to public college students<sup>33</sup> turn upon the context in which the

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<sup>31</sup> See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 248 (3d Cir. 2010) (indicating distinctions between speech rights of K–12 students and college students as the basis for not using the K–12 cases as firm rules in deciding college student speech cases); *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (en banc) (indicating that the *Hazelwood* framework was inappropriate for analyzing the rights of college students to express content in a yearbook); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 518 (Minn. 2012) (concluding that the *Hazelwood* framework is an inappropriate standard for analyzing whether a student’s Facebook posts are entitled to First Amendment protection from a university’s disciplinary sanctions).

<sup>32</sup> See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1826 (10th Cir. 2004) (applying *Hazelwood* to a play performed by college students); *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (holding that restrictions on a college professor’s religious references in class were permissible). Notably, one case that has generated a significant amount of criticism is the decision of *Hosty v. Carter (Hosty II)*, 412 F.3d 731 (7th Cir. 2005) (en banc). In *Hosty II*, students on the staff of the state university newspaper printed unflattering comments about an administrator. *Id.* at 732–33. When challenged about the accuracy of certain statements, the student journalist declined to retract any information or print the administration’s response to the matter. *Id.* at 733. Soon after, another administrator required that all subsequent papers be cleared by the administration prior to printing. *Id.* The students alleged that the administrators halted the newspaper printing, required prior approval for future publications, and threatened to suspend the newspaper’s allocation. *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 784 (N.D. Ill. 2001). Among the claims, the students challenged the university under First Amendment speech rights. *Id.* The trial court granted summary judgment to all the defendants except for one, the dean who halted production and required prior approval before printing. *Hosty II*, 412 F.3d at 733. On interlocutory appeal, the federal appellate court made clear that *Hazelwood* was the wrong framework. *Hosty v. Carter (Hosty I)*, 325 F.3d 945, 949 (7th Cir. 2003). Circuit Judge Terence T. Evans explained that “*Hazelwood*’s rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities.” *Id.* at 948. He clarified that “[t]he differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels.” *Id.* The Dean filed a petition for rehearing en banc, and the petition was granted. *Hosty II*, 412 F.3d at 733. In a 7–4 decision, the majority decided that *Hazelwood* was the appropriate framework. *Id.* at 734. In dicta, the court posed a discussion that weakened the curricular versus extracurricular distinction, pointing out times when a university may have a publication involving extracurricular activities of students but nonetheless fall outside the public forum sphere. *Id.* at 734–35.

<sup>33</sup> At both public and private colleges, standards derived from contract represent a source of standards relevant to charting students’ First Amendment rights. While courts are often resistant to depict the student/college relationship as simply contractual in nature, contract standards are routinely looked to in determining the legal rights of students. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 304 n.1 (3d Cir. 2008) (noting that one of the



speech takes place.<sup>34</sup> Courts typically afford public colleges greater legal leeway in placing limits on student speech occurring in formal instructional contexts, such as the classroom. In contrast, institutional authority often diminishes in relation to student speech taking

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initial claims asserted in a student's challenge of the sexual harassment policy included a state contract claim); *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998) (recognizing student handbooks as terms of the contract between the college and student); *Goodman v. President & Trs. of Bowdoin Coll.*, 135 F. Supp. 2d 40, 55–56 (D. Me. 2001) (offering a discussion about various courts' recognition of contractual relationships as a legal source for students to pursue). Under these standards, institutions must abide by the rules and standards that have been established to guide student conduct. Such standards are potentially of special relevance at private institutions, where they establish the speech protections available for students. Along with contractual standards, some state courts have also imposed a common law duty on private colleges to not treat students in a capricious or arbitrary manner and provided protections analogous to due process protections available to public higher education students. *See, e.g., Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 710 (D. Vt. 2012) (stating that under Vermont law, a private college's breach of contract with a student as derived from the terms in the student handbook requires a showing that the "disciplinary action at issue is fundamentally unfair, arbitrary, or capricious" (internal citation omitted)). At least one state, California, has enacted a law requiring secular private colleges to provide students with the same First Amendment rights that are available at public institutions. *Yu v. Univ. of La Verne*, 126 Cal. Rptr. 3d 763, 770–72 (Ct. App. 2011) (discussing California's Leonard Law, which prohibits private colleges and universities from disciplining students for off-campus speech when that speech would otherwise be protected under the First Amendment or the state constitution).

<sup>34</sup> While the *Hazelwood* decision discussed the school's sponsorship of the newspaper, the Court emphasized the locus of the speech, namely that the student newspaper was created and edited by students enrolled in a journalism class. 484 U.S. at 271 ("[S]chool-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 . . . may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."). *See also* *Head v. Bd. of Trs. of the Cal. State Univ.*, 315 F. App'x 7, 8 (9th Cir. 2008) (determining that a state university student failed to state a First Amendment violation based on the university's program that required students to take a "multicultural" course, which he claimed was counter to his conservative positions); *Axson-Flynn*, 356 F.3d at 1285–86 (holding that state university faculty may require a student to perform a play that includes words the student feels uncomfortable saying as the program presented justifications that were reasonably related to legitimate pedagogical concerns); *Brown v. Li*, 308 F.3d 939, 941 (9th Cir. 2002) (holding that a state university student did not have a First Amendment right to submit a nonconforming thesis or to have a hearing regarding the disapproval of the nonconforming thesis); *Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 208 (6th Cir. 1998) (finding that a state university student had no protectable protest rights when he failed to comply with the rule barring first-year dental students from sitting in the last row of the classroom and that college administrators had the authority to discipline him for the violation); *O'Neal v. Falcon*, 668 F. Supp. 2d 979, 986–87 (W.D. Tex. 2009) (determining that barring a public college student from presenting on a controversial topic, which might interfere with students' ability to focus on speech mechanics rather than the subject matter, presents a legitimate pedagogical concern).

place outside of formal instructional situations.<sup>35</sup> Apart from special circumstances, such as speech of a threatening or harassing nature, student speech, if it occurs outside of a curricular context, generally receives substantially more constitutional protection than if it occurs in an instructional setting.<sup>36</sup> This distinction proved more easily discernible in a pre-Internet age, as courts could often rely on physical location (e.g., student speech taking place in a classroom) in helping to distinguish between instructional and non-instructional settings in evaluating student speech claims.<sup>37</sup> Indeed, this application of “location” is consistent with *Hazelwood*, in which the U.S. Supreme Court integrated a forum analysis to determine that the classroom setting did not fall within a public forum.<sup>38</sup> Similarly, other First Amendment cases, outside of the online speech context, have determined that the educational place presents an analytical element.<sup>39</sup>

As shown in several decisions involving online speech, physical location breaks down as a proxy or determinative factor to categorize independent speech as taking place in an instructional or a non-instructional context.<sup>40</sup> As the Court emphasized in *Tinker*, “First

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35 See, e.g., *Crue v. Aiken*, 370 F.3d 668, 688 (7th Cir. 2004) (striking down a state university chancellor’s preclearance policy that banned students and university employees from contacting prospective student athletes on grounds of infringement of free speech); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1023, 1034 (C.D. Cal. 2002) (striking down a public college’s student free speech policy on invalid prior restraint and overbreadth grounds). Cf. *Burnham v. Ianni*, 119 F.3d 668, 681 (8th Cir. 1997) (finding that professors and students’ photographic display communicating a political and historical message, located in the public corridor next to the state university’s classrooms, was protected speech).

36 See Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 770 (2009) (arguing that a university’s prohibition of the expression of hate would constitute a content-based restriction that violated the First Amendment).

37 Professor Zick suggests a new approach to examine “place” within speech cases, and he considers cyber-speech, but suggests that it might fall within an existing speech topography he identifies. See Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 481–84 (2006) [hereinafter Zick, *Space, Place, and Speech*]; Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 619 n.252 (2006).

38 *Hazelwood*, 484 U.S. at 267–70.

39 See, e.g., *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (stating that the differences between high school and university students presents an important analytical distinction); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610, 613–14 (N.D. Tex. 2010) (finding that a college administration could not prevent students from wearing empty holsters in classrooms as a form of protest, even if they allowed them to do so in designated “free speech zones”).

40 See, e.g., *Feine v. Parkland Coll. Bd. of Trs.*, No. 09-2246, 2010 WL 1524201, at \*6 (C.D. Ill. Feb. 25, 2010) (finding that mean-spirited expressions attacking classmates through a public community college’s online course did not rise to the level of protected speech); *Harrell v. S. Or. Univ.*, No. 08-3037-CL, 2009 WL 3562732, at \*2 (D. Or. Oct. 30, 2009), *aff’d*, 381 F. App’x 731 (9th Cir. 2010) (supporting state university’s actions regulating

Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students” and they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>41</sup> But, the emergence of online environments has created difficulty for courts in defining where the schoolhouse gate should begin and end in relation to students’ online expression. Nonetheless, courts have routinely relied on physical location in efforts to define students’ speech rights.

### C. Faculty Authority over Curricular Matters

While often playing a lesser and poorly articulated role in relation to the *Hazelwood* standards, faculty authority to regulate independent student speech taking place in an instructional setting or occurring out of class, but involving a curricular dimension, has been bolstered by Supreme Court decisions dealing with judicial deference to genuine academic decisions.<sup>42</sup> In *Board of Curators of the University of Missouri v. Horowitz*, the Supreme Court stated that the types of due process requirements often necessary in student disciplinary matters, such as a formal hearing, are not the same as those required in the context of academic decision-making.<sup>43</sup> Similarly, in *Regents of the University of Michigan v. Ewing*, the Court announced that the judiciary should “show great respect for the faculty’s professional judgment” when reviewing a truly academic decision and intervene only when an institution shows a “substantial departure from accepted academic

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speech within an online classroom). Cases involving school-aged students, particularly at the junior high and high school levels, also import the use of “location.” The school law cases rely much more on *Tinker* for their legal reach of school authority. See, e.g., *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 765 (8th Cir. 2011) (finding that a high school student’s online discussions presented a true threat and were not protected speech); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (holding that the school had the authority to discipline a student for cyberbullying). But see *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc) (“[U]nder the circumstances, the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline.”); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930–31 (3d Cir. 2011) (en banc) (granting greater rights to public school students for off-campus speech that enters campus discussions).

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

42 See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (“When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment.”); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (holding that the procedural requirements of an academic dismissal are not stringent); see also *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we will defer.”).

43 435 U.S. at 86.

norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”<sup>44</sup>

Courts have looked to *Ewing* and *Horowitz* as secondary sources of authority along with the primary reliance often given to *Hazelwood* to bolster arguments for judicial deference to institutional authority to regulate higher education student speech with some type of curricular connection or implicating pedagogical concerns.<sup>45</sup> For instance, a recent decision from the Eleventh Circuit, *Keeton v. Anderson-Wiley*,<sup>46</sup> illustrates how the application of *Ewing* and *Horowitz* can be relied on by courts as a justification bolstering institutional authority to regulate student speech with a curricular nexus. In *Keeton*, the Eleventh Circuit agreed with the district court in denying a graduate student’s request for a preliminary injunction to prohibit her dismissal from a counselor education program.<sup>47</sup> The student, Jennifer Keeton, was dismissed from the program after she refused to complete a remediation program as a condition of participation in the program’s clinical practicum.<sup>48</sup> The faculty imposed the remediation plan requirement based on Keeton’s comments made in and out of class that demonstrated her unwillingness to abide by relevant professionalism standards for the counselor education program in her future interactions with clients.<sup>49</sup> In reviewing Keeton’s First Amendment speech and religion claims, the Eleventh Circuit looked to the *Hazelwood* standards and also relied on the principles articulated in *Horowitz* and *Ewing* regarding the need for courts to show deference to academic decision-making.<sup>50</sup> According to the court, forcing the university to let Keeton participate in the practicum course threatened to “interfere” with the program’s “control over its curriculum.”<sup>51</sup> In looking to *Hazelwood*, however, the court was relying on legal standards for school-sponsored speech when Keeton’s speech, even though implicating curricular concerns, was clearly independent student speech.

As a case such as *Keeton* illustrates, neither the line of cases addressing student speech in public schools nor the line of cases ad-

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44 474 U.S. at 225.

45 See, e.g., *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012) (crafting the decision around a deferential standard to academic decision-making, though not specifically identifying *Ewing* and *Horowitz* by name); *Brown v. Li*, 308 F.3d 939, 962 (9th Cir. 2002) (explaining the deferential standard afforded to the academic environment).

46 664 F.3d 865 (11th Cir. 2011).

47 *Id.* at 880.

48 *Id.* at 868–69.

49 *Id.* at 869–70.

50 *Id.* at 875–76.

51 *Id.* at 875.

addressing student due process rights in academic grievances have established a clear framework for challenges emerging from independent student speech that potentially implicates legitimate curricular concerns. As we develop in Part IV, several cases with online facets have especially served to highlight the limitations of this current approach to defining college students' speech rights.

## II. CONTINUUM OF HIGHER EDUCATION STUDENT SPEECH CASES

As discussed in the previous Part, while often failing to articulate speech standards specific and appropriate to higher education students, courts have looked to *Tinker* and *Hazelwood* and, secondarily, to *Horowitz* and *Ewing* in defining college students' speech rights in relation to institutional authority based on academic or curricular concerns. Decisions have followed a basic fault line where institutional authority is typically at a maximum in formal instructional settings and often diminishes markedly in relation to independent student speech occurring outside of such contexts.<sup>52</sup> While the in-class/out-of-class distinction has failed to create a tidy legal boundary and has increasingly become frayed because of the proliferation of online speech,<sup>53</sup> we loosely follow this general division in organizing our discussion of cases in this Part. First, Subpart A provides an overview of higher education student speech cases taking place in non-instructional contexts and not characterized as triggering curricular concerns. Then, Subpart B examines decisions originating in instructional (i.e., class) settings or in some way implicating curricular considerations.

### A. *Speech Outside of an Instructional Context*

Several Supreme Court cases involving public college student speech outside of a formal instructional setting have dealt with stu-

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<sup>52</sup> As discussed later, speech that threatens individuals is, however, subject to more intensive institutional regulation.

<sup>53</sup> See, e.g., *Yoder v. Univ. of Louisville*, No. 3:09-CV-00205, 2012 WL 1078819, at \*6 (W.D. Ky. Mar. 30, 2012) (holding that a college student had no First Amendment right to blog about a live birth she witnessed as part of a course on child bearing); see also *Yoder v. Univ. of Louisville*, No. 3:09-CV-205-S, 2011 WL 5434279 (W.D. Ky. Nov. 9, 2011) (finding that an online posting by a college student in state university's nursing program was not protected speech when the student described details of the birthing process experienced from a clinical course); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 511 (Minn. 2012) (holding that state university sanctions on a student for posts to social networking site did not violate the student's free speech rights when the postings violated professional program rules). These cases are discussed *infra* Part III.B.

dents engaged in speech or expression in campus settings generally open to students or student groups. These cases have crafted judicial standards expanding college students' free speech rights following the *Tinker* standards and forum analysis.

In the formative case of *Healy v. James*,<sup>54</sup> the Supreme Court, applying the principles articulated in *Tinker*, declared that First Amendment protections apply to public college students' speech.<sup>55</sup> The Court rejected arguments that a group of students suffered no First Amendment deprivation when they were denied access to use campus facilities in the same way as other students because they could still meet off campus.<sup>56</sup> According to the opinion, while the university could require students to adhere to "reasonable campus rules" to ensure that speech activities did not interfere with the educational opportunities of other students, it could not seek to silence students on the basis of expressing views disfavored by institutional officials.<sup>57</sup>

Just a year later, the Court addressed another set of expressive activities that university officials disfavored. The case, *Papish v. Board of Curators of the University of Missouri*, also relied on the *Tinker* analysis.<sup>58</sup> In that case, a state university expelled a graduate student, calling into question the decency of a political cartoon and choice of words, when she titled an article "M—f—" (i.e., Motherfucker), which was part of an organization's name involved in the news story.<sup>59</sup> Upon finding that the expressions were not obscene,<sup>60</sup> the Court concluded that the university disapproved of the content as the basis for the student's expulsion.<sup>61</sup> Thus, the university violated the student's constitutional rights when it failed to justify its actions based on reasonable rules governing conduct in a nondiscriminatory manner, but instead discriminated based on the speech content.<sup>62</sup>

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54 408 U.S. 169 (1972).

55 *Id.* at 180–81, 189–91.

56 *Id.* at 183.

57 *Id.* at 189.

58 410 U.S. 667, 670 (1973) (per curiam).

59 *Id.* at 667–68.

60 *Id.* at 670 ("We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' . . . [I]t is equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.").

61 *Id.* ("[T]he facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution.").

62 *Id.* at 671. In one of the dissenting opinions, Justice Burger questioned the conclusion of the Court that the university could not exercise authority to expel Papish. *Id.* at 672 (Burger, J. dissenting) ("[I]t is not unreasonable or violative of the Constitution to sub-

Starting in the 1980s, the U.S. Supreme Court faced a series of challenges that addressed the space of the expressive activity. A landmark decision, *Widmar v. Vincent*,<sup>63</sup> addressed the broad First Amendment protections generally available to students and student groups when a public institution creates some type of campus forum for independent student speech and expression. In the decision, the Supreme Court held that a university that had made its facilities available to meetings for student groups could not then deny campus access to a student organization with a religious purpose absent a compelling governmental interest<sup>64</sup> or as part of a reasonable, content-neutral regulation of the time, place, or manner in which the speech occurred.<sup>65</sup> According to the Court, once the university opted to create a forum generally open for use by student organizations, it could not restrict access on content grounds absent a compelling governmental justification.<sup>66</sup>

In *Widmar*, the Court stated that permitting student organizations to use university facilities resulted in “a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”<sup>67</sup> Citing *Police Department v. Mosley*<sup>68</sup> and *Healy*, the Supreme Court discussed how it had “recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”<sup>69</sup> But, the Court also stated that First Amendment standards should be evaluated “in light of the

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ject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values.”). The university documented Papish’s academic probation and her provocative actions around campus. *Id.* at 674–75 (Rehnquist, J. dissenting). While Papish may have been a controversial figure in terms of academic performance and campus discussions, the per curiam opinion noted that the university’s decision still rested on the content of Papish’s speech. *Id.* at 670–71 n.6 (“[I]n the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.”).

63 454 U.S. 263 (1981). Much of the debate in *Widmar* centered on whether the university could deny access to the student organization as part of an effort to avoid a potential Establishment Clause violation. *Id.* at 270.

64 *Id.* at 269–270. The Court rejected the university’s arguments that it should be permitted to deny the student group access to avoid Establishment Clause concerns. *Id.* at 273.

65 *Id.* at 276.

66 *Id.* at 267–68.

67 *Id.*

68 408 U.S. 92 (1972).

69 *Widmar*, 454 U.S. at 267 n.5.

special characteristics of the school environment.”<sup>70</sup> According to the *Widmar* opinion,

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.<sup>71</sup>

This excerpt suggests that public higher education reflects a substantially different kind of government organization with greater latitude to impose speech restrictions.

Later Supreme Court cases illuminated the standards applicable to student forums at public colleges. In *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>72</sup> *Board of Regents of the University of Wisconsin System v. Southworth*,<sup>73</sup> and, most recently, in *Christian Legal Society v. Martinez (CLS)*,<sup>74</sup> the Court evaluated institutional policies providing access in terms of campus facilities, funding opportunities, and organizational membership for officially recognized student groups as limited public forums, with accompanying requirements of reasonableness and viewpoint neutrality.

In short, the *Healy* and *Papish* cases present general institutional limits to restricting college student speech that is independent in nature and outside of an instructional context, though it occurs within some type of physical or virtual campus forum. These decisions and others establish that colleges may limit such speech based on reasonable campus rules and without content-based restrictions. *Widmar*, *Rosenberger*, *Southworth*, and *CLS* crafted constitutional standards based on the expressive space in which the speech takes place. Notably, when a limited public forum has been established, a college may restrict speech based on reasonable regulations related to the purpose

<sup>70</sup> *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

<sup>71</sup> *Id.*

<sup>72</sup> 515 U.S. 819 (1995). Potentially instructive for student speech rights in online settings, in *Rosenberger*, the Court applied forum standards to a non-physical environment, as a student religious organization sought access to funds available to help support student publications. *Id.* at 826–27.

<sup>73</sup> 529 U.S. 217, 220–221 (2000) (holding that the state university’s viewpoint-neutral application of student activities fees did violate students’ First Amendment rights).

<sup>74</sup> 130 S. Ct. 2971, 2978 (2010) (finding that the state university’s nondiscrimination policy requiring all-comers to be eligible members of student groups did not violate free speech and expressive association rights of registered student organizations).



of the forum so long as the policy or action is viewpoint-neutral.<sup>75</sup> Institutional authority over student speech in campus forums designated for independent student speech is relatively circumscribed when compared to curricular-based student speech.

*B. Student Speech Rights in Instructional Settings or Involving a Curricular Connection*

Unlike the relatively expansive First Amendment speech rights students often possess in non-instructional situations (absent particular conditions, such as speech that is threatening to specific individuals), courts have generally recognized heightened institutional authority to regulate college student speech arising in class settings or somehow triggering curricular concerns, such as the enforcement of professionalism standards.<sup>76</sup> The *Hazelwood* decision has proven especially important in framing the contours of college authority over student speech in instructional settings.<sup>77</sup> As noted, U.S. Supreme Court cases establishing judicial deference for college and university decisions made on academic grounds have also served as a basis to permit enhanced institutional control over student speech in this area of cases.<sup>78</sup>

*Axson-Flynn v. Johnson*<sup>79</sup> illustrates college authority in instructional settings and suggests, as well, some degree of judicial uncertainty re-

<sup>75</sup> See *Rosenberger*, 515 U.S. at 829 (holding that the university could not place content-based restrictions on speech in a limited public forum it had created). A limited public forum is typically a nonpublic forum that the government has identified for purposes of certain groups or certain topics such as the student groups, facilities, or publications.

<sup>76</sup> See, e.g., *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012) (observing that schools are given flexibility in determining and enforcing course policies, but denying summary judgment to the school on plaintiff's claims that it had violated her First Amendment rights); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875 (11th Cir. 2011) (deferring to the school's curricular choices in analyzing a student's First Amendment claims); see also, Neal H. Hutchens et al., *Testing the Limits of Faculty Authority: Graduate Students Challenge Professionalism Standards as Infringement of First Amendment Rights*, 283 EDUC. L. REP. 637 (2012) (discussing *Ward* and *Keeton*); Neal H. Hutchens, *A Delicate Balance: Faculty Authority to Incorporate Professionalism Standards into the Curriculum Versus College and University Students' First Amendment Rights*, 270 EDUC. L. REP. 371 (2011) (discussing cases in which courts have assessed First Amendment challenges to school professionalism standards).

<sup>77</sup> See discussions *supra* Parts I.A and I.C. The standards have also been applied to legal disputes involving institutional authority to regulate professorial speech. See, e.g., *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (holding that a college course was not a public forum).

<sup>78</sup> In the context of legal deference to academic decisions, lower courts have also looked to *Horowitz* and *Ewing* in deciding student speech cases. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292 n.14 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 950–51 (9th Cir. 2002).

<sup>79</sup> 356 F.3d at 1277.

garding an appropriate standard for student's academic speech. The case centered on a student enrolled in a theater program at the University of Utah. The student argued that the First Amendment protected her from not having to express words she found offensive in fulfilling course assignments.<sup>80</sup> In reviewing the student's legal claims, the Tenth Circuit described the classroom as a "nonpublic forum" subject to reasonable regulations by officials on student speech.<sup>81</sup> The opinion divided student speech in educational settings into the two areas of independent "student speech that 'happens to occur on the school premises'"<sup>82</sup> and "'school-sponsored speech,' which is 'speech that a school 'affirmatively . . . promotes' as opposed to speech that it 'tolerates,'" which is governed by *Hazelwood*.<sup>83</sup> While acknowledging disagreement among courts over applying *Hazelwood* to non-curricular student speech, the court stated that the standards from the decision applied to the current case because it dealt with curricular speech.<sup>84</sup>

*Brown v. Li*, one of the cases relied on by the court in *Axson-Flynn*, highlights disagreement over the appropriate legal standards to govern independent student speech implicating some type of academic or curricular concern.<sup>85</sup> This decision involved a graduate student who satisfied all degree requirements, but his committee withdrew its approval of his thesis after becoming aware that the student had included a "Disacknowledgements" section in the document originally approved by the committee.<sup>86</sup> In the "Disacknowledgements" section, the student stated that he "would like to offer special *Fuck You*'s to the following degenerates for . . . being an ever-present hindrance during my graduate career."<sup>87</sup> The student included elected officials, university employees, and academic departments among the targets of his comments.<sup>88</sup> After being informed about the inclusion of the

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80 *Id.* at 1280. The student opted to withdraw from the university after the theater department informed her that she would receive no exemption from being able to speak words that she found offensive in fulfilling course assignments. *Id.* at 1282. For support, the court looked to *Settle v. Dickson County School Board*, 53 F.3d 152, 155–56 (6th Cir. 1995), where the court relied on the *Hazelwood* framework to hold that a secondary school teacher, in the exercise of a legitimate pedagogical aim, could prohibit a student from writing an essay solely on Christianity or the life of Jesus.

81 *Axson-Flynn*, 356 F.3d at 1285.

82 *Id.* (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 923 (10th Cir. 2002)).

83 *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988)).

84 *Id.* at 1286 n.6.

85 308 F.3d 939 (9th Cir. 2002).

86 *Id.* at 942.

87 *Id.* at 943.

88 *Id.*

material, the student's thesis committee determined that the "Disacknowledgements" section failed to satisfy commonly accepted professional standards related to the inclusion of an acknowledgments section in a thesis.<sup>89</sup> The university eventually decided that it would award the student his degree based on the thesis originally approved without the offending section, but the student declined to submit the thesis without the "Disacknowledgements" page as the official version to the university library.<sup>90</sup>

A panel for the U.S. Court of Appeals for the Ninth Circuit, while agreeing to remand the case for consideration of a state constitutional claim, could not reach a consensus regarding the legal standards to guide analysis of the student's First Amendment arguments. The opinion announcing the court's judgment asserted that the *Hazelwood* standards sufficed in providing the appropriate legal framework,<sup>91</sup> even though the authoring judge acknowledged that no Supreme Court decision had specifically addressed "the appropriate standard for reviewing a university's regulation of students' *curricular* speech" and it represented "an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work."<sup>92</sup> Despite this lack of guidance from the Supreme Court, the judge stated that the *Hazelwood* standards still should apply to a higher education environment, with academic freedom considerations supporting greater regulation of college students' speech than would ostensibly be permissible for elementary and secondary students.<sup>93</sup> According to the opinion, the committee acted in accordance with a legitimate pedagogical purpose in refusing to approve the thesis.<sup>94</sup>

One of the judges on the panel<sup>95</sup> argued against applying the *Hazelwood* standards to higher education students, stating that "the reasons underlying the deference with respect to the regulation of the

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89 *Id.* at 943.

90 *Id.* at 945. Submitting the approved version to the library constituted a requirement for fulfilling degree requirements.

91 *Id.* at 949.

92 *Id.*

93 *Id.* at 951. The court acknowledged that faculty have academic freedom and autonomy to make decisions regarding teaching, but it found the *Hazelwood* case as the controlling framework to evaluate questions of curricular speech. According to the court, the *Hazelwood* framework, unlike an academic freedom justification, "does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them." *Id.* at 952.

94 *Id.*

95 *Id.* at 957 (Reinhardt, J., concurring in part and dissenting in part).

speech rights of high school youths do not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish.<sup>96</sup> Instead, standards regulating the limited or designated public forum or associated with intermediate scrutiny represented better alternatives to evaluate restrictions on college students' curricular-based speech.<sup>97</sup> Accordingly, while agreeing with the decision to remand the case to examine the state constitutional issues, the judge rejected the *Hazelwood* framework as the appropriate analysis for higher education contexts.

Despite continued periodic questioning of reliance on *Hazelwood* to evaluate student speech claims in higher education, as demonstrated by several lower federal court rulings, the decision continues to play a prominent role in higher education cases with a curricular dimension.<sup>98</sup> In *O'Neal v. Falcon*,<sup>99</sup> for instance, a community college student claimed that an instructor violated her First Amendment rights in refusing to let her select abortion as topic for an in-class speech assignment.<sup>100</sup> The court, looking to *Brown* and *Axson-Flynn*, determined that the "*Hazelwood* framework" should guide its analysis.<sup>101</sup> The court refused to apply the *Tinker* standards because the student's speech took place as part of a course assignment.<sup>102</sup> The court stated that *Hazelwood* did not require it to balance the student's speech rights against the college's educational purpose in disallowing the speech; instead, the inquiry focused on whether a valid educational purpose motivated the institution's actions.<sup>103</sup> Additionally, the allowance of other controversial topics for discussion in class assignments did not invalidate the school's ability to prohibit the speech topic.

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96 *Id.* Another concurrence argued that the student's act of deceit in hiding the "Disacknowledgements" section from the committee should bar the student from being able to assert a cognizable First Amendment claim. *Id.* at 956 (Ferguson, J., concurring).

97 *Id.* at 963-64.

98 Courts have not limited the decision's reach to cases involving students. In *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991), for example, the U.S. Court of Appeals for the Eleventh Circuit looked to *Hazelwood* in rejecting a faculty member's First Amendment arguments.

99 668 F. Supp. 2d 979 (W.D. Tex. 2009). The school also obtained a temporary restraining order against the student for potentially threatening language communicated by the student in legal documents related to the case. *Id.* at 985 n.2.

100 *Id.* at 982.

101 *Id.* at 985.

102 *Id.* at 987.

103 *Id.* at 986 (citing *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008)).

A federal district court case, *Heenan v. Rhodes*,<sup>104</sup> which involved a nursing student, provides an instructive example of a court struggling with application of the *Hazelwood* standards to student speech failing to qualify as school-sponsored. In *Heenan*, a student claimed that her dismissal from a nursing program occurred because she challenged the academic program's disciplinary policy, which was based on a points system.<sup>105</sup> In the case, the court issued an amended opinion to clarify several problematic legal stances it had seemingly taken in regards to the legal standards appropriate to evaluate the student's speech claims.

In its initial opinion, the court declined to apply the *Tinker* standards, even though the student's speech did not deal with satisfactory completion of course requirements, and at least some of the speech referenced by the court clearly took place outside of a class environment.<sup>106</sup> According to the opinion, the *Tinker* standards only should apply to politically based speech.<sup>107</sup> In contrast, stated the court, the nursing student's speech was non-political in nature and dealt only with complaints aimed at the school's internal grading and disciplinary policies.<sup>108</sup>

As such, determined the court in its first opinion, the *Hazelwood* standards governed the student's speech claims rather than those from *Tinker*.<sup>109</sup> In making the distinction between student speech that reflected a political versus non-political message, the court acknowledged that the case did not involve school-sponsored speech.<sup>110</sup> But, looking heavily to *Brown v. Li*, the court stated that *Hazelwood* "has been adopted by other courts faced with the question of what protections are due student expression that touches upon internal school matters of pedagogical and curricular concern."<sup>111</sup> That is, the court appeared to suggest that even in relation to any of the student's speech taking place outside of an instructional context, the *Hazelwood* standards should apply merely because the content of the speech ad-

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104 757 F. Supp. 2d 1229 (M.D. Ala. 2010). The student moved to alter or amend the judgment, which was denied by a later court. *Heenan v. Rhodes*, 761 F. Supp. 2d 1318, 1320 (M.D. Ala. 2011).

105 *Heenan*, 757 F. Supp. 2d at 1235.

106 *Id.* at 1236–38.

107 *Id.* at 1237.

108 The court looked to the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007), to support the position that the nature of the speech at issue in *Tinker* raised special First Amendment concerns.

109 *Heenan*, 747 F. Supp. 2d at 1237–38.

110 *Id.* at 1237.

111 *Id.* at 1238.

dressed pedagogical and curricular issues related to the nursing program.<sup>112</sup>

In a second opinion,<sup>113</sup> while refusing to rescind the grant of summary judgment against the student, the court offered some important clarifications. The court emphasized that the student's dismissal was proper because it was based on documented poor academic performance.<sup>114</sup> The amended opinion also stated that *Hazelwood* did not sanction institutional authority to take punitive action against a student for out-of-class speech that was not made to instructors.<sup>115</sup> The court discussed how *Hazelwood* could extend to comments made concerning the nursing standards "expressed in nurse-training related circumstances" as well as perhaps made to instructors outside of an instructional setting.<sup>116</sup> Notably, even in its revised opinion, the court indicated that the *Hazelwood* standards could still apply to a student's independent, in-class speech critical of instructional methods or assessment criteria simply based on the fact that it took place in class.<sup>117</sup> In doing so, the opinion failed to offer any meaningful distinctions regarding when a student should be able to, for instance, disagree with grading or pedagogical practices, including during class, without foregoing First Amendment protection.

The *Heenan* decision reveals a court struggling with the extent to which the *Hazelwood* standards should apply to college students' independent speech, either taking place in an instructional setting or occurring outside of an instructional context, but potentially implicating curricular matters. In attempting to remove some of the student's speech from the purview of *Tinker*, the court failed to announce a very convincing legal rationale as to why the decision only applied to independent student speech of a political nature.<sup>118</sup> The amended opinion in *Heenan*, despite offering some clarification, also

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112 The court found that the college did not violate Heenan's First Amendment rights as the complaints did not rise to the level of protected speech. The court rationalized that in "fulfillment of their duties as educators, the defendants [were] tasked with inculcating the necessary knowledge, values, and experience, so that their nursing students can become valued and reliable members of the medical community upon graduation." *Id.* at 1239. While the decision thus drew on concepts from cases articulating deferential treatment to colleges and their faculties when evaluating academic performance, the court relied on *Hazelwood* as the legal standard to determine that the nursing program's point system was "clearly 'reasonably related to legitimate pedagogical concerns.'" *Id.*

113 *Heenan v. Rhodes*, 761 F. Supp. 2d 1318 (M.D. Ala. 2011).

114 *Id.* at 1320–21.

115 *Id.* at 1321.

116 *Id.*

117 *Id.*

118 *Heenan v. Rhodes*, 757 F. Supp. 2d 1229, 1236–38 (M.D. Ala. 2010).

failed to articulate a sound basis for when independent student speech having some potential curricular connection should be subject to faculty authority.<sup>119</sup> In sum, the case illustrates problems with wholesale importation of the *Hazelwood* standards to college students' speech, especially when the speech at issue clearly falls outside the conceptual umbrella of being school-sponsored in nature.<sup>120</sup>

*Hazelwood* appears to provide a reasonable legal framework appropriate for higher education when dealing most directly with student speech pursuant to fulfilling curricular requirements, such as in *Axson-Flynn*.<sup>121</sup> In such instances, institutional authority over the student's speech is grounded in faculty expertise to make curricular and pedagogical choices clearly tied to student performance and to the overall learning environment for other students. A case like *Heenan*, in contrast, shows the *Hazelwood* school-sponsored speech concept being stretched too thin. Similarly, issues confronted in several of the online speech cases, discussed in the next Part, have also revealed the need to move away from or modify the *Hazelwood* standards in relation to independent student speech occurring in an instructional context or raising curricular concerns.

### C. Student Independent and Curricular Speech Distinctions

The line of cases analyzed between Subparts A and B raises three significant points in the application of student speech outside and inside of instructional contexts.

First, these cases illustrate that the reasonableness standard operates based on different assumptions. Student speech outside of an instructional setting is afforded greater degrees of freedom with reasonableness interpreted more narrowly, whereas courts have viewed reasonableness more broadly in regards to student speech within the curricular learning space. The *Heenan* case illustrates such a definitional stretch of the reasonable application in curricular matters, one well beyond the seeming confines of *Hazelwood*.

Second, these cases illustrate that the Supreme Court has established quite clearly that forum is not a location-based criterion. The Court has taken the forum analysis to include spatial forums in terms

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119 See *id.* at 1236–38; *Heenan*, 761 F. Supp. 2d at 1320–21.

120 The conflicts regarding the applicable standards present quite evidently the arguments pertaining to the over-reliance on K–12 cases—particularly *Hazelwood*, *Tinker*, and the cases addressing faculty authority over curricular matters, such as *Horowitz* and *Ewing*. See discussions *supra* Parts I.A and I.C.

121 *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1287 (10th Cir. 2004).

of access to what Professor Zick would characterize as an “expressive topography.”<sup>122</sup> Thus, physical location need not serve as such a strict marker to address what falls within the collegiate learning space. Because online speech adds new spatial challenges, the notion of curricular learning space may require re-conceptualization of location in terms of where the speech was initiated (i.e., origination of the posting), mediated (i.e., the facilitated transmission), and touched (i.e., the impacted campus area).

Third, student speech cases—e.g., *Widmar*, *Rosenberger*, *Southworth*, and *CLS*—establish that public higher education institutions must *not* favor or discriminate against particular student views in the regulation of forums that are open to students. This analysis is more restrictive regarding viewpoint neutrality than when courts typically employ the *Hazelwood* framework.<sup>123</sup> That is, viewpoint neutrality for students’ *independent* speech under the limited public forum standards followed in *Widmar*, *Rosenberger*, *Southworth*, and *CLS* examine if a public college’s actions foreclose access, while viewpoint neutrality in relation to students’ *curricular-based* speech grants public colleges the authority to foreclose access in a uniformly viewpoint neutral manner.

### III. STUDENT ONLINE SPEECH CASES IN AN INSTRUCTIONAL SETTING OR WITH A CURRICULAR CONNECTION

A review of legal decisions involving online student speech shows that courts have tended to follow the general distinctions discussed in Part II between speech taking place in curricular contexts versus in non-curricular settings. At the same time, the cases demonstrate that no definitive framework reflects the appropriate legal analysis for independent student speech taking place outside of an instructional setting but involving some type of curricular connection, such as the enforcement of professionalism standards.<sup>124</sup> A review of these cases

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<sup>122</sup> See Zick, *Space, Place, and Speech*, *supra* note 37, at 125. Thus, the cases are consistent with the view that greater distinctions are needed and that the expressive topography presents a viable analysis to delineate the “space” among these different speech settings.

<sup>123</sup> Even within these cases, there is a slight distinction. When a case involves the exclusion of certain classes of speakers or topics from the limited public forum, the restriction must be reasonable and viewpoint neutral. By contrast, if the regulation excluded certain classes of speakers or expressive matters of individuals or groups who achieved access to the limited public forum, the analysis would have followed a strict scrutiny review. That is, the restriction must be content neutral and narrowly tailored to serve a compelling government interest. *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2985–86 (2010).

<sup>124</sup> See, e.g., *Yoder v. Univ. of Louisville*, 2012 WL 1078819, No. 3:09-CV-0025, at \*7 (W.D. Ky. Mar. 30, 2012) (finding that the nursing program had a legitimate pedagogical purpose



serves to magnify the shortcomings of over-reliance on legal standards derived from cases at the elementary and secondary level to higher education student speech claims. Additionally, several decisions involving independent student speech claims in the context of practicums or internships show courts turning to the public employee speech cases in defining student speech rights.<sup>125</sup> Just as over-reliance on legal decisions involving elementary and secondary students is misplaced in defining student speech rights in a higher education setting,<sup>126</sup> looking to the public employee speech standards also often strikes a poor legal balance between college students' speech rights and faculty authority.

A. *Online Speech Cases in an Instructional Setting*

Several online speech cases have dealt with class-related expression of college students, where courts followed the pattern established in previous decisions involving physical classrooms of deference to academic authority and reliance on the *Hazelwood* standards. One such case, *Harrell v. Southern Oregon University*,<sup>127</sup> dealt with a student, Peter Harrell, challenging action taken against him for online postings made in two classes taught online.<sup>128</sup> The federal district court, adopting the report and recommendations of a magistrate judge, held that the institution acted appropriately in sanctioning the student.<sup>129</sup> University officials disciplined Harrell for making online postings in two courses that were determined to be disrespectful to students and to instructors.<sup>130</sup> The student's postings in the first class resulted in a formal censure, and his problematic online postings in the second course resulted in probation.<sup>131</sup> Illustrative of the type of comments made, in one class posting Harrell stated to another student that “clearly you haven't bothered to read the rest of the board

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to hold a student responsible for posting on a social media site about a patient's birthing process); *Byrnes v. Johnson Cnty. Cmty. Coll.*, No. 10-2690-EFM-DJW, 2011 WL 166715, at \*2 (D. Kan. 2011) (using none of the traditional frameworks in student speech cases to resolve this case, but recognizing less deference to the college for the discipline of nursing students for having posted photos examining a placenta specimen); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 524 (Minn. 2012) (finding that the violation of academic program rules was sufficient to discipline a student).

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

126 See discussion *supra* Part I.A.

127 *Harrell v. S. Or. Univ.*, No. 08-3037-CL, 2009 WL 3562732 (D. Or. Oct. 30, 2009).

128 *Id.* at \*2–3.

129 *Id.* at \*2.

130 *Id.* at \*2–3.

131 *Id.* at \*3.

[postings] on this topic.”<sup>132</sup> For this and other instances of speech deemed disrespectful to other students, Harrell was disciplined under the university’s student conduct standards, which contained a provision that prohibited students from disrupting, obstructing, or interfering with “‘educational activities.’”<sup>133</sup>

In reviewing the student’s claims, the magistrate judge’s report and recommendations discussed both *Tinker* and *Hazelwood* in relation to student speech rights, with the court noting that the latter decision sanctioned the regulation of student speech considered school-sponsored.<sup>134</sup> Looking to the *Hazelwood* standards, the court rejected Harrell’s argument that the school’s policy failed on vagueness or overbreadth grounds and also rejected the student’s challenge to the policy as applied to him.<sup>135</sup> In making these arguments, Harrell relied on previous decisions where courts had struck down general anti-harassment rules adopted by colleges or universities that had applied to speech or activity outside of the classroom.<sup>136</sup> The magistrate judge, rejecting these efforts, concluded that the school’s policy permissibly sought to regulate conduct that interfered with or obstructed educational activities, rather than seeking to target students on the basis of particular viewpoints.<sup>137</sup> In relation to the as applied challenge, the magistrate report and recommendations stated,

Plaintiff argues that because his objectionable speech is connected in some way, even tangentially, to his personal political convictions, he is entitled to express himself in any way he chooses. It is possible, however, for Plaintiff to express his political views without insulting other students. . . . His comments did not express his political opinions, as he asserts. The comments belittle other students’ work and their contribution to the discussion.<sup>138</sup>

While the federal district court acknowledged that the institution’s policy could have been clearer, it supported the magistrate judge’s determination that college officials acted well within their authority to restrict Harrell’s speech. According to the court, it appeared that he had “‘behaved in a manner that would be tolerated in few classrooms. Harrell perceives class discussion as a form of ‘combat’ and he conducts himself accordingly.”<sup>139</sup> Discussing the special

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132 *Id.*

133 *Id.* at \*3 n.1.

134 *Id.* at \*5–6.

135 *Id.* at \*6–9.

136 *Id.* at \*8.

137 *Id.*

138 *Id.* at \*9.

139 *Id.* at \*1.

institutional prerogatives existing in relation to the class environment, the federal district court stated

A classroom is not a public forum where each student has an absolute constitutional right to say whatever he pleases, when he pleases, however he pleases, for as long and as often as he pleases. This is not talk radio. Most of the precedents Harrell cites involve speech occurring on campus or otherwise having some connection to a school, but not during actual classes.<sup>140</sup>

Another case, *Feine v. Parkland College*<sup>141</sup> resulted in a similar outcome to *Harrell*, with the court in fact looking to that decision for support.<sup>142</sup> The case dealt with a student, Feine, who made several online comments that a course instructor determined to be inappropriate and warned the student to modify his future online postings directed at other students enrolled in the course.<sup>143</sup> The instructor's syllabus contained language that warned students against making "inappropriate postings (for example: personal attacks, prejudiced language, incoherent ramblings, proselytizing, etc.)."<sup>144</sup> In addition to warnings from the instructor, a student who was the target of some of Feine's online comments initiated a harassment complaint against him that alleged gender and disability discrimination.<sup>145</sup> Based on Feine's online posts, the professor deducted points from an assignment and also warned him that future incidents would result in disciplinary actions.<sup>146</sup> Feine initiated legal action after he unsuccessfully lodged an administrative complaint against the instructor, claiming deprivation of his First Amendment speech rights.<sup>147</sup>

In considering the student's claims, as in *Harrell*, the court determined that the institution did not discipline the student for the content of his speech but, rather, for the student's "manner of writing and his personal attacks on the postings of another student."<sup>148</sup> While pointing out that views and content are generally protected by the First Amendment, the court emphasized that the actions taken against Feine were based on legitimate pedagogical concerns related to his "*manner of expression* and not the content of his messages or his

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140 *Id.*

141 *Feine v. Parkland Coll. Bd. of Trs.*, No. 09-2246, 2010 WL 1524201 (C.D. Ill. Feb. 25, 2010).

142 *Id.* at \*6. The opinion does not provide specific details or examples regarding the nature of the student's online comments.

143 *Id.* at \*1-2.

144 *Id.* at \*1.

145 *Id.* at \*3.

146 *Id.* at \*2.

147 *Id.* at \*3.

148 *Id.* at \*6.

viewpoints regarding the subject matter of the course assignment.”<sup>149</sup> As such, stated the court, the student could not rely on the First Amendment to protect his abusive treatment of other students.<sup>150</sup> The court, directly addressing the online nature of the speech at issue, stated that precedent in the Seventh Circuit had established that classrooms are not public forums.<sup>151</sup> According to the opinion, “[u]nder the circumstances alleged here, the fact that classroom discussion was conducted via an electronic discussion board and email messages does not change the essential nonpublic nature of the classroom.”<sup>152</sup>

Cases such as *Harrell* and *Feine* indicate that courts are likely to show little hesitation in extending faculty authority recognized over student speech taking place in a physical classroom to the context of online course environments. Just as with a physical classroom, courts are likely to give considerable latitude to institutions in imposing viewpoint neutral regulations to online settings when that speech impinges on the learning environment of other students. As the next Subpart shows, more difficult legal questions have arisen in relation to online student speech not arising directly in a class context, but still potentially implicating a sufficient curricular or instructional concern to permit regulation of the student’s speech on academic grounds.

#### B. *Cases Outside of an Instructional Setting but Implicating Curricular Concerns*

In several cases, courts have considered institutional authority over student online speech occurring outside of a formal instructional context but raising curricular concerns, such as the application of professionalism standards in internships and practicums. One of these cases, *Yoder v. University of Louisville*,<sup>153</sup> involved a student, Nina

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (citing *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001)). The opinion also discussed *Pichelmann v. Madsen*, 31 F. App’x 322, 327 (7th Cir. 2002), where the court determined that a university e-mail system did not constitute an open forum.

<sup>152</sup> *Feine*, 2010 WL 1524201, at \*7.

<sup>153</sup> *Yoder v. Univ. of Louisville*, No. 3:09-CV-205-S, 2009 WL 2406235 (W.D. Ky. Aug. 3, 2009). On remand, the district court declined to rule that Yoder’s action was moot because she had graduated from the university’s nursing program during the litigation. *Yoder v. Univ. of Louisville*, No. 3:09CV-205-S, 2011 WL 5434279 (W.D. Ky. Nov. 9, 2011). Thus, this case may still result in a review of Yoder’s claims on First Amendment and due process grounds.

Yoder, who was dismissed from a nursing program at a public university based on online postings appearing on her personal page on the social networking site Myspace.<sup>154</sup> Yoder made online comments about an obstetric patient that she observed during the birthing process as part of fulfilling the requirements of a child-birthing class.<sup>155</sup> She wrote, for instance, “*Beautiful* pregnant women are beautiful, or more like, only slightly distorted with the belly . . . . Otherwise, pregnancy makes an ok-looking woman ugly, and an ugly woman— fucking horrifying.”<sup>156</sup> Another comment stated, “At last my girl gave one big push, and immediately out came a wrinkly bluish creature, all Picasso-like and weird, ugly as hell, covered in god knows what, screeching and waving its tentacles in the air.”<sup>157</sup>

After the course’s instructor learned of the posting from another student, she determined that Yoder had violated the school of nursing’s honor code, the course’s confidentiality agreement, the terms of the consent form signed by the mother, and the general standards of the nursing profession.<sup>158</sup> The honor code provided, in part, that students agreed “to adhere to the highest standards of honesty, integrity, accountability, confidentiality, and professionalism, in all written work, spoken words, actions and interactions with patients, families, peers and faculty.”<sup>159</sup> The confidentiality agreement provided that students would “consider confidential any and all information entrusted” to them during clinical rotations, with such information encompassing “medical, financial, personal, and employment related information.”<sup>160</sup> Yoder also agreed to respect the terms of the consent form signed by the patient, which stipulated that “[a]ny information shared with the named nursing student will be used only for written/oral assignments. . . . I understand that information regarding my pregnancy and my health care will be presented in written or oral form to the student’s instructor only.”<sup>161</sup>

The instructor brought the blog comments to the attention of administrators, and Yoder was dismissed from the nursing program after she admitted to making the blog post.<sup>162</sup> Yoder challenged her

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154 *Yoder*, 2009 WL 2406235, at \*1.

155 *Id.*

156 *Id.* (noting that the postings did not offer identifying information regarding the women observed by the student).

157 *Id.* at \*2.

158 *Id.* at \*3.

159 *Id.*

160 *Id.* Yoder also agreed to respect the terms of the consent form signed by the patient.

161 *Id.*

162 *Id.* at \*4.

dismissal on First Amendment and due process grounds.<sup>163</sup> The district court initially ruled in Yoder's favor, but on contractual grounds instead of on the basis of the First Amendment.<sup>164</sup> Following remand from the court of appeals on the basis that the contractual issue had not been properly raised for consideration, the federal district court upheld the nursing school's actions.<sup>165</sup> The court determined that requiring Yoder to adhere to the terms of the confidentiality agreement served a legitimate pedagogical purpose.<sup>166</sup> According to the court,

[I]n exchange for the opportunity to follow the birth mother, Yoder agreed not to publicly disclose any information about the birth-mother's pregnancy or health care. And . . . [the school of nursing] had a legitimate pedagogical purpose in requiring that its students agree to that condition with the patients they were to follow.<sup>167</sup>

Yoder also attempted to argue that other students had not been disciplined in a similar fashion for their "coarse" or "unprofessional" online speech.<sup>168</sup> The court accepted the explanation of program officials that these students had not been subject to discipline because their comments did not refer to specific patients.<sup>169</sup> In its decision, the court discussed that deference to academic judgment is "particularly acute in the case of schools in the health care field."<sup>170</sup> The court also held that the dismissal of Yoder complied with due process requirements, determining that she was dismissed for academic reasons versus disciplinary ones.<sup>171</sup> As such, stated the court, the "fairly minimal" process provided to Yoder was adequate.<sup>172</sup>

While vacated for improperly considering the student's claims on contractual grounds,<sup>173</sup> the initial district court opinion in *Yoder* pre-

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163 *Id.* at \*1, \*4.

164 *Id.* at \*5.

165 *Yoder v. Univ. of Louisville*, 417 F. App'x. 529, 529 (6th Cir. 2011) (vacating a previous order granting Yoder's motion for summary judgment); *Yoder v. Univ. of Louisville*, No. 3:09-CV-0025, 2012 WL 1078819 (W.D. Ky. Mar. 30, 2012) (denying Yoder's motion for summary judgment). In the most recent turn in this litigation, the U.S. Court of Appeals for the Sixth Circuit held that university officials named in the lawsuit were entitled to qualified immunity from liability, as any First Amendment right asserted by Yoder in relation to her blog posts was not clearly established. *Yoder v. Univ. of Louisville*, No. 12-5354, 2013 WL 1976515, at \*6-8 (6th Cir. May 15, 2013).

166 *Yoder*, 2012 WL 1078819, at \*6-7.

167 *Id.* at \*8.

168 *Id.*

169 *Id.* at \*7-8.

170 *Id.* at \*7.

171 *Id.* at \*10.

172 *Id.* at \*9.

173 *Yoder v. Univ. of Louisville*, 417 F. App'x 529, 530 (6th Cir. 2011).

sents an interesting contrast with the district court's later opinion, highlighting the inconsistencies that often surround the student speech cases. Namely, in the initial opinion, the district court gave much less deference to the academic authority of the nursing program faculty regarding the interpretation of the professionalism standards at issue. The court stated in the first opinion that the applicable standards governing the student's conduct and speech activities referred to the disclosure of identifying information and not to the disclosure of details involving specific, but unidentified (i.e., anonymous) patients.<sup>174</sup>

The court in this initial opinion also stated that professionalism was not adequately defined in the nursing school's rules and regulations.<sup>175</sup> The university argued that beyond any confidentiality issues, the posting violated professionalism standards because of its "vulgar and unprofessional manner."<sup>176</sup> The court drew a distinction between communications in the context of Yoder carrying out her responsibilities as a nursing student versus her engaging in expression outside of a professional context:

The court does not disagree with Defendants that the Blog Post is vulgar. It is generally distasteful and, in parts, objectively offensive. However, the Blog Post is not "unprofessional." Rather, it is entirely *nonprofessional*, and therefore it falls outside the purview of the Honor Code. Yoder did not post the Blog "as a representative of the School of Nursing." Moreover, the Blog Post is not "written work, spoken words, actions [or] interactions with patients, families, peers [or] faculty." It is simply a crude attempt by Yoder to be humorous in describing an anonymous prolonged labor and delivery. It was written without any clearly intended audience and posted on Yoder's own personal MySpace page. That the Blog Post was technically accessible to the public does not fundamentally alter the nature of the writing.<sup>177</sup>

The opinion also stated that if the school of nursing meant to include the type of information contained in Yoder's posting, then it bore a responsibility to provide "fair notice" to her by specifying the professionalism obligations imposed on nursing students.<sup>178</sup>

While not basing its decision on First Amendment grounds, the court in this first *Yoder* opinion made an important distinction between a student speaking in a professional setting—such as a clinical

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174 *Yoder*, 2012 WL 1078819, at \*6 ("In sum, the Blog Post does not contain information that could possibly lead to the discovery of the birth mother's identity.").

175 *Id.*

176 *Id.*

177 *Id.* at \*7.

178 *Id.*

rotation or formal instructional setting—and a student speaking in a non-curricular context.

The contrasting district court opinions in *Yoder* demonstrate how the emergence of online speech has left courts struggling with the appropriate legal standards that should govern student speech and expression that take place outside of a formal instructional setting, but still potentially manifest some type of appropriate curricular connection for institutions to regulate the speech. In another case that raises such concerns with online speech, *Snyder v. Millersville University*,<sup>179</sup> a federal district court turned to the legal standards governing public employee speech rights to determine the extent of a student's speech rights. *Snyder* dealt with the removal of a university student from her student teaching placement by the cooperating school due, in part, to online postings that she made.<sup>180</sup> Following her removal from the student teaching placement, the university could not award Stacey Snyder an education degree with teacher certification based on Pennsylvania requirements for the awarding of such degrees.<sup>181</sup> She sued the university, alleging deprivation of her First and Fourteenth Amendment rights.<sup>182</sup>

As part of the preparation for her student teaching experience, university officials provided Snyder with a guide informing her that she was expected to adhere to the same professionalism standards as full-time teachers at the placement school.<sup>183</sup> Student teachers were warned not to “friend” students or teachers on personal Web pages, and were informed of a past instance concerning a student teacher who was dismissed from a practicum for such activity.<sup>184</sup> Snyder, disregarding these admonishments, discussed her Myspace page with students at the placement school on several occasions.<sup>185</sup>

In one incident, Snyder confronted a student at her placement school who had recognized and communicated with a friend of hers, ostensibly as a result of viewing content on Snyder's Myspace page.<sup>186</sup> She discussed this incident on her Myspace page.<sup>187</sup> In this same posting, Snyder appeared to refer to a school official as the reason for not

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179 *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

180 *Id.* \*5–8. The student's removal from the placement meant that she was unable to obtain an education degree with teacher certification.

181 *Yoder*, 2012 WL 1078819, at \*2, \*8.

182 *Snyder*, 2008 WL 5093140, at \*1.

183 *Id.* at \*3.

184 *Id.* at \*4.

185 *Id.* at \*5.

186 *Id.*

187 *Id.*



wanting to apply for a permanent position at the placement school.<sup>188</sup> Snyder also had a picture on her Myspace page that showed her wearing a pirate hat and holding a plastic cup with the caption “drunken pirate.”<sup>189</sup> In part because of the content of her MySpace postings, school officials disallowed Snyder from continuing her placement.<sup>190</sup>

In analyzing Snyder’s claims, the court stated that a threshold issue involved whether she should be viewed as a student or as an employee for purposes of her First Amendment arguments.<sup>191</sup> Influenced by the fact that the student did not attend any classes at the university during the period of the placement and the professional nature of student teaching assignments, the court determined that Snyder “was more a teacher than a student.”<sup>192</sup> This meant, according to the court, that the student’s speech claims were subject to evaluation under First Amendment rules governing public employees’ speech rights.<sup>193</sup> Applying these standards, the court stated that her speech would be eligible to receive protection if it had addressed a matter of public concern, but stated that “[p]laintiff conceded at trial . . . that her posting raised only personal matters.”<sup>194</sup> Accordingly, the court rejected Snyder’s arguments that she should be eligible for the First Amendment protections that typically attach to student speech.

Another case raising issues similar to those at stake in *Yoder* and *Snyder* is *Tatro v. University of Minnesota*.<sup>195</sup> As with the two district court opinions in *Yoder*, the different analytical frameworks employed by the Minnesota Court of Appeals<sup>196</sup> and the Minnesota Supreme Court<sup>197</sup> illustrate how courts are wrestling with the proper legal standards to apply to student online speech. While the case involved online speech raising both curricular concerns and the issue of threatening speech, we focus on the curricular aspects at issue in the litigation.

The case involved a mortuary science student, Amanda Tatro, who made various postings on her Facebook page, such as assigning a

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188 *Id.*

189 *Id.* at \*6.

190 *Id.*

191 *Id.* at \*14.

192 *Id.* at \*15.

193 *Id.* at \*14–15.

194 *Id.* at \*16.

195 *Tatro v. Univ. of Minn.*, 800 N.W.2d 811 (Minn. Ct. App. 2011), *aff'd*, 816 N.W.2d 509 (Minn. 2012).

196 *Tatro*, 800 N.W.2d at 811.

197 *Tatro*, 816 N.W.2d at 509.

nickname to a cadaver used in classroom assignments.<sup>198</sup> She also posted, for instance, about wanting to use a mortuary device to stab someone in the throat, stating, “Hmm . . . perhaps I will spend the evening updating my ‘Death List # 5’ and making friends with the crematory guy. I do know the code . . . .”<sup>199</sup> Upon learning about the postings, university officials—in addition to asking the police to investigate<sup>200</sup>—charged the student with (1) violating the student conduct code by engaging in harassing or assaultive conduct and (2) violating rules governing student behavior in the mortuary science program.<sup>201</sup> A hearing panel determined that the student had violated student conduct rules as well as professionalism standards for mortuary science students.<sup>202</sup> It imposed sanctions on Tatro that included receiving a failing grade for the course and a requirement that she enroll in a clinical ethics course.<sup>203</sup>

In relation to the issue of professionalism standards, the Minnesota Court of Appeals considered several grounds on which the university took action against Tatro. The university concluded that Tatro violated rules in the mortuary science student conduct code related to “carry[ing] out all aspects of the funeral service in a competent and respectful manner” and treating deceased persons with “proper care and dignity during the transfer from the place of death and subsequent transportation of the remains.”<sup>204</sup> The court agreed with Tatro that these provisions dealt with funeral services and, thus, could not be applied to her Facebook postings.<sup>205</sup>

The court held that Tatro’s Facebook comments could fall under the rule regulating conversational language related to discussion of cadaver dissection.<sup>206</sup> Tatro also argued that the university improperly found that she had “violated rules outlined in her signed anatomy-bequest-program human-anatomy access-orientation disclosure form.”<sup>207</sup> She contended that the form did not contain any list of rules, but the court stated that the form demonstrated recognition from Tatro that she “understood the policies and the overall responsibilities that the privilege of dissecting a human body carries with

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198 *Tatro*, 800 N.W.2d at 814.

199 *Id.* at 815.

200 *Id.* at 814. The university police determined that no crime had been committed. *Id.*

201 *Id.* at 814–15.

202 *Id.* at 815.

203 *Id.*

204 *Id.* at 819.

205 *Id.*

206 *Id.* at 818–19.

207 *Id.* at 819.

it.”<sup>208</sup> “From the disclosure form,” discussed the court, “it is evident that certain policies and rules regarding treating donors with respect and dignity were explained during the orientation.”<sup>209</sup> As such, the court of appeals determined that it was appropriate for the university to reference the form in deciding that Tatro “violated the overall policy requirement of treating donors with respect and dignity.”<sup>210</sup>

The Minnesota Supreme Court upheld the ruling that the university could discipline Tatro on academic grounds, but it was careful to articulate limits on the extent of institutional authority in this area.<sup>211</sup> The court determined that neither *Tinker/Healy* nor *Hazelwood* provided the appropriate legal frameworks to evaluate Tatro’s speech claims dealing with whether she violated curricular standards.<sup>212</sup> In considering the academic rationale to discipline Tatro, the court considered two justifications advanced by the university: (1) to educate students regarding applicable professionalism and ethical standards; and (2) to help maintain the viability of the anatomy bequest program by ensuring the respectful treatment of donated remains.<sup>213</sup>

Regarding the issue of academic authority as a basis to sanction Tatro, the opinion referenced an amicus brief from the American Board of Funeral Service Education. That brief stated that the program standards were consistent with the organization’s accreditation standards.<sup>214</sup> The court viewed the professional standards as equivalent to academic standards, which is a basis to grant universities deference in decision-making absent arbitrary decision-making. The court concluded that Tatro’s social media posting did indeed violate academic program rules pertaining to the treatment of human cadavers.<sup>215</sup>

In relation to the *Tinker/Healy* standards, the court rejected Tatro’s arguments that her postings were beyond the purview of the university’s academic authority.<sup>216</sup> She had urged the court to accept the position that “public university students are entitled to the same free speech rights as members of the general public with regard to Facebook posts.”<sup>217</sup> Implicitly, the argument she raised contended

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208 *Id.* (internal quotation omitted).

209 *Id.*

210 *Id.*

211 *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 523 (Minn. 2012).

212 *Id.* at 518–21.

213 *Id.* at 521–24.

214 *Id.* at 516–17.

215 *Id.* at 524.

216 *Id.* at 517.

217 *Id.*

that her online postings reflected off-campus and non-curricular matters. The court acknowledged “the concerns expressed by Tatro and supporting amici that adoption of a broad rule would allow a public university to regulate a student’s personal expression at any time, at any place, for any claimed curriculum-based reason.”<sup>218</sup> Despite these concerns, the Minnesota Supreme Court noted that both parties agreed that a university has authority to regulate speech when such speech violates professional conduct standards. Thus, Tatro’s argument failed.

The university asserted the *Hazelwood* standard as the appropriate framework, stating that the policy was reasonably related to a legitimate pedagogical objective. The court disagreed about this framework too. In rejecting *Hazelwood* as providing the appropriate standard, the court stated that the decision’s standards apply to school-sponsored speech and “addresses the question whether the First Amendment requires a school affirmatively to promote particular student speech.”<sup>219</sup> The court stated that conceiving of Tatro’s Facebook posts as somehow school-sponsored would provide colleges with “wide-ranging authority to constrain offensive or controversial Internet activity by requiring only that a school’s actions be ‘reasonably related’ to ‘legitimate pedagogical concerns.’”<sup>220</sup> It noted that high school decisions had interpreted the concept of legitimate pedagogical concern broadly, permitting schools to address concerns related to such issues as courtesy and respect for authority.<sup>221</sup>

The court also declined to apply the substantial disruption standard from *Tinker* as an appropriate basis to ground the university’s academic authority over curricular issues, even as it noted that this had been applied in other decisions dealing with online student speech, including several ones involving secondary students.<sup>222</sup> As the court noted, the *Tinker* opinion had stated that speech causing substantial disruption could be subject to educators’ authority.<sup>223</sup> But, in relation to the university sanctioning Tatro on academic grounds, the court pointed out that the issue was not one of disruption to the campus or to the mortuary sciences program.<sup>224</sup> Instead, the university took ac-

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218 *Id.* at 521.

219 *Id.* at 518 (internal quotation omitted).

220 *Id.*

221 *Id.*

222 *Id.* at 518–21.

223 *Id.* at 519.

224 *Id.* at 520.

tion against Tatro based on violation of professional norms expected of students in the mortuary sciences program.<sup>225</sup>

Looking to several recent cases dealing with the enforcement of professionalism standards in relation to graduate students in counselor education programs,<sup>226</sup> the Minnesota Supreme Court focused on the enforcement of legitimately based professionalism standards as an appropriate basis for institutional authority to extend to student off-campus speech, such as that engaged in by Tatro. The court stated, “[W]e hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.”<sup>227</sup>

In reviewing the standards imposed on Tatro, the Minnesota Supreme Court discussed that there existed clearly established professionalism rules for those in the mortuary sciences dealing with respect for human cadavers.<sup>228</sup> The court then agreed that the specific rules imposed on Tatro comported with these standards and were narrowly tailored.<sup>229</sup> In making this determination, the court discussed the importance of showing appropriate deference to academic decisions dealing with curricular issues:

In this case, the University is not sanctioning Tatro for a private conversation, but for Facebook posts that could be viewed by thousands of Facebook users and for sharing the Facebook posts with the news media. Accordingly, we conclude that the University’s sanctions were grounded in narrowly tailored rules regulating widely disseminated Facebook posts.<sup>230</sup>

The court noted that the rules applied to Tatro permitted private conversational language about cadavers that was respectful.<sup>231</sup>

An interesting dimension to the court’s decision involved the emphasis that it placed on the public nature of Tatro’s comments. Thus, the court did not address the issue of a Facebook posting not available to large number of individuals. The public/private distinction appeared to represent a dimension responding to how online postings, especially on social media sites, can result in widespread distribution. The court failed to outline the parameters of this public/private divide. For instance, the court did not discuss the permis-

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225 *Id.* at 521.

226 *Id.* at 520–21.

227 *Id.* at 521.

228 *Id.* at 520.

229 *Id.* at 521.

230 *Id.* at 523.

231 *Id.*

sibility of sanctions if a student sent an e-mail or made a statement, and then another person posted these comments on a social media site.

In the evolving area of law related to higher education students' online speech, court decisions demonstrate varying approaches regarding the appropriate legal standards to apply. Some courts have sought to stretch the *Hazelwood* standards to accommodate issues raised by independent student speech involving potential curricular concerns, even when the speech occurs outside of a formal instructional context. As demonstrated in *Snyder*, for students enrolled in practicums and internships, the legal standards derived from the public employee speech cases have emerged as another option to define students' speech rights, one giving far-reaching authority to institutional officials over student speech in such settings. In contrast, when faced with circumstances not completely distinct from those at issue in *Snyder*, the two district court opinions in the *Yoder* case represent additional legal paths to dealing with independent student speech raising curricular concerns. The Minnesota Supreme Court's decision in *Tatro* represents yet another approach, one mindful of investing colleges with too much control over independent student speech.

Wading into this muddled situation, this Article now considers the issue of what legal standards courts should adopt when balancing legitimate institutional interests related to academic matters with the accompanying need to enforce rules suitable for higher education environments rather than ones predominately grounded in concerns at the elementary and secondary education levels.

#### IV. CONSTRUCTING THE CURRICULAR NEXUS TEST

In Part III, the focus was to further delineate the concept of speech taking place within or implicating the collegiate learning space. Now, in Part IV, the discussion shifts to presenting the Curricular Nexus Test. Cases involving higher education students' online speech help reveal the legal overreach that occurs as a result of wholesale application to higher education of legal standards developed in cases dealing with elementary and secondary students. Further, the need exists to refine the legal rules governing independent student speech in instructional settings or taking place outside of a formal class context but potentially implicating curricular concerns. Tackling these issues, Subpart A first considers independent student speech taking place in a curricular context and then turns to speech taking place outside of a formal instructional environment, but po-

tentially raising legitimate curricular considerations. Subpart B examines independent speech that takes place outside of the formal instructional setting but has a capacity to reach curricular concerns.

*A. Independent Student Speech in an Instructional Setting*

In relation to independent student speech taking place in a formal class context, the legitimate pedagogical standards from *Hazelwood* are not wholly unsuitable to apply to college student speech.<sup>232</sup> The important caveat that courts must recognize with these standards, however, relates to the need to clarify the concept of legitimate curricular or pedagogical interest in a higher education environment. While at times giving perfunctory acknowledgement to the need to tailor these standards to college student speech,<sup>233</sup> courts in fact often fail to clarify the specific types of criteria that they should take into account regarding the concept of legitimate pedagogical concerns justifying speech restrictions on college students.<sup>234</sup>

In *Hazelwood*, the Supreme Court put substantial emphasis on the fact that school officials had acted to protect younger students from exposure to certain views or information for which they might not be prepared to engage.<sup>235</sup> In contrast, the collegiate experience, rather than sheltering students from ideas or views from which they might not yet be mature enough to encounter, is focused on challenging students intellectually, including in relation to examining their own values and beliefs. Instead of seeking to shelter students from certain types of views or beliefs, colleges and universities fulfill a special niche in the “marketplace of ideas.”<sup>236</sup> Accordingly, the concept of pedagogical concern announced in *Hazelwood* should be adjusted to account for the Court’s declarations that colleges and universities are meant to be places of open inquiry and the exchange of ideas. In essence, the *Hazelwood* standards need to *grow up* if they are to constitute legal rules sensible to apply in higher education.<sup>237</sup>

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<sup>232</sup> See discussions *supra* Parts II.B and III.B.

<sup>233</sup> See discussion *supra* Part II.B, particularly with regard to the *Heenan* case.

<sup>234</sup> See discussion *supra* Part II.B.

<sup>235</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988).

<sup>236</sup> See discussions *supra* Parts I.C and II.B.

<sup>237</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (articulating that the “quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment” so courts should be weary of administrative actions of “suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“The college classroom with its surrounding environs is peculiarly ‘the marketplace of ideas.’”); *Keyishian v. Bd. of Regents of the Univ. of the State of*

The application of tort standards to the collegiate environment provides a good example of how courts have readily adopted the view that college students should be considered as adults.<sup>238</sup> Similarly, as discussed in Part I, courts have restricted institutional authority to regulate student speech in the co-curricular realm, even for speech that is offensive to members of the campus community. Yet, courts have too often balked at the need to acknowledge that higher education student speech in instructional settings also needs to be differentiated from elementary or secondary student speech. The suggestion that colleges have authority to restrict speech in a manner that signals high degrees of control in the learning process reflects an antithetical viewpoint about the individual development and responsibility of adulthood.<sup>239</sup>

Understandably, some of the resistance by courts to question faculty authority over independent student speech arising in a curricular context stems from the judicial deference to academic decisions established in cases such as *Ewing*<sup>240</sup> and *Horowitz*.<sup>241</sup> In fact, some opinions have even indicated that academic freedom concerns potentially should permit greater control of college students' speech in instructional contexts than of elementary and secondary students' speech;<sup>242</sup> but these opinions have failed to explain under what conditions specifically such circumstances arise.<sup>243</sup> The issue of faculty authority to enforce curricular standards and evaluate student competency at issue in cases such as *Ewing* and *Horowitz* should not be haphazardly comingled with the standards from *Hazelwood*. The fact that independent student speech has occurred in an instructional context or otherwise touched on curricular or pedagogical issues should not subject such college student speech in a perfunctory fashion to un-

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N.Y., 385 U.S. 589, 603 (1967) (recognizing academic freedom as a First Amendment interest because the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas" that occurs in higher education); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (valuing the role of colleges as an atmosphere of "speculation, experiment and creation," which is "essential to the quality of higher education").

238 *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("College students today are no longer minors; they are now regarded as adults in almost every phase of community life.").

239 Jeffrey Jensen Arnett, *Are College Students Adults? Their Conceptions of the Transition to Adulthood*, 1 J. ADULT DEV. 213 (1994) (finding that a majority of college students expressed signs of adulthood through recognition of independence and responsibility).

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

241 *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

242 See discussion *supra* Part I.C.

243 See discussion *supra* Part I.C.



warranted institutional control. Instead, courts need to discern the dimensions of the word “legitimate” when referring to a legitimate curricular pedagogical interest. That interpretation must fit the context of higher education as opposed to what could pass for a legitimate pedagogical or curricular interest in an elementary or secondary education context.

As active participants in the marketplace of ideas, college students are not supposed to behave merely as passive recipients of ideas and knowledge.<sup>244</sup> They may advocate for positions, raise questions, and challenge the views and positions of others, including faculty. While compelling grounds exist that a student should not enjoy free rein to disrupt a course, to interfere with the learning of other students, or to ignore curricular requirements developed pursuant to the exercise of faculty expertise,<sup>245</sup> the *Hazelwood* standards should not serve as a basis to limit higher education students' right to participate in the intellectual life of the academy, including in relation to voicing critiques and concerns about academic offerings. Accordingly, courts should pay attention to ensure that restriction of a student's independent speech in a curricular context is backed by curricular or pedagogical reasons suitable for adults.

Notably, absent creating a disruption or failing to satisfy curricular requirements, a student's disagreement in class with curricular, grading, or professionalism standards should not suffice to trigger a *Hazelwood* level of faculty control over the speech or expression. In *Heenan v. Rhoades*, discussed in Part II, the court clearly struggled with this important limitation on *Hazelwood* in a higher education setting. The court discussed the pedagogical need for students to accept and address their own academic shortcomings,<sup>246</sup> but it failed to sufficiently explain how mere disagreement with an instructor over the evaluation of a student's work or with curricular standards should serve as a basis to invoke the *Hazelwood* standards. Giving such unfettered authority to institutions over student speech conflicts with the concept of college students as adult members of an intellectual community and also runs contrary to student First Amendment cases in other settings, such as those involving institutionally created forums for student speech.<sup>247</sup>

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244 PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 16, 72 (2006) (arguing that education should not operate off of a “banking model” in which students learn from deposits of information without fully questioning and engaging in the lessons).

245 See generally discussion *supra* Part I.

246 *Heenan v. Rhoades*, 761 F. Supp. 2d 1318, 1321 (M.D. Ala. 2011).

247 See discussion *supra* Part II.A.

In considering independent student speech taking place in the curricular context of practicums and internships, the *Snyder v. Millersville University* decision represents an even more problematic approach than looking to the *Hazelwood* standards.<sup>248</sup> In *Snyder*, the court relied on the public employee speech standards as a basis to deny a student an education degree and accompanying state teaching certification.<sup>249</sup> Under these standards, a public employee engaging in speech pursuant to carrying out official employment duties may not look to the First Amendment to protect such speech or expression.<sup>250</sup> Speech not made pursuant to carrying out official employment duties may be eligible for First Amendment protection if it addressing a matter of public concern.<sup>251</sup>

The public employee standards, developed as a result of the need to permit public employers adequate control over the workplace environment,<sup>252</sup> are far removed from the types of considerations at issue in regards to faculty authority over curricular matters. Thus, in *Snyder*, the court conflated the speech standards applicable to public school teachers in regards to their employers with the legal standards an academic program should follow in relation to student speech rights.<sup>253</sup> Adoption of such a position permits institutions a degree of control over student speech far removed from that permitted in any of the other student speech cases, one not requiring even the establishment of a minimal curricular or pedagogical reason, even in instances where a student could be denied a degree. While a college or university may not be able to force a placement partner to allow a student to continue with an internship or practicum, the institution should still have to establish that legitimate curricular grounds exist to sanction the student or to disallow the granting of a degree.

The actions of the court in *Snyder* represent another variation of courts failing to tailor speech standards in a way that is appropriate to a higher education environment.<sup>254</sup> In this instance, rather than treating college students in a manner more appropriate for elementary or secondary students, the *Snyder* court adopted a stance that confused their status and speech interests with that of full-time public employees. In equating an internship or practicum to the experienc-

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248 *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

249 *Id.* at \*10.

250 *Id.* at \*14.

251 *Id.* at \*14–15.

252 *Id.* at \*10.

253 See discussion *supra* Part II.C.

254 Hutchens, *supra* note 76.

es of full-time employment, the court gave remarkable legal discretion to an institution not merely to dismiss a student from an employment situation, but also to deny the individual a degree. That is, failing to consider the unique circumstances at stake in relation to the student's educational pursuits, the court in *Snyder* articulated a position giving institutions almost unbridled control over student speech arising as part of fulfilling internship or practicum requirements. A student's participation in a practicum or internship should not serve as a sufficient basis to restrict college students' curricular speech under the First Amendment via the public employee speech standards.

Instead, when evaluating student speech in a formal instructional setting, including in a practicum or internship, courts should require that institutions demonstrate their curricular or pedagogical rationales in a manner that justifies the regulation in relation to the unique characteristics of higher education. This rule, of course, contains exceptions such as true threats, defamation, incitement, obscenity, and actual disruption to the class environment that interferes with the learning of other students or a faculty member's ability to teach (e.g., interrupting the instructor or other students). Further, speech that demonstrates a failure to comply with curricular requirements presumptively fails to meet protections in the curricular setting. As a general matter, college students' independent in-class speech should merit meaningful First Amendment protection. Accordingly, courts should be careful to ensure that institutions are not seeking to play the pedagogical card as a means to sanction student speech that runs counter to the views or opinions of faculty or institutional officials.

*B. Independent Student Speech Outside an Instructional Setting but Potentially Implicating Curricular Concerns*

In relation to independent student speech taking place outside a formal instructional setting, curricular concerns can and do exist, such as the enforcement of professionalism standards, where institutional authority should extend to the speech based on academic grounds. Outside such limited instances, institutions should be presumptively prohibited from sanctioning independent student speech based on academic grounds.

As the Minnesota Supreme Court articulated in *Tatro*, neither the *Tinker/Healy* nor *Hazelwood* standards are often appropriate to apply to independent student speech generally taking place outside of a

formal course environment but raising curricular concerns, such as professionalism standards.<sup>255</sup> As the decision pointed out, cases such as *Tinker* (and *Morse v. Frederick*) discuss standards that deal with the disruption of the elementary or secondary school environment.<sup>256</sup> Applying the kind of disruption standard on academic grounds articulated in those decisions to a college setting makes little sense and fails to comport with judicial treatment of higher education student speech in other contexts.

For instance, especially in legal decisions involving student forums, courts have demonstrated an unwillingness to permit colleges to prohibit independent student speech simply on the basis that members of the campus community may disagree vehemently with its contents or find the speech unsettling or offensive.<sup>257</sup> Thus, courts have disallowed institutions from banning anti-abortion speakers on campus from displaying graphic images<sup>258</sup> and barring students from wearing empty firearm holsters on campus as a means to promote open carry laws.<sup>259</sup> As pointed out by the Minnesota Supreme Court in *Tatro*, relying on the *Tinker* substantial disruption standards to regulate independent, out-of-class speech based on academic concerns represents an ill-advised approach, one threatening to provide institutional officials with too much discretion to restrict student speech.<sup>260</sup>

As the *Tatro* decision also pointed out, *Hazelwood* provides an inappropriate set of legal standards to apply to independent student speech arising outside of a formal course setting. The opinion noted correctly that permitting a college or university to regulate such speech only on the basis of pedagogical concerns absent a sufficient

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<sup>255</sup> See discussion *supra* Part III.B.

<sup>256</sup> *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 520 (Minn. 2012).

<sup>257</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230, 235 (2000) (acknowledging constitutional problems with a policy allowing student referenda as an acceptable means to fund or defund a program). In *Southworth*, the Court indicated that to “the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires.” *Id.* at 235. The Court explained that the “whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.” *Id.*

<sup>258</sup> *ASU Students for Life v. Crow*, No.CV 06-1824-PHX-MHM, 2008 WL 686946 (D. Ariz. Mar. 10, 2008), *aff'd in part and vacated in part*, 357 F. App'x. 156 (9th Cir. 2009); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 5 (S.D. Tex. 2003), *appeal dismissed*, 67 F. App'x. 251 (5th Cir. 2003).

<sup>259</sup> *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding a policy that barred students from wearing empty holsters in the classroom and hallways to be unconstitutional).

<sup>260</sup> *Tatro*, 816 N.W.2d at 519–20.

and legitimate curricular rationale results in giving colleges too much legal leeway over independent student speech taking place outside of an instructional setting. The Minnesota Supreme Court, while not completely defining its standard, demonstrated a sounder approach in limiting the regulation of out-of-class, independent student speech on legitimate professionalism grounds, with such standards derived from accepted professional practices and rules.<sup>261</sup>

We argue that regulation of independent student speech outside of a class setting should require an *appropriate curricular nexus* (i.e., an underlying logic or rationale fitting for higher education students versus elementary or secondary ones) before a school can take action against a student on academic grounds. As in *Tatro*, legitimate professionalism standards could suffice. The U.S. Court of Appeals for the Eleventh Circuit, even though invoking *Hazelwood*, essentially followed this type of standard in a recent decision, *Keeton v. Anderson-Wiley*,<sup>262</sup> when it permitted a counselor education program to take action against a graduate student who expressed an intention, including through her out-of-class speech, to violate applicable professionalism standards of the counseling profession.<sup>263</sup> Even though some of the student's comments occurred outside of class, the court permitted the program to take action, as the student had evinced a clear intent not to uphold standards of the counseling profession in dealing with clients.<sup>264</sup>

A standard that permits a program to take action on academic grounds for out-of-class student speech with an appropriate curricular nexus, such as legitimate and documented professionalism standards, provides a way to balance legitimate institutional concerns related to curricular authority with important interests related to safeguarding students' First Amendment rights. As an example, 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.<sup>265</sup> Thus, if the pledge for the exam had stated that students could not men-

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261 See discussion *supra* Part III.B.

262 664 F.3d 865 (11th Cir. 2011).

263 *Id.* at 876.

264 *Id.* at 877.

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

tion 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 establish some type of appropriate curricular nexus to take action against the student for such speech.

In looking for support for the appropriate curricular nexus test, the cases dealing with showing appropriate judicial deference to academic decision-making and noting the importance of safeguarding academic freedom provide a rationale for institutional authority distinctive from cases involving elementary and secondary students. Rather than suggesting that colleges should possess unfettered discretion, as the *Tatro* court stated, institutional authority in this area should be circumscribed. The exercise of curricular authority should align with the mission and purpose of higher education rather than be allowed to rest on some kind of vague invocation of educator authority that is overly reliant on standards appropriate for elementary and secondary students.<sup>266</sup>

In relation to professionalism standards and the idea of an appropriate curricular nexus, this standard could also be applied in relation to practicums and internships. In *Snyder*, much of the student's expression at issue took place outside of the student teaching placement. Students in practicums and internships should be viewed as students for purposes of their relationship with a university in terms of their ability to remain enrolled in an academic program.<sup>267</sup> While a school might not be able to prevent a student from being expelled from an internship or placement, an institution should not be able to deny a student a degree by latching onto the standards of the public employee speech cases, namely *Garcetti v. Ceballos*.<sup>268</sup> Accordingly, a

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<sup>266</sup> *Id.* at 518.

<sup>267</sup> *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*5-6 (E.D. Pa. Dec. 3, 2008).

<sup>268</sup> 547 U.S. 410, 411 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."). In *Snyder*, for instance, the application of professionalism standards could well have served as a basis to deny the student an education degree. But what about the student who alleges that she is removed for a student-teaching practicum for complaining about irregularities in the administration of student achievement exams? Even if a teacher's speech in such circumstances might fail to garner First Amendment protection under the *Garcetti* standards, should a student be denied a degree because she was fulfilling the duties of a teacher? Common sense would seem to dictate that this is not a rational reason to deny a degree, and such speech should be eligible for First Amendment protection in relation to the student being able to obtain a degree.

school should not be able to argue that a student raised only issues of private as opposed to public concern as a basis to deny a student First Amendment protection for independent student speech made outside of a formal instructional setting, but somehow connected to professionalism standards involving a practicum or internship.<sup>269</sup>

#### CONCLUSION

Cases involving college students' online speech demonstrate the limits of applying, to those in higher education, legal standards derived from cases dealing with elementary and secondary students. In addition, an emphasis on physical location to determine college students' speech rights often has run into limitations when courts were faced with online space. This Article suggests a Curricular Nexus Test as a means to construct a workable legal framework to address college students' online speech that impacts the curricular environment. Specifically, we argue for an emphasis on an appropriate curricular nexus that corrects over-reliance by courts on the K-12 student speech cases in constructing First Amendment standards applicable to college students. Reliance on an appropriate curricular nexus standard permits institutional regulation of independent student speech occurring not only in formal instructional contexts, but also outside of formal instructional settings in limited circumstances, such as when legitimate and established professionalism standards are at stake. As with our criticism of over-reliance on legal standards more appropriate for K-12 students, we also argue against applying legal standards from the public employee speech cases to students enrolled in practicums and internships.

The Curricular Nexus Test indicates that independent student speech taking place in a formal class context operates by default with the legitimate pedagogical standards from *Hazelwood*. As such, our test is more evolutionary than revolutionary for student online speech taking place in a class or instructional setting. Yet, to create a functional analysis of what constitutes curricular speech, the Curricular Nexus Test elaborates on the dimensions to clarify the concept of legitimate pedagogical interest in regards to higher education environments. Specifically, the determination of a legitimate pedagogical or curricular interest should be adjusted to account for the Court's declarations that colleges and universities are meant to be places of open inquiry and the exchange of ideas. Thus, an appropriate cur-

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<sup>269</sup> *Id.* at 414-16.

ricular nexus is viewed in terms of (a) *students as adults*, which includes the maturity of the students relative to other educational settings (e.g., middle and high school); (b) *the educational setting*, such as classrooms (in-person or online), practicums, and internships; (c) *the educational environment*, which fosters an exchange of ideas (i.e., not a banking model consisting of deposited information); and, (d) *the degree of intentionality* as a careful and deliberate process involving sound professional judgment—not perfunctory explanations or stretched conceptions of the educational purpose.

Under the Curricular Nexus Test, a college student's online speech that demonstrates a failure to comply with curricular requirements *presumptively* fails to meet protections in the curricular setting. Further, this test recognizes already-established *exceptions* to the boundaries of student speech rights such as true threats, defamation, incitement, obscenity, and actual disruption to the class environment that interferes with the learning of other students or a faculty member's ability to teach. Finally, the Curricular Nexus Test indicates that student speech outside of limited, defined instances is presumptively prohibited from campus sanctioning of independent student speech found within or implicating the curricular learning space.

In sum, in certain circumstances, extending institutional academic authority to independent student speech occurring in or out of a formal learning space is warranted, such as the enforcement of accepted professionalism or ethical rules. But, when independent student speech fails to trigger actual curricular or pedagogical concerns appropriate for a higher education environment, courts should operate with a presumption that institutions be prohibited on purely academic grounds from sanctioning such independent student speech.