Journal of College and University Law
Fall 1997

Note

***325** MAY A PUBLIC UNIVERSITY RESTRICT FACULTY EXPRESSION ON ITS INTERNET WORLD WIDE WEB SITES? ACADEMIC FREEDOM AND UNIVERSITY FACILITY USE RESTRICTIONS

Lisa R. Allred [FNa1]

Introduction

The Supreme Court has referred to academic freedom as both the freedom of the university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," [FN1] and the freedom of individual faculty members "to inquire, to study and to evaluate." [FN2] The Supreme Court has also stated that a public university has the authority to promulgate reasonable regulations of campus facilities to "reserve the forum for its intended purpose." [FN3] A conflict between the academic freedom of the faculty members and the institution surfaces when the administration attempts to restrict the use of university facilities, such as the university's Internet World Wide Web servers, [FN4] for faculty expression. This article addresses the tension between academic freedom of the faculty member and the university, and proposes that, in some circumstances, the content-based restriction of faculty expression on a public university's Web Server is permissible and will not violate the First Amendment academic freedom rights of university faculty members.

Section I provides a description of this relatively new medium of university expression, the university's Internet World Wide Web Site. Also presented is an overview of potential academic freedom issues that could arise when the administration retains control over messages published in Faculty Web Pages on its Web Server. Section II provides a historical ***326** analysis of constitutional academic freedom, and then describes the current constitutional free speech doctrine applicable to speech on government-owned property. Section III proposes that the combination of institutional academic freedom and the First Amendment nonpublic forum doctrine enable the university to control the content of Faculty Web Pages published on a public university's Web Server so long as the restriction is reasonable in light of the purpose of the forum and is not merely an effort to suppress the speaker's views. This power to manage university facilities is derived from the Supreme Court's recognition that the university administration, not a court, is charged with controlling the use of university facilities consistent with the university's mission, and the university has academic freedom to make such decisions. This section concludes with some suggestions for a university to maintain the nonpublic forum status of its computer system and thereby retain content control over web pages published on its Web Server.

I. University World Wide Web Sites

The Internet is a valuable and powerful tool for universities to communicate with the world. The Internet is a term used to describe a world wide network of computer networks, called nodes, that communicate with each other using machine language

known as IP, or Internet Protocols. [FN5] Originally established in 1964 by the Department of Defense Advanced Research Projects Agency (DARPA) to maintain communications in the event of nuclear war, [FN6] the Internet has evolved over the past 33 years to become a widely used tool by individuals, business, industry and education. [FN7] The size of the Internet has grown exponentially from four nodes installed in 1969 at the University of California, Los Angeles (then called "ARPANET," an acronym for Advanced Research Project Agency Network) to 37 nodes in 1972 and more than 2,217,000 in 1994. [FN8]

To access the Internet, all that one needs is a "personal computer with a modem, a 'phone line, an account with a provider, and software for connecting and navigating"' [FN9] the Internet. A popular form of communicat-ing on the Internet is electronic mail ("email") with approximately forty ***327** million worldwide users. [FN10] Computer Bulletin Boards-the electronic equivalent of a public bulletin board where users can place and receive messages, [FN11] and computer chat lines-which allow immediate real time communication between computer users, [FN12] are two other examples of communication methods on the Internet. [FN13] Although all of the methods of communicating on the Internet present interesting First Amendment issues, the focus of this article is on the World Wide Web component of the Internet.

The World Wide Web, also referred to as W3, WWW or "the Web," [FN14] is a series of documents stored in different computers all over the Internet. Documents contain information stored in a variety of formats, including text, still images, sound and video. [FN15] "The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be 'published' on the Web." [FN16]

Many universities have established an official World Wide Web site ("official Web Site") on their computer systems ("Web Server") [FN17] to communicate messages about the university campus, admissions, academic programs, and faculty. [FN18] These official Web Sites can serve as informational ***328** and marketing [FN19] tools for a university to convey its message to the public. Many universities allow faculty members to create Web pages ("Faculty Web Pages") which are typically accessed by a menu system set up on the official Web Sites.

Faculty Web Pages vary depending on the computer use policies of the universities and may include information about the classes taught by the faculty member, educational background, professional history and research areas of interest. Some may even contain personal information about the faculty member such as hobbies, professional affiliations and other interests. Others may contain information that is totally unrelated to the professors' research and teaching activities at the university. [FN20]

A potential conflict between the academic freedom of the faculty member and the institution arises when the university determines that a Faculty Web Page contains messages that are not consistent with the purpose of the university's Web Site and requires the faculty member to remove the message, but the faculty member refuses, claiming academic freedom or general First Amendment rights. For example, faculty members could include messages about personal or political beliefs that either are directly presented as such, or are presented as scholarly works. Or, a professor could include information which the university determines is not related to the professor's scholarly mission and is inconsistent with publication on the university's Web Site. The administration may be reluctant to restrict faculty speech on the Faculty Web Page because of concerns for the individual's academic freedom [FN21] or general First Amendment rights, but may nonetheless find it necessary to restrict the speech because of problems, actual or potential, [FN22] that the university encounters. The following discussion proposes that a public university may control expression in Faculty Web Pages published on a university's Web Server and such control can extend to the restriction of faculty expression based on the content of the ***329** speech, so long as the restrictions are reasonable and not merely an effort to suppress the speaker's views.

II. Academic Freedom as a First Amendment Right [FN23]

Although the concept of academic freedom is often discussed in constitutional terms, it is "not a specifically enumerated constitutional right." [FN24] Nevertheless, the Supreme Court has indicated that academic freedom is a "special concern of the First Amendment." [FN25] The first notable Supreme Court decision that recognized the concept of academic freedom was Sweezy v. New Hampshire, [FN26] where Chief Justice Warren's plurality decision stated:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. [FN27]

Additionally, Justice Frankfurter's concurring opinion in Sweezy, joined by Justice Harlan, indicated that a university has "'four essential freedoms'. . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." [FN28] Dicta in University of California v. Bakke [FN29] indicated that these "four essential freedoms" constitute the university's "academic freedom." That was the first time the Supreme Court used the phrase "academic freedom" in combination with the "four essential freedoms" articulated in Justice Frankfurter's concurring opinion in Sweezy, even though decisions issued between Sweezy and Bakke discussed academic freedom without specifically defining it.

An analysis of the Supreme Court decisions that refer to the concept of academic freedom reveals that two of the four freedoms-"what may be taught" and "how it shall be taught"-have not been directly addressed by the Court. Similarly, the "Supreme Court [has] never spoken to the level of First Amendment protection afforded teachers' in-class speech." [FN30]

However, in 1967, ten years after the Sweezy opinion was rendered, the Supreme Court addressed the concept of academic freedom in relation to the "who will teach" element of the "four essential freedoms" in Keyishian v. Board of Regents of University of the State of New York, and indicated that academic freedom is a "special concern of the First Amendment." [FN31] The KeyishianCourt evaluated the constitutionality of a New York plan, based partly on statutes and partly on administrative regulations, which conditioned prospective faculty members' employment on signing a form indicating either that they were not Communists, or if they had ever been Communists, communicating that fact to the President of the University. [FN32] The Court rejected the New York plan as unconstitutional. [FN33] The Court reasoned that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth ***331** "out of a multitude of tongues, [rather] than through any kind of authoritative selection." [FN34]

In reference to the New York laws and regulations, the Keyishian Court continued:

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful [zone]." The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. [FN35]

In the same year as Keyishian was decided, the Supreme Court in Whitehill v. Elkins, [FN36] declared unconstitutional a loyalty oath that was prepared by the Maryland Attorney General under a state law which required teachers at the University of Maryland to swear under the penalty of perjury that they are "not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland. . . ." [FN37] The Court indicated that

"[t]he continuing surveillance which this type of law places on teachers is hostile to academic freedom." [FN38] Just three years earlier in 1964, the Supreme Court in Baggett v. Bullitt [FN39] had declared unconstitutional a similar loyalty oath required by Washington state statutes in which all state employees and teachers were required to swear under penalties of perjury that they were not members of subversive organizations. The Court determined that the law was unconstitutionally vague and, therefore, violated due process, [FN40] although the court did not rely on academic freedom principles to reach this conclusion. The Keyishian, Whitehall and Baggett decisions limited the states' ability to exclude teachers because of their personal affiliations and in essence expanded the ability of the university administration to select its faculty without state interference.

As to the "who will be admitted to study" element of academic freedom, two Supreme Court cases are notable. The first is Regents of the University of California v. Bakke, [FN41] mentioned above, a case in which a student challenged the constitutionality of the admission policy to the University of California at Davis Medical School which consisted of two separate systems ***332** of evaluating students. Even though the Bakke plurality recognized the First Amendment right of the university to determine who will be admitted to study, the Court held the admissions program invalid under the Equal Protection Clause of the Fourteenth Amendment because the two separate admissions systems deprived the rejected applicant of an opportunity to be compared to those in the preferred group of applicants. [FN42] This opinion cautions that a university's right to academic freedom is limited by other constitutional considerations; therefore, administrative actions that may be permitted under the First Amendment academic freedom should not be issued without first identifying such considerations. [FN43]

Second, in Regents of University of Michigan v. Ewing, [FN44] a case in which a student was dropped in his sixth year from medical school on academic grounds after failing a major written examination which was required for his degree, the Court [FN45] recognized the freedom of the university to make academic judgments and held that the student's constitutional rights were not violated. The Court deferred to the academic judgments within the university and provided guidelines for judges to follow when reviewing academic decisions as follows:

> When judges are asked to review the substance of a genuinely academic decision . . . they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. . . . Added to [the Court's] concern for lack of standards (there are none obviously provided by the Constitution or elsewhere according to which judges or juries can say what norms of academic competence are suitable or unsuitable for any university as such) is a reluctance to trench on the prerogative of. . . educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." [FN46]

Ewing articulates the premise that judicial deference to academic decisions and institutional academic freedom coexist. Although Ewing addressed the ability of the university to evaluate students without outside interference from the courts, not a conflict between the faculty and the university, the Court clarified an important principle that this article addresses: Academic freedom encompasses both "the independent and uninhibited exchange of ***333** ideas among teachers and students" [FN47] as well as, "and somewhat inconsistently,. . . [the] autonomous decision-making by the academy itself." [FN48]

The Court rendered a decision one year before Ewing in which it indirectly addressed the tension between the academic freedom of the faculty and the academic freedom of the institution. In Minnesota State Board for Community Colleges v. Knight, [FN49] faculty members challenged the constitutionality of a Minnesota statute requiring public employees to select an exclusive professional representative to "meet and confer" with their public employer outside the scope of mandatory bargaining. The Minnesota Community College Faculty Association (MCCFA) was designated the exclusive representative of the faculty in the state community college system, and a group of the faculty who were not members of MCCFA attacked the constitutionality of this exclusive representation. [FN50] The Court defined the

issue in terms of the faculty's claim of "an entitlement to a government audience for their views." [FN51] The Court indicated that faculty "have no constitutional right as members of the public to a government audience for their policy views," and that their status as public employees "gives them no special right to a voice in the making of policy by their government employer." [FN52] The Court held that the "meet and confer" provisions do not violate faculty members' constitutional rights because, even though faculty involvement in institutional policy making is advisable, [FN53] faculty members do not have a constitutional right to participate in academic governance. [FN54] The Court indicated that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." [FN55]

With the effect of enhancing the concept of institutional academic freedom, Justice Marshall's concurring opinion in Knight reiterated that the ***334** Court should defer to the decisions of administrators with regard to university regulations in situations where the Courts would not do so if the government officials were involved with regulation of the university. Specifically, Justice Marshall wrote:

> [I]n general, colleges and universities are most likely to fulfill their crucial roles in our society if they are allowed to operate free of outside interference. . . . That insight should prompt us to defer to the judgment of college administrators-persons we presume to be knowledgeable and to have the best interests of their institutions at heart-in circumstances in which we would not defer to the judgment of government officials who seek to regulate the affairs of the academy. [FN56]

This concurring opinion reinforces the premise that academic governance and policy making is the duty of the university administration, and the courts should give great deference to the decisions of the administration.

Judicial deference to institutional academic freedom [FN57] is not a new concept in the law. [FN58] Prior to the Supreme Court's recognition of academic freedom as a "special concern of the First Amendment" in Keyishian, [FN59] the common law provided universities with a substantial degree of autonomy in resolving disputes with faculty and students. [FN60] It has been said that institutional academic freedom to control internal affairs and judicial deference to university administrators go hand in hand. [FN61] This is a necessary correlation to protect both individual and institutional academic freedom. The university administration is employed to manage the academy according to its educational mission, and this duty requires the balancing of many competing factors. [FN62] The Supreme Court's recognition ***335** of the constitutional value of academic freedom allows the university to fulfill this mission without judicial interference.

These Supreme Court cases emphasize the value that the Court places on First Amendment protection on university campuses and its recognition of the importance of such protection for both the university as an institution and members of the faculty as individuals. The Supreme Court has recognized that both the university and the faculty members have academic freedom. [FN63] The Court has also indicated that institutional policy making and governance is the function of the university administration and the courts will give great deference to the judgment of the administration. [FN64] The Court, however, has not to date directly addressed a case where the institutional and individual First Amendment academic freedoms conflict. [FN65] To answer the question at hand-the constitutionality of university control of faculty expression on a university's Web Server-it is necessary to consider the broader issue of First Amendment rights outside of the context of academic freedom.

A. First Amendment Free Speech Rights-Background

A closer examination of Supreme Court decisions reveals that First Amendment rights on university campuses are not limited to the academic freedom context. Instead, academic freedom is simply a subset of the general notion of First Amendment protections, and a full understanding of the constitutional limitations of on-campus speech requires a complete First Amendment analysis.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides for protection from arbitrary governmental interference in individual free speech, [FN66] and reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [FN67]

However, the "First and Fourteenth Amendments have never been thought to give absolute protection to every individual speaker whenever or wherever he pleases, or to use any form of address in any circumstances he chooses." [FN68] A few examples of speech that the Supreme Court has determined are not protected under the First Amendment are obscenity, [FN69] libel and/or slander, [FN70] and fighting words. [FN71] Additionally, reasonable government restrictions on the time, place and manner of speech are constitutionally permissible. [FN72] Within the category of time, place, and manner restrictions lies the limited ability to protect the individual privacy of unwilling viewers or listeners from protected expression. [FN73]

B. A University's Ability to Restrict Speech on University Facilities

Although the Supreme Court has given strong protection to the exercise of constitutional rights on university campuses, the Court has indicated its general unwillingness to elevate the scrutiny of every university restriction of on-campus conduct to a constitutional level. For example, in Healy v. James, [FN74] the Court held that a university may deny official campus recognition to any group that reserves a right to violate campus rules. The Court indicated that it is reasonable under the First Amendment for the university to require that student groups agree in advance to respect university regulations regarding the time, place and manner of their speech- related activities. [FN75] In reaching its decision the Court cited a prior Eighth Circuit opinion of Justice Blackmun which held that "[a] college has the ***337** inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property. . . . " [FN76] The Court also reiterated its previously expressed position that: "[W]here state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."' [FN77] In his concurring opinion, Justice Rehnquist summarized the proposition that different principles apply to First Amendment concerns when a state university is controlling speech than when another organization of government is doing the same:

> I find the implications clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. . . . The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. [FN78]

Healy articulates the premise that a university may regulate its facilities and may impose time, place and manner restrictions on free expression in the university campus environment.

Similarly, in Widmar v. Vincent, [FN79] the Court indicated that "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 use of its campus and facilities." [FN80] This point was then brought into the context of the University's own speech in Rosenberger v. Rector & Visitors of University of Virginia, [FN81] when the Supreme Court clarified its statements in Widmar that the Court does not "question the right of the University to make academic judgments as to how best to allocate scarce resources" [FN82] as follows:

> ***338** The quoted language in Widmar was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content

of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. [FN83]

The Rosenberger Court recognized the distinction between the university's messages and the private speech of students, because the university took action to ensure the distinction by requiring that the student groups sign an agreement indicating that they "are not the University's agents, are not subject to its control, and are not its responsibility." [FN84] This language should caution universities that disclaimers of responsibility for the speech of individuals granted access to facilities, may indicate that the individuals' speech cannot be regulated in the same manner as individuals under the university's control. [FN85]

The Supreme Court's decision in Perry Education Association v. Perry Local Educators' Association [FN86] demonstrates that the extent of allowable regulations varies by the classification of the forum and the status of the speaker. The Perry Education Association, a duly elected exclusive bargaining representative for the Metropolitan School District of Perry Township, Indiana, was given exclusive use of the interschool mail system and teachers' mailboxes in the Perry Township schools. The issue was whether the denial of similar access to the Perry Local Educators Association, a rival teachers group, violates the First and Fourteenth Amendment rights of that group. [FN87] The Court held that it did not, [FN88] reasoning that "[n]owhere have we suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for. . . unlimited expressive purposes," [FN89] and "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." [FN90] The Court developed a tripartite analysis based on the character of the property at issue.

The first category of property consists of public "streets and parks which have immemorially been held in trust for the use of the public and. . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." [FN91] Property in this category is classified as a public forum and regulations on free speech in this category must meet the following standards:

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content- neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. . . . [FN92]

The second category consists of public property which is not a traditional public forum, but which becomes a public forum for a limited purpose when the government chooses to open it up for public use. [FN93] The Court indicated that the government does not have to open up its property, [FN94] but, if it does, the government must abide by the same standards as if the property was a public forum. [FN95]

The third category consists of "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." [FN96] As the following passage states, if the government property falls within this third category the government can restrict access on the basis of subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose which the forum at issue serves. The Court wrote:

> [T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the ***340** regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . . [T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. [FN97]

The Supreme Court classified the school mail system in the third category, as a nonpublic forum that was not opened up to the public. [FN98] The Court continued:

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves. [FN99]

Perry has been called a "seminal decision in the modern forum doctrine." [FN100] After Perry, "the nature of the publicly owned location of speech, rather than the nature of the governmental regulation, determined the degree of judicial scrutiny." [FN101] This decision demonstrates that the standard used to evaluate content-based restrictions differs when the forum at issue is a traditional public forum or a limited public forum as compared to a nonpublic forum. In the case of either a traditional public forum or a limited public forum the content-based restrictions on expression must be narrowly drawn and necessary to serve a compelling state interest. In the case of the nonpublic forum, content-based restrictions are allowed if they are necessary to reserve the forum for its intended purpose and are not issued merely because the university opposes the speaker's views.

Moreover, in Cornelius v. NAACP Legal Defense and Educational Fund, Inc., [FN102] the Supreme Court clarified that the intent of the government determines whether a nonpublic forum becomes a limited public forum for First Amendment purposes. In Cornelius, the NAACP Legal Defense and Education Fund alleged that the Federal Government violated its First Amendment rights by excluding it from participating in a charity drive for federal employees, conducted in the federal workplace during working ***341** hours, called the Combined Federal Campaign (CFC). [FN103] To resolve this issue, the Court determined that the relevant forum was the CFC, not the federal workplace, [FN104] and that the CFC is a nonpublic forum. [FN105] In deciding that the forum was nonpublic, the Court stated: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." [FN106] The Court looked to the policy and practice of the government, the nature of the property, and the compatibility of the property with expressive activity in making the nonpublic forum determination. [FN107] Cornelius addressed the unanswered question after Perry of how a public forum is established by holding that the government must affirmatively open up its property for public discourse, and the government's intent as to the use of the property under its control determines whether a nonpublic forum becomes public for First Amendment purposes.

In summary, a joint reading of these university facility cases indicates that a university has the authority to regulate faculty expression on its property. Specifically, the public university may determine which facilities are nonpublic forums and which are "opened up" as either public or limit public forums. Content-based restrictions of public and limited public forums must be narrowly drawn to serve a compelling state interest. [FN108] Perry indicates, however, that a nonpublic forum, (i.e., that which the university does not intend to open up to the public [FN109]), may be regulated based on the content of the speech and the speaker identity so long as the restrictions are reasonable in light of the purpose of the forum and are not merely because the university disagrees with the speaker's views. [FN110]

***342** III. Is a University's Web Server a Nonpublic Forum?

Many universities have Internet World Wide Web Sites from which interested parties can obtain general information about the university as well as specific information about individual departments. [FN111] Cornelius v. NAACP Legal Defense and Educational Fund, Inc. [FN112] indicates that the intent [FN113] of the university will determine whether a university's Web Server which hosts the Web Sites is a nonpublic, limited public forum or public forum as defined by Perry, [FN114] and that inaction on behalf of the university does not create a public forum. [FN115] As a result, a university's Web Server is inherently a nonpublic forum, and will remain as such absent evidence that the university intended to open it up as a limited

public forum or public forum. In fact, one lower court has already held that the university's "computer and Internet services do not constitute a public forum." [FN116]

Generally, university faculty members are allowed to create Faculty Web Pages that are often accessed from the university's official Web Site to communicate messages to the public about themselves and their department. Members of the public generally are not allowed to create links to personal Web Pages under the official Web Site. To qualify for the nonpublic forum status, it is necessary for a university to demonstrate that it does not intend to convert its Web Server into a limited public forum. To do so, public universities should look to policies at the statewide [FN117] and university levels [FN118] which limit university computer facility use for university purposes and define the parties allowed to use the university's Web Server to create Web pages. Upon establishing that the university did not open up its Web Server for public use, the nonpublic forum standards articulated in the previous section of this article will apply.

A. Analogous Lower Court Decisions

The Supreme Court has not addressed a case where university faculty members' use of university facilities for expressive purposes was restricted by the university. Moreover, lower courts have not yet addressed the issue of university control of faculty expression in Faculty Web Pages published ***343** on the university's Web Server. A few lower court decisions, however, have addressed university control of faculty expression on university facilities. A review of these opinions is instructive.

The only case to date addressing the university's restriction of faculty use of the university's Internet system is the recent decision, Loving v. Boren. [FN119] In Loving, the court found no violation of the faculty member's First Amendment free speech rights when the University of Oklahoma (OU) blocked a number of news groups that were being accessed through the OU news server. [FN120] An OU professor challenged the decision by the president on First Amendment grounds. [FN121] The decision to block the news groups was made because the OU president believed that the servers "arguably contained obscene material the dissemination of which would violate state law." [FN122] The court indicated, that the plaintiff (who represented himself in this action) failed to establish any essential elements of his case. Nevertheless, the court held that OU's computer system is not a public forum, and that the OU policy which limits OU Internet service to research and academic purposes does not violate the professor's First Amendment rights. [FN123] While this case does not address the restriction of faculty expression on a university's Web Site, it does indicate that the university computer system is not a public forum, as this article proposes.

Outside the context of the Internet are three instructive First Amendment decisions. [FN124] First, in Piarowski v. Illinois Community College District ***344** 515, [FN125] Judge Posner of the Seventh Circuit Court of Appeals held that Prairie State College did not infringe upon the First Amendment rights of the art department chair merely by ordering him to relocate his sexually explicit art exhibit to another room in the same building. [FN126] The department chair had created and displayed stained glass windows of nudes which provoked a number of complaints. [FN127] The court characterized the issue in this case as one in which the academic freedom of the academy and the individual professor were in conflict, [FN128] and reasoned that a holding that prohibits the college from protecting its image would "limit the freedom of the academy to manage its affairs as it chooses." [FN129] Noting that "[t]he artist's status as an employee would give the college more control over his activities than over a stranger's," [FN130] and that "sexually explicit though nonporno-graphic art can be regulated more broadly than political speech," [FN131] the court held that the university's decision to relocate the display was reasonable in this case. The court also considered that the first-floor gallery in the "College's main building is a place of great prominence and visibility, implying college approval rather than just custody, and the offending windows could be seen by people not actually in the gallery." [FN132]

Similarly, in Close v. Lederle, a University of Massachusetts art instructor's art exhibit was removed from a corridor regularly used by the public after five days of a planned twenty-four day exhibit. [FN133] Several of the paintings were nudes and contained sexually explicit "cheap titles." [FN134] The instructor sued the university for violation of his First Amendment free ***345** speech rights. The court held that the university did not violate the art instructor's free speech rights by removing his exhibit. [FN135] The court did not address the issue in this case in terms of academic freedom, but rather considered the artist's constitutional interests minimal, and the university's countervailing interests as sufficient to justify their actions. The court indicated that:

> The defendants were entitled to consider the primary use to which the corridor was put. . . . On the basis of the complaints received, and even without such, defendants were warranted in finding the exhibit inappropriate to that use. Where there was, in effect, a captive audience, defendants had a right to afford protection against "assault upon individual privacy" short of legal obscenity. [FN136]

Another university case, Shelton v. Trustees of Indiana University, involved on-campus political expression by a resident assistant through the display of an AR-15 automatic rifle and Vietnam War memorabilia in his dorm room. [FN137] In Shelton, university regulations forbade the possession of firearms, and as a result, the resident assistant was required by the university to remove the weapon from his room. [FN138] The plaintiff failed to fully comply with the university's requests and lost his position. [FN139] The court held that the university's decision to not rehire the plaintiff was based on his insubordination, and not his political views; nevertheless, the court noted that "[a] public university does not violate the First Amendment when it takes reasonable steps to maintain an atmosphere conducive to study and learning by designating the time, place and manner of verbal and especially nonverbal expression; and the principles of academic freedom counsel courts to defer broadly to a university's determination of what those steps are." [FN140] While Shelton does not address the control of faculty expression, it demonstrates that the university's academic freedom extends to decisions regarding the restriction of campus facilities for expressive purposes by university employees.

Although not in the context of the Internet, Piarowski and Close demonstrate the University's ability to restrict nonverbal job-related faculty expression on university facilities without violating the faculty member's First Amendment or academic freedom rights. It is necessary to point out that in both cases, the university did not prohibit the expression entirely; rather, the expression was only restricted in certain university facilities. The control of faculty expression on the university's Web Server is ***346** analogous to the removal of art work from a particular building or the relocation to another building, because, in requiring the removal of faculty expression from the Web Server, the university would not be restricting either the off-campus expression or the on-campus expression through a limited public forum or public forum. The university would simply be restricting the expression on the particular nonpublic forum [FN141]-its Web Server. As Loving indicates, the university's computer system can be classified as a nonpublic forum, which means that the proper analysis of the restriction of faculty expression on the university's Web Server must follow the nonpublic forum analysis of Perry. [FN142]

B. The Control of Faculty Expression on a University's Web Server

A joint reading of Supreme Court opinions on academic freedom and the First Amendment reveals that both the university [FN143] and the faculty have academic freedom rights. [FN144] These rights are in conflict when a university restricts job-related faculty expression on campus facilities. [FN145] The university, however, also has rights that extend beyond the traditional academic freedom rights. A university has the ability to manage its affairs without outside interference, [FN146] to impose reasonable regulations compatible with its mission, [FN147] to make academic judgments regarding the allocation of its resources, [FN148] to designate its property as a nonpublic forum, [FN149] and to regulate nonpublic

forums based on the content of the expression and speaker identity. [FN150] However, the ability to regulate is not unlimited. Rather, content-based restrictions on the use of university nonpublic facilities for faculty expression must be reasonable in light of the purpose the forum at issue serves and not merely an effort to suppress the speaker's views. [FN151]

The university's Web Server is a nonpublic forum so long as the university does not intend to open it for public use. [FN152] Accordingly, the university may allow a faculty member to create a Faculty Web Page and ***347** publish messages that are consistent with the purpose of the forum. If the faculty member chooses to use this nonpublic forum for expression that the university reasonably determines is inconsistent with the purpose of the forum, the university may require the faculty member to refrain from publishing the message. To do so does not prohibit the faculty member from expressing his or her ideas in a limited public forum or public forum. Accordingly, the faculty member's rights to free expression are not impaired.

The decision of constitutionality will turn on whether the restrictions are reasonable and not merely to suppress the speaker's views. [FN153] If not, then the restriction will be unconstitutional. But judicial deference to university administrative decisions coupled with the Court's recognition of institutional academic freedom [FN154] are high hurdles to overcome to establish the unconstitutionality of university restrictions of faculty expression on a university's Web Server.

C. Suggestions for a University to Maintain the Nonpublic Forum Status of its Web Server

The previous analysis indicates that a university is able to make reasonable content-based restrictions on faculty expression published in Faculty Web Pages on the university's Web Server so long as the forum is classified as nonpublic as defined in Perry. [FN155] In reaching the forum decision, Cornelius indicates that the university's intent governs. [FN156] The most obvious evidence of a university's intent can be found in its computer use policies.

A university that wishes to retain control of messages published on its Web Server should take care to ensure that its computer use policies do not convert its Web Server, which is by default a nonpublic forum under Cornelius, into a limited public forum or public forum. This can best be done by avoiding policies which allow unrestricted access to publish on the university's Web Server. For example, a policy which allows faculty members to publish information in their nonprofessional capacity, as individuals, may be evidence that the university created a limited public forum. Also, a policy which allows for the creation and use of Faculty Web Pages for "any legal purpose" could be evidence that the university intended to create a limited public forum. Additionally, Rosenberger [FN157] instructs that the university's use of disclaimers of responsibility for the speech of individuals granted access to university facilities may be evidence that the university intended to create a limited public forum. As such, a university that wishes to retain the nonpublic forum status of its Web Server should avoid disclaimers of responsibility which could be reasonably viewed as ***348** communicating the university's relinquishment of control over the forum. If disclaimers of responsibility are necessary to protect the legitimate liability interests of the university, such disclaimers must be carefully drafted to ensure that they do not express the university's intent to relinquish control over the forum.

Prior to making content-based restrictions of faculty expression on a Faculty Web Page, a university should undergo a review of all computer use policies to determine if it has created a limited public forum. [FN158] If it has not, then the nonpublic forum analysis will apply. Under the nonpublic forum analysis, Perry indicates that the university may make content-based restrictions of faculty expression so long as the restrictions are reasonable and not merely an effort to suppress the speaker's views. To pass this second hurdle, the university must be able to demonstrate that it is reasonable to restrict the faculty expression because of the existence of valid university concerns with the content of the speech. These reasons must be

sufficient to indicate that the university is not restricting the speech merely because the university disagrees with the speaker's views.

The level of evidence necessary to demonstrate the reasonableness of the restrictions has not yet been decided by the courts. [FN159] This article, however, proposes that institutional academic freedom and judicial deference to decisions of administrators ("persons we presume to be knowledgeable and to have the best interests of their institutions at heart") [FN160] should allow for restrictions which a university can demonstrate were, in the judgment of administrators, rationally necessary to protect the university.

An awareness of the importance that the Supreme Court places on the First Amendment freedoms in the university environment should caution university administrators who desire to regulate faculty expression indiscriminately. In certain circumstances, through, the university administration must make difficult decisions regarding the restriction of faculty expression on its Web Server. This article proposes that the university's institutional academic freedom coupled with judicial deference to administrative decision-making indicate that a university administration may make reasonable content-based restriction of faculty expression on its nonpublic Web Server as necessary to accomplish its educational mission.

[FNa1]. B.B.A., M.B.A., University of New Mexico; J.D., University of Idaho, expected May, 1998. The author wishes to express gratitude to the following for encouragement, insight, direction and ongoing comments: Professor Kenneth Gallant and Professor Elizabeth Brandt of the University of Idaho College of Law, and Diane L. McDaniel of the Washington Attorney General's Office. Additionally, the author wishes to thank husband Michael and children Brandon and Aleece for their patience and support during the preparation of this article.

[FN1]. Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218 (1957).

[FN2]. Id. at 251, 77 S. Ct. at 1212.

[FN3]. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948 (1983).

[FN4]. See infra Section I of this article for a description of the Internet, the World Wide Web and related terminology utilized in this article.

[FN5]. See Dan L. Burk, Federalism in Cyberspace, 28 Conn. L. Rev. 1095, 1097 (1996).

[FN6]. Douglas Dangerfield, Web Surfing, or "The Internet for the Uninformed," 1996 Am. Bankr. L.J. 12.

[FN7]. See Burk, supra note 5, at 1100.

[FN8]. See Michael A. Fixler, Cyberfinance: Regulating Banking on the Internet, 47 Case W. Res. L. Rev. 81, 83 (1996).

[FN9]. Id. For more information on methods of accessing the Internet see William F. Yancey et al., A Tax Lawyer's Guide to the Worldwide Web, 24 Tax'n for Law. 95, 96 (1995). Some examples ofcommercial Internet service providers are: Prodigy,

Compuserve, America Online and Microsoft Network with almost twelve million individual United States subscribers. See ACLU v. Reno, 929 F.Supp. 824, 833 (E.D. Pa. 1996), aff'd, 117 S. Ct. 2329 (1997).

[FN10]. See Yancey et al., supra note 9, at 96. Email has been analogized to conventional mail because of the one-way nature of the communication; that is, email does not allow simultaneous dialogue.

[FN11]. There are an estimated 30,000 to 40,000 bulletin boards currently in operation in the United States. Edward J. Naughton, Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action, 81 Geo. L.J. 409, 412 (1992).

[FN12]. Reno, 929 F. Supp. at 835.

[FN13]. See id. at 830-49 (providing a complete description of methods of communication on the Internet).

[FN14]. See Dangerfield, supra note 6.

[FN15]. Reno, 929 F. Supp. at 836.

[FN16]. Id. at 837.

[FN17]. Within a Web site, Web pages are typically stored on multiple computers; nevertheless, the singular "Web Server" will be used throughout this article to refer to these computers. A "home page" is the first page of a World Wide Web site. See Andrew Sebok, What's All This Fuss About the Internet?, 25- SUM Brief 8 (1996). This first page contains "a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization." Reno, 929 F.Supp. at 836.

[FN18]. To view a university's official Web Site one must have the World Wide Web site address (often referred to as "Uniform Resource Locator" (URL)). This can be obtained by conducting a search, using one of the search programs (often referred to as "search engines") available through the World Wide Web navigation software. To find a university's Web address simply type in the name of the university and a list of Web cites which match the request will result. Once the address is known, the user can retrieve the university's Web Site. The first image to appear will be the Web Site's home page which will usually contain a directory of other Web pages that are linked to the Web Site. The typical university directory provides options such as "admissions," "general information," "academics," and "administration," to name a few.

[FN19]. The marketing aspect of the university's Web Site includes recruiting students, faculty and staff, and possibly research grants and contracts. The Internet is also becoming a valuable marketing tool for business and industry. See generally, Fixler, supra note 8.

[FN20]. For example, a tenured professor of electrical and computer engineering at private Northwestern University created a personal "home page" on the Northwestern Internet server, in which he advertised a book he had previously published which

claimed that "Nazi Germany did not deliberately murder millions of Jews during World War II." Edward Walsh, Professor's Holocaust Views Put Freedom Issues On-Line, Wash. Post, Jan. 12, 1997, at A3. Northwestern University refused to remove the material because of its policy of allowing Internet access for any legal purpose. Id. See also Barry Bennett, The Holocaust: Denial and Memory, Humanist, May 15, 1997, at 6.

[FN21]. See infra note 23.

[FN22]. See Jeffries v. Harleston, 52 F.3d 9 (2d Cir.), cert. denied, 116 S. Ct. 173 (1995) (holding that the potential disruptiveness to the university that could result from faculty speech on matters of public concern is enough to outweigh the First Amendment value of the professor's speech). For a complete discussion of the First Amendment analysis of public employee cases, see Richard H. Hiers, New Restrictions on Academic Free Speech: Jeffries v. Harleston II, 22 J.C. & U.L. 217 (1995).

[FN23]. Although academic freedom includes both a contractual component and a constitutional component, this article addresses only the constitutional component in the context of the First Amendment implications. It is important to note that academic freedom also exists in the faculty tenure context and the Fourteenth Amendment comes into play when dealing with procedural issues associated with the deprivation by the University of faculty members' property rights derived from the tenure system. See generally William A. Kaplin & Barbara A. Lee, The Law of Higher Education (3d ed. 1995). However, with regard to individual academic freedom, the First Amendment academic freedom does not depend on the status of a faculty member as a tenured employee. Perry v. Sindermann, 408 U.S. 593, 599, 92 S. Ct. 2694, 2698-99 (1972). The Supreme Court held in Perry that the lack of a contractual or tenure right of a professor, taken alone, does not defeat a First or Fourteenth Amendment claim. Id. at 596, 92 S. Ct. at 2697. But the Court also indicated that the lack of tenure is "highly relevant. . . [b]ut. . . it may not be entirely dispositive" of his procedural due process claim. Id. at 599, 92 S. Ct. at 2698-99. There is also a professional definition of academic freedom that stems from the American Association of University Professors (AAUP) 1915 General Report of the Committee on Academic Freedom and Academic Tenure, which evolved into the 1940 Statement of Principles on Academic Freedom. See Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 Tex. L. Rev. 1265, 1267-84 (1988).

[FN24]. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312, 98 S. Ct. 2733, 2759-60 (1978).

[FN25]. Keyishian v. Board of Regents of Univ. of the State of New York, 385 U.S. 589, 87 S. Ct. 675 (1967).

[FN26]. 354 U.S. 234, 250, 77 S. Ct. 1203, 1211-12 (1957).

[FN27]. Id. at 250, 77 S. Ct. at 1211-12. The issue in Sweezy concerned the constitutional limitations of the legislative inquiries into subversive activities ofgovernment employees under a New Hampshire statute. The Court held that Sweezy's Fourteenth Amendment due process rights were violated when the state attorney general questioned him about his personal affiliations, research and lectures at the University of New Hampshire. Id. at 254, 77 S. Ct. at 1214.

[FN28]. Id. at 263, 77 S. Ct. at 1218.

[FN29]. Bakke, 438 U.S. at 312, 98 S. Ct. at 2759-60.

[FN30]. Scallet v. Rosenblum, 911 F. Supp. 999, 1009 (W.D. Va. 1996).

[FN31]. 385 U.S. 589, 604, 87 S. Ct. 675, 684 (1967).

[FN32]. Id. at 592, 87 S. Ct. at 678.

[FN33]. Id. at 604, 897 S. Ct. at 684.

[FN34]. Id. at 603, 87 S. Ct. at 683-84 (citations omitted).

[FN35]. Id. at 604, 87 S. Ct. at 684 (citations omitted).

[FN36]. 389 U.S. 54, 88 S. Ct. at 184 (1967).

[FN37]. Id. at 55, 88 S. Ct. at 184-85.

[FN38]. Id. at 59-60, 88 S. Ct. 187.

[FN39]. 377 U.S. 360, 84 S. Ct. 1316 (1964).

[FN40]. Id. at 371, 84 S. Ct. at 1322.

[FN41]. 438 U.S. 265, 98 S. Ct. 2733 (1978).

[FN42]. Id. at 320, 98 S. Ct. at 2763-64.

[FN43]. Note that the Equal Protection Clause of the Fourteenth Amendment is implicated when on-campus speech by some violates the rights of others, for example, in the sexual harassment context. See infra note 62.

[FN44]. 474 U.S. 214, 215, 106 S. Ct. 507 (1985).

[FN45]. Justice Stevens delivered the opinion for the Court. Id. at 214, 106 S. Ct. at 507.

[FN46]. Id. at 225-26, 106 S. Ct. at 513-14 (citations omitted).

[FN47]. Id. at 226 n.12, 106 S. Ct. at 514 n.12 (citing Keyishian v. Board of Regents of the Univ. of the Stateof New York, 385 U.S. 589, 603, 87 S. Ct. 675, 683; Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1957)).

[FN48]. Id. at 226 n.12, 106 S. Ct. at 514 n.12 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312, 98 S. Ct. 2733, 2759 (1978); Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1957)).

[FN49]. 465 U.S. 271, 288, 104 S. Ct. 1058, 1068 (1984).

[FN50]. Id. at 278, 104 S. Ct. at 1062.

[FN51]. Id. at 282, 104 S. Ct. at 1065.

[FN52]. Id. at 286, 104 S. Ct. at 1066-67.

[FN53]. See Phoebe A. Haddon, Academic Freedom and Governance: A Call for Increased Dialogue and Diversity, 66 Tex. L. Rev. 1561 (1988) (discussing the importance of faculty involvement in institutional governance).

[FN54]. Knight, 465 U.S. at 287-88, 104 S. Ct. at 1067-68.

[FN55]. Id. at 288, 104 S. Ct. at 1068. Note that Knight has been criticized as the "least thoughtful" of the Court's forum decisions in which the "majority opinion upheld the law with virtually no analysis of the ways in which [the] restriction on the exchange of information among professional employees and administrators of a college might implicate first amendment values." Daniel A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1257 (1984).

[FN56]. Knight, 465 U.S. at 294-95, 104 S. Ct. at 1071 (citation omitted).

[FN57]. The concept of institutional academic freedom is well recognized by commentators. See, e.g., William H. Daughtrey, Jr., The Legal Nature of Academic Freedom in United States Colleges and Universities, 25 U. Rich. L. Rev. 233 (1991); Susan L. Pacholski, Comment, Title VII in the University: The Difference Academic Freedom Makes, 59 U. Chi. L.Rev. 1317 (1992); Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 Tex. L. Rev. 1265 (1988); Irwin H. Polishook, Academic Freedom and Academic Contexts, 15 Pace L. Rev. 141 (1994).

[FN58]. See J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L.J. 251 (1989) (recognizing that the judiciary has traditionally practiced "academic abstention" by its reluctance to involve itself in academic decision making).

[FN59]. See supra notes 25-29 and accompanying text.

[FN60]. See Byrne, supra note 58, at 323.

[FN61]. Id. See supra notes 44-48 and accompanying text.

[FN62]. It has been suggested that control of free speech by faculty in universities may be necessary where the Fourteenth Amendment conflicts with the First Amendment such as in the sexual harassment context or in the context of campus "speech codes and regulations that forbid the expression of racist, sexist, homophobic, or ethnically demeaning speech." See Polishook, supra note 57, at 153; Arthur L. Coleman & Jonathan R. Alger, Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom From Discrimination on University Campuses, 23 J.C. & U.L. 91 (1996). But see Neil W. Hamilton, Speech: Contrasts and Comparisons Among McCarthyism, 1960s Student Activism and 1990 Faculty Fundamentalism, 22 Wm. Mitchell L. Rev. 369 (1996) (suggesting that speech policies and codes and harassment policies threaten academic freedom).

[FN63]. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 106 S. Ct. 507, 514 (1985).

[FN64]. Minnesota State Bd. of Community Colleges v. Knight, 465 U.S. 271, 288, 104 S. Ct. 1058, 1067-68 (1984).

[FN65]. See David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, in Freedom and Tenure in the Academy, 227-301 (William W. Van Alstyne ed. 1993).

[FN66]. Cohen v. California, 403 U.S. 15, 19, 91 S. Ct. 1780, 1785 (1971).

[FN67]. U.S. Const. amend I.

[FN68]. Cohen, 403 U.S. at 19, 91 S. Ct. at 1785.

[FN69]. See Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304 (1957); Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973).

[FN70]. See Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725 (1952).

[FN71]. See Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942).

[FN72]. See Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S. Ct. 2294, 2303 (1972).

[FN73]. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 211, 95 S. Ct. 2268, 2273 (1975). In Erznoznik, the Supreme Court held invalid a city ordinance prohibiting the showing at drive-in theaters of films containing nudity. The court explained that each case depends on its own facts; however some general principles regarding the protection of individual privacy from intrusion by protected speech were described as follows:

> A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home. . . or the degree of captivity makes it impractical for the unwilling viewer

or auditor to avoid exposure.
Id. at 209, 95 S. Ct. at 2272-73 (citations omitted).

[FN74]. 408 U.S. 169, 194, 92 S. Ct. 2338, 2352 (1972). In Healy, Central Connecticut State College denied a student group's request for official campus recognition because of its concern over campus disruption, a concern that was based on the affiliation of the student group with groups from other campuses which had been known for engaging in disruptive activities.

[FN75]. Id. at 193, 92 S. Ct., at 2352.

[FN76]. Id. at 192, 92 S. Ct. at 2352 (quoting Estaban v. Central Mo. State College, 415 F.2d 1077, 1089 (9th Cir. 1969)).

[FN77]. Id. at 180, 92 S. Ct. at 2345-46 (quoting Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969)).

[FN78]. Id. at 201-03, 92 S. Ct. at 2356-57.

[FN79]. 454 U.S. 263, 102 S. Ct. 269 (1981). In Widmar, the university created what, two years later, Perry would define as a limited public forum by opening up its facilities to student groups. The Court held unconstitutional a university ban on the use of facilities by student religious groups where other student groups were allowed access to the facilities. The holding of Widmar is not relevant to the issue at hand because it is a limited public forum analysis.

[FN80]. Id. at 268 n.5, 102 S. Ct. at 274 n.5.

[FN81]. 515 U.S. 819, 115 S. Ct. 2510, 2518 (1995).

[FN82]. Widmar, 454 U.S. at 276, 102 S. Ct. at 278.

[FN83]. Rosenberger, 515 U.S. at 833, 115 S. Ct. at 2518.

[FN84]. Id. at 835, 115 S. Ct. at 2519.

[FN85]. Faculty members must be distinguished from students in this respect because of the employment relationship that exists between the faculty and the university. The ability of government employer to restrict employee speech involves a balancing of the employee's interest in commenting on matters of public concern against the employer's interest in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Educ. of Township High School Dist., 205, 391 U.S. 563, 88 S. Ct. 1731 (1968). See generally Hiers, supra note 22 (describing the public employee speech cases of Pickering and its progeny).

[FN86]. 460 U.S. 37, 103 S. Ct. 948 (1983).

[FN87]. Id. at 44, 103 S. Ct. at 954.

[FN88]. Id. at 37, 103 S. Ct. at 950.

[FN89]. Id. at 44, 103 S. Ct. at 954. David M. Rabban, Does Academic Freedom Limit Faculty Autonomy?, 66 Tex. L. Rev. 1405, 1408 (1988) (indicating that the AAUP's 1915 Declaration of Academic Freedom does not imply that a professor is exempt from all restrains on speech, and a professor "who departs from the scholarly standards that justify academic freedom can be disciplined or even dismissed").

[FN90]. Perry, 460 U.S. at 44, 103 S. Ct. at 954.

[FN91]. Id. at 45, 103 S. Ct. 954-55 (citation omitted).

[FN92]. Id. at 45, 103 S. Ct. at 955.

[FN93]. Id.

[FN94]. "[W]hen government property is not dedicated to open communication the government may-without further justification-restrict use to those who participate in the forum's official business." Id. at 53, 103 S. Ct. at 959.

[FN95]. Id. at 46, 103 S. Ct. at 955.

[FN96]. Id.

[FN97]. Id. (citations omitted).

[FN98]. Id.

[FN99]. Id. at 49, 103 S. Ct. at 957.

[FN100]. See David S. Day, The End of the Public Forum Doctrine, 78 Iowa L. Rev. 143, 160 (1992).

[FN101]. Id. at 163.

[FN102]. 473 U.S. 788, 801, 105 S. Ct. 3439, 3448 (1985).

[FN103]. Id. at 790, 105 S. Ct. at 3443.

[FN104]. Id. at 801, 105 S. Ct. at 3448.

[FN105]. Id. at 806, 105 S. Ct. at 3451.

[FN106]. Id. at 802, 105 S. Ct. at 3449.

[FN107]. Id. See, e.g., Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (8th Cir. 1996), cert. granted, 117 S.Ct. 1243 (1997), in which a public cable television station was held to have created a limited public forum by holding a congressional debate for the Democratic and Republican candidates. Forbes, a duly qualified independent candidate for the Congress in the Third District of Arkansas, asked to be included in the debate but was refused. Id. at 499. Forbes claimed that this exclusion violated his First Amendment rights. Id. The Eighth Circuit agreed with Forbes and held that the forum at issue is not the television station, but rather is the debate itself. Id. at 503. The court held that the debate is a limited public forum because the network opened up the debate for a limited class of speakers, Congressional candidates, and that the network's belief that Mr. Forbes did not have a chance to win was not a legally sufficient reason for excluding him from the debate. Id. at 504. The Supreme Court has granted certiorari to review this case; however, the decision was not available prior to publication of this article.

[FN108]. Perry, 460 U.S. at 45, 103 S. Ct. at 955.

[FN109]. 473 U.S. 788, 800, 105, S. Ct. 3439, 3449 (1985).

[FN110]. Perry, 460 U.S. at 49, 103, S. Ct. at 957.

[FN111]. See supra notes 17-20 and accompanying text.

[FN112]. Cornelius, 473 U.S. at 800, 105 S. Ct. at 3448.

[FN113]. Evidence of university intent will most likely come from university computer use policies.

[FN114]. Perry, 460 U.S. at 44-49, 103 S. Ct. at 954-57.

[FN115]. Cornelius, 473 U.S. at 802, 105 S. Ct. at 3449.

[FN116]. Loving v. Boren, 956 F. Supp. 953, 955 (W.D. Okla. 1997). For a description of this case, see infra text accompanying notes 119-123.

[FN117]. For examples of such policies, refer to state agency rules on the use of state resources,state executive orders on the use of electronic messaging, or other computer use policies that may exist at the state level.

[FN118]. For examples of such policies, refer to any applicable university business policy manuals and computer facility use manuals for guidelines on the use of university computer facilities.

[FN119]. 956 F. Supp. 953 (W.D. Okla. 1997).

[FN120]. Id. at 955.

[FN121]. Id. at 954.

[FN122]. Id.

[FN123]. Id. at 955.

[FN124]. Another instructive case, one which addressed the issue of qualified immunity of university administrators, is Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997). In Burnham the university allowed the student History Club to create a display, in the history department's campus display case, of pictures of history professors in costumes and with props that represent their historical interests and specialties. Two of the faculty members were depicted in military costumes with weapons. Prior to the establishment of the display, another faculty member had received violent anonymous death threats, and as a result, she complained about the depiction of other faculty members in historical costumes that included guns. The Chancellor asked the professors to remove the pictures because of concerns about the death threats, but they refused. Then the Chancellor had the photographs removed. Two student History Club members, joined by some of the faculty members whose photos were removed, sued the University claiming a violation of their First Amendment rights of free expression. See Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996), rev'd en banc, 119 F.3d 668 (8th Cir. 1997). The initial decision by the Eighth Circuit panel which held that the Chancellor was entitled to qualified immunity, Burnham, 98 F.3d 1007 (8th Cir. 1996), was vacated. On rehearing, the Eighth Circuit, sitting en banc, held that the Chancellor was not entitled to qualified immunity. Burnham, 119 F.3d at 670. The court utilized a three-prong qualified immunity analysis as follows: (1) whether the faculty member's expression is constitutionally protected speech, (2) whether that right was clearly established at the time of the violation; and (3) whether, given the facts most favorable to the plaintiffs, there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged action violated that right. Id. at 673-74. The court held that the Chancellor was not entitled to qualified immunity because (1) the photographs were constitutionally protected expression, Id. at 674; (2) the law on viewpoint discrimination is well settled and the Chancellor's removal of the photographs constituted impermissible viewpoint discrimination, Id. at 676; and (3) the Chancellor should have known that the alleged action violated the First Amendment rights of the professors. Id. at 677. The court also rejected the Chancellor's reliance on the public employee First Amendment line of cases of stemming from Pickering v. Board of Education of Township High School District 105, 391 U.S. 563 (1968). Burnham, 119 F.3d at 678. The dissent criticized the majority opinion for leaving out of the analysis critical facts regarding the violent death threats that were being waged against another faculty member and the effect of these death threats on the university. Id. at 681. The dissent indicated that the "parameters of the protection afforded to a university professor's academic speech were not clearly defined in May 1992 and are not clearly defined today." Id. at 683 (citation omitted). Further, the dissent argues that the removal of the photographs was not viewpoint discrimination, but was rather an attempt to address the potential disruptiveness that the photographs produced on campus. Id. at 684.

[FN125]. 759 F.2d 625 (7th Cir. 1985),

[FN126]. Id.

[FN127]. Id. at 628.

[FN128]. Id. at 629.

[FN129]. Id. at 630.

[FN130]. Id. at 629.

[FN131]. Id. at 630.

[FN132]. Id.

[FN133]. 424 F.2d 988 (1st Cir. 1970).

[FN134]. Id. at 990.

[FN135]. Id. at 989.

[FN136]. Id. at 990 (citations omitted).

[FN137]. 891 F.2d 165 (7th Cir. 1989).

[FN138]. Id. at 166.

[FN139]. Id. at 167.

[FN140]. Id.

[FN141]. Loving v. Boren, 956 F. Supp. 953 (W.D. Okla. 1997).

[FN142]. See supra notes 86-101 and accompanying text.

[FN143]. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12, 106 S. Ct. 507 n.12 (1985).

[FN144]. Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1957).

[FN145]. Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625, 629 (1985).

[FN146]. Minnesota State Bd. of Colleges v. Knight, 465 U.S. 271, 294-95, 104 S. Ct. 1058, 1071 (1984).

[FN147]. Widmar v. Vincent, 454 U.S. 263, 268 n.5, 102 S. Ct. 269, 274 n.5 (1981); Healy v. James, 408 U.S. 169, 180, 92 S. Ct. 2338, 2345 (1972).

[FN148]. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834, 115 S. Ct. 2510, 2519 (1995).

[FN149]. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802, 105 S. Ct. 3439, 3449 (1985).

[FN150]. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53, 103 S. Ct. 948, 959 (1983).

[FN151]. Id. at 49, 103 S. Ct. at 957.

[FN152]. See Cornelius, 473 U.S. at 801, 105 S. Ct. at 3448.

[FN153]. See supra notes 96-99 and accompanying text.

[FN154]. See supra notes 57-61and accompanying text.

[FN155]. See supra notes 96-97 and accompanying text.

[FN156]. See supra notes 102-107 and accompanying text.

[FN157]. See supra notes 82-85 and accompanying text.

[FN158]. If the university has turned its Web Server into a limited public forum, then Perry holds that the university will not be able to make content- based restrictions of faculty expression without first demonstrating that the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See supra notes 93-95 and accompanying text. As this standard is extremely difficult to meet, the university will effectively be giving up its right to control expression on its Web Server by transforming it into a limited public forum.

[FN159]. But see Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997).

[FN160]. Minnesota State Bd. of Colleges v. Knight, 465 U.S. 271, 294-95, 104 S. Ct. 1058, 1071 (1984).

END OF DOCUMENT