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with multiple legal challenges on First Amendment grounds. This Note relates some of that history, including the Third Circuit's decision declaring Solomon unconstitutional, and suggests some ways in which the Court might address the issues involved.

FREE AND REGULATED SPEECH ON CAMPUS: USING FORUM ANALYSIS FOR ASSESSING FACILITY USE, SPEECH ZONES, AND RELATED EXPRESSIVE ACTIVITY

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With their essential purpose being to inspire the exchange of new and challenging ideas, public colleges and universities are precisely the type of marketplaces that the Framers had in mind when they committed the nation to protecting both the process and the product of free speech under the First and Fourteenth Amendments.[1] As a result, public college and university attorneys are constantly challenged to draw constitutional lines between free and regulated speech on campus. In reviewing these lines, courts often walk through several common analytical steps and then use "forum analysis" to examine the location (i.e., forum), subject, and restrictions relating to the speech. Indeed, forum analysis has recently assumed a more visible role given the rise in challenges to colleges' and universities' use of "designated forums," or "speech zones" as they are now often called,[2] on campuses throughout the nation.

The purpose of this article is to explain forum analysis, as well as the issues that precede and follow its application, in order to assist college and university counsel with evaluating speech claims in a wide variety of circumstances. To this end, Part I introduces the context and setting for the article. Part II identifies the threshold issues that precede application of forum analysis, and explains how those issues can affect, confuse or even render its application moot. These issues include

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1. *See, e.g.*, Whitney v. California, 274 U.S. 353, 375–77 (1926) (Brandeis, J., concurring).

2. Challenges to such "speech zones" have been reported at a number of institutions around the country. For news reports of these challenges, search "speech zones" at http://chronicle.com.

identifying which, if any, speech right is involved; whom the law recognizes as the "speaker;" and whether the requisite state action is present. These issues also include distinguishing categories of speech that are generally protected from those that are not, and distinguishing the content of the speech from its viewpoint and effect. Part III explains the essential steps in forum analysis: identifying the specific location of the speech, and determining whether that location is a traditional public forum, a non-limited designated forum, a limited designated forum, or a private forum. Part III also discusses the timing and effect of the restrictions that institutions may apply in such forums, and the different standards of review that these restrictions may trigger. Part IV examines three recent cases that may serve as guides to college and university counsel in drafting or reviewing facility use policies that lawfully balance institutional needs with individual rights. Together, these three cases provide counsel with a reliable procedural checklist. Part V then offers a broader jurisprudential discussion of how counsel can identify and measure their clients', and even their own, philosophical biases in applying these procedures. The article concludes with a summary of the specific recommendations to counsel in drafting and applying policies governing speech throughout their campuses.

I. OVERVIEW OF COLLEGE FREE SPEECH AND FORUM ANALYSIS CASES

The United States Constitution provides that Congress, by force of the First Amendment, and that states, by force of the First Amendment through the Fourteenth Amendment, shall "make no law . . . abridging the freedom of speech . . . ."[3] States are further constrained by pertinent provisions of their own state laws.[4] Application of these prohibitions at public colleges and universities are particularly challenging for several reasons.

First, the culture of free ideological exchange is deeply embedded in the

3. U.S. CONST. amends. I, XIV. In 1998, Congress purported to extend First Amendment speech protections to students in *private* institutions that receive federal financial assistance. *See* 20 U.S.C. § 1011(a) (2000). The provision, however, has limited effect; it merely states the "sense of Congress" and has no enforcement mechanism. *See* WILLIAM KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION 327 (Supp. 2000).

4. Most of these laws are constitutional provisions. *See, e.g.*, ME. CONST. Art. 1, § 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press . . . ."). While states cannot impose standards less protective of federal individual liberties, states retain the sovereign and police powers to adopt protections of individual liberty more expansive than those conferred by the federal Constitution. Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980). For example, a state community interest standard under the obscenity analysis may be deemed more permissive than under federal jurisprudence. *See, e.g.*, City of Portland v. Jacobsky, 496 A.2d 646 (Me. 1985); MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE (1992). Likewise, federal constitutional analysis of a zoning ordinance may require an examination of the ordinance's predominant purpose, while a state constitutional inquiry might focus on whether there has been a purposeful attempt to regulate speech. Stringfellow's of N.Y., Ltd. v. City of N.Y., 694 N.E.2d 407, 415 (N.Y. 1998).

Some state protections of speech may also be statutory. *See, e.g.*, CAL. EDUC. CODE § 94367 (West 2002) (subjecting a private institution's student disciplinary actions to the strictures of the First Amendment). *See* KAPLIN & LEE, *supra* note 3, at 334–35 (discussing invalidation of a private university's harassment policy on First Amendment grounds under California law).

collegiate setting.[5] Second, there is a broad diversity of speakers—students, professors, non-teaching employees, vendors, external activists and the institution itself—all of whom bring differing rights to their expression.[6] Third, there are almost endless situations in which issues of free speech arise. For example, reported cases include claims relating to classroom lectures,[7] dormitory access,[8] lawn area use,[9] locker room pep talks,[10] student theses,[11] radio station funding,[12] movie showings,[13] internet usage,[14] graduation exercises,[15] commercial

5. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995); Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001). *See also* Healy v. James, 408 U.S. 169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506–07 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("[Academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (discussing the importance of academic freedom at colleges and universities). As counsel wade through the maze of fact-specific First Amendment cases, it is helpful to note there are many secondary school First Amendment cases, and their principles are often applicable in the university setting. They are not, however, *always* applicable. Key differences in institutional mission, student abilities, and societal expectations may mean that interests justifying secondary school action may be viewed as unduly protective or otherwise inapposite in the college or university setting. *See, e.g.*, Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003) *vacated and rehearing ordered en banc on unspecified grounds*, No. 01 C 0500, 2003 U.S. App. LEXIS 13195, at *1 (7th Cir. June 25, 2003); *Kincaid*, 236 F.3d at 346 n.4; 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 (2003).

6. *See, e.g.*, Galdikas v. Fagan, 342 F.3d 684 (7th Cir. 2003) (students); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001) (instructor); Besser v. Hardy, 535 U.S. 970 (2002) (professors); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (coaches); Hoover v. Morales, 164 F.3d 221, *superseding* 146 F.3d 304 (5th Cir. 1998) (employees as consultants or expert witnesses); American Future Sys. v. Pa. State Univ., 618 F.2d 252, 256-57 (3d Cir. 1980) (vendors); American Future Sys. v. Pa. State. Univ., 688 F.2d 907 (3d Cir. 1982) (vendors); Linnemeier v. Ind. Univ.-Purdue Univ. Fort Wayne, 155 F. Supp. 2d 1034 (N.D. Ind. 2001) (discussing the institution itself as speaker).

7. *See, e.g.*, Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908 (10th Cir. 2000); Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

8. *See, e.g.*, Fox v. Bd. of Trustees of State Univ. of N.Y., 841 F.2d 1207, 1211 (2d Cir. 1988) (holding that students have a speech right to receive information in their dormitory rooms), *rev'd on other grounds*, 492 U.S. 469 (1989) (holding that student's claim against university for regulating commercial speech in dormitories was not ripe for resolution). *See also* 64 ALR FED. 771 (regarding censorship in public libraries); *Am. Future Sys.*, 618 F.2d at 252; *Am. Future Sys.*, 688 F.2d at 907.

9. *See, e.g.*, Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735 (4th Cir. 1988); Auburn Alliance for Peace and Justice v. Martin, 684 F. Supp. 1072 (M.D. Ala.), *aff'd*, 853 F.2d 931 (11th Cir. 1988).

10. *See, e.g.*, *Dambrot*, 55 F.3d at 1157.

11. *See, e.g.*, Brown v. Li, 308 F.3d 939 (9th Cir. 2002).

12. *See, e.g.*, Fordham Univ. v. Brown, 856 F. Supp. 684 (D.D.C. 1994).

13. *See, e.g.*, Cummins v. Campbell, 44 F.3d 847 (10th Cir. 1994); Brown v. Bd. of Regents of Univ. of Neb., 640 F. Supp. 674 (D. Neb. 1986).

14. *See, e.g.*, Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000). *See also* 98 ALR 5th 167, §§ 3, 6 and 8 (internet regulations); KAPLIN & LEE, *supra* note 3, § 4.18 (discussing free speech on campus computer networks).

solicitations,[16] student recruiting,[17] employee hand-bills,[18] vendor advertising,[19] interest group leafleting,[20] student electioneering,[21] tree sitting,[22] and the content and distribution of student newspapers.[23] Finally, the broader legal context—the jurisprudence of free speech law generally—is itself a maze of legal nuances, factual distinctions, and frequent intersections with other constitutional principles.[24]

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15. *See, e.g.*, Foto USA, Inc. v. Bd. of Regents of Univ. Sys. of Fla., 141 F.3d 1032 (11th Cir. 1998) (holding that photographer has no First Amendment right to access graduation ceremonies for commercial purpose of taking photographs and later soliciting sales of same).

16. *See, e.g.*, *Foto USA*, 141 F.3d at 1032; Fox v. Bd. of Trustees of State Univ. of N.Y., 841 F.2d 1207 (2d Cir. 1988); Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985); Khademi v. S. Orange County Cmty. Coll., 194 F. Supp. 2d 1011 (C.D. Cal. 2002); Burbridge v. Sampson, 74 F. Supp. 2d 940 (C.D. Cal. 1999).

17. *See, e.g.*, Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004), *aff'g*, 137 F. Supp. 2d 1076 (C.D. Ill. 2001) (discussed in Anna L. Rossi, Note, *The Exception to the Rule: Government Employers Right to Restrict Free Speech of Employees*, 29 J.C. & U.L. 719 (2003)).

18. *See, e.g.*, Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001) (removing handbills constitutes impermissible viewpoint discrimination).

19. *See, e.g.*, Pitt News v. Pappert, 379 F.3d 96, 111 (3d Cir. 2004) (holding Pennsylvania statute barring liquor advertisements in newspapers published on behalf of an educational institution to be unconstitutional).

20. *See, e.g.*, Mason v. Wolfe, 356 F. Supp. 2d 1147, 1162 (D. Colo. 2005) (upholding organization's right to leaflet in designated public forum); Flint v. Dennison, 2005 WL 701049, No. CV 04-85-M-DWM (D. Mont. Mar. 28, 2005).

21. *See, e.g.*, Husain v. Springer, 336 F. Supp. 2d 207, 209 (E.D.N.Y. 2004) (holding that college cannot nullify a student election because of student newspaper's support of particular candidates); Welker v. Cicerone, 174 F. Supp. 2d 1055 (C.D. Cal. 2001); Ala. Student Party v. Student Gov't Assoc. of the Univ. of Ala., 867 F.2d 1344 (11th Cir. 1989).

22. *See, e.g.*, People v. Millhollen, 786 N.Y.S.2d 703 (N.Y. City Ct. 2004). In this unusual case, a New York city court determined, as a matter of first impression, that a university student's action of climbing a tree on the university campus, and remaining there after being ordered by a police officer and a university official to descend, for the purpose of protesting the felling of trees to make way for a parking lot, amounted to "speech" protected by the First Amendment. *Id*. at 706–07. The conduct did not amount to unlawful trespass, absent any evidence that the student's presence in the tree was incompatible with the university's normal activities. *Id*. at 707–08. The student was lawfully enrolled and, therefore, licensed to be on the property, and the university policy manual was unclear as to whether tree-sitting was a lawful First Amendment expressive activity if engaged in prior to five o'clock in the afternoon. *Id*. Interestingly enough, the court did not attempt to apply any forum analysis in this case. If it had, the result would likely have been different.

23. *See, e.g.*, *Husain*, 336 F. Supp. 2d at 207 (holding that college cannot nullify a student election because of student newspaper's support of particular candidates); Hosty v. Carter, 325 F.3d 945 (7th Cir. 2003) (regulation of content), *vacated and rehearing ordered en banc on unspecified grounds*, No. 01 C 0500, 2003 U.S. App. LEXIS 13195, at *1 (7th Cir. June 25, 2003); Hays County Guardian v. Supple, 969 F.2d 111, 117–18 (5th Cir. 1992) (regulation of distribution); Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986), *aff'd*, 829 F.2d 662 (8th Cir. 1987) (regulation of content). *See also* Donald T. Kramer, Annotation, *Validity, Under Federal Constitution, of Public School or State College Regulation of Student Newspapers, Magazines, or Other Publications—Federal Cases* 16 A.L.R. FED. 182 (regarding regulation of student publications).

24. These include several topics not treated extensively here, namely the First Amendment rights of assembly or association, petition, press, and religious exercise and establishment. For a broad treatment of college speech issues, see ROBERT O'NEIL, FREE SPEECH IN THE COLLEGE

Despite these challenges, three basic rules of guidance emerge. First, the right of free expression is widely protected. Second, the right is not absolute. Finally, courts frequently walk through several common analytical steps and apply "forum analysis" to balance this right against an institution's legitimate administrative and pedagogical interests. Under forum analysis, courts identify the location, either literal or figurative, where the speech will be expressed; the subject of the message; and the source, timing, and effect of any restrictions.

Recent opinions have used forum analysis to resolve speech claims regarding use of a "park-like" plaza;[25] financial support of student organizations;[26] access to meeting rooms,[27] email systems,[28] bulletin boards[29] and display cases;[30] use of sidewalks,[31] alumni magazines,[32] radio[33] and television stations;[34] and the regulation of yearbooks,[35] stage productions,[36] and student picketing.[37] This article cites these and other cases to explain forum analysis and the key analytical issues that, although technically outside of the analysis, pervade its application.

COMMUNITY (1997).

25. *See, e.g.*, Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575 (S.D. Tex. 2003).

26. *See, e.g.*, Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 229–30 (2000); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1039 (9th Cir. 1999); Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1548 (11th Cir. 1997) (holding that funding of student organizations is a limited public forum).

27. *See, e.g.*, Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir. 1994), *aff'g in part*, 811 F. Supp. 1137 (E.D. Va. 1993).

28. *See, e.g.*, White Buffalo Ventures, Inc. v. Univ. of Tex. at Austin, No. A-03-CA-296 SS 2004 WL 1854168 (W.D. Tex. March 22, 2004). For a copy of the university's anti-spam policy that the court upheld, see UNIV. OF TEX. AT AUSTIN INFORMATION TECH. SERVS., NO SPAM POLICY, ENFORCEMENT, AND APPEAL PROCEDURE, *available at* http://www.utexas.edu/its/policies/spam/spam-law-appeals.html (last modified Jan. 20, 2004).

29. *See, e.g.*, Khademi v. S. Orange County Cmty. Coll., 194 F. Supp.2d 1011 (C.D. Cal. 2002); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000).

30. *See, e.g.*, Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997).

31. *See, e.g.*, Brister v. Faulkner, 214 F.3d 675 (5th Cir. Tex. 2000) (discussed in Juliane N. McDonald, Note, Brister v. Faulkner *and the Clash of Free Speech and Good Order on the College Campus*, 28 J.C. & U.L. 467 (2002). *But see also* Paff v. Kaltenbach, 204 F.3d 425, 433 (3d Cir. 2000) (holding that sidewalk outside post office is a public forum but denying plaintiff relief).

32. *See, e.g.*, Rutgers 1000 Alumni Council v. Rutgers, 808 A.2d 679 (N.J. Super. Ct. App. Div. 2002).

33. *See, e.g.*, Knights of the Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1096 (8th Cir. 2000) (holding that university's radio station did not have to allow the KKK to underwrite a program because the underwriting spots constituted the radio station's speech and the underwriting program was not a public forum).

34. *See, e.g.*, Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982).

35. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 349 (6th Cir. 2001) (finding yearbooks at a public university to be a limited public forum, but reversing and remanding on the grounds that university confiscation was not a proper time, place or manner regulation).

36. *See, e.g.*, Linnemeier v. Ind. Univ.-Purdue Univ. Fort Wayne, 155 F. Supp. 2d 1034, 1040–41 (N.D. Ind. 2001) (finding that a public university's stage constituted a limited public forum).

37. *See, e.g.*, Galdikas v. Fagan, 342 F.3d 684, 695–96 (7th Cir. 2003) (finding that an alumni event did not constitute a public forum).

All told, these analyses explain how and why the factors in forum analysis move along a sliding scale of key facts.

II. TASKS THAT PRECEDE APPLICATION OF FORUM ANALYSIS

Before engaging in forum analysis, it is important to complete five tasks. These tasks are not only important in and of themselves, they are also important in their ability to influence, confuse, and even moot forum analysis.

A. Identify Whether There is "Speech" and, if so, the Dimension of the Speech Right Involved

The threshold task is to understand what types of expressive conduct constitute "speech" within the meaning of the First Amendment. The protection is broad and includes any oral, graphic, pictorial, or other expressive means that conveys an idea. Some, albeit often older, opinions distinguish "pure" speech from "symbolic" speech. Pure speech refers to direct expression of an idea, while symbolic speech, also often called "speech plus," refers to non-verbal conduct or displays.[38] "Non-verbal conduct constitutes symbolic speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way."[39] This distinction is important to note because some commentators have written that courts provide more protection to pure speech than to symbolic speech. It is, however, more accurate to say that symbolic speech is not less protected per se, but that the complicating factors that often accompany symbolic speech—such as disruptive conduct—are what limit the protection it ultimately receives in a given case.[40]

A related threshold task is to identify the dimension of the speech right that is involved. For example, it is well known that the First Amendment prevents the government from prohibiting one's own expression.[41] But the First Amendment also prohibits preventing one from receiving another's expression.[42] It further prohibits compelling one to express certain views[43] or to foster adherence to an

38. *See* Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 326 (1968) (Douglas, J., concurring).

39. Burnham v. Ianni, 119 F.3d 668, 674 (8th Cir. 1997) (citing Spence v. Washington, 418 U.S. 405, 411 (1969)).

40. *See* United States v. O'Brien, 391 U.S. 367 (1968) (holding that "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests").

41. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375–377 (1927) (Brandeis, J., concurring).

42. *See* Fox v. Bd. of Trustees of State Univ. of N.Y., 841 F.2d 1207, 1211 (2d Cir. 1988) (holding that students have a speech right to receive information in their dormitory rooms) *rev'd on other grounds* 492 U.S. 469 (1989) (holding that student's claim against university for regulating commercial speech in dormitories was not ripe). *See also* 64 ALR FED. 771 (regarding censorship in public libraries).

43. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1291 (10th Cir. 2004) (addressing genuine issue of material fact whether theater curricular requirement that student read some lines that

ideological viewpoint.[44] Finally, the First Amendment prohibits compelling one to subsidize speech to which one objects.[45] It is important to understand these different dimensions so that the full scope of the individuals' and the institutions' speech rights are recognized and protected.

B. Identify the Speaker

A second essential task is to identify whom the law recognizes as being the speaker. This is not always as obvious as it appears.

The first class of speakers consists of individuals who speak directly on their own behalf, such as protestors, or the institution itself through its own means of communication. Where the analysis can get challenging is when individuals seek to compel the institution to incorporate the individual's own speech into that of the institution. Speech of this type is frequently referred to as "school-sponsored speech" because the speech, by its nature, bears the imprimatur of the school.[46] Examples of such speech include individuals seeking to have their message printed in a college publication,[47] posted on a high school bulletin board,[48] seen in a display case,[49] heard on public television[50] or underwritten for a radio program.[51] By law, however, such speech is the speech of the institution, not the individual, and such individuals have fewer rights to require an institution to incorporate or amplify their own personal speech.[52]

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student found offensive required student to espouse an ideological position in violation of her First Amendment rights). *See also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998) (holding that First Amendment does not compel public broadcasters to allow third parties to participate in programming); Leonard Niehoff, *The First Amendment*, 29 J.C. & U.L. 225, 238 (2003) (presenting a review of higher education speech cases from 2001).

44. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that license plate motto "Live Free or Die" forced individuals "to be an instrument for fostering adherence to an ideological point of view"); W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (finding unconstitutional a requirement that objecting Jehovah's Witnesses salute the flag and recite the pledge of allegiance in contravention of their religious and ideological beliefs).

45. *See* United States v. United Foods, Inc., 533 U.S. 405 (2001); Keller v. State Bar of Cal., 496 U.S. 1 (1990); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). *But see* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); *and* cases cited, *supra* note 26.

46. *See* Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 270–73 (1988); Planned Parenthood v. Clark City Sch. Dist., 941 F.2d 817, 828–29 (9th Cir. 1991) (holding that advertising sections of student newspaper, yearbook, and school's athletic programs were not public forums).

47. *See, e.g.*, Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679 (N.J. Super. Ct. App. Div. 2002).

48. *See, e.g.*, Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000).

49. *See, e.g.*, Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997).

50. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (stating that the First Amendment does not compel public broadcasters to allow third parties access to programming).

51. *See, e.g.*, Knights of the Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1096 (8th Cir. 2000) (holding that university's radio station did not have to allow the KKK to underwrite a program because the underwriting spots constituted the radio station's speech and the underwriting program was not a public forum).

52. *See* DiLoreto v. Downey Unified Sch. Dist., 196 F.3d 958, 969 n.5 (9th Cir. 1999) ("The Supreme Court has made clear that the question whether the First Amendment requires a

It can be difficult to draw the distinction between individual and institutional speech. For example, questions often arise whether classroom lectures and assigning grades are a professor's speech or an institution's speech. Courts have held that, in the classroom, the institution has the right to express "what may be taught" and "how it shall be taught."[53] The professor, although an agent of the institution, has her own right of expression,[54] but it is limited by those rights of the college or university.[55] For example, a professor does not have a constitutional right to use profanity in the classroom,[56] unless that speech is related to the subject matter of the curriculum authorized by the institution.[57] With regards to grades, courts have held, for example, that the professor has a right to express his view of the grade and cannot be compelled by the university to change that assessment.[58] A professor cannot, however, compel the university to express his choice of grade on the institution's official transcript.[59] The transcript is the university's speech and the university retains the right to express its view of the grade that should be entered there.[60]

Finally, in identifying the speaker, counsel should note there is also a difference between speakers who are members of the college or university community, such as students and employees, and speakers who are from outside that community, such as vendors, activists, and external interest groups.[61] Succinctly stated, courts

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school to tolerate certain speech, such as the speech of students, is different from the question of whether the First Amendment requires a school to promote or endorse another's speech."); Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 270–73 (1988) (holding that schools are entitled to exert greater control over student speech and expression in the context of expressive activities that others "might reasonably perceive to bear the imprimatur of the school"); Planned Parenthood of Southern Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 828–29 (holding that high school faculty may exert greater control over content of outside organization's proposed advertisements in school publications).

53. Edwards v. Cal. Univ. of Penn., 156 F.3d 488, 492 (3d Cir.1998) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

54. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 678 (6th Cir. 2001); Parate v. Isibor, 868 F.2d 821, 831 (6th Cir. 1989). Note, however, that the Third Circuit rejected the *Parate* court's rationale as offering a less "realistic view of the university-professor relationship." Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001).

55. *Armenti*, 247 F.3d at 79.

56. Martin v. Parish, 805 F.2d 583 (5th Cir. 1986).

57. *Compare* Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001) (stating that professor's profane in-class speech not germane to the subject matter of the lecture) *with Hardy*, 260 F.3d 671, 679 (finding that profane in-class speech was germane to lecture).

58. *Armenti*, 247 F.3d at 76; Lovelace v. S.E. Mass. Univ., 793 F.2d 419, 425 (1st Cir. 1986).

59. Parate, 868 F.2d at 827–28 (stating that professor's assignment of grades is entitled to "some measure" of protection).

60. *Armenti*, 247 F.3d at 79.

61. *See* A.C.L.U. Student Chapter-Univ. of Md. Coll. Park v. Mote, 321 F. Supp. 2d 670, 681 (S.D. Md. 2004) (holding that forum limited to speakers associated with university legitimately furthers institution's primary purpose); Bourgault v. Yudof, 316 F. Supp. 2d 411, 421 (N.D. Tex. 2004) (holding that outside preacher was properly denied access to campus forums); Gilles v. Torgersen, 71 F.3d 497, 502 (holding that outside preacher was not entitled to speak at a university and that security and safety are legitimate interests if not specious or pretextual). *See also* Glover v. Cole, 762 F.2d 1197, 1201, 1201 n.7 (4th Cir. 1985) (holding that the state has a

are more likely to look favorably upon regulation of external speakers since they are not part of the immediate community and have, therefore, a less compelling right to be heard in that community.[62]

C. Identify State Action

A third task is to recognize that constitutional restrictions on the regulation of speech apply only to governmental institutions and not to private entities.[63] A threshold question, therefore, is whether the regulator at issue is a state actor.[64] The line of distinction between the state, a related public entity, and an intertwined private entity, is not always clear. Indeed, this question can arise not only with regard to affiliated entities like athletic associations,[65] university hospitals,[66] television stations,[67] and student groups,[68] but also with regard to the institution itself.[69]

The determination of whether there is requisite state action is based on a particularized inquiry. Such inquiry focuses on whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so

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recognized interest in regulating the way that third parties utilize its educational facilities).

62. *See, e.g.*, *Glover*, 762 F.2d at 1201. For an example of use policies distinguishing university from non-university groups, compare WICHITA STATE UNIV., USE OF UNIV. CAMPUS BY UNIV. GROUPS FOR FIRST AMENDMENT ACTIVITIES, *available at* http://webs.wichita.edu/inaudit/ch11_13.htm (Sept. 1, 1998), with WICHITA STATE UNIV., USE OF UNIV. CAMPUS BY NON-UNIVERSITY GROUPS FOR FIRST AMENDMENT ACTIVITIES, *available at* http://webs.wichita.edu/inaudit/ch11_12.htm (July 1, 1998).

63. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785 (2d ed. 1988).

64. *See* Coleman v. Gettysburg Coll., 335 F. Supp. 2d 586, 588 (M.D. Pa. 2004) (holding that exhibit of confederate flag in art gallery of private college does not implicate state action); Sinn v. Daily Nebraskan, 638 F. Supp. 143, 149 (D. Neb. 1986), *aff'd*, 829 F.2d 662 (8th Cir. 1987) (holding that student newspaper was not a state actor); Takle v. Univ. Hosp. & Clinics Auth., 402 F.3d 768 (7th Cir. 2005) (holding that university hospital is not an arm of the state).

65. *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179 (1988).

66. *See, e.g.*, *Takle*, 402 F.3d 768.

67. *See, e.g.*, Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982).

68. *See, e.g.*, Leeds v. Meltz, 898 F. Supp. 146, 148 (E.D.N.Y. 1995) (stating that student editors of a newspaper are not state actors when the school does not exercise control over the newspaper).

69. *See, e.g.*, Curto v. Smith, 248 F. Supp. 2d 132 (N.D.N.Y. 2003). *See also* Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968) (holding that State of New York's regulation of educational standards and incorporation of private institution did not transform acts by that private institution into state action but that acts by a state college operated by a private institution through a contract with the state do constitute state action); Jackson v. Strayer Coll., 941 F. Supp. 192, 196 (D.D.C. 1996) (holding that private college's efforts to prevent creation of student government did not constitute violation of First Amendment speech protections because private institution did not qualify as state actor); Stoll v. N.Y. State Coll. of Veterinary Med. at Cornell Univ., 723 N.E.2d 65 (N.Y. 1999) (holding that certain activities conducted by New York statutory colleges, which conduct a hybrid of government and private activities, may be excluded from classification as state acts); Logiodice v. Trustees of Me. Cent. Inst., 296 F.3d 22, 28 (1st Cir. 2002) (holding that acts by a nonstate entity may be considered state action in selected cases where "if, with respect to the activity at issue, the private entity is engaged in a traditionally exclusive public function; is 'entwined' with the government; is subject to governmental coercion or encouragement; or is willingly engaged in joint action with the government").

that the action of the latter may "be fairly treated as that of the State itself."[70] Acts by nominally private entities may comprise state action if, with respect to the activity at issue, the private entity is engaged in a traditionally exclusive public function; is "entwined" with the government; is subject to governmental coercion or encouragement; or is willingly engaged in joint action with the government.[71] "Entwinement" is likely to be found if the state creates the legal framework governing the conduct,[72] delegates its authority to the private actor,[73] or knowingly accepts the benefits derived from unconstitutional behavior.[74] In the college and university setting, courts look for these attributes by examining primarily the source of enabling authority, actual operational control, and sources of funding.[75]

D. Distinguish Protected from Unprotected Categories of Speech

The next task that precedes application of the forum analysis requires the recognition that, although the First Amendment applies broadly to oral, written, pictorial or other expressions of an idea or opinion, it does not protect every such expression. Indeed, there are several general categories of speech, and it is helpful to note, perhaps more as a general benchmark than a strict rule of law, the sliding degrees of scrutiny that each of the different classes often receive.

1. Speech Generally Protected by the First Amendment

There are four categories of speech that are commonly regarded as receiving First Amendment protection. The first is "political speech" which refers to expressions that advance "an idea transcending personal interest or opinion, and which impacts our social and/or political lives."[76] The second is "religious speech" which consists of expressions of deeply held beliefs in a recognized doctrine of faith.[77] The third category is "corporate speech" which denotes the speech of a corporate entity.[78] Finally, there is "commercial speech" that includes solicitations and advertisements and communicates only the financial interests of the speaker.[79]

Generally speaking, restrictions on political and religious speech receive the closest scrutiny. This is because of the historic and important social values that

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70. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–96 (2001) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974)). The color-of-law requirement of 42 U.S.C. § 1983 and the state-action requirement of the Fourteenth Amendment have been held to be equivalent. *NCAA*, 488 U.S. at 182 n.4.

71. *Brentwood Acad.*, 531 U.S. at 296.

72. *See, e.g.*, N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

73. *See, e.g.*, West v. Atkins, 487 U.S. 42 (1988).

74. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

75. *See, e.g.*, Curto v. Smith, 248 F. Supp. 2d 132 (N.D.N.Y. 2003).

76. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 682–83 (6th Cir. 2001) (quoting Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1189 (6th Cir. 1995)).

77. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961).

78. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

79. *See, e.g.*, Cent. Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

they embody and advance: Free expression of both political and religious speech is at the heart of our historical and constitutional conceptions of liberty and belief. The analysis of religious speech is, of course, complicated by the fact that governmentally restrained religious speech implicates the Free Exercise Clause of the First Amendment, and religious speech that is not so restrained implicates the Establishment Clause.[80]

By contrast, commercial speech primarily relates not to ideas, but to products. In a democracy, products are not deemed to be as constitutionally significant as ideas.[81] Commercial speech, which attracts its own constitutional test,[82] generally draws less protection than political or religious speech.[83] But commercial speech needs to be distinguished from corporate speech which, although the speech of a profit-making entity, may not relate solely to its product.[84] Nonetheless, because corporations are sanctioned by the government and accorded distinct benefits, such as limited liability, the government may impose greater restraints on corporate speech.[85]

These broad definitions and categorizations aside, distinguishing these different classes is not always easy. Consider, for example, the late Supreme Court Justice William Brennan's question as to whether a phrase like "Be a Patriot; Buy American Cars" constitutes a political or commercial utterance.[86] Nonetheless, the distinctions are important as at least general guideposts because of the level of scrutiny they are inclined to attract.

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80. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (holding that the exclusion of a Christian club is unconstitutional religious viewpoint discrimination); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (holding that facilities made available to the public must also be made available to religious groups). *See also* William B. Johnson, Annotation, *Validity and Construction of Public School Regulation of Student Distribution of Religious Documents at School*, 136 A.L.R. FED. 551 (2004) (discussing student distribution of religious materials at school); Martin J. McMahon, Annotation, *Bible Distribution or Use in Public School—Modern Cases*, 111 A.L.R. FED. 121, §§ 7, 8(a) (2004) (analyzing bible distribution); J.C. Vance, Annotation, *Use of School Property for Other than School or Religious Purposes*, 94 A.L.R. 1274 (1964) (discussing use of school property for religious purposes). The tension between the Free Speech and Establishment Clauses of the First Amendment is clearly illuminated by the sharply divergent majority and dissenting opinions in *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995). KAPLIN & LEE, *supra* note 3, at 346 (Supp. 2000).

81. *See* KAPLIN & LEE, *supra* note 3, at 657. *See also* TRIBE, *supra* note 63, at 891 (discussing the assimilation of commercial speech into the First Amendment).

82. Succinctly stated, the test for determining whether regulation of commercial speech violates the First Amendment is whether (1) the speech concerns a lawful activity; (2) the speech is not misleading; (3) the asserted governmental interest is substantial; (4) the regulation directly advances the governmental interest asserted; and (5) the regulation is not more extensive than is necessary to serve that interest. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001); Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 175 (1999).

83. Hoover v. Morales, 164 F.3d 221, 225 (citing Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

84. *See*, *e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (striking down a state statute forbidding certain corporations from spending certain funds on public referenda proposals).

85. *See*, *e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).

86. *See* Air Line Pilots Ass'n Int'l v. Dept. of Aviation of Chi., 45 F.3d 1144, 1160 (7th Cir. 1995).

2. Speech Generally *Not* Protected by the First Amendment

The Supreme Court in *Connick v. Myers*[87] said that government cannot function if everything is reduced to a constitutional matter.[88] This is one way of saying that not every expression, such as the following, rises to the level of First Amendment protection.[89]

First, there is a de minimis exception to the First Amendment. For example, a student's complaint about a seating assignment has "no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process."[90] Nor does a requirement that a theater student recite lines for a play constitute compulsion of a "state orthodoxy."[91] Similarly, a professor must show that her in-class speech is germane to the subject matter of the lecture in order for that speech to receive First Amendment protection.[92] And all public employees disciplined for their speech must show that the content of their speech is directed toward an issue of "public concern," and that their interest in speaking outweighs the employer's interest in regulating the speech.[93] Such speech need not itself constitute a "pure public debate," but it must "relate to matters of overwhelming public concern—race, gender and power conflicts in our society."[94] Whether a given expression is of such concern is determined from the content, form, and context of the statement.[95]

Second, speech that promotes or produces an unlawful end is likewise not protected by the First Amendment. This class includes expression that promotes the imminent prospect of actual violence or harm,[96] fighting words,[97] terrorist

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87. 461 U.S. 138 (1983).

88. *See id.* at 143.

89. Courts phrase this proposition differently. Some say the speech is outside, or not protected by, the Constitution. Others say not that it is unprotected, but that the permissible degree of its regulation is more clearly established. The Supreme Court has observed that the latter is literally more correct. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

90. Salehpour v. Univ. of Tenn., 159 F.3d 199, 208 (6th Cir. 1998).

91. Axson-Flynn v. Johnson, 356 F.3d 1277, 1301 (10th Cir. 2004).

92. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001); Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir 2001).

93. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 140 (1984); Schilcher v. Univ. of Ark., 387 F.3d 959, 965 (8th Cir. 2004); Hulen v. Yates, 322 F.3d 1229, 1237 (10th Cir. 2003); Landesberg-Boyle v. Louisiana, No. Civ A 03-3582, 2004 WL 2035003, *5 (E.D. La. Sept. 10, 2004); Serrato v. Bowling Green State Univ., 252 F. Supp. 2d 550, 554 (N.D. Ohio 2003); *Hardy*, 260 F.3d at 678; Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1185–91 (6th Cir. 1995); Diane Heckman, *The First Amendment and Academia: Twenty Years of Examining Matters of Public Concern*, 188 EDUC. L. REP. 585 (2004). For an account of Yale University's recent adverse jury verdict worth $5.5 million in a case that implicated the public concern test, see Thomas B. Scheffey, *Yale Doctors Survive Legal Trump Card*, CONN. LAW TRIBUNE, *available at* http://www.law.com/jsp/article.jsp?id=1103549723769 (Dec. 23, 2004).

94. *Hardy*, 260 F.3d at 679.

95. *Bonnell*, 241 F.3d at 812 (citing *Connick*, 461 U.S. at 147–48).

96. *See, e.g.*, Virginia v. Black, 537 U.S. 808 (2003); Gooding v. Wilson, 405 U.S. 518 (1972). Note that an "undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

threats,[98] hate speech[99] and speech that constitutes or promotes gross disobedience of legitimate rules.[100] This class also includes expression that constitutes criminal or severe harassment,[101] defamation,[102] obscenity,[103] false advertising,[104] criminal trespassing[105] and the use of public resources to promote partisan political activities in violation of state or federal law.[106] It may also include vulgarities at

97. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (holding that categories of speech such as obscenity, defamation, and 'fighting words' are considered to be constitutionally proscribable so long as restrictions are not aimed at restricting nonproscribable content).

98. *See* generally, John P. Ludington, Annotation, *Validity and Construction of Terroristic Threat Statistics*, 45 A.L.R. 4th 949 (1996–2005) (discussing the validity and construction of statutes which criminalize the making of a terrorist threats).

99. *See, e.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1189 (6th Cir. 1995) (holding that public employee could be fired for use of racial epithet even though school's anti-harassment policy is unconstitutional). *But see* Papish v. Univ. of Mo, 410 U.S. 667, 670 (1973) (finding that dissemination of ideas, no matter how offensive, could not be curtailed based solely on "conventions of decency"). *See also* Kevin O'Shea, *Review of Alexander Tsesis' Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, 30 J.C. & U.L. 681 (2004) (critiquing a book which argues that the federal government should follow the example of European governments in criminalizing 'hate speech' targeted at racial and other minority groups.).

100. *See, e.g.*, Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827 (7th Cir. 1998) (holding that article about how to hack into school's computers published in an underground newspaper was not entitled to protection); Mitchell J. Waldman, Annotation, *What Oral Statement of Student is Sufficiently Disruptive so as to Fall Beyond Protection of First Amendment*, 76 A.L.R. FED. 599 (2005). *See also* Timm v. Wright State Univ., 375 F.3d 418, 423 (6th Cir. 2004) (holding that an employee's insubordination and creation of "an unhealthy office environment" was not protected speech); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 681 (2001) (finding that employee's speech must not undermine working relationships within a department, interfere with duties, or impair discipline).

101. *See, e.g.*, State v. Cropley, 544 A.2d 302, 304 (Me. 1988) (holding that state harassment statute does not violate the First Amendment). *See also* U.S. DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html (July 28, 2003) (emphasizing that harassment must be "severe, persistent or pervasive" under those laws that the Office for Civil Rights enforces).

For competing cases regarding speech that may not rise to the level of "criminal" or "severe," compare *Cady v. South Suburban College*, 310 F. Supp. 2d 997, 1001 (N.D. Ill. 2004) (upholding student code of conduct banning hazing and abusive language) with *UWM Post v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (invalidating university offensive or hate speech code as overbroad and unduly vague).

102. *See, e.g.*, Gertz v. Welch, 418 U.S. 323, 339–40 (1974).

103. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973).

104. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748, 777 (1976) (Stewart, J., concurring).

105. *See generally* Joan Teshima, Annotation, *Trespass: State Prosecution for Unauthorized Entry or Occupation, for Public Demonstration Purposes, of Business, Industrial, or Utility Purposes*, 41 A.L.R. 4th 773 (2004) (discussing case law related to statutes that prohibit trespass intended to peacefully protest public issues). *But see* People v. Millhollen, 786 N.Y.S.2d 703, 708 (N.Y. City Ct. 2004) (holding that defendant's action of climbing campus tree and remaining there after police ordered him to leave constituted protected speech and did not amount to disorderly conduct).

106. *See* Hatch Political Activity Act, 5 U.S.C. § 1502 (2000) (prohibiting the use of public resources for partisan political activities). *See generally* Francis M. Dougherty, Annotation,

athletic events.[107]

Note, however, that even though these classes of speech are generally not protected by the First Amendment; colleges and universities must still be prepared to show that the speech at issue qualifies for such classifications, and that an institution's action with respect to that speech is not otherwise arbitrary, irrational, or capricious under a due process analysis.[108]

E. Distinguish Content of Speech from Its Viewpoint and Its Effect

The final pre-forum analysis task is for counsel to understand the subtle distinction between an expression's content and its viewpoint, and to distinguish both from an expression's effect. Succinctly stated, "content" refers broadly to the subject matter of the speech; "viewpoint" refers to the perspective from which a speaker views a particular topic—e.g. viewing child-rearing questions from a Christian perspective;[109] and "effect" is what happens or is likely to happen in response to the expression of that content and/or viewpoint. For example, the content of a regulated expression may be political, its viewpoint may be the promotion of anarchy, and its effect may be to incite a violent demonstration. While the content and viewpoint may themselves be protected, this speech would lose its protection when its effect is to yield a serious and imminent risk of harm.[110]

Content and viewpoint-based measures will both be subject to strict scrutiny. Viewpoint-based restrictions are a form of content-based regulation,[111] but viewpoint-based restrictions may in fact be more pernicious because of their more targeted focus. For example, as the Supreme Court has noted, a government may proscribe libel as content unworthy of First Amendment protection, but it may not proscribe only libel critical of the government.[112] Likewise, effect-based constraints will be closely scrutinized—and perhaps strictly scrutinized, depending

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Validity, Construction, and Effect of State Statutes Restricting Political Activities of Public Offices or Employees, 51 A.L.R. 4th 702 (1995) (discussing legal restrictions on the use of public resources of partisan political activities).

107. See, for example, reports of the effort by the University of Maryland, with the Maryland Attorney General's approval, to restrict vulgar chants and signs by athletic event spectators, available at http://chronicle.com/weekly/v50/i44/44a03202.htm and http://chronicle.com/weekly/v50/i31/31a00101.htm. For a thorough discussion of this issue, see Howard M. Wasserman, *Cheers, Profanity, and Free Speech*, 31 J.C. & U.L. 377 (2005).

108. R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992).

109. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995) (discussing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)). Note, however, at least two courts think that the distinction between content and viewpoint is too malleable. Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001); Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997).

110. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969); *Gay Lesbian Bisexual Alliance*, 110 F.3d at 1550.

111. *Rosenberger*, 515 U.S. at 829–30, 835; Burnham v. Ianni, 119 F.3d 668, 676; *Gay Lesbian Bisexual Alliance*, 110 F.3d at 1550; KAPLIN & LEE, *supra* note 3, at 353 (Supp. 2000).

112. *R.A.V.*, 505 U.S. at 383–84. For a thoughtful discussion of issues of content and viewpoint in the pornography context see *American Booksellers Ass'n. v. Hudnut*, 771 F.2d 323, 327–34 (7th Cir. 1985).

on how the facts are argued—to ensure that such effects are in fact real and immediate,[113] and not a mere "undifferentiated fear . . . of disturbance."[114]

III. COMPONENTS OF FORUM ANALYSIS

Having identified the foregoing threshold tasks that precede application of forum analysis, this article now turns to the components of forum analysis. First, a brief overview of the evolution of the analysis is instructive.

The origin of forum analysis dates back to 1897 when the United States Supreme Court held broadly that the government was free to control its property as it saw fit. There, in *Davis v. Massachusetts*,[115] the Court upheld a city ordinance requiring a permit for certain uses of Boston Common.[116] The Court held that the City had not only the right to control *some* use in the Common, it had the right to "absolutely exclude all right [of] use," and that plaintiff had "no particular right" to use the Common at all.[117]

However, in 1939, the Court retreated. There, in *Hague v. Committee for Industrial Organization*,[118] the Court struck down a Jersey City ordinance banning distribution of handbills and the like in all public places.[119] After purporting to distinguish the Court's decision in *Davis*, and without expressly overruling the rationale of *Davis*, the Court held that the public had, as part of their constitutional privileges and immunities of citizenship, a right to speak in certain public settings.[120]

In the nine years following *Hague*, the Court continued to address the scope of permissible speech in a number of public settings.[121] This emerging concept of

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113. *See* Hardy v. Jefferson Cmty. Coll. Dist., 260 F.3d 671, 682 (6th Cir. 2001); *Gay Lesbian Bisexual Alliance*, 917 F. Supp. at 1556 (citing Healy v. James, 408 U.S. 169, 186 (1972); *Bradenburg*, 395 U.S. at 447–48).

114. *Hardy*, 260 F.3d at 682. *See also Healy*, 408 U.S. at 184 ("While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action.").

115. 167 U.S. 43 (1897). *But see* Jamison v. Texas, 318 U.S. 413, 415–16 (1943) (noting that the argument made in *Davis* has been expressly rejected by the Court).

116. *Davis*, 167 U.S. at 48.

117. *Id.*

118. 307 U.S. 496 (1939)

119. *Id.* at 516.

120. *Id.* at 514–16. The Court noted:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 514–15.

121. *See, e.g.*, Saia v. New York, 334 U.S. 558 (1948) (invalidating an ordinance giving

forum analysis then "went through a troubled period of gestation . . . in the 1960's"[122] as the Court reviewed a variety of speech and assembly restrictions in a series of civil rights disputes.[123] Then, in 1972, in *Police Department of Chicago v. Mosely*,[124] the court first used the term "public forum" to define such public settings. Thereafter, the Court, in the 1983 case *Perry Education Ass'n v. Perry Local Educators' Ass'n*, articulated "forum analysis" as the standard for determining which speech must be permitted in such settings.[125]

A. Identify the Specific Location, or Forum, of the Speech

The first step in the forum analysis is to define *precisely* the location, or "forum" as the courts call it, that the speaker intends to use.[126] Again, this is not always obvious. If a speaker seeks access to a piece of property, such as a building, then that building is the relevant forum. But if a speaker seeks access to a bulletin board inside of a building, then that bulletin board is the relevant forum.[127] Note that the distinctions here can be very fine. For example, one court recently ruled that the pertinent forum in a dispute over the right to compel publication of an advertisement in a college magazine was not the magazine itself, but the much more limited advertising section of the magazine.[128]

Whether a court defines the scope of a forum narrowly or broadly depends on the context in which the forum is placed. Here, a forum's scope may have both an immediate and a broader context. For example, a display case in a student center may be regarded as a discreet, self-contained forum, but it may also be regarded as part of the larger lobby or gathering area in which it is located.[129] This question of

police "uncontrolled discretion" in denying permits for amplified speech in a public park); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating an ordinance forbidding door-to-door distribution and solicitation); Jamison v. Texas, 318 U.S. 413 (1943) (invalidating an ordinance prohibiting distribution of handbills); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a state law requiring a license for parades or processions on public streets); Schneider v. State, 308 U.S. 147 (1939) (invalidating an ordinance prohibiting solicitation and distribution of handbills on public streets and door-to-door without license from police).

122. TRIBE, supra note 63, at 986.

123. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (invalidating a parade ordinance for want of "narrow, objective and definite standards"); Cox v. Louisiana, 379 U.S. 536 (1963) (invalidating an ordinance prohibiting assembly, speech and breach of the peace that permitted "unfettered discretion"); Edwards v. South Carolina, 372 U.S. 229 (1963) (reversing breach of peace convictions for orderly speech at the state capitol).

124. 408 U.S. 92, 98–99 (1972) (invalidating municipal ordinance of labor pickets near a school).

125. 460 U.S. 37, 44 (1983).

126. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

127. *See* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).

128. Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 688 (N.J. Super. Ct. App. Div. 2002). For an example of a speech policy distinguishing indoor from outdoor forums, see W. VA. UNIV., BD. OF GOVERNORS' POLICIES at http://www.wvu.edu/~bog/bogpolicies.htm (last modified Feb. 21, 2005).

129. *See* U.S. S.W. Africa v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983). *See also* United States v. Kokinda, 497 U.S. 720, 727 (1990) (holding that although a sidewalk leading to the door of a post office shared physical characteristics with a traditional municipal sidewalk, the former did not constitute a "public forum," while the latter did); *Cornelius*, 473 U.S. at 805

a forum's scope is often determined by reference to the forum's purpose, a factor discussed below.

B. Determine Whether the Forum is Public or Non-Public

Once the precise scope of the forum has been identified, counsel should then determine whether that forum is public or non-public.[130]

1. Public Forums: Traditional and Designated

Public forums for college and university purposes are locations at an institution where the institution expressly allows or has otherwise tolerated speech to be expressed. There are two types of public forums: those that are public by tradition, and those that are public by designation. Traditional public forums, often called "open forums," are those places, like a sidewalk, park, or lawn area, that by tradition have long been used for assembly, communicating thoughts, and debating public questions.[131] Traditional public forums are defined by the objective characteristics of the property that render the property appropriate for communication of views of social and political significance.[132] Traditional public forums are open for expressive activity regardless of the government's intent; the objective characteristics of these properties require the government to accommodate speakers.[133]

Note that a classroom is not a traditional public forum.[134] Because an institution has a legitimate pedagogical interest in maintaining order and decorum in the classroom,[135] an institution may impose more prohibitions on speech there than it may elsewhere on campus. Thus, while marching and shouting may be protected in a quadrangle, they are likely not protected in a classroom.[136] Note, however, that a classroom protest that is silent, passive, and non-disruptive—like the black armband protest in *Tinker*—may not violate the institution's interests and may, therefore, be protected.[137]

"Designated" public forums are more limited areas, such as an auditorium or lobby, that do not qualify as traditional public forums but where the college or university has specifically permitted expression. It is critical to note that, to create

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("That [expressive] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes.").

130. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); Planned Parenthood Ass'n v. Chi. Transit Auth., 767 F.2d 1225, 1231 (7th Cir. 1985).

131. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988); *Perry*, 460 U.S. at 45.

132. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998); Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1042 (5th Cir. 1982).

133. *Ark. Educ. Television Comm'n*, 523 U.S. at 678–80 (defining the basic characteristics of a public forum).

134. *See* Bishop v. Arnov, 926 F.2d 1066, 1071 (holding that professor's classroom was not a public forum).

135. *See* KAPLIN & LEE, *supra* note 3, at 330 (Supp. 2000).

136. *See* Vanderhurst v. Colo. Mountain Coll. Dist., 208 F.3d 908, 913–14 (10th Cir. 2000).

137. KAPLIN & LEE, *supra* note 3, at 330 (Supp. 2000).

a designated public forum, a college or university must take purposeful action. An institution does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a location for public discourse.[138] Nor does an institution create a designated public forum when it allows selective access for individual speakers, rather than general access for a class of speakers.[139] Finally, an institution does not create a designated public forum when it merely reserves access for a particular class of speakers and then still requires specific individual permission for use.[140]

There are two types of designated public forums: non-limited and limited.[141] Non-limited designated forums, also often called "open forums," are open for all expression. There are no limits on who can speak or what the subjects may be. Limited designated forums are those areas where a college or university limits access to certain groups, such as internal constituents like students and employees, and denies access to others, such as external activists or vendors.[142]

The distinctions between these three types of forums—traditional, non-limited designated and limited designated—is important because of the different levels of scrutiny that they attract. While other factors may offset this general rule, the general rule is that restrictions in traditional and non-limited designated forums are subject to stricter scrutiny than those applied in a limited designated forum.[143]

2. Non-Public Forums

Where property is not a traditional public forum and the government has not chosen to create a designated public forum, property is said to be a non-public forum. Sometimes such areas are also said to be "no forum at all" for First Amendment purposes.[144] Non-public forums are those areas, such as offices and their related corridors and work areas, where public speech has typically not been permitted and is otherwise incompatible with the legitimate operations of that area.[145]

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138. *Ark. Educ. Television Comm'n*, 523 U.S. at 677–79. *But see* Brister v. Faulkner, 214 F.3d 675, 681 (5th Cir. 2000) (holding that an area in front of the University of Texas's Frank Erwin Special Events Center qualified as a traditional public forum because it was visibly indistinguishable from the city's sidewalk easement, and sidewalks have long been considered open public forums).

139. *See Ark. Educ. Television Comm'n*, 523 U.S. at 685; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995) (holding that the university's payments of third-party contractors opened a limited public forum, and university could not deny a benefit because of the religious content of the speech).

140. *Ark. Educ. Television Comm'n*, 523 U.S. at 677–79.

141. Rutgers 1000 Alumni Club v. Rutgers, 803 A.2d 679, 688–89 (N.J. Super. Ct. App. Div. 2002). Note, however, that many courts interchange the terms "designated" and "limited."

142. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir. 1990). Note that by excluding vendors, a college or university may be challenged for unlawfully prohibiting commercial speech.

143. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 346 (5th Cir. 2001); Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575 (S.D. Tex. 2003).

144. *Ark. Educ. Television Comm'n*, 523 U.S. at 678.

145. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

3. Distinguishing Public from Non-Public Forums

Despite the theoretical clarity of the above distinctions, determining whether a particular location is a public or non-public forum can be difficult. The task requires examining the purpose and nature of the forum; the forum's compatibility with public speech; and the availability of an alternative forum.[146]

The purpose of the forum is the first and most important factor. A forum may have one or several purposes. For example, the common purposes of college and university forums are educational, administrative, governmental, or commercial or some combination of them. If a college or university forum serves more than one purpose, the institution may argue that it gives certain types of speech priority over others. For example, the purpose of a student center is to facilitate delivery of student services, and not necessarily to promote expression.[147] But the center may also provide broader services, so a college or university may coincidentally designate a forum—e.g., a bulletin board—for solicitation and distributive activities.[148]

Counsel should next examine the nature of a forum. Here, the primary focus is on the institution's intent in creating and maintaining the forum. The component pieces of this analysis include the existence of a written use policy; the stated purpose of the written policy; the actual purpose of the written policy; actual past uses of the forum; consistent enforcement of the written policy; who determines the speech, if any, that is permitted; standards used to determine the permitted speech;[149] and whether a fee for access is charged.[150]

Forums that have been reasonably, objectively, and consistently limited are more likely to tolerate greater regulation by a college or university.[151] For example, objective indicia of intent and evidence of consistent enforcement are often required to sustain a regulation.[152] Courts do not uphold post-hoc policy formulations or selective enforcement of otherwise inoperative policies.[153] A college or university may not invoke an otherwise unenforced policy to justify suppression,[154] selectively charge fees,[155] or create a policy to implement a newly

146. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985).

147. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 683 (1992).

148. *See* Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of Chi., 45 F.3d 1144, 1158 (7th Cir. 1995).

149. Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011, 1023 (C.D. Col. 2002) (holding delegation of unfettered discretion to college president unconstitutional).

150. C*ornelius*, 473 U.S. at 802; Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988).

151. *See* Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 689–90 (N.J. Super. Ct. App. Div. 2002); *See also* Reproductive Rights Network v. President of the Univ. of Mass., 699 N.E.2d 829, 836 (Mass. App. 1998) (holding that university's failure to publish an explicit content-neutral policy containing objective standards on the use of university facilities allowed it unbridled discretion to deny use of its facilities to groups on the basis of the content of their speech). *See also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 317 (2000) (finding that the asserted secular purpose of a school prayer policy was a "sham").

152. *Stewart*, 863 F.2d at 1019.

153. *See* Hays County Guardian v. Supple, 969 F.2d 111, 118–121 (5th Cir. 1992).

154. Planned Parenthood Ass'n v. Chi. Transit Auth., 767 F.2d 1225, 1228 (7th Cir. 1985).

discovered desire to suppress a particular message.[156]

The third step in distinguishing public from non-public forums is to determine whether the speech would disrupt, interfere, threaten or otherwise be incompatible with the purpose of the forum, and the ability of that forum to achieve that purpose.[157] For example, classrooms, dorms and offices may only bear so much disruption before their essential purposes—learning, sleeping, and working—may be lost. However, such disruptions or threats must be meaningful and not merely speculative.[158]

Because this test of incompatibility is often a key attribute of non-public forums, it is critical to identify the particular administrative or pedagogical interests served by a regulation of speech. A college or university may have one or several such interests, and they may be of varying priority. For example, courts have recognized as legitimate educational institutions' interests in controlling the curriculum, which includes controlling academic standards, grades, lectures, readings, and assignments.[159] Courts have also recognized colleges' and universities' interests in ensuring safety, security, order and in preventing unlawful conduct,[160] preserving architectural aesthetics,[161] and limiting the volume of commercial solicitations.[162]

The final question in distinguishing a public from a private forum is whether there is, in addition to the restricted forum, an alternative forum—such as sidewalks, parks, meeting rooms, dining halls, or chat rooms—where the speech can effectively be expressed.[163] An alternative forum need not be the best or as good as the selected forum; it need only accord a meaningful opportunity for expression. The availability of an alternative location for the speech enhances an institution's argument that its denial in a different area is not a meaningful deprivation of the speaker's true ability to be heard.

C. Timing and Effect of Restrictions on the Speech

Two final questions remain in forum analysis. These questions focus on the

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155. Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 707 (4th Cir. 1994) (holding that charging only religious groups an escalating rental fee violates free speech).

156. *Hays County Guardian*, 969 F.2d at 117–18.

157. *See* Am. Future Sys. v. Pa. State Univ., 618 F.2d 252, 256–57. *See also* Hubbard Broad. v. Metro. Sports, 797 F.2d 552, 556 (8th Cir. 1986) (holding that a scoreboard is not a public forum and that first come/first serve policy was reasonable and content neutral).

158. Gilles v. Torgersen, No. 92-0933-12, 1995 U.S. Dist. LEXIS 8502 at *3 (W.D. Va. Jan. 31, 1995), *vacated by*, 71 F.3d 497 (4th Cir. 1995).

159. Brown v. Li, 308 F.3d 939, 949 (9th Cir. 2002).

160. *See, e.g.*, Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011 (C.D. Cal. 2002).

161. *See, e.g.*, Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735 (4th Cir. 1988) (architectural aesthetics).

162. *See, e.g.*, Am. Future Sys. v. Pa. State Univ., 618 F.2d 252 (3d Cir. 1980); Am. Future Sys. v. Pa. State Univ., 688 F.2d 907 (3d Cir. 1982).

163. *See* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1016 (9th Cir. 2000). *See also Gilles*, 1995 U.S. Dist. LEXIS 8502 at *25 (holding that university's denial imposes only a minimal burden on plaintiff's speech, and is otherwise outweighed by the university's interests), *vacated by*, 71 F.3d 497 (4th Cir. 1995).

restrictions that have been, or will be placed, on speech that occurs in the identified forum. There are two primary issues regarding such restrictions: timing and effect. These issues are important to understand because they can affect the level of scrutiny—strict, medium, or light—that a court may apply.

1. Timing of the Restrictions

A restriction can either restrain a speaker *before* he acts or punish him *afterwards*. A college or university imposes a post-speech punishment when it suspends a student or fires an employee after she speaks. By contrast, a prior restraint is defined as "any scheme which gives public officials the power to deny use of a forum in advance of [the] actual expression."[164] For example, a college or university imposes a prior restraint when it denies a permit, withholds funding, refuses to show a movie, or blockades an area. Because prior restraints censor speech before it occurs, there is a heavy presumption against their constitutionality.[165] Indeed, courts presume that prior restraints are constitutionally invalid, and the burden is on the college or university to prove otherwise.[166] Prior restraints, however, are not per se unconstitutional. A scheme tantamount to a prior restraint will be upheld so long as certain procedural requirements are met.[167]

2. Whether a Restriction is Content/Viewpoint Based or Content/Viewpoint Neutral

Finally, and very importantly, colleges and universities must distinguish those restrictions that limit the *content or viewpoint* of the speech from those that simply limit the *circumstances* in which the speech is expressed. The former are known as "content-based" restrictions. The latter are called both "content-neutral" or "time, manner, and place" restrictions, where "time" means the hour, day, week, month, duration, or frequency of the speech; "manner" means the form, volume,[168] or quantity of the speech; and "place" means either on or off-campus or, more

164. BLACK'S LAW DICTIONARY 1232 (8th ed. 2004). *See also* Alexander v. United States, 509 U.S. 544, 549 (1993) (defining prior restraint as an administrative or judicial order that forbids certain communications when issued in advance of the time that such communications are to occur) (internal citations omitted).

165. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992); Freedman v. Maryland, 380 U.S. 51, 57 (1965); Gay Students Servs. v. Tex. A&M Univ., 737 F.2d 1317, 1325 (5th Cir. 1984); Crue v. Aiken, 370 F.3d 668, 678 (7th Cir. 2004).

166. *See* Cummins v. Campbell, 44 F.3d 847, 852 (10th Cir. 1994); Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011, 1023 (C.D. Cal. 2002).

167. *See Forsyth County*, 505 U.S. at 130–31 (recognizing that there is a "heavy presumption" against prior restraints); Thomas v. Chi. Park Dist., 534 U.S. 316, 324 (2002) (holding that while the challenged ordinance constituted a prior restraint, it was nevertheless constitutional because it contained adequate procedural safeguards and objective standards to guide the hand of the decision maker). See also *infra* Part IV.C for a thorough discussion of *Thomas*.

168. *See* W.W. Allen, Annotation, *Public Regulation and Prohibition of Sound Amplifiers or Loud-Speaker Broadcasts in Streets and Other Public Places*, 10 A.L.R. 2d 627 (1950) (regulation of loud speakers).

specifically, which table in which lobby of which building.

The distinction between content-based and content-neutral restrictions is not always clear. Even good faith attempts to control the circumstances of the speech can appear to arise from an objection to the content of the message.[169] In determining whether regulation of speech is content/viewpoint-based or content/viewpoint-neutral, courts focus on the purpose of the regulation[170] and whether the regulation can be justified without reference to content or viewpoint of the regulated speech.[171] But, once again, the distinction is important because it will trigger different standards of review. Succinctly stated, a higher standard applies for content and viewpoint-based restrictions.

Restrictions based on content or viewpoints are subject to strict scrutiny when the speech occurs in a traditional or designated public forum.[172] When there are content-based restrictions in those public forums, the usual presumption of constitutionality of governmental action is reversed.[173] The restrictions are presumed to be invalid, and the college or university bears the burden of rebutting that presumption by showing that the restrictions are designed to protect a *compelling* administrative or pedagogical interest, are narrowly tailored to protect such interest(s), and do in fact protect such interests.[174] This is often a very difficult test for colleges or universities to pass.

Restrictions on speech that occur in traditional and designated forums and are truly tied to time, manner, and place are held to a slightly lower standard. Although different courts state the test differently, a cautious restatement of the opinions would indicate that colleges and universities retain the authority to limit location, duration, and volume of speech provided the restrictions protect an *important* administrative or pedagogical interest, are narrowly tailored to protect such interest(s), do in fact protect such interests, are evenly applied to all speakers, and leave open alternative channels of communication.[175] A college or university is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that represents not necessarily the single best disposition, but one whose scope is in proportion to the interest served.[176]

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169. *See* Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002) (considering whether "format" requirements represented content-based regulations).

170. *See* Gilles v. Torgersen, No. 92-0933-R, 95 U.S. Dist. LEXIS 8502, *17 (W.D. Va. Jan. 31, 1995), *vacated by*, 71 F.3d 497 (4th Cir. 1995).

171. *See* Bartnicki v. Vopper, 523 U.S. 514, 526 (2001).

172. *See* TRIBE, *supra* note 63, at 789–804; Equifax Servs., Inc. v. Cohen, 420 A.2d 189, 195 (Me. 1980).

173. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000).

174. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

175. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 297 (2000). *See also* Kincaid v. Gibson, 236 F.3d 342, 354 (6th Cir. 2001) (holding that university yearbook is a limited public forum under the editorial control of the students, and university can impose only reasonable time, place and manner regulation and content-based regulations that were narrowly drawn to effectuate a compelling state interest.). Seizing yearbooks and refusing to distribute them hardly qualifies as a reasonable time, place and manner restriction and was nothing more than an act of rank, unreasonable and viewpoint-based censorship. *Id*. at 354–56.

176. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999).

Finally, speech restrictions, whether content-based or content-neutral, that are imposed in non-public forums are tested by the lowest standard. In those private areas where no public speech has been currently invited or previously tolerated, a college or university may restrict speech merely by proving that the restriction is *reasonable.* Reasonableness is assessed in light of the purpose and nature of the forum and all surrounding circumstances.[177] This lower test is appropriate because it recognizes that colleges and universities can and should have some areas of operation where public access and speech are simply not compatible with certain operational functions.

IV. THREE RECENT CASES OF INTEREST

This article now turns to focus on one particular challenge for counsel: developing or reviewing procedures and policies that identify and regulate access to, and use of, traditional or designated public forums, as they are called by forum analysis, or "speech zones" as they are often called today. Recently, several colleges and universities have faced legal challenges to their "speech zone" policies.[178] Three recent opinions—two in the higher education setting—provide some guidance in this task.

A. *Roberts v. Haragan* (Texas Tech University)

The first opinion comes from the United States District Court for the Northern District of Texas in *Roberts v. Haragan*.[179] There, the court struck down Texas Tech University's "Designated Forum Area" policy and speech code as violating the First Amendment.[180]

Prior to the litigation, the university had a policy (the "prior policy") that, in pertinent part, permitted students desiring to speak on issues "intended to serve or benefit the entire University community" to do so on university grounds or in university facilities.[181] The policy required students to obtain prior approval from the university for such use.[182] The policy also permitted students desiring to speak on issues of "personal belief," but the policy required students to do so only in the university's one designated "free speech area."[183] The policy did not require any prior permission for such use of this area.[184]

Jason Roberts, a student at the university's law school, wanted to deliver a speech and pass out literature on campus to express his religious and political

177. *Id.*

178. *See supra* note 2.

179. 346 F. Supp. 2d 853 (N.D. Tex. 2004).

180. *Id.* at 866. The speech code analysis is not discussed here, except to note that the court struck down as overbroad the code's prohibition on "activities that include but are not limited to physical, verbal, written or electronically transmitted threats, insults, epithets, ridicule or personal attacks or the categories of sexually harassing speech." *Id.* at 871–873.

181. *Id.* at 856.

182. *Id.*

183. *Id.*

184. *Id.*

views that "homosexuality is a sinful, immoral, and unhealthy lifestyle."[185] Roberts agreed that this subject matter was "personal," but he did not want to speak in the "free speech gazebo."[186] He wanted to speak on a nearby street corner.[187] Pursuant to the requirements of the university's prior policy, Roberts submitted a "Grounds Use Request."[188] The university did not deny Roberts permission.[189] Instead, it requested that he move his location about 20 feet because of concerns for "vehicular traffic and safety issues."[190] Roberts, agreeing that these concerns were reasonable, agreed to move.[191]

Roberts never gave his speech. Instead, he filed a complaint under 42 U.S.C. § 1983 claiming that the prior policy violated his free speech rights.[192] He claimed principally that the university policy eliminated the traditional public forums from its campus by designating the entire campus as a limited forum.[193] He argued further that the university's creation of two sub-forums—one for community related speech in approved campus facilities, and one for personal speech in the lone gazebo—unduly infringed on his ability to speak.[194]

In response to Roberts' suit, the university amended its policy and adopted a revised policy (the "interim policy").[195] The most pertinent change was the designation of five additional "free speech areas" around campus.[196] The university continued to argue, nonetheless, that it retained the authority to designate the entire campus as a limited forum.[197] The university rested this assertion on its interests in "preserving an environment suitable for classroom instruction and library study;" in "knowing what activities are going to occur if for no other reason than to prevent scheduling two activities at the same place and time;" and in issues of "noise and safety associated with pedestrian and vehicular traffic."[198] These interests, the university argued, justified its attempt to impose "reasonable regulations compatible with [its] mission."[199]

On cross-motions for summary judgment, the court dismissed Roberts' facial attack of the prior policy as moot because the policy had been replaced.[200] The court also dismissed Roberts' as-applied attack on the prior policy for want of standing because the university never actually denied Roberts' request to speak

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 857.
190. *Id.*
191. *Id.* at 857, 864.
192. *Id.* at 857.
193. *Id.*
194. *Id.*
195. *Id.* at 857.
196. *Id.* at 866 n.18.
197. *Id.* at 862.
198. *Id.* at 869.
199. *Id.* at 862.
200. *Id.* at 857 n.5.

and because Roberts never actually gave his speech.[201] Nonetheless, the court, after a thoughtful recitation of forum analysis,[202] upheld Roberts' facial attack on the interim policy pursuant to the following analysis.[203]

The court started its analysis with these two axioms: "[T]he *entire* university campus is not a public forum" but, "equally important," the campus, "at least for its students, possesses many *characteristics* of a public forum."[204] Applying these two axioms, the court found that "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the university's students, irrespective of whether the university has so designated them or not."[205]

The court then wrote repeatedly that these public forums are "irreducible."[206] The university, "by express designation, may open up more of the residual campus as public forums for its students, but it can not designate less."[207] As a result:

> [A]ny restriction of the content of student speech in these areas is subject to the strict scrutiny of the "compelling state interest" standard, and content-neutral restrictions are permissible only if they are reasonable time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.[208]

Applying these standards, the court struck down as overbroad the university's designation of the entire campus as a limited forum because it imposed university control over "casual conversation and otherwise non-disruptive expressive activity" in the traditional public forums of the campus.[209] Likewise, the court held that the requirement that students receive prior approval before speaking on matters of personal concern in areas that, although designated as "free speech areas" by the university, were by law traditional public forums, was a prior restraint without constitutional justification.[210] The holding applied to both oral speech and distribution of printed materials.[211]

The lesson of this well-reasoned decision is that public colleges and universities cannot eliminate their traditional public forums. They can convert private forums into designated forums and vice versa, and they can limit some activity within a public forum subject to strict scrutiny. But a public college or university cannot convert a public forum into a designated forum and thereby effectively eliminate the true expressive nature of a traditional forum.

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201. *Id*. at 864 n.12.
202. *Id*. at 858–63.
203. *Id.* at 874.
204. *Id*. at 860–61 (emphasis added).
205. *Id*. at 861.
206. *Id*. at 862, 868, 870.
207. *Id*. at 862.
208. *Id*.
209. *Id*. at 869.
210. *Id*. at 869–70. The court also held that the "prioritized use" section of the policy was a regulation of speech on the basis of content in violation of the First Amendment if applied in a public forum. *Id*. at 867–68.
211. *Id*. at 868–70, 873.

B. *Pro-Life Cougars v. University of Houston*

The second opinion comes from the United States District Court for the Southern District of Texas in *Pro-Life Cougars v. University of Houston*.[212] There, the court struck down the University of Houston's "Disruption of University Operations and Events" policy and "Event Registration" procedure as violating the First Amendment.[213]

The university, a public entity, required all student organizations seeking to engage in organized expressive activities on the university campus to complete event registration and reservation forms.[214] These forms required those organizations to describe the proposed activity, and to propose a location and date for the event.[215] If the university determined from these forms that the proposed activity would be "potentially disruptive," the university required the organization to comply with additional restrictions.[216] Activities not deemed to be "potentially disruptive" bore no such burden.[217]

In this case, Pro-Life Cougars ("PLC") was a student organization that applied for permission to exhibit, for three days, a pro-life photographic display in a grassy area within a four-acre "park-like plaza" on campus.[218] The principle purpose of this "Justice for All" exhibit was to promote the right to life for the unborn.[219] A

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212. 259 F. Supp. 2d 575 (S.D. Tex. 2003).

213. *Id.* at 585.

214. *Id.* at 577.

215. *Id.*

216. This policy provided in pertinent part:

> The right of peaceful expression and/or assembly within the university community must be preserved; however, the University has the right to provide for the safety of individuals, the protection of property, and the continuity of the educational process. The University will not permit any individual or group of individuals to disrupt or attempt to disrupt the operation and functioning of the University by any device, including, but not limited to, the use of pagers, cell phones, and other communication devices.
>
> At least two weeks prior to an event which is potentially disruptive, in addition to making the appropriate facility reservations, the sponsor of the event shall meet with the Dean of Students' designate to determine the time, place and manner of the event. Potentially disruptive events, including events where amplified sound is used outdoors, will be limited to the hours of 11:30 a.m. to 1 p.m. and 4 p.m. to midnight on class days. On non-class days, potentially disruptive events must be over by midnight. Authorized sites for events of this nature include the University Center (UC) Arbor, UC Patio, UC Satellite, or Lynn Eusan Park. Generated output shall not exceed the established decibel levels. Information on established decibel levels is available in the UC Reservations Office and the Dean of Students Office. Any exception to this policy must be approved by the Dean of Students.
>
> In emergency situations, the President or designated representatives have the responsibility to determine when the conditions cited above prevail and shall have the authority to take such steps as are deemed necessary and reasonable to quell or prevent such disruption.

Id. at 577–78.

217. *Id*. at 578.

218. *Id*.

219. *Id*.

few months preceding PLC's request, the university had granted permission to the Free Speech Coalition, a different student organization, to display its own "Justice for All" exhibit on the same plaza for three days.[220] Upon reviewing PLC's event forms, a university dean determined that this exhibit would be "potentially disruptive;" denied PLC permission to use that plaza; but offered PLC use of one of two other sites on campus.[221] PLC declined because one site was too small, and the other site was too remote.[222] PLC then challenged the policy as unconstitutional, arguing principally that it vested the dean with unfettered discretion in assessing their "potential disruption."[223]

The court began its analysis by noting that "a speaker's right to access government property is determined by the nature of the property or 'forum.'"[224] On one side, the university argued that the plaza was a limited designated forum; that its policy was merely a content and viewpoint-neutral regulation of time, place, and manner; and should, therefore, be subject to the lighter scrutiny of reasonableness.[225] On the other side, PLC argued that the plaza was a traditional public forum subject to strict scrutiny.[226] After reviewing the physical nature, public surroundings and prior consistent use of the plaza, the court found that "[w]hen as here, a University by policy and practice opens up an area for indiscriminate use by the general public, or by some segment of the public, such as student organizations, such area may be deemed to be a designated public forum."[227] The court, citing *Thomas v. Chicago Parks District*[228] then applied a strict scrutiny, as opposed to the reasonableness, standard for two reasons: the plaza was a public forum and the permit denial process constituted a prior restraint.[229]

Applying strict scrutiny, the court then struck down the policy for four reasons. First, the dean was not required to provide an explanation for his decision.[230] Second, the dean's decision was not reviewable.[231] Third, the policy was not narrowly tailored to serve a significant governmental interest.[232] To be narrowly tailored, a speech regulation must "not burden substantially more speech than is necessary to further the stated legitimate governmental interest, which in this case

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 579.

224. *Id.* at 581.

225. At the same time, though, the president of the university approved a new speech policy that superseded the challenged policy. *Id.* at 79. The court ruled, however, that this change did not moot the case. *Id.*

226. *Id.* at 581.

227. *Id.* at 582 (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 348 (5th Cir. 2001); Hays County Guardian v. Supple, 969 F.2d 111, 116 (5th Cir. 1992)).

228. 534 U.S. 316 (2002) (discussed *infra* Part IV.C.)

229. *Pro-Life Cougars*, 259 F. Supp. 2d at 582.

230. *Id.* at 583–85.

231. *Id.*

232. *Id.*

is the preservation of the University's academic mission."[233] Here, the dean himself testified that he was banning *all* speech because of complaints that *some* previous events could be overheard in *some* classrooms located near the plaza.[234] Finally, and most importantly, the policy was "on its face . . . devoid of any objective guidelines or articulated standards that [the] Dean . . . should consider when determining whether any given student expressive activity should be deemed 'potentially disruptive.'"[235] The test of whether a regulation "delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."[236] In this case, neither the language nor the application of the university's policy supported the conclusion that "there are narrowly drawn, reasonable, and definite standards guiding the hand of the University official."[237]

Three primary lessons stand out from this decision. First, an institution must apply its policies consistently. Allowing one "Justice for All" exhibit but denying another was clearly problematic. Second, a use policy must have some procedural safeguards attending the denial of any permits. Here, there were none. And finally, counsel need to continue to impress upon courts the difference between the three types of public forums. In this case, the court appears by its opinion to have viewed traditional and designated forums as one and the same, and to have not addressed the concept of a limited designated forum. The opinion calls the plaza a designated forum, but this is only in conclusion of its analysis about traditional forum standards. And the court never addresses the law that states that designated forums are not made by default; they are made by purposeful action; and that the university's purposeful action for this plaza was to make it a *limited* designated forum. It is not clear if a closer analysis on this point would have changed the outcome. But it is clear that more precision from courts in distinguishing traditional from designated forums would be helpful for colleges and universities that rely on designated forum status to control significant portions of their property.

C. *Thomas v. Chicago Park District*

The final opinion comes from the United States Supreme Court and its construction of a public park use ordinance. Although this case did not involve a college or university, it is instructive because the case provides a thorough procedural grounds use policy that has been unanimously upheld by the Supreme Court.

In *Thomas v. Chicago Park District*,[238] the ordinance at issue required a person to obtain a permit in order to "conduct a public assembly, parade, picnic, or other

233. *Id.* at 584 (citing Hays County Guardian v. Supple, 969 F.2d 111, 118 (5th Cir. 1992)).

234. *Id.*

235. *Id.*

236. *Id* at 584 (citing Forsyth County v. Nationalist Movement, 505 U.S. 123 (1982); City of Lakewood v. Plain Dealer Publ'g. Co., 486 U.S. 750 (1988)).

237. *Id.* at 584-85.

238. 534 U.S. 316 (2002).

event involving more than fifty individuals," or engage in an activity such as "creating or emitting any Amplified Sound."[239] The ordinance further provided that "applications for permits shall be processed in order of receipt," and that the park district must decide whether to grant or deny an application within fourteen days unless, by written notice to the applicant, it extended the period an additional fourteen days.[240] Applications could be denied only upon any of thirteen specified grounds.[241] If the park district denied an application, it must have clearly set forth in writing the grounds for denial and, where feasible, must have proposed measures to cure defects in the application.[242] If the basis for denial were prior receipt of a competing application for the same time and place, the park district

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239. *Id*. at 318.

240. *Id*. at 318–19.

241. For example, the ordinance provided in relevant part:

> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:
>
> (1) the application for permit (including any required attachments and submissions) is not fully completed and executed;
>
> (2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed . . . ;
>
> (3) the application for permit contains a material falsehood or misrepresentation;
>
> (4) the applicant is legally incompetent to contract or to sue and be sued;
>
> (5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;
>
> (6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;
>
> (7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;
>
> (8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter . . . ;
>
> (9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;
>
> (10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;
>
> (11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent . . . .

Id. at 318 n.1.

242. *Id*. at 318–19.

must suggest alternative times or places.[243] An unsuccessful applicant has seven days to file a written appeal to the general superintendent of the park district, who must act on the appeal within seven days.[244] If the general superintendent affirms a permit denial, the applicant may seek judicial review in state court by common-law certiorari.[245]

Caren Cronk Thomas and the organization she represented applied for several permits under this ordinance to hold rallies advocating the legalization of marijuana.[246] Applying the above ordinance, the park district granted some permits and denied others.[247] Thomas and the organization filed an action challenging the denials alleging, inter alia, that the park district's ordinance was unconstitutional on its face.[248] Principally, they argued that the ordinance permitted arbitrary and open-ended denials of otherwise legitimate uses of the park.[249] The district court and the United States Court of Appeals for the Seventh Circuit, [250] however, found in favor of the park district, and the Supreme Court unanimously affirmed.[251]

The Supreme Court was persuaded that the ordinance adequately protected applicants from any arbitrary or content-based denials of their speech rights.[252] The Court noted that the ordinance permitted a denial for only one or more of thirteen specified reasons set forth in the ordinance, and that it required the park district both to process applications within a defined period and to explain in writing the reasons for its denial.[253] Focusing on the thirteen permissible bases for denial as listed by the ordinance, the Court said that such grounds were "reasonably specific and objective, and do not leave the decision 'to the whim of the administrator,'" and were thus sufficient to guide the decision maker's determination.[254] In addition, the Court noted that the ordinance provided two avenues of appeal—first to the general superintendent of the park district, and second, to an Illinois court.[255]

Three lessons stand out from this decision. First, even a traditional public forum such as a city park can be subject to meaningful regulation. Second, such regulation is more legally sound if the underlying use policy sets forth the nature of the possible reasons for denial and provides some form of review of an initial denial. Finally, if counsel wants an approved, albeit lengthy, model for drafting

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243. *Id.* at 319.

244. *Id.*

245. *Id.* For an opinion both praising and distinguishing the procedures of this policy, see *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004) (striking down a local ordinance governing protestors near the famous Masters professional golf tournament).

246. *Thomas*, 534 U.S. at 319–20.

247. *Id*. at 320.

248. *Id*.

249. *Id*. at 323.

250. Thomas v. Chi. Parks District, 227 F.3d 921 (7th Cir. 2000).

251. *Thomas*, 534 U.S. at 324.

252. *Id*. at 324.

253. *Id*.

254. *Id.* at 324 (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

255. *Id.*

such a use policy for their campus, the Chicago park ordinance at issue in this case is a tested template.

V. COMPETING PHILOSOPHIES THAT UNDERLIE ANY SPEECH ANALYSIS

Finally, even with all of the procedural safeguards endorsed by *Pro-Life Cougars* and *Thomas*, counsel should, as one final caution, be aware of both their client's and their own philosophical biases in protecting or regulating individual speech. For if one thing is clear from the preceding analysis, it is this: there are over a dozen judgment calls that counsel and/or administrators must make in determining whether a particular restriction on the given speech by a given speaker in a particular setting is tolerated by the First Amendment. The volume and complexity of these judgments necessarily implicate the personal philosophy—conscious or not—of the decision maker. Indeed, to this point, this article has focused only on *how* someone—an administrator, judge or attorney—decides whether certain speech is protected in a given case. The deeper question, though, is *why*? Why, for example, will one dean or judge in good faith find that a given application of the forum analysis constitutionally furthers a legitimate interest by a permissible means, while another dean or judge does not? The answer is neither simple nor easy, and this article is not the place to probe fully such an important and complex question. Nonetheless, a broad observation about the competing jurisprudential views of the role of free speech in our system of government lends some valuable insight.

One such view values the First Amendment as an end in itself. Essentially, this philosophy appreciates the intrinsic value of free speech; it holds that the guarantee of free speech represents an "expression of the sort of society . . . and persons we wish to be," as Professor Tribe has noted;[256] an "indispensable" attribute of liberty, as Justice Brandeis phrased it;[257] or, as Justice John Harlan observed, "the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[258] One who holds such views is more likely to be an absolutist; to see the First Amendment protections as broad; and his or her challenge is to accommodate legitimate competing interests without abandoning the absolutist principle.

An alternative view is more functional. It values the speech right less as an end and more as a means. A means, perhaps, to political "truth," as Justice Holmes called it;[259] or to long-term social and political stability, as Justice Brandeis phrased it.[260] One who holds these views is more likely to be a relativist, to balance individual rights against societal interests, and his or her challenge is to assign specific values or worth to individual expressions based on a truly principled, and not a merely content preferential, basis.

Finally, there is a third view—that the First Amendment is both a means and an

256. TRIBE, *supra* note 63, at 785.
257. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
258. Cohen v. California, 403 U.S. 15, 24 (1971).
259. Abrams v. United States, 250 U.S. 616, 630 (1919).
260. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

end. This philosophy has a certain practical and intuitive appeal because it recognizes the relative merits of both the absolutist and relativist positions. But this view also only raises the hard question of what, in the tough case, is the First Amendment's *primary* role? There is, of course, no "right" answer to this question, and this article makes no pretext to argue for one. Instead the point here is more practical: College and university counsel should be aware of their client's and their own answers to this question so that any bias in the application of the foregoing maze of forum analysis can be identified and weighed accordingly.

CONCLUSION

The article concludes by summarizing the recommended analytical steps that college and university counsel should take in assessing a variety of speech claims and in reviewing the institution's speech use policies and procedures. With regard to assessing claims, counsel should first identify the speech right involved, the speaker, and the presence (or absence) of the requisite state action. Counsel should then identify the content, viewpoint and effect of the speech, determine what category the speech falls into, and determine whether that category is generally protected by the First Amendment. Next, counsel should apply the forum analysis by identifying the specific location of the speech, and determining whether that location is a traditional, non-limited designated, limited designated, or private forum. Finally, counsel should examine the timing and effect of the restrictions that are being applied in the forum.

Regarding facility use policies, counsel should first determine if the policies identify the campus' traditional forums and specify the designated forums. Second, if the designated forum is intended to be limited, then counsel should examine the nature and reasons for the limitations, and whether they are specified in the policy. Third, the policy or procedure should identify the possible reasons for use denials. Fourth, in considering whether to permit or deny a requested use, the decision maker should be aware of whether there is precedent for granting like requests in the past. Fifth, the decision maker should honestly ask him/herself whether the subject matter of the expressive activity has had any undue bearing on their decision. Sixth, the policy should require written disclosure of the particular reason(s) for denial in each case. Seventh, the initial decision regarding denial should be subject to review. Finally, counsel, as one final caution, should be aware of both their client's and their own philosophical biases in protecting or regulating individual speech in applying these procedures.

First Amendment jurisprudence is replete with nuances that are very fact sensitive. Nonetheless, by working through the key steps and forum analysis outlined here, college and university counsel can help ensure that their institutions comply with the Constitution, meet their diverse administrative needs, and honor their legacy of meaningful ideological exchange.

THE CAMPUS AS AGORA: THE CONSTITUTION, COMMERCE, GADFLY STONECUTTERS, AND IRREVERENT YOUTH

JAMES F. SHEKLETON*

To what extent may a public institution of higher education regulate private commercial activities on campus?[1] To what extent may it regulate private commercial activities where the regulated commercial endeavor involves expressive products or activities? To what extent may it regulate private commercial activities if the activities involve commercial speech? To what extent may it regulate private advertiser access to university advertising venues?

At first blush, the principal questions to be examined in this article may seem oddly uninformed. From time immemorial, colleges and universities regulated commercial activities involving students and staff. From time immemorial, students traveled to college and university towns, took rooms at or near colleges or universities, sought books, food and amusements in all precincts, and paid fees for instruction; and the colleges and universities themselves typically enjoyed substantial authority over the conduct of students, and the costs, rents, and fees assessed for study, lodging, and incidentals.[2] So long as students come from

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1. For the sake of brevity, the terms "institution" and "university" are used throughout this article to designate public universities, colleges and community colleges whose powers are subject to limitations under the Fourteenth Amendment.

2. For example, Duke Rupert of Bavaria's 1386 decree founding the University of Heidelberg authorized the university to exercise:

> entire and total jurisdiction concerning the paying of rents for the lodgings occupied by the students, concerning the making and buying of codices, and the borrowing of money for other purposes by the scholars of our institution; also concerning the payment of assess meets, together with everything that arises from, depends on and is connected with these.

THE AVALON PROJECT AT YALE LAW SCHOOL, *The Foundation of the University of Heidelberg A.D. 1386*, *at* http://www.yale.edu/lawweb/avalon/medieval/heidelbe.htm (last modified Apr. 8, 2005). *See* HELENE WIERUSZOWSKI, THE MEDIEVAL UNIVERSITY: MASTERS, STUDENTS, LEARNING 106–08, 167–68 (1966) (noting the role played by university-regulated *hospita* in providing secure and supervised housing and food for students, and the origin of colleges as endowed lodgings for poor scholars pursuing advanced studies and detailing statutes of the City of Bologna, circa 1274, concerning the University of Bologna, prohibiting efforts to remove the institution to other municipalities, regulating the sales of books to students and assuring that the

distant places to study on campus, commercial activities will remain part of college and university life, and usually a beneficial part at that.[3] Many institutions see their residence life operations, which typically include lodging, food service, and various on-campus entertainment and service facilities, as critical to enhancing student satisfaction and educational achievement and, consequently, to improve enrollment management.[4] The suggestion that there may be significant legal restraints on college and university control of commercial activities occurring on their campuses may well seem out of step both with tradition as ancient as the Western university and with pervasive contemporary practice, but there are indeed

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university, its masters and its students had access to preferential commodities prices available to guilds and guaranteeing that masters and students would enjoy the legal protections ordinarily reserved to Bolognese citizens); Alan B. Cobban, *English* University *Benefactors in the Middle Ages*, 86 J. HIST. ASS'N, 283, 299–301, 307–08 (2001) (noting that English university endowed loan programs, dating from the Thirteenth Century, failed to benefit poor students who lacked the collateral needed to obtain loans).

3. Individual students regularly seek to buy or to sell furnishings, to obtain or to provide private tutoring, to secure rides or riders, to share living expenses, or otherwise to contract with one another to resolve the practical problems that arise when they live away from home to attend a university. *Cf.* Sinn v. Daily Nebraskan, 829 F.2d 662, 663 (8th Cir. 1987) (holding that student newspapers could reject advertisements for roommates). Student organizations often rely heavily upon commercial activities, such as fundraising sales or services, to supplement monies provided from mandatory student fees. *See e.g.*, Joan Burtner & Renee Rogge, *Faculty Advisors' Management Style and the Development of Students' Leadership Capabilities, Proceedings of the 2003 American Society for Engineering Education Annual Conference & Exposition, available at* http://www.asee.org/acPapers/2003-1014_Final.pdf (last visited May. 12, 2005). Student newspapers often depend in part upon advertising revenues. Pitt News v. Pappert, 379 F.3d 96, 102 (3rd Cir. 2004) (stating that all of *The Pitt News'* revenue was derived from advertising); Kincaid v. Gibson, 236 F.3d 342, 351 (6th Cir. 2001) (noting that a portion of yearbook's revenue derived from advertising); Stanley v. Magrath, 719 F.2d 279, 280 (8th Cir. 1983) (noting that the newspaper included paid advertisements); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976) (discussing a controversy over a paid advertisement for the newspaper).

The contemporary American university has come to rely upon its own commercial activities for a material part of its revenues. On average, 21.6% of total university revenues stem from institution-based forms of commercial activity. NATL. CTR. FOR EDUC. STATISTICS ("NCES"), *Digest of Education Statistics 2002*, 372, *available at* http//nces.ed.gov//programs/digest/d02/ (last visited May 12, 2005). "Sales and Services" includes "revenues derived from the sales of goods or services that are incidental to the conduct of instruction, research, or public service. Examples include film rentals, scientific and literary publications, testing services, university presses, and dairy products." *Id*. at 552.

4. Living on campus is thought to provide substantial educational benefits to students and, significantly, when combined with other strategies to engage students in the social and cognitive life of the institution, to contribute to enhanced retention of students. Nancy Wisely & Mark Jorgensen, *Retention Dormitories: The Social Psychological Grounding of Retention Processes*, 167 J. COLL. ADMISSIONS 16 (2000); Alexander W. Astin, *Student Involvement: A Developmental Theory for Higher Education*, 25 J. COLL. STUDENT PERSONNEL 297 (1984); VINCENT TINTO, LEAVING COLLEGE: RETHINKING THE CAUSES AND CURES OF STUDENT ATTRITION, (2d. ed. 1987).

To benefit student learning and to finance the facilities needed for such residences, universities commonly require students to reside on campus, notwithstanding the availability of private alternatives for securing room and board. Prostrollo v. Univ. of S.D., 507 F.2d 775, 778–80 (8th Cir. 1974). Revenues from auxiliary enterprises, many of which are related to residence system operations, comprised 9.6% of all institutional revenues in 2002. NCES, *supra* note 3, at 372.

restraints.

The typical problem case involves some entrepreneurial activity that threatens to disrupt the educational environment, or that may compromise the image that the college or university wishes to project to the public. Such challenges might involve a broad range of commercial activities, or activities with incidental commercial aspects, through which students or student organizations seek to earn extra money, such as by sponsoring Tupperware parties in dormitory rooms, distributing certain kinds of newspapers on campus, publishing parodies that trench on widely-held political or religious sensibilities, selling offensive t-shirts, or charging admission to entertainment featuring obnoxious or exploitative skits.[5] Merchants, entrepreneurs, and activists of various stripes have also been known to seek access to institutional commercial or quasi-commercial venues to exploit for their own advantage or to associate their causes with higher education, however attenuated the relationship between their businesses or purposes and the mission and values of the college or university.[6] Colleges and universities, or similarly situated defendants, do not always fare well in these cases; hence the need to examine carefully the questions about the extent of college or university authority

5. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 472 (1989) (involving a prohibition of student-sponsored parties at which an outside merchant sought to sell china, crystal, and silverware to university students); Hays County Guardian v. Supple, 969 F.2d 111, 118 (5th Cir. 1992) (involving the prohibition of free distribution of newspapers that contained paid advertising); Stanley v. Magrath, 719 F.2d 279, 280 (8th Cir. 1983) (involving the "Humor Issue" of the *Minnesota Daily*, styled in the format of a sensationalist newspaper, contained articles, advertisements, and cartoons satirizing Christ, the Roman Catholic Church, evangelical religion, public figures, numerous social, political, and ethnic groups, social customs, popular trends, and liberal ideas, used frequent scatological language and explicit and implicit references to sexual acts, and elicited numerous letters deploring the content of the "Humor Issue" from church leaders, members of churches, interested citizens, students, and legislators, who in many cases were responding to the complaints of constituents); Friends of the Vietnam Veterans Mem'l v. Kennedy, 116 F.3d 495, 497–98 n.2 (D.C. Cir. 1997) (involving a National Park Service regulation banning the sale of t-shirts on the Mall in Washington, D.C. and stating that "[a]s the t-shirts in question are message-bearing, the regulation proscribing their sale on the Mall, like one proscribing the sale of books or newspapers, raises First Amendment concerns"); One World One Family Now v. City and County of Honolulu, 76 F.3d 1009, 1012 (9th Cir. 1996); Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 250 (4th Cir. 2003) (involving prohibition on wearing t-shirts related to weapons in K-12 system that had no history of violence associated with weapons); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 387–88 (4th Cir. 1993) (involving a fraternity fundraiser denominated as an "ugly woman contest" with "racist and sexist" overtones).

6. *See generally* PMG Int'l Div., L.L.C., v. Rumsfeld, 303 F.3d 1163, 1165–66 (9th Cir. 2002) (discussing whether the government may limit magazine distributors' access to commissaries on military posts); Hopper v. City of Pasco, 241 F.3d 1067, 1069–70 (9th Cir. 2001) (arguing that artists, whose works were excluded from city hall, were denied their First Amendment rights); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000) (declining to apply forum analysis to acceptance of donation and on-air recognition as a public broadcasting sponsor, which are properly considered governmental speech); DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 962 (9th Cir. 1999) (involving a denial of a commercial advertisement on baseball diamond outfield fence); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 838 (6th Cir. 2000) (involving a request to link to municipal website); Friends of the Vietnam Veterans Mem'l, 116 F.3d at 495, 498 (D.C. Cir. 1997) (seeking access to the National Mall to sell t-shirts and citing, inter alia, the Park Service regulations that allows the sale of t-shirts—among other paraphernalia—from regulated kiosks).

over private commercial activities on campus.[7]

From the onset, it should be noted that the U.S. Supreme Court has already established a well-defined, robust doctrine that provides significant assistance in resolving some of these uncertainties. For over thirty years, the Court has refined its so-called forum analysis. The leading case in the forum line, *Lehman v. City of Shaker Heights*,[8] upheld a municipal regulation that limited advertising spaces on a public transportation system to commercial advertising.[9] Therefore, it is certainly sensible to expect that forum analysis might provide useful, if not sufficient, guidance to regulating commercial activities on campus.[10]

As jurisprudence goes, the forum doctrine is relatively simple and elegant. The Court grounded the doctrine on the principle that "the Government, '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,'" and it developed "a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[11]

The Supreme Court distinguishes among "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum."[12] The scope of government control depends upon the

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7. Plaintiffs prevailed in *Hays County Guardian* and *IOTA XI*, though the latter had only incidental commercial aspects, as well as in *Newsom*, *Hopper*, *Putnam Pit, Inc.*, and on a viewpoint discrimination challenge in *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004).

8. 418 U.S. 298 (1974).

9. In *Lehman*, the petitioner, a candidate for public office, sought to persuade the Court that the advertising cards on municipal buses should be treated as the equivalent of public places. *Id*. at 301. "[T]he car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication 'regardless of the primary purpose for which the area is dedicated.'" *Id.* (quoting Petitioner's Brief at 14). The Court declined to extend doctrines developed to protect speech rights in open spaces and public spaces to spaces used by a public entity engaged in a commercial venture. *Id.* at 302.

10. For a thorough discussion of the implications of forum analysis on facility use on campus, see Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005).

11. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)).

12. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (quoting *Cornelius*, 473 U.S. at 802). *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); United States v. Kokinda, 497 U.S. 720, 726–27 (1990); Int'l Soc'y for Krishna Consciousness, Inc. [("ISKCON")] v. Lee, 505 U.S. 672, 678–79 (1992); *Cornelius*, 473 U.S. at 800, 803; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981). The forum doctrine has been applied, or reviewed, in many contexts, not all of which involve access to public property. Many cases involved the question of whether governmental funding problems should be analyzed using forum analysis. *See* Locke v. Davey, 540 U.S. 712, 721 n.3 (2004) (noting that the state funded scholarship program is not a forum); Bd. of Regents of the Univ. of Wis. System v. Southworth, 529 U.S. 217, 230 (2000) (recognizing that a mandatory fee assessment to support, inter alia, expressive student activities is analogous to a forum); Nat'l Endowment for the Arts v. Finley, 524 U. S. 569, 586 (1998) (concluding that federally funded grants for artistic activities do not involve a forum, because the

classification of a place or program as a traditional public forum, a forum by designation, or a nonpublic forum.[13]

"Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'"[14] Speakers may be excluded from traditional public fora based on the content of their speech only when the exclusion "is necessary to serve a compelling state interest and that [the exclusion] is narrowly drawn to achieve that end."[15] They may also be excluded from traditional fora pursuant to "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."[16]

Public fora by designation "are created by purposeful governmental action. 'The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.'"[17] The public forum by designation may be "of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public."[18] Access to public fora by

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regulations do not encourage a diversity of expression by private speakers, but, rather, make inherently content-based esthetic distinctions under defined standards); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (discussing the eligibility to participate in student activity fee distributions to support expressive activities).

13. *See Cornelius*, 473 U.S. at 800:

> [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes; accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

14. *Ark. Educ.*, 523 U.S. at 677 (quoting *Perry*, 460 U.S. at 45).

15. *Perry*, 460 U.S. at 45.

16. *Id.*

17. *Ark. Educ.*, 523 U.S. at 677 (quoting *Cornelius*, 473 U.S. at 800 and citing *ISKCON*, 505 U.S. at 678).

18. *ISKCON*, 505 U.S. at 678. The Court has not been disciplined in describing the subcategories of public fora by designation. Two descriptions appear in many cases, as the Court sometimes speaks of designated public fora and other times of limited public fora. The Court has not developed a consistent usage to mark a distinction between the two. Fortunately, the lax usage does not appear to have any real doctrinal consequences. At most, the phrasing appears to vary as the Court shifts from describing a forum that operates as if it were a traditional public forum to describing a forum that is subject to various limitations on access, but the Court is not wholly consistent even in this usage.

The Court's forum analysis suggests that when government opens a nontraditional forum to private speech it can establish four levels of restriction. Government can open the forum to the whole world on the same terms as traditional public fora, in which anyone may address whatever topic they wish. It can open it to the whole world, but only for the discussion of certain topics. It can open it to limited groups of persons who may discuss whatever topics they wish. It can open it to limited groups of persons who may discuss only certain topics. *See Ark. Educ.*, 523 U.S. at 678 (stating that "government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating a designated public fora"); A.C.L.U. v. Mineta, 319 F. Supp. 2d 69, 81 (D.D.C. 2004) (stating that designated fora may be

either limited or unlimited in character)

The use of the terms "designated public fora" and "limited public fora" stems from *Perry*. *Perry*, 460 U.S. at 46–60. *Perry* intimated a distinction between places that had been designated as public forums open to all and others that were open either to limited classes of speakers or to discussion of limited topics. *Id*. at 45. "A public forum may be created for a limited purpose such as use by certain groups, e.g., [*Widmar*] (student groups), or for the discussion of certain subjects, e.g., [*City of Madison Joint Sch. Dist. No. 8 v. Wis. Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976)] (school board business)." *Perry*, 460 U.S. at 46 n.7. C*f. id.* at 48 (stating "even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a 'limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character").

Later cases ignore the distinction or differ from one another in the language that they use when describing the same kind of forum. In *Good News Club v. Milford Cent. Sch.*, the Court seems to dispatch with the phrase "designated public forum" altogether and focuses, instead on the question of whether government action "creates a limited or a traditional public forum." 533 U.S. 98, 106 (2001). *Good News Club* proceeds to reiterate its instruction that when a "[s]tate establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U. S. 819, 829 (1995). *See also* Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C., 518 U.S. 727, 792 (1996) (O'Connor, J., concurring in part and dissenting in part) ("The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public.") (quoting *ISKCON*, 505 U.S. at 678).

Good News Club also cites *Lamb's Chapel* as authority for its instruction. *Good News Club*, 533 U.S. at 106 (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993)). Nevertheless, *Lamb's Chapel* draws the distinction somewhat differently from the *Good News Club* formulation: "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that '[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Lamb's Chapel*, 508 U.S. at 392–93 (quoting *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49)).

In yet another setting, the Court suggested that the material distinction is between designated public fora and nonpublic fora. *Ark. Educ.*, 523 U.S. at 666. Designated public fora are created where government intends "to make the property 'generally available,' . . . to a class of speakers," as when the University of Missouri, Kansas City, implemented a policy that expressly made its meeting facilities generally open to registered student groups. *Id*. at 680. Nonpublic fora result where government "does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'" *Id*. at 679 (citing *Cornelius*, 473 U.S. at 804.).

The distinctions drawn in these cases are merely lexical. In all cases, whether using the phrase "designated public forum" or the phrase "limited public forum," the Court is clear that this category of forum shares certain characteristics with public fora and with nonpublic fora. However denominated, fora in this category are created by government action opening a nonpublic forum to a range of private expression. However denominated, fora in this category are subject to identical restrictions on the power to deny access to speakers who are within the class of speakers entitled to use the forum. *Perry*, 460 U.S. at 45–46 (stating that once government opens a forum to the public for expressive activities, so long as it holds it open, "it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest") (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)). *See also Rosenberger*, 515 U. S. at 829–30 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'") (quoting

Cornelius, 473 U.S. at 804–06); *Perry*, 460 U.S. at 46, 49 (stating that the state may not discriminate against speech on the basis of its viewpoint); *Lamb's Chapel*, 508 U.S. at 392–93; *Perry*, 460 U.S. at 46; R.A.V. v. City of St. Paul, 505 U.S. 377, 386–88, 391–393 (1992). *Cf.* Texas v. Johnson, 491 U.S. 397, 414–15 (1989). Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, there is a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

To the extent that any difference between the two species within the category can be identified, it relates solely to the standards used to assess the validity of the limitations on access to the forum. The constitutionality of limitations that govern access to limited public fora are judged by the same standards applied to nonpublic fora. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (stating that "the State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint . . . and the restriction must be reasonable in light of the purpose served by the forum") (citing *Rosenberger*, 515 U. S. at 829; *Cornelius*, 473 U.S. at 806)). *Cf. Lamb's Chapel*, 508 U.S. at 392–93 (describing the same limitation and circumstances, but framing it as applicable to a nonpublic forum) ("With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that '[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'") (quoting *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49)).

Not surprisingly, the Court's undisciplined approach to the forum lexicon has led to a similar profusion of practices among the circuits. Counsel in active litigation may not ignore such differences, even though the different lexical practices seem not to affect the practical application of the tests used to resolve disputes.

The First Circuit has vacillated over the proper use of the phrase "limited public forum," and has settled upon a singularly unhelpful resolution, taking the phrase to designate a species of nonpublic forum:

> The phrase "limited public forum" has been used in different ways. We used the phrase "limited public forum" as a synonym for "designated public forum" in *Berner v. Delahanty*, and again in *New England Reg'l Council of Carpenters v. Kinton*. On the other hand, we used the phrase "limited public forum" as a synonym for "nonpublic forum" in *Fund for Cmty. Progress v. Kane*. This confusion is echoed elsewhere. We adopt the usage equating limited public forum with non-public forum and do not discuss the issue further.

Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004) (internal citations omitted). The conclusion that the First Circuit reached is similar to the ways in which the Eighth Circuit has applied the tripartite distinction set forth in *Perry*. In *Families Achieving Independence & Respect v. Neb. Dep't of Soc. Serv.*, the Eighth Circuit concluded that the majority opinion in *ISKCON v. Lee*, presented the touchstones for forum analysis. 111 F.3d 1408, 1419–21 (8th Cir. 1997) (concluding that bulletin boards in a state social services office were nonpublic fora and restrictions on postings need only "be reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view") (citing *ISKCON*, 505 U.S. at 679–80). Unfortunately, *ISKCON* also specifies that the "second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public," thus suggesting a level of distinction that the Eighth Circuit ignores. *ISKCON*, 505 U.S. at 678. But the Eighth Circuit promptly returned to differentiating the limited public forum as a distinct subdivision of designated fora in *Nat'l Fed'n of the Blind of Mo. v. Cross*. 184 F.3d 973, 982 (8th Cir. 1999) (noting that "[a] limited public forum can be created only 'by intentionally opening a nontraditional forum for public discourse.' A government agency may create one by designating a place of communication for use by the public at large, for use by certain speakers, or for the discussion of specific subjects") (quoting *Cornelius*, 473 U.S. at 802)). The Tenth Circuit has

also classified the limited public forum as a subset of the nonpublic forum. *See* Summum v. City of Ogden, 297 F.3d 995, 1002 n.4 (10th Cir. 2002).

In more recent cases, the Supreme Court has used the term "limited public forum" to describe a type of nonpublic forum where the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum. The Eleventh Circuit, too, parses the cases in ways that differentiate among traditional public fora, designated public fora that have been opened to the same discourse as traditional public fora, and nonpublic fora, which may be opened to limited discourse. Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275, 1278 (11th Cir. 2003) (stating "government does not create a public forum by permitting limited discourse; instead, the government must intentionally open a nontraditional forum for public discourse"). *See also* A.C.L.U. v. Mineta, 319 F. Supp. 2d 69, 78 (D.D.C. 2004) (noting the convergence of nonpublic forum analysis and limited public forum analysis and stating "[w]hile there is wider latitude to exclude certain subject matter in so-called nonpublic forums and in designated but limited public forums than there is in traditional public forums like public streets and parks . . . even that exclusion still must be viewpoint-neutral").

However resolute the First Circuit may be, its chosen nomenclature, though not its essential analysis, veers away from another broad stream of judicial usage. Many other courts and commentators employ the phrases "designated forum" and "limited purpose forum" interchangeably. *See* United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738, 750 (6th Cir. 2004) (noting the persistent differences over the use of the distinction, but declining to attempt to resolve the differences between designated or limited fora since the case at hand involved public property that was not opened for any sort of expression, but merely as a polling place); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 842 n.5 (6th Cir. 2000) (noting that the Sixth Circuit did not differentiate between designated and limited forums and reviewing other circuit statements); Good News Club v. Milford Cent. Sch., 202 F.3d 502, 508–09 (2d Cir. 2000) (drawing no distinction between designated and limited public fora, and stating that restrictions on these limited public fora must be "reasonable and viewpoint neutral"); Whiteland Woods, L.P. v. Township of W. Whiteland, 193 F.3d 177, 182 n.2 (3d Cir. 1999) (stating that the designated forum is a nontraditional forum opened for "public discourse," but that the Court has also "discussed 'limited' public fora, which are designated for expression, but only on limited topics," and choosing to treat both categories under the stricter standards for designated public fora); Warren v. Fairfax County, 196 F.3d 186, 193–94 (4th Cir. 1999) (treating designated and limited public fora as the same category, and setting up two Fourth Circuit standards for this forum—an "internal" standard, which gives strict scrutiny protection for the class of speakers to whom the forum was opened and an "external" standard, which "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened").

The Second, Third, Fifth, Seventh and Ninth Circuits differentiate between designated and limited forums. N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 128 n.2 (2d Cir. 1998) (treating the limited public forum as a sub-category of the designated public forum, where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects); Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 155 F. Supp. 2d 142, 174 (D.N.J. 2001), *rev'd*, 309 F.3d 144, 174 (3rd Cir. 2002) ("The second category of forum, a limited or designated public forum, is created when the state, although not required to do so, opens public property for expressive purposes."); Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 346–47 (5th Cir. 2001) (distinguishing between designated and limited fora, but recognizing confusion over the terminology used to describe the middle category (or categories) between traditional and nonpublic forums); Air Line Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1152 (7th Cir.1995) (stating designated public forums are areas that the government has dedicated to use by the public as places for expressive activity; they may be opened generally for all expressive activity; or they may be designated for more limited purposes such as use by certain groups or discussion of certain subjects); DeBoer v. Vill. of Oak Park, 267 F.3d 558, 566 (7th Cir. 2001) (stating that "the use of this terminology . . . has introduced some analytical ambiguity because the [Supreme] Court previously had employed the term 'limited

designation may be open to the public at large, or it may be restricted to "certain groups or for the discussion of certain topics," so long as these restrictions are viewpoint neutral and "reasonable in light of the purpose served by the forum."[19] Speakers who are within the group of persons entitled to the use of a public forum by designation may be excluded only under the same standards that apply to traditional public fora.[20]

"Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all."[21] Speakers may be excluded from nonpublic fora based upon "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral . . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[22]

The power to limit access to the campus to certain persons or for certain purposes can, and does, provide significant assistance to governing boards or administrators who fear that commercial activities may disrupt campus functions. The Court has invoked forum analysis to permit public entities to restrict access to their advertising venues, workplaces, or transportation facilities where necessary to maximize the commercial value of the advertising venues or to minimize disruption caused by solicitation in the transportation facility or government workplace.[23] The forum doctrine, thus, provides a fundamental tool to balance

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public forum' as a subcategory of the designated public forum, subject to the strict scrutiny governing restrictions on designated public forums"); Cogswell v. City of Seattle, 347 F.3d 809, 814 (9th Cir. 2003) ("[A] limited public forum is a sub-category of a designated public forum that 'refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.'") (quoting Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (citing DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999)). In both circuits, in a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible. N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 128 n.2 (2d Cir. 1998); *Hopper*, 241 F.3d 1074–75.

The Federal Circuit in *Griffin v. Secretary of Veterans Affairs* has not marked the distinction at all, describing the Court's forum distinctions at their most general level as a tripartite classification: "public fora, designated public fora, and nonpublic fora." 288 F.3d 1309, 1321 (Fed. Cir. 2002). The D.C. Circuit has adopted the same approach. Marlin v. D.C. Bd. of Elections & Ethics, 236 F.3d 716, 718 (D.C. Cir. 2001) (stating that the "Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum").

Given the inconsistent, though insignificant and insubstantial, variations among the phrasing employed by the Court and the circuit courts, I have attempted to avoid the terminology to the extent possible by addressing the second category of fora as "public fora by designation," employing a turn of phrase introduced in *Cornelius*. *Cornelius*, 473 U.S. at 803.

19. *Good News Club*, 533 U.S. 98, 106–7 (2001) (quoting *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806); *Lamb's Chapel*, 508 U.S. at 392–93.

20. *Ark. Educ.*, 523 U.S. at 677.

21. *Id.* at 678; *ISKCON*, 505 U.S. at 678–79.

22. *Cornelius*, 473 U.S. at 806. *See Ark. Educ.*, 523 U.S. at 677–78; *Perry*, 460 U.S. at 45–46, 49.

23. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (finding the decision to reject political advertising and to allow only "innocuous and less controversial commercial and

university and private interests in the use of institutional facilities for commercial purposes.

Despite this utility, forum analysis does not provide a comprehensive mechanism for addressing First Amendment issues that arise in conjunction with commercial activities on campus. Three factors limit the utility of the forum doctrine. First, the forum doctrine relates only to questions involving the right to enter public property for expressive purposes. With minimal exceptions involving the use of advertising venues, forum analysis cannot answer the additional questions whether, or when, the expressive conduct itself might be subject to regulation or on what grounds.[24] Second, the Court has intimated, and the lower

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service oriented advertising does not rise to the dignity of a First Amendment violation"); *Cornelius*, 473 U.S. at 811 (holding that a federal workplace is a nonpublic forum and, though avoidance of controversy is not a valid ground for restricting speech in a public forum, the First Amendment does not forbid a viewpoint-neutral exclusion of charitable solicitation that might disrupt a nonpublic forum and hinder its effectiveness for its intended purpose); *ISKCON*, 505 U.S. at 681–82 (holding that an airport terminal is a nonpublic forum and that the governmental purpose of airport terminal concourse shops is to provide services attractive to the marketplace and operating at a profit, not expression, and restrictions to achieve the commercial purpose need only be reasonable).

24. Advertising venues are the nonpublic fora in which the courts' most often discuss the extent to which government may control the content of speech, once it has made the decision to permit private speech in a nonpublic forum, although there is authority that would permit similar discretion in nonpublic fora established for the purpose of communicating particular kinds of expression. *See* Griffin v. Secy of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002) (rejecting a facial challenge to regulations that allowed Veterans Affairs officials to limit the flying of the confederate flag in a national cemetery containing only the bodies of confederate soldiers who died in a prisoner of war camp).

There really seem to be three fact patterns that inform the Supreme Court's analysis of nonpublic fora. *Greer v. Spock* presents the first analytical framework in its tenth footnote:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

424 U.S. 828, 838 n.10 (1976).

Thus conceived, the nonpublic forum arises when government brings in an outside party, whose message it believes will advance the interests of the government program. Here there is no suggestion that government parses the message after the invitation has been extended. In essence, government invites speakers with known views because it believes that their standard messages will advance its purposes, but there is no indication that the specific expression is reviewed further.

The second fact pattern is that discussed in *Cornelius*. There, government decided that permitting ad hoc access to the federal workplace for fundraising purposes had grown too disruptive, so it began to limit the numbers and kinds of groups that could solicit contributions and to limit the times when that could be done. *Cornelius*, 473 U.S. at 791–95. In 1982, the regulations were changed to restrict participation to charities that provided certain direct aid to persons in need, and the restrictions were framed to exclude advocacy groups that subsidized legal aid. *Id*. In this fact pattern, rather than invite speakers whose speech will advance its purposes, government identifies a utility to allowing private speakers access, then defines a class of entities or topics that may apply for permission to access the nonpublic forum. Here, again,

there is no general indication that government may pick and choose detailed content once a qualified speaker applies, although there is no general provision to the contrary, either. The fact patterns here generally do not provide occasions for the issue to arise.

The third fact pattern arose in the original forum case, *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (upholding the city's refusal to allow "political advertising" on public transportation), which spawned the advertising cases. The key element in this decision lay in the fact that government acted in an entrepreneurial capacity when operating its transportation system, together with their associated advertising venues, and properly could make reasonable business judgments to achieve its objective of providing "rapid, convenient, pleasant, and inexpensive service to the commuters." *Id*. at 303–04. In that limited context, the Court concluded:

> In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303. This fact pattern suggests that where government creates a nonpublic forum, whose operation essentially involves expression, there may be additional latitude in reviewing the content of speech to assure that the proffered expression advances the intended operation of the forum.

The advertising cases present the only line of authority where content-based distinctions among applicants for use of a nonpublic forum have been regularly accommodated, but these distinctions always seem related to the fact that advertising venues, unlike other nonpublic fora are used to generate revenues and content-based distinctions among advertisers and advertisements are generally recognized to have some bearing on revenue generation. The intrinsic communicativeness of advertising and the inherent relationship between effective advertising approaches and revenue generation necessitate government attention to advertising content if it is to achieve the revenue production goal it had in establishing these fora. The revenue-generating purpose of the advertising forum provides a principle of decision under the nonpublic forum rational basis test that is sui generis among the various other settings in which nonpublic forum analysis comes into play and therefore spawns a series of decision in which the courts accommodate government weighing the content of expression before deciding to allow the expression or to allow it to remain.

Although *Griffin* did not involve an advertising venue, it does not suggest a broad new category of forum in which government officials may make content-based decisions about expression. The *Griffin* court grounded its opinion on consideration of the expressive character and purpose of the national cemetery system, "the government has established national cemeteries to serve particular commemorative and expressive roles." *Griffin*, 288 F.3d at 1324.

Not only are the national cemeteries nonpublic fora, but they are also the fora whose very purpose is expressive, to serve "national shrines as a tribute to our gallant dead." *Id.* (internal citations omitted). In the distinctive context of a forum created to communicate a specific kind of expression, the *Griffin* court had little difficulty in concluding that "government may need to decide what forms of expression are compatible with this atmosphere of solemnity in order to preserve the forum for the purpose it was established." *Id.*

Given the very narrow premises of the *Griffin* opinion, there is little reason to believe that it represents an expansion of the range of nonpublic fora in which government enjoys the power to make content-based decisions about expression in the forum. For the most part, even in nonpublic fora, government has little authority to regulate expression.

Student newspapers also present a special case in which a means of communication has been held to be outside university control, but not truly a public forum. Kincaid v. Gibson, 236 F.3d 342, 348 n.6 (6th Cir. 2001) (noting that public universities generally have little power to control student newspapers and declining to extend forum analysis to student newspapers) (citing Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983) (finding violation of students' First Amendment rights to free expression where university cut student newspaper's funding at least in part on the basis that it disapproved of paper's content)); Schiff v. Williams, 519 F.2d 257, 260 (5th Cir. 1975) (holding that "the right of free speech embodied in the publication of a college student newspaper

courts have concluded, that, to the extent that a university opens its campuses, facilities or programs to ranges of student private expressive activities, as to its students for permitted classes of expression, at least, those campuses, facilities or programs become effectively public fora.[25] Hence, as to students, the forum

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cannot be controlled except under special circumstances"); Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) (stating that "if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment"); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970) (holding that university requirement that all material to be published in student newspaper be previewed by university administrators violated students' rights to free expression)); Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (concluding that forum analysis is inapposite to consideration of student papers). *But see* Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 690–92 (N.J. Super. Ct. App. Div. 2002) (holding that, despite the university's apparent efforts to operate an official paper directed to alumni and supporters as a nonpublic forum, it became a limited public forum). The *Rutgers* court stated:

> We conclude that the Magazine's advertising section was a limited public forum, and the Magazine's policy against issue-oriented advertisements was reasonable and, as such, valid. . . . However, once the Magazine violated its own policy by acceptance of the Big East advertisement in the context of the prior Mulcahy article, it ceded its right to similarly deny plaintiff of its opportunity to place an ad addressing the same issue.

Id. at 692 (internal citations omitted).

25. *Widmar* provides a classic statement of this position:

> This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. *See generally* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965). "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" Healy v. James, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.* at 181–182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.* at 181, 184. At the same time, however, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969). We continue to adhere to that view. 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.

Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (emphasis added). *See also Cornelius*, 473 U.S. at 802–03 ("[A] state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use.") ("[A] university campus, at least as to its students, possesses many of the characteristics of a traditional public forum."); *Ark. Educ.*, 523 U.S. at 678 ("In *Widmar*, for example, a state university created a public forum for registered student groups by implementing a policy that expressly made its meeting facilities 'generally open' to such groups."). Lower courts commonly cite this passage in *Widmar* for the propositions that, with respect to students, the campus is like a public forum. *See, e.g.*, A.C.L.U. Student Chapter–Univ. Of Md., College Park v. Mote, 321 F. Supp. 2d 670, 679 (D. Md. 2004) (involving a situation where the university, through policies that permitted

doctrine may well default back to some variation on the general rules that apply to police power regulations of commercial activities.[26] Third, forum analysis does

outsiders to reserve time to use university fora for speaking purposes, albeit with lesser priority than university students, faculty or employees, purposefully opened its doors to a class of speakers, while excluding others. As a result of this purposeful action, what otherwise would have been a non-public forum became a limited public forum.); Bourgault v. Yudof, 316 F. Supp. 2d 411, 419–20 (N.D. Tex. 2004) (holding that the University of Texas campus is not a traditional public forum but a designated public forum, or a limited public forum, opened for the use of members of the university community and upholding exclusion of itinerate preacher from campus); Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003) (finding that the physical setting of a campus with "many streets, parking facilities, sidewalks and walkways, various stadiums and sports arenas, theaters, bookstores, convenience stores, some 25 restaurants, a Hilton Hotel, and numerous park-like plazas, nearly all of which facilities are open and accessible not only to students and faculty but also to the general public," together with institutional policy, led to the conclusion that a metropolitan campus square was a public forum) (applying strict scrutiny to a policy involving potentially disruptive free speech activities); Burbridge v. Sampson, 74 F. Supp. 2d 940, 948–50 (C.D. Cal. 1999) (finding that a regulation that distinguished between "commercial" and "noncommercial" speech or activities and gave preferential treatment to "noncommercial" speech or activities was content-based and failed to survive strict scrutiny analysis); Hays County Guardian v. Supple, 969 F.2d 111, 116–17 (5th Cir. 1992) (concerning university that deliberately fosters an environment in which students may freely distribute newspapers, pamphlets, and other literature concerning public affairs "outdoors, on grounds owned or controlled by the University," subject to the limits necessary to preserve the academic mission and to maintain order, assuming arguendo that restrictions on newspaper distribution was content neutral, the court found the restrictions not to be narrowly tailored).

It should be noted that the Supreme Court appears to be more cautious than some of the lower courts in drawing the conclusion that property that serves as a limited public forum for some expressive purposes might still be a nonpublic forum for others. *Widmar*, after all, only concerned access to facilities by student organizations seeking meeting rooms. *Widmar*, 454 U.S. at 264–65 n.5. The specification that a university need not "grant free access to all of its grounds or buildings" certainly suggests that the Court might conceive of a university policy that treated a lecture hall as a public forum for purposes of student organization meetings but as a nonpublic forum for purposes of bake sales or other commercial fundraising activities. *Widmar*, 454 U.S. at 267 n.5. *See also Perry*, 460 U.S. at 44 (finding that the First Amendment does not require equivalent access to all parts of a school building in which some form of communicative activity occurs and that the 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) (quoting Grayned v. City of Rockford, 408 U.S. 104, 117–18 (1972) ("Nowhere [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.")); Greer v. Spock, 424 U.S. 828, 836 (1976) (holding that the guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please") (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)). In theory, students who could claim access for expressive purposes relating to organizational meetings could be denied access to the very same properties when the students approached the university to obtain permission to raise funds through bake sales or t-shirt sales or talent shows. *Cf. ISKCON*, 505 U.S. at 683–85 (finding that a public airport is a nonpublic forum and that solicitation may be banned in an airport where it may reasonably be thought that solicitation could interfere, e.g., with the flow of passengers through the terminal).

26. Justice Harlan described the police power thusly:

> [T]here is a power, sometimes called the police power, which has never been surrendered by the states, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. In its broadest sense, as sometimes defined,

not shield regulations governing access to the forum from scrutiny under the Due Process Clause. Even before the full bloom of civil rights legislation and decisions, the Court recognized that "the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer" and could not adopt workplace rules that implemented invidious racial or religious discrimination or political orthodoxy.[27] The Court will not consider the nature of the forum where a regulation of commercial solicitation is manifestly overbroad, and it will scrutinize restrictions for impermissible purpose or irrational application.[28]

Regulations involving commercial speech illustrate both the distinctive issues that cannot be addressed using forum analysis and the uncertainty about the proper framework for resolving such problems.[29] "Commercial speech" is a term of art relating to speech, signage and the communicative aspects of marketing products and services.[30] Commercial speech jurisprudence departs from the main current of First Amendment jurisprudence by allowing government to impose limited content-based rules, such as requirements that commercial speech at least "concern lawful activity and not be misleading."[31] If the campus is treated as public forum

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> it includes all legislation and almost every function of civil government. As thus defined, we may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public high ways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

New Orleans Gas Co. v. La. Light & Heat Producing & Mfg. Co., 115 U.S. 650, 661 (1885) (internal citations omitted).

27. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 897–98 (1961).

28. Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (regarding overbreadth); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 93–95 (1st Cir. 2004) (suggesting that the vagueness inquiry in the context of a nonpublic forum might be less exacting than where the regulatory scheme involves licensing or a traditional nor a designated public forum); United States v. Kokinda, 497 U.S. 720, 725–26 (1990) (finding that government action as proprietor restricting access to property is valid unless it is unreasonable, or "arbitrary, capricious, or invidious") (quoting Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974)); Greer v. Spock, 424 U.S. 828, 840 (1976) (finding that no evidence that rules governing access had been applied irrationally, invidiously, or arbitrarily).

29. In *Fox*, the Court relied upon commercial speech analysis to examine the question of whether a state university system prohibition against certain forms of commercial activities in university residence halls violated the First Amendment rights of the students. The university defended its rules under the forum analysis, as reasonable regulations in a nonpublic forum, but the Court declined to review such arguments because the Second Circuit Court of Appeals had decided the case against the university solely on commercial speech grounds. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473 n.2 (1989).

30. *See infra* notes 255–310 and accompanying text. Commercial speech differs from "for profit" speech, such as that involved in tutoring, counseling or publishing newspapers, all of which would be subject to the standard ranges of First Amendment protections. *Fox*, 492 U.S. at 482 (holding that tutoring, legal advice, and medical consultation provided—for a fee—in students' dormitory rooms would consist of speech for a profit, they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech).

31. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566

as to students, even regulations of commercial speech might be subject to strict scrutiny standards.[32] To maximize the likelihood that university regulations of commercial activities will be upheld, it may well be prudent to fashion them to meet forum and commercial speech requirements, as well other constitutional doctrines relating to the regulation of commercial activities in general and expressive commercial activities in particular.[33]

(1980).

32. *Cf.* Burbridge v. Sampson, 74 F. Supp. 2d 940, 950 (1999) (finding that regulation that distinguished between "commercial" and "noncommercial" speech or activities and gave preferential treatment to "noncommercial" speech or activities was content-based and failed to survive strict scrutiny); Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011, 1028 (C.D. Cal. 2002) (applying strict scrutiny and invalidating a prohibition on commercial advertising that was "defamatory and/or which contains obscene language as defined" under state law). Urban universities may experience special problems here, depending upon the nature of their campuses and the flow of traffic and commerce around their perimeters and through their grounds. When laying the factual groundwork for its conclusion that a particular square on the campus of the University of Houston was a public forum, the *Pro-Life Cougars* court noted:

> On the campus are many streets, parking facilities, sidewalks and walkways, various stadiums and sports arenas, theaters, bookstores, convenience stores, some 25 restaurants, a Hilton Hotel, and numerous park-like plazas, nearly all of which facilities are open and accessible not only to students and faculty but also to the general public.

Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003). To the extent that institutional grounds are indistinguishable from the sidewalks, streets, parklands, and enterprises that abut them, colleges and universities may find that at such peripheries, they are subject to rules that define the First Amendment status of such contiguous properties. *See* United States v. Grace, 461 U.S. 171, 179 (1983) ("The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently."); United Church of Christ v. Gateway Econ. Devel. Corp. of Greater Cleveland, Inc., 383 F.3d 449 (6th Cir. 2004) (finding that sidewalks at periphery of private athletic stadium housing professional baseball and basketball teams that were fully integrated into municipal system and indistinguishable from municipal systems were public fora, but the internal walks, drives, and grounds were not).

33. *Khademi*, 194 F. Supp. 2d at 1028–29 (reviewing ban on certain advertising under commercial speech standards). This ban prohibited advertising involving:

> 1. Alcoholic beverages, including wine, liquor, and beer of any type (exception non-alcoholic beer); 2. Tobacco products of any kind, including cigarettes, cigars, and chewing tobacco; 3. Guns or firearms of any kind; 4. Illegal substances as identified by the Federal Government, and/or by the State of California; 5. Explosive materials of any kind.

Id. The court upheld the ban on advertisements for illegal substances, but struck the rest as content-based and unsupported by any state interest. *Id*. The *Khademi* court overlooked the implications of the 1989 Drug-Free Schools and Communities Act of 1989. *See* 20 U.S.C. § 1011i(a)(1)(A) (2000). *See infra* note 308 and accompanying text. S*ee also* Am. Future Sys., Inc., v. Pa. State Univ., 464 F. Supp. 1252, 1263–64 (M.D. Pa. 1979) (applying commercial speech authorities in approving rules designed to avoid subjecting consumers to pressure sales tactics by entities with a history of deceptive or fraudulent sales practices, rather than following forum analysis); Brister v. Faulkner, 214 F.3d 675, 681, 683 n.5 (2000) (finding that the university paved sidewalk area between the public entrance to the University of Texas at Austin's Erwin Center and Red River Street was indistinguishable from the municipal sidewalk and was, therefore, a traditional public forum) (limiting holding to the specific property at issue on Red River Street and stipulating that it was "not to be interpreted to apply to any other property around the perimeter of the Erwin Center or elsewhere, about which we express no opinion"). Clearly, where properties at the periphery of campuses take on the character of public fora,

To begin to address these matters, it will be useful to return to the taproot of constitutional analysis of state action—the Due Process Clause of the Fourteenth Amendment. Due process requirements attach to all state actions.[34] Any authority delegated to a public college or university by the state remains subject to such limitations. Hence, the threshold inquiry into the sources and limitations of college or university power to regulate commercial activities should focus on the general constraints that the Due Process Clause places on state police power regulations of commercial activities.[35]

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university policies should reflect such circumstances and should hew closely to the general principles that govern local government regulations of like properties.

34. The application of due process restrictions to all state action may not be immediately obvious, given the origin of the Bill of Rights as a restriction on legislative power. The First and Fifth Amendments were conceived and framed as a restriction on the legislative power of the national government. Representative James Madison explained the rationale for limiting only the legislative power when he presented the proposed amendments to the House on June 8, 1789:

> In our Government it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the Legislative, for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper.

1 ANNALS OF CONG. 454 (J. Gales ed. 1834) (remarks of James Madison) (June 8, 1789).

Later, the Fourteenth Amendment reached beyond legislative action to encompass state action whether legislative, executive or judicial. *Ex Parte* Virginia, 100 U.S. 339, 346 (1897) (holding that the prohibitions of the Fourteenth Amendment are directed to the States and are to a degree restrictions of State power, whether that action be executive, legislative, or judicial). Hence, to the extent that the Court has incorporated the Bill of Rights into the Fourteenth Amendment, the Bill of Rights must be understood as applicable to all forms of state action, whichever branch or agency of government may exercise that power.

35. The Due Process Clause of the Fourteenth Amendment "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189, 196 (1989) (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." Collins v. Harker Heights, 503 U.S. 115, 127, n.10 (1992). "This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911), was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Collins*, 503 U.S. at 127 n.10 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)). *See also* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (stating that the touchstone of due process is protection of the individual against arbitrary action of government); Dent v. West Virginia, 129 U.S. 114, 123 (1889) (finding that the phrase "due process of law" figured in the law of England and that the concept was "designed to secure the subject against the arbitrary action of the crown, and place him under the protection of the law").

It should also be noted that, as with "other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause." Ladue v. Gilleo, 512 U.S. 43, 51 n.9 (1994); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94–95 (1972) (analyzing the ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment because Chicago treats some picketing differently from others). Like due process analysis, equal protection analysis also involves three levels of scrutiny: rational basis, intermediate, and strict. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J. dissenting); Clark v. Jeter, 486 U.S. 456, 461 (1988). At a minimum, a statutory classification must be rationally related to a legitimate

I. UNIVERSITIES MAY REGULATE PRIVATE COMMERCIAL ACTIVITIES ON CAMPUS THAT INVOLVE NO EXPRESSION OR EXPRESSIVE CONDUCT SO LONG AS THEIR REGULATIONS COMPORT WITH SUBSTANTIVE DUE PROCESS REQUIREMENTS.

A. Substantive due process standards that apply to police power regulations of commercial activity also apply to rules governing access to university grounds and facilities for commercial endeavors that involve neither expressive activities nor expressive products.

At first blush it may appear that the forum doctrine supplies an adequate ground for justifying college or university regulations of commercial activities that involve no expression. On closer inspection, it becomes clear that the forum standards for constitutionality are significantly more stringent than those required under a substantive due process analysis.

The forum cases articulate several principles that appear to be directly on point. College and university rules governing access to grounds or facilities for purposes of commercial activity do not involve the exercise of the sovereign power to regulate or license.[36] Rather, colleges and universities act in much the same manner as other governmental proprietors to manage their internal operations, and, in that capacity, their actions should be entitled to a lower level of substantive due process scrutiny than that applied in the typical First Amendment setting.[37] Even

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governmental purpose. *Jeter*, 486 U.S. at 461. The standards for determining the rationality of a classification under the Equal Protection Clause are the same as those employed under the Due Process Clause. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470, n.12 (1981) ("From our conclusion under equal protection, however, it follows *a fortiori* that the Act does not violate the Fourteenth Amendment's Due Process Clause."); Powers v. Harris, 379 F.3d 1208, 1215 (10th Cir. 2004) (holding that substantive due process analysis proceeds along the same lines as an equal protection analysis); Gary v. City of Warner Robins, 311 F.3d 1334, 1339 n.10 (11th Cir. 2002) (finding that the rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim).

Intermediate scrutiny generally has been applied to discriminatory classifications based on sex or illegitimacy. *Jeter*, 486 U.S. at 461. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. *Id.* Classifications based on race or national origin and classifications affecting fundamental rights are subject to strict scrutiny. *Id*. Classifications based on race or affecting fundamental rights are constitutional only if they are narrowly tailored to further compelling governmental interests. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). This article will not focus upon equal protection considerations involving commercial speech.

36. Power over such matters resides in the legislative branches of government. Mugler v. Kansas, 123 U.S. 623, 661 (1887) (stating that the legislative branch has the power "to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."); Barbier v. Connolly, 113 U.S. 27, 31 (1884) (finding the requirement that laundry operators obtain a license is within the municipal police power).

37. Governmental actions are subject to a lower level of scrutiny when the government acts, not as lawmaker to regulate or license, but, rather, as proprietor, to manage its internal operations. United States v. Kokinda, 497 U.S. 720, 725 (1990) (involving solicitation for contributions, book and newspaper subscription sales, and distribution of political literature); ISKCON v. Lee, 505 U.S. 672, 678 (1992) (involving disseminating religious literature and soliciting funds to support the Krishna Consciousness religion).

in the most exacting circumstances involving expressive activities, government may "ban the entry on to public property that is not a 'public forum' of all persons except those who have legitimate business on the premises."[38] The often reiterated

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The Court's approach to First Amendment analysis often appears to be but another species of due process analysis. The tests and levels of scrutiny applied in First Amendment analysis exhibit their due process provenance. "The Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided* . . . ." Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting). In general liberty interests "may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest." *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 728 (1997). A different, stringent rule applies where the state action trenches upon fundamental interests. There, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) (citing *Glucksberg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). Only fundamental rights qualify for heightened scrutiny protection. Fundamental right are those that are "deeply rooted in this Nation's history and tradition" and also "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if [it] were sacrificed." *Lawrence*, 539 U.S. at 593 n 3 (Scalia, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721).

Long ago, the Court concluded that the rights guaranteed by the First Amendment comprised an element of the liberty protected under the Due Process Clause of the Fourteenth Amendment from some forms of state action. Hague v. Comm. For Indus. Org., 307 U.S. 496, 519 (1939) ("It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (holding that freedom of speech, of the press and of assembly are fundamental rights which are safeguarded by the Due Process Clause of the Fourteenth Amendment); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States).

Where government action regulating speech clearly impinges upon fundamental interests, the Court holds government to the most exacting standards. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 130–33 (1992) (holding that parade licensing standards must contain narrow, objective and definite standards to guide the decision-making authority in order to avoid arbitrariness). Where the speech at bar does not impinge on such interests it affords governmental agencies greater latitude. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) ("Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. . . .); *Id*. at 571 ("[T]he terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."); *ISKCON*, 505 U.S. at 682 (holding that governmental purpose of airport terminal concourse shops is to provide services attractive to the marketplace and operating at a profit, not expression, and restrictions to achieve the commercial purpose need only be reasonable); Waters v. Churchill, 511 U.S. 661, 675 (1994) (noting that some actions "that would be impermissible if attempted in a regulatory capacity, may be appropriate where government is employing someone for the very purpose of effectively achieving its goals"); *Kokinda*, 497 U.S. at 725 (holding that governmental actions are subject to a lower level of First Amendment scrutiny when the government acts, not as lawmaker to regulate or license, but, rather, as proprietor, to manage its internal operations).

38. United States v. Grace, 461 U.S. 171, 178 (1983) ("The United States Constitution does

general rule is that restrictions on speaker access to a nonpublic forum need only be "reasonable in light of the purpose served by the forum."[39]

The "reasonable in light of the purpose served by the forum" standard, recognized as the least restrictive test in forum analysis, converges lexically and functionally with the minimum standard of scrutiny recognized in substantive due process analysis, the rational basis test, which is the standard under which most commercial regulations are upheld so long as their requirements are rationally related to permissible state interests.[40] Nevertheless, the nonpublic forum rational basis standard differs significantly from the substantive due process rational basis standard, and it does so in ways that embody a higher standard than substantive due process entails.

The phrase "reasonable in light of the purpose served by the forum" presents a narrower rule than is typically imposed on police power commercial regulations. Police power commercial regulations are upheld unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[41] The forum rational basis test calls for an affirmatively reasonable relation to objective characteristics, the purposes of the forum, whereas the police power test provides more ample ground for government regulation by defining rationality in negative terms.[42] For purposes of substantive due process, rules are reasonable so long as they are not clearly arbitrary or unreasonable or not lacking any substantial relationship to permissible goals. This disparity reflects the fact that the forum test is designed to protect fundamental First Amendment rights,

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not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.") (citing Adderley v. Florida, 385 U.S. 39, 47–48 (1966)); Cox v. Louisiana, 379 U.S. 536, 554 (1965) ("The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.").

39. *See supra* notes 18–19 and accompanying text. College and university decisions to permit some commercial activity on campus appear to share certain features with the decision to allow some private speech on campus. Just as colleges and universities could operate residence halls without permitting private speakers to use common areas to meet with residents, colleges and universities could perfectly well operate residence halls without permitting residents to contract for the construction of custom lofts to fit into dormitory rooms, to sell dormitory furnishings to one another, or to engage in similar commercial activities. Because there is no material difference between the decision to permit limited speech and to permit limited commerce, it would seem that both forms of internal regulations should be subject to rational basis scrutiny.

40. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (stating that economic or tax legislation is scrutinized under rational basis review); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955). In *Lee Optical*, the Court stated:

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Id.

41. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

42. *See infra* Part I.B.2.

whereas, in the absence of these or other fundamental rights, substantive due Process requires mere rationality.[43]

To the extent that college and university regulations of commercial activity reach only transactions involving non-expressive goods and services, they are unlikely to implicate fundamental rights. Such regulations should be subject to no more exacting reasonableness standards than apply to police power commercial regulations addressing similar non-expressive goods and services.

B. Police power commercial regulations affecting non-expressive commercial goods and services must address a permissible purpose, be rationally related to that purpose, and provide fair notice of what conduct is regulated.

Three factors guide the Court's review of police power commercial regulations that involve non-expressive products or conduct. The Court seeks assurance that the regulation seeks a proper governmental purpose. It weighs whether the regulation bears a rational relation to its purpose. It considers whether the regulation provides fair notice of what conduct is regulated. Colleges and universities should anticipate that their regulations will be subject to the same inquiries.

1. A broad range of purposes may support police power commercial regulations, including purposes that serve to preserve the historic, aesthetic, and noncommercial character of certain places or districts within a governmental jurisdiction.

The police power has been said to encompass the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."[44] The Due Process Clause generally places few limits on the power to regulate commercial activities, so long as the regulations are reasonably related to a legitimate government purpose.[45]

Two kinds of limitation on the police power are well-established. The police power is subject to organic limitations rooted in the Constitution.[46] The police

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43. *See supra* note 37 and accompanying text.

44. Barbier v. Connelly, 113 U.S. 27, 31 (1884).

45. Williams v. Glucksberg, 521 U.S. 702, 721 (1997) (arguing that where no fundamental interest is implicated, due process requires a reasonable relation to a legitimate state interest to justify state action); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (stating that economic legislation is "not . . . unconstitutional unless . . . facts . . . preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators").

46. New Orleans Gas Co. v. La. Light & Heat Producing & Mfg. Co., 115 U.S. 650, 661 (1885) ("[T]he State cannot, in its exercise [of police powers], for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."); *Carolene Prods.*, 304 U.S. at 152, n.4 ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). Implied limitations on state power may also trigger more exacting review of state economic regulations. Or. Waste

power is also subject to an intrinsic limit that proscribes its use to impose disabilities on disfavored classes of citizens.[47] A state regulation that breeches either limitation cannot be said to pursue a legitimate state interest, and therefore must be deemed invalid.

Apart from such organic and intrinsic limitations, the range of purposes that may support police power commercial regulation is broad and inclusive. When reviewing such regulations, the Court acknowledges that states may properly attempt to create or to preserve aspects of community environments that affect the quality of life and that yield psychological, as well as economic, benefits for the community.[48] States have the power to adopt measures to assure safety and order, and to promote the free circulation of traffic on streets and sidewalks.[49] States may also control market access and product price and some aspects of product presentation.[50] They may attempt to prevent deception of consumers.[51] States may regulate commercial uses of property to protect noncommercial uses or interests, including historic or aesthetic interests.[52] States may protect their

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Sys., Inc. v. Dep't of Env'l Quality of Oregon, 511 U.S. 93, 98 (1994) (stating that the Commerce Clause grant of power to regulate interstate commerce operates to deny states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce).

47. This principle does not stem wholly from the Equal Protection Clause, but, rather, from the principle that due process precludes the use of governmental power to pursue purely personal ends. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886). The *Yick Wo* Court stated:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

Id. This limitation entails the further proscription of uses of the police power to suppress disfavored groups, since the use of governmental power in order to implement shared bias is as arbitrary and abusive as its use to implement private animus. "We have consistently held, however, that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests." Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring) (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). *See also Lawrence*, 539 U.S. at 574 (striking down a state constitutional amendment that divested various homosexuals of protection under state antidiscrimination laws because "the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose") (quoting Romer v. Evans, 517 U.S. 620, 634 (1996)).

48. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816–17 (1984) (holding that the city's traffic control, safety and aesthetic interests are both psychological and economic, since the character of the environment affects the quality of life and the value of property in both residential and commercial areas, and such interests are sufficient to support a ban on temporary signs on public property).

49. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (holding that the state "also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks").

50. *Carolene Prods.*, 304 U.S. 144, 152 (1938) (food products); Nebbia v. New York, 291 U.S. 502 (1934) (price controls); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (environmentally responsible milk containers).

51. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

52. City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (zoning permitted to regulate secondary effects of adult businesses); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (historic preservation); *Vincent*, 466 U.S. at 816–17 (1984) (aesthetic

citizens "from unwelcome noise," maintain parklands "in an attractive and intact condition," and promote the safety and convenience of persons using public grounds and facilities.[53] Where they erect monuments, states may maintain an atmosphere of tranquility and respect.[54]

Except for such limits emanating from the Constitution itself, the Court's rational basis test imposes no external restriction on the purposes that states may pursue through the exercise of police powers. The Court thus reserves to the states the flexibility to identify what circumstances warrant a regulatory response, subject principally to such controls as may be imposed through the political process.[55]

> 2. The "rational basis" test employed in commercial settings minimizes the likelihood that a commercial regulation will be held invalid and deters opponents of commercial regulations from using litigation instead of political persuasion to pursue desired change.

It has become hornbook law that under the rational basis test "legislation is

considerations); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding that the police power to zone is not confined to elimination of filth, stench, and unhealthy places, it may reserve land for single-family residences, preserving the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people"). Where property interests are adversely affected by zoning, the regulation will generally be upheld if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980). Nevertheless, when a zoning law infringes upon protected liberties, such as those protected by the First Amendment, it must be narrowly drawn and must further a sufficiently substantial government interest. *Schad*, 452 U.S. at 68.

53. Such interests have all been recognized as substantial governmental interests entitled to degrees of deference even in the First Amendment setting. Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (involving park regulations to control noise levels at bandshell events in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park and to ensure the quality of sound at bandshell events); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984) (recognizing government's substantial interest in maintaining the parks in the heart Washington D.C. in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence); Kovacs v. Cooper, 336 U.S. 77, 87–88 (1949) (stating that an "[o]pportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets"); *Madsen*, 512 U.S. at 768 (holding that the state "also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks"); Heffron v. ISKCON, 452 U.S. 640, 650 (1981) (recognizing state interest in safety and convenience of citizens using public fora); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (recognizing state interest in safety and convenience on public roads).

54. *See* Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1324 (Fed. Cir. 2002). The court in *Griffin* stated:

> Because the government has established national cemeteries as shrines to honor the memory of those who served, maintaining an atmosphere of tranquility and respect is necessarily central to the purpose of the forum. Consequently, the government may need to decide what forms of expression are compatible with this atmosphere of solemnity in order to preserve the forum for the purpose it was established.

Id.

55. *See infra* note 58 and accompanying text.

presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[56] Nevertheless, this formulation suggests a higher standard, rationality, than the Court actually imposes; speaking strictly, the Court does not require that an action be rational. The Court will not consider the pivotal questions that might be asked if the question truly were whether the challenged legislation was rationally related to the legislative purpose, whether the means selected by the legislature are in truth ineffective, unwise, needless, wasteful, or without adequate grounding in fact.[57]

The Court has adopted this approach in order that "the people must resort to the polls, not to the courts," for protection against abuses by legislatures.[58] Hence, it has embraced tests that minimize the incentives to challenge commercial regulations under the Due Process Clause.

Under the minimal rationality standard that applies to economic regulations, the mere fact that there is "'some rational basis within the knowledge and experience of the [regulators],' under which they 'might have concluded' that the regulation was necessary to discharge their statutorily authorized mission" will support college and university regulations of private commercial activity.[59] A commercial regulation will fail the rational basis test when it is so unrelated to the achievement of any combination of legitimate purposes that it must be concluded that the government's actions are irrational, so irrational as to be arbitrary.[60] If there is any

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56. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

57. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). The Court will not consider whether legislation presents needless, wasteful requirements. *Id*. at 487. Neither will the Court consider whether some other approach may prove to be more effective. Mourning v. Family Publ'g Serv., Inc., 411 U.S. 356, 378 (1973). The Court will also not consider whether the approach selected may fail to achieve its purpose. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 50 (1966).

58. *Lee Optical*, 348 U.S. at 488 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)). S*ee also Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) (discussing Equal Protection doctrine) ("Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'") (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)). In *Day-Brite Lighting, Inc. v. Missouri*, the Court stated:

> Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits . . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

342 U.S. 421, 423 (1952).

59. Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 627 (1986) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); *Lee Optical*, 348 U.S. at 487). Both substantive due process and equal protection analysis may involve rational basis analysis. *See supra* note 35.

60. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000); Kelley v. Johnson, 425 U.S. 238, 248 (1976) ("The constitutional issue to be decided by these courts is whether petitioner's

"reasonably conceivable state of facts that could provide a rational basis" for the measure, the regulation will not be found to be so arbitrary as to fail the constitutional test.[61] Indeed, those attacking the legislative arrangement "have the burden 'to negative every conceivable basis which might support it.'"[62]

If the range of purposes which may be proper objects for the police power is broad, so too is the range of mechanisms available to the government to achieve those objects. Insofar as the means prong of the rational basis test is concerned, the net effect of the test is to permit the political branches of government great latitude to experiment with mechanisms that may serve to abate or to avoid the problems that beset society or to secure advantages that present themselves.

3. Commercial regulations that satisfy the "rational basis" test may still run afoul of the Due Process Clause if they are found to be unconstitutionally vague because they fail to provide fair notice of what conduct is regulated.

Substantive due process places an additional range of requirements on commercial regulations. Commercial regulations cannot be so vague that a person of ordinary intelligence would lack fair notice of what conduct is regulated. It is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined.[63] Regulations must be "sufficiently explicit to inform those who are subject to [them] what conduct on their part will render them liable to [their] penalties."[64] In *Grayned v. City of Rockford*, the Supreme Court explained the principal purposes of the doctrine:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful

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determination that such regulations should be enacted is so irrational that it may be branded "arbitrary," and therefore a deprivation of respondent's "liberty" interest in freedom to choose his own hairstyle.").

61. Heller v. Doe, 509 U.S. 312, 320 (1993); F.C.C. v. Beach Communications, Inc, 508 U.S. 307, 313 (1993).

62. *Beach Communications, Inc.*, 508 U.S. at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

63. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

64. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (arguing that such notice is "the first essential of due process of law").

> zone" . . . than if the boundaries of the forbidden areas were clearly marked.[65]

When reviewing statutes for vagueness, the Court focuses on two principal, albeit related, inquiries: whether the regulations provide fair notice to citizens of the regulations' requirements, and whether they provide a standard for enforcement that "does not encourage arbitrary and discriminatory enforcement."[66]

With respect to the first inquiry, a regulation is void for vagueness if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[67] The Court recognizes the inevitability of some uncertainty with respect to the reach of language.[68] It will take recourse to practices of statutory construction to avoid vagueness where the text of a challenged regulation identifies a clear means to select the intended meaning.[69]

The Court regards the second aspect of the vagueness inquiry as the more important.[70] This emphasis accommodates challenges to regulations whose

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65. *Grayned*, 408 U.S. at 108–09 (internal citations omitted).

66. Kolender v. Lawson, 461 U.S. 352, 357 (1983). *See also* Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County, 542 U.S. 177, ___, 124 S.Ct. 2451, 2457 (2004); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 170 n.64 (2003). The Court noted that:

> The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."

Id. (quoting *Grayned*, 408 U.S. at 108–09).

67. *Connally*, 269 U.S. at 391; *McConnell*, 540 U.S. at 338 (Kennedy, J., dissenting in part and concurring in part). *See also* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (stating that disqualification from public employment based upon membership in "subversive" organizations without requirement that the person know of his or her subversive character is unconstitutionally arbitrary under the Due Process Clause); Smith v. Goguen, 415 U.S. 566, 572 (1974) (holding that the void for vagueness doctrine "incorporates notions of fair notice or warning"); Keyishian v. Bd. of Regents of the Univ. of State of N.Y., 385 U.S. 589, 604 (1967) (stating that legislation seeking to disqualify members of "subversive" organizations from public employment was unconstitutionally vague); *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . .").

68. *Grayned*, 408 U.S. at 110 (stating that condemned to the use of words, we can never expect mathematical certainty from our language); Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973). In *Broadrick*, the Court stated:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Broadrick, 413 U.S. at 608 (quoting Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973)).

69. *See* Reno v. A.C.L.U., 521 U.S. 844, 884 (1997) (declining to construe a statute to avoid vagueness and drawing lines when Congress sent inconsistent signals as to where the new line or lines should be drawn would involve a serious invasion of the legislative domain).

70. Kolender v. Lawson, 461 U.S. 352, 357–58 (1983). In *Kolender*, the Court stated:

> Although the doctrine focuses both on actual notice to citizens and arbitrary

imprecision permits "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[71] Laws so vague "impermissibly [delegate] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."[72]

Although these doctrines arose primarily in the context of criminal legislation, they are also applicable to economic regulations.[73] Economic regulations receive less exacting treatment than criminal legislation, so long as they do not threaten "to inhibit the exercise of constitutionally protected rights."[74] Such regulations are void for vagueness only when they are vague "not in the sense that [they require] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[75]

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. outlined the essential elements of the rationale for employing a more relaxed vagueness standard when reviewing economic regulations:

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.
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> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law

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> enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—requirement that a legislature establish minimal guidelines to govern law enforcement."

Id. (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). *Kolender* construed a statute that required a suspect to give an officer "credible and reliable" identification when asked to identify himself. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply with it, resulting in "virtually unrestrained power to arrest and charge persons with a violation." *Kolender*, 461 U.S. at 360 (quoting Lewis v. New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring in result)).

71. *Id*. at 358 (quoting *Goguen*, 415 U.S. at 575).

72. *Grayned*, 408 U.S. at 108–09.

73. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982); A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925); Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs., 111 F.3d 1408, 1425 n.23 (8th Cir. 1997).

74. *Vill. of Hoffman Estates*, 455 U.S. at 499.

75. *Id.* at 495 n.7 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

> interferes with the right of free speech or of association, a more stringent vagueness test should apply.[76]

The Court's rationale for relaxing the vagueness standard used to test economic regulation rests on pragmatic assumptions about businesses and governmental authorities. The Court assumes that business operators know that their activities take place in a pervasively regulated environment and take steps to understand those legal requirements just as surely as they take steps to craft their business models. The Court also assumes that governmental authorities regulate businesses for discrete purposes and establish administrative mechanisms to assist businesses to comply with pertinent regulations. In the Court's view, business operators have incentives to understand regulations and to demand that government officials assist them to achieve compliance, and government officials have equally strong incentives to meet those expectations.

C. College and university regulations of non-expressive commercial products and activities can be crafted to fit the model of police power commercial regulations.

College and university interests in regulating commercial activity on campus and in college and university facilities often involve the same interests that have been identified as sufficient to support police power regulations of commercial activity. Given the practical necessities of allocating scarce resources on campus, including access to facilities, colleges and universities should encounter little problem in assuring that administrative practices accommodate an additional layer of rule-based proposals review and approval.

1. College and university interests in preserving the safety, historic and aesthetic character of its grounds and an educational environment provide firm bases for regulating non-expressive commercial goods and services.

College and university interests in the maintenance of campus grounds and facilities conform to interests that courts have found sufficient to support police power regulations. Just as states have interests in protecting the aesthetic character of municipalities, so too do colleges and universities have substantial interests in maintaining the aesthetic character of their campuses.[77] Just as states have

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76. *Id*. at 498–99 (internal citations omitted). Absent a First Amendment challenge, economic regulations are ordinarily reviewed as applied; persons objecting to the application of a regulation to them cannot avoid the rule by arguing that it may be impermissibly vague in unrelated settings. Chapman v. United States, 500 U.S. 453, 457 (1991) (noting that where First Amendment freedoms are not infringed, vagueness claims must be evaluated as the rule is applied); Maynard v. Cartwright, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis."). If a party brings a facial vagueness challenge to an economic regulation, the regulation must be shown to be impermissibly vague in all of its applications. *Vill. of Hoffman Estates*, 455 U.S. at 497. In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning of what is proscribed. *Id*. at 503.

77. Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 338 (W.D. Va.

interests in preserving the safety, security and tranquility of communities, so too do colleges and universities have interests in "promoting safety and security . . . and preserving residential tranquility."[78] Just as states have interests in preserving the character of parklands or cemeteries, so to do colleges and universities have substantial interests in "promoting an educational rather than a commercial atmosphere on . . . campuses."[79] Colleges and universities, no less than municipalities, have interests in assuring the free flow of pedestrian traffic through their precincts.[80] Just as municipalities may act to counter the documented secondary effects of adult entertainment,[81] so should colleges and universities be able to counter the disruptive effects of alcohol abuse by students.[82] Just as

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1987), *aff'd*, 838 F.2d 735 (4th Cir. 1988).

78. Bd. of Trs. of State Univ. of N.Y. v. Fox , 492 U.S. 469, 475 (1989).

79. *Id*.

80. Brister v. Faulkner, 214 F.3d 675, 683 (5th Cir. 2000). In *Brister*, the court stated:

> While the district court did hold that the Erwin Center's grounds, between the base of the building and the curb of Red River Street, were a public forum, it nevertheless left the university the option of reasonable time, place, and manner restrictions. Thus, the university still can remove anyone who interferes with the flow of traffic to and from the Erwin Center, thereby ensuring that the university's interests retain some protection.

Id. *See* A.C.L.U. Student Chapter–Univ. of Md. Coll. Park v. Mote, 321 F. Supp. 2d 670, 679 (D. Md. 2004). The *Mote* court noted:

> The campus is not a public street, park or municipal theatre, the use of which is contemplated or expected by the public at large. Rather, it is an institution of higher learning devoted to the mission of public education. The focus of that mission is, as it should be, on students and members of the University community. As such, it has not traditionally been opened to the public . . . .

Id. at 679. *But see* Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003) (noting that a plaza on an urban campus was found to be a public forum for purposes of student speech, noting both that institutional policy treated the plaza as a public forum and that the campus was home to three thousand students and that it comprised "many streets, parking facilities, sidewalks and walkways, various stadiums and sports arenas, theaters, bookstores, convenience stores, some 25 restaurants, a Hilton Hotel, and numerous park-like plazas, nearly all of which facilities are open and accessible not only to students and faculty but also to the general public").

81. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986) (stating that "the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight . . . . ").

82. Richard D. Kadison, *The Mental-Health Crisis: What Colleges Must Do*, CHRON. HIGHER EDUC., Dec. 10, 2004, at B20; Joshua Karlin-Resnick, *Helping Students Stay Clean and Sober: More Colleges Create Programs for Recovering Alcoholics and Drug Addicts*, CHRON. HIGHER EDUC., Aug. 13, 2004, at A31. *See also*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 589 (2001) (opinion of Thomas, J.) (noting that states have substantial interests in avoiding the deleterious consequences of underage consumption); Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). The existence and magnitude of alcohol abuse problems among college and university students has also factored in discussions about evolving standards of college and university tort liability, for claims attempting to hold colleges and universities liable for injuries arising from alcohol abuse on campus or by students affiliated with institutions have a long history. *See generally*, Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 492, 494–98 (2003). One pair of scholars has written:

municipalities have interests in maximizing their income for property devoted to commercial purposes, so too do colleges and universities.[83]

Wherever colleges and universities encounter circumstances akin to those addressed by state or local commercial regulations, the purposes that are recognized as legitimate for purposes of supporting state or local government action should also suffice to support college and university action to regulate commercial activities on their campuses.[84]

> Sixty-three percent of college students ranked drinking, including bar-hopping and partying, as their favorite activity. . . . Thirty-four deaths attributable to drinking on college campuses were reported in 1997. . . . In the future, emerging social forces may weaken basic judicial reluctance to impose liability on institutions for student drinking. A social and political climate increasingly intolerant of alcohol abuse by underage drinkers is evident. . . . Most importantly for colleges and universities, underage drinking has commanded growing press attention and an infrastructure of groups dedicated to limiting its scope and impact. Most college students are underage and drink unlawfully. Drinking is now characterized as a problem specific to college settings. Alcohol-related accidents on campus regularly garner headlines.

Christopher T. Pierson & Lelia B. Helms, Commentary, *Liquor and Lawsuits: Forty Years of Litigation over Alcohol on Campus*, 142 WEST'S EDUC. L. REP. 609, 609–11 (2000). *See* Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From 'In Loco Parentis' to Bystander to Facilitator*, 23 J.C. & U.L. 755, 759, 774 (1997); Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty To Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 272–73, 277–80 (1994). Congress has also recognized the problem. When it enacted the Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption, Congress recognized the existence of a problem on campus and expressed its sense that all institutions of higher education should be actively engaged "in an effort to change the culture of alcohol consumption on college campuses." *See* Drug Free Schools and Communities Act of 1989, 20 U.S.C. § 1011h(b) (2000).

83. Lehman v. City of Shaker Heights, 418 U.S. 298, 303–04 (1974). Indeed, the Bayh-Dole Act implicitly requires colleges and universities that receive federal grants to protect commercially valuable intellectual properties arising from such research in order to commercialize such properties through small businesses. *See* Bayh-Dole Act of 1980, Pub. L. 96-517, 94 Stat. 3020 (codified as amended at 35 U.S.C. §§ 200, 202 (2000)).

84. The fact that college and university rules governing non-expressive commercial activities would preserve the grounds and facilities for activities that further the purposes for which they were established provides additional assurance that such regulations would be upheld. Numerous forum cases affirm that government may regulate its property to assure that its unique purposes are achieved. ISKCON v. Lee, 505 U.S. 672, 681–82 (1992); *Lehman*, 418 U.S. at 303–04; Brister v. Faulkner, 214 F.3d 675, 683 (2000); Griffin v. Sec'y of Veteran's Affairs, 288 F.3d 1309, 1324 (Fed. Cir. 2002); A.C.L.U. Student Chapter–Univ. of Md. Coll. Park v. Mote, 321 F. Supp. 2d 670, 679 (D. Md. 2004). Where the demand for entry onto public grounds is bereft of any independent constitutional claim of entitlement, reasonable regulations prohibiting private commercial activity in public institutions or on public grounds will likely be given effect. *Cf.* Henderson v. Kennedy, 253 F.3d 12, 18 (D.C. Cir. 2001) (stating that the mere fact that the National Park Service authorized some concessionaires to operate on the National Mall does not entail the conclusion that it must authorize any and all vendors to sell similar merchandise). In *Henderson v. Kennedy*, the court stated:

> Congress has decided that some concessions may be appropriate to serve park visitors, and the Park Service has adopted a reasonable scheme to accomplish that end while preserving the aesthetic integrity of the National Mall. The classification of which plaintiffs complain "does not contain the kind of discrimination against which the Equal Protection Clause affords protection."

2. Although many of the examples that have been cited involving police power commercial regulations related to location and manner in which commercial activities occur, colleges and universities may give consideration to the kind of activity that may be permitted on campus.

Some forms of activity may be wholly inappropriate for a colleges or university setting. Colleges and universities may prohibit unlawful transactions on their properties or commercial transactions that violate institutional rules; institutions are not powerless to prohibit drug sales on campus or sales of alcohol where institutional rules prohibit possession of alcohol on campus.[85] Residence hall rooms are usually inappropriate for the conduct of resident-run welding or restaurant businesses. Some matters are perhaps less obvious. If a group of adroit knitters wishes to work in their residence hall, the production work may interfere little with the facility, but it would not follow that they could knit campus trademarks into their work and sell the resulting product. Colleges and universities could certainly proscribe the production of works for sale that infringed college or university intellectual property, just as they could enforce their rights to the exclusive use of such properties against third parties.[86]

College or university interests in maintaining academic standards have been recognized as compelling state interests, and the judiciary has been instructed to defer to genuinely academic decisions so long as they do not compromise other constitutional rights.[87] It follows that regulations involving commercial activities that could compromise the academic integrity of the college or university should also fall within the power of the college or university.[88] Prohibiting the sale of

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Henderson, 253 F.3d at 18 (quoting Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949)).

85. For example, the Drug-Free Schools and Communities Act of 1989 requires institutions that receive federal funds to adopt regulations that the prohibit the "unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on the institution's property or as part of any of the institution's activities." *See* 20 U.S.C. § 1011i(a)(1)(A) (2000); *infra* note 304 and accompanying text.

86. *See generally* Scott Bearby & Bruce Siegal, *From the Stadium Parking Lot to the Information Superhighway: How to Protect Your Trademarks from Infringement*, 28 J.C. & U.L. 633, 634 (2002) (providing "an overview of collegiate trademark cases; discusses several forms of infringement, including traditional infringement on commercial products, ambush marketing and internet infringement; addresses available remedies; and offers practical tips for dealing effectively with trademark protection").

87. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Bd. of Regents of Univ. of the Wis. Sys. v. Southworth, 529 U.S. 217, 231–34 (2000); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 472 (1989); Regents of the Univ. of Mich. v. Ewing, 474 U. S. 214, 226 n.12 (1985); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 89–91 (1978); Healy v. James, 408 U.S. 169, 171 (1972); Keyishian v. Bd. of Regents of the Univ. of State of N.Y., 385 U.S. 589, 604, 608 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Wieman v. Updegraff, 344 U.S. 183, 195 (1952).

88. Universities' authority to act to protect the integrity of the academic process is integral to the special status accorded universities under the Constitution. *See infra* notes 405–413 and accompanying text. The potential conflict between individual commercial interests and the proper functioning of the research process are well recognized, as is the institutional power and duty to

institutional examination questions or of term papers, for instance, might well be supported under such authority.[89]

Where there is a nexus to college or university rights or essential practices, regulations that proscribe certain commercial activities altogether could very well withstand constitutional scrutiny.

3. Policies that regulate transactions involving non-expressive commercial products and activities should afford reasonable protection for institutional facilities use and program functions, contain clear standards, and provide mechanisms to obtain authoritative policy interpretation.

Five sets of considerations enter into play when developing policies to regulate non-expressive commercial activities on college or university grounds and in college or university facilities.

First, policy-makers should be able to identify the grounds for regulating an activity by stating how the activity could affect institutional uses of grounds and facilities or could affect institutional program operations. This will help to assure that the rules serve a legitimate institutional purpose.

Second, policy-makers should be able to explain how the regulation that they adopt will prevent the commercial activity from interfering with the institutional

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guard against circumstances that give rise to suspicion that researcher investment may influence research. *See, e.g.*, 42 C.F.R. § 50.601 (2004) (establishing "standards to ensure there is no reasonable expectation that the design, conduct, or reporting of research funded under PHS grants or cooperative agreements will be biased by any conflicting financial interest of an Investigator"); *Id*. § 50.604 (requiring disclosure of significant financial interests that may be affected by research); *Id*. § 50.605 (requiring university grant recipients to review all "financial disclosures; and determine whether a conflict of interest exists and, if so, determine what actions should be taken by the institution to manage, reduce or eliminate such conflict of interest"); 45 C.F.R. §§ 94.1, 94.4, 94.5; NATIONAL SCIENCE FOUNDATION, GRANT POLICY MANUAL § 510 (2002). The power to police the research process in order to protect the integrity of such processes is well recognized in federal law. "[R]esearch institutions bear primary responsibility for prevention and detection of research misconduct and for the inquiry, investigation, and adjudication of research misconduct alleged to have occurred in association with their own institution." OFFICE OF SCI. & TECH. POLICY, *Federal Policy on Research Misconduct*, at § 3, *available at* http://www.ostp.gov/html/001207_3.html#_ftn1 (last visited May 12, 2005). *See also* Debra M. Parrish, *The Federal Government and Scientific Misconduct Proceedings, Past, Present, and Future as Seen Through the Thereza Imanishi-Kari Case*, 24 J.C. & U.L. 581 (1998); Debra M. Parrish, *Scientific Misconduct and the Plagiarism Cases*, 21 J.C. & U.L. 517 (1995).

89. Such sales have been targeted under police power statutes seeking to proscribe fraud as criminal or tortious conduct. *See* Trs. of Boston Univ. v. ASM Communications, Inc., 33 F. Supp. 2d 66 (D. Mass. 1998) (attempting to assert claims under RICO and state unfair or deceptive acts or business practices statutes); United States v. Int'l Term Papers, Inc., 477 F.2d 1277(1st Cir. 1973) (mail fraud); New York v. Saksniit, 332 N.Y.S. 2d 343, 349 (N.Y. Sup. Ct. 1972) (involving an injunction pending completion of corporate dissolution action initiated by attorney general for violation as accessory of state statute against obtaining academic degrees through fraudulent means) ("'Education,' wrote James Madison, 'is the true foundation of civil liberty.' Assisting and promoting plagiarism the most serious academic offense--strikes at the core of the educational process, and thus at the very heart of a free society.); Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use if Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167 (2002).

uses of grounds and facilities or institutional program operations. This will help to assure that the regulations bear a reasonable relationship to achieving their purpose.

Third, policy-makers should be careful to frame their regulations in a manner that describes unambiguously what transactions are prohibited and what conditions apply to permitted transactions. This will help to avoid the threshold vagueness concerns with uninformative or imprecise economic regulations.

Fourth, policy-makers should supply sufficient detail in the regulations to curb the discretion of those who administer the regulations. This will help to avoid the vagueness concerns that unrestricted discretion may bleed into arbitrariness.

Fifth, policy-makers should provide some administrative mechanism to enable those who are regulated to obtain clarification of any uncertainties in the rules.[90]

In view of the very regulation friendly standards that apply to commercial regulations generally, the third, fourth, and fifth issues hold the greatest significance. Still, college and university administrations have considerable experience weighing competing interests when allocating campus space among academic, research, public service, development, and similar mission-related activities, as well as among student, faculty, support staff, and external support organizations. Adding an additional range of administrative rule should not present wholly new challenges to seasoned administrators.

II. COLLEGES AND UNIVERSITIES MAY REGULATE PRIVATE COMMERCIAL ENDEAVORS INVOLVING EXPRESSIVE PRODUCTS OR ACTIVITIES, BUT SUCH REGULATIONS WILL BE SUBJECT TO THE FULL PANOPLY OF FIRST AMENDMENT SPEECH RESTRICTIONS.

College and university efforts to regulate commercial activities that involve significant expressive elements present greater challenges than do regulations that address other forms of commercial activity. The Due Process Clause imposes more stringent standards than rational basis review where the regulated commercial activity implicates independent constitutional interests.[91] Commercial activities or products with significant communicative elements merit protection under the First Amendment.[92]

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90. *Village of Hoffman Estates* suggests that a scienter requirement might also protect civil rules from vagueness challenges. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 n.14 (1982). However, the cases that it cited to support the proposition, all involved criminal statutes. *Id*. at 499 (citing Colautti v. Franklin, 439 U.S. 379, 395 (1979); Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952); Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion)). Some consideration might be given to requiring a knowing violation of policy before imposing university sanctions.

91. *Vill. of Hoffman Estates*, 455 U.S. at 499. S*ee supra* note 37 and accompanying text.

92. First Amendment commercial conduct and commercial speech analysis supplements Fourteenth Amendment economic analysis because it is the more specific source of constitutional protection for the challenged conduct. "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (quoting Graham v. Connor, 490 U.S. 386 (1989)). The First Amendment comes into play where conduct

Many commercial activities or products involve expression in the form in which commercial transactions occur, in the nature of the services provided, or in the nature of the goods themselves. Examples range from door-to-door solicitation or distribution of handbills, to tutoring and legal or medical advising, to newspaper sales, to zoning ordinances involving adult businesses, to placement of advertising within stores, to the use of logos to acknowledge sponsorship, to the sidewalk sale of t-shirts, to placement of signs on private residential properties, to prohibition of billboards, to sale of audiotapes on the National Mall, to vaudeville-type entertainments, and to military recruitment on a college or university campus.[93] Many of these commercial activities may arise in context of student fundraising or in the course of use of college or university grounds or facilities by persons to whom access has been permitted.[94] Hence, college or university regulations of expressive commercial endeavors must anticipate a full range of First Amendment problems.

The task before the college or university is made all the more difficult because different forms and media of expression present distinctive problems; panhandling may affect pedestrian or automobile traffic, sound amplification may interfere with the ordinary use of classrooms, libraries or student residences, television or radio

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is intended "to convey a particularized message" and occurs in a setting where there is a great likelihood "that the message would be understood by those who viewed it." Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

93. *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc., v. Vill. of Stratton, 536 U.S. 150, 166–68 (2002) (suggesting, in dicta, that a permit requirement for door-to-door commercial solicitation may be allowable, though such a restriction on religious or political solicitation was held to be impermissible); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 630–31 (1980) (citing Martin v. Struthers, 319 U.S. 141 (1943) (invalidating a municipal ordinance that forbade the door-to-door distribution of handbills, circulars, or other advertisements)); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) (tutoring, legal advice, and medical consultation, and newspaper sales); City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002) (zoning ordinances designed to respond to non-speech secondary effects of adult businesses); *Vill. of Hoffman Estates*, 455 U.S. at 496 (displaying and marketing merchandise); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 569–70 (display of tobacco products); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (cable television transmissions); Transp. Alternatives v. New York, 218 F. Supp. 2d 423, 432 (S.D. N.Y. 2002) (stating that nonprofit's use of logos to acknowledge corporate sponsorship constituted commercial speech); One World One Family Now v. City & County of Honolulu, 76 F.3d 1009 (9th Cir. 1996) (stating that sale of message-bearing t-shirts on public sidewalks by nonprofit organization is protected speech, but subject to reasonable regulations); City of Ladue v. Gilleo, 512 U.S. 43, 47 n.6 (1994) (stating that although the facts arose from placement of political sign, the regulation was broad enough to have barred garage and yard sale signs); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (prohibition of billboards); ISKCON of Potomac, Inc., v. Kennedy, 61 F.3d 949 (D.C. Cir. 1995) (sale of audio tapes on National Mall protected, but subject to reasonable regulations); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (involving a fraternity fundraiser denominated as an "ugly woman contest" with "racist and sexist" overtones); Nomi v. Regents for the Univ. of Minn., 796 F. Supp. 412 (D. Minn. 1992), *vacated*, 5 F.2d 332 (8th Cir. 1993) (holding that military recruitment was purely commercial speech and therefore subject to campus antidiscrimination regulations); Gaudiya Vaishnava Soc'y v. City & County of San Francisco, 952 F.2d 1059, 1064 (9th Cir.1990) (holding that the sale of merchandise in conjunction with other activities to disseminate organization's message is fully protected speech).

94. *See supra* notes 3 and 5 and accompanying text.

transmissions may be subject to pervasive federal regulations, facilities access may be limited, and postings and flyers may trigger significant aesthetic concerns.

The applications of First Amendment doctrine reflect the "differing natures, values, abuses and dangers" of each form, medium, and setting.[95] Hence, institutional regulations must be sensitive to the differences presented by the means of communication embodied in different commercial activities.

Regulations may proscribe altogether some forms of commercial activity involving unprotected expression.[96] Regulations governing commercial activity that involves elements of communication may be subject to either strict or intermediate scrutiny, depending upon the purpose of the regulations and the extent to which they are directed at the content of speech.[97] In a few instances, expressive commercial activity may even be deemed to have no First Amendment significance.[98] Commercial regulations affecting communicative activities may fall under the more stringent vagueness standards that apply where the First Amendment is implicated.[99] Commercial regulations affecting expressive activities may be subject to examination for overbreadth or underinclusiveness or

95. *Metromedia*, 453 U.S. 490, 501 (1981). *See* Reno v. A.C.L.U., 521 U.S. 844, 868 (1997) (stating that "[e]ach medium of expression . . . may present its own problems. Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers." And concluding that "[i]n these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception; and its 'invasive' nature.") (internal citations omitted); *Metromedia*, 453 U.S. at 501 (citing Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of 'communication of ideas.'. . . The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.")); *Metromedia*, 453 U.S. at 501 n.8 ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.") (citing S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)); F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) ("Each method tends to present its own peculiar problems.").

96. *See*, *e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (citing New York v. Ferber, 458 U.S. 747 (1982) (trafficking in child pornography)). *See infra* notes 102–107.

97. Hill v. Colorado, 530 U.S. 703, 735 (2000) (Souter, J. concurring) ("[C]ontent-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others."). But note that First Amendment jurisprudence differentiates between limits on expressive activities that happen to be the substance or subject of commercial activity and the special forms of speech that are involved in soliciting and effecting a commercial transaction. The term of art "commercial speech" relates to this latter form of speech. Government has limited power to regulate the content or manner of commercial speech. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) (advertisements); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). These matters are discussed at length *infra* at Part III.

98. *See*, *e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982). *See infra* note 140 and accompanying text.

99. *See*, *e.g.*, *Vill. of Hoffman Estates*, 455 U.S. at 499. *See infra* notes 176, 180–190 and accompanying text.

to examination as prior restraints.[100]

Part II.A–E of the article discusses the several tests that the Court has designed to assess the compatibility of government regulations, including commercial regulations, with First Amendment interests. Part II.F seeks to identify implications that these general principles hold for university regulations of commercial activities that involve expressive elements.

A. Some private speech has so little social value that it is not protected under the First Amendment and may be regulated to protect against the harms that the speech occasions.

Certain categories of speech are not protected under the First Amendment, "including defamation, incitement, obscenity, and pornography produced with real children."[101] These categories of speech may be prohibited without violating the First Amendment because, where "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[102] Such restrictions

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100. *See, e.g.*, Reno v. A.C.L.U., 521 U.S. 844, 882 (1997) (overbreadth); Ladue v. Gilleo, 512 U.S. 43, 51–52 (underinclusiveness); *S.E. Promotions*, 420 U.S. at 559 (prior restraint); Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (time, place, and manner regulations). *See infra* notes 191–234.

101. *Ashcroft*, 535 U.S. 245–46 (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)). "Incitement" or its next of kin, "fighting words" and "threats of immediate violence," can prove to be tricky categories. Government may proscribe words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Government may prohibit fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971). But, "though Government may ban a true threat," it may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Virginia v. Black, 538 U.S. 343, 359 (2003) (citing Watts v. United States, 394 U.S. 705, 708, (1969) and quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," whether or not the individual actually intends to do so. *Id.* A prohibition on "true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)). Intimidation "is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

102. *Black*, 538 U.S. at 361–62. *See also R.A.V.*, 505 U.S. at 388–89:

> To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. *See Kucharek v. Hanaway*, 902 F.2d 513, 517 (CA7 1990), cert. denied, 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have

are permitted because the restricted speech is deemed to have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[103]

The power to regulate proscribable speech, though broad, is not without limits. The First Amendment does not require that government take an all or none approach to regulation of proscribable conduct. It may regulate conduct that occurs in some places but not others, or it may regulate a subset of proscribable conduct.[104] Nonetheless, government may not regulate proscribable speech in ways that discriminate against disfavored views.[105]

B. The First Amendment does not permit government to use its regulatory powers to suppress private messages or viewpoints expressed through commercial activities or products.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[106] The constitutional protection of free speech is intended "to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[107]

The First Amendment divests government of its ability to use regulatory powers

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special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707 (1969) (upholding the facial validity of § 871 because of the 'overwhelmin[g] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence'). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by Justice Stevens, post, at 421-422), a State may choose to regulate price advertising in one industry, but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 -772 (1976)) is in its view greater there. Cf. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (state regulation of airline advertising); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (state regulation of lawyer advertising). But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. *See, e.g.*, Los Angeles Times, Aug. 8, 1989, section 4, p. 6, col. 1.

103. *Black*, 538 U.S. at 358–59 (quoting *R.A.V.*, 505 U.S. at 382–83 (quoting *Chaplinsky*, 315 U.S. at 572)).

104. *R.A.V.*, 505 U.S. at 388–89. *See supra* note 102 and accompanying text.

105. *See infra* notes 106–117.

106. Texas v. Johnson, 491 U.S. 397, 414 (1989). *See also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (quoting F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745 (1978))); W.Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

107. *Black*, 538 U.S. at 358 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

to favor one message or viewpoint over another, either through prohibiting disfavored speech or through relieving favored speech from regulatory burdens.[108] Just as the Court strikes down government efforts to suppress or to encourage private expression of particular viewpoints, so too does it reject government efforts to prohibit public discussion of entire topics.[109]

The Court has not been entirely consistent in describing the consequences of finding that a governmental action is motivated by viewpoint discrimination. The Court has suggested that viewpoint discrimination is per se unconstitutional in all contexts.[110] The Court has also, and more recently, addressed viewpoint discrimination as though it was but one form of content-based regulation that is presumptively invalid and subject to strict scrutiny under First Amendment standards.[111]

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108. *Id*. at 358; *R.A.V.*, 505 U.S. at 386 ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed."); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 677–78 (1994) (O'Connor, J. dissenting in part and concurring in part) ("The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable.") (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231–32 (1987)).

109. Burson v. Freeman, 504 U.S. 191, 197 (1992).

110. *Johnson*, 491 U.S. at 414 ("We have not recognized an exception to this principle even where our flag has been involved."). *See infra* note 116 and accompanying text.

111. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 ("Content-based regulations are presumptively invalid . . . and the Government bears the burden to rebut that presumption.") (citing *R.A.V.*, 505 U.S. at 382); *R.A.V.*, 505 U.S. at 390 n.6 (noting that presumptive invalidity does not mean invariable invalidity). The Court in *R.A.V.* stated:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility - but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at 395–96. *See also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 601 (1998) (Souter, J. dissenting):

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414; "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas . . . ," *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), which is to say that "[t]he principle of viewpoint neutrality . . . underlies the First Amendment," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). Because this principle applies not only to affirmative suppression of speech, but also to disqualification for government favors, Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses.

Id; *Black*, 538 U.S. at 361–62:

> Consequently, while the holding of *R.A.V.* does not permit a State to ban only obscenity based on "offensive *political* messages," or "only those threats against the President that mention his policy on aid to inner cities," the First Amendment permits content discrimination "based on the very reasons why the particular class of speech at

Even though the Court has recently characterized viewpoint discrimination as a variant of content-based regulation, there is reason to expect that it will continue to treat regulations that discriminate on viewpoint as invalid per se. Per se invalidity accords with the rationale for treating viewpoint regulations as problematic. The Court regards government regulation of the views expressed by individuals as an encroachment on the integrity of the political process:

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control . . . . The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. [112]

The framers of the Constitution:

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[113]

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issue . . . is proscribable."

Id. (quoting *R.A.V.*, 505 U.S. at 388) (internal citations omitted).

Content-based speech regulations must be shown to use the least restrictive means to advance a compelling government interest. *Playboy Entm't Group*, 529 U.S. at 813; Erie v. Pap's A.M., 529 U.S. 277, 301–02 (2000); City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

112. *Playboy Entm't Group*, 529 U.S. at 817–18.

113. N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (quoting Whitney v. California, 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring)). The full passage in *Whitney* warrants attention:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed

The fundamental premise of the First Amendment is that stable government depends upon full and free exchanges among citizens and upon the consensus that emerges from these processes. At its core, the First Amendment serves "to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."[114]

> remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by the law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney, 274 U.S. at 375–76 (Brandeis, J., concurring). In few words, Justice Brandeis provides a comprehensive theory for the First Amendment as the lynchpin that binds together in a workable whole the personal, social, political, emotional and intellectual spheres of life, and a theory that anchors the plan of the Constitution in the ordinary experiences of a self-governing people. The Framers' insight into political reality is that people will inevitably chafe at circumstances that inconvenience them and try to divine ways to improve their situations. It has always been so. The oldest written story opens with the tale of a people vexed by their interfering king. The people of Uruk appealed to the gods for assistance to prevent Gilgamesh from interfering in their private lives, and the gods recognized the justice of their plight and created a hero, Enkidu, to help them. *The Epic of Gilgamesh*, Tablet I, column 2, *in* THE EPIC OF GILGAMESH 1, 3–4 (Danny P. Jackson trans., 1992). From such roots in human experience, spring political movements touting solutions to the problems that beset society at particular times and places. The Framers understood that the processes that give rise to political movements are inevitable, however government is formed, and that political movements are not to be feared, but to be incorporated into the very structure of government to channel such forces constructively. As surely as the main body of the Constitution establishes means to make government accessible and responsive to the people, the First Amendment protects the free operation of the processes that shape and reshape popular belief and practice and mature into political expectation.

114. *See De Jonge v. Oregon*, 299 U.S. 353 (1937):

> [The] rights [protected under the First Amendment] may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Id. at 364–65. *See also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–47 (1995) (holding that the anonymous distribution of campaign literature violated the First Amendment and stating that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation"); *Johnson*, 491 U.S. at 409 (involving a prohibition on flag burning and stating that "a principal 'function of free speech under our system of government is to invite dispute; it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'") (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (arguing that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a

Against this backdrop, all government efforts to suppress the expression of private opinions appear as illegitimate uses of governmental powers to interfere with the processes on which the very legitimacy of popular government depends, even where the interference targets non-political artistic or commercial speech.[115] Hence, the authorities that suggest that viewpoint discrimination is per se invalid represent the sounder line. In fact, even where the Court indicates that it regards viewpoint rules as presumptively invalid, it applies the content-based analysis more in an effort to determine whether the regulation is supported by some compelling government interest other than a bare hostility toward certain views.[116] Even under the guise of seeking to determine whether a presumptively invalid regulation may be saved, the finding that a regulation serves no other purpose than to suppress disfavored views renders the regulation per se invalid.[117]

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wide variety of political, social, economic, educational, religious, and cultural ends"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (prohibiting corporate speech about referendum proposals and noting that "there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs"); Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . .) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); N.A.A.C.P. v. Button, 371 U.S. 415, 431 (1963) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association.") (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250–51 (1954)). *Cf*. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205 (2003) (holding that some limits on political expression or association may be permitted to protect public confidence in the political process and that contribution limits serve to protect the integrity of the electoral process by which freedom of speech is translated into tangible political action); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (noting that taking away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance).

115. *Playboy Entm't Group*, 529 U.S. at 817–18 (cable television programming); Va. State Bd. of Pharmacy v. Va. Citizens, 425 U.S. 748, 765 (1976) (price advertisements); Thompson v. W. States Med. Ctr., 535 U.S. 357, 365 (2002) (prohibition on advertising compound drugs).

116. *R.A.V.* illustrates this very clearly. The regulation involved in *R.A.V.* proscribed hate speech as expressing racial, gender or religious intolerance. *R.A.V.*, 505 U.S. 393–94. The Court commented that, "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty." *Id.* Finding that the city had certainly sought "to handicap the expression of certain ideas" sufficed to reach the conclusion that the ordinance was unconstitutional. *Id*. at 395–96. The Court noted:

> [T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. *See also* Reno v. A.C.L.U., 521 U.S 844, 868 (1997) (stating that "merely protecting listeners from offense at the message is not a legitimate interest of the government").

117. In *Simon & Schuster*, Justice Kennedy provides a trenchant criticism of the Court's introduction of the compelling interest test into its First Amendment jurisprudence, a development that he regards as mistaken. *See* Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 125–29 (1991) (Kennedy, J., concurring). The pivotal argument in Justice Kennedy's critique supports the conclusion that viewpoint-based regulations are per se invalid. "The inapplicability of the compelling interest test to content-based restrictions

C. Content-based regulation of commercial activities will be subject to strict scrutiny, and rules must be shown to be narrowly tailored to protect compelling state interests by the least restrictive means.

Not all content-based regulations are motivated by approval or disapproval of the viewpoints expressed. For instance, regulations that seek to protect polling places from intimidation by election day political campaigning differentiate among advertising based upon content—restricting political messages—but they do not necessarily reflect any animus toward political speech or toward particular viewpoints.[118] Regulations that prohibit all picketing other than collective bargaining picketing have been held to be content-based, and constitutionally suspect because they placed a prohibition on discussion of particular topics, even though the regulations did not embody hostility toward any particular views that might be expressed about the permitted topics.[119] The Court has concluded that regulation "of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."[120]

In general, then, commercial regulations that are motivated primarily by the content of the communicative elements are presumptively invalid and are subject to strict scrutiny.[121] In the context of content-based speech regulations, strict scrutiny requires that the government use the least restrictive means of advancing a compelling government interest.[122]

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on speech is demonstrated by our repeated statement that, 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id*. at 126 (citing Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972)). *See also* Ark. Writers' Project, Inc. v. *Ragland*, 481 U.S. 221, 229–30 (1987) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citing Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984)); *Simon & Schuster*, 502 U.S. 126–27 ("These general statements about the government's lack of power to engage in content-discrimination reflect a surer basis for protecting speech than does the test used by the Court today.").

118. Burson v. Freeman, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display.").

119. Hill v. Colorado, 530 U.S. 703, 722–23 (2000). *See also* Carey v. Brown, 447 U.S. 455, 462 n.6 (1980) ("It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. 'The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'") (quoting Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)).

120. *Hill*, 530 U.S. at 723.

121. *See* Ashcroft v. A.C.L.U., 542 U.S. ____, 124 S.Ct. 2783, 2788 (2004) (holding that content-based restrictions on speech, enforced by criminal sanctions, are presumed invalid); City of L.A. v. Alameda Books, Inc., 535 U.S. at 434, 441 (holding that if zoning regulation was content-based, it would be considered presumptively invalid and subject to strict scrutiny).

122. United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); Erie v. Pap's A.M., 529 U.S. 277, 301–02 (2000); *Alameda Books, Inc.*, 535 U.S. at 455 (Souter, J., dissenting).

1. The Court has not provided a clear or comprehensive approach to determining when a regulatory purpose might constitute a compelling government interest capable of supporting a restriction on speech, though it has recognized compelling interests in complying with constitutional limitations, protecting the political process and protecting persons or their privacy when they are unable to protect themselves.

The effort to determine what ranges of interest might support speech restrictions stalls at the very onset, for the Court has not developed doctrines that might help to predict what range of interests it may deem to be compelling. The Court has marked some guideposts, though it has not attempted to gather into a theoretical whole the inferences that its guideposts ground.

The Court has indicated that "complying with [an agency's federal] constitutional obligations may be characterized as compelling."[123] Complying with constitutional obligations "may justify content-based discrimination," but "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."[124] Such concessions surely must be expected, for a contrary view would hold that the conflicting organic limitations on government render government powerless to do what it is obligated to do.

Another variation on the "complying with the constitution" authority can be found in a cluster of holdings suggesting that a state may have compelling interests in protecting First Amendment rights of individuals.[125] The Court has recognized that government has a compelling interest in protecting the integrity of the political process.[126] This rationale departs little from the conclusion that government has a

123. Widmar v. Vincent, 454 U.S. 263, 271 (1981); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–95 (1993) ("[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment").

124. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112–13 (2001). As discussed above, at notes 106–116, there is no reason to expect that the Court would find that viewpoint discrimination can be supported in any form.

125. *See* Denver Area Educ. Telecomm. Consortium v. F.C.C., 518 U.S. 727, 805 (1996) (Kennedy, J., concurring in part, concurring in judgment and dissenting in part) (arguing that government cannot have a compelling interest in protecting a cable operator's First Amendment right of editorial discretion where the law recognizes no material discretion); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) (upholding public broadcasting station's right to select candidates to participate in a televised debate). The Court argued that "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint based." *Id*. The Court recognized that protecting the editorial discretion of public officials presented some risk that the discretion would be abused, but regarded that as a calculated risk "taken in order to preserve higher values." *Id.*, at 674 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973)).

126. *Burson* outlines the rationale for recognizing ranges of compelling interests implicated by the necessity of protecting the electoral process:

> The interests advanced by Tennessee obviously are compelling ones. This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

legitimate interest in complying with the organic limitations on its power. The whole plan of the Constitution is to assure government responsive to the people, and fair elections are the vehicle for achieving the essential objectives of the plan.[127]

Various aspects of police power regulations have also been recognized as presenting compelling state interests. Not surprisingly, the Court has found compelling state interests where states intervene in settings in which individuals have reduced opportunity, or reduced capacity, to avoid the harmful affects of expressive activities. The Court has recognized a compelling interest in protecting various aspects of a right to avoid unwanted communications where individuals are in some sense captive in settings where they cannot readily avoid the expression, characterizing such interests as variations on a right of privacy.[128] Numerous cases provide variations on the conclusion that government has a compelling interest in protecting minors, who may lack the judgment or ability to avoid harms from sexual exploitation or with exposure to certain forms of film or literature.[129]

> Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).
>
> Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence. See *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 228–229 (1989).
>
> The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." *Id.*, at 231. The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9 (1983) (collecting cases). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.

Burson v. Freeman, 504 U.S. 191, 199 (1992). *See also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205 (2003) (illustrating its conclusion that campaign finance reform is a compelling interest by reference to its approval of "legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas'") (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

127. *See supra* notes 112–117, 126 and accompanying text.

128. *See* Hill v. Colorado, 530 U.S. 703, 716–17 (2000). In Hill, the Court stated:

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." The right to avoid unwelcome speech has special force in the privacy of the home, and its immediate surroundings, but can also be protected in confrontational settings. Thus, this comment on the right to free passage in going to and from work applies equally—or perhaps with greater force—to access to a medical facility.

Id. (internal citations omitted). The Court in *Hill* is careful to characterize the right to be let alone as a common law right. *Id.* at 717 n.24. Moreover, it is clear that there is no protectable right in avoiding messages just because the listener finds the content unpleasant. *Reno v. A.C.L.U.*, 521 U.S at 868.

129. Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors."). This

There is also authority finding compelling interests in ensuring that victims of crime are compensated by those who harm them and in ensuring that criminals do not profit from their crimes.[130]

2. Even where government acts to protect a compelling interest, it must show that its chosen regulation is narrowly tailored to remedy the evil it intends to avoid and that its chosen regulation represents the least restrictive alternative to protecting that interest.

To survive strict scrutiny, "a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest."[131] The degree of proof required to demonstrate the necessary connection to the interest served will vary. Government must supply more than anecdote and supposition; it must demonstrate both an actual problem and that the curative measure will have a real and material effect.[132] At minimum, the corrective measures must have some intrinsic relationship to the evil to be corrected, or they cannot be deemed to be narrowly tailored.[133] Government should expect that it

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interest extends "to shielding them from indecent messages that are not obscene by adult standards." *Reno v. A.C.L.U.*, 521 U.S. at 869. *See also* New York v. Ferber, 458 U.S. 747, 758 (1982) (distinguishing child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process).

130. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118–19 (1991). Given that the compelling interest test was borrowed from other areas of the law, it is quite possible that interests that have been deemed compelling for purposes of substantive due process, equal protection or other purposes may also be deemed compelling for First Amendment purposes.

131. Burson v. Freeman, 504 U.S. 191, 199 (1992).

132. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 475 (1995):

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Id. (quoting Turner Broad. Sys. v. F.C.C., 512 U.S. at 664); Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("[T]his Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity'"); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 822 (2000) (declining to rely upon a record that contained "a sole conclusory statement," noting that such a barren record "tells little about the relative efficacy of" the measures Congress adopted to prevent certain content from being readily available to children.); *Sable Communications*, 492 U.S. at 129–30 (faulting a congressional record that contained "no evidence as to *how* effective or ineffective" the regulations were or might prove to be); *Reno v. A.C.L.U.*, 521 U.S. 844, 858 n.24, 875–76 n.41.

133. In *Simon & Schuster*, the Court considered a state statute that confiscated the royalties paid to a criminal who wrote an account of his crimes and distributed them to the victims of the crime. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991). Although the Court acknowledged that the state had compelling interests in not allowing criminals to benefit from the crimes and in compensating victims, it concluded that the measure could not be narrowly tailored in the absence of any justification for treating the criminal's royalties differently from other assets. "The distinction drawn by the Son of Sam law has nothing to do with the State's interest in transferring the proceeds of crime from criminals to their victims." *Simon & Schuster*, 502 U.S. at 120–22 ("[W]hile the State certainly has an important

will be held to documenting objectively that protected First Amendment activities that are subject to regulation interfere with the compelling state interest that supports the regulations.[134] Where a dispute involves a conflict in which the exercise of First Amendment rights may compromise other constitutionally protected rights, and arises in a setting in which post hoc remedies are imperfect, the Court may allow measures that are reasonable and that do not significantly impinge on protected speech.[135]

A restriction "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[136] The purpose of the least restrictive means test "is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished."[137] If the selected restrictions are challenged, government has the burden of showing that proposed less restrictive alternatives are less effective than those it has adopted.[138] To carry that burden, it must "prove that the alternative will be ineffective to achieve its goals."[139]

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interest in raising revenue through taxation, that interest hardly justified selective taxation of the press, as it was completely unrelated to a press/non-press distinction.") (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983); Carey v. Brown, 447 U.S. 455, 465 (1980) ("Nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy").

134. In *Burson*, the Court stipulated that it was only in limited circumstances involving rules that sought to protect elections from harms stemming from the tangible consequences of free speech activity that states would not be required to demonstrate empirically the objective effectiveness of their measures and that more exacting proof would be required where the state seeks to mute the consequences of heeding speech. *Burson*, 504 U.S. at 209 n.11.

135. *Id*. at 209. The Court discussed the conflict between restrictions on campaign speech and protections to protect elections by minimizing the threat of voter intimidation or fraud and noting the lack of an adequate remedy for tainted elections it noted that declining to require restrictions:

> would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986)).

136. Ashcroft v. A.C.L.U., 542 U.S. ___, 124 S.Ct. 2783, 2791 (20040 (quoting Reno v. A.C.L.U., 521 U.S. 844, 874 (1997)).

137. *Ashcroft*, 124 S.Ct. at 2791.

138. *Id.* at 2791–92; *Reno v. A.C.L.U.*, 521 U.S. at 874.

139. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000).

D. Content-neutral regulation of commercial activities will be subject to intermediate scrutiny and rules must be shown to have demonstrable connections to substantial government interests, while leaving reasonable alternative avenues of communication.

Regulations that are motivated primarily by the non-communicative aspects of conduct are deemed to be content neutral and are subject to intermediate scrutiny. They must be shown to serve "a substantial government interest" based upon a demonstrable connection between the regulated conduct and the effects to be addressed by the regulation, and they must be shown to avoid placing unreasonable limits on "alternative avenues of communication."[140]

1. When determining whether a regulation is content-neutral, the Court considers the circumstances that prompted the regulation, its text and its application to assess whether the purpose, text or application of the rule hinge on the content of speech.

Content-neutral speech regulations "are justified without reference to the content of the regulated speech."[141] To assess the content-neutrality of a regulation, the Court focuses primarily on factors that prompted its adoption. The "principal inquiry in determining content neutrality . . . is whether the government

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140. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (holding that ordinance aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely, at crime rates, property values, and the quality of the city's neighborhoods was content neutral); City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 440–41 (2002) (municipality must demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance and that the ordinance does not unreasonably limit alternative avenues of communication); *Alameda Books, Inc.*, 535 U.S. at 455 (Kennedy, J., concurring) (noting that the comparatively softer intermediate scrutiny is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech or other expression).

Regulations involving commercial practices that have only attenuated communicative aspects have no First Amendment significance if the restrictions do not appreciably limit the communication of information. *See, e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982). In *Vill. of Hoffman Estates*, the Court stated:

> [I]nsofar as any *commercial* speech interest is implicated [by requirements triggered by the placement of drug paraphernalia in proximity to literature advocating illegal drug use], it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information—with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.

Id. *But see* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 569–70 (2001) (assuming without deciding that retailers had a First Amendment interest in the manner in which they displayed tobacco products for sale, then using the standard analysis for commercial speech regulation to determine whether manner of display rules infringed the First Amendment).

141. Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, 425 U.S. 748, 771 (1976).

has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[142] The Court seeks to assure that government has not "adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[143] Where "the 'predominate concerns' motivating the [regulation] 'were with the secondary effects of [speech], and not with the content of [speech],'" the Court will likely find the regulation to be content-neutral[144]

The matter is more complicated; even though finding "a content-based purpose may be sufficient" to show that a regulation is content-based, it is not necessary to in all cases.[145] The Court looks past the avowed intent of those who promulgated the regulation to examine the text and application of the regulation.[146] Laws that by their text or application "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[147] Laws that "confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[148]

2. Measures intended to achieve effective government present interests of sufficient substantiality to support content-neutral regulations of expression.

As with compelling government interests, the Court has provided no doctrinal guidance to assist in determining which government interests may qualify as substantial government interests. It tends to identify particular instances of interests that qualify as substantial government interests, without attempting to develop a theory that might harmonize the run of cases. Nevertheless, the cases reveal three fact patterns in which the Court states rationales that lend themselves to generalization and that may assist government officials in grounding regulations of expressive commercial products and activities.

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142. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). *See infra* note 148 and accompanying text.

143. *Ward*, 491 U.S. at 791; Hill v. Colorado, 530 U.S. 703, 720 (20000). S*ee infra* note 148 and accompanying text.

144. *Alameda Books*, 535 U.S. 425, 440–41 (2002) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)).

145. *Turner Broad. Sys.*, 512 U.S. at 642.

146. *Renton*, 475 U.S. at 47–48 (noting that the ordinance was designed "to prevent crime, protect the city's retail trade, maintain property values and generally [to] 'protect and to preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life,' [and] not to suppress the expression of unpopular views").

147. *Turner Broad. Sys.*, 512 U.S. at 643 (addressing whether "individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign") (citing Burson v. Freeman, 504 U.S. 191, 197 (1992)); Boos v. Barry, 485 U.S. 312, 318–19 (1988) (addresing whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not").

148. *Turner Broad. Sys.*, 512 U.S. at 643 (holding that ordinance prohibiting the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view") (citing City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)); Heffron v. ISKCON, 452 U.S. 640, 649 (1981) ("State Fair regulation requiring that sales and solicitations take place at designated locations 'applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds.'").

a. Government has a substantial interest in the effective performance of its regulatory functions.

The Court has acknowledged that implicit in the constitutional order is the assumption that government authorities and agencies may perform effectively their police power functions:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order.[149]

The juxtaposition of one of the highest goals of constitutional government, the guarantee of liberty, and the principal social mechanism to protect that goal, the freedom of speech and assembly,[150] with the quotidian concern for traffic control bespeaks a trenchant insight into the nature of government as the instrument, accountable to the people, through which the people can balance their conflicting needs and wants, while providing for the creation, operation and preservation of commonly held resources, improvements and social institutions, on whose existence, accessibility and functioning all depend. The Court perceives that protecting the quotidian underpinnings of social order is not a marginal concern of government, but lies very much at the heart of stable government, and is a necessary condition for the existence of liberty.[151] The Court recognizes that inherent in the constitutional plan is the need to have an effective government, one that enjoys the power to address the problems that beset the people in the course of their ordinary affairs.

The insight that representative government must resolve problems of ordinary

149. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

150. *See supra* notes 113–114 and accompanying text.

151. The recognition that government must be responsive in matters mundane as well as in matters of high politics is as deeply ingrained in the Anglo-American political tradition as is the notion of government accountability to the governed. The very foundation document of Anglo-American representative government, the Magna Carta, recognizes the centrality of government action to provide for the necessities of commerce within a unified kingdom with the same degree of specificity that it employs to exact a pledge to respect the ancient privileges of the assembled nobility and the customs of the people, "Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, 'the London quarter;' and one width of cloth (whether dyed, or russet, or 'halberget'), to wit, two ells within the selvages; of weights also let it be as of measures." MAGNA CARTA cl. 35 (1215). *See also id.* at cl. 41 (assuring safe conduct to all merchants entering, leaving and staying in England). Likewise, James Madison, in Federalist Paper No. 14 extolled the benefits of the new Constitution by citing the prospect that "the intercourse throughout the Union will be facilitated by new improvements. Roads will everywhere be shortened, and kept in better order; accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout, or nearly throughout, the whole extent of the thirteen States." James Madison, *Representative Republics and Direct Democracies*, *in* THE FEDERALIST 150, 153 (Howard Manford Jones ed., 1961).

life within society informs the Court's approach to the identification of substantial government interests. The Court looks to the social setting in which controversies arise and considers the possible role that government might play in avoiding conflicts that could disrupt social order or compromise the effectiveness of government programs.[152] The circumstances that can justify governmental action are as diverse as are the substantial problems and annoyances that can set one person against another, ranging from matters involving public safety and health[153] to matters involving aesthetics or an educational rather than a commercial atmosphere in university residence halls.[154] The substantiality of government interests in regulating economic matters is well established, as would be expected, given the pervasive influence of economic interests on social life. The Court has recognized substantial government interests in measures intended to protect property values,[155] strengthen the national economy,[156] provide fair and efficient

152. The Court also recognizes that not all social concerns will give rise to substantial governmental interests. *See supra* notes 106–116 and *infra* notes 273, 275 and accompany text.

153. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (noting that government has a substantial interests in protecting communities from increases in crime rates that number among the secondary effects of proximity to adult entertainment businesses); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528 (2001) ("The governmental interest in preventing underage tobacco use is substantial, and even compelling."); City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) ("[S]econdary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' establishment . . . .); *Id*. at 296 (stating that the "interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important."); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989) (finding that substantial government interests in the university setting include "promoting an educational rather than commercial atmosphere on [campus], promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility"); Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (finding "a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs"); Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986) (finding that interest in promoting the health, safety, and welfare of its citizens by reducing their demand for gambling provided a sufficiently "substantial" governmental interest).

154. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805–07 (1984) (stating that government "may legitimately exercise its police powers to advance aesthetic values . . . . [T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.") (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976)); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (holding that aesthetic objectives are substantial government goals); Berman v. Parker, 348 U.S. 26, 32–33 (1954) (recognizing government power to remove blighted housing since such housing may be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn").

155. *See Alameda Books*, 535 U.S. at 425 (holding that government has a substantial interest in protecting communities from reductions in property values and in the quality of the city's neighborhoods that number among the secondary effects of proximity to adult entertainment businesses). The Court understands that aesthetic interests tie into broader economic interests. In *Penn Central Transportation Co. v. City of New York*, the Court quoted extensively from the rationale adopted to support New York City's historic preservation laws:

> The city acted from the conviction that "the standing of [New York City] as a world wide tourist center and world capital of business, culture and government" would be threatened if legislation were not enacted to protect historic landmarks and

access to utilities,[157] and to assure that misconduct does not interfere with markets.[158] The Court has also frequently affirmed the substantiality of the state's interest in protecting the peace and tranquility of private dwellings and the precincts of public places whose functioning may be compromised by public disturbance.[159]

The common thread among these decisions lies in the recognition that people expect authorities to resolve differences that they cannot resolve themselves informally and that government must be responsive to those expectations.[160]

> neighborhoods from precipitate decisions to destroy or fundamentally alter their character. The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: e.g., fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors'"; "support[ing] and stimul[ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city."

438 U.S. 104, 109 (1978) (internal citations omitted).

156. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 568 (1980) (finding that promotion of energy conservation in the midst of an energy crisis is a substantial governmental interest).

157. *Id.* at 569 (finding that the effort to assure that utility rates are fair and efficient is a substantial governmental interest).

158. Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 792 (1988) (holding that interest in protecting charities and the public from fraud is substantial interest); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985). In *Zaudrer*, the Court stated:

> Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

Id. at 626. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464–66 (1978) (arguing that face-to-face solicitation is rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud and poses especial risk when "a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person" in order to justify a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain).

159. Hill v. Colorado, 530 U.S. 703, 728 (2000) ("States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places. For example, we have recognized the special governmental interests surrounding schools, courthouses, polling places, and private homes. Additionally, we previously have noted the unique concerns that surround health care facilities.") (internal citations omitted); Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.") (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980)); Kovacs v. Cooper, 336 U.S. 77, 87–88 (1949).

160. People have had such expectations ever since they turned to authority for assistance in resolving disputes that they could not settle privately. Hammurabi understood that conflict would arise inevitably in the course of life in a complex society where some enjoyed advantages and power that others lacked. He knew that effective lawgiving required striking balances that would be accepted as just, and he knew that only through such decisions could any government hope to foster enduring prosperity:

b. Government has a substantial interest in the effective operation of its agencies, instrumentalities and institutions.

A second line of authority suggests another approach to finding substantial government interests, one that is not based upon balancing interests but, rather, on achieving the purposes for which the people establish the agencies, instrumentalities and institutions of government.

The Court repeatedly acknowledged the substantiality of the interest inherent in assuring that public property is devoted to its intended purposes.[161] Where government has established an enterprise or an institution, it has a "substantial interest in preserving the viability and utility of the [enterprise or institution] itself."[162] What is entailed in preserving the viability and utility of the government enterprise or institution depends in large measure upon the particular work that it is meant to accomplish and the circumstances in which particular expressive commercial endeavors may interfere with their operations.[163]

> That the strong might not injure the weak, in order to protect the widows and orphans, I have in Babylon the city where Anu and Bel raise high their head, in E-Sagil, the Temple, whose foundations stand firm as heaven and earth, in order to bespeak justice in the land, to settle all disputes, and heal all injuries, set up these my precious words, written upon my memorial stone, before the image of me, as king of righteousness . . . In future time, through all coming generations, let the king, who may be in the land, observe the words of righteousness which I have written on my monument; let him not alter the law of the land which I have given, the edicts which I have enacted. . . . If such a ruler have wisdom, and be able to keep his land in order, he shall observe the words which I have written in this inscription; the rule, statute, and law of the land which I have given; the decisions which I have made will this inscription show him; let him rule his subjects accordingly, speak justice to them, give right decisions, root out the miscreants and criminals from this land, and grant prosperity to his subjects.

HAMMURABI'S CODE, Epilogue (L.W. Krig trans.), *available at* http://eawc.evansville.edu/anthology/hammurabi.htm (last visited May 12, 2005).

161. United States v. Kokinda, 497 U.S. 720, 739 (1990) (Kennedy, J. concurring) (stating that the government has a significant interest in protecting the integrity of the purposes to which it has dedicated property); *Ward*, 491 U.S. at 796–97 (noting that regulations of municipal band shell sound system components and volume served substantial interest in ensuring that citizens could enjoy parks by enabling those who attended events held at the band shell to hear well while avoiding unnecessary intrusion upon the enjoyment of parklands by those who were not attending such events); Heffron v. ISKCON, 452 U.S. 640, 652–53 (1981) (holding that permitting all exhibitors at the state fair to engage in peripatetic solicitation would impair the flow of visitors through the state fair grounds); United States v. O'Brien, 391 U.S. 367, 381–82 (1968) (stating that the government has a substantial interest in preventing harm to the smooth and efficient functioning of the Selective Service System by persons who burn their draft cards because continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies).

162. Lehman v. City of Shaker Heights, 418 U.S. 298, 317 (1974); ISKCON v. Lee, 505 U.S. 672, 682–85 (1992) (stating that airports are commercial enterprises dedicated to facilitating traveler transfer from ground to air transportation systems and among planes and meeting incidental needs while waiting in the terminals).

163. *ISKCON*, 505 U.S. at 682 (noting that airport builders and managers focus their efforts on providing terminals that will contribute to efficient air travel); *Ward*, 491 U.S. at 796–97 (providing effective, but unobtrusive sound system); *Lehman*, 418 U.S. at 303 (advertising placards were intended to generate income to help subsidize transportation system); Cox v. Louisiana, 379 U.S. 536, 555 (1965) (preserving general access to the public ways) *Kovacs*, 336

3. Evidence reasonably believed relevant may suffice to establish demonstrable connections to substantial government interests sufficient to support content-neutral regulations of expression.

To establish a demonstrable connection between the regulated conduct and the effects to be addressed by the regulation, a government entity "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest."[164] The data and reasoning supporting the existence of a connection may not be "shoddy" but must fairly support the stated rationale for the regulation.[165] Government agencies may rely upon their own understanding of the evils that they seek to avoid; they are not required to obtain corroboration that meets the standards of empirical proof recognized by social science or science.[166] Government "must advance some basis to show that its regulation has the purpose and effect of suppressing [the speech-related harms that compromise the substantial government interest], while leaving the quantity and accessibility of speech substantially intact."[167] Government may not seek to eliminate harms caused by speech "by suppressing speech."[168]

This relatively relaxed approach to proof of a connection reflects the Court's understanding that governmental agencies "will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts."[169]

U.S. at 87–88 (preventing distractions that might imperil traffic).

164. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (Souter, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986) and citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991)).

165. *Alameda Books*, 535 U.S. at 438. The *Alameda* Court stated:

> If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton* [i.e., any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. *Renton*, 475 U.S. at 51–52]. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438–39.

166. City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000) (stating that whether the harm is evident to our "intuition," is not the proper inquiry, but government officials may rely upon their own experience that harms materialize in certain circumstances).

167. *Alameda Books, Inc.*, 535 U.S. at 449 (Kennedy, J., concurring). *See also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563 (2001) (advertising restrictions) (discussing the fact-specific nature of the inquiry of whether a particular regulatory scheme tends to suppress speech or to leave alternative avenues available for speech).

168. *Alameda Books*, 535 U.S. at 450.

169. *Id*. at 442.

4. The availability of alternative avenues for communication within a jurisdiction or outside an institution may suffice to support content-neutral regulations of expression.

First Amendment requirements that government regulations affecting communication leave alternative avenues of communication vary depending upon the nature of the government action. In the context of zoning regulations, the First Amendment requires that government entities "refrain from effectively denying [commercial speakers] a reasonable opportunity to open and operate [business engaged in protected First Amendment speech] within" the government body's physical jurisdiction.[170]

The alternative avenues of communication standard for zoning regulations would present very daunting problems in contexts involving regulations that apply, not to the lands within a political subdivision, but within an institution or grounds operated by a government agency. It is one thing to require that a municipality permit the operation of adult entertainment establishments somewhere within the physical boundaries of its jurisdiction; it is quite another to suggest that the Supreme Court, for example, must reserve a portion of its grounds[171] for adult entertainments, or the National Park Service a portion of the National Mall[172] for such purposes, or the Board of Education of Perry Township, Indiana, a portion its public school facilities[173] for such enterprises.

Where access to grounds or facilities are at issue, the Court frames its inquiry as a forum analysis and focuses upon the specific property or program for which access has been requested.[174] In assessing the availability of alternative avenues,

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170. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 55 (1986) (zoning regulations); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (ban on promotional advertising of gambling to territorial residents); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (ban of off-site billboard advertising).

171. United States v. Grace, 461 U.S. 171, 173–74 (1983) (stating that a prohibition on "display[ing] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" on the building or grounds of the Supreme Court cannot be applied to a pamphleteer who distributed political leaflets on the public sidewalks in front of the Court building).

172. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984) (holding that a National Park Service regulation prohibiting camping in certain parks does not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the National Mall in connection with a demonstration intended to call attention to the plight of the homeless).

173. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39 (1983) (stating that a school district is not required to provide a rival union access to internal mail system even though access is provided to the union serving as official bargaining representative of its employees).

174. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985) (stating that because the plaintiff sought to participate in a charitable fund drive, the fund drive was the relevant forum). Where a public entity controls multiple similar venues, the practices allowed in fora other than the one requested will not control its policies with respect to the forum for which access has been requested. Diloreto v. Downey Unified Sch. Dist. Bd. Of Educ., 196 F.3d 958, 967 (9th Cir. 1999) (stating that the fact that another high school within the district accepted advertisements for ESP Psychic Readings and the local Freemason organization does not indicate that the Downey High School fence was a designated public forum open to

the Court takes into consideration those avenues that are available to the requester at locations or through means other than the one that has been sought.[175] In sum, the availability of places off campus or in media that the university does not regulate may satisfy this prong of the test applied to content-neutral regulations of expressive commercial activities or products.

E. Regulation of commercial activities will be subject to examination for vagueness, overbreadth or underinclusiveness, or as prior restraints.

Commercial regulations are subject to four more focused forms of inquiry. First, they may be challenged as vague where their proscriptions are framed so imprecisely that there can be doubt whether certain conduct has been prohibited or not.[176] Second, they may be challenged as facially overbroad if their prohibitions or conditions burden a substantial amount of protected conduct or if they allow substantial governmental discretion in their application.[177] Third, they may also be challenged as underinclusive where exclusions are granted in a manner that favors one side or another in a public debate, where the combination of rules and exclusions permits the government to control the permissible subjects for public debate or where the underinclusiveness is so great as to call into question whether the asserted purpose was the true purpose of the rule.[178] Fourth, they may be challenged as prior restraints if they require a prior request for access to

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advertisements promoting personal religious beliefs).

175. *Perry*, 460 U.S. at 53–54; Greer v. Spock, 424 U.S. 828, 839 (1976); Pell v. Procunier, 417 U.S. 817, 827–28 (1974); Cogswell v. City of Seattle, 347 F.3d 809, 818 (9th Cir. 2003) (the existence of alternative channels of communication outside the forum allow political candidates to communicate information restricted by the purposes of the forum, providing other means of contact and communication with the intended audience); Friends of the Vietnam Veterans Mem'l v. Kennedy, 116 F.3d 495, 497 (D.C. Cir. 1997):

> [T]here is nothing to stop appellees from giving away their expressive t-shirts on the Mall (or selling them near the Mall). That is unsatisfactory, according to Friends, because it does not promise an adequate source of fundraising. Yet raising money is not a First Amendment concern that the regulation bears upon: The cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the act of solicitation contains a communicative element

Id.; *ISKCON* v. Kennedy, 61 F.3d 949, 958 (D.C. Cir. 1995) (noting that regulations barring sales of items on the National Mall by religious groups did not prevent the group from disseminating its message in other ways, through chants, speech or donating its paraphernalia). *But see* Burbridge v. Sampson, 74 F. Supp. 2d 940, 951 (C.D. Cal. 1999).

176. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 n.9 (1982).

177. Virginia v. Hicks, 539 U.S. 113, 117 (2003). The overbreadth doctrine applies "where the plaintiff mounts a facial challenge to a law investing the government with discretion to discriminate on viewpoint when it parcels out benefits in support of speech." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 619 (1998) ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.") (citing City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988)); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (applying overbreadth doctrine to invalidate on its face an ordinance allowing for content-based discrimination in the awarding of parade permits).

178. City of Ladue v. Gilleo, 512 U.S. 43, 51–52 (1994) (underinclusiveness).

facilities.[179]

1. Commercial regulations will be held void for vagueness under the First Amendment if their prohibitions are so imprecise that discriminatory enforcement is a real possibility.

The general principles involved in reviewing regulations for vagueness have already been described.[180] While the Court has specified that where a "law interferes with the right of free speech or of association, a more stringent vagueness test [than those used in connection with economic regulations] should apply," [181] the more stringent test does not imply an additional test for vagueness. In the First Amendment context as in the due process context, a regulation "is void for vagueness if its prohibitions are not clearly defined."[182] The application of a regulation to expressive conduct triggers an additional rationale for concern with vagueness, for the Court is apprehensive that the chilling effects of vague regulations may inhibit the exercise of First Amendment freedoms.[183] Uncertain meanings inevitably lead citizens "to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[184] Particularly where a regulation implicates the First Amendment, a precise statute proscribing specific conduct provides assurance "that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation."[185]

The stringency that the Court addresses involves the level of precision that judges should require, not a different test. In reviewing a regulation for vagueness, the Court will read it as a whole and consider the regulation within the practical context in which it is to be applied.[186] Where the legislative intent is clear, a regulation should be construed to avoid problems of vagueness.[187] Regulations

179. Prior restraints may be content neutral. Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002) (upholding time, place, and manner restraints on park usage). They may be content-based. S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (striking down standardless board review of whether to grant access to municipal theater facilities); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (striking down a state scheme for the licensing of motion pictures).

180. *See supra* notes 64–76.

181. *Vill. of Hoffman Estates*, 455 U.S. at 499. *But see* Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 93–95 (1st Cir. 2004) (suggesting that the vagueness inquiry in the context of a nonpublic forum might be less exacting than where the regulatory scheme involves licensing or a traditional nor a designated public forum).

182. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The vagueness inquiry differs from the overbreadth inquiry in that vagueness analysis addresses the question of whether a regulation regulates certain conduct, while overbreadth analysis addresses the question of whether the regulation has been stated in a way that sweeps up protected speech in addition to conduct properly subject to regulation. *See Vill. of Hoffman Estates*, 455 U.S. at 497 n.9.

183. The fundamental concern with vague statues under the First Amendments is that the uncertainty of their reach may discourage speech. Denver Area Educ. Telecomm. Consortium v. F.C.C., 518 U.S. 727, 751 (1996) (citing Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965)).

184. *Grayned*, 408 U.S. at 109 (internal citations omitted).

185. *Id.* at 109 n.5 (citing Edwards v. South Carolina, 372 U.S. 229, 236 (1963)).

186. *Id.* at 110.

187. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 191 (2003).

whose component definitions "are both easily understood and objectively determinable" will not be found to be vague.[188] The core concern is not whether a rule has actually been enforced in an arbitrary or discriminatory manner, but rather whether it "is so imprecise that discriminatory enforcement is a real possibility."[189]

Here, again, the existence of mechanisms that permit persons to clarify the meaning of rules will help to minimize vagueness concerns.[190]

2. Commercial regulations will be invalidated as overbroad if they burden a substantial amount of protected free speech, judged in relation to their plainly legitimate sweep.

A regulation is said to be overbroad if it is written in terms that may apply both to protected and unprotected expression, since such a regulation threatens to impose its sanctions, not only on unprotected expression, but also on protected expression.[191] In addition to the principal concern with textual overbreadth, procedural considerations can also justify the use of overbreadth analysis. A system of regulation may be held overbroad where it requires official approval for expression or expressive conduct but delegates "standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights."[192] Likewise, overbreadth analysis is applicable to

188. *Id.* at 194.

189. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991). This approach differs, of course, from the rule in cases involving economic regulations, which are analyzed as applied. Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

190. *McConnell*, 540 U.S. at 170 n.64.

191. Virginia v. Black, 538 U.S. 343, 371 (2003) (Stevens, J., concurring) ("[O]ur overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution.") (citing Houston v. Hill, 482 U.S. 451, 459 (1987) (stating that a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid" (emphasis added)); *Grayned*, 408 U.S. at 114 (stating that a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct") (emphasis added); R.A.V. v. City of St. Paul, 505 U.S. 377, 397 (1992) (White, J., concurring in judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes* . . . expression protected by the First Amendment" (emphasis added)).

192. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (internal citations omitted). *Thornhill v. Alabama* states the fundamental rationale for applying overbreadth analysis to regulatory schemes that charge an administrator with the discretion to authorize an expressive activity or not or to sanction those who have violated a rule:

> The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit

governmental assistance programs in which officials are granted "discretion to discriminate on viewpoint when it parcels out benefits in support of speech."[193]

The Court recognizes that the threat of sanction presented by an overbroad regulation "may deter or 'chill' constitutionally protected speech," as surely as might a vague regulation.[194] The overbreadth doctrine was fashioned in the belief "that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." [195]

An overbroad regulation will be held to be invalid in all its applications, even as applied to conduct that is both harmful and unprotected under the First Amendment.[196] Recognizing the significant social costs incurred where harmful, unprotected conduct escapes regulation, the Court places a series of limitations on the operation of overbreadth analysis in order to protect the legitimate interest in regulating harmful conduct.[197]

As an initial matter, the Court has been unwilling to apply overbreadth analysis to controversies that involve neither speech nor expressive conduct.[198] This reluctance reflects the Court's sense that "the overbreadth doctrine's concern with 'chilling' protected speech 'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct.'"[199]

> their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940). The Court recognizes that the unrestrained power of regulatory officials to discriminate against expression or expressive conduct based upon their distaste for the message deters speech as surely as an overbroad statute.

193. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 619 (1998).

194. Virginia v. Hicks, 539 U.S. 113, 119 (2003); *Black*, 538 U.S. at 365; *Cf. Grayned*, 408 U.S. at 109 ("[A] vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.").

195. *Broadrick*, 413 U.S. at 612.

196. *Hicks*, 539 U.S. at 119 (stating that overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989).

197. *Hicks*, 539 U.S. at 119.

198. *Hicks*, 539 U.S. at 124 ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).)" *See also* United States v. Salerno, 481 U.S. 739, 745 (1987). *Broadrick* recognized that the doctrine would also be applicable where "rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." *Broadrick*, 413 U.S. at 612.

199. *Hicks*, 539 U.S. at 124. *Broadrick* provides the fullest statement of the Court's reasoning:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful,

Even where protected speech is affected by a regulation, the Court seeks a balance. It requires that the regulation apply to a substantial amount of speech both "in an absolute sense" and "relative to the scope of the law's plainly legitimate applications."[200] An overbroad regulation is substantially overbroad—i.e., it "sweeps too broadly . . . [and] penaliz[es] a substantial amount of speech that is constitutionally protected."[201] In *Hicks*, the Court stated:

> The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression [i.e., in relation to its proper application to unprotected expression or conduct.][202]

The Court normally does not strike down a statute on First Amendment grounds "when a limiting construction has been or could be placed on the challenged statute."[203] Nevertheless, courts may not rewrite regulations to conform them to constitutional requirements.[204]

Overbreadth analysis is fully applicable to commercial expression and to expressive products.[205] Nevertheless, overbreadth analysis is inappropriate in

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> constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Broadrick, 413 U.S. at 615. This reluctance also reflects the Court's appreciation for the fact that a person whose conduct may be outside the protections of the First Amendment and fully within the regulatory power of government may, nevertheless, escape the rule if an overbreadth challenge succeeds. *Fox*, 492 U.S. at 483; Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 462 (1978); *Broadrick*, 413 U.S. at 610. Where a Court declines to permit an overbreadth challenge, a plaintiff may still pursue an "as-applied" challenge to the regulation. *Hicks*, 539 U.S. at 124. An "as-applied" challenge consists of a challenge to a regulation's application only to the party before the court. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758–59 (1998).

200. *Hicks*, 539 U.S. at 119–20; New York v. Ferber, 458 U.S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications"); *Broadrick*, 413 U.S. at 615 ("[I]it is not enough for a plaintiff to show 'some' overbreadth. Our cases require a proof of 'real' and 'substantial' overbreadth.").

201. Reno v. A.C.L.U., 521 U.S. 844, 894 (1997) (O'Connor, J., concurring in part and dissenting in part) (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992)).

202. *Hicks*, 539 U.S. at 118–19 (quoting *Broadrick*, 413 U.S. at 615).

203. *Broadrick*, 413 U.S. at 613.

204. Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988).

205. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989). The litigation involving the Communications Decency Act of 1996 ("CDA") and the Child Online Protection Act, 47 U.S.C. § 231 (framing prohibitions to reach internet transactions involving provision of obscene material to minors), also involved the regulation of commercial speech, and pivoted on the application of congressional rules to noncommercial speech. Ashcroft v. A.C.L.U., 542 U.S. ___, 124 S.Ct. 2783 (2004). *See also Reno*, 521 U.S. at 865 (distinguishing the Communications Decency Act from New York state legislation prohibiting the sale of obscene magazines to minors on the basis, in part, that the CDA was not limited in its reach to commercial transactions); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150,

connection with commercial speech, i.e., to speech that is involved in proposing or effecting commercial transactions.[206] The Court regards commercial speech as less susceptible to the chilling effects of a potentially overbroad regulation. The Court reasons that since commercial speech is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation.[207]

In the context of content-based, as opposed to content-neutral, commercial regulations, overbreadth also factors into the assessment whether the regulatory means are narrowly tailored to provide the least restrictive, effective measures.[208] Defense of an overbroad regulation "imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective."[209]

3. Exemptions written into commercial regulations may trigger concerns that the regulations' underinclusiveness gives effect to an impermissible purpose.

Regulations are said to be underinclusive when the entities or individuals exempted from their application are similarly situated to those who are subject to the regulation. Underinclusiveness may become an issue when evaluating content-neutral rules under an intermediate standard of review, as well as content-based regulations under a strict scrutiny standard of review.[210]

165–66 (2002) (faulting a solicitation permit ordinance that might have been constitutional if applied only to commercial solicitation for reaching protected political, religious or informal speech); *Ferber*, 458 U.S. at 752 (sale of films); S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547 (1975) (theatrical production); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 59–61 (1976) (commercial zoning).

206. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 619 n.12 (1998) (Souter, J., dissenting) ("[O]verbreadth doctrine does not apply to commercial speech.") (internal citations omitted). Narrow tailoring of content-neutral requirements resemble the application of overbreadth analysis to the extent that narrowly tailored regulations may not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

207. Bates v. State Bar of Ariz., 433 U.S. 350, 380–81 (1977) (advertising). *See infra* notes 224 and 263 and accompanying text.

208. Although overbreadth and narrow-tailoring analyses reflect similar concerns, they also harbor important differences. Overbreadth claims allege that a regulation is invalid in all its applications, while narrow-tailoring claims allege that a regulation is invalid as applied to the plaintiff. *Fox*, 492 U.S. at 482–83. The overbreadth challenge operates as an exemption to standing requirements. *Id.* Standing is relaxed on the theory that an overbroad statute might serve to chill protected speech through fear of punishment for violating the statute. *Bates*, 433 U.S. at 380. Positing an inherent link between commercial well-being and commercial speech, the Court found the essential rationale for relaxing standing requirements inapplicable in the commercial speech context. *Id*, at 380–81. Hence, individuals may only challenge a commercial regulation if it has been applied to them.

209. *Reno*, 521 U.S. at 879.

210. City of Ladue v. Gilleo, 512 U.S. 43, 51–53 (applying intermediate scrutiny and assuming content neutrality); F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 376, 396 (1984) (applying intermediate scrutiny); Republican Party of Minn. v. White, 536 U.S. 765, 774, 780 (2002) (applying strict scrutiny); Fla. Star v. B.J.F., 491 U.S. 524, 533–34, 540 (1989) (applying strict scrutiny).

Underinclusive regulations may trigger the First Amendment concerns in any of three ways.[211] First, exemptions or exemptions combined with the reach of a regulation may reflect an effort to control the course of public debate by favoring one side over another or by limiting the substantive issues that may be raised.[212] Second, exemptions may permit forms of expression that suggest that the regulation's stated purpose, however proper it may be, is not its real purpose, and that the real purpose may be to silence disfavored speech.[213] Third, means selected to serve the regulation's stated purpose may be so ineffective as to suggest that the regulation's stated purpose, however proper it may be, is not its real purpose.[214]

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211. *National Federation of the Blind v. Federal Trade Commission*, 303 F. Supp. 2d 707 (D. Md. 2004), identifies three ways in which regulations may be underinclusive:

> (1) where underinclusiveness indicates that the regulation is intended to give one side of a debate an advantage over another; (2) where the regulation excludes so much speech that it undermines the likelihood of a genuine governmental interest; and (3) where the underinclusiveness is so severe as to cast doubts on whether the government is actually serving the interests that are supposed to justify the regulation.

Id. at 720–21 (internal citations omitted). The third prong of this analysis suggests that it provides but another avenue of testing the actual purpose of the regulation, but this construction would render the third prong as a mere variant on the second; a better formulation might suggest that underinclusiveness of means bears upon their ability to meet the requirement that means be, at minimum, narrowly tailored to achieve substantial purposes.

212. *Gilleo*, 512 U.S. at 51 ("[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people'") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785–786 (1978)); *Id.* ("[T]he combined operation of a general speech restriction and its exemptions, the government might seek to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.'") (quoting Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980)).

213. *Nat'l Fed'n of the Blind*, 303 F. Supp. 2d at 720–21; Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 170 (2002) (Breyer, J. concurring) ("It is also intuitively implausible to think that Stratton's ordinance serves any governmental interest in preventing such crimes. As the Court notes, several categories of potential criminals will remain entirely untouched by the ordinance."); *See also League of Women Voters of Cal.*, 468 U.S. at 396:

> [I]t seems doubtful that § 399 can fairly be said to advance any genuinely substantial governmental interest in keeping controversial or partisan opinions from being aired by noncommercial stations. Indeed, since the very same opinions that cannot be expressed by the station's management may be aired so long as they are communicated by a commentator or by a guest appearing at the invitation of the station during an interview; see also *Accuracy in Media*, 45 F.C.C.2d 297, 302 (1973), § 399 clearly "provides only ineffective or remote support for the government's purpose." Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 564 (1980).

Id.; *Bellotti*, 435 U.S. at 817 n.13 ("The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject.").

214. *Florida Star* links underinclusiveness with the selection of means that are ill suited to achieve the stated objective:

> [T]he facial underinclusiveness of § 794.03 raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance. Section 794.03 prohibits the publication of identifying information only if this information appears in an "instrument of mass

In the end, underinclusiveness does not involve an independent constitutional infirmity. Rather, questions of underinclusiveness involve evidentiary matters that arise under content-based strict and content-neutral intermediate scrutiny tests, since these tests inquire into governmental purposes and the relation between those purposes and the means selected to achieve them. Underinclusiveness comes into play on issues of whether government acted to achieve a permissible purpose or acted in ways reasonably calculated to achieve that purpose.

4. Commercial regulations that place prior restraints upon expression or expressive conducts or products will be subject to strict scrutiny if they are content-based or intermediate scrutiny if they are content-neutral.

Prohibiting government regulations designed to censor speech has long been recognized as the chief objective of the Free Speech Clause of the First Amendment.[215] Prior restraint doctrine springs from the abiding First Amendment

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communication," a term the statute does not define. Section 794.03 does not prohibit the spread by other means of the identities of victims of sexual offenses. An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.

Fla. Star, 491 U.S. at 540. The reference to the disparity between declared purpose and the effect of the regulatory means does not appear meant to insinuate a different purpose so much as an impermissibly ineffective means to achieve that purpose. *Id.* at 541. ("Without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose."). *See also* Ashcroft v. A.C.L.U., 542 U.S. ____, 124 S.Ct. 2783, 2793 (2004) (upholding a preliminary injunction, in part, based upon the government's failure to document the effectiveness of the means selected to enforce its prohibition; no "evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive").

215. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731–33, § 1874 (1833) ("[T]he language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint."). The doctrine of prior restraints derives from English common law and follows English precedent in distinguishing between previous restraints "on publications," which are not permitted, and punishments or sanctions after publication, which are permitted. Alexander v. United States, 509 U.S. 544, 553–54 (1993) (Rehnquist, C.J., for the Court); *Id*. at 567 (Kennedy, J. dissenting) (quoting 4 W. BLACKSTONE, COMMENTARIES *151–*152). The English doctrine arose to counter legislation under which all printing presses and printers were licensed by the government, and nothing could lawfully be published without the prior approval of a government or church censor. *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 320 (2002); *Alexander*, 509 U.S. at 553, n.2 (Rehnquist, C.J., for the Court) (citing T. Emerson, SYSTEM OF FREEDOM OF EXPRESSION 504 (1970)); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988) (citing 4 W. BLACKSTONE, COMMENTARIES *152)). Although the common law system constrained only administrative censorship, American practice extended the limitation on prior restraint to the exercise of judicial power as well. *Alexander*, 509 U.S. at 553, n.2 (stating that the protection against prior restraint at common law barred only a system of administrative censorship, but, since, *Near v. Minnesota*, 283 U.S. 697 (1931), the First Amendment protections have also encompassed judicial action) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389–90 (1973)).

concern to avoid empowering censors or chilling free expression. It has long held that "placing unbridled discretion [to grant or to deny a license or permission] in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[216] The Court fears that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[217]

Concerns with government censorship of expressive commercial activity may arise where the right to engage in a commercial activity requires a license or other prior authorization. Such licensure or authorization regulations may be subject to challenge as prior restraints, i.e., as "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[218]

Prior restraint analysis arises in the commercial context only where regulated "conduct with a significant expressive element . . . drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."[219] Four additional factors enter into consideration when determining whether a regulation responsive to express content or with a disparate effect on expressive content is subject to scrutiny as a prior restraint. Regulations will be found to impose prior restraint where: (1) Persons who seek to exercise First Amendment rights must apply to the government for permission; (2) The government is empowered to determine—on the basis of the content of the proposed expression—whether it should grant the applicant permission to speak; (3) Permission to speak depends on the government's affirmative action; and (4) Approval is not a routine matter, but requires the government to examine facts, exercise judgment, and form opinions.[220]

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216. *City of Lakewood*, 486 U.S. at 757. *See also* Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969):

> [T]he prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

Id. (quoting Staub v. Baxley, 355 U.S. 313, 322 (1958).

217. *City of Lakewood*, 486 U.S. at 757.

218. *Alexander*, 509 U.S. at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, p. 4.14 (1984)).

219. *Alexander*, 509 U.S. at 557 (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986) (quoting United States v. O'Brien, 391 U.S. 367 (1968); Minneapolis Star & Tribune Co. v. Comm'r of Revenue, 460 U.S. 575 (1983))).

220. Westbrook v. Teton Cty. Sch Dist. No. 1, 918 F. Supp. 1475, 1481 (D. Wyo. 1996) (citing S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 554 (1975)). In *Southeastern Promotions*, one seeking to use a theater was required to apply to the board. *Id.* The board was empowered to determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of its review of the content of the proposed production. *Id.* Approval of the application depended upon the board's affirmative action. *Id.* Approval was not a matter of routine; instead,

Prior restraint analysis may take two different courses, depending upon the nature of the regulation. Prior restraints that pivot on the content of the speech are subject to strict scrutiny and exacting procedural requirements.[221] Prior restraints that are content-neutral are examined under an intermediate level of scrutiny and are not subject to procedural requirements.[222]

a. Content-based prior constraints will be subject to strict scrutiny.

Content-based prior restraints are not unconstitutional per se, but they are subject to a heavy presumption against their constitutionality.[223] To be upheld, a prior restraint must satisfy strict scrutiny, and it must be "accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech."[224] Required procedural safeguards include:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[225]

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it involved the "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the board. *Id.*

221. *S.E. Promotions*, 420 U.S. at 559; Freedman v. Maryland, 380 U.S. 51, 58 (1965).

222. Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002).

223. *S.E. Promotions*, 420 U.S. at 558; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

224. *S.E. Promotions*, 420 U.S. at 559. *See also* Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.01[4] (1994):

> The [Supreme] Court has tended to recognize only a narrow number of situations in which prior restraints might be permissible, such as restraints against obscenity, or to protect imminent threats to national security, or as a last resort to protect a defendant's right to a fair trial, and has suggested that outside these narrow 'exceptions,' no prior restraints at all should be permitted.

Id.

It has been suggested that the strictures of the prior restraints doctrine may be relaxed when advertising or similar restrictions are at issue. Zauderer v. Supreme Court of Ohio, 471 U.S. 626, 668, n.13 (1985) (Brennan, J., concurring in part and dissenting in part) (writing that traditional prior restraint principles do not fully apply to commercial speech); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571, n.13 (1980) (stating that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it). The Court understands that regulation of speech that merely proposes commercial transactions may be more resilient than other forms of speech, since speech is intrinsic to many forms of economic activity and hence subject to incentives. Va. Pharmacy Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72, n.24 (1976) ("Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."). It also recognizes the need to impose additional requirements on such speech to avoid deception or to achieve other policy goals. *Id.* ("[Government] may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive"). Commercial speech doctrines are discussed at greater length below. *See infra* notes 256–311 and accompanying text.

225. *Thomas*, 534 U.S. at 321 (quoting FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990)

These procedural requirements apply fully to commercial activities conducted in traditional public fora and, as to persons entitled to their use, in designated or limited public fora.[226]

b. Content-neutral prior constraints will be subject to intermediate scrutiny.

Time, place, and manner restrictions, zoning regulations, and permit and licensing requirements are the most common forms of content-neutral prior restraints.[227] To satisfy constitutional requirements, time, place, and manner "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication."[228] Time, place, and manner regulations need not employ the least restrictive or least intrusive means of achieving their ends, so long as they promote "a substantial government interest that would be achieved less effectively absent the regulation."[229]

The Court relaxes procedural requirements where time, place, and manner regulations operate in a content-neutral fashion, but it scarcely abandons its concern with the application of such regulations.[230] The Court recognizes that sound, neutral regulations may still be applied in an unconstitutional fashion. If "the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on

(citing *Freedman*, 380 U.S. at 58–60)).

226. *S.E. Promotions*, 420 U.S. at 560 ("If a scheme that restricts access to the mails must furnish the procedural safeguards set forth in *Freedman*, no less must be expected of a system that regulates use of a public forum.") (discussing decision of municipal board managing a city auditorium and a city-leased theater to reject commercial promoter's application to perform the rock musical "Hair").

227. *Thomas*, 534 U.S. at 322; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (treating zoning ordinances as a species of time, place, and manner restrictions); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 165 (2002) (suggesting that a permit requirement limited to commercial speech may be permissible); City of Lakewood v. Plain Dealer Publ'g, 486 U.S. 750, 753 (1988). For ease of reference, these different sorts of regulatory schemes will hereafter be designated as time, place, and manner regulations.

228. *Thomas*, 534 U.S. at 323, n.3 (quoting Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992) and referring to Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293). *See also* Reno v. A.C.L.U., 521 U.S. 844, 879 (1997) (holding that time, place, and manner regulations may not regulate speech based on its content).

229. Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). *See also* Hill v. Colorado, 530 U.S. 703, 726, 726 n.32 (holding that when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal); *Id*. at 726 n. 32 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.") (quoting *Ward*, 491 U.S. at 798).

230. *Thomas*, 534 U.S. at 321.

its content."[231]

Indeed, even though content-neutral time, place, and manner regulations are subject to intermediate scrutiny, the Court looks favorably upon rules that contain substantive and procedural restrictions on regulator discretion like those applicable to content-based time, place, and manner regulations. Regulators should be permitted to act only on grounds that are narrowly drawn, "reasonably specific and objective, and do not leave the decision to the whim of the administrator."[232] The Court also approves of regulations that limit the time allowed for acting on an application.[233] Regulatory schema may be further reinforced by requiring regulators to explain clearly their reasons for denying any requests for permits or licenses and by permitting both the administrative and judicial review of appeals from initial decisions.[234]

F. Colleges and universities seeking to regulate private commercial endeavors involving expressive products or activities should focus their efforts on protecting substantial institutional interests through narrowly tailored, content-neutral policies.

College and university efforts to regulate expressive commercial endeavors and products should be organized around the protection of substantial institutional interests through content-neutral regulations.[235] The ample authority that

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231. *Id.* at 323.

232. *Id*. at 324 (quoting *Forsyth County*, 505 U.S. at 133). In *Thomas*, e.g., the Court noted with approval that park officials could deny an application:

> [W]hen the application [was] incomplete or contains a material falsehood or misrepresentation; when the applicant [had] damaged Park District property on prior occasions and [had] not paid for the damage; when a permit [had] been granted to an earlier applicant for the same time and place; when the intended use [presented] an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant [had] violated the terms of a prior permit.

Id. at 324. The Court observed that the regulations themselves were content neutral.

> None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park. The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event.

Id. at 322.

233. *Id*. at 324 (approving a Chicago park ordinance that required action within twenty-eight days). *See also* Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1260–61 (10th Cir. 2004) (approving 240 day delay in processing a request for demonstration permit where the regulation was content neutral and the delay was due to the delay in selecting venues for the 2002 Winter Olympics).

234. *Thomas*, 534 U.S. at 324.

235. Once again, the range of possibilities is as wide as the imagination of entrepreneurs and students, but clearly might include tutoring, street performers or "theatrical" efforts, sales of t-shirts or artworks, baked goods or candies that have been shaped to have expressive content or

recognizes that governmental institutions have substantial interests in assuring their effective operation should lend strong support for regulations that are truly content neutral.[236]

Colleges and universities may also incorporate into their regulations, as appropriate, content-based proscriptions on unprotected commercial expression or expressive products.[237] The academic mission of the college or university may encompass the study of proscribable expression and merchandize, but the research and teaching functions of the college or university would not likely be furthered by permitting, or hindered by prohibiting, trade in proscribed expression or expressive products.

The educational institution's mission certainly permits it to make content-based decisions to protect the rigor of academic, scholarly, artistic, and research processes.[238] Nonetheless, the institutional considerations that support such decision-making are not likely to extend either to viewpoint-based regulations or to other content-based rules governing expressive commercial endeavors on campus.[239] Once the college or university has decided, for instance, that registered student organizations may sell t-shirts in the student union to raise funds, the basis for insisting upon institution-determined standards of good taste in private expression becomes more attenuated.[240]

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that are sold, e.g., in conjunction with the marketing of some expressive activity such as a play.

236. *See supra*, notes 37, 38, 84, and 161–163 and accompanying text.

237. To the extent that a university might wish to ban certain forms of commercial activity entirely, e.g., fundraising by showing obscene films, it must also hew to the distinctions that are drawn in the relevant substantive law. Erznoznik v. City of Jacksonville, 422 U.S. 205, 208 (1975) (overturning ban on outdoor movie theaters screening movies containing nudity where the scenes did not involve obscenity); Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (ruling that a film that is not obscene under the standards of *Miller v. California*, 413 U.S. 15 (1973) is entitled to First Amendment protection).

238. *See supra*, notes 87 and 88, and *infra* notes 405–413 and accompanying text.

239. To the extent that a forum has not been opened to private expression by students or others, a university might still make limited content-based decisions concerning the topics for which it may be used. *See supra*, notes 17–21 and accompanying text. Even conceding that in matters of pedagogy and research universities may make viewpoint-based distinctions, e.g., grading down responses on geography examinations that affirm that the earth is flat or discounting research proposals that seek to prove terrestrial flatness, any effort to translate the power that a university may make viewpoint-based distinctions in academic matters to its oversight of student activities should be avoided. *See infra*, at notes 405–413. *Cf.* Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 230 (2000) (holding that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students).

240. University control over student expression in the context of coursework does not typically extend to expression that involves no direct university control. Kincaid v. Gibson, 236 F.3d 342, 352 (Ky. 2001) (holding that a university yearbook was a limited public forum for purposes of student speech) (noting that a college yearbook is not a closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content); Student Gov't Ass'n v. Univ. of Mass., 868 F.2d 473, 480 n.6 (1989) (questioning the applicability in the university setting of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 and 273 n.7 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns, but reserving the question "whether the same degree of deference is appropriate with

The kinds of consideration that might ground content-based regulations, such as the necessity of balancing constitutional interests or of protecting minors or zones of privacy,[241] are unlikely to provide much support for college or university commercial regulations. Student organization t-shirt sales are unlikely to conflict with the right of franchise or other constitutional values.[242] Given the fact that an educational institution's rules will ordinarily not extend beyond its grounds, content-neutral time, place, and manner restrictions should be effective in preventing commercial intrusions upon childcare centers or laboratory schools frequented by minors, upon residential areas or infirmaries or hospitals.[243] Hence, it would become difficult, in the institutional setting, to show that content-based restrictions present the least restrictive means of protecting such interests.[244] For all these reasons, colleges and universities should avoid content-based regulations of expressive commercial endeavors and products. Viewpoint-based regulations, of course, should be avoided in all circumstances.[245]

Content-neutral approaches hold the greatest promise for constitutionally firm regulation of commercial expression on campus. Colleges and universities should consider six general ranges of doctrinal issues, five relating to the substance or form of the regulations and one relating to the procedures through which they are applied.

First, consider carefully what interests may be affected by an activity, based on the objective characteristics of the activity, its time and place. Determine whether they are substantial. This may specifically include actions intended to preserve an educational rather than a commercial atmosphere.[246] But the complex college or university setting provides numerous instances in which regulations that balance competing interests may also be appropriate.[247] Regulations should recite the purposes to be protected or the harms to be avoided, or that otherwise permit the ready and certain identification of the purposes that the rules are to achieve.

Second, draw distinctions that will have a material effect in protecting those interests or avoiding those harms, and draw them to minimize the likelihood that the restrictions will impinge on greater protected activity than is required to achieve the purpose. Where a college or university believes that a rule is necessary to preserve an institutional goal—such as preservation of an educational atmosphere—it should consider both what sorts of activities normally support

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respect to school-sponsored expressive activities at the college and university level")). A different rule may apply to the extent that a university operates an enterprise as a nonpublic forum in which limited private speech is permitted. *See infra* notes 312–384 and accompanying text.

241. *See supra* notes 128, 129 and 161 and accompanying text.

242. *See supra* notes 125–127 and accompanying text.

243. *See supra* notes 128, 129, and 161 and accompanying text.

244. *See supra* notes 131–139 and accompanying text.

245. *See supra* notes 106–117 and accompanying text.

246. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989) (ruling that university had a substantial interest in promoting an educational rather than a commercial atmosphere in its residence halls).

247. As noted *supra* at notes 78–82, universities with their multiple residences and affiliated enterprises, encounter many of the concerns for the flow of traffic, security and public health that shape the expectations placed upon states and their political subdivisions.

those interests and what aspects of the commercial endeavor would impair them.[248] Where the college or university believes that the secondary effects of a commercial endeavor present safety or security challenges, or other evils of the sort commonly addressed through police power regulations, it should seek documentation both that the secondary effects would be likely to attend the activity and that they would likely interfere with specific institutional interests.[249]

Third, make sure that policies reflect the differences in the places or expressive activities to be regulated.[250] Different forms of expressive commercial products or activities present different ranges of First Amendment issues, and it is critical that policies be crafted to reflect those differences.[251]

Fourth, where activities lend themselves to regulation based on time, place, or manner of the activity, adopt this approach to formulating the regulations.[252] No college or university has an unlimited number of venues suited to support commercial activities, so each institution will have to consider how best to differentiate among places that are suitable for commercial activities and those that are not, how to allocate access to places that are suitable, and whether additional time or manner requirements are necessary at those venues to prevent interruption of other functions.[253]

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248. The Court's analyses in *Heffron v. ISKCON*, 452 U.S. 640, 650–51 (1981), and *ISKCON v. Lee*, 505 U.S. 672, 683–85 (1992), illustrate the necessary approach.

249. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (Souter, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986) and citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991)). *See also* City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000) (stating that whether the harm is evident to our "intuition," is not the proper inquiry, but government officials may rely upon their own experience that harms materialize).

250. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (declaring that each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems); *Heffron*, 452 U.S. at 650–51 (noting that consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved).

251. For instance, student sponsored dances, concerts, or lectures may pose the necessity of regulating the amplification of sound in certain venues, *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989), while such considerations may have little importance in conjunction with transactions involving visual expression, such as t-shirt sales or solicitation where interference with building accessibility may be a larger concern. *Cf.*, One World One Family Now v. City of Miami Beach, 175 F.3d 1282, 1287–88 (11th Cir. 1999) (noting that a single table staffed by an organization vending for profit or nonprofit goods and distributing information aims at causing people to stop, loiter, perhaps bargain, engage in dialogue, or obtain the correct change, all of which potentially impedes the efficiency of the pedestrian path created by the city and interfere with the historic and aesthetic ambience that the municipality seeks to maintain).

252. Colleges and universities may reasonably require students who wish to engage in fundraising sales involving t-shirts, for instance, to confine their activities to places and times that comport with other expected uses of facilities. *See supra*, at notes 227–234. They may allocate space among student organizations on first come first serve or other objective criteria unrelated to content. Widmar v. Vincent, 454 U.S. 263, 277 (1981).

253. *Widmar*, 454 U.S. at 277 ("Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.").

Fifth, where activities may be subjected to requirements akin to licensure, do not hesitate to adopt such rules.[254] It may be reasonable, for instance, to require that would-be tutors demonstrate their competency in the academic discipline in which they wish to offer their services.[255]

Sixth, design the procedural aspects of the regulations to require administrators to give rule-based reasons for their decisions, permitting private parties to obtain clarification of the rules and to appeal decisions implementing the rules. Such practices will help to assure a fundamental continuity between institutional regulations of expressive commercial endeavors and other forms of commercial activity, and will provide some assistance in avoiding problems with vagueness or prior restraint doctrines.

III. COLLEGES AND UNIVERSITIES MAY REGULATE PRIVATE COMMERCIAL ENDEAVORS INVOLVING COMMERCIAL SPEECH SO LONG AS THEIR REGULATIONS PROSCRIBE ONLY UNLAWFUL OR MISLEADING SPEECH OR OTHERWISE ADVANCE SUBSTANTIAL INSTITUTIONAL INTERESTS DIRECTLY AND WITHOUT INTRUDING ON MORE PRIVATE SPEECH THAN IS NECESSARY TO SERVE THOSE OBJECTIVES.

Colleges and universities have substantial latitude to regulate private commercial speech. Practices that conform to the Court's requirements for such regulations share common features with regulations of commercial endeavors in general—and of expressive commercial products or activities in particular—facilitating a consistent approach to policy development and administration.

The Court's First Amendment jurisprudence involving speech and expressive activities inherent in commerce differentiates between, on the one hand, expressive products or activities that may be the subject matter of commercial transactions and, on the other hand, the expression that is involved in proposing and effecting the commercial transaction itself. The Court uses the phrase "commercial speech" to designate the latter forms of expression.[256] Commercial speech relates solely to the economic interests of the speaker and its audience, proposes a commercial transaction, and occurs in an area traditionally subject to government regulation.[257]

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254. Some qualifications may be relatively objective. For instance, tutors could reasonably be expected to have achieved advanced standing and high grades in the subject matter that they wish to tutor. Still, there may be times when there may be occasions for the exercise of academic judgment, as when a prospective language tutor has a solid command of a written language but poor oral skills. There may be circumstances where universities could properly rely upon academic judgment. *See generally*, *infra*, notes 404–413. Of course, licensing an organization to operate a coffee concession could present a very different matter.

255. Zelman v. Simmons-Harris, 536 U.S. 639, 647 (2002) (recognizing state payment available for tutoring from registered tutors); Minn. Fed'n of Colls. v. Minn. Bd. of Technical Colls., 1993 WL 480185, No. CO-93-998 (Minn. Ct. App. Nov. 23, 1993) (discussing board licensed post-secondary technical tutors); Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971) (discussing tutors approved by school administration).

256. *See* Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) (ruling that tutoring, legal advice, and medical consultation provided—for a fee—in students' dormitory rooms would consist of speech for a profit; they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech).

257. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–63 (1980); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001)

Advertising that refers to a specific product and that is prompted by the speaker's economic motive is commercial speech.[258] Commercial speech that is inextricable from, or deeply intertwined with, protected speech may be subject to the rules governing communicative activities discussed above in Part II.[259]

The rationale for protecting commercial speech under the First Amendment draws out fundamental connections between commercial speech and the quintessential First Amendment concerns to protect the social and political underpinnings of popular democracy.[260]

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and

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258. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

259. *See* Nike, Inc., v. Kasky, 539 U.S. 654, 675 (2003) (dismissing writ of certiorari as improvidently granted) (Breyer, J., dissenting) (asserting that a letter to university presidents did not appear in the customary format of advertisements, did not propose commercial transactions and purported to provide additional information for persons interested in controversies involving Nike Inc.); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795–96 (1988) (concerning a state law that required professional fundraisers working on behalf of nonprofit charities to disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity and mandating speech that a speaker would not otherwise make necessarily alters the content of the speech and must therefore be analyzed as a content-based regulation of speech). The Court stated:

> [E]ven assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

Id. *Fox* involved a sales pitch at a Tupperware party that included discussions of how to be financially responsible and how to run an efficient home. *Fox*, 492 U.S. at 473–74. The *Fox* Court rejected the contention that the financial components of the pitch were inextricable from the sales pitch, reasoning that such noncommercial components no more converted the pitch into educational speech than would opening the Tupperware parties with prayers or the Pledge of Allegiance have converted the sales pitch into religious or political speech. *Id.* at 474–75. Moreover, mere links between advertising and current public debates will not convert advertising to noncommercial speech. *Id.* at 475 (citing *Cent. Hudson*, 447 U.S. at 563 n.5). Nevertheless, the intertwining of commercial speech and noncommercial speech may be material to the First Amendment analysis applied to the facts before the Court. *Fox*, 492 U.S. at 481–86 (remanding for consideration of both the commercial and noncommercial components of the speech to determine whether the regulation could be upheld as narrowly tailored and, if so, whether it was overbroad). *See also* Nike, 539 U.S. 654, 665 (Breyer, J., dissenting from denial of certiorari) (urging heightened scrutiny where the speech at issue differed from traditional commercial speech in its form, in its predominant noncommercial content and enforcement). Justice Breyer argued:

> The speech here is unlike speech—say, the words 'dolphin-safe tuna'—that commonly appears in more traditional advertising or labeling contexts. And it is unlike instances of speech where a communication's contribution to public debate is peripheral, not central . . . . At the same time, the regulatory regime at issue here differs from traditional speech regulation in its use of private attorneys general authorized to impose 'false advertising' liability even though they themselves have suffered no harm.

Id. at 678.

260. The ineluctable tie between the First Amendment and the integrity of the political process figures in a broad range of contexts. *See supra* notes 113 and 114 and accompanying text.

> selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. [261]

In the Court's view, the free flow of commercial information is essential to the efficient operation of free markets and ultimately the effective regulation of markets within a democratic system; hence, it must be protected under the First Amendment.

A. Commercial speech may be subject to certain forms of prior restraint under regulations that satisfy modified intermediate scrutiny tests.

Regulations that govern commercial speech differ from other government rules that protect First Amendment interests. Commercial speech regulations may be content-based, and even may go so far as to prohibit false or misleading speech or speech that proposes unlawful transactions.[262] Even though commercial speech regulations may be content-based, they are not subject to strict scrutiny, but are tested under intermediate scrutiny standards that "are substantially similar" to time, place, and manner analysis.[263]

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261. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) (internal citations omitted). *See also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 365 (2002). The connection between economic prosperity, well-regulated markets and political stability would have been immediately obvious to the 1976 Court, whose members, tempered by the Great Depression, doubtless knew too well the hardships and dangers of economic collapse exacerbated by unregulated investment markets.

262. *Cent. Hudson*, 447 U.S. at 566 (deciding that for commercial speech to be protected under the First Amendment, "it at least must concern lawful activity and not be misleading"). The emphasis on facilitating the flow of information needed to support the economy noted above at note 261 also provides a justification for regulations of commercial speech designed to prevent communications that interfere with market forces. "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 485 (1996); *See also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) ("[The State] may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of 'purely factual and uncontroversial information.'").

263. *Lorillard*, 533 U.S. at 554 (stating the framework for analyzing regulations of commercial speech is substantially similar to the tests for time, place, and manner restrictions) (citing *Fox*, 492 U.S. at 477); Glickman v. Wileman Brothers & Elliot, Inc., 521 U.S. 457, 492 n.6 (1997) (Souter, J. dissenting) ("Regulation of commercial speech necessarily turns on some assessment of content . . . yet that fact has never been thought sufficient to require a standard of

The less stringent restriction on government regulation of commercial speech reflects the Court's recognition that more exacting tests might impair the power to regulate commercial conduct. If the state is to protect consumers or to proscribe conduct that interferes with the market, it must have the power to regulate the speech uttered or published in the course of proposing or completing regulated commercial transactions.[264] Commercial speech is the means through which the commercial transaction is consummated; hence, commercial speech must be subject to regulation or the state would be unable to regulate the commercial transaction, and the whole area, speech and underlying transaction, is traditionally subject to government regulation.[265]

The framework for testing the constitutionality of commercial speech regulations has been well defined, since 1980 when the Court presented it in the *Central Hudson* case.[266] Commercial speech that concerns unlawful activity or is misleading is not protected under the First Amendment.[267] If the speech concerns

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strict scrutiny.") (citing *Va. Pharmacy Bd.*, 425 U.S. at 761). *See also Cent. Hudson*, 447 U.S. at 564 n.6:

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."

Id. (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977)).

264. *44 Liquormart*, 517 U.S. at 499 ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions.") (citing Friedman v. Rogers, 440 U.S. 1, 10, n. 9 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

265. *44 Liquormart*, 517 U.S. at 499 ("The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services") (citing with approval LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–15, p. 903 (2d ed. 1988). *See also Lorillard*, 533 U.S. at 554 (recognizing "the 'distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'") (quoting *Cent. Hudson,* 447 U.S. at 562).

266. *See Lorillard*, 533 U.S. at 554. The analysis contains four elements:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. (quoting *Cent. Hudson, 447 U.S.* at 566). Notwithstanding the reservations of several justices, the Court has rejected repeated efforts to persuade it to abandon this intermediate standard and to apply strict scrutiny. *Thompson*, 535 U.S. at 367–68; *Lorillard*, 533 U.S. at 554.

267. Nike, Inc. v. Kasky, 539 U.S. 654 (Stevens, J. concurring) (holding that the First Amendment, while offering protection to truthful commercial speech, does not protect false or misleading commercial speech) (citing *Central Hudson*, 447 U.S. at 563); Greater New Orleans Broad. Ass'n, Inc., v. United States, 527 U.S. 173, 183 (1999) (quoting *Cent. Hudson*, 447 U.S. at 566 ("For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading")). "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity

lawful activity and is not misleading, the regulations must be shown to satisfy each of three additional requirements. The asserted governmental interest must be substantial; the regulations must directly advance the governmental interest asserted; and they may not be more extensive than is necessary to serve that interest.[268] The government bears the burden of defending the regulation.[269] If the regulation bans altogether a range of truthful, non-misleading commercial speech, the regulations will be approached with skepticism.[270] Where regulations specifically target the content of truthful, non-misleading commercial speech, government must demonstrate that it could not "achieve its interests in a manner that does not restrict speech, or that restricts less speech."[271]

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itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973) (upholding a ban on sex-segregated employment advertising). Regulations that govern the marketing of items whose labels reveal that they "may be used for an illicit purpose" involving unlawful drug use do not embrace commercial speech, or, if they do, they propose an illegal transaction and such speech may be regulated or banned entirely. Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (discussing an ordinance requiring license to sell drug paraphernalia if sold in proximity to literature advocating illegal drug use and requiring licensees to record the product purchased and name and address of each person purchasing a regulated product and to make such records available for police inspection).

268. *See Lorillard*, 533 U.S. at 554; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 183; *Central Hudson*, 447 U.S. at 566.

269. *See 44 Liquormart*, 517 U.S. at 505; Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

270. *Thompson*, 535 U.S. at 375 ("[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth . . . . The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (quoting *44 Liquormart*, 517 U.S. at 503). In *Gilleo* the Court voiced similar misgivings about broad prohibitions of expressive commercial activities, even when these arose in the guise of content-neutral regulations:

> Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, handbills on the public streets, the door-to-door distribution of literature, and live entertainment. Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent--by eliminating a common means of speaking, such measures can suppress too much speech.

City of Ladue v. Gilleo, 510 U.S. 43, 55 (1994) (internal citations omitted). Hence, the Court's deep-rooted antipathy to interfering with the free flow of information would doubtless lead it to examine blanket bans using strict scrutiny. *See Gilleo*, 514 U.S. at 60 (O'Connor, J, concurring) (arguing that the Court should not have assumed that the blanket prohibition on signs on residential property was content-neutral, but rather should have examined the regulations at issue under the strict scrutiny standards applied to content-based rules).

271. *Thompson*, 535 U.S. at 371.

B. Measures to protect the integrity of markets, to regulate transactions that may be lawful for adults but harmful and unlawful for children, or to protect the effective operation of governmental institutions will satisfy the substantial government interest test for purposes of supporting commercial speech regulations.

The substantial government interest prong of the *Central Hudson* test may be satisfied by traditional police power considerations incidental to protecting the integrity of markets, such as, "the prevention of fraud, the prevention of crime, and the protection of residents' privacy."[272] The Court also recognizes the propriety of regulations that limit speech that encourages transactions that are lawful for adults but that may be harmful to children and unlawful where children are involved. [273]

Not all police power concerns will support commercial speech regulations. The "power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."[274]

Some police power purposes, such as solicitude for the sensibilities of listeners who disapprove of indecent, but lawful, speech, conflict so directly with First Amendment principles that they are unlikely to constitute a substantial government interest.[275] The substantial government interest test may be satisfied, nonetheless, by considerations that advance the mission of a government agency, such as "promoting an educational rather than commercial atmosphere on [campus], promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility."[276] In a more complex setting, the substantiality

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272. Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 164–65. Congressional judgments involving policies intended to advance the general welfare may also be deemed to reflect substantial government interests. *See, e.g.*, *Greater New Orleans Broad. Ass'n*, 527 U.S. at 185–86 (concluding that the federal government may have substantial interests in "(1) reducing the social costs associated with 'gambling' or 'casino gambling,' and (2) assisting States that 'restrict gambling' or 'prohibit casino gambling' within their own borders"); *Lorillard*, 533 U.S. at 555 (preventing the use of tobacco products by minors).

273. *Lorillard*, 533 U.S. at 555 ("[N]one of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors."). The Court also insists that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 564 ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.") (quoting Reno v. A.C.L.U., 521 U.S. at 844, 875 (1997) and citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983)). *See also* Butler v. Michigan, 352 U.S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.").

274. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 193.

275. *See* United States v. Playboy Entm't Group, 529 U.S. 803, 813–14 (2000) (concluding that where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails; government need not be indifferent to unwanted, indecent speech that comes into the home without parental consent, but the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative). *See also Thompson*, 535 U.S. at 374–75 ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.").

276. *Fox*, 492 U.S. at 475.

prong could be satisfied where the government purpose is tied to protecting the effectiveness and integrity of its decision-making processes.[277]

When applying the *Central Hudson* test, the Court will limit its review of the regulatory purpose to the asserted purposes for the regulation.[278] The Court will not uphold a commercial speech regulation based upon hypothetical governmental purposes that might have sufficed to establish a rational basis for the rule; *Central Hudson* analysis is more exacting than rational basis analysis.[279]

C. Measures that regulate commercial speech must address real harms and must alleviate them to a material degree.

The *Central Hudson* requirement that regulations "directly advance the governmental interest asserted" focuses upon the effectiveness of the means selected to advance the governmental purpose. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[280] Regulations that provide "only ineffective or remote support for the government's purpose," or that have little chance of advancing the purpose, cannot be upheld.[281] The Court does not require expansive empirical data to demonstrate the existence of a harm and the efficacy of the remedial measures. It has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"[282] By the same token, the failure of a regulation may not be a function of empirical deficiencies.[283] Regulations that accord different treatment to "speakers conveying virtually identical messages" are unlikely to be found to have "any meaningful relationship to the particular interest[s] asserted."[284]

D. Measures that regulate commercial speech may be no more extensive than is required to achieve their ends.

The final element in the *Central Hudson* analysis requires a reasonable fit

277. *Thompson*, 535 U.S. at 369.

278. *Id.* at 373–74.

279. *Id.*

280. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

281. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566 (2001) (citing *Edenfield*, 507 U.S. at 770 (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564) and *Greater New Orleans Broad. Ass'n*, 527 U.S. at 193)).

282. *Lorillard*, 533 U.S. at 555 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

283. The existence of harms or the efficacy of regulations may be challenged on empirical grounds, of course. *See Lorillard*, 533 U.S. at 556–61 (discussing studies that purport to document the link between teenage smoking and advertising practice, together with the efficacy of limiting exposure to advertising as a means to decrease the use of tobacco products).

284. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 193–95.

between the means and ends of the regulatory scheme.[285] This requirement complements the requirement that regulations directly advance the government purpose by "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it."[286] In recent years, the Court has come to differentiate between two species of commercial speech regulations when applying the final *Central Hudson* test. The Court distinguishes between regulations that serve to protect the integrity of markets, products, and market mechanisms, and regulations that seek to suppress certain messages or to limit their effectiveness. The Court takes the view that there is an essential continuum between the social mechanisms that the First Amendment protects in political, social, and intellectual spheres and the mechanisms that influence commercial speakers:

The commercial marketplace, like other spheres of our social, and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.[287]

Consequently, the Court is less exacting where regulations protect consumers

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285. *Lorillard*, 533 U.S. at 561 (citing *Cent. Hudson*, 447 U.S. at 569). The Court has explained the difference between an as applied narrow tailoring defense and an overbreadth defense as follows:

> The person invoking the commercial-speech narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Assn*., he "attacks the validity of [the statute] not facially, but as applied to his acts of solicitation," whereas the person invoking overbreadth "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him."

Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 468, 482–83 (internal citation omitted).

286. *Lorillard*, 533 U.S. at 556 (quoting *Greater New Orleans Broad. Ass'n*,, 527 U.S. at 188).

287. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 484, 503–04 (1996) (quoting Virginia Pharmacy Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)). *Cf.*, N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (holding that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all") (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). In *Sweezy*¸ Chief Justice Warren wrote:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.

Id.

from misleading, deceptive, or aggressive sales practices, or require the disclosure of beneficial consumer information and more exacting where a state prohibits or inhibits truthful, non-misleading messages about lawful transactions.[288]

1. Content-neutral measures regulating commercial speech and measures that protect the integrity of markets must be reasonable and proportionate to the ends served.

When addressing commercial speech regulations that protect the integrity of market processes or that operate without regard to content of speech, the Court specifically rejects a least restrictive means standard, but, instead, requires a reasonable fit "between the legislature's ends and the means chosen to accomplish those ends . . . means narrowly tailored to achieve the desired objective."[289] A government regulation can be considered narrowly tailored so long as the government interest "would be achieved less effectively absent the regulation."[290]

In general, this means the regulation need not be a perfect fit for the government's needs, but it must be reasonable and proportionate to the interests served; it cannot burden substantially more speech than necessary.[291] The Court has come to expect that regulations be "unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase."[292] Even though commercial speech regulations are not subject to the least restrictive means test, "if there are numerous and obvious less burdensome alternatives to the restriction on

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288. The Supreme Court has noted:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

44 Liquormart, 517 U.S. at 501. *See also Lorillard*, 533 U.S. at 565 (invalidating some, but not all, regulations that included broad advertising bans and limitations on various tobacco products and that failed to differentiate among the distinctive practices involving advertising for different tobacco products) ("[A] speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products."); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 (1981) ("A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.").

289. *Lorillard*, 533 U.S. at 556 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995) (quoting *Fox*, 492 U.S. at 480)).

290. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

291. *Id.* at 800; *Fox*, 492 U.S. at 480.

292. *Lorillard*, 533 U.S. at 570 (upholding regulations on sales practices that would provide minors with access to tobacco products, e.g., unattended displays or providing product samples: "The means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.").

commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[293]

There are matters of degree here. Provisions that reach marginally beyond what would adequately serve the governmental interest will ordinarily be upheld.[294] Where a regulation provides only minimal relief from the evils that government seeks to avoid, the presence of "numerous and obvious less burdensome alternatives" to the chosen means, will support a finding that the fit between ends and means is unreasonable and the regulation invalid.[295]

2. Content-based measures regulating lawful, non-misleading commercial speech may be supported if government objectives can only be achieved by regulating speech.

When reviewing content-based regulations that do not address market integrity concerns, the Court will expect to find evidence that the regulation protects the interests of commercial speakers in conveying truthful information about their products, sales terms and locations, and the interests of consumers in receiving such information.[296]

Regulations that close access to otherwise available advertising venues based upon content or that deny the use of advertising means that are customarily used to market like products are unlikely to be found to be narrowly tailored.[297] Regulations that fail to recognize market differences based upon geographical or demographic circumstances or upon the characteristics or uses of distinct, though

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293. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, n.13 (1993).

294. The Court has gone so far as to suggest:

> None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding "far less restrictive and more precise means."

Fox, 492 U.S. at 479.

295. The *Discovery Network* Court observed that the benefit "derived from the removal of 62 newsracks while about 1,500–2,000 remain in place was considered 'minute' by the District Court and 'paltry' by the Court of Appeals." 507 U.S. at 417–18. The Court concluded that the benefit was too attenuated to justify "the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks," and held that such a de minimis benefit could not constitute a reasonable "'fit' between the city's goal and its method of achieving it." *Id*. at 618.

296. *Lorillard*, 533 U.S. at 564–66.

297. In *Lorillard*, the Court considered a complement of Massachusetts rules designed to reduce smoking among children by restricting their exposure to tobacco advertising. It struck down a Massachusetts ban on outdoor advertising of smokeless tobacco and cigar advertising within one-thousand feet of schools or playgrounds, in part, because the prohibition would have prevented "advertising in 87% to 91% of Boston, Worcester and Springfield, Massachusetts." *Id.* at 561–62. The Court found no basis for a ban on outdoor oral communications involving the product, as though a merchant would only be barred from answering consumer questions about product availability if the conversation occurred out of doors. *Id.* at 563. It noted, too, that because the ban reached indoor advertising that was visible from the street, it also interfered with merchant's ability to advertise to passers-by the availability of tobacco products. *Id*. at 565.

related, products are unlikely to be found to be narrowly tailored.[298] Regulations that embody unreasonable assumptions about potential consumers are unlikely to be found to be narrowly tailored.[299]

Where non-speech related regulations could be effective to achieve its purposes, government may not prefer regulations that restrict commercial speech, "regulating speech must be a last—not first—resort."[300] In sum, where regulations reach the content of lawful, non-misleading commercial speech, "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[301]

E. College or university regulations of private commercial speech should be drafted to meet the standards applied to content-neutral regulations of commercial expression.

Since commercial speech regulations are tested under intermediate scrutiny standards that resemble time, place, and manner analysis,[302] college or university regulations addressing commercial speech should be framed and administered in ways that resemble the practices discussed above in connection with regulations of commercial endeavors involving expressive products or activities.[303] A principal difference between the regulation of commercial speech and the regulation of commercial endeavors involving expressive products or activities will lie in the additional latitude to proscribe commercial speech based on content that is false or misleading or that proposes an illegal transaction. Many universities may wish to consider such authority to proscribe advertising related to the sale of term papers, or similar products designed to enable academic fraud, or advertising related to the sale of illegal drugs or comparable unlawful goods or services.[304]

Banning news-media delivered advertising for goods or services that may be lawfully acquired or used by some college or university students or staff, but that are nonetheless disruptive to the institution, present serious difficulties. In *Pitt News v. Pappert*,[305] the Third Circuit struck down a Pennsylvania statute that banned publication of alcohol advertisements in student papers throughout the

298. *Id.* at 563–65 (faulting the Massachusetts' rule for failing to reflect differences in rural and urban environments or to reflect differences in markets for smokeless tobacco products and cigars).

299. *Id.* at 566 (rejecting a rule that required indoor tobacco products advertisements to be five feet above floor level, since not all children were less than five feet tall and since those that were less than five feet tall could still see advertising placed above that height).

300. Thompson v. W. States Med. Ctr., 535 U.S. 357, 371–73 (2002).

301. *Id.* at 371.

302. *Lorillard*, 533 U.S. at 554; Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

303. *See supra* notes 235–254 and accompanying text.

304. *See supra* note 89 for authority relating to the sale of term papers. The proscription of advertisements for illegal drugs, specifically permitted under *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) (holding that speech proposing an illegal transaction may be regulated or banned entirely) would also further institutional obligations under the Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2000), and the Drug and Alcohol Abuse Prevention regulations. 34 C.F.R. pt. 86 (2005).

305. 379 F.3d 96, 107 (3d Cir. 2004).

state. The Court concluded that such an on-campus advertising ban could not be shown to combat "underage or abusive drinking 'to a material degree,' or [to provide] anything more than 'ineffective or remote support for the government's purposes,'" given the multiple media sources for precisely such advertising that were readily available on campus.[306] Educational institutions, no less than states, would have trouble enforcing such blanket bans on news-media advertising for lawful activities.

The difficulties that colleges and universities may encounter in justifying a prohibition of news-media advertising for lawful, though disruptive, activities do not imply that colleges and universities have no power to regulate other forms of advertising for activities that they have prohibited on campus.[307] Although prohibitions on news-media based advertising may provide only ineffective or remote support for the institution's purposes, prohibitions on the use of other forms of media based on campus or distributed in conjunction with campus activities may still be sufficiently effective to pass constitutional muster. Educational institutions that receive federal funds, for example, have substantial interests in complying with their obligation under the Drug-Free Schools and Communities Act of 1989 to prohibit the "unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on the institution's property or as part of any of the institution's activities."[308] Colleges and universities have a specific duty under this spending power legislation to prohibit unlawful alcohol distribution by students on campus. A prohibition on the use of campus facilities, such as bulletin boards or sidewalks, or institutional activities to advertise such prohibited transactions would appear to be narrowly tailored to achieve that substantial end, even if parallel prohibition could not be extended with like degrees of effectiveness to news-media borne advertising.

College and university regulators should be sensitive to the possibility that one medium or another, or one sales tactic or another, may present unique challenges in different institutional settings. College and university regulations may properly reflect such differences. Considerations that were material in conjunctions with the expressive commercial endeavors themselves may also be material in conjunction with commercial speech. In various settings colleges and universities may wish, for example, to consider noise, obstruction of pedestrian traffic, or abuse of sales prospects in framing regulations that affect the manner in which

306. *Id.* at 107 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995); Edenfield v. Fane, 507 U.S. 761, 770 (1993) (quoting Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 564 (1980)). The *Pitt News* Court held:

> Even if Pitt students do not see alcoholic beverage ads in *The Pitt News*, they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News.*

Id.

307. *Lorillard*, 533 U.S. at 534 (discussing regulations of outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.)

308. 20 U.S.C. § 1011i (a)(1)(A) (2000).

sales are proposed or conducted.[309]

As with regulations of commercial endeavors involving expressive products or activities, care should be exercised to identify the specific aspects of a kind or medium of commercial speech that could interfere with the normal operation of the college or university or otherwise adversely affect its interests. Where there are reasonable grounds to believe that the interests affected would be regarded as substantial institutional interests, close attention should be given to assuring that the means chosen to protect those interests are effective and leave ample alternative avenues, even if these are located off campus, to disseminate the advertising or to conduct the sales.[310] To the extent that regulations can be targeted at content-neutral secondary effects of particular media or means, the enforceability of the regulations can be enhanced. To the extent that the regulations necessarily consider content, the regulations should focus closely upon the particular media or means that adversely affect the substantial institutional interest.

Once again, creation of administrative procedures to permit the clarification of the regulations, assure consistent application to like cases, constrain decision-makers by requiring them to provide rule-based reasons for their decisions or for review of their decisions, can provide some degree of protection in the face of vagueness or prior restraint challenges.[311]

IV. COLLEGES AND UNIVERSITIES SHOULD OPERATE INSTITUTIONAL ADVERTISING VENUES AS NON-PUBLIC FORA MANAGED TO ENHANCE THE EFFECTIVENESS OF THE FACILITIES, SERVICES, OR PROGRAMS WHERE THE ADVERTISING VENUES ARE SITUATED, TO MAXIMIZE ADVERTISING REVENUES OR TO ACHIEVE BOTH PURPOSES.

A. Courts use forum analysis to assess the constitutionality of regulations that govern access to publicly owned advertising venues.

Access to college and university advertising venues involves access to institutional properties or programs; hence, the special rules of forum analysis play controlling roles in developing policies to govern access to college or university

309. *Cf.*, ISKCON v. Lee, 505 U.S. 672, 683–85 (1992) (discussing the interference of pedestrian traffic, abusive sales techniques, and fraud); Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (avoiding intrusion of noise on other users of public grounds and facilities); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978) (holding that face-to-face solicitation is "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud").

310. Friends of the Vietnam Veterans Mem'l v. Kennedy, 116 F.3d 495, 497 (D.C. Cir. 1997) (finding alternative avenues where expressive t-shirts could be given away or sold near the National Mall); ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 958 (D.C. Cir. 1995) (finding alternative avenues where ban on sales did not prevent religious groups from disseminating their messages on the National Mall through chanting, speaking or donating its paraphernalia).

311. *Cf.* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 493 (1982) (noting, in passing, that Flipside neglected to clarify the meaning of regulations that it subsequently challenged on overbreadth and vagueness grounds).

advertising venues.[312] The general public forum classifications and principles discussed above apply to government owned advertising venues.[313] The Court distinguishes among three types of forum, the traditional public forum, the public forum by designation, and the nonpublic forum.[314] The categorization of an

312. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (holding that advertising space on municipal buses constituted a nonpublic forum); Ridley v. Massachusetts Bay Transp. Authority, 390 F.3d 65 (1st Cir. 2004) (holding that advertising spaces on transportation system constitute a limited or nonpublic forum); Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275, 1278–79 (holding that advertising space on bus benches constituted a nonpublic forum); Cogswell v. City of Seattle, 347 F.3d 809 (9th Cir. 2003) (holding that a voter's guide constituted a nonpublic forum); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834 (6th Cir. 2000)) (holding that a municipality that allowed commercial advertisers to link to its website could not refuse to link a tabloid and internet publisher who sought to expose municipal wrongdoing); Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) (holding that state could not constitutionally prohibit Klan participation in Missouri's Adopt-A-Highway program); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000) (declining to apply forum analysis to acceptance of donation and on-air recognition as a public broadcasting sponsor, which are properly considered governmental speech); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (holding that high school bulletin boards served as an expressive vehicle for the school board's policy of "Educating for Diversity," and thus constituted government speech, not a forum); DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958 (9th Cir. 1999) (holding that commercial advertising on baseball diamond outfield fence constituted a nonpublic forum); United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 364–65 (6th Cir.1998) (holding that an attempt to regulate advertising as nonpublic forum state agency that permitted advertising on public policy issues, including pro-union advertising, barred from rejecting ad that showed union members protesting outside a meeting of management side labor attorneys); Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998) (stating that municipality may restrict bus advertising to commercial transactions and may reject an antiabortion advertisement that had been re-worked to appear in the guise of an invitation to purchase an antiabortion bumper sticker); Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Auth., 148 F.3d 242, 251 (3d Cir. 1998) (holding that a state agency may not reject antiabortion advertising in subway system based upon alleged inaccuracies where it has accepted public service advertising relating to abortion and family planning); N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 128 (2d Cir. 1998) (holding that a public corporation owning buses in New York rejected advertising that referred to Mayor Giuliani's first name on the authority of a criminal statute that prohibited the use of individuals' names without their permission); Families Achieving Independence and Respect v. Neb. Dep't of Soc. Services, 111 F.3d 1408 (8th Cir. 1997) (holding that bulletin boards in welfare office are a nonpublic forum); Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650, 656 (2d Cir. 1995) (holding that a billboard at Penn Station was a nonpublic forum and could be closed to political advertisements); Air Line Pilots Ass'n, Int'l v. Dept. of Aviation, 45 F.3d 1144 (7th Cir.1995) (holding that access to display cases in O'Hare Airport terminal could be restricted); Nat'l A-1 Advertising v. Network Solutions, Inc., 121 F. Supp. 2d 156 (D.N.H. 2000) (holding that second level domain names are not a forum); Henderson v. Stadler, 112 F. Supp. 2d 589 (E.D. La. 2000) (holding that vanity license plates were a forum).

313. *See supra*, notes 9–29 and accompanying text.

314. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 668, 677–78 (1998). *See also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); United States v. Kokinda, 497 U.S. 720, 726–27 (1990); *ISKCON*, 505 U.S. at 678–79; Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, 473 U.S. 788, 800, 803 (1985); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45–46 (1983); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981). The forum doctrine has been applied, or reviewed, in many contexts, not all of which involve access to public property. Cases such as *Locke v. Davey*, 540 U.S. 712, 721 n. 3 (2004); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 230 (2000); *National Endowment*

advertising venue as one kind of forum or another dictates the level of scrutiny that is applied to government actions to exclude would-be advertisers from the venue.[315] In essence, the Court applies strict scrutiny to government policies that exclude speakers from traditional public fora, from fora by designation that have been opened to the public at large, or from fora by designation that have been opened to limited classes of speakers or for limited topics where the speakers or their topics number among the speakers or topics that are permitted in the forum; all subject to exclusions permitted pursuant to valid time, place, and manner regulations.[316] The Court employs an intermediate scrutiny standard of review when examining content-neutral policies that restrict access to fora to designated speakers or for the discussion of limited topics.[317] The Court employs a variant on rational basis scrutiny when considering the exclusion of speakers from nonpublic fora.[318] Irrespective of the nature of the forum, government actions to exclude

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for the Arts v. Finley, 524 U. S. 569, 585 (1998); and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), all involved the question whether governmental funding problems should be analyzed using forum analysis.

315. *See supra*, notes 13–22.

316. In *Perry*, 460 U.S. at 45, the Court said:

> For the [s]tate 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[s]tate 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.

Id. (internal citation omitted). *See Ark. Educ.*, 523 U.S. at 677.

317. In *Good News Club*, the Court said:

> When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum."

Id. at 106–07 (internal citations omitted).

318. In *Cornelius*, the Court held:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . [A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created.

473 U.S. at 806 (internal citations omitted). *See Ark. Educ.*, 523 U.S. at 677–78; *Perry*, 460 U.S. at 45–46, 49.

The Court regards the less exacting treatment that it accords government regulations of nonpublic fora as an inducement to government to open property to expressive activities:

> By recognizing the distinction [among public and nonpublic fora], we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Ark. Educ., 523 U.S. at 680.

speakers based upon the content of their speech are subject to strict scrutiny, and government actions to exclude speakers based upon the viewpoint that they express are invalid per se.[319]

B. Advertising venues are unlikely to be classified as traditional public fora, and they are unlikely to be classified as public fora by designation absent a specific action to make them operate as such.

Advertising venues simply do not have the characteristics that would justify their classification as traditional public fora and are unlikely to be subject to the regulations governing such places. A traditional public forum has the physical characteristics of a public thoroughfare,[320] has the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct,[321] and by history and tradition has been used for expressive conduct.[322] The physical characteristics of electronic message centers, scoreboards, billboards or advertising placards on benches or buses have little in common with the physical characteristics of thoroughfares, sidewalks and parklands that are the quintessential public fora.[323] Hence, the critical issues in classifying an advertising venue forum generally revolve around the question whether a government agency has opened the venue to the public, and if so, has the

319. *Perry*, 460 U.S. at 46 ("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 regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."); *Cornelius*, 473 U.S. at 806; *Ark. Educ.*, 523 U.S. at 677–78; *Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993). Efforts to suppress speech are per se suspect and subject to strict scrutiny. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434, 441 (2002) (holding that content-based regulations would be considered presumptively invalid and subject to strict scrutiny). *See supra* notes 106–117 and accompanying text.

320. Warren v. Fairfax County., 196 F.3d 186, 191 (4th Cir. 1999) (en banc) (citing United States v. Kokinda, 497 U.S. 720, 727 (1990)). But note: "mere physical characteristics of the property cannot dictate forum analysis." *Kokinda*, 497 U.S. at 727. Where public property that has physical characteristics of traditional public forums serves special uses, it may not be subject to rules governing traditional public forums. *Id.* (holding that a postal sidewalk constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office does not have the characteristics of public sidewalks traditionally open to expressive activity); Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that the business of a military installation is to train soldiers, not to provide a public forum).

321. *Warren*, 196 F.3d at 191 (citing *Ark. Educ.*, 523 U.S. at 678).

322. *Id.* (citing *Perry*, 460 U.S. at 45) (stating that traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate").

323. Bulletin boards or similar structures where all and sundry may post notices may be thought to present a closer call if they are generally open to the public and postings are unregulated, but bulletin boards are not per se fora and are typically not held to be traditional fora. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 130 n.6 (1981) (holding that a bulletin board in a cafeteria on a military post was not a public forum merely because it was used for speech); Desyllas v. Bernstine, 351 F.3d 934, 943 (9th Cir. 2003) (stating that only campus bulletin boards designated as public fora under university policy were free speech fora); Giebel v. Sylvester, 244 F.3d 1182, 1185 (9th Cir. 2001) (holding that university policy opened bulletin board to members of the public at large).

venue been opened only to certain advertisers or only to certain classifications of advertisements.

Whether an advertising venue operates as a nonpublic forum or as a public forum by designation hinges upon the intention of the government agency that operates the venue.[324] The Court assumes that government property has intended purposes independent from communication and that government dedicates the property to those purposes. [325] Properties that government uses to conduct its functions, including the provision of public services, are ordinarily considered to be nonpublic fora or not fora at all.[326] Given this assumption, the touchstone question in determining how to classify an advertising venue becomes whether government has decided to devote the property to the additional purposes of providing a forum for communication of private views.

Intention is the key. The mere fact that a venue is used for the communication of ideas does not make it a public forum.[327] Government may permit expressive activities in nonpublic fora without thereby converting them into designated public fora.[328] Government does not create a public forum by designation by inaction or

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324. Even if advertising is handled by third party contractors, their practices may be subject to constitutional scrutiny where governmental authority dominates an activity. In *Lehman*, a contractor operated the advertising venues. Lehman v. City of Shaker Heights, 418 U.S. 298, 309–10 (1974) (holding that although advertising space was available and Lehman's proposed advertisement met Metromedia's copy standards, rental space was nevertheless denied Lehman on the sole ground that Metromedia's contract with the city forbids acceptance of political advertising). *See also* Air Line Pilots Ass'n Int'l v. Dep't of Aviation of Chi., 45 F.3d 1144, 1149–50 (7th Cir. 1995) (holding that state action exists if the government has exercised coercive power or has provided significant encouragement, either overt or covert, in effecting the challenged action) (finding state action where a municipality had both the express authority and the stated desire to influence the content of the display case).

325. *Warren*, 196 F.3d at 193 (holding that the forum decisions assume nonpublic government property has been dedicated to some objective use or purpose—i.e., a use or purpose independent of any speech restrictions). These assumptions undergird the rationale, noted above at notes 11 and 37–39, that the Court advanced to ground forum analysis on the principle that "the Government, '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,'" and it developed "a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985) (quoting *Greer*, 424 U.S. at 836).

326. *Ark. Educ.*, 523 U.S. at 677 (describing traditional and designated public fora, then noting that "[o]ther government properties are either nonpublic fora or not fora at all."); ISKCON v. Lee, 505 U.S. 672, 678–79 (1992) (describing traditional and designated public fora, then noting that "[f]inally, there is all remaining public property.").

327. *Perry*, 460 U.S. 49, n.9 ("Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.") (quoting *Lehman*, 418 U.S. at 304).

328. *Ark. Educ.*, 523 U.S. 666 (examining a candidate forum on public television limited to the major party candidates or any other candidate who had strong popular support); *Cornelius*, 473 U.S. 788 (examining approved charities soliciting contributions in federal workplaces); *Perry*, 460 U.S. 37 (granting to bargaining representative access to school internal mailboxes); Jones v. N.C. Prisoners' Union, 433 U.S. 119 (1977) (discussing Jaycees and Alcoholics Anonymous speakers and activities in prison); *Lehman*, 418 U.S. 298 (discussing advertising

by permitting limited discourse.[329] Government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it.[330] A public forum by designation may be created only when government purposively opens a nontraditional public forum for public discourse.[331] It must intend to make the property generally available for expressive purposes to a class of speakers.[332] Actual practice may establish such an intention where government grants permission as a matter of course to all who seek access to its property for expressive purposes.[333]

C. Policies that regulate advertising venues to maximize revenues are unlikely to be deemed to create public fora.

To distinguish between government created public fora and nonpublic fora that government has opened to limited expression, attention must focus on the policies that govern access to government property.

In *Perry*, for example, the Court held a school district's internal mail system was not a designated public forum even though selected speakers were able to gain access to it.[334] The basis for the holding in *Perry* was explained by the Court in *Cornelius*: "In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to

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space on municipal buses); *Greer*, 424 U.S. 828 (discussing invited speakers of various sorts on a military base). A forum may be a designated public forum as to certain groups yet a nonpublic forum as to others. *Perry*, 460 U.S. at 48 (stating that while the school mail facilities might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to a teacher union, which is concerned with the terms and conditions of teacher employment); Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Auth., 148 F.3d 242, 256 (3d Cir. 1998).

329. *Greer*, 424 U.S. at 838 n.10 ("The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever."); *Cornelius*, 473 U.S. at 802.

330. *Ark. Educ.* 523 U.S. at 679.

331. *Cornelius*, 473 U.S. at 802.

332. *Ark. Educ.* 523 U.S. at 678–79 (citing Widmar v. Vincent, 454 U.S. 263, 264 (1981) and *Perry*, 460 U.S. at 45). Merely allowing public access to a venue does not suffice. It is a mistake to conclude "that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer*, 424 U.S. at 836. The First Amendment does not mean "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Id.* (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

333. In *Perry*, the Court found it material that there was no evidence that, in actual practice, the school district granted access to its internal mail system "as a matter of course to all who seek to distribute material." *Perry*, 460 U.S. at 47.

334. *Perry*, 460 U.S. at 47.

communicate with teachers was granted."[335]

And in *Cornelius* itself, the Court held the Combined Federal Campaign ("CFC") charity drive was not a designated public forum because "[t]he Government's consistent policy ha[d] been to limit participation in the CFC to 'appropriate' [i.e., charitable rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials."[336]

Policies that create rights of access to government property for the public at large create public fora that have all the attributes of traditional public fora.[337] Policies that create rights of access to all members of a class, as did the university policies at issue in *Widmar* that afforded all students access to facilities, or that create rights of access to discuss certain topics, as was the case in *City of Madison Joint School District No. 8 v. Wisconsin Public Employment Relations Commission*,[338] which assured public access to discuss school board business, create fora that operate as public fora open to all who fall within the designated categories of persons having rights of access or who wish to address the topics for which the forum has been opened.[339] Provisions for "general access" to a venue indicate that "the property is a designated public forum," while provision for "'selective access' . . . indicates [that] the property is a nonpublic forum."[340]

The Court will not find that a public forum has been created in the face of clear evidence of a contrary intent.[341] "In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum."[342]

The Court has specifically acknowledged that these principles weigh against holding governmental advertising venues to be public fora. It characterized *Lehman* as resting on a finding "that the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum."[343] The Court recognizes that when government opens venues to

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335. *Cornelius*, 473 U.S. at 803.

336. *Id.* at 804; *Ark. Educ.* 523 U.S. at 679.

337. Ward v. Rock Against Racism, 491 U.S. 781, 790–791 (1989) (stating that the municipal "bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment"); S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (holding that leased municipal theater is a public forum); Heffron v. ISKCON, 452 U.S. 640 (1981) (holding that state fair is a public forum); Edwards v. South Carolina, 372 U.S. 229 (1963) (holding that grounds of state capitol are a traditional public forum).

338. 429 U.S. 167 (1976).

339. *Perry*, 460 U.S. at 46, n. 7 (citing *Widmar*, 454 U.S. 263; *Madison Joint Sch. Dist.*, 429 U.S. 167).

340. *Ark. Educ.*, 523 U.S. at 679 (quoting *Cornelius*, 473 U.S. at 803, 805).

341. *Cornelius*, 473 U.S. at 803–04 (noting that the evidence in *Lehman* demonstrated that Shaker Heights intended to limit access to the advertising spaces on municipal buses, since it had done so for twenty-six years and had written requirements for limitations into its management contract).

342. *Cornelius*, 473 U.S. at 804.

343. *Id.*

advertising it is engaged in commerce and that, to manage the venture successfully, government must have substantially the same latitude in making business decisions that is accorded to private entities:

> [T]he city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.[344]

The Court concluded that reasonable choices might include preference of steady revenue from long-term commercial advertisements over short-term political candidacy or issue-oriented advertisements, rejection of classes of advertising that might impose political propaganda on riders, avoidance of potential favoritism charges that would arise inevitably as politicians vied for access to limited advertising space.[345] It characterized such decisions as being as inherent in the operation of the venture as those involved in setting fare rates or deciding on the location of routes and bus stops and concluded that "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation."[346]

In essence, as *Cornelius* recognized, the *Lehman* Court concluded that the inherent communicativeness of advertising did not justify the conclusion that Shaker Heights opened the buses to advertising in order to create a forum for the free expression of private speech. The municipal purpose for permitting advertising on its buses was rather to generate revenues for the government. Hence, the advertising facilities, despite their expressive character, did not constitute a public forum at all and were subject only to a rational basis type scrutiny.[347]

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344. Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974). *See also* ISKCON v. Lee, 505 U.S. 672, 682 (1992) (holding that as commercial enterprises, airports must provide services attractive to the marketplace; in light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting the free exchange of ideas). *Lehman* arose when a candidate for the Ohio House of Representatives sought to purchase car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. *Lehman*, 418 U.S. at 299–300. The contractor that operated the advertising spaces on the municipal transit rejected the ad pursuant to its contract with the city that prohibited the placement of political advertising on transit cars. *Id*.

345. *Lehman*, 418 U.S. at 304.

346. *Id.*

347. The *Lehman* Court wrote:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Id.

D. Regulations that permit routine access to advertising venues by all advertisers are likely to be deemed to be public fora by designation, irrespective of any policy declarations to the contrary.

Government agencies commonly regard advertising venues in their revenue-producing ventures as nonpublic fora, but this characterization never ends the matter.[348] Although, following the logic of *Lehman*, the starting point for the forum analysis of government advertising venues is that they may be nonpublic fora, the analysis cannot end with the simple review of substantive provisions of policy documents. The procedures and practices through which the policies are administered must also be heeded closely, for if a government grants access to a venue as a matter of course, its practice will not confirm that its stated intent is its true intent.[349] Any approach that ignored policy administration would permit government to "circumvent what in practice amounts to open access simply by declaring its 'intent' to designate its property a nonpublic forum in order to enable itself to suppress disfavored speech."[350] "What matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted."[351] Occasional lapses in implementing a policy will

348. *See supra* note 312 and accompanying text.

349. The Court "has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998). The Court's conclusions about the intention of Shaker Heights was grounded on the fact that for twenty-six years, it refused to accept political or public issue advertising. *Lehman*, 418 U.S. at 300–01. In *Perry*, the Court found it material that there was no evidence that, in actual practice the school district granted access to its internal mail system "as a matter of course to all who seek to distribute material." Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 47 (1983).

The combination of "significant substantive content limitations and procedural limitations" consistently administered negates the affirmative intent "to create a public forum." Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004). Nonetheless, procedural limitations are not essential to the administration of a nonpublic forum. In *Griffen v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1328 (Fed. Cir. 2002), the Court said:

> To the extent its concerns are not subsumed into the unbridled discretion analysis, the procedural safeguards requirement provides little or no independent basis for striking down a regulation in a nonpublic forum. While some courts identify the lack of procedural safeguards as an added liability of schemes they condemn for unbridled discretion, we are aware of no case demanding procedural safeguards as an independent requirement in a nonpublic forum.

Id. The application of the purported standards and procedures is the critical factor in determining whether a forum that appears on paper to be nonpublic forum operates as one in practice. The requirements for substantive content standards are discussed below in Part IV.E.

350. United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Auth., 163 F.3d 341, 353 (6th Cir. 1998); *Ridley*, 390 F.3d at 102 (Torruella, J., concurring in part and dissenting in part) (writing that such a self-serving approach would allow the government to simply declare property a non-public forum whenever conflicts arose) (citing ISKCON v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring)); Air Line Pilots Ass'n v. Dept. of Aviation of Chi., 45 F.3d 1144, 1153 (7th Cir. 1995) (holding that government's stated policy, without more, is not dispositive with respect to the government's intent in a given forum).

351. The Court in *Hopper v. City of Pasco* wrote:

> [C]onsistency in application is the hallmark of any policy designed to preserve the non-

not render the administration of a policy so inconsistent as to defeat the claim that an agency did not intend to establish a public forum.[352] Nevertheless, acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government's intent to create an open forum.[353] The timing of policy development may also be relevant. Policies adopted after a request has been made for access to a forum may be reviewed with especial attention.[354]

> public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted.

241 F.3d 1067, 1076 (9th Cir. 2001). *See also* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F. 3d 958, 966 (9th Cir. 1999) (holding that where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public forums); Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Auth., 148 F.3d 242, 252 (3d Cir. 1998) (finding city's practice of permitting virtually unlimited access to forum created a designated public forum); *United Food & Commercial Workers Union*, 163 F.3d at 353 (holding that courts must closely examine whether in practice a public entity has consistently enforced its written policy in order to determine whether its stated policy represents its actual policy); *Air Line Pilots Ass'n*, 45 F.3d at 1154 (holding that actual policy—as gleaned from the consistent practice with regard to various speakers—shows whether a state intended to create a designated public forum); Grace Bible Fellowship, Inc. v. Me. Sch. Admin. Dist. No. 5, 941 F.2d 45, 47 (1st Cir.1991) (finding that in determining whether the government has designated public property a public forum, "actual practice speaks louder than words").

352. *Ridley*, 390 F.3d at 78 (noting that one or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum) ("By consistently limiting advertisements it saw as in violation of its policy, even if doing so imperfectly, the MBTA evidenced its intent not to create a designated public forum."); New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 22 (1st Cir. 2002) (finding no government intent to create a designated forum exists "even if [government's] policy of restricted access is erratically enforced").

353. *United Food & Commercial Workers Union*, 163 F.3d at 355; *Christ's Bride Ministries*, 148 F.3d at 252.

354. Longstanding policy and practice supports the finding that a policy is thought to be related to recognized purposes of the forum. *See supra* notes 335, 340 and 348 and accompanying text. An agency that receives a request to place an advertisement and subsequently adopts a policy that would require the rejection of the advertisement invites a challenge to its motives. Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 845–46 (6th Cir. 2000) (holding that although the lack of an established policy in an area of evolving technology is not fatal, the city's adoption of a new policy, which was at least stimulated by an advertiser request, and which was then used to deny the requested link to the city's Web page, and which, in some respects, appears less clearly relevant to the purpose of the city's Web site, presents a question of fact whether the action reflected viewpoint discrimination). *But see* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999) (holding that government has an inherent right to control its property, which includes the right to close a previously open forum so closing a forum after a request to post a religious message has been received in order to avoid potential Establishment Clause problems is not viewpoint discrimination); Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998) (upholding standards adopted after a request to place pro-life advertisements on city buses was received and then used to deny request).

E. Retention of a right to review advertising will weigh in favor of treating an advertising venue as a nonpublic forum, but absent standard-based decision-making to evaluate judgments about acceptable advertising, decisions will be closely scrutinized to assure that they do not reflect hostility towards excluded messages.

Retaining the right to review advertising will support a finding that government operates the venue as a nonpublic forum where the review is conducted pursuant to clear standards that have been designed to prevent interference with the forum's designated purpose.[355] Absent standard-driven decision-making, courts will scrutinize governmental action closely to assure that it does not reflect hostility toward the message of those seeking access to a forum.[356] Absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship.[357] "[T]he more subjective the standard used, the more likely that the category will not meet the requirements of the first amendment."[358] Where advertising occurs in a larger business setting and where advertising practices may reasonably be thought to affect that business, government standards that attempt to assure that advertisements will not diminish the customer base in the larger business may be reasonable, notwithstanding some reliance on concepts such as "prevailing community standards" to differentiate among proposed advertisements.[359]

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355. *Ridley*, 390 F.3d at 77 (holding that significant content limitations and procedural limitations on access weigh against finding an advertising venue to be a public forum); *United Food & Commercial Workers Union.*, 163 F.3d at 352 (holding that in determining government intent to operate advertising as a nonpublic forum, courts should look, in part, "to whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose"); *But see Christ's Bride Ministries*, 148 F.3d at 251 (holding that the fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum) (finding that reservation of the right to reject any ad for any reason does not conclusively show that the governmental entity intended to keep the forum closed).

356. *Cf. Christ's Bride Ministries*, 148 F.3d at 251 (stating that courts must scrutinize more closely the speech that the government bans under such a protean standard).

357. Hopper v. City of Pasco, 241 F.3d 1067, 1077 (9th Cir. 2001) (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 244–45 (1990) (holding that generalized definition of permissible content poses risk of arbitrary application); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 845–46 (Tenn. 2000) ("[B]road discretion [given] to city officials [raises the] possibility of discriminatory application of the policy based on viewpoint").

358. *Hopper*, 241 F.3d at 1077 (citing Cinevision Corp. v. City of Burbank, 745 F.2d 560, 575 (9th Cir.1984); *Christ's Bride Ministries*, 148 F.3d at 251 (holding that suppression of speech under defective standard requires closer scrutiny)).

359. *Cf.* Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 95 (Mass. 2004):

> The MBTA's regulatory guidelines, which . . . reject any advertisement that "demeans or disparages an individual or group of individuals" and which use "prevailing community standards" to determine whether advertisements fall afoul of this standard, are not unreasonably vague or overbroad, given the nature of the MBTA's advertising program and its chief purpose of raising revenue without losing ridership. Some kinds of advertisements that will be consistent with this purpose may be difficult to pinpoint with exact precision; some degree of interpretation, and some reliance on concepts like 'prevailing community standards,' is inevitable.

In addition to seeking clarity in the standards that govern access to advertising venues, courts will inquire whether the standards relate to the venues' purpose.[360] Courts scrutinize government-imposed restriction on access to advertising venues carefully to assure themselves that the restrictions are truly part of "the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property."[361] Where there is only an attenuated relationship between a rule governing the venue and the governmental purposes for maintaining the venue, courts may infer an intent to create a public forum.[362]

The policy judgments inscribed in the standards need only be reasonable; they need not be the most reasonable or the only reasonable limitations.[363] Assuming that a policy is itself reasonable, the reasonableness of excluding a particular advertisement requires a determination of whether the proposed conduct would "actually interfere" with the forum's stated purposes, as set forth in the advertising policy.[364] It may be reasonable to exclude an advertisement on a public policy

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Id.

360. The Court assumes a close connection between the purposes that the government has in operating a facility and the effects that proscribed expressive conduct might have on the operation of the facility. *Cf.* ISKCON v. Lee, 505 U.S. 672, 683–85 (1992) (upholding a ban on solicitation in airports after discussing in detail how solicitation in airports might interfere with the flow of travelers through such facilities, expose harried or hurried travelers to duress or deception and permit wrongdoers to avoid detection since travelers would be unlikely to report misconduct); Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805 (1985) ("[Consolidated federal fundraising campaign] was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property").

361. United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Authority, 163 F.3d 341, 351–52 (Ohio 1998) (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 49 (1983)). A rule that "focused solely on whether a speaker must obtain permission to access government property 'would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.'" *United Food & Commercial Workers Union*, 163 F.3d at 351 (quoting N.Y. Magazine v. Metro Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998)).

362. *United Food & Commercial Workers Union*, 163 F.3d at 351 (citing *S.E. Promotions, Ltd.*, 420 U.S. at 555 (applying heightened scrutiny where the reason for exclusion of plaintiff was not related to the public forum's purpose or the preservation of rights of other individuals); Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Authority, 148 F.3d 242, 251 (3d Cir. 1998) (holding that transit authority's advertising space was a public forum where standards for inclusion and exclusion were promulgated "without reference to the purpose of the forum"); *N.Y. Magazine*, 136 F.3d at 129–30 (holding that transit authority's restriction on access to its advertising space was unrelated to transit authority's proprietary interests, advertising space was a designated public forum)).

363. *ISKCON*, 505 U.S. at 678; Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978–79 (9th Cir. 1998). Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. *ISKCON*, 505 U.S. at 678 (citing United States v. Kokinda, 497 U.S. 720, 725 (1990)).

364. *United Food & Commercial Workers Union*, 163 F.3d at 358 (holding that acceptance of pro-union advertising could not be shown to interfere with a forum's stated purpose where such advertising had been accepted previously). *See also* Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Authority, 767 F.2d 1225, 1231 (7th Cir. 1985) (affirming district court's finding that transit authority's justification for rejecting plaintiff's advertisement could not be credited where

topic not otherwise within the range of permitted topics in order to avoid, as a consequence, triggering litigation or diminishing the financial benefit derived from advertising revenues.[365] The predictions about the consequences of accepting a range of advertising need not rest on an extensive empirical record: inferences supported by common sense will suffice.[366] The reasonableness of a restriction will be enhanced where it is clear that the affected advertisers have alternate means to reach their audiences.[367]

A broad range of objectives may enter into play when framing advertising policies. Advertising policies may restrict advertising that would have reduced First Amendment protections, because it is obscene or libelous.[368] Aesthetic considerations may constitute legitimate governmental interests,[369] though incorporating an aesthetic criterion into a policy without specifying standards to guide the application of the criterion may not prove to be acceptable.[370] Government may shape advertising policies that both enhance the profitability of the advertising venue and provide a showcase for enterprises whose success

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it was "entirely speculative" as to whether acceptance of the advertisement would adversely affect the transit authority's commercial interests)); Air Line Pilots Ass'n v. Dep't of Aviation of Chi., 45 F.3d 1144, 1156 (7th Cir. 1995) (concluding that where the advertising space at issue "[has] contained 'political' or other public interest messages in the past, the City cannot now claim that those messages are incompatible with the purpose of the forum").

365. DiLoreto v. Downey United Sch. Dist. Bd. of Educ., 196 F.3d 958, 969 (9th Cir. 1999).

366. *Kokinda*, 497 U.S. at 734–35 (holding that common sense is sufficient to uphold a regulation under reasonableness review); Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1278, 1280 (Fla. 2003) (stating that we need only ask whether it is intuitively obvious or commonsensical that the City's limitation on bus bench advertising is reasonable).

367. *Uptown*, 337 F.3d at 1281 (holding that the presence of numerous alternative channels for pawnshop advertisements also supports the conclusion that the city's proprietary decision to limit advertising on bus benches is reasonable) (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n., 460 U.S. 37, 53–54 (1983). The *Uptown* court noted:

> [T]he reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place . . . . The variety and type of alternative modes of access present here compare favorably with those in other nonpublic forum cases where we have upheld restrictions on access.

Id.

368. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 75 (Mass. 2004); *United Food & Commercial Workers Union*, 163 F.3d at 355 (holding that public entities may limit obscene or offensive material if narrowly tailored to include only less protected speech) *Cf.*, Christ's Bride Ministries, Inc v. S.E. Pa. Transp., 148 F.3d 242, 251 (3d Cir. 1998) (noting that the government policy proscribed acceptance of advertisements deemed libelous or obscene).

369. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) (requiring that the city's aesthetic interest must be sufficiently important or substantial to justify a prohibition against certain forms of speech in a public forum); Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1045 (9th Cir. 2002) (holding that aesthetics can be a substantial governmental interest); Jacobsen v. City of Rapid City, 128 F.3d 660, 662 (8th Cir. 1997) (holding that city's restrictive policy based in part on aesthetic considerations need only be "reasonable"). *But see* Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 161 (4th Cir.1993) (applying "sufficiently substantial" standard to airport commission's aesthetic rationale).

370. *United Food & Commercial Workers Union*, 163 F.3d at 358 (holding that the assertion that an advertisement is not aesthetically pleasing, without more, is insufficient to permit the restriction of protected expression absent aesthetic standards or guidelines).

improves the economic well-being of the community.[371] Government may reasonably limit advertising in order to minimize the appearance of favoritism.[372]

Advertisement policies may seek to avoid controversy.[373] In the context of a commercial venture, government "has a legitimate interest in not offending [customers] so that they stop their patronage."[374] Standing alone, the term "controversial" vests the decision maker with an impermissible degree of discretion.[375] A standard that identifies how the consequences of a controversy may compromise a forum may pass the constitutional muster.[376] Although

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371. *Uptown*, 337 F.3d at 1280–81 (holding that the city was not unreasonable in limiting advertisers "on Gateway bus benches in an effort to protect the revenue stream and 'market those businesses which [the City] is most proud of, and which are thought to be consistent with its long-term economic health'").

372. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974); Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985) (noting that avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum); Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650, 658 (2d Cir. 1995) (upholding reasonableness of policy rejecting displays favoring any political view).

373. *Cornelius*, 473 U.S. at 811:

> Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Id.; DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965–68 (9th Cir. 1999) (holding that disruption and potential controversy are legitimate reasons for restricting the content of the advertisements, given the purpose of the forum and the surrounding circumstances of the public secondary school); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (maintaining a position of neutrality on political and religious issues is an especially strong rationale); Brody v. Spang, 957 F.2d 1108, 1122 (3d Cir.1992) (holding that reasonable grounds for content-based restrictions include the desire to avoid controversy); Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir.1991) (en banc) (holding that "avoidance of controversy" constitutes a reasonable justification for refusing plaintiff's potentially controversial advertisement where publication of an ad in the defendant-school district's yearbook and newspaper could create the perception of sponsorship and endorsement by the schools, thereby compromising the school's interest in maintaining its position of neutrality).

374. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 85 (Mass. 2004).

375. *United Food & Commercial Workers Union*, 163 F.3d at 359 (citing Nat'l Endowment for the Arts v. *Finley*, 524 U.S. 569, 588 (1998) (concluding that the terms of a provision directing the National Endowment for the Arts to take into consideration general standards of "decency and respect" for diverse beliefs and values of the American public "are undeniably opaque, and . . . could raise substantial vagueness concerns" if appearing as part of a regulatory scheme); Aubrey v. City of Cincinnati, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (holding that Cincinnati Reds' ban on ballpark banners that are not in "good taste" is unconstitutional because the policy "leaves too much discretion in the decision maker without any standards for that decision maker to base his or her determination").

376. *United Food & Commercial Workers Union*, 163 F.3d at 359 (holding that where a policy limits the ban on controversial advertisements to cases where the advertisements adversely affect Southwest Ohio Regional Transit Authority's ("SORTA")image or ridership, the question becomes whether in linking the term "controversial" to commercial interests, renders the term sufficiently precise so as to constrain the decision maker's discretion and protect those seeking access to SORTA's advertising space from arbitrary or discriminatory treatment). The Court held:

> Here there is no established causal link between SORTA's goal of enhancing the

government need not wait for disruption to occur before acting to avoid controversy,[377] government should be able to identify an established causal link that would indicate that controversy might interfere with the purposes for which it established a forum.[378]

Where a public entity controls multiple similar advertising venues, the advertising practices allowed in forums other than the one requested will not control its policies with respect to the forum for which access has been requested.[379]

F. Even in a nonpublic advertising forum that permits limited content-based decision making, government may not discriminate on the basis of viewpoint, or adopt rules that are overbroad, vague or irrational.

Even if a decision to reject a proposed advertisement is consistent with an unambiguous, objective policy and with well-established past practice under the policy, it may be subject to challenge if the decision reflects disapproval of the viewpoint of the proposed advertisement.[380] A rule excluding a class of speech from an advertising venue will not run afoul of viewpoint discrimination doctrines

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> environment for its riders, enhancing SORTA's standing in the community, and enabling SORTA to attract and maintain its ridership, and its broad-based discretion to exclude advertisements that are too controversial or not aesthetically pleasing. Although political and public-issue speech is often contentious, it does not follow that such speech necessarily will frustrate SORTA's commercial interests. Rather, it may be the case that only in rare circumstances will the controversial nature of such speech sufficiently interfere with the provision of Metro bus services so as to warrant excluding a political or public-issue advertisement.

Id. at 354–55. *Cf.* Air Line Pilots Ass'n v. Dept. of Aviation of Chi., 45 F.3d 1144, 1157 (7th Cir. 1995) (stating that "there is no indication that political or public interest messages would generally disrupt air travel services" if displayed in airport terminal's display cases).

377. *See Cornelius*, 473 U.S. at 810 ("[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum.") (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 52 n.12 (1983)).

378. *United Food & Commercial Workers Union*, 163 F.3d at 354. *Cf. Air Line Pilots Ass'n*, 45 F.3d at 1157 (stating that "there is no indication that political or public interest messages would generally disrupt air travel services" if displayed in airport terminal's display cases).

379. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir. 1999) (holding that the fact that another high school within the district accepted advertisements for ESP Psychic Readings and the local Freemason organization does not indicate that the Downey High School fence was a designated public forum open to advertisements promoting personal religious beliefs) (noting that advertising at other sites was commercial or non-religious in character).

380. *DiLoreto*, 196 F.3d at 969; *United Food & Commercial Workers Union*, 163 F.3d at 356. *See also* Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650, 658 (2d Cir. 1995) (suggesting that if Amtrak excluded controversial political advertisements from its advertising billboards, a nonpublic forum, its policy would be void for viewpoint bias); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996) (arguing that government actions that discriminate against speech deemed "controversial" violate the principle of viewpoint neutrality); C*f.* Air Line Pilots Ass'n v. Dep't of Aviation of Chi., 45 F.3d 1144, 1157 (7th Cir. 1995) (stating that airport authority's exclusion of plaintiff's advertisement on the grounds that it undermined its commercial interests by offending the airport authority's largest airline customer was "troubling" because advertisement was objectionable only when considered in the context of the viewpoint the plaintiff wished to express).

unless it "targets not subject matter, but particular views taken by speakers on a subject."[381] Such considerations may justify viewpoint-neutral exclusion of advertising involving religious or political topics where such advertising may be thought to interfere with revenue generation or with the effective operation of the program or facility in which the advertising venue is located.[382] Government may exclude religious or political advertising to avoid a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded "from using the same forum commonly used by those wishing to communicate primarily political or religious messages."[383]

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381. Ridley v. Mass. Bay Transp. Authority, 390 F.3d 65, 87–89 (Mass. 2004) (stating that rejection of advertisements submitted by organization advocating revision of drug laws reflected hostility for the organization's viewpoint); *DiLoreto*, 196 F.3d at 969 ("Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic.). *See also* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 981 (9th Cir. 1998) (finding that limiting the forum to commercial advertisements was a permissible content-based restriction). In contrast, impermissible viewpoint discrimination is a form of content discrimination in which the government "targets not subject matter, but particular views taken by speakers on a subject." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

382. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upholding a policy that precluded political advertising on specified routes on the basis that the city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience); *Ridley*; 390 F.3d at 75 (upholding policies that excluded from transit system political advertising and broad ranges of advertising that disparaged groups whose members may number among the transit system riders); Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275, 1278–79 (Fla. 2003) (city had previously accepted advertisements from pawnbrokers, but adopted a new policy prohibiting those advertisements in hopes of increasing revenues by attracting a high class of advertisers); *DiLoreto*, 196 F.3d at 965, 968 (rejecting advertisement that merely stated the ten commandments) (government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech) (excluding certain subjects from the advertising forum as sensitive or too controversial for the forum's high school context, e.g., the District rejected advertisements for alcohol or taverns, as well as an advertisement for Planned Parenthood); *Children of the Rosary*, 154 F.3d at 978 (finding no public forum when the city consistently enforced policies restricting bus advertisements to commercial advertising); Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Authority, 148 F.3d 242, 251, 253 (3d Cir. 1998) (holding that SEPTA may specify a few areas in which it will not freely accept advertising—e.g. alcohol and tobacco advertising beyond a specified limit and advertisements deemed libelous or obscene) (holding that the improperly rejected advertisements addressed topics permitted under the advertising policy as implemented); N.Y. Magazine v. Metro Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998) (disallowing political speech and allowing commercial speech only).

383. *Children of the Rosary*, 154 F.3d at 979. *See also Lehman*, 418 U.S. at 304 (stating that revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards); Ridley, 390 F.3d at 92 (holding that the goal of the guidelines has nothing to do with censoring religious speech, the purpose is to maintain a certain minimal level of decorum in all advertisements); *Uptown*, 337 F.3d at 1278–79 (stating that city may prohibit advertisements from pawnbrokers where it had accepted them previously as part of a new policy aimed at increasing revenues by attracting a higher class of advertisers); *DiLoreto*, 196 F.3d at 969 (finding it reasonable to avoid triggering litigation or diminishing the financial benefit derived from advertising revenues by necessitating their expenditure to cover litigation costs).

Rules governing access to advertising venues will also be subject to First Amendment restrictions against vagueness and overbreadth, as well as Fourteenth Amendment restrictions on unreasonable, arbitrary, capricious, or invidious action.[384]

G. Colleges and universities should structure their regulations and administrative practices to assure that their advertising venues operate as nonpublic fora managed to enhance the effectiveness of the facilities, services or publications where the venues appear or managed to assure that their advertising venues operate as profit centers.

To assure that their advertising venues are classified as nonpublic fora, colleges and universities should adopt policies that contain "significant substantive content limitations and procedural limitations on the advertisements" that they will accept.[385] Taken in tandem, content and procedural limitations negate the inference that the institution affirmatively intended to create a public forum by opening the venues for some range of unrestricted private speech.[386]

Substantive content limitations should be crafted to accomplish either, or both, of two objectives. They should enhance the effectiveness of the facilities, services or publications where the venues appear or they should assure that advertising venues operate as profit centers.

1. Substantive content limitations on access to advertising venues may be crafted to advance the institutional purposes in maintaining the facility, service or publication where the advertising venue is located.

Advertising does not occur in isolation. Advertising is time and place specific, and times and places are chosen in order to maximize the number of people who will encounter the advertising. The primary function of outfield fences is scarcely to serve as advertising venues, but, because ballgames draw crowds, advertisers find fences to be desirable advertising venues.[387] The same is true of the places on transportation systems cards, stations and benches, magazines and webpages. Certain places lend themselves to advertising because large numbers of people pass by those places or because large numbers of people are drawn to those places. The utility of such places for advertising purposes is incidental to their primary

384. Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (finding overbreadth); *Ridley*, 390 F.3d at 93–95 (suggesting that the vagueness inquiry in the context of a nonpublic forum might be less exacting than where the regulatory scheme involves licensing or a traditional nor a designated public forum); United States v. Kokinda, 497 U.S. 720, 725–26 (1990) (finding that government action as proprietor restricting access to property is valid unless it is unreasonable, or "arbitrary, capricious, or invidious") (quoting *Lehman*, 418 U.S. at 303); Greer v. Spock, 424 U.S. 828, 846 (1976) (finding no evidence that rules governing access had been applied irrationally, invidiously, or arbitrarily).

385. *Ridley*, 390 F.3d at 77.

386. *Id.*

387. *DiLoreto*, 196 F.3d 958 (holding that certain high school baseball diamond outfield fences were not public fora).

functions, whether those be providing directions to hurried travelers or serving as pasturage for Dutch Belted cattle.

The Court's analytical approach to rules governing advertising reflects its understanding that government operation of advertising venues is incidental to its conduct of some other government activity. The validity of rules governing access to a nonpublic forum is tested by determining whether "the distinctions drawn are reasonable in light of the purpose served" by the larger government property or activity within which the private party seeks access for advertising purposes.[388] Hence, college or university rules governing access to advertising venues operation should complement the overarching functioning and purpose of the facilities, service or publications that contain them.

2. Substantive content limitations on access to advertising venues may be crafted to maximize advertising revenues.

The Court has recognized that advertising venues may be regulated, not only as incidental parts of a larger commercial venture, but also as independent commercial ventures in which government managers decide among advertisements based upon the likelihood that certain classes of advertisers will maximize revenues.[389] Colleges and universities may consider, for example, the possibility that short-term advertising revenues are less certain than those derived from long-

388. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805–06 (1985). Although *Cornelius* frames the issue as involving access to the "forum," i.e., to the specific place or program where access is sought, it clearly anticipates a relationship in which the forum is part of a larger workplace or undertaking, just as the fund drive occurred in federal workplaces designed to accomplish tasks unrelated to the fund-related speech. *Id.* The cases that *Cornelius* cited as authority all recognized that First Amendment rights should be extended in ways that preserve government's ability to complete the functions for which property has been acquired or operated. *Id.* (citing *Greer*, 424 U.S. at 838 ("[T]he business of a military installation [is] to train soldiers, not to provide a public forum")); Connick v. Myers, 461 U.S. 138, 150–51 (1983) ("[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."); Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part) (holding that removal of a public employee without a prior trial-like hearing does not deprive the employee of due process or chill protected speech) ("Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 128–29 (holding that inclusion of a mail drop as an "authorized depository" under postal regulations does not convert the mailbox into a public forum). Congress may prohibit the deposit of unstamped letters into mailboxes in order "to protect mail revenues while at the same time facilitating the secure and efficient delivery of the mails." *Id.* at 129.

389. The Court in *Lehman* held:

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation.

Lehman, 418 U.S. at 304.

term advertisements.[390] Colleges and universities may reasonably consider the possibility that opening venues to certain advertisements or advertisers may dissuade other advertisers from patronizing college or university venues. Banks and hospitals and major corporations with deep pockets long-term interests in higher education may not wish to have their advertising share space with advertisements promoting "liquor, tobacco, X-rated movies, adult book store, massage parlor, pawn shop, tattoo parlor or check cashing" sales or services.[391] Thus, colleges and universities may take such factors into account and may draw distinctions among its substantive content limitations that are reasonable in light of its purpose to maximize the advertising revenues.[392]

3. Substantive content limitations on access to advertising venues should reflect differences among venues, and may advance substantial institutional values.

Standards should reflect differences among the venues.[393] It may be proper to restrict advertising for venues on a bus or in a residence hall in ways that will avoid discouraging persons from using that mode of transportation or taking up residence in those facilities.[394] It may be proper not to accept issue advertising in a sporting facility whose primary purpose is not the open discussion of ideas; such measures help to avoid drawing the college or university into disputes with fans or other advertisers over the polemical content of issue advertising.[395] It may be

390. *Id.*

391. Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275, 1277 (Fla. 2003) (listing kinds of "less desirable" advertisers whose advertisements were not to be permitted on municipal bus system).

392. *Cornelius*, 473 U.S. at 805–06 (upholding distinctions in a nonpublic forum where "the distinctions drawn are reasonable in light of the purpose served"); *Uptown*, 337 F.3d at 1280–81 (finding substantive content limitations reasonable where they were drawn in an "effort to protect the revenue stream and 'market those businesses which [the City] is most proud of, and which are thought to be consistent with its long-term economic health'"); Children of the Rosary v. City of Phoenix, 154 F.3d 972, 979 (9th Cir. 1999) **(**finding it reasonable to exclude religious or political advertising to avoid "a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded 'from using the same forum commonly used by those wishing to communicate primarily political or religious messages.'").

393. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir. 1999) (noting that different advertising venues operated by a school district could properly have different rules).

394. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) ("The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 85 (Mass. 2004) ("MBTA has a legitimate interest in not offending riders so that they stop their patronage"). The *Ridley* court went on to note:

> [MBTA has a legitimate interest in] 'maximiz[ing] revenue' by making money through advertisements while not reducing ridership through offensive advertisements, 'maintaining a safe and welcoming environment' for its riders (including children), and avoiding its identification with the advertisements it displays. A guideline preventing demeaning or disparaging advertisements is likely to serve these purposes well and is consistent with the MBTA's own 'Courtesy Counts' program.

Id. at 93.

395. *DiLoreto*, 196 F.3d at 968 ("The District essentially offers two reasons for excluding the

proper to craft content-based regulations that are sensitive to the audience for its advertisements, including reasonable, informed assumptions about how the particular audience would understand a particular advertisement and whether the audience reaction might interfere with the intended function or purpose of the facility, service, or publication where the advertising is located or render the venue less desirable to other advertisers.[396]

Colleges and universities may adopt standards that justify rejection of advertising that proposes unlawful conduct.[397] Colleges and universities may

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subject of religion from the forum. The District's first concern was disruption. The District feared controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post. The District's second concern was the potential Establishment Clause violation presented by posting the Ten Commandments in a public high school."). *See also Uptown*, 337 F.3d at 1281 ("[C]ommon sense supports the idea that it is reasonable for the City to limit 'less desirable' businesses' access to bus bench advertising in hopes that the limitation will encourage 'more desirable' advertisers").

396. *Ridley*, 390 F.3d at 75 (upholding against vagueness and overbreadth challenges to the following standard:

> The advertisement contains material that demeans or disparages an individual or group of individuals. For purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals.

Id. *See Uptown*, 337 F.3d at 1281 (permitting reasonable consideration of advertiser willingness to use venues based upon other advertisements permitted on venues). *See also* Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C., 518 U.S. 727, 751–53 (1996) (upholding an F.C.C. regulation that permitted cable operators, who were otherwise obliged to accept programming on leased channels without editing, to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards") (noting that this standard tracked the tests for obscenity that had been adopted in *Miller v. California*, 413 U.S. 15, 24 (1973) ("(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.")); Hopper v. City of Pasco, 241 F.3d 1067, 1080 (9th Cir. 2001) (acknowledging both that avoidance of controversy may trigger viewpoint discrimination concerns and that public entities have legitimate concerns to reflect community standards) (suggesting that "community standards of decency [may] have [a] place in the regulation of government property . . . [if they are] reduced to objective criteria set out in advance"); *But see* United Food & Commercial Workers Union v. S.W. Ohio Regional Transit Auth., 163 F.3d 341, 361–62 (6th Cir. 1998) (criticizing a rule against controversial advertising by suggesting a reliance on community standards and hence viewpoints) (noting that policies that purport to avoid contention may enable viewpoint discrimination since an "opinion that conforms with prevailing community standards is unlikely to prove contentious." The court reasoned that a "viewpoint challenging the beliefs of a significant segment of the public . . . frequently will generate discord," and concluded that because "an ad's controversy often is inseparable from the viewpoint it conveys," policies that restrict access to advertising fora based on potential for controversy implicitly rely upon a viewpoint sensitive, and hence unlawful, criterion—prevailing community standards).

397. *Ridley*, 390 F.3d at 85 (holding that rejection of advertisements that promote illegal

adopt standards that permit rejection of advertising that proposes conduct that would be prohibited under other policies governing commercial activity on campus.[398]

If colleges and universities adopt content-based policies that restrict based on aesthetic or other value-related objectives, the policies should be specified as objectively as possible, the distinctions drawn should relate to values that the college or university fosters in its programs, and administrators should be provided guidance to the proper application of policy requirements.[399]

4. Substantive content limitations must require that administrators remain viewpoint neutral when making access decisions.

The distinctions drawn between acceptable adverting content and unacceptable content must not only be "reasonable in light of the purpose served by the forum," but they must also be "viewpoint neutral."[400] The latitude given administrators to consider advertising content should never be so great as to allow them to reject otherwise proper advertisements based upon hostility toward the views that they express.[401]

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activity, particularly among children, is constitutional).

398. If the institution can ban conduct such as the sale of examination questions or term papers because it compromises institutional policies, reasons that support the ban should satisfy the rationality test for purposes of rejecting advertising that would interfere with university operations. *See supra* note 89 and accompanying text; *supra* Parts I.C, II.F and III.E.

399. *Ridley*, 390 F.3d at 93:

> The MBTA's stated purposes in running its advertising program include "maximiz[ing] revenue" by making money through advertisements while not reducing ridership through offensive advertisements, "maintaining a safe and welcoming environment" for its riders (including children), and avoiding its identification with the advertisements it displays. A guideline preventing demeaning or disparaging advertisements is likely to serve these purposes well and is consistent with the MBTA's own 'Courtesy Counts' program. . . . In any event, for purposes of the acceptance or rejection of advertising, words like "demean" or "disparage" have reasonably clear meanings. We recognize that several courts have struck down, on vagueness grounds, school speech codes that incorporated somewhat similar terms. *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1183–84 (6th Cir.1995); UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1178–81 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852, 866–67 (E.D. Mich. 1989). *Cf.* UWM Post, 774 F. Supp. at 1179–80 (holding that in the context of a university hate speech regulation, the word "demean" is not "unduly vague," since it has a "reasonably clear" meaning: "to debase in dignity or stature.").

Id. at 93–95.

400. Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

401. *Ridley*, 390 F.3d at 88–89 (holding that rejection of advertising advocating the legalization of marijuana on the basis that it might confuse teenagers about the legality of marijuana use embodied viewpoint discrimination in the form of attempting to shift the political balance and lacked a reasonable grounding in common experience, given the amount of anti-drug use advertising addressed to young people) ("Its judgments must be reasonable and it would not be reasonable to think that juveniles were exposed to no other information about drugs. Indeed, the MBTA has itself a long history of running advertisements stressing that drug use is illegal and that drug laws should be obeyed."). *See supra*, notes 379–382 and accompanying text.

5. Procedural requirements for access to advertising venues should be crafted to assure prior review of advertisements pursuant to published guidelines and should provide for limited internal review of decisions.

College or university policies should allow selective access for individual speakers rather than general access for a class of speakers.[402] Colleges and universities should only allow access to their institution's advertising venues to advertisers who have sought permission to access the venues, whose advertisements have been reviewed and approved under regulations that identify permitted content in the requested advertising venue and that provide for administrative review of decisions applying the regulations.[403]

Colleges and universities should not skimp on their investment in policy creation and administration. The decision to permit advertising on college or university grounds, premises or websites, if poorly implemented, will result in forum by designation rather than a nonpublic forum, and colleges and universities may find that their own venues are open to disgruntled employees, activists of all sorts, and all manner of persons whose sense of good taste and decorum diverges from the example that the institution wishes to set.[404]

V. CONCLUSION: COLLEGES AND UNIVERSITIES HAVE SUBSTANTIAL AUTHORITY TO REGULATE COMMERCE AND EXPRESSIVE COMMERCIAL ACTIVITIES ON CAMPUS, BUT REGULATIONS OF EXPRESSIVE COMMERCIAL ACTIVITY MUST BE ASSEMBLED THOUGHTFULLY AND IMPLEMENTED INTELLIGENTLY.

At the very dawn of the Western university, governmental authorities empowered institutional officials to regulate commercial activities that are incidental to an educational institution's operations. For a host of practical, programmatic and financial reasons, control over commercial activity on campus continues to be a significant concern for all colleges and universities. With respect to the importance of controlling various forms of commercial activity within campus precincts, college or university administrators differ little from other government officials for whom regulation of commercial activity is a daily necessity.

The legal doctrines that the Court has developed to define the bounds of permissible governmental regulation of commercial activity reflect the Court's

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402. Ark. Educ Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.").

403. This is a prudential recommendation. As noted above in note 349, such restrictions are not strictly required in the nonpublic forum setting. Nonetheless, procedural clarity will help to assure the consistent administration of substantive policy that corroborates the intent to operate a venue as a nonpublic forum. *See supra* notes 348–353 and accompanying text; *Ridley*, 390 F.3d at 74, 77 (noting the "comprehensive review procedure with four different layers of scrutiny[,] by Viacom, the MBTA Contract Administrator, the MBTA General Counsel, and the MBTA General Manager[,] before any advertisement could be rejected based on the guidelines") (noting that the combination of significant substantive and procedural limitations on access to a forum negates the inference of a public forum).

404. *See supra* notes 348–353 and accompanying text.

understanding that government must be able to adopt effective rules if it is to satisfy the demand for public order and for the efficient administration of government agencies and institutions. Despite their superficial heterogeneity, the many doctrines that comprise the Court's jurisprudence of commercial regulation share a common phylogeny and exhibit common patterns.

At its most general level, and reflecting the due process origin of its commercial activity jurisprudence, the Court has established two sets of requirements, one substantive and one procedural. The substantive component of the Court's doctrine focuses upon the need to establish that the regulator has acted to achieve a proper governmental end and has selected means that are appropriate to that end and that do not unnecessarily interfere with related activity. The procedural component of the Court's doctrine adopts the standpoint of the person who is to abide by the rules and seeks assurance that the rules are understandable, that those who must conform to them can obtain assistance in clarifying their meaning, that administrators are bound to apply the rules, and that their application of the rules can be tested through the appeal and review of their decisions.

Colleges and universities enjoy ample power to regulate commercial activities on campus, even activities that involve expression, so long as they exercise their power in a reflective fashion that accords due consideration to what purposes they truly need to achieve and to how those purposes can be gained without unnecessarily trammeling private commercial activity on campus and, in matters involving regulation of expressive activities, without ever giving in to the temptation to quash views deemed objectionable. The courts are likely to support sound regulations, so long as colleges and universities carry through with their efforts by investing in the administration of policies to assure that they are applied evenhandedly and consistently over time.

VI. A FINAL WORD OF CAUTION: AVOID THE TEMPTATION TO BELIEVE THAT THE CASES ACCORDING DEFERENCE TO COLLEGE AND UNIVERSITY ACADEMIC JUDGMENTS WILL EXTEND TO DECISIONS ABOUT THE SUBSTANTIALITY OF INSTITUTIONAL INTERESTS THAT ARE IMPLICATED BY COMMERCIAL ACTIVITIES ON CAMPUS.

The Court has often recognized that higher education plays a special role in society, a role that involves internal decision processes that are integral to acquiring critical judgment, enlarging knowledge and maintaining rigor.[405]

405. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003) (noting the Supreme Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits"); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231–34, 238–39 (2000) (Souter, J., concurring in the judgment) (noting that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. at 472 (1989); Regents of Univ. of Mich. v. Ewing, 474 U. S. at 226 n.12 (1985); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 89–91 (1978); Healy v. James, 408 U.S. 169, 171 (1972); Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 604 & 608 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (Warren, C.J.); *Id*. at 263 (Frankfurter, J., concurring in result) (quoting The Open Universities in South Africa 10–12);

Nevertheless, however often the courts grant deference to their academic decisions, college and university administrators should not assume that their predictions concerning the consequences of allowing students to sell t-shirts that deprecate homecoming opponents, or to use bullhorns to hawk them in the student union, will receive similar accommodation. The deference shown to their academic decisions reflects a special exception to the usual prohibitions against content-based decision making, an exception that is unlikely to transfer to predictions involving the secondary effects that various commercial endeavors might have on institutional activities and interests.

The Court has developed sophisticated insights into the necessity of permitting content-based college and university decisions in academic matters. The training that encourages the wide-ranging inquiry that the doctrine of academic freedom is intended to protect also subjects that inquiry to critical examination under accepted academic standards.[406] The Court recognizes that processes of adjudication are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'"[407] The Court also recognizes that it has an obligation under the First Amendment to protect the processes of academic decision making from interference by litigants.[408] This protection takes the form of a limited deference accorded to academic decision making:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, 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.[409]

Wieman v. Updegraff, 344 U.S. 183, 195 (1952). *See also* Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 46–57 (2002) (providing additional background for The Open Universities in South Africa).

406. *Horowitz*, 435 U.S. at 91–92.

407. *Ewing*, 474 U.S. at 226:

> [Academic] judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. (quoting *Horowitz*, 435 U.S. at 90–91).

408. The *Ewing* Court affirmed that the Court had a "responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Ewing*, 474 U.S. at 226 (quoting *Keyishian*, 385 U.S. at 603).

409. *Ewing*, 474 U.S. at 225 (holding that university faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation) (citing *Horowitz*, 435 U.S. at 96, n.6 (Powell, J., concurring)); *Grutter*, 539 U.S. at 309 (noting the Court's tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits); Univ. of Pa. v.

The Court recognizes that accepted academic norms restrict the exercise of professional judgment in ways that are inconsistent with arbitrary or discriminatory action.[410]

Institutions hold students and faculty alike to standards of academic method and judgment, based upon the consensus among scholars in the relevant disciplines. It could be no other way. As was the case when Socrates forced Thrasymachus to defend his claim that "justice is nothing but the advantage of the stronger," the very essence of knowledge involves assembly of evidence and presentation of argument that withstand scrutiny.[411] It is no more sensible to suppose that individuals can freely determine what evidence and methods of proof will be acceptable than it is to assume that, in the fashion of Humpty-Dumpty, they can both communicate with others and determine for themselves the meaning of the words that they utter.[412] Even those who challenge the foundational assumptions of their colleagues do so by invoking shared understandings.[413] The tension

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E.E.O.C., 493 U.S. 182, 199 (1990) (affirming applicability of these principles in the context of judgments about the qualifications of faculty members); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) (holding that university decisions are entitled to presumption of legality and legitimate educational purpose, but if that presumption can be overcome by evidence of impropriety, the university must prove that it acted on a legitimate educational purpose).

410. The Court also recognizes that institutions are not immune from social or political pressures that might skew academic judgment. *See Gratz*, 539 U.S. 244 (holding that where admissions criteria expressly consider race, administrative convenience cannot justify failure to give individualized review to applicants); United States v. Virginia, 518 U.S. 515, 541–46 (1996) (holding that evidence that "adversative" pedagogy was ill suited for most women would not justify exclusion of all women); Miss. Univ. For Women v. Hogan, 458 U.S. 718, 725 (1982) (holding that if statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate); Sweatt v. Painter, 339 U.S. 629, 634 (1950) (holding that a segregated law school excluding substantial and significant segments of society is not substantially equal to that which the plaintiff would receive if admitted to the University of Texas Law School); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 633 (1948) (holding that states must provide legal education in conformity with the Equal Protection Clause); Missouri v. Canada, 305 U.S. 337, 351 (1938) (holding that a black law school applicant was entitled to admission to the University of Missouri law school in the absence "of other and proper provision for his legal training within the State").

411. PLATO, REPUBLIC, 338c (Rouse, trans.).

412. *See* Lewis Carroll, *Through the Looking Glass*, THE BEST OF LEWIS CARROLL 238 (Castle Books 2001):

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

413. The Declaration of Independence illustrates this point. Jefferson framed his challenge to the authority of George III in ways that emphasized common ground between the British and the colonists in order to frame a sound argument that would demonstrate that George III had deprived the colonists of rights assured to all British subjects. The Declaration of Independence reiterated principles enshrined in the Magna Carta itself. Jefferson recorded that George III had assented to laws designed "For depriving us, in many cases, of the benefits of Trial by Jury." DECLARATION OF INDEPENDENCE ¶ 20 (1776). That charge tracked the thirty-ninth clause of the Magna Carta, which provides that "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful

between encouraging freedom of inquiry or expression and constraining it with standards for acceptable proof, method, reasoning or judgment is intrinsic to the unique role of the college or university.

Teaching students the nuances of accepted processes of testing ideas provides the training in critical inquiry that is essential to formation of citizens. This process of critical examination also establishes and adjusts the academic norms themselves and minimizes the possibility that decisions informed by accepted academic norms themselves might embody arbitrary or prejudiced standards of decision making.[414]

The rub, of course, is that the decisions that colleges and universities must make when estimating the consequences of various commercial activities, whether the sale of deprecatory t-shirts or the use of bullhorns to hawk them, will have adverse affects on institutional interests and are cut from wholly different cloth. Nothing in such decisions enforces academic rigor or advances the reach of human understanding. Rather, the choices that are presented to colleges and universities

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judgment of his peers or by the law of the land." MAGNA CARTA cl. 39 (Eng. 1215). To be effective, a challenge to orthodoxy must be understood by adherents and it must be framed in ways that compel their assent, however unwillingly it is given.

414. The Court is well aware of the fact that the academic process involves both the testing of particular assertions and adjustments to the theories or information on which judgments are made:

> The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, *e.g.*, Brief of Amicus Curiae Nicolaas Bloembergen et al. at 9, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) ("Indeed, scientists do not assert that they know what is immutably 'true'--they are committed to searching for new, temporary, theories to explain, as best they can, phenomena"); Brief of Amicus Curiae American Association for the Advancement of Science et al. at 7–8, *Daubert*, ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original)). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 509 U.S. at 589–90 (1993).

The Court understands that the adjustment of knowledge claims based upon academic processes is central to the justification for accepting certain forms of testimony as sufficiently reliable to present to a jury. Although the Court recognizes that similar processes apply in other academic disciplines, it clearly does not follow that all academic disciplines yield knowledge claims similar to those in science. *Id.* at 590 n.8. Nevertheless, it is sensible to suggest that the processes of scholarly debate reliably force a consensus that embodies more than mere subjective belief or unsupported speculation. The Court's understanding that the processes by which academic norms gain acceptance seems implicit in its repeated expressions of deference to the decisions guided by accepted academic norms. Acceptance implies a high degree of reliability and assures that the norms are relatively free of arbitrariness or prejudice.

embody the sorts of practical judgments that are made by fair- or airport-managers or school principals about the effects that permitting the sale of such goods or the use of such methods may have on the orderly functioning of their events, facilities, and institutions. In matters involving the regulation of commercial activities on campus, college and university authorities should not expect different treatment than their fellow public servants.

PRIVATE LAW CONTINUES TO COME TO CAMPUS: RIGHTS AND RESPONSIBILITIES REVISITED

PETER F. LAKE*

INTRODUCTION

Professor Robert D. Bickel and I published our first book, *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?*,[1] in 1999. The book was both descriptive and prescriptive. *Rights and Responsibilities* was the culmination of a series of law review articles,[2] presentations,[3] and papers,[4] and offered a vision of the "facilitator" university.[5] The book described the burgeoning responsibility to protect students with respect to foreseeable dangers in a campus environment.[6] Revisiting *Rights and Responsibilities* entails determining whether the description of a general trend towards imposing legal duties of reasonable care on colleges and universities remains largely correct, and whether the book's prescription—to adopt a "facilitator" orientation towards students—has been viable. Has the law since the book's publication agreed that an institution should be neither student babysitter

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1. ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? (1999) [hereinafter RIGHTS AND RESPONSIBILITIES].

2. *See, e.g.,* Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University's Duty to Provide Safe Learning Environment,* 20 J.C. & U.L. 261 (1994).

3. The book was a direct result of a presentation made at the invitation of the University of Notre Dame following publication of the first Bickel & Lake article, *Reconceptualizing the University's Duty*, in the *Journal of College and University Law*.

4. Several unpublished papers preceded *Rights and Responsibilities.*

5. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193–201. "Facilitator" universities are universities that seek to create positive student campus life outcomes proactively by guiding their respective student bodies toward making positive lifestyle decisions. *Id*. at 193. While facilitator universities exercise control over the excesses of student life, such as binge drinking or fraternity and sorority (collectively, "Greek") hazing practices, the facilitator university does not seek ultimate control over all aspects of student life. *Id*. at 195–96. A facilitator university must defer to a student's informed choice to take some of the inherent risks that makes college life worthwhile, and to this end, the facilitator university can choose to help safely facilitate some risky student activity, such as rock-climbing or canoeing, by offering planning, guidance, or instruction. *Id*. at 195.

6. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 159−221.

nor bystander?[7]

Citations to *Rights and Responsibilities* and predecessor articles have become common in legal literature and the press.[8] Moreover, *Rights and Responsibilities* has had a significant impact on some college's and university's policies.[9] Nonetheless, the book has had only a limited impact on reported legal decisions. Only one court has cited a predecessor article to *Rights and Responsibilities*,[10] even though there have been several decisions since 1999 that are consistent with themes in the book. The more significant impact *Rights and Responsibilities* has had so far has been its role in furthering the rise of a risk management culture in American colleges and universities.[11]

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7. In loco parentis is a legal relationship between schools and students that was generally observed prior to 1960. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 17. An analogy can be drawn between babysitting and in loco parentis in that in loco parentis also involved a delegation of parental power from a student's parents to a third party, in this case the student's university. *Id*. at 20−22. This delegation of parental power permitted the university to control and discipline the student to the same extent as the student's parents. *Id.* Following the immediate demise of in loco parentis, courts entered a new era of legal protectionism of colleges based on a vision of student life as distinct from academic pursuits. *Id*. at 49. The college became, in our terms, *a bystander* to student life, such that legal duty would only be owed in special circumstances. *Id*. at 104.

8. *E.g.*, Kathleen Connelly Butler, *Shared Responsibility: The Duty to Legal Externs*, 106 W. VA. L. REV. 51, 111 (2003); Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 105 n.61 (2002); Kerri Mumford, Note, *Who is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POLICY 737, 743 n.45 (2001); *Articles, Notes, and Commentary*, 29 J.L. & Educ. 521, 545 (2000).

9. DePauw University, Texas A&M University, and the University of Arizona have all adopted or modified policies in response to themes of the book. *See* Peter F. Lake & Holiday Hart McKiernan, *The Depauw Greek Community: An Assessment of the Environment*, *available at* http://www.depauw.edu/univ/coalition/assessment.asp (last visited May 8, 2005); TEXAS A&M UNIV., DEPT. OF STUDENT AFFAIRS, *Risk Management and Organizational Development*, *available at* http://studentactivities.tamu.edu/risk/facilitator.htm (last visited May 8, 2005) [hereinafter Texas A&M Policy]; Kevin A. Cranman & Paul J. Ward, *Review of Robert Bickel & Peter Lake's The Rights and Responsibilities of the Modern University*, *available at* http://www.asu.edu/counsel/brief/bookreview.html (last visited May 8, 2005). In addition, the book has been featured twice at National Department of Education meetings in meet-the-author-sessions. U.S. DEPT. OF EDUC., *The U.S. Department of Education's 18th Annual National Meeting on Alcohol and Other Drug Abuse and Violence Prevention in Higher Education*, *available at* http://www.edc.org/hec/natl/2004/detailedagaenda.html (last visited May 8, 2005); U.S. DEPT. OF EDUC., *Deep in the Heart of Prevention: Collaboration for Accountability and Effectiveness*, *available at* http://www.edc.org/hec/natl/2003/detail.html (last visited May 8, 2005).

10. Gross v. Nova S.E. Univ., 758 So. 2d 86 (Fla. 2000). *Gross* was in turn used to support a student plaintiff's argument that the defendant university had a duty to protect her in *McLean v Univ. of St. Andrews*, 2004 ScotCS 45 (2004) (Scot.) at ¶ 16, *available at* http://www.scotcourts.gov.uk/opinions/A1143_01.html (Feb. 25, 2004) (citing *Gross*, 758 So. 2d 86).

11. For the better part of two decades, most Greek organizations have focused heavily on risk management to try to manage legal liability. *See* FIPG, INC., *Risk Management Manual*, *available at* http://www.sigmapi.org/pdfs/manuals/fipg.pdf (last visited May 8, 2005) [hereinafter FIPG Manual]. Today many universities put specific emphasis on developing risk management programs. *See, e.g.*, Texas A&M Policy, *supra* note 9; CAL. STATE UNIV. BAKERSFIELD, *California State University Bakersfield Risk Management Policy*, *available at* http://www.csubak.

Rights and Responsibilities has not been a common tool in litigation. College and university lawyers apparently rarely cite *Rights and Responsibilities* in briefs or arguments, perhaps because the book would not support every argument an institution could make in litigation. Whereas college and university lawyers generally are familiar with the book, judges and personal injury lawyers may have difficulty locating *Rights and Responsibilities*. It is much easier to access law review articles in legal research than academic books. Thus, *Rights and Responsibilities* remains descriptively valid of legal decisions only to the extent that it describes the principles animating recent cases. *Rights and Responsibilities*, however, has demonstrated some prescriptive success in that it has influenced policy makers, colleges, and universities in the development of safety and risk management programs.[12]

Part I of this article discusses cases decided since 1999 that deal with central issues of legal duty. The major focus of *Rights and Responsibilities* was describing the evolution of the law of legal duty in higher education. It has become apparent that the most significant cases in this regard are those involving student alcohol use.[13] *Rights and Responsibilities* was not a book devoted to college alcohol issues, as such.[14] Yet, it is increasingly apparent that the battleground over competing visions of the modern university is the high-risk alcohol culture and its epidemic primary and secondary effects.[15] Litigation over injuries fueled by alcohol drive college and university safety law today.[16] Many of the recent alcohol cases involve Greek organizations.[17] Courts continue to hold Greek organizations responsible for foreseeable danger to members and others.[18] There are also some

edu/BAS/srm/EHS/Forms/pdf/riskpolicy.pdf (July 1, 1999) [hereinafter Cal. State. Bakersfield Policy]. Thus, for example, Texas A&M University became a national leader following its tragic bonfire incident by establishing specific risk management principles to govern student activities and student life. *See* TEXAS A&M UNIV. DEPT. OF STUDENT ACTIVITIES, *Student Organization Manual*, *available at* http://orgmanual.tamu.edu/manual.PDF (last visited May 8, 2001).

12. *See supra* note 9.

13. The non-alcohol cases, with exception of the non-alcohol cases discussed below, are not particularly significant; most represent the routine application of typical private law categories, more often than not tort law. These cases show clearly and consistently that private law has come to campus; *Rights and Responsibilities* described a trend towards the mainstreaming of college law. *See also* Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law,* 64 MO. L. REV. 1, 1−3 (1999) (describing long-term trends in tort law that parallel developments in higher education law).

14. Nonetheless, a portion of the book is devoted specifically to alcohol issues and many of the cases discussed involve injuries flowing from high-risk alcohol use. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 205–10. The book uses the term "alcohol abuse" to refer to alcohol issues; today I prefer the term "high-risk alcohol use." *Id*. at 205.

15. Almost half of all college students report significant amounts of binge drinking. *See infra* note 39 and accompanying text.

16. *See, e.g.*, Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa 2000); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999).

17. *See, e.g.*, *Garofalo*, 616 N.W.2d 647; *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757; *Ex parte* Barran, 730 So. 2d 203 (Ala. 1998).

18. *E.g.*, *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757. *Contra Garofalo*, 616 N.W.2d 647; *Barran*, 730 So. 2d 203.

significant cases that do not involve alcohol and are relevant to issues of duty and reasonable care in higher education law.[19] Importantly, as "No-duty" arguments begin to fail in court,[20] it is increasingly necessary for college and university lawyers to turn to other arguments such as causation and plaintiff fault to manage the litigation boom.[21]

Part II discusses some future trends. First, the article briefly discusses the continuing rise of risk management cultures at colleges and universities in recent times. *Rights and Responsibilities* did not cause the rise in risk management cultures; yet, there is a profound interrelationship between the book and the continued development and refinement of the concept of college risk management. The modern college or university now attends to foreseeable risks as a matter of good business, not just for litigation avoidance.[22] Second, Part II also discusses the need for further development of the facilitator model as set out in *Rights and Responsibilities*. With the benefit of hindsight, it is clearer than ever that *Rights and Responsibilities* and the facilitator model require further development in at least two areas. One area concerns student process systems.[23] Today, safety is intimately connected to the efficacy of student process systems.[24] These systems are failing and need attention.[25] Additionally, *Rights and Responsibilities* and its facilitator model were deeply animated by active risks posed to students by the students' own behavior, the behavior of other students, and non-students; and to a lesser extent, passive risks created by conditions on or near campus.[26] Although *Rights and Responsibilities* did attend to some wellness issues,[27] it did not focus upon the ever-growing range of student wellness issues including student suicide, depression, anxiety, cutting, etc.[28] We are now on the leading edge of a new generational set of student concerns. There will be a rise in concern for—and thus ultimately litigation over—issues related to student wellness. The future of the facilitator model depends on attending to these new risks.

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19. *E.g.*, Jain v. Iowa, 617 N.W.2d 293 (Iowa 2002); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001); Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002).

20. *E.g.*, *Stanton,* 773 A.2d 1045.

21. One major implication of *Rights and Responsibilities* is that as courts continue to acknowledge that colleges and universities owe a duty of reasonable care to protect students from foreseeable danger, litigation will begin to turn toward such issues as compliance with the reasonable person standard of care, causation, appropriate damages, and plaintiff fault arguments. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 105–09.

22. For example, the University of Delaware has found that a risk program has reduced alcohol related injuries, vandalism, and fraternity problems without negatively impacting admissions. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 212–13.

23. *Id*. at 190–92.

24. *Id*.

25. *Id*. at 190–91.

26. *Id*. at 5.

27. *Id*. at 15–16, 194–95.

28. In 2004, the American College Health Association released figures stating that the number of students reporting a diagnosis of depression had jumped almost fifty percent from 2000 to 2004. Eric Hoover, *More College Students Report Diagnoses of Depression,* CHRON. HIGHER EDUC., Dec. 10, 2004, at A28.

I. RECENT CASES INVOLVING THE LEGAL DUTY OF COLLEGES AND UNIVERSITIES FOR STUDENT SAFETY AND OTHER ISSUES RELATING TO LEGAL LIABILITY.

Rights and Responsibilities had the benefit of fortuitous timing. There were several extremely significant state supreme court decisions consistent with the facilitator model decided months after *Rights and Responsibilities* was published.[29] *Rights and Responsibilities* did not cause this sequence of cases. *Rights and Responsibilities* was designed to provide the best approximation of national case law and described many trends in private law that were nearly certain to come to campus.[30] The timing—and even the consistency—of the cases' messages were coincidence. Thus, a word of caution to advocates or detractors of the "facilitator" model: no single case or single set of cases should be interpreted as either "proving" or "disproving" the central themes of *Rights and Responsibilities*.[31] It will take many years, and perhaps an entire generation of cases, to determine whether *Rights and Responsibilities* can stake a claim as a strong descriptor of modern higher education law.

There are many reasons to believe that *Rights and Responsibilities* will remain an accurate descriptive model for case law involving college and university student safety. Perhaps the single greatest trend that continues in the law of torts is the consolidation of the paradigm of reasonableness.[32] "No-duty" rules in tort law have become particularly suspect: while courts do not take the position that duty is universally owed,[33] exceptions continue to eviscerate "No-duty" rules.[34] One assertion of *Rights and Responsibilities* will likely remain accurate and gain additional support over time: "No-duty" rulings in college student safety cases will diminish, although it is unlikely that "No-duty" rulings will completely disappear.[35] Indeed, there already has been at least one court ruling that a university owed no duty to a student,[36] and there will likely be others. In an earlier time, the concept of duty was taught as an important protective litigation avoidance norm.[37] Today, courts increasingly re-imagine former "No-duty" arguments as

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29. *E.g.*, Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999). The cases impose duties upon the universities for student welfare.

30. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 179–201.

31. *Rights and Responsibilities* focuses primarily on advocating a "facilitator" model of university governance. *Id.* at 216. *See also supra*, note 5 and accompanying text (describing the facilitator model).

32. *See* RESTATEMENT (THIRD) OF TORTS § 29 (Tentative Draft No. 3, 2003); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 663 (1992) (proscribing descriptions of tort liability based upon reasonableness).

33. Schwartz, *supra* note 32, at 659–63 (1992).

34. *E.g.*, *Knoll*, 601 N.W.2d 757; *Coghlan*, 987 P.2d 300.

35. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 12.

36. *Ex Parte* Barran, 730 So. 2d 203, 207–08 (Ala. 1998).

37. Many legal scholars were educated under classic Prosser torts treatises and casebooks that acknowledged the erosion of no duty rules but also emphasized the necessity of using duty as a litigation limiting tool. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, 373–75 (5th ed., West 1984).

plaintiff-fault arguments or causation arguments, among other things.[38] Thus, a long term restructuring of higher education litigation strategies is inevitable if the current and well-established trends in tort law continue.

A. College and University Duty and High-Risk Alcohol Use

By far the most significant pressure on student safety issues at colleges and universities today is high-risk alcohol use.[39] Colleges and universities are increasingly sensitive to high-risk alcohol use and strategies to combat high-risk behavior.[40] Even in cases that do not specifically involve alcohol, colleges and universities are sensitive to the implications of case law related to the alcohol problem.[41] Thus, *Rights and Responsibilities* has been tested in cases that involve alcohol as well as cases that effect litigation over alcohol related injuries.[42]

Two decisions in 1999, *Knoll v. Board of Regents of the University of Nebraska*[43] and *Coghlan v. Beta Phi Fraternity*,[44] underscore courts' increasing willingness to acknowledge the legal duty of institutions for risk to students arising out of the high-risk alcohol culture in which the students live. These cases held that the respective universities have a legal duty to use reasonable care to prevent injuries to students arising out of events where alcohol is served and available.[45] Both cases demonstrate that the path-breaking decision in *Furek v. University of Delaware*,[46] which imposed a legal duty upon the college or university to protect

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38. *See, e.g.*, *Barran*, 730 So. 2d 203.

39. *See* HIGHER EDUC. CTR., *National College Alcohol Study Finds College Binge Drinking Largely Unabated, Four Years Later*, *available at* http://www.edc.org/hec/thisweek/tw980910.html (Sept. 10, 1998) (discussing Henry Weschler et al., *Changes in Binge Drinking and Related Problems Among American College Students Between 1993 and 1997*, *available at* http://www.hsph.harvard.edu/cas/Documents/97_survey-surveyReport/ (last visited May 8, 2005)).

40. Peter F. Lake & Joel C. Epstein, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611, 612–13, 618–21 (2000).

41. *E.g.*, Saelzler v. Advanced 400 Group, 23 P.3d 1143 (Cal. 2001) This case was not a university case at all and dealt primarily with the nexus between an assault on the plaintiff that occurred on the defendant's property and whether the defendant's lack of security on the property was the cause of the plaintiff's injuries. *Id*. at 769, 772. This case did not involve alcohol, however, universities in California filed an amicus brief in the case arguing in favor of the defendant. *Id*. at 766. For a further discussion of the facts of this case see *infra* note 339–359 and accompanying text.

42. *See, e.g.*, Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa 2000); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999); Jain v. Iowa, 617 N.W.2d 293 (Iowa 2002); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me. 2001); Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002). All of these cases are pertinent to testing the facilitator model advocated by *Rights and Responsibilities* in the context of alcohol-related injuries and injuries not involving alcohol.

43. 601 N.W.2d 757.

44. 987 P.2d 300.

45. *Knoll*, 601 N.W.2d at 764−65; *Coghlan*, 987 P.2d at 314.

46. 594 A.2d 506 (Del. 1991).

students from foreseeable hazing and alcohol injuries, is not anomalous.[47] *Knoll* and *Coghlan* also illustrate that the traditional trinity of "No-duty" college and university rulings of *Beach*,[48] *Bradshaw*,[49] and *Rabel*[50] are no longer controlling authority in a significant number of jurisdictions.[51]

Knoll and *Coghlan* are pronouncements from the supreme courts of Nebraska and Idaho, respectively. Both high courts held that a duty was owed, but not that *liability* always follows from the existence of that duty.[52] To that extent, these cases represent a continuing trend to recognize a legal duty of institutions to protect students from foreseeable danger, and also represent the parallel trend not to assume that legal duty always leads to liability, or significant liability.[53]

This point is illustrated by related decisions from the Indiana Supreme Court.[54] In *L.W. v. Western Golf Ass'n*, a student at Purdue University was raped after returning home from a bar.[55] The *L.W.* court recognized that there had been previous personal safety issues at the university housing where the student lived.[56] There was even an attempted act of violence directed at another female in the same housing unit.[57] The Indiana Supreme Court noted that there was evidence that life at the residence building was not entirely safe.[58] The court, however, distinguished the general prior incidents that had occurred from the incident that specifically occurred in *L.W.*[59] Crucially, the student was living in an environment where there had been no rape or serious sexual assault.[60] The *L.W.* court used the totality of the circumstances test to determine foreseeability for purposes of determining duty.[61] Although the totality of the circumstances test does not require an identical or similar incident to the tort in question for a finding of foreseeability, the *L.W.* court found that while the housing situation was "childish" and "deplorable at times,"

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47. *Id*. at 522–23.

48. Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).

49. Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

50. Rabel v. Ill. Wesleyan Univ., 514 N.E.2d. 552 (Ill. App. Ct. 1987).

51. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 49−104.

52. Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 765 (Neb. 1999); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 314 (Idaho 1999).

53. *See* L. W. v. W. Golf Ass'n, 712 N.E.2d 983 (Ind. 1999); Delta Tau Delta v. Johnson, 712 N.E.2d 968 (Ind. 1999). A third case, *Vernon v. Kroger Co*., 712 N.E. 2d 976 (Ind. 1999), reinforced that rules applied in college cases apply in commercial contexts and vice versa.

54. *L. W.*, 712 N.E.2d 983; *Delta Tau Delta*, 712 N.E.2d 968; *Vernon*, 712 N.E. 2d 976.

55. *L.W.*, 712 N.E.2d at 984. A fellow tenant of the victim's resident hall raped the victim. *Id*. The victim was required to live in this building pursuant to a scholarship program. *Id*. The victim had become intoxicated at a bar and was helped back to her room by several individuals. *Id*. Upon returning to her room, the victim passed out from intoxication. *Id*. A short while later, one of the individuals who had helped the victim back from the bar raped the victim while she was unconscious. *Id*.

56. *Id*. at 985.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*.

61. *Id*. at 984–85.

there was insufficient evidence of prior dangerous activity for L.W.'s rape to be foreseeable.[62]

In *Delta Tau Delta v. Johnson*, however, the Indiana Supreme Court recognized that there were sufficiently similar prior incidents of sexual misconduct to support foreseeabililty as an aspect of legal duty owed to a student.[63] These two cases from Indiana indicate that there are sometimes insufficient predicate facts to create a legal duty to a tenant or business invitee.[64] Moreover, duty does not necessarily mean liability.[65] Courts since the era of *Beach, Bradshaw*, and *Rabel* have implicitly recognized a key argument from *Rights and Responsibilities*—a college's or university's duty to students does not equal insuring student safety.[66]

The *Knoll* case involved an incident (although not a sexual assault) at a fraternity.[67] A student at the University of Nebraska was involved in a hazing incident that resulted in very serious injury.[68] During a pledge induction process, members of a fraternity met the plaintiff student at a university building on campus and brought the student to an off-campus, but university regulated, fraternity house.[69] The injured student consumed hard liquor and beer over a several hour period.[70] At one point the student was handcuffed to a radiator.[71] The student managed to become free of the handcuffs and attempted an escape out an upstairs window.[72] During the attempted escape, the student suffered serious injuries in a fall.[73]

The critical issue in *Knoll* revolved around the fact that the injuries ultimately took place at a premise not owned or operated by the university.[74] Although the fraternity house was not on university-owned property, it was subject to the student code of conduct, which created sanctions for certain forms of dangerous conduct.[75]

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62. *Id*. at 985.

63. Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973–74 (Ind. 1999). In *Delta Tau Delta*, the victim brought suit against local and national offices of a fraternity arising out of a sexual assault at a fraternity house. *Id*. at 970. The victim attended a party at a fraternity house where she met up with an alumnus of the fraternity. *Id*. Near the conclusion of the party, the victim sought a ride home, and the alumnus offered the victim a ride after he "sobered up." *Id*. The two went to a separate room within the fraternity house to wait for the alumnus to regain his sobriety, and during this time, the alumnus locked the victim into the room and sexually assaulted her. *Id*. Applying a totality of the circumstances test, the court found that the victim's assault was foreseeable because of prior instances of sexual assault within the defendant fraternity's house. *Id*. at 973.

64. *Compare L. W.*, 712 N.E.2d 983, *with Delta Tau Delta*, 712 N.E.2d 968.

65. *E.g.*, *L. W.*, 712 N.E.2d 983.

66. *E.g.*, *Delta Tau Delta*, 712 N.E.2d 968.

67. Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 760 (Neb. 1999).

68. *Id*.

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*. at 761–62.

75. *Id*. at 764.

The Nebraska Supreme Court, though, did not focus upon the regulation of the off-campus property, but focused instead on the fact that the incident began on university property.[76] In deploying the totality of the circumstances test—the virtually identical test employed by other courts[77]—the Nebraska Supreme Court relied heavily upon the fact that there had been prior hazing incidents where students had been snatched and removed from buildings or otherwise coerced into high-risk alcohol consumption or other harassing hazing activities.[78] From this the court concluded "the University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom."[79]

In so holding, the court made it clear that events leading to an eventual injury off campus do not themselves have to be injurious or even seriously dangerous independent of the resulting injury.[80] Importantly, off-campus injuries to students sometimes occur when students are lured from a university premise to an off-premise location. If the *Knoll* reasoning is correct, there could be a sufficient link—subject to possible proximate cause limitations—between almost any off-campus event that initially commences on-campus and the ultimate injury that arises from that event. Therefore, whether a college or university has a duty to a victim may hinge upon where an attacker commences contact with the victim, even if the initial contact itself is neither harmful, nor portends harm. In this sense, duty may lie in the hands of an attacker.

The fact that the existence of a duty in a given case may turn upon circumstances largely beyond the control of the institution leads to an extremely important point. Danger has a way of spilling from one location to several others in a chain reaction. A risk may result from a series of specific events that thus may or may not trigger a legal duty; it is often impossible to predict how harmful events will unfold. After *Knoll, a college or university must often behave as if duty were owed, even if in actuality the college or university has no duty.* A facilitator institution does the same. A college or university should act *as if* it were accountable under a reasonable person standard for foreseeable danger to students, whether or not it actually will be held accountable in a court of law. For example, tests like the totality of the circumstances test make it difficult for a student or administrator to predict in advance whether a duty will be owed in a given fact pattern. Hence, despite the continued existence of the law of duty, colleges and universities cannot heavily rely upon duty case law to deduce the limits of responsibility a prioi. The law of duty in higher education law no longer guards the gates of the courthouse as it did in *Palsgraf*.[81] Duty law now serves the primary function of being a major factor in limiting or eliminating liability post

76. *Id*.
77. *E.g.*, L. W. v. W. Golf Ass'n, 712 N.E.2d 983, 984–85 (Ind. 1999).
78. *Knoll*, 601 N.W.2d at 764–765.
79. *Id*. at 765.
80. *Id*. at 762.
81. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

hoc, not in keeping cases involving physical injury to students occurring within some proximity to campus life blocked from the courthouse door. For instance, the line between *L.W.* and *Delta Tau Delta* is ever so thin—constructive notice of a single sexual assault may be enough to tip the former into the latter. This is a feature of most cases involving duty issues, not just those cases involving landowner duty.[82]

In this vein, *Knoll* made clear that it was not essential that a specific prior incident occur with respect to a specific fraternity. Using the totality of circumstances test, the Nebraska Supreme Court was willing to look at prior acts of sneaking and grabbing of students and also prior, but not identical, criminal activity in the fraternity community.[83] Crucially, the court made it clear that "prior acts need not have occurred on the [specific] premises [where the injury occurred]."[84] Sufficiently similar incidents occurring in a nearby community can give rise to an inference that such criminal activity is foreseeable on a nearby landowner's property.[85]

The *Knoll* court did address the fact that the university had asserted some control over fraternity houses by regulating them under the student code.[86] Nonetheless, it appears from the court's reasoning with respect to landowner duties that the mere fact that control was or was not exercised over an off-campus property would not be dispositive.[87] The court included the exercise of university control over students as one of the factors in the totality of circumstances test, but the court did not find university control to be the only—or even most important—factor in determining liability.[88] Thus, one critical implication of *Knoll* is that it does not hold that regulating off-campus behavior imposes duty. This is not an "assumed duty" case. The obverse is also certainly not true: not regulating off-campus behavior does not insulate an institution from liability. One of the implications of bystander-era cases[89] was that assuming a duty—for example, regulating off-campus behavior—would increase an institution's liability.[90] The Nebraska Supreme Court, by reversing the trial court's grant of summary judgment for the University of Nebraska, suggests, to the contrary, that the failure to enforce regulations involving off-campus behavior could be a factor under the totality of the circumstances test.[91] The result ultimately turns on what a

82. *Knoll*, 601 N.W.2d at 764.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*.

87. *See Id*.

88. *Id*. at 764−65.

89. Bystander era cases refer to a period during the 1970s and 1980s where the courts cast universities as "bystanders" to student life. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 49. Essentially, the courts found that universities were "bystanders" to non-educational student life, and that universities therefore owed no legal duties to prevent injuries students inflicted upon each other. *Id*. at 49–50, 63–65.

90. *See Id*. at 65.

91. *See Knoll*, 601 N.W.2d at 764–65.

reasonable person would do with respect to business invitees considering all the circumstances.[92] *Knoll* may be the first American case to imply that not being proactive is *itself* a factor in creating duty.[93] Certainly, a facilitator college or university recognizes that a small amount of prevention may be a cure for potential liability.[94]

In retrospect, it seems that the University of Nebraska's strong and proactive concern for student behavior off-campus (and certain safety measures that were taken, such as working security phones) may have ultimately resulted in minimal *liability* to the university.[95] By way of settlement with the university, the injured student received only $25,000.[96] This relatively small sum in the range of tort injury settlements[97] seemed related to the fact that the institution had regulated pledge sneak events and had offered security phones, one of which the injured student had admitted that he had chosen not to use because he wanted to participate in the event.[98]

The other decision establishing the duty of a college or university to use reasonable care to protect students in high-risk alcohol situations is *Coghlan v. Beta Theta Phi Fraternity*.[99] In *Coghlan*, Rejena Coghlan, a freshman, was injured during rush week.[100] Rush week had developed into a highly planned event sanctioned by the university and performed in conjunction with Greek organizations.[101] One of the specific concerns during rush week was underage drinking.[102] To protect students from underage drinking, several policies were created.[103] One of those policies required sororities to assign a "guardian angel" to any underage student that sought induction into a sorority.[104] The "guardian angel" was a member of the sorority to which the student wished to belong.[105] The "guardian angel" was to shadow the student during rush week, particularly during evening activities.[106] Advisors from the Greek system and the university jointly

92. *Id*. at 761–65.

93. *See id.* at 764 (indicating that the university was aware of hazing and created regulations prohibiting hazing, but that the university did not enforce those regulations off-campus).

94. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 212.

95. Peter F. Lake, *Tort Litigation in Higher Education,* 27 J.C. & U.L. 255, 274–75 (2000) [hereinafter *Tort Litigation*].

96. *Id*. at 275.

97. The $25,000 *Knoll* settlement is relatively small when compared to a $6 million settlement paid by the Massachusetts Institute of Technology ("MIT") to the family of Scott Krueger, an MIT student, for his death from alcohol poisoning. HIGHER EDUC. CTR., *MIT Settlement Makes Other Colleges and Universities Take Notice*, *available at* http://www.edc.org/hec/press-releases/000915.html (Sept. 15, 2000).

98. Lake, *Tort Litigation*, *supra* note 95, at 274–75.

99. 987 P.2d 300 (Idaho 1999).

100. *Id*. at 304–05.

101. *Id*. at 305

102. *Id*.

103. *Id*.

104. *Id*.

105. *Id*.

106. *Id*.

monitored the evening events, which were a series of alcohol parties.[107] Ms. Coghlan managed to obtain alcohol at two parties entitled "Jack Daniels' Birthday" and "Fifty Ways to Lose Your Liver"—and became so intoxicated that she later fell and suffered injuries.[108] Another sorority sister—not her assigned "guardian angel"—had escorted Coghlan from a party and put her into bed in a sorority house, but this did not prevent Coghlan from sustaining permanent injuries by later falling thirty feet from the sorority's fire escape.[109]

Idaho's Dram Shop Act is highly protective of servers: it protects a server from being sued by a person who voluntarily consumes alcohol from that server, even though the individual who consumes the alcohol is underage.[110] As a result of this loophole in the Idaho Dram Shop Law, the lawsuit against the fraternity defendants was dismissed as they were deemed servers.[111] The university, however, was not a server and, therefore, did not quality for Idaho Dram Shop immunity.[112]

A major issue in the case was the nature and source of legal duty, if any, owed by the university to the student.[113] The *Coghlan* court correctly noted that the student-university relationship is not itself a special relationship imposing an affirmative duty.[114] Finding it unnecessary to discuss issues related to landowner duties, the court determined that the injured party's pleadings were sufficient to create an issue regarding an assumption of duty toward Coghlan.[115] The *Coghlan* court pointed out that there were university employees at parties who were charged with supervisory responsibilities, and that there were allegations that the employees either knew or should have known that Coghlan was drunk and required reasonable care to protect her from injury.[116] The matter was remanded for further determinations with respect to the issue of voluntary assumption of duty.[117]

Does *Coghlan* mean that the best course of action for college and university officials is to decline to participate in supervision of student events? The answer is almost certainly no. For one thing, substantial interaction with student life and Greek affairs is well entrenched in modern student affairs.[118] It also seems unrealistic as a college or university business practice to disconnect from risk management with student groups and organizations.[119] Moreover, managing the classroom environment and creating conditions for academic success require a

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107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*. at 306–07.
111. *Id*. at 306.
112. *Id*. at 312.
113. *Id*. at 310–12.
114. *Id*. at 311–12.
115. *Id.* at 312.
116. *Id*.
117. *Id*. at 314.
118. *See, e.g.*, *Id*. at 300; Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757, 761 (Neb. 1999); BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 150–53.
119. For instance, university risk management efforts reduced the plaintiff's settlement in *Knoll*. Lake, *Tort Litigation*, *supra* note 95, 274–75.

whole life-learning strategy and the creation of a reasonably safe environment.[120] Thus, it seems unlikely that the modern college or university would select a strategy of disengagement from the Greek system even if *it* were legally advisable.

Such a strategy would also be legally unsound. As in the *Knoll* case, danger has a nasty habit of transporting on and off premises: the failure to attend to a risk that occurs near campus or at a student off-campus event is as likely to create college or university liability as a failure to attend to a risk on campus.[121] Hypothetically, the plaintiff in the *Knoll* case might have returned to a dormitory and fallen in or near the dormitory, triggering potential landowner duties.[122] Landowner duty analysis in *Coghlan* might have created a foundation for that court's conclusion that the university shared responsibility for the injuries to the plaintiff.[123] Crucially, it may be impossible to find factual situations that do not create a triable issue of fact on whether a duty has been assumed. The modern college or university is so interactive in student life—and offers so many interlocking business activities concentrated in time and space[124]—that any time a student is injured on or near campus, a college or university employee is probably involved to an extent that a fact issue on assumed duty likely exists.

Coghlan also illustrates a significant defect in some states' underage drinking and high-risk alcohol activity rules. The Idaho Dram Shop Act is too protective of servers.[125] Categorical immunity for a server from suits (*especially*) by underage students who have voluntarily consumed is simply too broad a rule and, as a matter of policy, unsupportable if we have any hope of combating underage drinking risks. A facilitator college or Greek group recognizes that it shares some responsibility for high risk and underage drinking—the mere fact that the participation by students has an element of voluntarism does not absolve a facilitator from responsibility.[126] This sort of statutory rule is not consistent with the facilitator model.[127]

Similarly, the Alabama Supreme Court took an exceedingly disappointing step backwards in 1998. In *Ex parte Barran*,[128] the Alabama Supreme Court ruled that a student who voluntarily participated in hazing activities might be barred from suit against other parties because the student voluntarily participated in the hazing process.[129] The case is significantly out of line with the dominant approach to

120. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193–94.

121. *Knoll*, 601 N.W.2d at 764.

122. The facts of *Knoll* are located at *Knoll*, 601 N.W.2d at 760–61.

123. The *Coghlan* Court did not reach landowner duty analysis because it found that the defendant university assumed a duty to the plaintiff. Coghlan v Beta Theta Pi Fraternity, 987 P.2d 300, 312 (Idaho 1999).

124. *See, e.g.*, *Coghlan*, 987 P.2d at 300; *Knoll*, 601 N.W.2d at 761; BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 150–53.

125. *Coghlan*, 987 P.2d at 306–07.

126. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 195.

127. For a description of the facilitator model, *see supra* note 5.

128. *Ex parte* Barran, 730 So. 2d 203 (Ala. 1998).

129. *Id*. at 208.

fighting hazing, which bars the assumption of risk defense as a matter of policy.[130] The decision to penalize a student who voluntarily participates in hazing by barring a hazing related claim effectively shields other students who have perpetrated hazing. By abolishing consent defenses in hazing cases, lawsuits may proceed even from parties who have voluntarily participated in hazing. This rule can have a significant impact in ending voluntary behavior that is utterly inappropriate, uneconomical, antisocial or otherwise extremely dangerous, or involves minors.[131]

The messages from *Knoll* and *Coghlan* were echoed in another case that never made it to final adjudication. Scott Krueger died as a result of alcohol poisoning at the Massachusetts Institute of Technology ("MIT").[132] As a result of Scott Krueger's death, MIT settled with the Krueger family for $6 million, a public apology, and the undertaking to perform various activities and policy changes.[133] The settlement sent shock waves through the education community in part because the size of the settlement was unusually large.[134] There is much speculation as to what occurred and why MIT settled because the matter was never given the chance to develop as a full matter of record in a court of law. Nonetheless, the case is indicative of a new climate of concern for potential success in courts of law on the issue of the legal duty of colleges to protect students from foreseeable danger in high-risk alcohol situations.[135]

Not all student alcohol cases have involved only university defendants.[136] On

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130. *See* Dara Aquila Govan, *"Hazing Out" the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability,* 53 RUTGERS L. REV. 679, 689–91 (2001).

131. These cases illustrate a continuing issue. Many courts seem to feel that the voluntary drinker has crossed a significant moral or social boundary and therefore, is undeserving of any recovery. It is true that there will be some individuals whose behavior is so unpredictable, unforeseeable, or so unpreventable that when coupled with a college or university exercising reasonable care, these students are undeserving of any significant recovery. Nonetheless, courts should be cautious to apply such a rule categorically because the effect is to create a legal climate in which others may take advantage of the negligence of victims and use that legal rule as an opportunity for gross injustice.

132. HIGHER EDUC. CTR., *MIT Settlement Makes Other Colleges and Universities Take Notice*, *available at* http://www.edc.org/hec/press-releases/000915.html (Sept. 15, 2000).

133. *Id.*

134. *Colleges and Universities Nationally Cope With Concerns About Students' Alcohol Use*, DEPAUW MAGAZINE, *available at* http://www.depauw.edu/pa/magazine/summer_2003/feature_3.html (last visited May 8, 2005).

135. A similar situation occurred when Ferrum College recently settled with respect to a student suicide. In the public settlement, Ferrum College admitted a shared responsibility with respect to suicide risk. G. Jeffrey MacDonald, *Reaching Out to Students*, USA TODAY, Dec. 6, 2004 at 7D. This case is particularly notable because the law of college student suicide is still in its relative infancy and presently awaits further determinations from the Massachusetts judicial system in the matter of *Elizabeth Shin v. MIT* (a matter in which a student burned herself to death in a suicide). *See* Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES, Apr. 28, 2002, § 6 (Magazine), at 57; Peter F. Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 126 n.3 (2002).

136. *E.g.*, Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa 2000); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999); Knoll v. Bd. of Regents of Univ. of Neb.,

the whole, litigation against fraternities and fraternity members remains strong.[137] There appears to be no significant let-up in a judicial orientation (that began in the 1980s) to hold Greek organizations potentially responsible for injuries caused in the context of Greek organizational functions.[138] One of the most notable recent cases involving Greek organizations is *Garofalo v. Lambda Chi Alpha Fraternity*.[139] *Garofalo* involved a fraternity pledge named Matt Garofalo, who died after consuming large quantities of alcohol at the fraternity house.[140] Garofalo "drank heavily," consuming excessive quantities of both beer and hard liquor.[141] There had been a fraternity ceremony that created a traditional mentoring relationship between active fraternity members and fraternity pledges.[142] Most active fraternity members took part in the ceremony, although the fraternity did not require participation.[143] The ceremony itself did not involve alcohol.[144] Nonetheless, it was common for post-ceremonial festivities to take place.[145] These festivities typically included a post-ceremony drink with the mentor in the chapter house followed by a trip downtown for additional drinking activities.[146] Each mentor gave his respective pledge beer and hard liquor in this context.[147] On the ill-fated evening of the ceremony, Garofalo never made it out of the fraternity house—he became so intoxicated from liquor purchased by Chad Diehl, Garofalo's mentor, that Garofalo tumbled down some stairs and staggered in a way that caused another fraternity member, Tim Reier, to describe his gait as "'like an injured player from the field.'"[148] Diehl and Reier placed Garofalo on a couch in a position such that he would not aspirate vomit in case he became sick.[149] Diehl stayed with Garofalo for a period of time while Reier left to hit the town with other fraternity members.[150] Diehl, who remained back at the fraternity house to look in on Garofalo, left for a while but returned and found Garofalo "snoring or, perhaps, 'gurgling.'"[151] At 3:00 a.m., Reier, who had gone downtown to drink with other fraternity members, returned to the house and saw Garofalo "snoring and look[ing] fine."[152] Reier turned over the drunken member again so as

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601 N.W.2d 757 (Neb. 1999); *Ex parte* Barran, 730 So. 2d 203 (Ala. 1998).

137. *See Garofalo*, 616 N.W.2d 647; *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757; *Barran*, 730 So. 2d 203.

138. *See Garofalo*, 616 N.W.2d 647; *Coghlan*, 987 P.2d 300; *Knoll*, 601 N.W.2d 757; *Barran*, 730 So. 2d 203.

139. 616 N.W.2d 647.

140. *Id.* at 650.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 651.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

to avoid aspiration of vomit—and thought that Garofalo "looked pretty content."[153] The next day, some time between 8:00 a.m. and 8:30 a.m., Reier looked in again and this time it appeared that Garofalo was sleeping.[154] According to the medical examiner, Garofalo actually had likely died sometime between 7:00 a.m. and 8:00 a.m.[155] Nonetheless, Garofalo's death was not discovered that day until around 11:30 a.m., along with evidence of vomit near Garofalo's body.[156] Following Garofalo's death, a blood alcohol test caused the medical examiner to conclude that Garofalo's blood alcohol content may have been as high as 0.30% some time before he died.[157]

Garofalo's family brought suit against several parties including the national fraternity, the local Iowa chapter, Reier, and Diehl.[158] Garofalo's family appealed the trial court ruling granting summary judgment in favor of Reier, the local fraternity chapter, and the national fraternity to the Iowa Supreme Court.[159] The Iowa Supreme Court first considered any duty of the local chapter with respect to the death of the fraternity member.[160] The court considered whether there was a special relationship with the Iowa chapter and the fraternity pledge so as to impose a legal duty of care upon the local chapter to assist the student.[161] Citing *Beach v. University of Utah*,[162] the court concluded that there was no such special relationship as the critical issue in determining special relationship, in their terms, was relationship of "dependence or mutual dependence."[163] The court was unwilling to characterize the relationship between members of a fraternity as a relationship of mutual dependence.[164]

A critical issue with respect to the local chapter was violation of statutory law prohibiting underage drinking.[165] Following the earlier Iowa case of *Sage v. Johnson*,[166] the *Garofalo* court acknowledged that a "[v]iolation of [liquor laws] will support a common law cause of action by the underage person against the person furnishing the alcohol."[167] Nonetheless, Iowa courts have construed a cause of action under Iowa liquor laws as fairly limited: to establish a cause of action under the statute, service must constitute "knowing and affirmative

153. *Id*.
154. *Id*.
155. *Id*.
156. *Id*.
157. *Id*.
158. *Id.*
159. *Id.* at 649.
160. *Id.* at 652.
161. *Id.*
162. 726 P.2d 413 (Utah 1986).
163. *Garofolo*, 616 N.W.2d at 652 (citing RESTATEMENT (SECOND) OF TORTS, § 314A, cmt. b (1965)). It is important to realize that not all special relationships have this characteristic. Some relationships of dependence are not special for purposes of affirmative duty; some relationships that are legally special would be hard to categorize as based upon dependence.
164. *Garofolo*, 616 N.W.2d at 653–54.
165. *Id.* at 654.
166. 437 N.W.2d 582 (Iowa 1989).
167. *Garofolo*, 616 N.W.2d at 653.

delivery."[168] As *Garofalo* pointed out, merely permitting consumption or knowing that alcohol is being consumed on premises is not sufficient to meet the statutory requirement of a "knowing and affirmative delivery."[169]

The Iowa Supreme Court in *Garofalo* determined that there was no knowing and affirmative delivery to the underage student by the fraternity.[170] Discussing a number of cases in which fraternities were held liable, the court distinguished those cases by determining that the critical factor in imposing responsibility is that alcohol was provided during an initiation process.[171] The court concluded:

> [T]he facts established in the record before us revealed no affirmative harm by the Iowa Chapter of Lambda Chi Alpha, illegal or otherwise, toward Garofalo. The drinking that ultimately led to Garofalo's death was not part of any initiation ritual or ceremony. No chapter funds were used to purchase the liquor. It is true that tradition played a part in the decision by individual members to drink with underage pledges after the ceremony, and liquor was bought for that very purpose. But appellants have come forward with no proof to suggest, even impliedly, that Garofalo or any other member's consumption was coerced or required as a condition of chapter membership. To the contrary, the record yields proof that Garofalo was an experienced, if not sensible, drinker and that at least one of his peers chose not to drink at all.[172]

With this decision, the Iowa Supreme Court effectively equated "initiation" with only formal initiation ceremonies, and as a consequence, a chapter can escape responsibility for underage drinking so long as initiations neither require nor coerce—by ritual rules or pressure by chapter leaders in the scope of their official capacities—a member to consume liquor. De facto tradition was distinguished from formal ceremony or initiation: *Garofalo* attempts to create a bright line distinction for liability. The Iowa Supreme Court approved of the trial court's decision to use summary judgment because there was insufficient evidence of duty for the case to go to a jury.[173]

What is disturbing about *Garofalo* is that the court itself admitted that it was "traditional following the ceremony for each big brother to invite his new little brother to his room to toast their new relationship with drinks before adjourning to downtown taverns for more serious partying."[174] Alcohol was purchased specifically for the toasting event following the chapter ceremony and was to precede the heavier drinking.[175] The decentralized purchase and consumption of alcohol was designed to avoid the problem of slush funds being created by social

168. *Id.* at 653 (citing Fullmer v. Tague, 500 N.W.2d 432 (Iowa 1993)).
169. *Id.* at 653.
170. *Id.* at 654.
171. *Id.* at 653 (internal citations omitted).
172. *Id.* at 653–54.
173. *Id.* at 654.
174. *Id.* at 650.
175. *Id.* at 653.

chairmen to purchase alcoholic beverages.[176] Such a slush fund likely would have led the *Garofalo* court to a finding of liability on the basis that it was officially sanctioned by a fraternity.[177] Again, the court admitted that "[t]he ceremony may have created an opportunity for members to be together which could have spawned an opportunity to drink alcohol, but the ceremony itself carried no imperative for consumption."[178] The court concluded that "[i]ndications regarding Garofalo's intake of alcohol reflect[ed] a decision on his part to consume rather than a mandate from his house mates to that effect."[179] The Iowa Supreme Court ruled that only if a student were coerced, forced, or mandated to consume alcohol would a duty exist.[180] *Garofalo* effectively held that despite knowledge and complicity of the fraternity in the violation of underage alcohol rules, no legal liability can flow against a local chapter for injuries resulting from underage drinking unless the drinking occurs in the context of initiation or is coerced, forced, or otherwise involuntary. Such a rule encourages subterfuge tactics to avoid alcohol rules; and it also encourages the creation of an "unofficial culture" which is actually, in all reality, the true culture of the fraternity. The drinking that occurred was clearly in pursuance of a goal of the chapter—making a mockery of the fraternity's official statements of fellowship and compliance with local and federal alcohol laws.[181] *Garofalo* was not a good decision in this regard, and is not in any way consistent with the vision of a facilitator college or fraternity. The ruling encourages fraternities to engage in dangerous high-risk drinking.

There are, however, two sensible interpretations of *Garofalo*. First, the Court put significant emphasis upon the fact that Garofalo was an experienced drinker who chose to drink excessively and voluntarily.[182] It is interesting to consider what the Iowa Supreme Court might have done with a less experienced drinker, or with someone who had become seriously intoxicated without the type of self-generated excessive behavior that the student displayed in the *Garofalo* case. Is *Garofalo* just a case about Bluto Blutarsky of Animal House fame?[183]

The other way to make sense of the *Garofalo* case may lie in the distinction between a chapter and a house corporation.[184] In the Greek world, living arrangements are typically governed by several entities. For one, the local chapter makes many of the rules and regulations for chapter life and is significantly

176. *Id.*

177. *Id.*

178. *Id.* at 651.

179. *Id.*

180. *Id.* at 654.

181. *Id.* at 650.

182. *Id.* at 653–54.

183. NATIONAL LAMPOON'S ANIMAL HOUSE, (Universal 1978) [hereinafter ANIMAL HOUSE]. *Animal House* is a fictional film about the fictional Delta House, a hedonistic fraternity that rebels against an autocratic university administration. Bluto Blutarsky is a member of the Delta House, and is characterized throughout the film as a rowdy individual who parties and drinks to excess.

184. *See Garofolo*, 616 N.W.2d at 657 (Lavorato, Larson & Ternus, JJ., concurring in part and dissenting in part) (discussing defendant Lambda Chi Alpha's house corporation status).

involved in initiation and ceremony.[185] The national chapter also sets guidelines, rules, and regulations.[186] In addition, a house corporation is often the entity that owns, and to some extent, operates the facility in which Greek students live.[187] There is such a close legal connection between a house corporation and a local chapter that it may be confusing and difficult to sort out which entity is the possessor for purpose of determining landowner duty liability. Many injuries to students in fraternity houses occur in common areas that are traditionally under the control of the landlord and thus are the responsibility of the landlord or house corporation.[188] As a result, one interesting issue that was not raised by the *Garofalo* case would be the obvious issue of special relationships arising through landlord-tenant and business-invitee relationships. No analysis of this issue appears anywhere in the opinion, and it would have been helpful for the court to have at least made a reference as to why this issue was not raised in the case. If *Garofalo* assumes, sub silentio, that a house corporation bears responsibility for common areas, then the case is less disturbing from a high-risk alcohol prevention perspective.

The *Garofalo* court also considered whether the national chapter bore any responsibility.[189] The court disallowed claims against the national chapter: "[T]he national fraternity had no more duty than the Iowa chapter to protect Garofalo from his decision to drink following the big brother/little brother ceremony. It neither furnished the alcohol he consumed nor forced him to consume as part of any recognized fraternal activity."[190] The court analogized its decision to the national cases that it believed had refused "to hold universities responsible for injuries resulting from the drinking habits of their adult but underage children . . . ."[191] The court cited *Bradshaw*, *Booker,* and *Beach* to this effect but ignored the contradictory cases of *Furek, Knoll*, and *Coghlan*.[192] The Iowa Supreme Court failed to distinguish these cases, which were plainly apposite. Nonetheless, the decision is consistent with many decisions from other courts in result, if not in rationale.[193] Although national chapters have been subject to successful

185. *See id.* at 650 (majority) (implying that the local fraternity chapter created rules).

186. *Id.* at 654.

187. *E.g.*, ALPHA XI DELTA, *Alpha Xi Delta Housing Corporation*, *available at* http://www.alphaxidelta.org/housingmission.asp (last visited May 8, 2005).

188. *See* Sec'y of Housing & Urban Dev. v. Layfield, 152 Cal. Rptr. 342, 343 (Cal. Super. App. Dept. 1978).

189. *Garofolo*, 616 N.W.2d at 654–55.

190. *Id.* at 654.

191. *Id*.

192. *Id*. (citing Bradshaw v. Rawlings, 612 F.2d 135, 141 (3d Cir. 1979); Booker v. Lehigh Univ., 800 F. Supp. 234, 237–38 (E.D. Pa. 1992); Beach v. Univ. of Utah, 726 P.2d 413, 419–20 (Utah 1986); but not Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb. 1999); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999)). The first series of cases found no duty was owed to students who voluntarily drank to excess and became injured as a result, the second set of cases held that a duty was sometimes owed to students who voluntarily drank to excess.

193. *E.g.*, *Bradshaw*, 612 F.2d at 141; *Booker*, 800 F. Supp. at 237–38; *Beach*, 726 P.2d at 419–420.

lawsuits,[194] most courts seem to be more concerned with local chapter and individual member responsibility.[195]

The most challenging feature of the *Garofalo* court's analysis was with respect to Reier.[196] Diehl had furnished alcohol to the decedent; Reier had not.[197] The court rejected the argument that fraternity brothers enjoyed a special relationship with respect to each other that creates a duty to rescue.[198] The court considered whether section 324 of the *Restatement (Second) of Torts*, which deals with taking charge of one who is helpless, applied in this situation.[199] With respect to Reier, who did not furnish alcohol to Garofalo but took actions with respect to Garofalo's care, the court stated:

> Thus the question boils down to whether Reier 'took charge' of Garofalo on the night in question. Appellants contend Reier assumed this duty when he permitted Garofalo to lie down on the couch in his room. He acted reasonably, they concede, when he left Garofalo in Diehl's care while he went downtown. Upon Reier's return to the fraternity house, however, they contend his duty resumed. They fault Reier for "going to bed" and failing to "constantly monitor or check on Garofalo throughout the remainder of the early morning hours of September 8." They cite the fact that Reier made no attempt to awaken Garofalo before he left for class as evidence that he breached his duty to him.
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> We, like the district court, do not believe these facts, viewed in their most favorable light, establish a special duty running from Reier to Garofalo based on section 324 of the Restatement. Reier was not responsible for Garofalo's intoxication. He was not his "big brother." He merely let Garofalo "sleep it off" on his couch. Even if these facts could be stretched to fit the notion of "taking charge," Reier's conduct reveals no breach of that duty. When he left the fraternity house at midnight, Garofalo was intoxicated but conscious. When Reier returned to his room at 3:00 a.m., Garofalo was asleep and snoring. Reier repositioned him on his side, mindful for his safety. When he hurried out the door for an 8:30 a.m. class, Reier glanced at Garofalo, assumed he was asleep and made no attempt to awaken or "revive" him. Although appellants fault this later omission, we believe the standard urged by appellants is substantially higher than what is required under the Restatement. Given the gratuitous nature of the undertaking, the

194. Mumford, *supra* note 8, at pt. IV.

195. *See, e.g.*, *Garofalo*, 616 N.W.2d at 652 (precluding summary judgment for an individual fraternity member defendant); *Coghlan*, 987 P.2d at 314 (precluding summary judgment for sorority defendant).

196. *Garofalo*, 616 N.W.2d at 655–56.

197. *Id*. at 650.

198. *Id.* at 655. This position is sound. Only one case clearly creates a special relationship for "companions on a social venture." *Farwell v. Keaton*, 240 N.W.2d 217, 222 (Mich. 1976).

199. *Garofalo*, 616 N.W.2d at 655.

> rule requires only acting in "good faith and with common decency" and relieves the actor from responsibility for "a high standard of diligence and competence, to possess any special skill, or to subordinate his own interest to those of the other." Thus Reier and the chapter were entitled to judgment as a matter of law in this claim.[200]

The court hedged on the issue of legal duty in regard to Reier. The court indicated that even if Reier's conduct would fit under the notion of assuming a duty by taking charge, Reier's conduct revealed no *breach* of that duty.[201] On this point the court may have been correct, although such issues are often for a jury. Most of Reier's conduct, although not consistent with professional or emergency medical technician's standards, was in the nature of giving reasonable assistance. Some judges might be willing to send to the jury the issue of whether Reier should have taken more steps in the early morning hours for the assistance of the other intoxicated fraternity member.

While the one fraternity member may have barely escaped liability, Diehl, who provided the alcohol, did not fare as well.[202] The Iowa Supreme Court stated that "based on evidence that Diehl furnished alcohol to Garofalo in violation of state law, and disputed facts regarding his conduct once Garofalo became intoxicated and passed out, the [lower] court ruled summary judgment in Diehl's favor would be inappropriate," and Diehl did not appeal the lower court's denial of his summary judgment motion.[203] While there were disputed facts regarding Diehl's conduct, as reported in the *Garofalo* decision, his conduct was not significantly different from the conduct of Reier except for the fact that he directly furnished alcohol to Garofalo.[204] Thus, it is crucial to realize that even in a non-sanctioned, non-coercive, fraternity-related event, a member of a fraternity who acts as an alcohol-supplier may be held responsible for injuries that flow to a student as a result of alcohol consumption—even if the injured student uses excessive amounts of alcohol voluntarily.

One other feature of *Garofalo* stands out. The court split with respect to some of the defendants and sat en banc to hear the case.[205] With respect to the ruling of the lower court regarding the national fraternity, all of the Iowa Supreme Court justices agreed that the national fraternity should not be held liable.[206] As to the ruling of the lower court with respect to Reier, four justices agreed that summary judgment in his favor was proper; two disagreed.[207] Most importantly, however, the justices split three to three on the issue of whether the local chapter should be held responsible for the events related the big brother ceremony.[208] In a vigorous

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200. *Id.* at 655–56.
201. *Id.*
202. *Id.* at 654–55.
203. *Id.* at 652.
204. *Id.* at 650–51.
205. *Id.* at 656. However, two justices took no part in the case. Six justices heard the case.
206. *Id.*
207. *Id.*
208. *Id.* at 656–60 (Lavorato, Larson & Ternus, JJ., concurring in part and dissenting in part).

partial dissent, Justice Lavorato and two other justices challenged the reasoning of the affirming split with respect to the local chapter.[209] According to the dissent on this issue:

> The evidence in this case is that underage drinking in the Iowa chapter house was the norm rather than the exception long before the incident in question. As the majority itself notes, virtually every witness testified that beer and other alcoholic beverages were made available to underage members. The reasonable inference from the record is that virtually every member was aware that this was happening and virtually every member, passively if not actively, approved of the practice.
>
> A report of the university investigation of the incident revealed that many of the twenty-four new members who participated in the "Big Brother/Little Brother" ceremony consumed alcohol purchased by other chapter members in the chapter house after the ceremony. The report clearly revealed that all twenty-four new members were under the legal drinking age, as were many of the active members. Besides the forty-eight little brothers and big brothers, at least twelve other chapter members came to the ceremony, bringing the total number of members in attendance to sixty. Additionally, the report noted that three new chapter members passed out as a result of the alcohol consumption, including the decedent. The report also noted that the decedent consumed all the liquor provided him by chapter members within one hour after the conclusion of the ceremony. According to the investigation report, active members, including some chapter officers (defendant Chad Diehl was vice-president of the chapter), purchased alcohol before the ceremony with the intention of offering it to new members after the ceremony had concluded. Following the ceremony, alcohol was available in three rooms on the second floor of the chapter house and in three rooms on the third floor of the house. In all six rooms, hard liquor was available as well as beer, in several rooms more than one variety of hard liquor was consumed. There was some evidence that other rooms in additional to the six offered an open bar. The decedent's drinking spree occurred in three of the rooms.
>
> All of this drinking was traditional following the "Big Brother/ Little Brother" ceremony, and that included drinking by underage members and associate members.
>
> *The university concluded that the post-ceremony activities took place in the course of the Iowa chapter's affairs.* The university suspended the chapter, finding that it did not exercise reasonable preventative measures to ensure compliance with relative policies (one of which was to comply with Iowa's underage drinking statute) in the course of the chapter's affairs.[210]

209. *Id.*

210. *Id.* at 658–59 (emphasis added).

In light of this significant evidence suggesting a strong connection between the local chapter's activities and the incident, the dissenters concluded that there was a genuine issue of material fact to determine whether the local chapter owed the decedent a duty.[211]

In many ways the legacy of the *Garofalo* case is the virtual certainty of further litigation on the same issue in other cases. Even with respect to Reier, who did not furnish alcohol, the significant disagreement among the justices the Iowa Supreme Court leaves open the possibility that slight variations in the facts of the next case could be distinguishable.[212] Most importantly, the summary judgment granted by the lower court in favor of the local chapter[213] was affirmed only by the operation of the rule of law due to the three-three split on the issue of its liability.[214] The case is solid precedent for the proposition that no duty is owed by national organizations,[215] but of little decisive long-term value as a precedent in future cases regarding local chapter responsibility.[216]

From the point of view of *Rights and Responsibilities*, the *Garofalo* case is one of the most interesting that has occurred in the past five years. The *Garofalo* case illustrates that some courts will undoubtedly continue to rely upon the bystander-era precedent of *Beach*, *Bradshaw*, and *Rabel*[217] despite current trends in the law.[218] The three-three split on the issue of chapter responsibility precisely illustrates the difference between the bystander and facilitator concepts. The three justices voting to affirm the summary judgment of the lower court did not believe that the chapter should be anything more than a bystander to collateral activities occurring in student rooms after formal chapter process and ritual.[219] This ruling would clearly suggest that the most dangerous legal course of action for the chapter would be to engage in proactive measures to deal with high-risk alcohol activities occurring in the chapter house following formal or ceremonial proceedings. The great risk would be to assume a duty.

The three justices who disagreed with granting summary judgment in favor of the local chapter showed that they were inspired by concepts of facilitation. A facilitator organization, like its host university, deals not just with what it causes, directly coerces, or brings into action or form, but also with what it facilitates, engenders, and indirectly promotes.[220] A facilitator university or Greek

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211. *Id*. at 659.

212. *Id*. at 656 (majority) (outlining the breakdown of judicial opinions in *Garofalo*).

213. *Id.*

214. 5 AM. JUR. 2D *Appellate Review* § 908 (2004).

215. *Garofalo*, 616 N.W.2d at 656 (all justices agreed that summary judgment was appropriate for the fraternity's national organization).

216. *Id*. at 656 (Lavorato, Larson & Ternus, JJ., concurring in part, and dissenting in part) (showing a 3-3 split on the issue of local chapter liability).

217. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 78 (citing Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d. 552 (Ill. App. Ct. 1987)).

218. *Id*. at 128.

219. *See Garofalo*, 616 N.W.2d at 653–54 (finding no duty of local chapter to intervene).

220. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193–201.

organization looks to the substance of a situation, not just to form. The initiation/relationship ceremonies are sometimes the context for very dangerous high-risk drinking activities. A fraternal value of fellowship means little if it does not bring with it a commitment to take reasonable steps to protect people from clearly foreseeable high-risk danger.

Garofalo lends support to *Rights and Responsibilities*' assertion that the law still sits on a cusp between two different generations of thought. On the one side, and largely in the past, lies an image of the college student as adult to whom host institutions and organizations serve as little more than structures for formal educational or ceremonial activities. On the other hand, and in the future, lies a vision of the college or university in which whole life learning and living integrates educational and extra-curricular activities. The process of moving from one generational vision to another is something that will take more than a few years, and it is likely that *Garofalo*-like decisions will continue to surface over the next few decades or so. There is, however, a strong wind at the back of the facilitator model, even though the voyage is not over.

A case from 2004 stands out as an important case in relation to the alcohol-related themes of *Rights and Responsibilities*, although it is not directly a case relating to student safety as such. In *Pitt News v. Pappert*,[221] the United States Court of Appeals for the Third Circuit struck down a Pennsylvania law that barred alcohol beverage advertising in college and university newspapers.[222] In holding that the First Amendment does not permit such a restriction, the court remanded the case to the district court for the entry of a permanent injunction in favor of permitting alcohol advertising.[223] In the mid-1990s the Pennsylvania legislature amended the state liquor code to prohibit "any advertising of alcoholic beverages" in any communication format at a college or university.[224] The act defined specifically what constitutes "unlawful advertising."[225] Pursuant to the act, the Pennsylvania Liquor Control Board ("PLCB") promulgated an advisory notice dealing with the new law.[226] The *Pitt News*, a publication created by the University of Pittsburgh Board of Trustees, displayed alcoholic beverage ads.[227] The PLCB became aware of these advertisements and communicated with licensees regarding the statute and regulatory advisory.[228] At least one major licensee cancelled a significant advertising agreement with the paper.[229]

The statute and regulation were, in part, an attempt to use Pennsylvania law to promote the environmental management strategy as outlined by the Higher

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221. 379 F.3d 96 (3d Cir. 2004).

222. *Id*. at 113.

223. *Id*.

224. 47 PA. CONSOL. STAT. ANN. § 4–498 (West 2004) (struck down in *Pappert*, 379 F.3d 109–10).

225. 47 PA. CONSOL. STAT. ANN. § 4–498 (West 2004).

226. *Pappert*, 379, F.3d at 102.

227. *Id.*

228. *Id.* at 103.

229. *Id*.

Education Center of the U.S. Department of Education.[230] Studies have shown that raising taxes on alcoholic beverages, limitations on alcohol advertising, and regulation of alcohol outlet operation all contribute to reductions in alcohol use.[231] Moreover, the reduction of alcohol advertising also tends to reduce the impression in college students that college is about consumption of alcohol and, particularly in the context of college sports, an excuse to become highly intoxicated.[232]

The Third Circuit deployed the four-part test determining the constitutionality of commercial speech as set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[233] The regulation failed the four-part test according to the court because the regulation was found not to have furthered a substantial government interest.[234] This decision will have a chilling effect on regulations that would be used to limit certain forms of alcohol advertising and commercial speech in college publications.[235] The implications of this decision are not entirely consistent with facilitator norms. A facilitator university attempts to create an overall environment in which reasonable and responsible choices are most likely to be made.[236] It will be more difficult to promote a safe and reasonable campus environment when that environment features publications which generally promote alcohol use and in some cases excessive alcohol use.[237] Free speech is a core value for a facilitator college, but that value must be balanced with other values.[238] While this decision will not operate as a categorical bar to all regulatory activity with respect to college and university newspapers, it does impose burdens on the regulatory bodies that may be insurmountable in some cases.

There is some indication that the shift away from *Beach, Bradshaw*, and *Rabel* is trickling down to lower courts from the technically unreported decision of a Connecticut court in *McClure v. Fairfield University*.[239] In *McClure*, a Connecticut superior court considered a situation involving a vehicular accident

230. William DeJong et al., *Environmental Management*, *available at* http://www.edc.org/hec/pubs/enviro-mgnt.html (1998); *See also* Lake & Epstein, *supra* note 40, at 627 (discussing how controlling the influence of alcohol on the campus environment can reduce alcohol-related risks).

231. DeJong et al., *supra* note 230.

232. *Id*.

233. 447 U.S. 557 (1980). *See Pappert*, 379 F.3d at 106. The four-part test that determines whether a commercial speech restriction is constitutional is as follows: (1) the speech in question must be protected under the First Amendment; (2) the government must have a substantial interest in regulating that speech; (3) the restriction must further the substantial interest enumerated by the government; and (4) the regulation must not be overly-broad in serving the enumerated government interest. *Id*. (applying the "four-part analysis" set forth in *Central Hudson*, 447 U.S. at 566).

234. *Pappert*, 370 F.3d at 107.

235. *Id.* at 106–10.

236. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193.

237. DeJong et al., *supra* note 230.

238. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193 (stating that part of the facilitator's responsibility is to withdraw options where appropriate).

239. McClure v. Fairfield Univ., 2003 WL CV000159028, No. 21524786 (Conn. Super. Ct. June 19, 2003).

stemming from an off-campus outing at a beach involving alcohol use, for which the university offered a safe ride program.[240] The complaint alleged various forms of negligence against the university including failing to adequately supervise and monitor off-campus and underage drinking.[241] In considering whether a duty was owed from the university to the injured students, the court specifically considered the trilogy of *Beach*, *Bradshaw*, and *Rabel*.[242] The court, however, spoke more highly of *Furek v. University of Delaware*,[243] in rejecting the reasoning of that line of cases.[244] While the court's reasoning seemed to turn upon an assumption of duty argument—based upon the fact that the university had provided a safe ride program between the beach and campus[245]—its comments about *Beach* and *Bradshaw* and the change in the minimum drinking age and alcohol issues are instructive:

> Both *Furek* and *Mullins* are distinguishable from the present case in that the events in those cases occurred on campus. However, while the events in the present case occurred off-campus, the university's providing information about the beach area housing in the student binder was an imprimatur. It was well known that students would attend parties at the beach residences where they would consume alcohol. When *Bradshaw* and *Beach* were decided, the legal drinking age in a majority of jurisdictions was 18 years of age. In Connecticut, the legal drinking age is presently 21 years of age, as it was at the time of the accident. A large percentage of university students are therefore below the age of majority with respect to the usage of alcohol. Student alcohol use has become an increasingly serious problem in recent years. The university has acknowledged this in that it has an anti-alcohol policy that applies to all underage students. While the university had knowledge that underage drinking frequently occurred at the beach area, it did nothing to enforce the policy there, which indirectly encouraged students to go to the beach area in order to drink alcohol.[246]

Not only did the court reject the *Beach* and *Bradshaw* rationales, it went on to predicate a duty upon the existence of and awareness about alcohol rules and policies, as evidenced by the school's safe-ride program.[247] The interesting question in light of the *McClure* case—in addition to whether it will ultimately remain the law of Connecticut—is whether the case would have turned out differently if there had been no safe-ride programs in place.

Technically, the case is unreported; however, it has been cited in another

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240. *Id.* at *1.

241. *Id.* at *1 n.1.

242. *Id*. at *3–4.

243. 594 A.2d 506 (Del. 1991)

244. *McClure*, 2003 WL at *5.

245. *Id.* A safe-ride program enlists volunteers to safely drive individuals to and from locations serving alcohol. *Id.* at *4.

246. *Id* at *7.

247. *Id.* at *4, *7–8.

jurisdiction.[248] The *McClure* matter went to arbitration, and in a subsequent decision, the same Connecticut court decided that the arbitration award barred further recovery by the plaintiff against the university defendant in the matter.[249] Nonetheless, since reported cases involving college and university liability from alcohol injuries are so few and far between, it is inevitable that the case will be cited again.

B. Sexual Assault, Suicide, and Causation Cases

1. Sexual Assault

The problems of sexual assault at colleges and universities—usually fueled by alcohol—have continued to vex courts since publication of *Rights and Responsibilities*.[250] Two important decisions have occurred since 1999 that are potentially reconcilable with *Rights and Responsibilities*, although perhaps with some difficulty.[251] Both cases involved female students being sexually assaulted in residence halls.[252]

In *Freeman v. Busch*[253] and *Stanton v. University of Maine System*,[254] the Eighth Circuit Court of Appeals and the Maine Supreme Judicial Court, respectively, confronted this issue of college sexual assault. The *Freeman* court declined to impose a duty on the university to protect a student from a sexual assault.[255] In *Stanton*, however, the Supreme Judicial Court of Maine took a different position and held that there was a duty to protect a female in a residential facility.[256]

In *Freeman,* the injuries to Carolyn Freeman arose out of a college party.[257] Freeman was invited to party at the dorm room of her attacker, Scott Busch.[258] Freeman became drunk and blacked out.[259] While Freeman was unconscious, Busch sexually assaulted her.[260] Freeman sued Simpson College under the theory that the college should be responsible under the doctrine of respondeat superior for the negligent failure of the resident assistant to prevent the assault.[261] The trial court granted Simpson College's motion for summary judgment, ruling that the

248. Freeman v. Busch, 349 F.3d 582, 588 n.6 (8th Cir. 2003).

249. McClure v. Fairfield University, 2004 WL 203001, No. CV000159028S, at *1 (Conn. Super. Ct. Jan. 14, 2004).

250. *Freeman*, 349 F.3d 582; Stanton v. Univ. Me. Sys., 773 A.2d 1045 (Me. 2001).

251. *Freeman*, 349 F.3d 582; *Stanton*, 773 A.2d 1045.

252. *Freeman*, 349 F.3d at 585; *Stanton*, 773 A.2d at 1047–48.

253. 349 F.3d 582 (8th Cir. 2003).

254. 773 A.2d 1045 (Me. 2001).

255. 349 F.3d at 589.

256. 773 A.2d at 1052.

257. 349 F.3d at 585.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id*. at 586–87.

college owed no duty to Freeman, and Freeman appealed to the Eight Circuit Court of Appeals.[262] On appeal, the Eighth Circuit correctly noted that there is no special relationship between the college and the students simply because students are students of the college.[263] The court, however, noted that there are circumstances under which courts have found that a duty is owed and a special relationship exists.[264]

In *Freeman*, the evidence linking the resident assistant to the incident was relatively thin. Some time after Freeman had passed out from alcohol intoxication, Busch went downstairs and informed the resident assistant that he had a visitor (Freeman) who had consumed alcohol, thrown up, and passed out.[265] The resident assistant informed Busch to monitor Freeman's condition and to report back if things took a turn for the worse.[266] Freeman and Busch then had sex.[267] The parties disagreed as to whether the sex was consensual.[268] Freeman alleged sexual assault and asserted that no consent had been, nor could have been, given in her unconscious state, while Busch alleged that the sex had been consensual.[269] After the disputed sexual encounter, two other students returned from a fraternity party and both of them were permitted by Busch to engage in impermissible touching of Freeman.[270] Based on these facts, the court declined to hold that there was a special relationship between the resident assistant and the plaintiff-student.[271]

While it is true that there was no special relationship between the resident assistant and Freeman (a student) arising simply out of the college-student relationship,[272] it is unclear why the court did not consider the more obvious basis for a special relationship: landlord-tenant.[273] The court reasoned that since there was no special relationship between Freeman and the resident assistant the general rule of section 314A of the *Restatement (Second) of Torts* applies: generally, the mere fact that a party is aware of danger to others does not create a duty to assist.[274] Yet, while the resident assistant was not the landlord, the resident assistant was an agent of the landlord—the institution.[275] The landlord-tenant

262. *Id*. at 585.

263. *Id.* at 587–88 (citing inter alia Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647 (Iowa 2000) and Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979)).

264. *Id.* at 588 n.6.

265. *Id.* at 585.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 589.

272. *See, e.g.*, Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 655–56 (Iowa 2000) (holding that fraternity membership does not create a special relationship); Bradshaw v. Rawlings, 612 F.2d 135, 141–43 (3d Cir. 1979) (holding that a college regulation prohibiting the possession or consumption of alcohol at college-sponsored events did not create a special relationship between the college and its students).

273. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

274. *See id.*

275. *Freeman*, 349 F.3d at 586–87.

relationship creates a special relationship,[276] and this should have been sufficient to create a relationship in this case.

The *Freeman* court also considered whether the resident assistant had assumed a legal duty to come to the victim's aid under section 324 of the *Restatement (Second) of Torts*.[277] The court held that "a finding that [the residential assistant] 'took charge of' Freeman requires that he took specific action to exercise control or custody over her."[278] The court then looked to *Garofalo* for assistance in determining whether the resident assistant had taken charge and control of the student.[279] The court found *Garofalo* highly analogous and determined that "there is much less evidence that Huggins took control of Freeman."[280] As the court went on to state, the resident assistant was informed that "[Freeman] had consumed a substantial quantity of alcohol; and that after consuming it, she had thrown up and passed out."[281] The court was not willing to interpret the resident assistant's decision to ask another to assist as a form of taking charge or control of Freeman.[282] The *Freeman* court did not feel that there was enough evidence to find that the resident assistant had "exercise[d] control or custody over Freeman."[283]

It may be that *Freeman* is nothing more than a no *breach* of duty case lurking as a "No-duty" case. The result in *Freeman* is sound; notifying a resident assistant that someone is drunk does not alert the resident assistant that a rape is likely. On these facts, many juries would likely agree that the resident assistant's conduct was not unreasonable. Indeed, this situation is tragically typical. Students who are drunk but do not need medical transport are often remanded to the care of friends, fellow students, and resident assistants. There are few drunk tanks on college campuses: the "solution" to the problem of what to do with thousands of significantly intoxicated students who are easy targets of abuse and a danger to themselves and others. If the alcohol crisis on campus is the Vietnam of this generation, its first lieutenants are the overworked and often under-trained and under-equipped resident assistants. *Freeman* may have recognized that coping with the triage of Friday and Saturday nights will lower the amount of care owed. It would have been better for *Freeman* to say that it ought to be cited with *Beach*, *Bradshaw*, and *Rabel*.[284] The core implication of those cases is that colleges are

276. *See* RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965) (imposing a duty upon one who voluntarily takes custody of another such that it deprives the individual in custody of the opportunity to defend himself). It is unclear from the reported decision whether the landlord/tenant issue was ever raised or resolved in any proceeding. *See Freeman*, 349 F.3d 582. The failure of the court to address this issue, or the parties to raise it, is an oversight and undermines the credibility of *Freeman* as precedent for similar cases.

277. *Freeman*, 349 F.3d at 588.

278. *Id.* at 588 (citing RESTATEMENT (SECOND) OF TORTS § 324 (1965)).

279. *Id.* at 588 (citing Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 654–55 (Iowa 2000)).

280. *Id*. at 588–89.

281. *Id*. at 589.

282. *Id*.

283. *Id.* at 588–89.

284. *See* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Beach v. Univ. of Utah, 726

overwhelmed by a hard-to-manage and persistent alcohol culture; the solution is not to say that there is no responsibility for danger, but rather to acknowledge that a reasonable college or university will do what it reasonably can with the resources it has. Such a standard would mean, at times, doing little or nothing.[285]

The Supreme Judicial Court of Maine has a different view.[286] In *Stanton v. University of Maine System*, plaintiff Dolores Stanton was a "special student" taking classes at the university prior to receiving a high school diploma.[287] While attending a pre-season soccer program and staying in dorms on the campus, she was sexually assaulted.[288] Her attack arose out of a fraternity party.[289] After being walked back to her dorm by a young man she met at the party, Stanton exited an elevator and went to her room.[290] She opened her door and went inside.[291] When Stanton turned around, the young man was standing in her room; he proceeded to sexually assault her.[292]

Although there had been few rapes reported at that institution, Maine's university system had engaged in significant safety planning for students regarding dorm room security.[293] Importantly, however, Stanton had not received instruction on the rules and regulations regarding safety in the dormitory facilities and there were no signs indicating who should be permitted in and out of the dorms.[294] The university provided a different level of safety training to full-time students.[295] Despite this disparity in treatment between full-time students and Stanton, the trial court granted the university's motion for summary judgment, holding that it did not breach any duty owed to her.[296] On appeal, the Supreme Judicial Court of Maine pointed out that the university, as a premise owner, owed a duty to students as business invitees.[297] There was "a duty to exercise reasonable care in taking such measures as were reasonably necessary for [Stanton's] safety in light of all then existing circumstances."[298] The court recognized that under previous

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P.2d 413 (Utah 1986); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d. 552 (Ill. App. Ct. 1987). *See also* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at ch. 4 (referring to the "bystander" era of college duty where colleges and universities have no obligation to interfere with students' non-academic lives).

285. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 201–05 (limiting duty by a standard of reasonable care).

286. Stanton v. Univ. of Me. Sys., 773 A.2d 1045, 1050 (Me. 2001).

287. *Id.* at 1047–48.

288. *Id.*

289. *Id.* at 1048.

290. *Id*.

291. *Id*.

292. *Id*.

293. *Id*.

294. *Id*.

295. *See id*. The court enumerated several different university safety precautions, such as meetings and signs, implying that these safety precautions were taken with full time students and not with a "special student" like Stanton, the plaintiff.

296. *Id*. at 1047.

297. *Id.* at 1049 (citing Schultz v. Gould Acad., 322 A.2d 368, 370 (Me. 1975)).

298. *Id*.

decisions a landowner is under no duty to anticipate utterly unforeseeable burglars and rapists who might attack at any time without warning.[299] Following *Mullins v. Pine Manor College*,[300] the court stated that sexual assault was foreseeable at the university since the university environment is favorable for crime because of the high concentration of young people, and that the university took notice of this fact by implementing some preventative procedures.[301] On this basis, the Supreme Judicial Court had little trouble determining that the university owed a duty to Stanton and that the type of injury that occurred, sexual assault, was foreseeable.[302] In rejecting the university's motion for summary judgment, it noted that Stanton's statement "that the University failed to warn her of any dangers or explain the security measures implemented," was enough to generate a sufficient fact issue to go to a fact-finder.[303]

Stanton also attempted an interesting implied contract theory, which the court ultimately rejected.[304] She sought to create something similar to an implied warranty of habitability, such as an "implied warranty of safety."[305] In short order, the court refused to recognize the implied term because Stanton "fail[ed] to show with sufficient definiteness any terms that plaintiff allege were assented to by the parties."[306] The *Stanton* court upheld the lower court's summary judgment in favor of the institution on this novel issue.[307]

Stanton reached a result that is consistent with a number of cases noted in *Rights and Responsibilities* that impose safety responsibilities on institutions with respect to dormitory students.[308] *Stanton* is unique in that it relates to special students who come to campus for particular programs.[309] Effectively, the *Stanton* court told the colleges and universities in Maine that students coming to campus for alternative programs are entitled to the same level of safety training that full-time residential students receive if those students will be exposed to the same types

299. *Id.* at 1049 (citing Brewer v. Roosevelt Motor Lodge, 295 A.2d 647 (Me. 1972)).

300. 449 N.E.2d 331 (Mass. 1983). It is important to remember that the Maine Supreme Judicial Court is a court whose jurisdiction is intimately connected to the Massachusetts Supreme Judicial Court, which decided *Mullins v. Pine Manor College*. At one time, the Supreme Judicial Court of Massachusetts actually had jurisdiction over much of what is now Maine. *See* MAINE STATE ARCHIVES, *Summary History of Courts in Maine*, *available at* http://www.state.me.us /sos/arc/archives/judicial/courthis.htm (last visited May 8, 2005). It is common today for the two courts to consider each other as sister courts and precedent from one court is often closely followed in the other.

301. *Stanton*, 773 A.2d at 1050.

302. *Id*.

303. *Id*.

304. *Id*. at 1050–51.

305. *Id*.

306. *Id.* at 1051.

307. *Id.*

308. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 112–15, 137–44 (discussing Delaney v. Univ. of Houston, 835 S.W.2d 56 (Tex. 1992); Johnson v. Washington, 894 P.2d 1366 (Wash. Ct. App. 1995); Nero v. Kan. State Univ., 861 P.2d 768 (Kan. 1993)).

309. *Stanton*, 773 A.2d at 1047–48.

of risks as residential students.[310] Colleges and universities typically provide orientation and safety training to full-time traditional students,[311] but may let certain groups of individuals who come to campus for special programs or overnight stays slip through the cracks.[312] Dangers to atypical students may be equal to or even greater than risks to typical students, since the former are often new to the area and unfamiliar with specific risks and the best means to protect themselves.

2. Suicide

Perhaps the most difficult issue for the facilitator institution to address is the issue of self-inflicted injury and suicide. In our article, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, Dr. Nancy Tribbensee and I discuss the burgeoning problem of self-inflicted injury on campus.[313] *Rights and Responsibilities* was essentially silent on this issue. Two important court decisions have come down since *Rights and Responsibilities* dealing with the subject of self-inflicted injury. These cases, *Schieszler v. Ferrum College*[314] and *Jain v. Iowa*,[315] both address student suicide.

In *Schieszler*, a student named Michael Frentzel was suffering difficulties with school and social interactions.[316] Frentzel eventually wound up getting in an argument with his girlfriend, Crystal, in which Ferrum campus police and Frentzel's resident assistant intervened.[317] Frentzel proceeded to give Crystal a note stating his intent to hang himself with his belt.[318] The resident assistant and campus police responded again and found Frentzel locked in his room with self-inflicted bruises.[319] Within a few days, Frentzel wrote two more notes, one stating "tell Crystal I will always love her" and "only God can help me now."[320] Crystal gave these notes to Ferrum employees, who forbid her from seeing Frentzel, but took no further action.[321] Ferrum employees found Frentzel in his room dead from a self-inflicted hanging shortly thereafter.[322] The district court refused to dismiss

310. *Id.* at 1047–51.

311. *See, e.g.*, HOPE COLLEGE, *Hope College Orientation Student Schedule*, *available at* http://www.hope.edu/orientation/student.php (last visited May 8, 2005); ILL. WESLEYAN UNIV., *Welcome to Fall Festival: Orientation 2004 at Illinois Wesleyan University*, *available at* http://titan.iwu.edu/~stdntaff/fallfestival/Intro/intro.html (last visited May 8, 2005).

312. *E.g.*, *Stanton*, 773 A.2d at 1047–48.

313. Lake & Tribbensee, *supra* note 135, at 125–29.

314. 236 F. Supp. 2d 602 (W.D. Va. 2002). This case is also referred to as the *Ferrum College* case.

315. 617 N.W.2d 293 (Iowa 2002).

316. *Schieszler*, 236 F. Supp. 2d at 605.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

the claim against Ferrum College arising out of the suicide.[323] The case ended in settlement when Ferrum College chose to acknowledge a share of responsibility for the student's death.[324]

Jain also involved a student suicide, except that the Iowa Supreme Court handed down a no-liability ruling in favor of the university.[325] In *Jain*, Sanjay Jain was a freshman student at the University of Iowa.[326] Jain began contemplating suicide after suffering declining academic performance and punishment for repeated social misconduct.[327] Jain then attempted to kill himself by asphyxiation—by running his moped in his locked dorm room—but was stopped by his girlfriend and a university resident assistant.[328] The resident assistant advised Jain to seek counseling.[329] The resident assistant also wished to contact Jain's parents, but Jain prohibited her from doing so.[330] About a week later, Jain committed suicide by running his moped in his locked dorm room again.[331] Not surprisingly, the Iowa Supreme Court refused to find a special relationship between the student who committed suicide and the university.[332]

These cases are inconsistent. *Jain* held that no duty was owed by the institution, as a matter of law,[333] while *Schieszler* held that a duty could exist.[334] There is so little jurisprudence in this area that future cases will likely settle the direction that American law will take on this issue.[335] On the horizon is the matter of *Shin v. MIT*, which is still being litigated in the Massachusetts court system.[336] In the *Shin* case, a student at the Massachusetts Institute of Technology ("MIT") burned to death, allegedly at her own hand. A principal allegation in the case is that her death was a suicide and MIT did not inform the parents of their daughter's suicidal intentions.[337] The case may turn, at least in part, on issues of causation: if the Shin family was aware that their daughter was suicidal, the Massachusetts courts may hold that, even if a duty to warn existed and was breached, MIT had no causal link to the ultimate injury because the family's lack of notice from MIT as to matters that the family already had knowledge of would not ordinarily be considered the but-for cause of harm.

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323. *Id*. at 614–15.

324. *Va. College Acknowledges Some Responsibility in Student's Suicide in 2000 as Part of Lawsuit Settlement*, NORTH COUNTY TIMES, July 26, 2003, *available at* http://www.nctimes.com/articles/2003/07/26/backpage/7_26_036_13_44.txt.

325. Jain v. Iowa, 617 N.W.2d 293, 296, 300 (Iowa 2002).

326. *Id*. at 295.

327. *Id*.

328. *Id*.

329. *Id*.

330. *Id*. at 296.

331. *Id*.

332. *Id*. at 300.

333. *Id*.

334. Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 614–15 (W.D. Va. 2002).

335. *See* Lake & Tribbensee, *supra* note 135, at 129–37.

336. *See* Sontag, *supra* note 135, at 57.

337. *Id*.

3. Causation

Causation is becoming a critical issue in higher education litigation as courts increasingly find that a duty is owed. Causation traditionally has not been a significant issue in higher education litigation; research in the cases prior to *Rights and Responsibilities* demonstrates that case law is thin in this area.[338] This is not surprising. There is no reason to reach the question of causation if no duty exists in the first place, or if no breach of duty occurred. In an era of changing responsibilities for colleges and universities, however, causation is becoming a more prominent issue.

The most significant recent case on causation came from the California Supreme Court. *Saelzler v. Advanced 400 Group*[339] involved an attack on a woman who was making a delivery at a low-income housing project.[340] In a sharply divided, four-to-three decision, the *Saelzler* court determined that the plaintiff failed to show causation-in-fact, resulting in the dismissal of Saelzler's claim.[341]

The case involved Marianne Saelzler, a delivery employee who attempted a delivery at a three hundred-unit multi-building apartment complex.[342] As Saelzler attempted to leave the premises, several men attacked her and attempted to sexually assault her.[343] Saelzler staged a valiant defense and prevented the men from raping her, but she was seriously injured in defending herself.[344] The complex was rife with crime and the police frequented the premises.[345] Security patrols were deployed during the evening, but not during the daytime, presumably as a cost-saving measure.[346] There was a security gate, but at the time of the attack it was propped open.[347] The majority painted a very dark and terrifying picture of the apartment complex and its state of security and repair.[348] Unsurprisingly, Saelzler was unable to identify her attacker.[349] Crucially to her case, neither she nor anyone else was able to identify whether the assailants were living in the complex or had entered the premises either through the gate or by some other

338. *See, e.g.*, Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986); Delaney v. Univ. of Houston, 835 S.W.2d 56 (Tex. 1992).

339. 23 P.3d 1143 (Cal. 2001). Interestingly, the suit was not a college or university case at all; however, institutions in California filed an amicus brief in the case, arguing in favor of the defendant. *Id.* at 1145.

340. *Id*. at 1147.

341. *Id*. at 1155.

342. *Id*. at 1147.

343. *Id.*

344. *Id*.

345. *Id*. Additionally, the manager of the apartment complex only went to her vehicle with a police escort and pizza delivery would not be made into the complex—pizza delivery employees would only meet tenants at the street with their pizza. *Id*. The complex also allegedly housed gangs and a reported drug ring. *Id*.

346. *Id.*

347. *Id*.

348. *See id*. at 1147–48.

349. *Id*. at 1147.

means.[350]

Saelzler had a tortured path toward its four-to-three decision in the California Supreme Court.[351] The case originally had been dismissed on summary judgment, but the Intermediate Court of Appeals reversed and held for the plaintiff.[352] On appeal to the Supreme Court of California, the decision was rendered by a bare majority.[353]

The issues of duty and breach were not contested.[354] In language reminiscent of cases on duty, rather than causation, the court engaged in policy analysis and acknowledged that the case presented a particularly difficult dilemma of attempting to determine whether to place financial burdens of increased security on low-income business defendants or to provide greater safety for victims in those complexes.[355] The majority opinion reads as if the opinion had originally been written to state that no duty was owed, but in order to flip a judge to the majority, the opinion was edited to become a causation case.

The majority's reasoning was fairly straightforward. Since the gate was designed to deal with intruders, Saelzler's failure to identify the assailants as either insiders or intruders was fatal to her claim because she would never be able to show by a preponderance of the evidence that it was the negligence of the complex that caused the assault.[356] It is equally likely that the attack came from the inside and, if so, poor security and the broken gate would not have been the cause.[357] Security patrols theoretically could have impacted crime within the complex. Nonetheless, the majority stated effectively as a matter of judicial notice that increased security cannot be shown to prevent the causation of crime, either *specifically* or in *general*.[358] Thus, Saelzler's failure to identify her assailants and whether they were from inside or outside the complex was fatal to her case because without that evidence she would be unable to establish causation between the defendant's breach of duty and her injury.[359]

Following *Saelzler*, many claims will fail where there is a defect in proof of causation. Although it is usually clear whether an assailant came, for example, from inside or outside a dormitory, there will be situations where it may be hard for an injured student to prove the identity of an assailant. *Saelzler* suggests that issues will shift from questions of duty and breach to questions of causation. Causation law in higher education portends significant development in the next

350. *Id*.

351. *Id*. at 1148.

352. *Id*.

353. *Id.* at 1155.

354. *Id*. at 1149. The issue, however, was whether the defendant's negligence *caused* the plaintiff's injuries.

355. *Id*. at 1152 (stating that even if security was more extensive in the defendant's complex, the attack still could have happened).

356. *Id.* at 1155.

357. *Id.*

358. *See id.* at 1152. The majority refused to acknowledge that lack of security personnel could be the cause of injury in a negligence case. *Id*.

359. *Id.* at 1155.

several decades.

II. FUTURE TRENDS

There are at least three trends in process that are related to the facilitator model. One of the developments most clearly connected to *Rights and Responsibilities* has been the rise of a risk management culture in student affairs. In the last decade, and especially in the last several years, colleges and universities have engaged in deliberate, proactive, risk management programs, some of which have been influenced by the facilitator model put forward in *Rights and Responsibilities*.[360] A second major trend has been a movement to re-think student discipline and process norms.[361] It is becoming increasingly apparent that today's students exist in an environment where large amounts of academic cheating occur,[362] alcohol use is rampant and shows a stubborn refusal to decline,[363] and sexual violence against college females is perhaps at an all-time high.[364] The logical inference is that something is not functioning properly in our current student process systems. Third, as indicated earlier, we are on the leading edges of a significant self-inflicted injury/wellness crisis. The most significant and salient phenomenon of the current wellness crisis on campus is suicide; however, suicide is only the tip of an iceberg in a sea of wellness issues that includes depression, cutting, eating disorders, and social dysfunctions. A facilitator college or university is sensitive not only to academic and student safety, but also to the overall wellness of the community.[365] Sound education requires not only safety, but conditions under which students are encouraged to promote individual and group wellness.

A. Risk Management

Recently, there have been many attempts to create risk management programs in higher education.[366] Insurers of college student risk have engaged in programs of risk management information dissemination and training.[367] Many institutions have undertaken their own independent risk management programs, including several that have been influenced specifically by facilitator concepts.[368] Such

360. *See supra* note 9 and accompanying text.

361. Lake & Epstein, *supra* note 40, at 627–28.

362. PLAGIARISM.ORG, *Statistics*, *at* http://www.plagiarism.org/plagiarism_stats.html (surveying several different studies about the increasing prevalence of academic dishonesty) (last visited May 8, 2005).

363. *See* HIGHER EDUC. CTR., *supra* note 39.

364. U.S. DEPT. OF EDUC., *Forcible Sex Offenses* (showing statistics indicating an increase in forcible sexual assaults on-campus), *available at* http://www.ed.gov/admins/lead/safety/crime/criminaloffenses/edlite-forcesex.html (last visited May 8, 2005).

365. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193 (stating that facilitator universities seek to guide and support students through difficult times in their lives).

366. *See, e.g.*, Texas A&M Policy, *supra* note 9; Cal. State Bakersfield Policy, *supra* note 11.

367. *See, e.g.*, FIPG Manual, *supra* note 11.

368. *See, e.g.*, SYRACUSE UNIV., SYRACUSE UNIVERSITY RISK MANAGEMENT, *available at* http://sumweb.syr.edu/ir/APM/BUSFIN/Risk.html#safpol (last modified Nov. 2002) [hereinafter

institutions as Syracuse University have made notable proactive attempts to manage student behavior.[369] Texas A&M University and DePauw University have been overt in their adoption of key precepts of the facilitator model.[370] In addition, facilitator concepts are so closely aligned with environmental management strategies outlined by the U.S. Department of Education's Higher Education Center that risk management approaches taken on campus could easily be identified with either or both philosophical approaches.[371]

Virtually all risk management programs feature some of the same basic principles. For example, risk management programs are based on principles of proactive intervention designed to reduce the possibility of future harm. This approach also has the incidental effect of potentially reducing litigation—however, litigation reduction is not a first goal of proactive intervention. Risk management programs are not litigation avoidance programs per se. Nonetheless, risk management programs are sensitive to the fact that litigation is often spawned when an injured party or his or her family feels aggrieved by an institution for a perceived mishandling of an incident. Conversely, institutions often avoid liability when an incident has been handled carefully and compassionately. Risk management must be based upon a genuine concern for student safety; only then does it seem to have the required effect.

Risk management is concerned with environmental factors. Few risk management programs are executed in isolation from comprehensive planning. Risk management today is based on principles of student empowerment. Integral to successful risk management is the use of students as agents of safety and the training of students to assist other students. Risk management principles acknowledge that some activities carry with them inherent dangers, along with ordinary background risks. Injury or even death may occur in a program at any time despite best efforts.[372] Risk management principles are not designed to eliminate all possible risks from every possible activity. Instead, consistent with legal principles, risk management typically focuses upon the reduction of risks that are not inherent or reasonable in an activity or sport while maintaining the principles of the activity or sport in question.

Risk management recognizes that some activities are simply too unreasonably dangerous to continue. Texas A&M's unusual saga involving its bonfire tradition illustrates that even after careful review certain activities are simply too dangerous to justify their continued existence.[373] In this sense, risk management often

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Syracuse Policy]; Texas A&M Policy, *supra* note 9; Cal. State Bakersfield Policy, *supra* note 11.

369. Syracuse Policy, *supra* note 368.

370. *See* Texas A&M Policy, *supra* note 9; Lake & McKiernan, *supra* note 9.

371. DeJong et al., *supra* note 230.

372. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 195 (stating that it is impossible to eliminate all risk from life).

373. Tosin Mfon, *A&M Remembers Bonfire Tragedy, University Pays Tribute to Victims, Mourns Loss of Honored Tradition*, DAILY TEXAN, Nov. 19, 2004, *available at* http://www.dailytexanonline.com/news/2004/11/19/TopStories/Am.Remembers.Bonfire.Tragedy-811494.shtml.

conflicts with local tradition.[374] These local traditions and customs in colleges and universities often do not develop along safety boundaries.[375] In fact, local traditions and customs often create unusual risks that seem odd or out of place at other colleges and universities.[376] A risk management approach attempts to respect local traditions and customs to the extent that those traditions and customs are consistent with a reasonably safe environment. Many traditions and customs can easily be re-made to work within reasonable risk management guidelines.

In due course, a full body of scholarship and research regarding risk management will develop. This development may be one of the most important in the history of higher education safety. *Rights and Responsibilities* cannot claim to be the theoretical foundation for the current risk management culture. It is clear, however, that themes in *Rights and Responsibilities*, particularly with regard to the facilitator university concept,[377] are consistent with and form the theoretical foundation for many risk management programs.[378]

B. Process

It is painfully apparent that *Rights and Responsibilities* was only a first book in a series of books related to similar and overlapping topics. Perhaps the most glaring omission in *Rights and Responsibilities*—diplomatically overlooked by our critics and supporters—is that it deals thinly at best with an issue central to creating a reasonably safe environment.[379] Most risk management systems on some level ultimately depend on the functioning of process systems. Certainly, the viability of virtually every American college or university's academic integrity system depends on processes designed to deal with violations of academic standards. It is completely unthinkable that a facilitator institution could develop without parallel conceptualization regarding student process. At the time of the writing of this article, Professor Bickel and I are well into the process of producing a second book in the *Rights and Responsibilities* series dealing with student process rights, tentatively titled *New Process*.

Today, most student process systems, whether conduct or academic in nature, are typically highly legalistic and often feature extremely complicated procedural rules. There is some evidence that American higher education, however well-intentioned, may have gone a little off track in developing process rules and norms. Some courts themselves have indicated their concern about strategic thinking about the role and function of process on campuses. The most prominent case is *Schaer v. Brandeis University*.[380] In that case, a sharply divided court narrowly upheld Brandeis University's discipline of a student arising out of inappropriate sexual

374. *Id*.

375. *Id*.

376. *Id*.

377. *See supra* note 5 (defining a facilitator university).

378. *See supra* note 9 and accompanying text.

379. *See* BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 193–201 (describing the role of a facilitator university in student life).

380. 735 N.E.2d 373 (Mass. 2000).

activity, affirming the lower court's summary judgment for the defendant predicated upon the fact that plaintiff David Schaer failed to state a claim on which relief could be granted.[381]

In *Schaer*, a female student reported to the university that the she woke up finding Schaer having sex with her even though she had previously told him "she 'did not want to have sex.'"[382] Under the auspices of the university, a university conduct board found Schaer to have violated provisions of the student university code.[383] The determination resulted in Schaer's suspension from Brandeis.[384] Schaer brought suit against Brandeis for failing to adhere to the disciplinary procedural rules that Schaer alleged Brandeis had previously established by contract.[385] Among Schaer's claims were that the board failed to make an adequate record of the proceeding, permitted inappropriate evidence, did not appropriately apply the evidentiary standard, did not determine credibility properly, and failed to confer sufficient process, in contravention of Brandeis' contractual agreement with Schaer.[386] The majority carefully considered each issue Schaer raised about the hearing procedure, but rejected his claim,[387] with Judge Abrams speaking for the majority: "While a university should follow its own rules, Schaer's allegations, even if true, do not establish breaches of contract by Brandeis. Thus, Schaer has failed to state a claim . . . ."[388]

The *Schaer* dissenters believed that the dismissal of the complaint was premature.[389] Justice Ireland stated:

> In short, if the university puts forth rules of procedure to be followed in disciplinary hearings, the university should be legally obligated to follow those rules. To do otherwise would allow Brandeis to make promises to its students that are nothing more than a "meaningless mouthing of words. While the university's obligation to keep the members of its community safe from sexual assault and other crimes is of great importance, at the same time the university cannot tell its students that certain procedures will be followed and then fail to follow them. In a hearing on a serious disciplinary matter there is simply too much at stake for an individual student to countenance the university's failure to abide by the rules it has itself articulated. I would therefore

381. *Id.* at 375–76, 381.

382. *Id.* at 376.

383. *Id*.

384. *Id*.

385. *Id*.

386. *Id*. Brandeis required Schaer to sign a "Rights and Responsibilities" contract, the terms of which required certain standards of investigation of wrong doing, application of a specific evidentiary standard, limits on what disciplinary boards could consider during disciplinary hearings, and the creation of a record for purposes of appeal in the context of disciplinary hearings. *Id*. at 377 n.6, 377–81.

387. *Id*. at 377–81.

388. *Id*. at 381.

389. *Id.* at 381 (Ireland, J., dissenting, joined by Cowin, J.).

not affirm the dismissal of Schaer's complaint so hastily.[390]

The issue in the *Schaer* case emphasizes that an institution should be careful not to promise proceedings it will not or cannot deliver.[391] The majority opinion repeatedly referred to the fact that student hearings should not mimic judicial proceedings.[392] How much leeway will a court give a college or university that fails to meet its own stated procedures? Clearly if the *Schaer* case is an indication, some judges will feel that there is some room for interpretation and error;[393] other judges will not be willing to grant significant latitude for error.[394] The issue of how much room to grant colleges and universities in administering student process rights is a sharply polarizing issue. There is a continuing and identifiable subculture that effectively identifies changes in process rights away from anything other than full-blown judicial due process as a return to the era of double secret probation as portrayed in *Animal House*.[395] For example, the *Schaer* case spawned a law review note that was sharply critical of the *Schaer* case and cases like it.[396] The note, citing *The Shadow University*,[397] argued that:

> When private universities blatantly ignore due process standards at disciplinary hearings, everyone's due process rights are at stake. College disciplinary hearings are educational tools, and therefore, private colleges are teaching young Americans that the end result is far more important than the process. When college students enter American society as adults, their ideas about due process will be distorted. Our Constitution does not tolerate this inverted notion of justice; neither should private universities or the courts that interpret private university disciplinary decisions. If anything, American colleges and universities should teach students to respect and cherish the ideal that one is innocent until proven guilty under due process of law.[398]

Given the history of the abuse of process rights in American colleges and universities around mid-century,[399] it is easy to see why process orientation is so strong in the hearts and minds of modern college and university students and

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390. *Id.* at 382–83 (Ireland, J., dissenting, joined by Cowin, J.) (internal citations omitted).

391. *Id*. at 381 (majority opinion); *Id*. at 382–83 (Ireland, J., dissenting, joined by Cowin, J.).

392. *Id*. at 380–81.

393. *Id*. at 381.

394. *Id*. at 381 (Ireland, J., dissenting, joined by Cowin, J.).

395. *Animal House*, *supra* note 183. Part of the satire of university life presented by *Animal House* was that Dean Wormer, the university authority figure in the film, would arbitrarily and secretly place student organizations on probation with essentially no procedural process.

396. *See* Johanna Matloff, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169 (2001).

397. *Id*. at 169 (citing ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY 279–80 (1998)).

398. Matloff, *supra* note 396, at 188.

399. *See* Dixon v. Univ. of Ala., 294 F.2d 150, 151 nn.1–2, 152 n.3, 154 (5th Cir. 1961) (confronting the issue of whether a university could expel students in retaliation for the students' participation in a civil rights demonstration without a hearing or any student violation of school rules).

faculties. Nonetheless, as the above-cited article advocates, process ideals may be held too strongly in comparison to competing ideals. For example, holding students responsible for academic infractions or serious conduct violations under a beyond a reasonable doubt standard as suggested by the article,[400] would leave our campuses teeming with dangerous individuals and rife with academic misconduct. Moreover, although there are tremendous interests at stake for students in college and university proceedings, students are not subject to jail sentences or serious fines and penalties as in criminal court. Even the civil tort justice system does not use this incredibly high standard of proof when dishing out civil justice awards. No case has ever held that due process of law requires that basic contract and tort cases be decided on a burden of beyond a reasonable doubt.

Underlying this quest for hyper-process protections for students is a deep mistrust of the inner workings of academic institutions. This problem may actually be exacerbated by the fact that, because discipline processes are typically confidential under FERPA,[401] student process often gives the appearance of proceedings like the Courts of Star Chamber.[402] The difference, of course, between a Star Chamber Court and a public college or university student discipline process is that federal law guarantees students' access to a level of process that the Star Chamber Court typically denied individuals subject to its draconian jurisdiction.[403]

Finding the right balance for process norms is essential to enabling a facilitator institution. Process issues portend significant philosophical, political, and technical battles. Finding a facilitator process will likely be more contested and contestable than other aspects of the facilitator model.

C. Wellness

Today welness is a lesser concern to the modern college or university. Most risk management programs today focus principally on safety and risk reduction with a secondary emphasis, if an emphasis at all, upon harm to self. General norms of wellness do not usually occupy the same level of strategic vision and implementation that academics, athletics, and risk management currently do.

Nonetheless, a wellness crisis is on the horizon. It is already evident that more students are coming to campus with mental health and wellness issues than ever before. Collegiate wellness resources, such as health and counseling services, are

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400. *See* Matloff, *supra* note 396, at 188 (suggesting that constitutional due process protections should extend to the university context).

401. 20 U.S.C. § 1232g(b), (d) (2000 & West Supp. 2004).

402. BRITAIN EXPRESS, *English History, The Court of Star Chamber 1487-1641*, *available at* http://www.britainexpress.com/History/tudor/star-chamber.htm (last visited May 8, 2005). The Court of Star Chamber was an English court that operated by mandate of the Crown to specially try—and consequently suppress—individuals who opposed the Crown's policies. *Id*. Star Chamber tribunals were held secretly with no right of appeal, exacting swift punishment upon any opposition to the Crown. *Id*.

403. Matloff, *supra* note 396, at 171–73; BRITAIN EXPRESS, *supra* note 402. Public college and university students are assured the right to a meaningful hearing under federal law, while Star Chamber defendants were typically denied any meaningful hearing.

already becoming overwhelmed, and there is no reason to believe that the trend will not continue. One significant issue that *Rights and Responsibilities* only glanced at is the interior workings of the facilitator model.[404] In other words, the facilitator model was principally designed to deal with outward manifestations of inward states. Although the facilitator model was meant to be a philosophical conception that could be intuitively internalized, it was not a model for wellness. The facilitator model must develop a perspective on wellness and thus deal with both interior and exterior states. As our students turn more and more upon themselves and inward, we must react to this problem.

CONCLUSION

Today, the facilitator model is an even more appropriate description of case law than when *Rights and Responsibilities* was published in 1999. The law has taken steps toward adopting a model of shared responsibility for student injury, and placed more burdens on colleges and universities to use reasonable care to protect students from foreseeable danger. The rise of a risk management culture itself shows the viability of the facilitator model as a tool for proactive risk management. There are cases that do not support the themes of *Rights and Responsibilities*; this is no surprise, as the law remains in a transitional moment, although the transition has recently appeared to accelerate.

Students are changing too. Today's college students bring their own unique beliefs, attitudes, and orientations with them. It is already clear to most of us that this generation of students is different from earlier generations. Colleges and universities may be challenged by students who are not as engaged in residential life, civic engagement, and whole life learning as the students who have preceded them. These students also come with a much higher level of wellness needs. *Rights and Responsibilities* was designed to be a model for a transitional period in higher education. In order to get a better perspective on the ultimate success or failure of the facilitator model, it will be necessary to put the book to the test of time. It is still too early to tell where the law will go with the facilitator model.

Rights and Responsibilities was an attempt to create a pragmatic philosophical vision that combines law and principles of higher education. There are some for whom the core intuitions of *Rights and Responsibilities* resonate very deeply; however, there are some intuitions that appear in judicial opinions and elsewhere that are hard to reconcile with the vision. Ultimately, the success of *Rights and Responsibilities* will lie in its ability, or failure, to incorporate intuitions relating to the evolving relationship between students and their colleges or universities.

The law of higher education safety is still very complex. This is a challenging time for administrators and leaders in higher education. The cases suggest that it would be wise to assume that a duty of reasonable care will be owed. Occasionally, a court will be willing to step in and take a case from a jury, but it is hard to predict in advance which cases those will be. The line between the six million dollar settlement in the Krueger matter and the *Freeman* "No-duty" ruling

404. BICKEL & LAKE, RIGHTS AND RESPONSIBILITIES, *supra* note 1, at 187–201.

is not so great. The courts are still willing to protect higher education, but higher education is unlikely to receive the kind of protection that keeps serious cases from the courthouse. Duty law in higher education has shifted in a very subtle way. Once, "No-duty" rules in higher education were effectively immunity rules blocking the door to the courthouse; now, "No-duty" arguments are much more like affirmative defense arguments that, at best, will send a case *out* of a courthouse. Instead, protective decisions are now made more frequently on summary judgment because courts want to look around a little bit before they send a case away. Given that cases are now more likely to proceed to discovery and summary judgment, it is sensible to remember that the best defense to any negligence action is still reasonable care. No institution has ever lost a case when it has used reasonable care, which is the one aspect of a prima facie case of negligence that is within its power to control. This central message of *Rights and Responsibilities* remains true.

DISCHARGEABILITY OF STUDENTS' FINANCIAL OBLIGATIONS: STUDENT LOANS VERSUS STUDENT TUITION ACCOUNT DEBTS

MATTHEW C. WELNICKI, ESQ.*

"Neither a borrower nor a lender be."[1] Unfortunately, the economics of higher education regularly renders the old adage obsolete. Colleges and universities often extend credit to students who are unable to pay tuition and fees on a current basis. By "extending credit," these educational institutions are then faced with the possibility of becoming creditors in the students' subsequent bankruptcy proceedings. Although student loans are exempt from the general discharge granted to debtor students, the landscape changes when the students' debt simply reflects unpaid bills or outstanding tuition accounts. These debts do not qualify for the student loan exception to discharge. Thus, the distinction between loans and unpaid tuition accounts is an important one. Not only can this distinction make a crucial difference in the ability to collect the amount owed, it can also significantly impact existing debt collection efforts as well as debtor students' future relationships with creditor institutions.

I. OVERVIEW OF DISCHARGE IN BANKRUPTCY

One of the central purposes of the Bankruptcy Code is to give worthy debtors a "fresh start."[2] At the heart of the debtors' abilities to obtain this fresh start is the discharge of debts under § 727 (liquidation) and § 1328 (personal reorganization) of the Code.[3] Upon being granted a discharge by the Bankruptcy Court, the debtors have their obligations and debts, with several exceptions, forgiven.[4] The

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1. WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 3.

2. Grogan v. Garner, 498 U.S. 279, 286 (1991); *In re* Bankvest Capital Corp., 360 F.3d 291, 296 (1st Cir. 2004) (quoting *In re* Carp., 340 F.3d 15, 25 (1st Cir. 2003)).

3. H.R. REP. NO. 95–595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 (legislative history to 11 U.S.C. § 727). As discussed in later footnotes, for the purpose of this article, no important distinction presently exists between discharges obtained under different chapters of the Code. Selections from the legislative history of the provisions of the Code are found in the *Collier Pamphlet Edition of the Bankruptcy Code*. *See* COLLIER PAMPHLET EDITION (Alan N. Resnick et al. eds., 2004).

4. 11 U.S.C. § 727 (2000); 11 U.S.C. § 1328 (2000). *See also* 11 U.S.C. § 524(a)(2) (2000) ("[A discharge] operates as an injunction against the commencement or continuation of an

slate is wiped clean with respect to these dischargeable debts; it is as if the debts have been satisfied. A creditor cannot take any steps to recover on debts that have been discharged.[5] This includes any action that could be regarded as harassment, discrimination, or a penalty for having obtained a discharge.[6] The Code also specifically bars discrimination in the issuing of insured or guaranteed student loans against persons who have applied for bankruptcy relief.[7]

In order for debtors to obtain a discharge, they must file a petition for bankruptcy relief along with a schedule disclosing all their debts and obligations.[8] A trustee is appointed; assets, if any, are liquidated; certain debts can be reaffirmed or reorganized; and proceeds and secured assets, if any, are distributed to the creditors according to a statutory priority scheme.[9] Absent any fraud or bad faith, the Bankruptcy Court then issues a general discharge.[10]

Certain debts, however, are not included in the general discharge: taxes, support obligations, liabilities for fraud or intentional torts, and student loans.[11] Specifically, the student loan exception to discharge applies to all student loans—including direct, insured, or guaranteed loans.[12] This exception is self-executing, and the lender or institution need not commence an adversary proceeding or file a motion to determine the dischargeability of any student loan.[13] In this sense, the

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action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.").

5. 11 U.S.C. § 524 (2000).

6. H.R. REP. NO. 95-595, at 365–6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; S. REP. NO. 95-989, at 80 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787.

7. 11 U.S.C. § 525 (2000).

8. *See id*. § 301 (filing petition) and § 521 (scheduling debts and debtor's duties).

9. *See id.* §§ 701–702 (selection of trustee); *id.* §§ 721–728 (collection, liquidation, and distribution of the estate).

10. *Id.* § 727 (discharge). For the purposes of this article, there is no present distinction between a discharge obtained under a Chapter 7 liquidation and a personal reorganization under Chapter 13. Chapter 13 allows the debtor to pay off creditors under an approved plan and to obtain a discharge under § 1328. Section 523, however, excepts from any discharge—including both §§ 727 and 1328—student loans. 11 U.S.C. § 523(a)(8) (2000). Section 1328 was specifically amended in 1990 to incorporate the student loan exception provided by § 523(a)(8). A line of cases prior to the amendment of § 1328 distinguished between discharges under Chapters 7 and 13. *See, e.g.*, Johnson v. Edinboro State Coll., 728 F.2d 163, 166 (3d Cir. 1984). *See also infra* note 49.

11. 11 U.S.C. § 523(a)(1)–(19) (2000). On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. P.L. 109-8 (April 20, 2005). This new Act, which amends several provisions of the Bankruptcy Code, places additional burdens on a debtor seeking to file for bankruptcy protection. While the impact of the Act on student debtors remains to be seen when the provisions go into effect in October 2005, the language of the student loan exception to discharge found in § 523(a)(8) remains largely unchanged, adding only text that clarifies that all educational loans defined in § 221(d)(1) of the Internal Revenue Code are included in the exception. Pub. L. 109-8, § 220, 119 Stat. 23 (to be codified at 11 U.S.C. § 523). See also *infra* note 17 and accompanying text (discussing HEAL loans).

12. *Id.* § 523(a)(8); S. REP. NO. 95-989, at 77–79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787.

13. S. REP. NO. 95-989, at 77–79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787.

bankruptcy laws not only benefit the debtor, but also provide certain creditors with protections consistent with public policy.[14]

This is not to say that student loans can never be discharged. Through the showing of undue hardship, a debtor may be able to have her student loans forgiven.[15] The courts, however, have been hesitant to grant these hardship discharges.[16] Courts have imposed a heavy burden on the debtor and look to several different, nondispositive factors in arriving at case-by-case determinations of hardship.[17] Just as the debtor can seek to expand the general discharge, a creditor can oppose the general discharge or the dischargeability of a certain debt.[18] Claims of fraud or concealment are grounds for challenging, as well as

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14. *In re* Marchiando, 13 F.3d 1111, 1115 (7th Cir. 1994). *See also In re* Burkhead, 304 B.R. 560, 565 (Bankr. D. Mass. 2004) (holding that the court must balance the general policy of preventing a discharge of a student loan with the fundamental bankruptcy principle of providing a "fresh start."); *In re* Joyner, 171 B.R. 762, 764–65 (Bankr. E.D. Pa. 1994) (holding that loans for fees other than tuition are nondischargeable, even if for room, board, and books). See *Mehta v. Boston University*, 310 F.3d 308, 311–12 (3d Cir. 2002), for a good discussion of the history and purpose behind this exception to discharge.

15. *Mehta*, 310 F.3d at 311-12; Andrew M. Campbell, Annotation, *Bankruptcy Discharge of Student Loan on Ground of Undue Hardship Under § 523(a)(8)(B) of Bankruptcy Code of 1978* (11 U.S.C. § 523(A)(8)(B)) *Discharge of Student Loans*, 144 A.L.R. FED. 1 (2005).

16. *See generally* TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 927–28 (1st Cir. 1995) (discussing the nondischargeability of student loans provided by a federal credit union); *In re* Burkhead, 304 B.R. 560, 566 (Bankr. D. Mass. 2004) (holding that debtor who was able to work part-time despite a debilitating medical condition failed to demonstrate that repayment of her student loan would cause her undue hardship).

17. *See In re Burkhead*, 304 B.R. at 565 (finding that the debtor failed to meet her burden on undue hardship). The court looked to:

> (1) whether the Debtor could meet necessary living expenses . . . if forced to repay the loans; (2) whether the Debtor has made good faith efforts to repay the loan; (3) whether the Debtor filed for bankruptcy for the sole reason of discharging the student loan debt; [and] (4) whether additional facts . . . such as a medical condition . . . weigh in favor of a hardship discharge.

Id. *See also TI Federal Credit Union*, 72 F.3d at 927 (suggesting hardship must be attributed to unusual circumstances such as illness or an unusually large number of dependants); Weller v. Tex. Guaranteed Student Loan Corp., 316 B.R. 708, 716–17 (Bankr. W.D. Mo. 2004) (collecting cases and identifying nine factors considered in determining undue hardship). It should be noted that with loan interest rates at record lows, the existence of forbearance and forgiveness programs and the ability to consolidate and restructure debt could weigh in favor of precluding hardship discharges.

A note on Health Education Assistance Loans ("HEAL"): Not all educational loans are governed by the general discharge provisions of the Code. For example, HEAL are governed by the discharge provisions of the act establishing such loans. 42 U.S.C. § 292 (2000). Under this separate statute, the "undue hardship" standard is replaced by a burden on the debtor to show that not discharging the loan would be "unconscionable." *Id*. § 292f. This standard has been described as "more exacting" than the undue hardship standard set forth in the Code. *See In re* Buracker, No. 02-83952, 2004 WL 950771, at *2 (Bankr. C.D. Ill. May 3, 2004) (citing U.S. Dept. Health & Human Serv. v. Smitley, 347 F.3d 109 (4th Cir. 2004)). However, the analysis of "unconscionability" to be employed by the reviewing court is largely the same as a determination of "hardship." *Id*.

18. *See* 11 U.S.C. § 523(a)–(d) (2000).

revoking, a discharge.[19] Creditors, however, should be aware that a court can award the debtor her reasonable attorneys' fees and costs for successfully defending against a challenge to a discharge.[20] Therefore, both the creditor and debtor must carefully consider the costs and benefits involved in seeking an expansion or diminution of the standard discharge.

II. STUDENT LOANS VERSUS STUDENT ACCOUNTS

Student loans, whether from the government or an educational institution, cannot be discharged absent an affirmative showing of undue hardship by the debtor. However, unpaid *bills* and *accounts* for tuition, fees, and other charges assessed by the college or university are included in the standard bankruptcy discharge.[21] With such different treatment between loans and unpaid tuition accounts, it is important to examine the distinction between the two. In most cases, the debts in question will be in the form of loans made under established programs, including those created and governed by state and federal statute or an established loan program.[22] In such cases, there should be no dispute that the debt qualifies as a loan. More problematic is the situation in which the circumstances surrounding the extension of "educational credit" are unclear and the documents, if any, are ambiguous.

With the term "loan" being undefined in the context of the discharge provisions of the Code, and also not defined under the general definitions in § 101 of the Code, courts addressing whether a debt is a true "loan" have looked to the traditional definition and use of this term. In *In re Renshaw*, the court applied the traditional common law notion that, "[t]o constitute a loan there must be (i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services to another, and (iii) the other party agrees to pay for the sum or items transferred at a later date."[23] The court added that "[t]his definition implies that the contract to transfer items in return for payment later must be reached prior to or contemporaneous with the transfer. Where such is the intent of the parties, the transaction will be considered a loan regardless of its form."[24] The court then instructed that the nonpayment of tuition could qualify as an educational loan only

19. Under § 727(c), a creditor, trustee, or the United States Trustee has an outside window of one year from the date of discharge or closing of the case in which to challenge the discharge on limited grounds including fraud and concealment. *Id*. § 727(c). Under Bankruptcy Rule 8002, a party has ten days in which to file a notice of appeal concerning any court decision, ruling, or judgment. FED. R. BANKR. P. 8002(a).

20. 11 U.S.C. § 523(d) (2000).

21. *See, e.g.*, *In re* Chambers, 348 F.3d 650 (7th Cir. 2003); *In re* Mehta, 310 F.3d 308 (3d Cir. 2002); *In re* Renshaw, 222 F.3d 82 (2d Cir. 2000); *In re* DePasquale, 225 B.R. 830 (B.A.P. 1st Cir. 1998).

22. Such loans include federal Perkins Loans, HEAL loans, Stafford Loans, or other traditional loans, both public and private, requiring detailed documentation. Another indicator of a traditional loan could be the loan's ability to be consolidated or transferred on a secondary market.

23. *In re Renshaw*, 222 F.3d at 88.

24. *Id.*

(1) where funds have changed hands or (2) where the school extends credit in accordance with a promissory agreement for repayment.[25] This approach, which adopts the principle that exemptions from discharge are to be interpreted narrowly in favor of the debtor, appears to be widely adopted by the courts.[26]

Other courts, including the First Circuit Bankruptcy Appellate Panel ("B.A.P."), have given a slightly more expansive definition of "loan" by looking to the overall substance of the transaction and to the understanding between the parties, but *not* to whether any money has changed hands.[27] The First Circuit B.A.P. has suggested that one or two bookkeeping entries, such as posting a paper balance to a debtor's account and then debiting the account to pay tuition, could create a loan if there was a mutual contemporaneous understanding concerning future repayment.[28] At least one court has found that the extension of short-term credit to a student awaiting receipt of other financing can constitute a loan.[29] Another court has stated that an agreement to perform future services in lieu of cash repayment might qualify as a loan.[30] Yet, even those courts that have relaxed the technical requirements of a loan still require that some common understanding exist between the parties.[31]

In re Roberts illustrates this distinction between a loan and an account.[32] In *Roberts*, the court held that amounts owed by the debtor to the college for certain evening and weekend classes on the college's campus were dischargeable.[33] On the other hand, the court also found that amounts owed for certain classes offered by the college but held at the debtor's place of employment were exempt from

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25. *Id.* at 90. *See also In re* Merchant, 958 F.2d 738, 740–41 (6th Cir. 1992) (holding that where student agreed to repay credit extensions used for educational expenses, the credit extensions were loans); *In re* Grand Union Co., 219 F. 353, 356 (2d Cir. 1915) (holding that a loan is a contract wherein one party delivers a sum of money to another party, and the latter agrees to return a sum equivalent to that which was borrowed). Whether or not funds or credits extended to students constitute a loan is just part of the analysis; the funds must also be for "educational" purposes. *In re* Shipman, 33 B.R. 80, 82 (Bankr. W.D. Mo. 1983). The courts generally have established a broad definition of the "educational" requirement, including funds and credits for room, board, and books. *In re* Joyner, 171 B.R. 762, 764-65 (Bankr. E.D. Pa. 1994).

26. *In re Chambers*, 348 F.3d at 656-57; *In re Mehta*, 310 F.3d at 316-17. *See also In re* Roberts, No. 03-009655, 2004 WL 2278773, at *2 (Bankr. N.D. Iowa Oct. 1, 2004) (holding that a "contract to transfer items in return for payment later must be reached prior to or contemporaneous with the transfer" and that "[w]here such is the intent of the parties, the transaction will be considered a loan regardless of its form").

27. *In re* DePasquale, 225 B.R. 830, 832–33 (B.A.P. 1st Cir. 1998) (listing cases stating and supporting this definition of "loan").

28. *Id.* It should also be noted that some creditor schools have argued that § 523(a)(8) excepts from discharge all "funds received as an educational benefit"—a term that includes unpaid tuition. The courts, however, have generally rejected this argument. *See In re Mehta*, 310 F.3d at 316–17 (citing *Renshaw*, 222 F.3d at 92). *But see In re* Najafi, 154 B.R. 185 (Bankr. E.D. Pa. 1993).

29. *In re* Hill, 44 B.R. 645, 647 (Bankr. D. Mass. 1984).

30. U.S. Dept. of Health & Human Serv. v. Smith, 807 F.2d 122, 124 (8th Cir. 1986).

31. *In re DePasquale*, 225 B.R. at 832–33.

32. No. 03-009656S, 2004 WL 228773 (Bankr. N.D. Iowa Oct. 1, 2004).

33. *Id.* at *3.

discharge.[34] Based on the college's varying policies concerning payment for those classes, the court drew distinctions between the treatment of the amounts owed for the different categories of classes.[35] The college *did not* require prepayment for classes at the debtor's place of employment and allowed *future* payment by either the debtor or the employer.[36] Thus, the extension of educational credit to be paid at a future date was considered a loan.[37] The college did, however, *require* prepayment for evening and weekend classes.[38] The student's failure to pay (and the college's failure to collect on) tuition bills due at the beginning of the term was *not* considered a loan where there was no agreement to *defer* payment of such bills.[39] In other words, no extension of educational credit could be repaid at a future date, and thus, no student loan existed.[40]

III. COLLECTING DEBTS AND PROTECTING AGAINST DISCHARGE

It may seem unfair or anomalous to treat student loans and unpaid tuition accounts differently when the result in both instances is an institution's failure to receive payments due for educational services. As one court has noted, however, in declaring a tuition account debt to be discharged:

> This decision does not leave educational institutions without the ability to protect their financial relationships with their students. Educational institutions may avoid the situation presented in this case by taking simple precautions. When students fail to pay tuition bills on time, institutions can withhold educational services until payment, or they can enter into a separate agreement with the student to accept later payment. A separate agreement to accept later payment would create a loan and would be excepted from discharge under § 523(a)(8).[41]

So to protect themselves against nonpayment, institutions are left with difficult decisions about whether to issue an additional number of traditional loans instead of billing students or to "lock the doors" on students unable to prepay their tuitions. Each of these potential remedies is imperfect. Locking the doors on students is a harsh measure that institutions usually wish to avoid. Institutions usually wish to avoid situations that can both disrupt the educational services and embarrass students with whom the institutions hope to establish a long-standing relationship. Logistically, it is also often a difficult policy to enforce. On the other hand, educational institutions should not have to be in the full-time business of issuing loans, as there are drawbacks to providing services on credit to each student. For example, loans reduce operating capital and can subject the institutions to lending laws. Additionally, the schools should not have to enter into

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *In re* Chambers, 348 F.3d 650, 658 (7th Cir. 2003).

promissory agreements with each student before each semester.

The case law hints that there could be a middle ground. The institutions can continue to bill students and *later* try to treat unpaid bills as loans. As illustrated by several courts, the essential component of a "loan" is the mutual understanding that the credit extended must be paid back at some future time, the agreement between the parties that the amount now due will instead be due in the future. While a unilateral statement by the institution that overdue tuition bills become loans is most likely insufficient, the institution may reach separate agreements with students for the future payment of the amounts presently due in exchange for the continuation of educational services.

For example, an institution might adopt a policy of identifying all delinquent accounts at an early stage and notifying the students. The institution could then require these students to enter into additional repayment agreements, credit their accounts with the "loan" proceeds, and then also debit the accounts to payoff the outstanding debts. The repayment terms could be as simple as a promise to repay once other loans or funds are obtained, a promise allowing the students and the institution to work together in finding alternate sources of financing. This approach could be useful when a student misses a loan application deadline or sees her financial situation change unexpectedly. Of course, it is in the institution's best interest to take these steps as soon as possible, and in any event before the student files for bankruptcy protection.[42]

How the courts will treat, on a case-by-case basis, institutions' attempts to classify unpaid tuition accounts as loans is uncertain. On one hand, a loan allows a student to pay for educational services after he or she obtains and has the ability to benefit from those services. For example, a loan allows a student to obtain a degree and then use the degree to obtain employment to pay for it. Thus, there is justification for the proposition that disputes be resolved in favor of a determination that a debt is a loan. On the other hand, the courts may be reluctant to impose loan obligations on unwilling or unwitting students. Permitting the conversion of unpaid accounts into loans could discourage institutions from issuing loans in the first place. Coupling the fresh start policy of the bankruptcy laws with

42. In any circumstance, a creditor is usually better off dealing with a debtor before that debtor obtains relief afforded by the automatic stay. In fact, acting as early as possible is most advisable, as payments from a debtor within ninety days (and up to a year in some instances) of the bankruptcy petition can be considered a preference and be recovered by the estate. *See* 11 U.S.C. § 547 (2000) (preferences and certain exceptions); *Id*. § 548 (fraudulent transfers and obligations). This is not to say, however, that prompt action after the date of the bankruptcy petition is futile. Even after the date of petition but before discharge, a creditor—being mindful of the automatic stay and working with debtor's counsel, the trustee, and the court—can attempt to design a repayment plan or reaffirmation of debts. *See id*. § 524(c) (reaffirmation of debts); *Id*. §§ 1321–1330 (personal reorganization plan). Formal reaffirmation in this context, however, should only be sought by an institutional creditor through its counsel, and will likely require court approval. *See, e.g.*, FED. R. BANKR. P. 408; *In re* Lucas, 317 B.R. 195, 206 n.9 (D. Mass. 2004) (discussing requirement under local bankruptcy rules that, except in expressly set forth circumstances, an institution may only be represented by counsel). It is worth noting that the Bankruptcy Abuse Pretension and Consumer Protection Act of 2005 requires that creditors include certain disclosures in any reaffirmation agreement. Pub. L. 109-8, § 202, 119 Stat. 23 (to be codified at 11 U.S.C.A. § 524).

the fact that—for financial or other reasons—institutions can choose whether to issue loans or simply bill the students at the start of their relationships, the courts might remain reluctant to favor loans over dischargeable accounts.[43]

IV. ADDITIONAL CONSEQUENCES OF DISCHARGEABILITY DETERMINATION

Determining the dischargeability of an unpaid student account or loan affects not only the institution's bottom line, but also influences the future relationship between the debtor student and the creditor institution. What if the debtor student wishes to reenroll in the creditor institution? What if the debtor student wants a copy of her transcript? While it is unusual for a debtor student and a creditor institution to be discussing a future relationship of a contractual nature, such a relationship is readily imaginable. More common, though, is a situation in which the debtor student asks for a transcript or recommendation from the creditor institution.

Section 524 of the Code prohibits a creditor from attempting to collect on any discharged debt from a debtor in bankruptcy. This section places a bar on any acts of the creditor that can be viewed as an attempt to extort post discharge payment on the discharged debt. A violation of this section warrants monetary and other sanctions for contempt against the creditor.[44] Often, allegations concerning alleged violations of § 524 are coupled with allegations of violations of the Code's automatic stay prohibiting actions against the debtor while in bankruptcy.[45]

The courts have consistently held that a discharged student debt on a tuition account cannot be grounds for withholding a school transcript.[46] The courts have viewed institutions' withholding of transcripts in these situations as an extortionate attempt to force a student to pay on a discharged debt. The reasoning of the courts, and the purpose and history of the applicable provisions of the Code, imply that the same analysis and decision could be applied to institutions that deny reenrollment to a former student on the grounds that she had a student account debt discharged.[47]

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43. As discussed above several courts have adopted the view that exemptions from discharge should be narrowly construed in favor of the debtor. *See, e.g., In re Chambers*, 348 F.3d at 656–57.

44. Besset v. Avco Financial Serv., Inc., 230 F.3d 439, 444–46 (1st Cir. 2000); Cox v. Zale Del., Inc., 239 F.3d 910, 915–16 (7th Cir. 2001). It should be noted, however, that § 524 does not appear to provide for a private cause of action; thus, the debtor must bring an action for contempt under §§ 105, 524(a)(2), or 362. *See* Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 422–26 (6th Cir. 2000).

45. A core feature of the Code is the "automatic stay" set forth by § 362. 11 U.S.C. § 362 (2000). The automatic stay is a general stay of all pending and contemplated proceedings or actions involving the debtor. It serves as a protective device for both the debtor (by providing him or her with breathing room) and the creditors (by ensuring a fair, common resolution of all claims and not a scramble for assets).

46. *See* Johnson v. Edinboro State Coll., 728 F.2d 163, 165 (3d Cir. 1984). *See infra* note 48 and accompanying text.

47. Providing still further protection to debtor students who wish to reenroll in or obtain a transcript is § 525's prohibition against discriminating against a bankrupt or former bankrupt person. 11 U.S.C. § 525(a)–(c) (2000). Thus, a debtor student might be able to obtain financing

On the other hand, where the debt is a nondischargeable student loan, the courts appear recently to have relaxed their restriction on allowing creditor institutions to withhold the debtor student's transcript.[48] In such instances, the courts have held

for future enrollment despite being in default on past tuition amounts. This is not to say that the institution would have no other nondiscriminatory, nonextortionate grounds for refusing to readmit the student. The institution, however, should be careful to classify the "alternative" grounds as the proximate and only reason for taking adverse action against the student. *See* FCC v. Nextwave Personal Communications, Inc., 537 U.S. 293, 300–02 (2003) (finding under § 525, even where the FCC had valid regulatory motive for revoking the license of the debtor, the debtor's bankruptcy and failure to pay a discharged debt were considered alone the proximate cause of revocation, whatever the agency's ultimate motive may have been). Prior to amendments in 1984 and 1994, the courts stated that § 525, in this context, applied only to government entities, and therefore, only to state schools. *See, e.g., In re* Ware, 9 B.R. 24, 25 (Bankr. D. Mo. 1981); Paula Aiello and Eric K. Behrens, *Student Loans, Chapter 13 of the Bankruptcy Code, and the 1984 Bankruptcy Amendments*, 13 J.C. & U.L. 1, 15 n.71 (1986) (stating that the 1984 amendments to § 525 leaves open the question whether private schools may withhold transcripts of student debtors). However, the present language of the statute appears to extend its application, in this context, to both private and public institutions. In any event, a private institution is still subject to § 362, and the courts appear to reach the same results whether applying § 362 or § 525. *See In re* Billingsley, 276 B.R. 48, 51 n.3 (Bankr. D.N.J. 2002); Sara Hollan, *Student Loan Debtors and the Automatic Stay: Can a University Lawfully Withhold the Transcript of a Defaulting Student Debtor?*, 56 Baylor L. Rev. 205, 211–25 (2004). Additionally, prior to the 1984 and 1994 amendments, debtor students challenged the withholding of transcripts by invoking the Supremacy and Equal Protection Clauses of the Constitution. *See Validity, Construction, and Application of Statutes, Regulations, or Policies Allowing Denial of Student Loans, Student Loan Guarantees, or Educational Services to Debtors Who Have Had Student Loans Scheduled in Bankruptcy*, 107 A.L.R. FED. 192 §§ 10, 11 (2004). Such challenges are not addressed in the recent, post-amendment cases. *See, e.g.*, *In re* Billingsley, 276 B.R. 48 (Bankr. D.N.J. 2002).

48. *In re Billingsley*, 276 B.R. at 54 (holding that withholding student's transcript did not violate automatic stay); Juras v. Aman Collection Serv., Inc., 829 F.2d 739, 742–43 (9th Cir. 1987) (stating that student's transcript was not security and that withholding the transcript did not violate the Code or collection laws); Johnson v. Edinboro State Coll., 728 F.2d 163, 166 (deciding that the college could withhold student's transcript and diploma without violating the Code's fresh-start policy and § 525*). But see In re* Howren, 10 B.R. 303 (Bankr. D. Kan. 1980) (concluding that is was a violation of § 525 to withhold student's transcript); Loyola Univ. v. McClarty, 234 B.R. 386 (E.D. La. 1999).

The bankruptcy court in *In re Billingsley* examined a Supreme Court case, *In re Strumpf*, 516 U.S. 16 (1995), in which the Court found that it was not a violation of the automatic stay for a creditor to refuse to perform under a contract with a debtor. *Id*. at 21. In *Strumpf*, a bank's administrative freeze on account was not a violation of the stay because it was simply a refusal to perform under a contract that was first breached by the debtor when the debtor defaulted on a loan. *Id*. The *Billingsley* court then applied *Strumpf* in ruling that supplying transcripts is a contractually based obligation and that the withholding of transcripts does not violate the stay where the debt is a nondischargeable student loan. In Re Billingsley, 276 B.R. at 51. In distinguishing the cases that arrived at contrary results, the *Billingsley* court stated that those cases were decided prior to *Strumpf* or did not consider *Strumpf*. *Id*. at 54-55. While *Billingsley* addressed only the facts of that case—involving an undisputed nondischargeable loan—it will be interesting to see if the same logic will be used in cases involving discharged or dischargeable tuition account debts. It warrants noting that in *Strumpf* and *Billingsley*, the courts addressed situations where the institutional creditors refused to perform under a contract that had been first breached by the debtor when the *debtor failed to perform*. The institutional creditors in those cases did not consider the debtor to have breached or terminated the relevant contracts through

that restrictions on releasing transcripts do not violate the provisions and intent of the Code.[49] At least one court has suggested that this rationale extends to reenrollment and that a creditor institution can deny the debtor student's request to take future classes.[50] Even with the recent case law permitting the withholding of transcripts because of outstanding loans, institutions, faced with the possibility of being found in contempt of the automatic stay and in violation of other sections of the Code, however, should proceed with caution and be sure that they are on firm ground for denying requests by debtor students.[51]

A more complicated issue arises when a student is not merely seeking a transcript, but—after she has filed for bankruptcy relief—intends to continue attending courses despite not paying her debts to the institution. In such a situation the student is not simply requesting access to her past records or seeking the right to reenroll after a discharge, she is attempting to obtain continuing services without paying for them. Here, if the debt is a loan, the institution will have promised the student that she could repay at some future time; thus, this scenario likely presents a moot issue because present repayment is not the question and the debt is nondischargeable. But if the debt is an unpaid tuition account, the institution may be able to cease providing the services to the student on the grounds that a creditor has no obligation to continue to perform under a contract where the debtor has not done so.[52] Still, the institution should proceed with caution and consider requesting permission from the bankruptcy court, the trustee, and debtor's counsel to terminate the contract for services.[53]

V. PROPER NOTICE AND COMMUNICATION CAN AVOID LATER PROBLEMS

It can easily be seen how unpaid student tuition accounts and student loans can create headaches for institutions. Some of the stress can be alleviated through

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the *filing for bankruptcy protection.* Section 365(e)(1) of the Code prohibits the enforcement of Ipso Facto clauses that terminate or modify contractual rights through a party's insolvency or filing for bankruptcy relief. 11 U.S.C. § 365(e)(1) (2000).

In this context, there is no distinction between the discharges provided by Chapter 7 and Chapter 13. *In re Billingsley*, 276 B.R. at 51 (discussing how student loan exemptions to discharge have recently been amended to apply to petitions under Chapter 13). It should also be noted that the court in *Billingsley* saw no need to draw a distinction between analyses under the present language of §§ 362 and 525. *Id*. at 51 & n.3.

49. *See supra* notes 42–48 and accompanying text.

50. Juras v. Aman Collection Serv., Inc., 829 F.2d 739, 742 (9th Cir. 1987).

51. Caution should especially be taken in situations where the student is in bankruptcy but has not yet obtained a discharge. Because that student could still request a specific discharge of the student loans, the courts might view withholding a transcript as a violation of the automatic stay. In *Loyola University v. McClarty*, 234 B.R. 386 (E.D. La. 1999), the court did not indicate whether the debt was a dischargeable account debt or a nondischargeable loan (the parties appeared to be disputing the status of the debt) but stated that the institution's withholding of the transcript violated the automatic stay. *Id*. at 387. In any event, with the costs and risks of litigation and appeals, an institution might, as a practical matter, simply release the transcript and avoid the fight.

52. *See supra* note 48.

53. *See, e.g.*, 11 U.S.C. § 365 (2000) (stating that a trustee has the authority to assume or reject executory contracts and unexpired leases).

better monitoring of unpaid accounts and opening lines of communication between all persons involved with accounts receivable, debt collection, and student services.

Starting with the monitoring of unpaid accounts, an institution should, if it does not already do so, flag accounts that have outstanding balances and discuss the matter with the individual students. Whether the institution chooses to allow the student to continue to receive services and whether it attempts to reshape the unpaid account as a loan, the institution is better served by early action—especially before the student files for bankruptcy protection. Policies and procedures should also be established to ensure that student services offices share the same basic understanding.

When an unpaid account goes into collection, the collection agency and collection attorneys need to keep the institution informed about the status of the action as well as the status of the debtor student—who may consider filing for bankruptcy protection. Upon notice that the student filed for bankruptcy protection, the collection agency and attorney not only must avoid problems with the automatic stay and § 524 in pursuing the collection action, but must also make sure that the institution does not violate these Code provisions through other actions adverse to the student—for example, by refusing to release the student's transcript.

Opening the lines of pre-bankruptcy communication will also allow the institution, and its collection agencies and attorneys, to evaluate the nature of the debt and chart the safest and most efficient course of action. At this planning stage, the institution can seek settlement or reaffirmation of the debt if there is doubt whether the debt is a loan or an unpaid tuition account. Proper notice and communication will enable the institution to capitalize on any leverage it might have before the bankruptcy.

Opening the lines of post-bankruptcy communication will allow the institution to evaluate whether it can pursue collection on the debt and withhold services. At this stage, the institution can decide whether it can presume that the debt is nondischargeable or whether it should seek clarification from the court before it risks contempt for future actions.

CONCLUSION

The fine line between unpaid tuition accounts and student loans has the potential of creating headaches for any educational institution. When a student files for bankruptcy protection, the law treats these two debts very differently. In facing the possibility that the debt is not a student loan, the institution not only must risk the loss of revenue, but also be wary of taking any action adverse to the student that could be viewed as an attempt to recover on a discharged debt. The important question then becomes whether the institution can take steps to protect itself if the tuition is not paid. While the institution may have some ability to classify otherwise ordinary tuition account debts as student loans, the courts will evaluate the institution's efforts on case-by-case bases. Given the consequences involved, any institution faced with such a situation should proceed with caution.

THE VOTE IS IN: STUDENT OFFICER CAMPAIGNS DESERVE FIRST AMENDMENT PROTECTIONS

JEREMIAH G. CODER*

INTRODUCTION

No one seriously doubts that college students on public campuses have free speech rights, but just what differentiates college students from their non-academic peers has not been so widely discussed. So while speech codes and activity fees have been the focus of numerous court cases and legal scholarship,[1] the fundamental basis of a college student's free speech rights is not as clearly defined. Likewise, campaign finance has been greatly scrutinized for its effect on First Amendment concerns. It is surprising, then, to discover that judicial and academic attention has been sparse at the juncture where these two topics intersect—student election codes.

Yet, campaigning by students for campus offices is neither a recent addition to university life nor an area of uncontroversial activity. Over the past several decades, many higher education institutions have enacted rules that regulate major (and minor) aspects of the how, when, and where students may run for election to student offices. The free speech implications of these provisions are no less troubling because they occur on a public college campus rather than in non-academic settings.

This note will examine three specific areas in order to show the compelling need for protection of students' free speech rights in college elections: (1) the two reported cases to deal specifically with expenditure limits in student elections (with opposite outcomes); (2) the extent to which public universities can act to limit free speech rights to promote their educational mission; and (3) what the Supreme Court has said about campaign finance laws with regard to public elections outside of the college and university setting. A discussion of these topics will reveal, after a sorting out of all the intricate complexities of the law, a reasonable rationale for

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1. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post, Inc., v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004).

strong protection of student election speech.

I. COLLEGE AND UNIVERSITY ELECTIONS

The starting point for any analysis of student elections held at the college and university level is *Alabama Student Party v. Student Government Ass'n*,[2] which was decided by the Eleventh Circuit, the highest federal court to consider the subject. Although the facts of the case did not involve a campaign-expenditure limit, which will become the focus of this note later on, the conclusions of the court's majority—regarding the juxtaposition of judicial deference to university regulations (adopted in order to carry out the institution's educational mission) with the important constitutional rights a student possesses to engage in free speech—has become a standard beginning point for decisions by other courts confronted with similar cases and therefore serves as the springboard into the topic.

In *Alabama Student*, the court was confronted with a student challenge to rules adopted by the Student Government Association ("SGA") at the University of Alabama ("UA") that: (1) restricted the distribution of campaign literature to three days prior to the election and permitted dissemination only to on-campus residence halls or other buildings outside of campus; (2) prohibited distribution of campaign literature on the day of the student election; and (3) limited debates and open forums among candidates to the week of the election.[3] Students who belonged to a campus political party brought suit against the SGA to enjoin the enforcement of the election restrictions on the ground that such regulations violated their free speech rights under the Constitution.[4] The federal district court held that while the university had in fact restricted speech based upon its content, the election bylaws were nonetheless constitutional.[5] On appeal, the Eleventh Circuit determined that SGA was a state actor whose purpose was to support the educational mission of the university.[6] The court agreed with UA's contention that the regulation should be evaluated under a reasonableness standard, but distinguished the campaign challenge from other cases in which reasonableness was used (e.g. student groups seeking access or funding similar to treatment other groups received).[7] The issue was framed as:

> the level of control a university may exert over the school-related activities of its students. The question is whether it is unconstitutional for a university, which need not have a student government association at all, to regulate the manner in which the Association runs its elections. That question is a different one than posed by election restrictions in a non-academic setting.[8]

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2. 867 F.2d 1344 (11th Cir. 1989).
3. *Id.* at 1345.
4. *Id.*
5. *Id.* at 1349 (Tjoflat, J., dissenting).
6. *Id.* at 1347.
7. *Id.* at 1345. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972).
8. *Alabama Student*, 867 F.2d at 1345–46.

While academic qualifications and regulations for *public* office would not withstand constitutional examination, the court noted that the educational setting poses several justifications for excluding academic institutions from traditional scrutiny. First, the purpose for which institutions of higher education are organized demands special treatment compared to non-academic settings.[9] Students do not attend college in order to achieve the objective of getting elected to campus government; rather, the goal is taking classes at a "university, whose primary purpose is education, not electioneering. Constitutional protections must be analyzed with due regard to that education[al] purpose . . . ."[10] A second justification that the court spoke of relates to the reason speech control was being sought. At the level of K-12 education, the Supreme Court has recognized the "right of educators to control school-related speech . . . 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"[11] For example, to require a school official to publish sensitive or indecent stories in a school newspaper, or to prevent punishment against students who use lewd or vulgar language in school assemblies, would undercut a school's attempts at achieving an educational experience.[12] In contrast, the "standards governing burdens on the speech of adults to an audience of adults may differ from the standards governing speech of students in [K-12] public schools."[13] The court interpreted the First Amendment to allow reasonable regulation, in certain restricted circumstances, of speech-connected activities in conjunction with school-related pursuits.[14] Because, the court said, the SGA was created to serve as a "learning laboratory" for students interested in public service and practical democracy (similar to the purposes of student newspapers or yearbooks for journalistic experience), the campaigns for student office were not an open public forum but rather "[constituted] a forum reserved for its intended purpose, a supervised learning experience."[15] The Supreme Court's decision in *Hazelwood v. Kuhlmeier*[16] recognized that two distinct categories of speech existed at a K-12 public school: speech that a school must tolerate, and speech that a school must affirmatively promote.[17] The majority's opinion in *Hazelwood* held that a school need not tolerate student speech that is inconsistent with its basic educational mission.[18] Campaigns for public office outside of the academic setting, the *Alabama Student* court said, serve no primary purpose beyond that for which they were instituted—viz., the election of government officials—and this is why the courts apply full protection of the First Amendment to such activities.[19] But where students are involved, the court

9. *Id.* at 1346.

10. *Id.*

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

12. Such speech would "undermine the school's basic educational mission." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

13. 867 F.2d at 1346.

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

15. *Id.* at 1347.

16. 484 U.S. 260 (1988).

17. *Id.* at 270–71.

18. *Id.*

19. *Alabama Student*, 867 F.2d at 1346.

said, reasonable restrictions with regard to speech must be tolerated, at least when the speech is only a secondary component of a voluntarily-established learning program.[20]

The *Alabama Student* majority concluded its opinion by reiterating the great deference federal courts should give to regulations by university officials.[21] Historically, courts have been reluctant to interfere with the operation of state and local educational institutions due to the belief that "autonomous decisionmaking by the academy" fosters academic freedom.[22] In cases raising First Amendment challenges, "these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission."[23]

The dissent challenged the majority's position by first stating that forum analysis was appropriate in this case, and should be used to determine the applicable standard.[24] Further, the dissent concluded that the university had not sufficiently established an educational interest in regulating student elections, and then, assuming arguendo that the interest had been advanced, continued by construing the campaign regulations as overbroad anyway.[25] The regulation of campaign materials by the SGA, the dissent said, "restrict[s] speech based on its content, as opposed to the time, place and manner of speech."[26] The SGA rules apply to all printed political advertising and forums for student elections both on and off campus, and thus are content-based speech discrimination, the dissent argued.[27] For that reason, the dissent contended that the proper constitutional standard to be applied is not reasonableness (applicable to such nonpublic fora as school administrative buildings), but rather a compelling state interest required when speech occurs in a traditional public forum (e.g. student union, sidewalks, streets, etc.).[28] The dissent found that the university had failed to state a sufficient educational interest in allowing the SGA to prohibit distribution and placement of campaign literature within a specific time period and proscribed area.[29] As a result, the dissent regarded the challenged campaign regulations as unconstitutional.[30]

In considering the extent to which the majority decision in *Alabama Student* affects the analytical framework of student election expenditure limits, it is important to identify what the court's rationale really is. The SGA's regulation of the campus campaigning process involved "time, place, and manner" restrictions—

20. *Id.* at 1347.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1349–50 (Tjoflat, J., dissenting).
25. *Id.* at 1348.
26. *Id.* at 1349.
27. *Id.* at 1352.
28. *Id.*
29. The dissent pointedly noted that contrary to the factual record adopted by the majority, testimony by the university's administrative officials indicated that the university "does not even approve of the challenged [SGA election] regulations." *Id.* at 1350.
30. *Id.* at 1354.

prescribing when and where debates took place and how literature was distributed—that still allowed the student candidate to engage in political expression. This differs substantially from other cases in which the student was prevented from engaging in free speech on his own behalf by a rule that prevented candidates from any communication that cost more than the proscribed threshold.[31] The Eleventh Circuit sanctioned the former speech restrictions because the university, in allowing student elections to take place, was engaged in creating a "supervised learning experiment;" the regulations allowed the university to funnel the speech activities into a timeframe that was conducive to its academic mission while minimizing disruptive effects on campus.[32] Because these measures constituted reasonable constraints that allowed the school to allocate its resources in the best fashion, the limiting effects on free speech could be tolerated under the Constitution. The court did not at any time discuss how its deferential approach in the case to "time, place, and manner" restrictions might apply to expenditure caps, leaving the issue clothed in the uncertainty that we find today.

II. RECENT CASES

To date, only two court opinions have specifically determined an individual's free speech rights with regard to campaign expenditure limits in campaigns for collegiate student government. Both cases made it to a federal district court only on the issue of whether a preliminary injunction would be granted to enjoin the campus election restrictions applicable in each situation. Coincidentally, both claims occurred within the Ninth Circuit but resulted in different outcomes; this split has yet to be resolved by the appellate circuit court.

A. *Welker v. Cicerone*

The first suit to reach federal district court, *Welker v. Cicerone*,[33] was instituted against the student elections commission at the University of California at Irvine ("UCI") by David Welker, who, at the time in question, was a senior at UCI.[34] In his suit, he sought a preliminary injunction against the commission that would restore him to his position on the student council and expunge his election disqualification from the record.[35] The Associated Students of the University of California, Irvine ("ASUCI") is the student organization comprised of all students attending UCI who have paid the established ASUCI fee.[36] The ASUCI governing

31. *See* Flint v. Dennison, 336 F. Supp. 2d 1065 (D. Mont. 2004); Welker v. Cicerone, 174 F. Supp. 2d 1055 (C.D. Cal. 2001).

32. *Alabama Student*, 867 F.2d at 1347.

33. *Welker*, 174 F. Supp. 2d 1055.

34. *Id.* at 1060.

35. *Id.* at 1062.

36. The Preamble to the ASUCI Constitution sets forth the organization's purpose and goals:

> [T]o provide a forum for the expression of the student views and interests, encourage and maintain the freedom to pursue knowledge, encourage student academic rights and responsibilities, represent and articulate our rights to a voice in campus governance, to enhance the quality of student life, and foster recognition of the rights of students in

body consists of several branches, including a legislative council, executive cabinet, and judicial board;[37] any ASUCI student who maintains a minimum grade point average of 2.0 is eligible to run for elected office.[38] The ASUCI Elections Code ("Elections Code"), adopted by the ASUCI Legislative Council pursuant to the ASUCI Constitution, provided: "No candidate for ASUCI Legislative Council may spend more than one hundred dollars ($100) on his/her campaign."[39] The ASUCI Elections Commission consisted of six students, and it investigated all alleged violations of the election code by a student candidate.[40] If the election commission found a violation to have occurred, immediate disqualification of the candidate for the office to which the candidate was elected was to occur.[41] Appeals could be made to the judicial board, which had the authority to make a final, non-appealable ruling.[42]

Welker ran for a seat on the ASUCI Legislative Council as a senior in the spring 2001 election.[43] During the course of the campaign, Welker spent $233.40 on election posters, and was duly elected to a seat on the legislative council.[44] The elections commission, however, disqualified him from serving in his council seat after it was informed of his violation of the campaign expenditure limit.[45] Welker appealed the decision to the judicial board, which upheld the disqualification.[46] As a result, the seat to which Welker had been elected was filled by another student, and Welker went to federal court seeking a preliminary injunction because, he alleged, ASUCI had violated his First Amendment rights by its spending cap.[47]

The federal district court engaged in a review of the necessary elements Welker had to show in order for the court to issue a preliminary injunction.[48] "To obtain a preliminary injunction, a party must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor."[49] First, the district court found that there was at least a fair

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this university community . . . .

ASSOCIATED STUDENTS, UNIV. OF CAL. AT IRVING CONSTITUTION, *available at* http://www.asuci.uci.edu/documents/constitution.pdf (last visited Apr. 18, 2005).

37. ASUCI Legislative Council and Executive Cabinet members are each elected to one-year terms; students appointed by the executive cabinet to the judicial board serve two-year terms. *Welker*, 174 F. Supp. 2d at 1059.

38. *Id.*

39. *Id*. (quoting former Article XVII, § E, of the Election Code).

40. *Id*. at 1059–60.

41. *Id.* at 1060.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. The court also resolved issues of mootness (Welker's continued disqualification from the council seat served as harm to uphold standing) and sovereign immunity ("Eleventh Amendment provides no shield for state officials acting in their official capacities when plaintiffs request prospective injunctive relief"). *Id.* at 1062.

49. *Id.* (citing Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990)).

chance of success on the merits of the suit.[50] Welker argued that a forum-based analysis should be adopted in scrutinizing the constitutionality of the expenditure limit in the university's election code, and further maintained both that UCI was a limited public forum and that the expenditure limit was a content-based regulation not narrowly drawn to effectuate a compelling state interest.[51] Welker relied exclusively on the dissent in *Alabama Student*, which is discussed in Part I of this note. The *Alabama Student* dissent had "opined that a forum-based analysis is proper when reviewing a challenge to the constitutionality of a university election code."[52]

The *Welker* court refused to adopt "the view of [the] lone [*Alabama Student*] dissent [in] applying it to the facts of [the] case."[53] But the court was disinclined to embrace the reasonableness standard of scrutiny that the university claimed should apply.[54] The *Welker* court distinguished the case at bar from *Alabama Student* by noting that the expenditure limit at issue was substantially different from the regulation concerning physical activities on campus that had characterized the regulations at issue in *Alabama Student*.[55] Rather, as the court saw it, the election provision challenged by Welker implicated "the quantity and diversity of speech" instead of affecting how UCI distributed its scarce resources.[56]

The district court relied upon *Buckley v. Valeo*,[57] the "seminal 'campaign finance' case," for its constitutional standard.[58] Because *Buckley* made it clear that the freedom of speech found in the First Amendment encompasses political campaign spending, the *Welker* court held that UCI must demonstrate that its election code was adopted pursuant to a compelling interest and was narrowly tailored to achieve that interest.[59] Although *Buckley* involved the regulation of federal campaigns, it had been extended to state elections by the time *Welker* was decided,[60] and the *Welker* court saw no reason not to apply it to elections at a public university.[61]

The district court next dealt with the four compelling interests posited by UCI in maintaining the expenditure limits, finding all of them to fail the narrow tailoring threshold. First, the university argued that the provisions promoted equal participation by all students, regardless of socio-economic backgrounds, so that all individuals would have a chance to influence the election outcome.[62] The *Welker* court was unconvinced, stating that it was problematic for the government to

50. *Id.* at 1063–67.
51. *Id.* at 1063.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. 424 U.S. 1 (1976) (per curiam).
58. *Welker*, 174 F. Supp. 2d. at 1064.
59. *Id.*
60. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000); Suster v. Marshall, 149 F.3d 523, 528 n.3 (6th Cir. 1998).
61. *Welker*, 174 F. Supp. 2d at 1064–65.
62. *Id.* at 1065.

"'restrict the speech of some elements of our society in order to enhance the relative voice of others.'"[63] A second compelling interest put forth by UCI was encouraging academic pursuits.[64] As with the first interest, however, the court found the argument lacking; because the university already required student candidates running for legislative council to maintain a minimum grade point average for eligibility, the regulation was not narrowly tailored to meet the interest.[65] Third, UCI argued that the expenditure limit decreased the influence of private corporate sponsors upon candidates.[66] But the court identified alternate avenues outside of monetary disbursements that could cause a candidate to become beholden to a corporation (e.g. donation of campaign materials, food, office space, etc.); therefore, the court said, the "$100 expenditure restriction will not stem the potential of undue corporate influence over candidates."[67] The last interest claimed by the university was an increase in candidates' creativity.[68] UCI argued that by limiting how much a candidate could spend during the course of the campaign, the university was encouraging students to become more inventive and original.[69] The court saw no direct correlation between spending caps and creativity, noting that the opposite was more likely to be true (i.e. creativity increases as the money that a candidate has to spend on various channels of communication increases).[70] Because the university failed to meet its burden under strict scrutiny by establishing that its election regulation rose to the level of a compelling interest and did not achieve its stated objectives through narrowly tailored means, the court concluded that Welker suffered a loss of First Amendment freedoms at the hands of the university and granted his request for an injunction ordering his reinstatement to the legislative council.[71]

B. *Flint v. Dennison*

The second case involving judicial scrutiny of an expenditure restriction in a campus election for student office is *Flint v. Dennison*.[72] As in *Welker*, the student plaintiff, Aaron Flint, challenged campaign finance regulations adopted by a student government association, and sought a preliminary injunction against the University of Montana ("UM") and the Associated Students of the University of Montana ("ASUM").[73] During the 2003 elections, plaintiff ran for President of

63. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976)).
64. *Id.* at 1065–66.
65. *Id.* at 1066.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1066–67.
72. 336 F. Supp. 2d 1065 (D. Mont. 2004).
73. *See* ASUM, *ASUM Bylaws*, Art. V, § 2, *available at* http://www2.umt.edu/asum/government/bylaws.htm (last updated Apr. 6, 2005) [hereinafter ASUM Bylaws] ("Campaign expenditures, including donations, by each candidate or write-in candidate shall be limited to . . . . $100, with or without a primary election").

ASUM and was elected by the student body.[74] Flint and his running mate spent roughly $300 in the course of that election, despite campaign rules that limited their expenditures to only $175 for president/vice-president teams.[75] As a result, Flint was censured for his violation of the election bylaws.[76] In 2004, Flint ran for office to the ASUM Senate, this time spending $214.69, more than double the $100 limit for senate races.[77] Upon disclosure of the campaign breach, the ASUM Senate voted to deny Flint his seat pursuant to its bylaws.[78] Flint sued to regain his seat on the ASUM Senate.

The federal district court began its analysis of whether to grant Flint's request for a preliminary injunction by stating that Flint had to "show (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor."[79] In considering the first potential step of Flint's likelihood of success on the merits and irreparable injury, the court reasoned that the outcome of such an inquiry would "[depend] primarily on the degree of scrutiny with which the Court assesses the constitutionality of ASUM's spending limits."[80] Flint urged the court to apply strict scrutiny to the spending caps using *Buckley* as its guide,[81] whereas UM argued that as an academic institution, a deferential standard of review was appropriate in examining its actions.[82] The court sided with UM and rooted its decision in the fact that the United States Supreme Court has "acknowledged the right of [educational institutions] to ensure the quality and availability of educational opportunities, even where the exercise of that right results in the exclusion of First Amendment activities."[83] Because the purpose of UM in instituting campus elections was to provide additional educational opportunities to its students, rather than to fulfill a democratic requirement that drives state and national political elections, the court distinguished *Buckley's* affirmation of political speech rights from a university's regulation of student government.[84] It

74. *Flint*, 336 F. Supp. 2d at 1067.

75. *Id.*

76. *Id.*

77. *Id.*

78. ASUM Bylaws, *supra* note 73, at Art. V, § 5, prescribes: "Any candidate who violates any of these rules may be barred from candidacy and/or denied from taking office, as recommended by the Elections Committee, and approved by a two-thirds (2/3) majority vote of the Senate. This rule is not suspendable."

79. *Flint*, 336 F. Supp. 2d at 1067 (citing Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1068. The district court relied upon *Widmar v. Vincent*, 454 U.S. 263 (1981), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), as its basis to apply a deferential standard of review to UM's actions. *Widmar* and *Tinker*, however, both held that the students' free speech rights had been violated by the schools' actions; additionally, it should be noted that *Hazelwood* and *Tinker* are both K-12 cases, rather than college or university-based cases.

84. The court's adoption of a reasonableness standard was based on its interpretation of the Supreme Court's view that a court: "should honor the traditional 'reluctance to trench on the prerogatives of state and local educational institutions.'" *Id.* at 1069 (quoting Alabama Student

refused to apply *Welker* (which had found that a university's regulation of student campaign expenditures infringed upon the First Amendment) and instead chose to rely on the analysis in *Alabama Student* (which *Welker* had rejected).[85] The district court held that *Alabama Student's* precedential value was not about the allocation of scarce resources that *Welker* claimed it to be based upon, but rather stood for the "proposition that a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech that would be impermissible outside of the academic environment."[86] Using a reasonableness standard, the court concluded that Flint had a low probability of success on the merits.[87] Because ASUM was organized to promote educational purposes,[88] the expenditure limits in the ASUM bylaws struck the court as "a reasonable attempt to maintain equal access to pedagogical benefits of ASUM participation throughout the student body."[89]

The alternate way in which Flint could obtain a preliminary injunction was to demonstrate to the court that there was a "significant likelihood of irreparable injury or show that the balance of hardships tips sharply in his favor."[90] Here, the court found that any hardship claimed by Flint was considerably reduced by his delay in seeking an injunction.[91] Flint, the court said, could have challenged the regulations in 2003 after he was censured for violating the expenditure limit in his presidential race; rather, he took the chance of being disqualified or receiving other punishment from the ASUM Senate when he again knowingly broke the election rules in overspending for his 2004 senate campaign.[92] The court concluded that Flint's hardship in being denied his senate seat was of less importance when balanced against the hardship ASUM would suffer "in its ability to enforce its election regulations."[93] Therefore, Flint's motion for a preliminary injunction was denied.[94]

The district court later issued a second ruling in which it granted the university's motion for summary judgment.[95] The court elaborated on its previous

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Party v. Student Gov't Ass'n, 867 F.2d at 1344, 1347 (11th Cir. 1989)) (internal citation omitted). The *Flint* Court also relied on the fact that "[t]he basis for distinction between school elections and government elections . . . is one of purpose. '[T]his is a university, whose primary purpose is *education*, not electioneering.'" *Id.* at 1069 (quoting *Alabama Student*, 867 F.2d at 1346) (internal citation omitted).

85. *Id.* at 1068.

86. *Id.*

87. *Id.* at 1070.

88. The ASUM Constitution reads: "ASUM shall be the representative body of the members of the Association, organized exclusively for educational and non-profit purposes. The primary responsibility of the Association is to serve as an advocate for the general welfare of the students." ASUM, ASUM Constitution, Art. II, § 1, *available at* http://www2.umt.edu/asum/government/constitution.htm (last updated July 28, 2004)

89. *Flint*, 336 F. Supp. 2d at 1070.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. ___ F. Supp. 2d ___ (No. CV 04-85-M-DWM, 2005 WL 701049 (D. Mont., Mar. 28,

opinion by holding that the existence of UM's student government was strictly an educational opportunity.[96] Drawing upon *Alabama Student*, *Hazelwood*, *Bethel*, and *Tinker*, the court elucidated the following controlling principle: "a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech that would be impermissible outside of the academic environment."[97] Therefore, a reasonableness standard controlled the analysis, and the university could impose expenditure limits to maintain the learning function of student elections.[98]

III. DEFERENCE GRANTED TO EDUCATIONAL INSTITUTIONS

It is quite true that public colleges and universities have been granted considerable leeway by the courts in carrying out their educational missions. For example, the Supreme Court held in *Regents of the University of Michigan v. Ewing*[99] that a university's decision to dismiss a student from a program of study after the student failed an exam required to continue in the program was a reasonable exercise of professional academic judgment that did not substantially depart from accepted academic norms. The Court expressed great hesitation at interfering in areas that inherently encompass the essence of academic instruction.[100] At times, certain constitutional rights (such as students' free speech rights) may constitutionally be impinged by an educational institution's decision or practice, even where most other state actors must always abide by the constraints of the First Amendment.[101] The Supreme Court has guided the development of this "doctrine of deference" to some extent, but the exact limits of that deference are unclear and imprecise, leading to inconsistent outcomes and application among state courts and lower federal courts. *Tinker v. Des Moines Independent Community School District*[102] established that students do possess some First Amendment rights that cannot be abridged by school administrators absent strict scrutiny, even where judicial deference might seem applicable.[103] *Bethel School*

2005)).

96. *Id.* at *4.

97. *Id.*

98. Id. at *5. Additionally, the court approved of the university's argument that spending limits were necessary to ensure access to the educational benefits ASUM provided that "if we reach the stage where participation in student government is perceived as only given to those interests with large money contributions, the fundamental predicate of student governance breaks down." *Id.* at *6.

99. 474 U.S. 214 (1985).

100. *Id.* at 225 ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment"). *See also* Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) (holding that the University of Michigan Law School's desire to achieve diverse student body was compelling interest grounded in academic freedom).

101. *See, e.g.*, Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 215 (2000); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

102. 393 U.S. 503 (1969).

103. *Id.* at 511 ("[Students] are possessed of fundamental rights which the State must respect . . . . In the absence of a specific showing of constitutionally valid reasons to regulate their

District No. 403 v. Fraser[104] permits public schools to censor and punish offensive student speech that causes disruption to the school's operations or is detrimental to the values it is inculcating.[105] But two important decisions by the Court within the past two decades have left the issues of academic deference and reasonableness in flux—*Hazelwood School District v. Kuhlmeier*[106] addressed the speech rights of elementary and secondary school students,[107] while *Board of Regents of the University of Wisconsin System v. Southworth*[108] dealt with the proper treatment of free speech on college campuses.[109]

A. *Tinker*

The Supreme Court constructed a roadblock to a total sweeping away of free speech rights for students in public school when it handed down its decision in *Tinker v. Des Moines Independent Community School District.*[110] At issue was the conduct of several students who were suspended for protesting the Vietnam War by wearing black armbands to school, after school officials had adopted a policy banning the wearing of armbands.[111] The Court had to grapple with the intersecting problem "where students in the exercise of First Amendment rights collide with the rules of the school authorities."[112] The *Tinker* Court held that the student's display was a passive expression of speech that did not cause any interference with the school's operation.[113] Because students are "persons" under the Constitution, a school must respect their rights to expression absent a permissible reason to regulate their speech.[114] Only if students' conduct in exercising their free speech rights cause a "material or substantial" disruption to a school's pedagogical attempts will the Constitution allow limits to be placed upon the students' expression.[115]

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speech, students are entitled to freedom of expression of their views.").

104. 478 U.S. 675 (1986).

105. *Id.* at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

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

107. *Id.* at 262.

108. 529 U.S. 217 (2000).

109. *Id.* at 220–21.

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

111. *Id.* at 504.

112. *Id.* at 507.

113. *Id.* at 508.

114. The Court noted:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id. at 511.

115. The *Tinker* Court stated:

B. *Bethel*

The Supreme Court upheld a high school's decision to suspend a student for inappropriate remarks given at a student assembly in *Bethel School District No. 403 v. Fraser*.[116] During a speech nominating a fellow student for school elective office, Fraser used lewd and sexually graphic remarks to describe the candidate. [117] As a result, the school district suspended Fraser for three days and removed him from a list of possible speakers at the high school commencement ceremony.[118] The Court distinguished the case at hand from other cases involving offensive political speech, stating that "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."[119] Because the speech was not essentially political and reached an audience of children, the school board possessed the right, according to the Court, to impose sanctions in order to uphold the fundamental values of the school's educational purpose.[120]

C. *Hazelwood*

The notion that courts should defer to public K-12 institutions when the latter are regulating speech in order to carry out their primary mission was firmly established in *Hazelwood School District v. Kuhlmeier*.[121] In that case, high school students who were enrolled in a journalism class at the school wrote and edited the school newspaper, which was published about every three weeks and

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> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. . . . The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom. If a regulation were adopted by school officials forbidding . . . expression by any student . . . anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

Id. at 513.

116. 478 U.S. 675 (1986).

117. *Id.* at 677–78.

118. *Id.* at 678–79.

119. *Id.* at 682.

120. The Court noted:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. . . . Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Id. at 685–86.

121. 484 U.S. 260 (1988).

distributed to about 4,500 students, school personnel, and community members.[122] Prior to publication, proofs of the articles and layout were submitted to the principal for approval.[123] At issue in the case was the principal's censorship of two student articles: one dealing with student pregnancy at the school, the other about the effect of divorce on students at the school.[124] As to the first story, the principal believed that even with the "'[the false names used] to keep the identity of [the female students] a secret,' the pregnant students still might be identifiable from the text . . . . [and] that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school."[125] Likewise, the principal feared that the second story's use of quotes from a student disparaging her divorcing dad was unfair since no opportunity for the father to respond was available.[126] For those reasons, the newspaper was sent to publication without these two articles appearing in print.[127] Several journalism students sued, claiming their First Amendment rights had been violated by the school omitting the written pieces from the paper.[128] The district court held that no constitutional violation had occurred;[129] the circuit court reversed that decision,[130] and certiorari was sought from the Supreme Court, which the Court granted.

In an opinion written by Justice White, and joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia, the Supreme Court ruled that on occasion, school administrative officials need to have the flexibility to monitor the speech that occurs within their educational confines.[131] The majority was careful to emphasize that "students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;'"[132] the Court said, however, that speech that substantially interferes with the goal of education or encroaches upon the right of other students relegates that expression to a realm of principal/teacher supervision.[133] School officials would now have the duty of determining what speech was inappropriate when it occurred under the auspices of a school setting; although that decision could be challenged under the First

122. *Id.* at 262–63.

123. *Id.* at 263.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 264.

128. *Id.*

129. *Id.* at 264–65 (holding that it was permissible for school officials to restrict student speech that is strongly related to an educational purpose).

130. *Id.* at 265–66 (holding that newspaper was a public forum and therefore censorship was inappropriate absent circumstances that met defined criteria for an exception).

131. *Id.* at 266.

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

133. The Court found adequate support for its position in past cases: "We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'" *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)); "[Students' freedom of speech] must be 'applied in light of the special characteristics of the school environment.'" *Id.* (quoting *Tinker*, 393 U.S. at 506); and "A school need not tolerate student speech that is inconsistent with its "basic educational mission." *Id.* (citing *Bethel*, 478 U.S. at 685).

Amendment, federal courts would accord the school's judgment greater regard than had been previously recognized.[134]

The Court based its decision on the fact that the school newspaper at issue did not constitute a public forum. "School facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' . . . or by some segment of the public, such as student organizations."[135] As represented by the board rules and curriculum guide of the Hazelwood School District, school policy regarded the newspaper as part of its educational program and as a classroom activity by journalism students; thus, the Court found that there was no intent by the public school to treat the publication as a public forum.[136] Any student control over the newspaper's content was limited to developing leadership skills that the school hoped to foster.[137] Because school officials "'reserved the forum for its intended purpose,' as a supervised learning experience for journalism students . . . . [those officials] were entitled to regulate the contents of [the newspaper] in any reasonable manner."[138]

Using forum analysis, the majority moved on to consider whether the First Amendment required a school to promote certain student speech. School activities such as newspapers, theater productions, and the like, the Court said, are expressive activities that some parents, students, and community members might regard as conveying school approval of the content in question.[139] To combat this problem of perception:

> [e]ducators are entitled to exercise greater control over this [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, and that the views of the individual speaker are not erroneously attributed to the school.[140]

If the school is to be responsible for producing the speech as part of its goal of educating students, it is important that the institution have the ability to check speech that is detrimental or in opposition to its ultimate purpose.[141]

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134. *Id.* at 267 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts.") (internal citations omitted).

135. *Id.* (internal citations omitted).

136. *Id.* at 270.

137. *Id.*

138. *Id.* (internal citations omitted).

139. *Id.* at 271 ("School-sponsored publications, theatrical productions, and other express activities [are ones] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.").

140. *Id.*

141. For example, the Court noted that "a school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the 'shared values of a civilized social order.'" *Id.* at 272 (internal citations omitted). Otherwise, a school would be expressing sentiments that posed diametrical suggestions to the educational goals it is working to inculcate within its students.

The Court acknowledged (under its traditional jurisprudence) that when there is no "valid educational purpose" behind the censoring of student expressive activity, the full force of the First Amendment applies to protect the students' constitutional rights, and courts may involve themselves in the vindication of those rights.[142] But when an activity has been adopted as a means to fulfill an educational goal, deference to a school administrator is appropriate. In this case, "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[143] The Court concluded that the principal in *Hazelwood* had acted reasonably in omitting the articles in question out of concerns of privacy and suitability; therefore, the Court said, there was no violation of any student's First Amendment rights.[144]

The dissent in *Hazelwood*, while recognizing the difficult role public educators occupy and the numerous challenges they face in carrying out their duties, balked at giving school administrators too much deference. When the competing interests of free speech and pedagogy collide, the dissent said, student expression must be accommodated even when incompatible with the message the school is attempting to inculcate.[145] How *Hazelwood* should apply to colleges and universities will be discussed in Part V.B.

D. *Southworth*

The Supreme Court tackled the issue of deference to college and university action when it considered the question of student activity fees in *Board of Regents of the University of Wisconsin System v. Southworth*.[146] In that case, several students challenged the university's mandatory nonrefundable activity fee used to support various campus services and extracurricular student activities, including organizations claiming to be engaging in political and ideological speech. The university's student government association disbursed the allocable portion of the collected fees to qualified student groups that registered under the applicable

142. *Id.* at 273 ("It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights.") (internal citations omitted).

143. *Id.*

144. Legal commentators have noted that it is unclear after *Hazelwood* whether its central holding will be extended to public universities. *See, e.g.*, Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1917 (2002) ("The Supreme Court, indeed, has not foreclosed the possibility of extending *Hazelwood* to colleges. In *Hazelwood*, the Court explicitly left open that possibility, stating 'We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.'" (internal citation omitted)).

145. The dissent opined that "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting).

146. 529 U.S. 217 (2000).

guidelines.[147] The district and appellate court both found that the fee program constituted compelled speech and thus violated the First Amendment;[148] the students sought certiorari, which the Court granted.

The Court's majority opinion, written by Justice Kennedy, and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Ginsburg, began its analysis by analogizing the claims of the students regarding the fee program to past cases involving members of unions and bar associations required to fund objectionable speech.[149] The Court quickly decided, however, that prior precedent in this area was neither "applicable nor workable in the context of extracurricular student speech at a university."[150] The reason the majority distinguished college students from members of professional and occupational organizations was due to the immense range of speech existing on college campuses.[151] While courts can attempt to define what type of speech was appropriate for a labor union or bar association to engage in without committing its members to supporting expression that conflicted with their personal beliefs, the public university setting posed an impossible arena in which to set a manageable standard.[152] It might seem then that a possible solution would be to allow students to indicate which organizations they wanted their fees to support; but doing so, the Court said, would undoubtedly create an administrative nightmare that would probably undo the university's goal of "stimulat[ing] the whole universe of speech and ideas" on campus.[153]

Higher educational institutions often seek to "facilitate a wide range of speech"[154] as part of the college experience, the Court said. In recognition of this lofty ideal to which colleges and universities aspire, the Court held that courts should ordinarily defer to the judgment of the university regarding mandatory student fees:

> The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.[155]

While the university is, of course, not free to abrogate the constitutional speech rights of students,[156] the Court stated that as long as the institution follows the principle of viewpoint-neutrality, reasonable action by administrative officials to

147. *Id*. at 225–26.

148. *Id.* at 221.

149. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Keller v. State Bar, 496 U.S. 1 (1990).

150. *Southworth*, 529 U.S. at 230.

151. *Id.* at 231.

152. *Id.*

153. *Id.* at 232.

154. *Id.* at 231.

155. *Id.* at 233.

156. The *Southworth* majority stated: "The University must provide some protection to its students' First Amendment interests . . . . The proper measure . . . is the requirement of viewpoint neutrality in the allocation of funding support." *Id.*

control access to or quantity of expression on campus (e.g. compulsion through mandatory fees) is permissible when done in the name of education.[157] Thus, in this case, as long as viewpoint neutrality existed in the allocation process, students could be required to pay fees to the university without endangering their First Amendment rights—even if the funds eventually ended up going to organizations that disseminated speech to which some students objected.[158]

The three concurring members of the Court outlined an even broader position of deference that they would grant to public universities in this situation.[159] Drawing upon the "academic freedom" cases decided by the Supreme Court,[160] the concurrence noted that "autonomous decisionmaking by the academy itself" was an essential component of free-flowing speech in the marketplace.[161] While the concurring opinion refused to go so far as to recognize an immunity that attached to the judgment of school officials in discharging their educational mission, it considered deference an important analytical component in First Amendment claims of this type.[162]

IV. CAMPAIGN SPENDING

A. *Buckley*

The seminal Supreme Court decision dealing with campaign finance

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157. The majority maintained that if "the University reaches [the conclusion that a broad range of speech is necessary], it is entitled to impose a mandatory fee to sustain an open dialogue to these ends. The University must provide some protection to its students' First Amendment rights, however . . . . [by following the] viewpoint neutrality [principle]." *Id.* On the other hand, the Court provided a warning as to what rules it would apply to speech outside of the "educational mission" box:

> Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.

Id. at 234–35.

158. *Id.* at 233–34.

159. Justices Souter, Stevens, and Breyer joined in concurring with the majority's opinion. *Id.* at 1357.

160. *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

161. *Southworth*, 529 U.S. at 237 (Souter, J., concurring). Justice Souter, who authored the concurring opinion, wrote: "Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach." *Id.*

162. The concurrence opined that "we have never held that universities lie entirely beyond the reach of students' First Amendment rights." *Id.* at 239. It continued, "[a]s to that freedom and university autonomy, then, it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees." *Id.* A similar sentiment seems to have played an important role in the outcome of the Court's recent decisions regarding affirmative action policies in higher education. *See* Grutter v. Bollinger, 539 U.S. 306, 324, 329 (2003).

regulations, and specifically expenditure caps, took place almost three decades ago in *Buckley v. Valeo*.[163] The challenge brought before the Court involved the constitutionality of several provisions in the Federal Election Campaign Act of 1971 ("FECA").[164] Of particular importance was the manner in which FECA treated contributions by individuals to political campaigns versus how the campaigns in turn spent their money. The legislation at issue placed restrictions on the amount individuals could contribute to candidates and political organizations (no more than $25,000 in a single year or more than $1,000 to any single candidate); limited independent expenditures by individuals or groups to $1,000 annually; required public disclosure and reporting of contributions and expenditures that rose above a certain threshold; and prescribed limits for campaign spending by candidates for federal office.[165] In a per curiam opinion, the Supreme Court set out the boundaries of constitutional protection afforded to various types of political contributions and expenditures.

The opinion started its analysis of the federal legislation by recognizing that political expression is an integral component of free speech.[166] The history and purpose of the First Amendment reflect a strong desire to "protect the free discussion of governmental affairs . . . . [and] the ability of the citizenry to make informed choices among candidates for office . . . ."[167] The problem the Court faced was to determine the correct legal standard that applied to communication that was a combination of both speech and conduct.[168] Part of the government's rationale for FECA was to "level the playing field" among candidates for federal office by instituting spending and contribution limits; the government argued that regulation was directed at the "conduct" of citizens giving money to candidates (contributions) and also of candidates spending their own money on their own campaigns (expenditures), rather than being directed at an attempt to get at the "speech" element of supporting particular political ideas expressed by candidates.[169] The Court, however, refused to accept this rationale as legitimate, stating:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass

163. 424 U.S. 1 (1976).

164. Pub. L. No. 92-225, 86 Stat. 3 (1971).

165. *Buckley*, 424 U.S. at 7.

166. *Id.* at 14 ("The First Amendment affords the broadest protection to such political expression in order to 'assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (internal citations omitted).

167. *Id.* at 14–15.

168. Restrictions on expressive conduct were approved by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968). In *Buckley*, the appellees argued that the Act regulated conduct and thus any effect on speech was incidental. The Court found the claim without merit and refused to apply *O'Brien*. *Buckley*, 424 U.S. at 16.

169. *Id.* at 25.

society requires the expenditure of money.[170]

The Court treated expenditures as if they were speech by the candidate and treated contributions as if they were speech by the donor. The Court upheld FECA's limit on the amount an individual may contribute to a specific candidate.[171] Although the contribution size may be curtailed by the government with respect to the amount of the donation, the speech still exists (regardless of the actual amount given). The Court thought that having the symbolic ability to give some money to a specific campaign was sufficient protection of a donor's right to free political expression and association,[172] but the Constitution's speech guarantee did not prevent Congress from limiting the total amount an individual could give.[173]

In contrast, when a candidate "speaks" through spending his own money, his statements are truncated if they are limited to a maximum expenditure amount.[174] Expenditures directly determine the quantity of political speech, and allowing the government to decide indirectly which speech is proper by capping how much can be spent is squarely opposite to the intentions of the First Amendment.[175] Ultimately, the Court believed that the distinction between regulation of campaign expenditures and contributions rested on the idea that "*expenditure* ceilings impose significantly more severe restrictions on protected freedoms of political expression and associations than do its limitations on financial *contributions*."[176]

The opinion in *Buckley* also reached the notion of combating the negative public perception resulting from the then-current financing of federal campaigns. The government claimed that its primary interest in the legislation was to prevent

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170. *Id.* at 19.

171. *Id.* at 29.

172. The Court distinguished its contribution rationale by stating:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount . . . [a person may contribute to a candidate] entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Id. at 21.

173. The Court stated that a spending limitation involved "little direct restraint on [a person's] political communication, for it permits the symbolic expression of support evidenced by a contribution . . . . the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

174. *Id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). *See also* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 161 (2003) (noting that "while contributions may result in political expression if spent by a candidate or an association . . . the transformation of contributions into political debate involves speech by someone other than the contributor") (quoting *Buckley*, 424 U.S. at 20–21).

175. *Buckley*, 424 U.S. at 57 ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.").

176. 424 U.S. at 23 (emphasis added).

actual and apparent corruption of the political process.[177] On the expenditure side, the Court flatly denied that such an interest was achieved by the regulation laid out in FECA and instead held that it "heavily burden[ed] core First Amendment expression."[178] Allowing the government to dictate how much an individual can spend of his personal financial wealth to advance his own candidacy, the Court said, directly reduces his right to engage in political speech.[179] Instead of creating an unequal influence on the election, the Court held that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures" that Congress was attempting to prevent.[180]

Since the time *Buckley* was handed down, the Supreme Court has reaffirmed the case's central holdings on numerous occasions. In *Federal Election Commission v. Beaumont*,[181] for example, the Court restated that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."[182] On the other hand, the Court has continued to recognize that "limits on political expenditures deserve closer scrutiny than restrictions on political contributions . . . . [as] [r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do."[183] The line drawn between permissible limits on contributions versus required strict scrutiny for expenditure restrictions continues to hold on in the Court's jurisprudence.

In its most recent exposition of campaign finance expenditures limits, *McConnell v. Federal Election Commission*,[184] the Court allowed the government to impose restrictions on the amounts that outside political groups (i.e. political action committees ("PACs")) can spend to influence the election of a certain candidate or issue through coordinated independent expenditures.[185] The *McConnell* majority (over a vigorous dissent) sanctioned the campaign expenditures impositions on the basis that the "soft money" the law was aimed at regulating was similar to the corruption rationale that *Buckley* upheld for contribution limits.[186] The majority, however, did not disturb *Buckley's* long-standing principle that spending by a candidate cannot be restricted under the First Amendment unless the law survives strict scrutiny.

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177. *See id.* at 25.

178. *Id.* at 48.

179. *Id.* at 52–53.

180. *Id.* at 53.

181. 539 U.S. 146 (2003).

182. *Id.* at 161.

183. 533 U.S. 431, 440 (2001) (internal citations omitted). *See* Nixon v. Shrink Mo Gov't PAC, 528 U.S. 377, 386–88 (2000); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 610, 614–15 (1996); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986).

184. 540 U.S. 93 (2003).

185. *Id.* at 706.

186. *Id.*

V. DISCUSSION

A. Political Speech

Campaigning for an elective office in our nation traditionally involves rhetoric by a candidate telling the electorate why the candidate believes he or she is worthy of office; this elemental practice should be governed by uniform standards. Despite the deference that courts owe academic decisions, just because a student decides to run for student government and is elected on a university campus by his peers does not mean that he should be treated differently by the law, especially when it comes to such fundamental liberty interests as free speech. *Buckley* made it clear that on the federal level, any restriction on candidates' ability to spend funds (either their own or those collected subject to contribution limits) in an effort to get elected abridged their First Amendment right to engage in unhindered political expression.[187] This broad construction of an individual's right to free speech has been expanded to cover state political elections. Although the issue in *Nixon v. Shrink Missouri Government PAC*[188] was the constitutionality of state campaign finance laws that limited contributions to state candidates, the U.S. Supreme Court held that the *Buckley* rationale must be applied at the state level as well as the federal level.[189] Based upon this natural extension of First Amendment protection present in *Nixon*, *Welker* applied *Buckley's* strict scrutiny standard to the student elections held at UCI.[190] I will argue that the *Welker* court's approach to resolving conflicts between academic deference and students' First Amendment rights is the correct approach.

Student elections are an exercise in limited self-government and hence involve concerns similar to those at the federal or state level. Professor Kevin Saunders has noted that "[p]olitical speech is at the core [of democracy and self-expression] and deserves the strongest of protection."[191] Just as expenditure limits at the state and federal levels adversely impact a candidate's right to political expression, students too are hindered by their inability to expend their own resources beyond a certain threshold in attracting voters.[192] Student candidates with low name-

187. Buckley v. Valeo, 424 U.S. 1, 58–59 (1979).

188. 528 U.S. 377 (2000). *See also* Suster v. Marshall, 149 F.3d 523, 528 n.3 (6th Cir. 1998) (rejecting defendant's argument that the *Buckley* standard should not apply to expenditure limit in state election).

189. Justice Souter, writing for the majority in *Nixon*, stated: "We hold *Buckley* to be authority for comparable state regulation . . . ." *Nixon*, 528 U.S. at 382. He continued, "[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute." *Id.* at 397–98.

190. Welker v. Cicerone, 174 F. Supp. 2d 1055, 1064–65 (C.D. Cal. 2001). Judge Timlin held: "The court sees no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities. Thus, *Buckley's* strict scrutiny is the proper standard to apply to the expenditure restriction at bar." *Id.* at 1065.

191. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 21 (2003).

192. Campaign finance scholar Bradley A. Smith (now an FEC commissioner) has written: "[S]peech costs money. If the government can regulate or limit expenditures to fund speech, it can effectively regulate or limit the corresponding speech." Bradley A. Smith, UNFREE SPEECH:

recognition or facing popular incumbents are at a disadvantage if they are limited in the amount of money they can spend to achieve a level of presence at which they can compete for office.[193] Professor Bradley Smith has written that "voters' understanding of issues increases with the quantity of campaign information received . . . [but] spending less on campaigns will result in less public awareness and understanding . . . ."[194] It is vitally important that student candidates have the ability to communicate their message to the campus body in order to compete for votes.[195] The speech rights at issue in student elections are not so different from those of a state or federal candidate in campaigning for public office as to justify a wholly different constitutional norm for them. Students elected to campus office make substantive decisions that have a genuine consequence for certain aspects of student life, and the money spent in their effort to get elected has a real effect on the number of students who vote for them. If the First Amendment dictates strict scrutiny of expenditure limits in regular elections, there is no good reason why these students do not deserve the same speech protection. Although *Southworth*, in principle, allows universities to require students to pay fees to support campus activities with which the students may not agree, collection of fees is fundamentally different from spending money in a campaign. Paying a fee to a college in order to fund a school newspaper is not a voluntary act by the student compelled to pay the fee, whereas the student seeking campus office spend his or her own money voluntarily, and the students who contribute to his or her campaign do that voluntarily as well.

In *Buckley*, the Court accepted as a compelling governmental interest—which justified limits on contributions to candidates—the prevention of both actual corruption and the appearance of corruption.[196] With regard to the expenditure limits, however, a majority of the justices concluded that the government's attempt at avoiding corruption was not narrowly tailored.[197] The corruption rationale that was given some approval in *Buckley* and other more recent campaign finance regulation cases[198] is a weak ground for schools to base spending caps on student candidates. Because the Constitution forbids the state from placing monetary

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193. Professor Smith argues that "the positive effect of added spending is significantly greater for challengers than for incumbents" as overall spending caps hurt a challenger's ability to offset the advantages of incumbency. BRADLEY A. SMITH, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1074 (1996).

194. *Id.* at 1060.

195. The essential point is to be able to get your message out to others, even though it may not ultimately win the day. *See* Michael Malbin, *Most GOP Winners Spent Enough Money to Reach Voters*, POL. FIN. & LOBBY REP., Jan. 11, 1995, at 9 ("[H]aving money means having the ability to be heard; it does not mean the voters will like what they hear").

196. Buckley v. Valeo, 424 U.S. 1, 29 (1976) (stating that "the weighty interests served by [the law] . . . are sufficient to justify the limited effect upon First Amendment freedoms . . . .").

197. *Id.* at 55 (reiterating the belief that "no governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by [the] campaign expenditure limitations").

198. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

constraints on a candidate's ability to spread his or her political message, it should also bar public universities from adopting the same regulations for students. A student candidate could easily get around the expenditure prohibition by having supporters provide non-monetary backing;[199] moreover, if the money is coming from a candidate's own pocket, the corruption argument falls on it face.[200] Thus, even if the university could legitimately argue that it was attempting to prevent donors from influencing a candidate, a spending limit is not narrowly tailored to achieve the institution's interest in preventing any "indebtedness" a student has to particular groups or individuals.

Likewise, the *Buckley* Court held that the state's interest in equalizing the financial resources of candidates so as to impose a "level-playing field" upon which to compete for votes was not compelling, but was rather an illegitimate pursuit by the government.[201] In the realm of campus elections, barring all candidates from spending more than $100 on their election efforts would hardly "equalize" students in communicating their political message and attracting voters. Students can receive endorsements or non-monetary support that potentially could have a far greater effect on the election outcome than what is attributable to financial expenditures alone. As the Court has reaffirmed, "political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."[202]

Professor Charles Fried has distinguished "time, place, and manner" regulations from speech-silencing on the ground that the former is a content-neutral attempt to give speakers the right to express a message while also protecting individuals who prefer not to listen from the message being communicated; the autonomy of each individual is preserved.[203] Campaign expenditure restrictions limit a student's

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199. For example, the *Welker* court noted that "private sponsors could . . . [donate] campaign materials, food, utility services, telephone services, office space, etc., to candidates" that would create the same problem of undue influence. Welker v. Cicerone, 174 F. Supp. 2d 1055, 1066 (C.D. Cal. 2001).

200. Indeed, *Buckley* specifically held that the "use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks" present in campaigning. *Buckley*, 424 U.S. at 53.

201. *Id.* at 54 ("[T]he First Amendment simply cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit [even based upon equality concerns] on behalf of his own candidacy").

202. Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986).

203. Professor Fried asserts that "time, place, and manner regulations, which are content-neutral, are not an illiberal assertion of authority, but rather a good faith attempt by the liberal state to adjust zones of privacy without regard to what will be pursued within those zones." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 237 (Geoffrey Stone, et al. eds.) (1992). Fried describes the role of the First Amendment as:

> The Constitution protects speech primarily against state *silencing* of private speech because silencing is distinctive. Silencing invokes the power of the state against both speaker and audience. It stops both mouth and ears. It prevents a transaction between citizens. Classic free speech law privileges speech transactions between citizens as none of the state's business . . . . [B]y silencing, the state is asking us to acquiesce in sovereignty over our minds, our rational capacities.

Id. at 236 (emphasis original).

ability to reach fellow students who might wish to hear the message being conveyed. A historical approach to the First Amendment informs us that the Framers' worry over state suppression of political speech was the central motivating factor in adopting this component of the Bill of Rights.[204] If this concern remains true today, it is anomalous for courts to single out college students as unworthy recipients of First Amendment protection when they are engaged in political speech of their own in a campus election.

While the Supreme Court has countenanced further campaign finance reforms that have eroded some of the protections afforded political spending since *Buckley* was decided,[205] its adherence to a standard of strict scrutiny for candidate expenditure limits has not wavered.[206] Even in the area of political contributions, where the Court has employed a watered down standard of review to uphold congressional action that imposes limits on an individual's free speech rights, the Court has nonetheless specifically recognized the First Amendment rights of minors to engage in speech by making political donations.[207] If even children have a constitutional right to participate in the political system by donating to candidates and national parties on the contribution side, the justification for finding expenditure caps a violation of an *adult* college student's free speech rights becomes all the more compelling.

B. Educational Prerogative

Although the *Hazelwood* Court specifically refrained from deciding whether the judicial deference courts gave to high school principals would extend to university officials,[208] there are several reasons that counsel against expansion.[209] In a variety of situations, the federal courts have recognized that college and university students possess the same panoply of rights as adults.[210] And this is as it should

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204. *See* Cass Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 305 (Geoffrey Stone et al. eds.) (1992).

205. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

206. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S 377 (2000); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S 238 (1986).

207. The Court in *McConnell* held that the portion of the Bipartisan Campaign Reform Act ("BCRA"), which forbid individuals under the age of seventeen from making political contributions, was a "violat[ion of] the First Amendment rights of minors." *McConnell*, 540 U.S. at 109.

208. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level").

209. *See* Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 EDUC. LAW. REP. 339, 344 (2003) (stating that political speech, defined as "expressions that advance 'an idea transcending personal interest or opinion, and which impacts our social and/or political lives,'" is a category of speech generally protected by the First Amendment).

210. *See* Hosty v. Carter, 325 F.3d 945, 949 (7th Cir. 2003), *vacated and reh'g en banc granted*, No. 01-4155, 2003 U.S. App. LEXIS 13195 (7th Cir. June 25, 2003) (stating "the judicial deference the Supreme Court found necessary in the high school setting . . . is inappropriate for a university setting"); Goss v. Lopez, 419 U.S. 565, 591 (1975); Bystrom

be, for most students attending institutions of higher education are adults under the law: they can vote, drive, marry, enter into contracts, and serve in the armed forces.[211] In addition, with the advent of many non-traditional students enrolling on college campuses, it is silly to reduce the scope of rights that they have enjoyed for many years just because the individual is now a college or university student. Given the repeated pleas by college officials for judicial deference, it is rather telling that the U.S. Supreme Court has consistently held that courts must "subject[t] restrictions on campaign expenditures to clos[e] scrutiny"[212] rather than defer to legislative attempts to restrict campaign spending by enacting expenditure limits. If Congress, usually given wide latitude in acting "rationally" on the public's behalf, is prevented from proceeding in such a manner, it surely is irrational to give such forbidden power to a public university.

On the other hand, high school students typically do not receive such an extensive range of rights under our laws.[213] Moreover, the reason the Supreme Court has granted a deference exception to public schools with respect to student speech rights is based on a recognition that elementary and secondary students are at a vulnerable emotional stage in their maturity.[214] At this level, courts are concerned that students might get the impression that school-sponsored speech bears the imprimatur of the principal and teachers.[215] In other contexts, such as

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Through & By Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14, 822 F.2d 747, 750 (8th Cir. 1987); Kincaid v. Gibson, 191 F.3d 719, 730 n.1 (6th Cir. 1999) (Cole, J., concurring in part and dissenting in part), *vacated and reh'g en banc granted*, 236 F.3d 342 (6th Cir. 2001). *See also* Fiore, *supra* note 144, at 1930 ("[F]ederal courts . . . generally have recognized broader First Amendment rights at the college level, both before and after *Hazelwood*"); J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 728 (arguing that "[college] students are, in fact, young adults with full legal rights in our system (save in most states, the right to drink)").

211. The Seventh Circuit, in a case directly focused on *Hazelwood's* applicability to higher education, found that:

> [O]nly 1 percent of [students] enrolled in American colleges or universities are under the age of 18, and 55 percent are 22 years of age or older. Treating these students like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step for us to take absent more direction from the Supreme Court.

Hosty, 325 F.3d at 948–49.

212. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134 (2003). *See also id.* at 311 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[T]he constitutionality of [the expenditure limits] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression") (internal citations omitted).

213. *See* Veronia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995) (stating that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public [elementary and secondary] schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children").

214. For example, the *Hazelwood* Court noted, "[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." Hazelwood Sch. Dist v. Kuhlmeier, 484 U.S. 260, 272 (1988).

215. *Id.* at 271 ("Educators are entitled to exercise greater control over this . . . form of student expression to assure that . . . the views of the individual speaker are not erroneously

government funding of religious schools and state-sponsored prayer at public school graduations, the Court has traditionally been concerned about the impressionability of school-age children.[216] As schools are "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,"[217] public school officials deserve greater latitude than what is typically allowed to ensure that our children receive instruction in an environment that is most conducive to an upbringing of which society approves.[218] Additionally, Professor Saunders argues that the full application of First Amendment rights to children is not as compelling because they are typically not decisionmakers.[219] Insofar as we value speech for its ability to impact self-government, then it is not as important that children receive all the same information as adults.

These emotional and maturity concerns are less-justifiable when considered at the postsecondary level.[220] As the Supreme Court has noted, "[t]here is substance to the contention that college students are less impressionable and less susceptible" than elementary students in presuming the government is endorsing school-sponsored speech.[221] By the time students enter college, their core moral and personal beliefs have often been established through years of parental and educational instruction. Part of the goal, and indeed, allure, of college life is

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attributed to the school.").

216. *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (noting the "impressionable age of the pupils, in primary schools particularly"); Lee v. Weisman, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . . [for] adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention").

217. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

218. One commentator has noted:

> [F]ederal courts view the role of free expression on college campuses in stark contrast to its role in primary and secondary schools. Whereas colleges historically have taken it upon themselves to cultivate creativity, experimentation, and a "marketplace of ideas," such free expression rights are less recognized in primary and secondary schools. Indeed, as the Court now firmly recognizes, those schools are primarily responsible not for encouraging exposure to a vast array of viewpoints, but rather for instilling in students particular values and principles that will prepare them for future endeavors.

Fiore, *supra* note 144, at 1954–55.

219. SAUNDERS, *supra* note 191, at 21–22 (stating that "children are not among those who make the decisions, so it as at least questionable how strongly the First Amendment, at least on this justification, applies to children").

220. *See* 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, 194 (2003). ("[C]ollege students are both more mature than high school students and less likely to be influenced on controversial topics.").

221. Tilton v. Richardson, 403 U.S. 672, 686 (1971). *See also* Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (observing that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion."); Goss v. Lopez, 419 U.S. 565, 591 (1975) (stating that the "rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students").

exposure to a wide set of values and philosophies different from our own.[222] The years an individual spends at a postsecondary institution should be characterized by exploration and engagement in the "marketplace of ideas;" therefore, free speech should especially bloom in full form at the academy without unnecessary restriction.[223] Additionally, by the time they enter college, students are of an age at which they are ready to begin participation in self-government. "Straw votes and mock political campaigns, as well as campaigns for school government, serve to prepare [students] for participation in self-government."[224]

Proponents of judicial deference at the university level might point to the Supreme Court's recent affirmative action decisions as evidence of judicial acceptance of their position. Indeed, in *Grutter v. Bollinger*,[225] the Court reiterated that "academic freedom [has long] 'been viewed as a special concern of the First Amendment,'"[226] and an argument can be made for a link between institutional academic freedom and judicial deference to academic policy decisions. Yet the *Grutter* decision did not involve student speech; the University of Michigan was engaged in carrying out its academic mission by determining the composition of its student body. After *Grutter*, it would be unwise to conclude that a court should defer to university regulation of student elections solely because the postsecondary institution is supposedly fulfilling its academic mission, when the effect is to burden students' free speech.[227]

Certainly, when the government is acting as an educator, it has much more leeway to control how it goes about its teaching role than when it is not in the process of education. That is why it is permissible for a public university to impose certain "time, place, and manner" restrictions on student campaigns. If schools are trying to "teach" by allowing students to participate in campus elections, they must ensure that their educational goal is not frustrated by

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222. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231–33 (2000) ("Students enroll in public universities to seek fulfillment of their personal aspirations and of their own potential . . . . [The educational] mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects . . ."). *See also* Fiore, *supra* note 144, at 1949–50 ("[I]ntellectual curiosity of students remains today a central determination of a university's success . . . restriction of that curiosity 'risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses'") (internal citations omitted).

223. *See* Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001) (en banc) ("The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection."); Hosty v. Carter, 325 F.3d 945, 948 (7th Cir. 2003) ("The 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."), *vacated and reh'g en banc granted*, No. 01-4155, 2003 U.S. App. LEXIS 13195 (7th Cir. June 25, 2003).

224. SAUNDERS, *supra* note 191, at 23.

225. 539 U.S. 306 (2003).

226. *Id.* at 324 (citing Justice Powell's decision in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

227. Justice Scalia in *Grutter* criticized the majority for their acquiescence to the deference principle, writing: "The Court bases its unprecedented deference to the Law School—*a deference antithetical to strict scrutiny*—on an idea of 'educational autonomy' grounded in the First Amendment." *Id.* at 362 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

substantial disruption in the process.[228] Schools, however, cannot go so far as to regulate the type or volume of speech allowed in a student election. It is one thing to restrict the placement of partisan placards or the timing of debates, but quite another to require a student to turn off his message by placing a spending cap on his election campaign. When the area of speech being proscribed—by draconian funding limits—is the fundamental message being communicated, public universities are no longer engaged in "education" but rather have turned into censors. Campus officer elections can be broken into two distinct parts: an extracurricular activity where the goal is to teach students about the nature and process of representative government; and a free speech component in which an individual candidate is expressing his or her own views in a political message to potential student voters. The former component can be reasonably regulated by the state as no important rights a student possesses are implicated; the latter, on the other hand, involve a fundamental liberty interest in freedom of expression and participation in the "marketplace of ideas."

A last argument for why the educational deference principle should not extend to expenditure limits in public university elections flows from a means/end analysis. The *Tinker* Court sanctioned the ability of a school to take action that caused a diminution in students' constitutional speech rights only where the action in question was intended to prevent a material and substantial disruption of the work and discipline of the school.[229] Even assuming that a university enacted election spending caps in the belief that unlimited spending by student candidates would cause "material and substantial disruption" to the institution's attempts to educate, such regulation is not narrowly tailored to achieve those objectives. There is no direct correlation between monetary expenditures and academic disturbances. Rather, the speech restrictions are both over- and under-inclusive in that they prevent a certain group of people (i.e. candidates) from exercising speech rights that might not cause disruption while allowing non-candidates to exercise speech rights that might adversely impact teaching at the university. Moreover, the type of speech in the election context is one of personal expression akin to "pure speech,"[230] rather than an institutionally-sponsored activity such as a newspaper or yearbook. The former is speech that an institution should tolerate because the speech in question can only be viewed as the candidate's own opinion, while the latter may be subject to some level of regulation as it is more likely to be perceived as bearing the institution's imprimatur.[231] Thus, the justification for judicial

228. *See, e.g.*, Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989).

229. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

230. *Id.* at 508.

231. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988). The Court held:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities

deference is misplaced under the test provided in *Hazelwood*, even on the assumption that *Hazelwood* is applicable in the post-secondary setting.

C. Student Expenditure Limits

Once it becomes clear that the significant aspects of primary and secondary education that induce courts to grant school officials substantial deference with respect to limitations on student speech are not applicable at the university level, it is easy to see why campus speech restrictions on student election expenditures run afoul of the First Amendment. The rationale for K-12 public school deference is based on the need to maintain the smooth operation of the "educational mission" by giving school officials the ability to avoid learning interruptions or distractions in furtherance of that goal.[232] As adults, college students no longer need such a rigid structure to guide them upon the path to knowledge, hence placing burdens on their ability to engage in protected political self-expression is impermissible.

Whereas "time, place, and manner" speech restrictions may be constitutionally-permissible in some circumstances,[233] prohibitions on the amount of money that can be spent, on the other hand, directly affects the quantity of speech.[234] If a student is allowed to "purchase" only $100 of speech in a campaign, once that limit is reached, he is precluded from reaching any more potential voters. The following hypothetical is instructive: Bobby and Sam are running for student body president; each can spend $100 on his campaign. Both want to increase their name recognition and inform students of their platforms by distributing flyers to each dorm room. Bobby can make copies of his flyer at ten cents each; therefore, he can purchase a total of 1,000 copies. But the campus has 3,000 dorm rooms, so Bobby can only reach one-third of potential student voters. Sam's father is in the printing business and can make a flyer at the cost of one cent per copy. Thus, Sam

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> 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.

Id.

232. *See Alabama Student*, 867 F.2d at 1345 ("This deference to the educational mission of institutes of higher learning has resulted in the recognition of a 'university's right to exclude even First Amendment activities that violate reasonable campus rules or *substantially interfere with the opportunity of other students to obtain an education*'") (internal citations omitted) (emphasis added).

233. Even when "time, place, and manner" restrictions are permitted, the government is limited to adopting regulations that are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Roberts v. Haragan, 346 F. Supp. 2d 853, 859 (N.D. Tex. 2004) (internal citations omitted).

234. Professor Smith writes:

> Gifts of money and the expenditure of money are forms of speech. Across the board regulation of monetary gifts and spending are not content neutral . . . . [c]ampaign finance regulations attempt to limit speech precisely for its communicative value, and do so in ways that are not content neutral . . . they significantly interrupt the flow of information by silencing certain voices and limiting the total amount of communication between candidates and the public.

Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45, 55 (1997).

can hand out a flyer to each dorm room and still have $90 left over. It can easily be seen that the expenditure cap placed on Bobby limits whom he can reach. A simple "time, place, and manner" restriction, such as limiting flyers to public bulletin boards around campus, would have given Bobby and Sam a more equal chance of reaching all the students on campus.[235]

An expenditure limit on student spending does not further the goal of giving school administrators a means to control their scarce resources. Rather, as the *Welker* court found, it is a direct limit on the "quantity and diversity of speech."[236] For that reason, a court should apply a strict scrutiny standard to the challenged restriction: if the public university can assert a compelling interest that is narrowly tailored to achieve its ends, then the speech restriction should be tolerated; if not, the restriction should be struck down. Like the defendants in *Welker*, officials often claim their regulation is supported by a goal of equal access to student government. *Buckley* flatly denies the legitimacy of such a claim, stating:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[237]

Moreover, proponents of spending caps argue that creativity is enhanced: thereby, students must find unique ways to spread their message without money. The opposite is closer to the truth—spending opens up new "channels of communication."[238] Without having to worry about exceeding a university's expenditure cap, students can engage in numerous avenues of cutting-edge or untraditional campaigning; for example, with money, candidates can set up websites or "blogs" on the internet or design campaign t-shirts and other apparel for supporters to wear.

The Court in *Southworth* upheld mandatory student fees against claims of compelled speech because the purpose and effect of the fee system was to promote a broader and diverse range of speech on campus. Likewise, if the primary goal of campus elections is to provide the student body with a forum for political expression and an opportunity to engage in democratic practice, colleges and universities should promote actions that foster enhanced opportunities for speech

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235. Although, again, the university would need to make sure that its regulations were content-neutral and narrowly tailored to serve its compelling interest. *See Roberts*, 346 F. Supp. 2d at 869–70.

236. Welker v. Cicerone, 174 F. Supp. 2d 1055, 1064 (C.D. Cal. 2001). *See also* Healy v. James, 408 U.S. 169, 180 (1972) (stating that "the precedent of this Court leaves no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large").

237. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

238. Welker, 174 F. Supp. 2d at 1066 (stating that "the potential to spend more than $100 on a campaign likely opens up new channels of communication that might not otherwise be available to candidates who are limited to spending $100. Thus, the expenditure restriction has the *potential to stifle, not foster*, candidates' creativity." (emphasis added)).

to occur. Spending restrictions are antithetical to this objective, as "[the] regulation and bureaucracy required to limit campaign spending contributions and spending limits [tend] to intimidate and silence voices."[239]

CONCLUSION

Expenditure limits on student campaigns at public universities run afoul of the First Amendment's free speech guarantee; a student's rights to free speech should not be diminished merely because he or she is pursuing further education at a postsecondary institution. Whereas K-12 students have less than a full bundle of First Amendment rights due to their impressionability and the special role schools play in their development, college students, as adults, occupy a substantially different position under the law. When analyzed on the spectrum of the protection afforded speech rights, college students are much more akin to adults (indeed, if they are not already fully recognized as such under most laws) than to elementary school students. Thus, there is good reason to argue that the First Amendment should be wholly applicable to individuals running for office in a public university election, especially with regard to expenditures of money for campaign purposes.

The early attempts by courts to define the extent to which public colleges and universities can limit the First Amendment rights of students running for campus government offices have produced little definitive guidance for either administrators or students. The district court's decision in *Flint* presumed *Hazelwood's* reasonable deference standard was applicable to universities and upheld a student expenditure restriction. In contrast, the *Welker* court identified no discernable distinction between an election at the federal or state level and one taking place on a public university campus, and thus reinstated a student to his student government position after he was removed for violating an election spending cap. *Buckley*, which outlawed spending caps in federal elections as a violation of the First Amendment, has been extended to state elections, and should apply to student campaigns as well. For free speech to remain a valued liberty interest under our Constitution, any incursion to limit its applicability must be called into question. While both *Welker* and *Flint* deal with the issue only superficially on procedural grounds, educators should be aware of the delicate and uncertain ground they tread upon in regulating spending in student elections. The best course of action is to focus university regulations on content-neutral "time, place, and manner" restrictions, for which there is a stronger legal basis, instead of suppressing the quantity of student political speech that occurs when campaign expenditure limits are adopted.

239. Smith, *supra* note 234, at 75.

HAS SOLOMON'S REIGN COME TO AN END?

RICHARD SCHWARTZ*

INTRODUCTION

No doubt a cry of satisfaction rose up across many college and university campuses when, in separate opinions, a federal district court and a federal court of appeals both held the Solomon Amendment ("Solomon")[1] to be an unconstitutional restriction on the First Amendment rights of various groups involved in higher education.[2] Students and faculty members have long protested the presence of military recruiters on college and university campuses, largely compelled by the threat of losing federal funds unrelated to military purposes. Their opposition to both the military's policy of not employing openly avowed homosexuals and the coerced presence of recruiters has hardly gone unnoticed.[3]

Although Solomon applies to colleges and universities who receive federal funds, this note examines the implications for law schools in particular because the challenges to the statute thus far have been brought by members of law school communities. The simple statement that accompanies military recruiting materials in law school career services offices is probably most law students' introduction to this debate. Due to the widespread membership of the American Association of Law Schools ("AALS"), whose bylaws include a policy against allowing employers who discriminate on the basis of sexual orientation to recruit on-campus, this is an issue that affects students more profoundly than it inconveniences their effort to interview with the armed services.

Part I briefly outlines the history of Solomon. Initially enacted as a rider to the Defense Authorization bill in 1994, it was amended in 1997 and underwent its most recent revision in the summer of 2004. In short, Solomon allows the Department of Defense ("DoD") to withhold nearly all federal funds, regardless of

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1. 10 U.S.C. § 983 (1998 & West Supp. 2005).

2. Forum for Academic & Institutional Rights [("FAIR")] v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004), *cert granted*, No. 04-1152, 2005 WL 483339 (May 2, 2005) (holding Solomon unconstitutional on First Amendment grounds); Burt v. Rumsfeld, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment to plaintiffs on claims of First Amendment violations in enforcement of Solomon at Yale University).

3. For a comprehensive review of ways to protest Solomon, see http://www.law.georgetown.edu/solomon/Index.html (last visited May 4, 2005), which is maintained by faculty at the Georgetown University Law Center. In addition to posting letters in opposition to Solomon written by the deans of nine prestigious law schools, the website contains photos of past demonstrations and instructions on how students, faculty, and administrators can oppose Solomon on their campus.

which cabinet department authorized them, from colleges and universities that deny access to campus to ROTC programs or military recruiters. Part II addresses the differing approaches that law schools have taken to complying with Solomon while attempting to maintain their anti-discrimination principles. With the sheer enormity and widespread scope of funds involved, it has become practically impossible for any college or university to enforce their anti-discrimination policy against the military. In practice, for those law schools that officially state that they will not allow discriminatory employers to recruit on campus, it is not feasible to risk invoking Solomon and consequently lose federal dollars by enforcing their policy against the military.

As a result of the impracticability of banning the military from campus, an uneasy compromise was informally reached whereby law schools allowed the military on campus but ensured that their views were heard by way of some form of disparate treatment from the services offered to other employers. That informal compromise was shattered in late 2001, when the DoD put schools on notice that it intended to enforce Solomon against schools that made such distinctions.

Part III discusses the four federal lawsuits that have challenged the constitutionality of Solomon. This includes the status of preliminary motions that were decided in the summer of 2004 and the U.S. District Court for the District of Connecticut's January 2005 ruling that Solomon is unconstitutional. Part IV is a review of the Court of Appeals for the Third Circuit's November 2004 decision ordering a preliminary injunction of enforcement of Solomon pending final resolution of that suit.[4]

Finally, Part V considers the weaknesses of the Third Circuit's application of existing First Amendment jurisprudence and suggests that the long-standing doctrines of deference to both military and academic judgments may force the Court to favor one over the other when the two are in conflict.

I. THE PATH TO SOLOMON

A. EARLY LEGISLATION AND THE INITIAL ENACTMENT OF SOLOMON

Military recruiters on college and university campuses faced significant adversity even before the first academic institution added sexual orientation to its anti-discrimination policy. As early as 1972, with opposition to the conflict in Vietnam apparent on campuses across the country, Congress authorized the DoD to withhold funding to any institution that prohibited military recruiting on its grounds.[5]

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4. *FAIR*, 390 F.3d at 246.

5. National Defense Authorization Act for 1973, Pub. L. No. 92-436, 86 Stat. 734 (1972). The Act stated:

> No part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from the premises of the institution . . . .

Id. § 606(a), 86 Stat. at 740.

The social context that brought about Solomon in 1994 was very different from anti-war sentiments that had fueled previous legislation.[6] Though the military had transitioned to an all-volunteer force that depended on active recruitment of new candidates for its ranks, it was then enjoying a period of sparse operational commitments following the overwhelming success in the 1991 Persian Gulf War. In fact, far from facing a shortfall of personnel, the Army was actively working to shrink the overall size of the force. Recruiting goals were consistently met, and the military continued to assert that it was attracting a smarter and more qualified recruit than at any other time in its history. At the same time, the military was in the process of implementing the newly adopted "Don't Ask, Don't Tell, Don't Pursue" policy with regard to homosexual service members.[7]

With the satisfactory condition of military recruiting at that time, it should not be surprising that the first verbal assaults against the "ivory tower" came from members of Congress and not the DoD.[8] If the debate on the floor of the House of Representatives does not indicate the largely symbolic nature of the gesture, then the effect certainly would. Because so few funds disbursed on college campuses came from the DoD, the original version of Solomon had relatively little impact on the discrimination policies of law schools, or any other educational institutions, for that matter.

B. The First Revision of Solomon

Realizing that the limit to the scope of funds involved was not having the desired effect, Congress took action. By 1997, a finding of non-compliance with the original version of Solomon by the DoD would subject the institution to loss of funds from the Departments of Education, Transportation, Labor, and Health and Human Services, as well as Defense.[9] Since this included federal Title IV funds

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6. National Defense Authorization Act for 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994) (not codified, but published as 10 U.S.C. § 503 note) . Essentially, Solomon was an amendment to the DoD's annual authorization on how to allocate its funds. Solomon allowed the DoD to withhold funds from any educational institution which denied or effectively prevented the military from obtaining entry to campuses (or access to students on campuses) for recruiting purposes. *Id.* Solomon, in the words of its named sponsor, was offered "on behalf of military preparedness." 140 CONG. REC. H3861 (1994). Ironically, the DoD actually objected to the proposed amendment as "unnecessary" and "duplicative." 140 CONG. REC. H3864 (1994). Ultimately, Solomon passed in the House of Representatives by a vote of 271 to 126 and became law when the bill passed the Senate and was signed into law. 140 CONG. REC. H3865 (1994).

7. See 10 U.S.C. § 654 (2000) for codification of the policy on openly gay servicemembers, which prevents the military recruiters from being in compliance with non-discrimination clauses.

8. Representative Solomon of New York is quoted in debate on the House floor as saying, "Tell recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your First Amendment right. But do not expect Federal dollars to support your interference with our military recruiters. 140 CONG. REC. H3861 (1994). A co-sponsor, Representative Pombo of California went so far as to suggest that the amendment would "send a message over the wall of the ivory tower of higher education" that colleges' and universities' "starry-eyed idealism comes with a price." 140 CONG. REC. H3863 (1994).

9. Omnibus Consolidated Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). On April 8, 1997, the DoD published an interim rule entitled Military Recruiting

such as federal Work Study, the Perkins Loan Program, and Pell Grants, the Act finally included the teeth that had been missing from the earlier version.[10] Pressure on law schools to conform to Solomon was only compounded by the fact that the Secretary of Defense could withhold not only their funds in the event of non-compliance, but also those of the rest of the college or university at large.[11] In 1999, Congress took a step toward paring back the effect of Solomon by no longer including student funds in those that were subject to withholding for non-compliance.[12]

C. Solomon's Present Form

The most recent revision of Solomon occurred in the summer of 2004.[13] The overall effect of the latest change was to codify the more stringent requirements for compliance that the DoD had been reading into regulations made pursuant to Solomon.[14] In its current form, compliance with Solomon requires that military recruiters receive access that is "at least equal in quality and scope" to the degree of access to students and campuses granted to other recruiters.[15]

II. CONFLICT AND UNEASY SOLUTIONS

A. Commitment to Non-discrimination

Enactment of Solomon caused turmoil at law schools across the country. In

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and Reserve Officer Training Corps Program Access to Institutions of Higher Education. 62 Fed. Reg. 16,691, 16,694 (Apr. 8, 1997) (codified at 32 C.F.R. pt. 216 (2005)). This rule and the Omnibus Consolidated Appropriations Act for 1997 require the DoD semi-annually to publish a list of the institutions of higher education ineligible for Federal funds. 62 Fed. Reg. at 16,692. As of August 2003, there was only one institution listed as ineligible for federal funds—William Mitchell College of Law, and as of July 2004, there was once again only a single school named—this time the Vermont Law School. 68 Fed. Reg. 48888-01 (Aug. 15, 2003) and 69 Fed. Reg. 43833-01 (July 22, 2004), respectively.

10. *See* Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 T. MARSHALL L. REV. 351, 359–60 (1998).

11. DoD regulations currently allow any sub-element of an institution of higher learning (e.g. a law school) that is not in compliance with Solomon to be deprived of its funding from all federal agencies, while the parent college or university only loses funds received directly from the DoD. 32 C.F.R. § 216.3(b)(1) (2005).

12. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999). Subsidized and un-subsidized Stafford Loans as well as Pell Grants were no longer among the funds that were able to be withheld. *See* Valdes, *supra* note 10, at 359 n.3.

13. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

14. Prior to the latest revision, compliance with Solomon required: that institutions not "prohibit or in effect prevent" entry to campuses for recruiting purposes, nor deny access to students while on campus or access to student information for recruiting purposes. In its implementing regulations, however, the DoD interpreted Solomon to require that military recruiters receive access that is "at least equal in quality and scope" to that granted to other recruiters. 32. C.F.R. § 216.4(c) (2005). The effect of the latest revision was to bring the code in line with the DoD's implementing regulations.

15. 10 U.S.C.A. §983 (1998 & West Supp. 2005).

1990, the AALS voted to add sexual orientation to its list of prohibited bases of discrimination.[16] Following that addition, all 165 member schools were required to adopt the clause and take positive steps to be in compliance. Consistent with this adoption, law schools began to prevent the military from interviewing on campus and from using their career development and job placement offices when they failed to agree to abide by the anti-discrimination requirements that civilian recruiters affirmed in exchange for access to campus.[17]

B. Changing Landscapes

After Solomon appeared in 1994, the AALS permitted individual law schools to decide whether they would abide by its anti-discrimination policy and face a loss of federal funding or comply with Solomon and make their principles known to students in other ways.[18] Law schools that chose to comply with Solomon were encouraged to accompany access to military materials with a statement that they did so under threat of loss of funding, and to promote dialogue on campuses about

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16. The full non-discrimination policy is stated at AALS Bylaw 6-4 and falls under the Article 6 "Requirements for Membership." The Bylaw states:

> a. A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or *sexual orientation.*
>
> b. A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.
>
> c. A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex. A member school may pursue additional affirmative action objectives.

AALS, BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, *available at* http://www.aals.org/bylaws.html (last visited May 4, 2005) (emphasis added).

17. The relevant AALS Regulation covering non-discrimination by recruiting employers is 6.19, which reads:

> A member school shall inform employers of its obligation under Bylaw 6-4(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b). A member school has a further obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-4(b).

AALS, EXECUTIVE COMMITTEE REGULATIONS OF THE AMERICAN ASSOCIATION OF AMERICAN LAW SCHOOLS, *available at* http://www.aals.org/ecr/ (last visited May 4, 2005).

18. Although no specific requirements were imposed by the AALS, its intent was to evaluate the overall efforts of the school to develop a "hospitable environment for its students." *See* FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 281 (D.N.J. 2003). Such efforts would include the presence of an active gay and lesbian student organization and the presence of openly lesbian and gay faculty and staff. *Id.*

the military's policy with regard to discrimination in employment.[19] Under the threat of a loss of federal funds, many law schools chose to abrogate their stated policy that employers who would discriminate against a portion of their students were not welcome.

Although a handful of schools chose to forgo the funds to maintain their intellectual independence,[20] and some moved to complete compliance with Solomon,[21] most attempted to strike a balance.[22] To varying degrees, this generally included allowing access to military recruiters in another part of campus than the law school itself. Likewise, interviews were announced and conducted, but not with the assistance of the law school's career placement services offices. In some cases students had to actively seek out an interview with a recruiter in order to receive information. Additionally, military recruiters were generally not invited to job fairs and other recruiting events, although some law schools allowed them to be present at the request of students. Certainly there was an inconvenience to the government in its recruiting efforts, but the law schools targeted as non-compliant could hardly be said to have denied access to students or campuses.

C. Changing Sentiments

It was not until 2001 that the military departments, which had neither sought the original provision in the first place, nor shown any real interest in enforcing it, began to put colleges and universities on notice of non-compliance and imminent

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19. Specifically, the AALS suggested certain "ameliorative" measures that law schools could take if they chose to abrogate their anti-discrimination policy in order to avoid a loss of funding. *Id.* Among these measures were: assurances by the law school to students that the military's discrimination is in violation of its policy and is being accommodated only to avoid a loss of funding and forums or panels for the discussion of the military policy or for discussion of discrimination based on sexual orientation. *Id.*

20. Reportedly, only three institutions have been able to maintain their complete anti-discrimination policy. Patrick Healy, *Despite Concerns, Law Schools Admit Military Recruiters*, BOSTON GLOBE, Nov. 12, 2002, at A1. William Mitchell, Golden Gate, and Vermont law schools receive relatively little funding and have been able to bear the brunt of forfeiture. *Id*. Another, New York University Law School, initially withstood the loss of funding and eventually capitulated under the sheer amount involved. Thomas Adcock, *Law Schools Question Pentagon's Push for Military Recruiters on Campus*, N.Y. L.J., Dec. 3, 2004, at 16. The university reportedly gave up more than $100,000 from 1998 to 2000, when the threat of greater loss of funding forced it to relent. *Id*.

21. Duke University Law School, which had previously allowed the military to put recruiting materials in the career services office, but had only allowed interviews to take place in the ROTC facility, decided not to resist the DoD's demands when threatened with the loss of $600,000. Pamela B. Gann, *No-Win Amendment Traps Law Schools*, NAT'L L. J., Oct. 13, 1997, at A23. Reportedly, all eight other schools that the military targeted at the same time as Duke (American, Hamline, Ohio Northern, St. Mary's of Texas, University of Oregon, Willamette, William Mitchell, and Georgia State) also rescinded their policies when faced with the loss of funds. *See* Terry Carter, *Costly Principles: Pentagon Forces Law Schools to Choose Between Federal Funding and Backing of Gay Rights*, 83 A.B.A. J. 30 (Dec. 30, 1997).

22. For instance, Harvard Law School allowed military recruiters to recruit on campus, but required that they do so at the offices of the student-veterans organization and did not allow its recruiting professionals to assist in scheduling. FAIR v. Rumsfeld, 390 F.3d 219, 227 (3d Cir. 2004). Boston College Law School likewise allowed the military on campus to interview, but kept their literature in the library as opposed to the career services office. *Id*.

action as a result.[23] Late in the year, Yale University and the University of Pennsylvania, among others, received letters from the military departments to the effect that their attempts at compromise were no longer satisfactory.[24] The DoD's position was that Solomon allowed no distinction to be made between the quality and nature of access being offered to the military vis-à-vis any other recruiter admitted to campus. While the timing of the government's enforcement measures roughly correlates to the horrific attacks of September 11, it is not clear that there was suddenly a shortage of recruits or burden on access that required the DoD's attention.

III. THE "IVORY TOWER" FIRES BACK

Shortly after the DoD began to put colleges and universities on notice of its intent to penalize the disparate treatment of military recruiters, a series of lawsuits were filed in federal court in three separate jurisdictions. The outcomes of these cases are likely to affect law schools across the country, based on the broad membership of the organizations making claims and the ability of federal courts to issue injunctions that reach across circuits in their scope.

Solomon has been in place for nearly ten years without challenge, but in a relatively short space of time, decisions on the merits could be forthcoming in four separate cases which have challenged its constitutionality in U.S. district courts in Connecticut, New Jersey, and Pennsylvania.[25] Solomon has already been declared unconstitutional by two courts in the space of a few months, a track record which hardly bodes well for Solomon.[26] Although the cases are addressed here in the

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23. Up until this time, the DoD had actually expressed satisfaction with law schools' participation in "successful" recruiting efforts and did not consider the measures taken by the many law schools who attempted to strike a balance between compliance and principle to be a violation of Solomon. FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 282 (D.N.J. 2003).

24. Yale University's Law School had believed it was in compliance in allowing recruiters to visit the campus, access student information, and use law school classrooms for informational meetings when requested by students. Peter H. Schuck, *Equal Opportunity Recruiting*, AM. LAW., Vol. 26 No. 1 (Jan. 2004). Students could even reserve rooms for interviews, and employees of the University were used to assist in scheduling meetings off campus. *Id*. In December 2001, the DoD indicated that this disparity of treatment was risking the $300 million in grants then being administered to the university. *Id*. Not to be outdone, more than $500 million in federal aid is apparently riding on the outcome of the University of Pennsylvania's suit, *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004). Scott D. Gerber, *Allow Military Recruitment on Campus*, N.J. L.J., Dec. 29, 2003.

25. *FAIR*, 291 F. Supp. 2d 269 (denying preliminary injunction of enforcement of Solomon sought by various groups), *rev'd*, 390 F.3d 219 (3d Cir. 2004); Burt v. Rumsfeld, 322 F. Supp. 2d 189 (D. Conn. 2004) (denying preliminary injunction of enforcement of Solomon sought by Yale Law School ("YLS") faculty); Burt v. Rumsfeld, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment to plaintiffs on claims of First Amendment violations in enforcement of Solomon at Yale University); Student Members of SAME v. Rumsfeld, 321 F. Supp. 2d 388 (D. Conn. 2004) (denying preliminary injunction of Solomon sought by students of YLS); Burbank v. Rumsfeld, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004) (denying preliminary injunction of enforcement of Solomon sought by faculty and students at the University of Pennsylvania Law School).

26. *FAIR*, 390 F.3d at 246 (holding Solomon unconstitutional on First Amendment grounds); and *Burt*, 354 F. Supp. 2d at 178 (granting summary judgment to plaintiffs on claims of

order in which they were brought, the district court's grant of summary judgment in *Burt v. Rumsfeld* is actually the most recent of the decisions, and, as will be seen, generally applies much of the reasoning used by the Third Circuit analysis.

A. *FAIR v. Rumsfeld*

The first challenge to Solomon was brought on September 19, 2003, when several organizations and individuals primarily associated with Rutgers University combined to seek a preliminary injunction against enforcement of Solomon as unconstitutional for three reasons: it is a violation of their First Amendment rights, it discriminates based on viewpoint, and it is unconstitutionally vague.[27]

With regard to the First Amendment claims, FAIR argued that Solomon, as it was then written, violated their rights to academic freedom, freedom of expressive association, and free speech.[28] Because their continued receipt of federal funding

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First Amendment violations in enforcement of Solomon at Yale University). Prior to the present line of cases, the government received wide latitude due to the "long-standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters." United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986). In that case, the Third Circuit prohibited the City of Philadelphia from enforcing its own anti-discrimination in employment ordinance (the Philadelphia Fair Practices Ordinance, Philadelphia Code §§ 9-1101 to 9-1110) against the Temple University Law School's placement office. *Id*. at 88. Citing the forerunner to Solomon and a compelling government interest in recruiting for critical military specialties, the court concluded that preemption prevented the City from doing indirectly what it could not do directly, namely preventing Temple from making its facilities "available to the J.A.G. Corps." *Id*. at 89. For nearly twenty years, that basic premise of a compelling government interest would be accepted without being tested.

27. *FAIR*, 291 F. Supp. 2d at 274–76. The named plaintiffs include: FAIR, the Society of American Law Teachers, Inc. ("SALT"), the Coalition for Equity ("CFE"), Rutgers Gay and Lesbian Caucus ("RGLC"), law professors Erwin Chemerinsky, then of the University of Southern California Law School and Sylvia Law of the New York University Law School, and three individually named law students at Rutgers University. *Id*. FAIR is a New Jersey Corporation which consists of law schools and law faculties which vote by majority to join the association. *Id*. at 275. Its stated mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.* at 275. Membership in FAIR has largely remained secret, although Golden Gate University School of Law, Whittier Law School, New York University Law School, and Chicago-Kent University School of Law all eventually agreed to be named as members for purposes of the lawsuit. *Id*. at 275–76. SALT is a New York corporation which consisted of nine hundred law faculty members at the time of the suit. *Id*. at 275. Its goals include "making the legal profession more inclusive and extending the power of the law to underserved and communities." *Id*. at 276. CFE and RGLC are student organizations, of Boston College and Rutgers University, respectively, devoted to "furthering the rights and interests of all groups including gays and lesbians." *Id*. The named defendants included the individual cabinet secretaries, in their official capacities, of the departments whose funds were subject to withholding for non-compliance. *Id*.

28. The president of FAIR, Professor Kent Greenfield of Boston College Law School, has compared Solomon to "allowing the government to take away the driver's license of anyone who opposes pay raises for government bureaucrats and cutting off social security benefits to retirees who protest the Iraq War." Kent Greenfield, *Imposing Inequality on Law Schools*, WASH. POST, Nov. 10, 2003, at A25. His position that Solomon allows the government to withhold funding unless schools "give up deeply held beliefs about the equality of students" does seem to overstate the case, given the widespread derision of Solomon and "Don't Ask, Don't Tell" that abounds on college campuses. *Id*.

hinged on allowing military recruiters to be present on campus, FAIR posited that an unconstitutional condition was placed on their First Amendment rights.[29] In response, the government largely argued that Congress was entitled to wide latitude under the Spending Clause and the authority to raise and support armies.[30] The district court noted the strong policy interest in favor of the government's position.[31]

Recognizing the interaction between the Spending Clause and the First Amendment, the district court viewed the constitutionality of Solomon as hinging on the nature and extent of the conditions imposed on receipt of federal funds.[32] Although Congress is generally entitled to "less exacting" limitations when acting pursuant to its spending power, that latitude is circumscribed when other constitutionally protected interests are involved.[33] The district court ultimately decided that a sufficient likelihood of success on the First Amendment claims had not been established because "[T]he Solomon Amendment, on its face, does not interfere with academic discourse by condemning or silencing a particular ideology or point of view."[34] Because Solomon did not explicitly promote or exclude a certain point of view, the court concluded that the interference with free speech was "incidental."[35]

Upon reviewing the other First Amendment interests claimed to be affected—academic freedom and expressive association—the court was similarly skeptical.[36] After pointing out that academic freedom itself is not absolute, the court determined that previous cases involving an inhibition of academic freedom "have almost exclusively dealt with direct and serious infringements on individual teachers' speech or associational rights."[37] Without the direct attack on speech, the court could not be convinced that academic freedom was sufficiently inhibited.[38]

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29. *FAIR*, 291 F. Supp. 2d at 274.

30. *Id*. at 297.

31. *Id.* at 298 ("Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance.") (quoting United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986)).

32. *Id*. at 297.

33. *Id*. at 298.

34. *Id*. at 302.

35. *Id*. at 299.

36. *Id*. at 301–304.

37. *Id*. at 301 (discussing Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217 (2000) (holding that the First Amendment permits a public university to charge its students an activity fee used to fund student political and ideological speech, provided allocation of funding support is viewpoint neutral)); Wieman v. Updegraff, 344 U.S. 183 (1952) (requiring state employees to take loyalty oath); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (involving an investigation by the state attorney general into a professor's political ideology and lecture content); Shelton v. Tucker, 364 U.S. 479 (1960) (requiring teachers to file affidavits giving names and addresses of all organizations to which they belonged); Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967) (requiring removal of teachers based on treasonable or seditious words)).

38. In his recent comprehensive analysis of threats to constitutional academic freedom, Professor Byrne of the Georgetown University Law Center takes a similar approach to the nature of the plaintiff's academic freedom argument and points out that such claims may actually weaken the ability to redress true violations of that right. Professor Byrne argues:

Although it found that law schools were indeed expressive associations for purposes of invoking the claim of an expressive association violation, the court concluded that the degree of interference was not sufficient to amount to a violation.[39] While recognizing that Solomon required an inclusion of unwanted persons that affected the schools' messages and viewpoints, this inclusion did not require that the law schools adopt their message, accept the recruiters as members of their organizations, or bestow on them any semblance of authority.[40] It also drew a distinction from the fact that the military recruiter is a visitor who arrives on campus only infrequently, and thus could have little effect on the law schools' preferred message of non-discrimination.[41]

With regard to FAIR's second claim, because the district court had already concluded that Solomon does not directly regulate speech, Solomon could therefore not result in unconstitutional viewpoint discrimination.[42] Its reasoning was that a law school which chose to allow military recruiters on campus and accept federal funds was still free to take the ameliorative measures suggested by the AALS and continue to "voice objections" and "disassociate itself from the military recruiters."[43] In fact, the court was satisfied with evidence that Solomon notwithstanding, the anti-discrimination message of law schools across the nation was alive and well.[44]

Finally, the court turned to the void-for-vagueness argument. Giving the term "access to campus" its common use, the court determined that the flexibility and broad applicability did not render Solomon impermissibly vague.[45] After reaching this conclusion, the district court went on to make some interesting comments on the DoD's interpretation of the Act. After looking at the language as then written, which applied to schools which "prohibit[ed] or in effect prevent[ed]" military

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> To me this argument cries, 'wolf!' It may well be that Congress has acted unconstitutionally in its irrational and cruel discrimination or that the regulations are in excess of statutory authority, but the claim that the amendment violates academic freedom, when they have nothing to do with teaching, scholarship, or curriculum, but only the way students can be recruited for employment, may weaken claims of constitutional academic freedom when they will need to be made.

J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 140 n.365 (2004).

39. *FAIR*, 291 F. Supp. 2d at 304–05.

40. *Id.* at 304.

41. *Id.*

42. *Id.* at 314–15.

43. *Id.* at 314.

44. *Id.* The court noted:

> The first flaw in this argument is that anti-military sentiment can and does thrive in situations where law schools decide to comply with the Solomon Amendment. The record demonstrates that law school administrators, faculty, and students have all openly expressed their disapproval of the military's discriminatory policy through various channels of communication. Some law schools have posted ameliorative statements throughout the school; law faculty and student bar resolutions have openly condemned the military's policy; and faculty and students have held demonstrations protesting the military's presence on campus.

Id.

45. *Id.* at 319–20.

recruiting efforts, the court found the government's insistence on equal access to military recruiters and a lack of "substantial disparity" to be "problematic."[46] Notwithstanding the fact that the court was unconvinced by the vagueness argument, its discussion of the government's "seemingly unwarranted interpretation" of Solomon[47] was nothing less than a victory for law schools wishing to argue that much less access was required under Solomon than the military was demanding. Of course, the subsequent Congressional revision of the statute shows that the court's observation was indeed prescient.[48]

Ultimately, the district court denied the request for a preliminary injunction on the grounds that the case was not substantially likely to succeed on the merits.[49] The plaintiffs appealed to the U.S. Court of Appeals for the Third Circuit, which reversed the decision based on its own analysis of Solomon's constitutionality.[50] That decision is addressed in Part IV of this note.

B. *Student Members of SAME v. Rumsfeld* and *Burt v. Rumsfeld*

Less than a month before the U.S. District Court for the District of New Jersey ruled on the motion for preliminary injunction in *FAIR v. Rumsfeld*, two similar lawsuits were initiated in federal court in Connecticut. The first suit, *Student Members of SAME v. Rumsfeld*,[51] was brought by two student organizations at Yale Law School ("YLS") and the second suit, *Burt v. Rumsfeld*,[52] was filed by forty-five members of the faculty at YLS.[53] The students alleged that the government's interpretation of Solomon violated their rights to expressive association, to receive information, to equal protection, and also amounted to viewpoint discrimination.[54] In turn, the law faculty alleged that the regulations violated their First and Fifth Amendment rights and exceeded the scope of the Act itself. The government made a motion to dismiss both suits for lack of standing and lack of ripeness, which was denied in a published opinion issued in the summer of 2004.[55]

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46. *Id*. at 320.

47. *Id*. at 321.

48. *Id*. at 319 ("It follows that anything short of preventing or totally thwarting the military's recruitment efforts does not trigger funding denial pursuant to the statute.").

49. *Id*. at 321.

50. FAIR v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004).

51. 321 F. Supp. 2d 388 (D. Conn. 2004)

52. 322 F. Supp. 2d. 189 (D. Conn. 2004).

53. The YLS student organization plaintiffs were the Student/Faculty Alliance for Military Equality ("SAME") and "Outlaws." *SAME*, 321 F. Supp. 2d at 390. The latter's purpose was to educate the YLS community about the legal issues affecting lesbian, gay, bisexual, and transgendered persons. *Id*. The named members of the YLS faculty included Mr. Robert A. Burt. *Burt*, 322 F. Supp. 2d at 194.

54. *SAME*, 321 F. Supp. 2d at 391–92.

55. Additionally, both suits alleged that Yale's policies were compliant with Solomon. First, because their recruiting programs occur off campus, Yale cannot be said to be denying access to campus. Second, Yale concluded that because military recruiters were free to sign the non-discrimination statement and gain access to their career development office, they are in fact providing access that was equal in quality and scope to that granted to non-military recruiters. *Burt*, 354 F. Supp. 2d 156, 170–72 (D. Conn. 2005). The court quickly dispensed with both of

The students' principal claim was that they had chosen to attend YLS, at least in part, because of its non-discrimination policy and message, and their decision to be a part of such an expressive association was curtailed by the government's interpretation of Solomon.[56] Because Solomon requires law schools to choose between allowing military recruiters onto campus or give up federal funds, the students alleged that their associational rights were violated by the presence of the military, and even more, they were required to adopt the military's discriminatory message.[57] They further argued that Solomon amounts to viewpoint discrimination because it penalized "only those students, like Plaintiffs, who attend law schools that seek to apply otherwise generally applicable non-discrimination policies to military recruiters."[58] Lastly, they argued that Solomon also violated their Fifth Amendment right to equal protection.[59]

The district court dismissed the students' expressive association claim on the basis that the law school faculty, and not the students, were the actual determinants of who had a right to be associated with the law school.[60] Thus, only the faculty could govern whether military recruiters were allowed to participate in the discourse of the law school. For the same reason, the viewpoint discrimination claim was also dismissed.[61] In the court's judgment, it was the prerogative of the faculty to determine what message would be passed on as the official view of the law school.

On the issue of a right to receive information, however, the court found that the students had alleged a cognizable injury in fact.[62] Namely, were it not for the government's application of Solomon, the students would have been able to receive the law school's message that discrimination against gays and lesbians is not acceptable.[63] The court also allowed the equal protection claim to go forward based on the plaintiffs' argument that Solomon required the law school's non-discrimination policy to be repealed with regard to gay and lesbian students

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these arguments. "The argument that the military has the opportunity to sign the [law school's Non-Discrimination Policy] is unavailing. The statute does not say that military recruiters must have the same opportunity to comply with an institution's policies as non-military employers, nor does it say that military recruiters must have access to the same procedures as non-military employers in order to gain access to students." *Id.* at 173. "In sum, YLS may offer military recruiters the same opportunity as non-military recruiters to comply with its policy regarding subscription to the NDP, but that policy 'in effect prevents' military recruiters from gaining access to campus and students on campus 'at least equal in quality and scope' to that afforded other recruiters." *Id.* The United States was therefore granted summary judgment on the issue of whether or not YLS was in compliance with the statute. *Id*. at 173–74.

56. *SAME*, 321 F. Supp. 2d at 391.

57. *Id.* at 394.

58. *Id.* at 390.

59. Although the text of the Fifth Amendment does not provide an equal protection clause, the Supreme Court has interpreted the Amendment to require one going back at least as far as 1954. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that school segregation based on race in the District of Columbia denied African-Americans the equal protection guaranteed by the Fifth Amendment).

60. *SAME*, 321 F. Supp. 2d at 394.

61. *Id.* at 396.

62. *Id.* at 395.

63. *Id.*

alone.[64] This repeal of the anti-discrimination policy would be a violation of the gay and lesbian students' right to equal protection if it were done "arbitrarily" and "with no legitimate governmental objective."[65] The district court concluded that these alleged injuries were sufficiently linked the government's threats to cut off funding and that the matter was ripe for adjudication.[66] A final decision on the merits of the students' remaining claims is still forthcoming.

Based on the reasoning used in the analysis of the students' claims, it is not unexpected that the same district court allowed the faculty plaintiffs to proceed with their separate but related allegations.[67] The court was satisfied that the faculty speech with regard to an anti-discrimination policy was being suspended because of threats from the DoD.[68] Similarly, the faculty were being limited in their right to choose with whom to associate as an institution by the fact that the military recruiters were being forced upon them in contravention of their stated message on discrimination.[69] The court also briefly addressed their Fifth Amendment Due Process allegation that Solomon impinged on their "special relationship between student and teacher."[70] Although expressing doubt about the merits of the Due Process claim, the court cited *Meyer v. Nebraska*[71] for the proposition that the Supreme Court has recognized such a relationship under certain circumstances. The faculty were thus allowed to proceed with both claims, which had already been found to be ripe for adjudication.[72]

In January 2005, the district court, in granting summary judgment in favor of the faculty plaintiffs, held Solomon to be an unconstitutional violation of their First Amendment rights and enjoined enforcement of Solomon against Yale University.[73] The court ultimately agreed that Solomon placed an unconstitutional condition on the receipt of federal funds (in that the funds affected do not relate to military recruiting),[74] that the faculty were prevented from sending their chosen message on discrimination,[75] and that Solomon forces them to associate with the United States military,[76] an organization whose policies are antithetical to their own.

The court first examined the unconstitutional condition claim under the premise that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[77] Although the Supreme Court has conceded that the government's

64. *Id.*
65. *Id.* at 396.
66. *Id.*
67. Burt v. Rumsfeld, 322 F. Supp. 2d 189 (D. Conn. 2004).
68. *Id.* at 196.
69. *Id.* at 198.
70. *Id.* at 199.
71. 262 U.S. 390 (1923).
72. *Burt*, 322 F. Supp. 2d at 201.
73. Burt v. Rumsfeld, 354 F. Supp. 2d 156, 189 (D. Conn. 2005).
74. *Id.* at 174–75.
75. *Id.* at 182.
76. *Id.* at 187.
77. *Id.* at 174 (quoting Perry v Sindermann, 408 U.S. 593, 597 (1972)).

power under the Spending Clause might allow some conditions to be imposed on a grant of funds, these conditions must be reasonably related to the purpose of the federal program.[78] Here, the over $300 million at issue for Yale University had no direct relation to military recruiting, so once the court was satisfied that the compelled speech and association violations were established, Solomon necessarily imposed an unconstitutional condition.[79]

Using the same reasoning and line of cases that the Third Circuit employed in analyzing the compelled speech claim in *FAIR*, the district court concluded that "the First Amendment guarantees both 'the right to speak freely and the right to refrain from speaking at all.'"[80] By implication, it thus found unavailing the government's position that assisting military recruiters is not the exercise of speech. Despite the fact that Yale has been on record for over twenty-eight years in opposition to discrimination in employment based on sexual orientation, the court also found a violation in that "The Solomon Amendment has forced the Faculty to change their message from a categorical statement that 'employers who discriminate based on sexual orientation are not welcome at YLS-sponsored recruiting events to an equivocal statement that includes the disclaimer 'except for the military.'"[81] Thus, the court concluded that Solomon had forced the faculty to change their stated message and assist the military in the promulgation of its speech.[82]

Although it accepted at face value that there is a compelling governmental interest in raising an effective military, the court concluded that Solomon is not narrowly tailored to be the least restrictive alternative designed to serve that interest.[83] The court was not persuaded that the government had met its burden in this regard, either by a showing that access to Yale's career services apparatus would have a positive effect on recruiting or by a showing that Congress had considered other alternatives to tying funding to access to campuses.[84]

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78. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

79. *Burt*, 354 F. Supp. 2d at 175.

80. *Id.* at 176 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)). The government's argument on this point was that the law school is being required to assist the military in the *act* of recruiting and not the expression of any message, and the correct standard would thus be for expressive conduct as set forth in *United States v. O'Brien*. 391 U.S. 367 (1968) (holding that a statute forbidding an individual from destroying his draft card was not a First Amendment violation).

81. *Burt*, 354 F. Supp. 2d at 178.

82. It is unclear exactly what speech YLS has been compelled to assist the government in making. At one point the court employs the *FAIR* majority's logic that the school has to help the military "convince prospective employees that the employer is worth working for" and at another the law school is "assisting DoD in the dissemination of DoD's message of its 'Don't Ask, Don't Tell' policy . . . ." *Id.* at 178–80. Perhaps the court finds that both statements are being compelled, but from the record it would seem highly unlikely that anyone would associate either concept with the faculty of YLS.

83. *Id*. at 182.

84. *Id*. In footnote 27 the court pointed out that approximately half of YLS students obtain employment from a source that does not use the Career Development Office or recruit on campus—i.e. judicial law clerks. *Id*. at 182 n. 27. Ironically, the dean of the University of Southern California Law School, Matthew L. Spitzer, by way of showing that the compromise measures taken at his school have been effective, points out that since allowing the military back

The district court found similarly unpersuasive the government's position that Solomon did not require law schools to associate with the military because the risk of the public attributing the military's views on employment of homosexuals to the law schools is "vanishingly small."[85] The court discussed the rule stated in *Boy Scouts of America v. Dale*[86] and proceeded to apply the same reasoning as the Third Circuit's *FAIR* analysis, which is addressed in greater detail in Part IV. Thus, the plaintiffs successfully established two separate grounds for overturning Solomon.

Their Fifth Amendment claim did not fare as well. Echoing its earlier sentiments in the preliminary injunction decision, the court concluded that "the scope of this "right to educate" is not as broad as the faculty suggested.[87] The American "concept of ordered liberty" is not implicated when the federal government passes a law governing who may participate in college recruiting programs."[88] A small victory, indeed, for the DoD. With that, the district court declared Solomon unconstitutional and enjoined enforcement of it against Yale University based upon the YLS Non-Discrimination Policy.[89]

C. *Burbank v. Rumsfeld*

The summer of 2004 also brought a ruling on summary judgment motions from the U.S. District Court for the Eastern District of Pennsylvania in a challenge to Solomon brought by faculty and students at the University of Pennsylvania.[90] This case was unique in that in addition to a frontal attack on the constitutionality of Solomon, the plaintiffs also sought a declaratory judgment that their actions were fully in compliance with the regulations and that funding could not properly be revoked.[91] The district court denied the government's motion to dismiss for lack

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on campus, the number of graduates placed with the military has risen. Matthew L. Spitzer, *An Open Letter to the USC Law School Community*, August 19, 2002, *available at* www.law.georgetown.edu/solomon/USCdean.pdf. Although there were none from 1990 to 1993, three were hired from 1994 to 1996, and that number rose to nine between 1997 and 2001. *Id*. So, at least one administrator is willing to laud the gains made by recruiters on campus, even if it is only to justify the limitations on access that have been common.

85. *Burt*, 354 F. Supp. 2d at 184.

86. Boy Scouts of America v. Dale, 530 U.S. 640, 659–60 (2000) (holding that a state statute which denied the Boy Scouts of America from revoking the membership of a gay scoutmaster was an unconstitutional limit on the organization's First Amendment right to expressive association).

87. *Burt*, 354 F. Supp. 2d at 188.

88. *Id*.

89. *Id*. at 189.

90. Burbank v. Rumsfeld, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004).

91. In 1998, the University of Pennsylvania Law School began referring military recruiters to the institution's main career placement center (the "Office of Career Services" or "OCS") instead of the law school's career placement office. *Id*. at *5. OCS would then notify all law students of the dates that military recruiters would be on campus and subsequently schedule interviews for those interested. *Id*. The Judge Advocate General of the Air Force notified the president of the university that their approach was non-compliant with Solomon and DoD regulations in January of 2003. *Id*. at *2.

of standing and failure to state a claim,[92] arguments which had been similarly dealt with in each of the earlier cases.

Closely mirroring the claims put forth in the other Solomon lawsuits, the plaintiffs sought a declaration from the court that Solomon was a violation of their First Amendment rights to free speech, association, academic freedom, and their Fifth Amendment rights to due process and equal protection under the law.[93] Citing to both the District of New Jersey and Connecticut cases in its opinion, the court denied the government's motion to dismiss the faculty plaintiffs' free speech, association, expression, and academic freedom claims.[94] Likewise, the students' claims for a right to receive an anti-discriminatory message from the law school were recognized as cognizable injuries-in-fact.[95] In allowing these claims to proceed, the court declined to grant the plaintiffs summary judgment.[96] Resolution of the suit is pending.

IV. FAIR TRIUMPHS ON APPEAL

In late 2004, Solomon's fortunes changed sharply when the Court of Appeals for the Third Circuit held by a divided panel that FAIR had a likelihood of success on the merits that warranted the granting of a preliminary injunction.[97] Although a district court's decision to deny a preliminary injunction is reviewed for abuse of discretion, a court of appeals will apply a de novo standard to any constitutional analysis which the district court uses to reach that decision. Because the U.S. District Court for the District of New Jersey employed its own First Amendment analysis in determining whether to grant the injunction, the Third Circuit exercised plenary review of the constitutional analysis below and reached a sharply different conclusion on the strength of the plaintiff's claims.

A. Underpinnings of the Third Circuit's Reasoning

Before considering the Third Circuit's analysis, it is helpful to review the Supreme Court's jurisprudence on expressive association.[98] In evaluating the First

92. *Id*. at *5.

93. *Id*. at *2.

94. *Id*. at *5.

95. *Id*.

96. *Id*.

97. FAIR v. Rumsfeld, 390 F.3d 219, 246 (3d Cir. 2004). After concluding that FAIR had a reasonable likelihood of success and had met all the other requirements for issuance of an injunction, the Third Circuit remanded the case with an order to issue the preliminary injunction against enforcement of Solomon. *Id*. In addition to a reasonable likelihood of success on the merits, a plaintiff seeking preliminary injunction must also show: irreparable harm absent the injunction, that the harm to the plaintiff absent the injunction is greater than the harm to the defendant in granting it, and that the injunction serves the public interest. *Id*. at 228.

98. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court addressed the concept of a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" implicit in the protections of the First Amendment. *Id*. at 622. Part of that freedom to associate includes a freedom not to associate by denying group membership to persons who are undesirable. *Id*. at 622–23. Prior to that, the Court recognized in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), the longstanding tradition that "the freedom to

Amendment expressive association violation asserted by the *FAIR* plaintiffs, the Third Circuit addressed previous Supreme Court holdings in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*[99] and *Boy Scouts of America v. Dale*[100] to reach its judgment in favor of FAIR. Much of the rationale behind declaring Solomon unconstitutional depends on the Third Circuit's understanding of *Hurley* and *Dale*.

1. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*

In 1992, organizers formed the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to march in Boston's St. Patrick's Day Parade and "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."[101] The parade was a formal city event until 1947, when the city gave permission to the South Boston Allied War Veterans Council ("Council") to organize and conduct it.[102] From 1947 to 1992, the Council, which is a private association of various veterans groups in the Boston area, conducted the parade with city funds and use of the official city seal.[103] After the Council refused to allow GLIB to march as a parade unit in 1992, a state court issued an injunction which allowed them to participate.[104]

The Council again denied GLIB's request to march in the 1993 parade, and GLIB subsequently sued in state court alleging, among other things, a violation of the Massachusetts law that prohibited discrimination based on sexual orientation in public accommodations.[105] The parade organizers asserted that forcing admittance of GLIB would violate their First Amendment right to expressive association.[106]

In its analysis of the claim, the trial court found that the parade was a mixture of diverse "'patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes,' as well as conflicting messages."[107] Based on this lack of a unitary, coherent message, the court held that the parade was a public event and that admitting GLIB could not violate the

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engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

99. 515 U.S. 557, 573 (1995) (holding that a state law requiring St. Patrick's Day Parade organizers to include a homosexual activist group violated their First Amendment right by altering the expressive content of the parade).

100. 530 U.S. 640, 655 (2000) (holding that state public accommodation law which required the Boy Scouts of America to admit an openly gay scoutmaster violated the Boy Scout's First Amendment right to expressive association).

101. *Hurley*, 515 U.S. at 561.

102. *Id.* at 560.

103. *Id.* at 561.

104. *Id.* at 560–61.

105. *Id* at 560 (discussing Mass. Gen. Laws § 277:98 (1992)). The law prohibited "any distinction, discrimination, or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.". *Id.*

106. *Id.* at 558.

107. *Id.* at 562 (quoting the trial court's findings of fact).

organizers' First Amendment right to expressive association.[108] In the court's reasoning, expressive association would require that the parade have a requisite "focus on a specific message, theme, or group."[109] The Supreme Judicial Court of Massachusetts affirmed, finding that it was "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."[110]

On appeal, the U.S. Supreme Court agreed that the parade lacked a coherent message, but found that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[111] Thus, the organizers' were exercising their freedom of speech through the symbolism, the banners, and the participants marching along a route lined with bystanders, even though they did not have a single succinct message.[112]

The Court likewise found that GLIB's participation in the parade was intended to be of an expressive nature.[113] GLIB wanted to show the community their existence, to celebrate it, and to support a like-minded group marching in the New York City St. Patrick's Day Parade.[114] Viewing both the parade and GLIB as expressive elements, the Court found that admitting GLIB to the parade would require the organizers to alter their chosen expressive content of the parade and expose their message to being shaped by any class of persons protected by the state who wished to join.[115] In essence, anyone viewing the parade would assume that the organizers had evaluated GLIB's social message and deemed it worthy of support by inclusion in the parade. In upholding the First Amendment right of the private organizers to exclude GLIB, the Court stated that expression involved not only the right to speak on one subject but also to remain silent on another.[116]

2. *Boy Scouts of America v. Dale*

In *Boy Scouts of America v. Dale*, the Supreme Court further articulated it's position on the nature of an expressive association claim. The Boy Scouts of America ("BSA") removed James Dale from his position as an assistant scoutmaster after he was recognized in local news media as an "avowed homosexual and gay rights activist."[117] Dale brought suit under a New Jersey public accommodation statute essentially identical to the Massachusetts statute in

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108. *Id*. at 564.

109. *Id*. at 562 (quoting the trial court's findings of law).

110. *Id*. at 564 (quoting Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc. v. Boston, 636 N.E.2d 1293, 1299 (Mass. 1994)).

111. *Id*. at 569.

112. *Id*. at 568–570.

113. *Id*.

114. *Id*.

115. *Id*. at 572–73. ("Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.").

116. *Id*. at 574.

117. 530 U.S. 640, 643 (2000).

Hurley.[118] The BSA defended its decision by arguing that it was a private organization committed to instilling values in young people, that homosexual conduct is inconsistent with those values, and that having to place Dale in a leadership position in the BSA would violate their right to expressive association.[119] Although the trial court found in favor of BSA, the intermediate appellate court and New Jersey Supreme Court both ultimately entered judgment on behalf of Dale.[120]

In analyzing whether application of the New Jersey statute constituted a violation of the BSA's expressive association rights, the Court formulated a four step analysis. First, it determined that the Boy Scouts were an expressive association for purposes of First Amendment protection.[121] That is, even though they were not an advocacy group, they engaged in some form of expression (namely the transmittal of a system of values to young people).[122] Second, the Court considered whether including Dale would significantly affect the BSA's ability to express itself.[123] After finding that homosexual conduct was in moral opposition to the BSA's system of values, the Court concluded that directing it to accept an avowed homosexual and gay rights activist would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[124]

Third, the Court considered whether New Jersey's application of its public accommodations law furthered a compelling government interest.[125] Although recognizing that states may enact public accommodations laws when they find that a given group is the target of discrimination, in the fourth and final step of the analysis, the Court concluded that New Jersey's interest did not justify the severe intrusion on the Boy Scouts' right to freedom of expressive association.[126] Its quote from *Hurley* seems a fitting summary of the balancing conducted: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[127] The Court thus found the requirement of admitting Dale into the BSA to violate the Boy Scouts' right to expressive association.

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118. *Id*. at 645 (discussing N.J. Stat. Ann. §§ 10:5-4 and 10:5-5 (West Supp. 2000) (prohibiting discrimination based on sexual orientation in public accommodations)).

119. *Id.* at 644.

120. *Id* at 646–47 (discussing 706 A.2d 270 (N.J. App. Div. 1998) (holding that denying membership in BSA based on member's homosexuality violated New Jersey public accommodations law) and 734 A.2d 1196 (N.J. 1999) (holding that membership of an avowed homosexual does not violate BSA's expressive association rights because such inclusion does not inhibit the existing members in carrying out their various purposes), respectively).

121. *Id*. at 654–55.

122. *Id*. at 649–50.

123. *Id*. at 656.

124. *Id*. at 653.

125. *Id*. at 656–57.

126. *Id*. at 658–59.

127. *Id*. at 659–60 (quoting Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995)).

B. The Majority Opinion in *FAIR*

From the outset, the Third Circuit took notice of the fact that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[128] Solomon would be found unconstitutional if the plaintiffs could show either: that law schools are "expressive associations" whose right to distribute their chosen message is impaired by the forced inclusion of military recruiters ("expressive association claim") or that their right to free speech is impaired by being compelled to assist military recruiters in the expressive act of recruiting ("compelled speech claim").[129]

1. The Expressive Association Claim

The Third Circuit first addressed the expressive association claim.[130] Using the Supreme Court's analysis from *Dale*,[131] the court systematically found the elements of a successful expressive association claim present in FAIR: the group must be an "expressive association," the state action must significantly affect the group's ability to advocate its viewpoint, and the state's interest must not justify the burden it imposes on the group's expressive association.[132] In noting that *Dale* does not require that an expressive association be an advocacy group, nor even that the group exist primarily for the purpose of expression, the court easily found that a law school meets the definition by virtue of the values that it seeks to express to its students.[133]

Next, the court examined the significance of the effect of Solomon on the law schools' ability to express their viewpoint in light of the plaintiffs' argument that Solomon interferes with their prerogative to shape the way they educate (including,

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128. FAIR v. Rumsfeld, 390 F.3d 219, 229 (3d Cir. 2004) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

129. *Id*. at 230. The court's finding that only one of those impairments need be shown to invalidate Solomon is based on the strict scrutiny applied in this context. Under such a review, the law must be narrowly tailored to serve a compelling governmental interest and employ the least restrictive means of doing so. *Id*. As the court put it, such a standard inevitably resulted in an "imposing barrier" for the Government. *Id*.

130. Various commentators have noted the irony in how the majority used *Dale*, a case that gave the Boy Scouts the power to discriminate under the First Amendment, to prevent the government from doing so here. *See* David L. Hudson, Jr., *Boy Scout Case Helps Gay Rights Cause*, ABA JOURNAL E-REPORT (Dec. 3, 2004) ("*Dale's* expansive view of expressive association turned out to be exactly what was needed to give law schools and organizations in the academic community a basis to resist a government policy.") (quoting Robert O'Neil). One of the plaintiffs' lead attorneys, Mr. Joshua Rosenkranz, chose to put it another way: "The [Third Circuit] understood that if bigots have a First Amendment right to exclude gays, then enlightened institutions have a First Amendment right to exclude bigots." Adcock, *supra* note 20, at 16.

131. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

132. *FAIR*, 390 F.3d at 231 (quoting *Dale*, 530 U.S. at 648–58).

133. *Id*. In agreeing with the district court that the law schools were expressive associations, the Third Circuit drew from its earlier precedent that "By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *Id*. (quoting Circle Schs. v. Pappert, 381 F.3d 172, 182 (3d Cir. 2004)).

of course, the manner in which they communicate their message).[134] Finding *Dale* to be controlling, the court acknowledged that "'[t]he forced inclusion of an unwanted person in a group' could significantly affect the group's ability to advocate its public or private viewpoint."[135] Just as a requirement to include an openly gay scoutmaster in the Boy Scouts would have been inconsistent with their stated values and goals and their choice of role models, the court reasoned that forcing law schools to include military recruiters on campus is inconsistent with the law schools' commitment to justice and fairness and provides role models that are inconsistent with their expectations.[136] With a last analogy to the *Dale* decision, the court noted that the presence of military recruiters would also force the law schools to send a message to their students and the larger legal community that they accept employment discrimination.[137]

Perhaps anticipating criticism of its reasoning, the court chose to address the findings of the district court that because the military recruiters visited only occasionally, were not accepted as full members of the community, and were not placed in a position of authority, they could therefore not impact on the official message of that community.[138] The Third Circuit's response to the district court's finding was that the limited duration of the intrusion does not eradicate the underlying nature of the First Amendment violation.[139] To the challenge that recruiters are never really made official speakers of the law school, the court again reverted to *Dale's* mandate to "give deference to an association's view of what would impair its expression."[140] Thus, the court is prepared to accept the law schools' claims that accepting military recruiters onto campus significantly compromises their stated message at face value.[141]

Finally, the court examined the differing interests and determined that, on balance, the government had not justified the burden placed on the law school's First Amendment protected expressive associations.[142] Although recognizing the DoD's compelling interest in procuring talented military lawyers, its strict scrutiny analysis required that the means to achieving that interest be narrowly tailored.[143] The court's conclusion, which ultimately secured the expressive association claim, was that Solomon "could barely be tailored more broadly."[144]

The court reached this position with regard to narrow tailoring based on the fact that the tremendous resources of the government allow it to recruit in other ways

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134. *Id.*

135. *Id.* (quoting *Dale*, 530 U.S. at 648.).

136. *Id.* at 232.

137. *Id.*

138. *Id.*

139. *Id.* at 232–33 (discussing *Circle Schs.*, 381 F.3d at 182).

140. *Id.* at 233.

141. The court bolstered its claim that the government's actions significantly affect the law schools' message by noting that the latest revision of Solomon codifies the informal enforcement that had been taking place, and thus requires the institutions to "actively assist" military recruiters in a manner equal in quality and scope to the assistance provided other recruiters. *Id.* at 233 n.11.

142. *Id.* at 234.

143. *Id.*

144. *Id.*

that could arguably be just as effective, if not more so, than access to students on campus.[145] By its ability to offer loan repayment programs and to employ advertising through mass media, the DoD could arguably satisfy its recruiting requirements without the assistance of the law schools' space or personnel.[146] The court could not have been blunter in its summation that "The government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal."[147] With that, the court was able to conclude that the plaintiffs had established a reasonable likelihood of prevailing on the merits such as to warrant the granting of a preliminary injunction.[148]

2. The Compelled Speech Claim

Although the expressive association finding was enough to warrant an injunction by itself, the Third Circuit went on to analyze the merits of FAIR's second claim—that they were being compelled to assist and subsidize the government in its discriminatory message.[149] After initially establishing that recruiting for employment does amount to expression, the court first addressed the schools' opposition to the message that military recruiters espoused and then the requirement that law schools propagate and subsidize that message.[150]

Even though the court believed that the "most discordant speech the Solomon Amendment compels the law schools to accept" was the statement by a military recruiter to an openly gay interviewee that he or she was not eligible for military service, it was enough to establish that a disconsonant message was being offered.[151] Thus, access to campus itself was an objectionable message to law

145. For a foreshadowing of the majority's reasoning on this point, see Lindsay Gayle Stevenson, *Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 LOY. L.A. L. REV. 1331, 1369 (2004) (arguing that on balance the limitation on expressive association is too great because the government can satisfy its interests through "television ads, high school recruiting, bus banners, mailings, word of mouth, and online recruiting tools").

146. The court went even further in suggesting that the DoD might be *more* effective at recruiting were it not having to wage the Solomon campaign. Citing the frequency of protests on campuses across the country, the court found it plausible that the bad publicity might be outdoing any gains made by forced access. *FAIR*, 390 F.3d at 235.

147. *Id.* If the court is correct in this assertion then it seems fitting that Solomon in practice is reduced to the rhetorical symbolism that its authors originally gravitated to. The pressing question would then be how the military departments allowed themselves to be thrust into such a controversy which had no real benefit to them in the first place.

148. *Id.* at 235–36.

149. *Id.* at 236.

150. The Third Circuit was not convinced by the district court's reasoning that recruiting has a solely economic or functional motive and thus does not amount to expression or advocacy of a particular viewpoint. The court concluded that the expression being offered in a recruiting setting is that "our organization is worth working for" and thus compared it to other forms of expression that have a mixed economic/functional and expressive nature. *Id.* at 237. In the court's view, job recruiting can be put alongside soliciting for charitable contributions or for new members of a church. *Id.*

151. *Id.* at 239. The court addresses the state of compelled speech precedent from the U.S. Supreme Court and concluded that the law is unsettled as to whether an actual disagreement is required between the government's message and that of the compelled speaker. Opponents of an

schools, as evidenced by the protests, opposition, and ameliorative efforts taken to counter the government's message on campus.

In assessing whether the statute required law schools to propagate, accommodate, or subsidize the opposed message of the government, the majority of the panel expressly disavowed the lower court's finding that Solomon did not include a direct requirement to participate in dissemination.[152] In fact, the majority found that Solomon required all *three* forms of compelled speech.[153] Where the district court viewed the ability of law schools to disclaim or disassociate themselves from the message being presented on their campuses by the military as a way to escape the compelled nature of an endorsement, the Third Circuit found that this fact was irrelevant for the discussion of a compelled speech claim.[154]

The court enumerated how Solomon resulted in a violation of all three forms of compelled speech. First, because Solomon required law schools to provide access "equal in quality and scope," career services offices would have to assist the military in "getting its message out" the same as they would for any other employer.[155] This type of assistance in distributing materials constituted propagation of the government's message.[156] Second, by requiring that the military be included at job fairs, recruiting receptions, and interview sessions, Solomon was forcing an accommodation of the government's message.[157] Third, by placing demands on the law schools' employees and resources, albeit to a minimal extent, Solomon was requiring law schools to subsidize the government's

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outright disagreement requirement, including Justice Souter, as espoused in his dissenting opinion in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 488–89 (1997), would maintain that "protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference . . . ." *FAIR*, 390 F.3d at 238–39. Nonetheless, the court concludes that the disagreement over employment of homosexuals would be enough to establish the claim, if disagreement were indeed required by the Supreme Court's prior precedent. *Id*.

152. *FAIR*, 390 F.3d at 240.

153. *Id.*

154. The revision of the statute that took place between the issuance of the district court's opinion and the appellate court's reversal actually furthered the majority's argument. Because the law schools would not disclaim the message of any other on-campus recruiter, they could not disclaim the military's message and still be providing treatment "equal in quality and scope." Yet another place where the revision that was intended to strengthen the statute actually worked toward its undoing.

Of course, the law schools could then limit the quality and scope of the assistance they provided to all of their on-campus employers and avoid invoking Solomon altogether, but the court concluded that would in itself be a First Amendment violation in the form of self-censorship of the kind recognized in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974). *FAIR*, 390 F. 3d at 236.

Regardless, the court cites the plurality opinion of *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 n.11 (1986), for the proposition that "the presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure . . . to respond to [compelled] speech." *FAIR*, 390 F.3d at 241. Further, the court points out that a "forced reply" may actually add to the injury of compelled speech, where an organization would otherwise be free not to respond to the disagreeable speech at all. *FAIR*, 390 F.3d at 241.

155. *FAIR*, 390 F.3d at 240.

156. *Id.*

157. *Id.*

message.[158]

In finding that Solomon violated FAIR's First Amendment rights on both the expressive association claim and the compelled speech claim, the court finally turned to whether Solomon might still survive a constitutional challenge under strict scrutiny analysis.[159] Because the government had not made any showing that it would not be able to recruit as effectively using a less restrictive alternative, the court perfunctorily concluded that Solomon was not likely to withstand such a rigid standard.[160]

After briefly addressing each of the other factors requisite to the grant of a preliminary injunction, the court remanded the case. Its order to the district court was that the government could no longer condition federal funding on the expression of a message that law schools find incompatible with their objectives, at least not until the DoD is able to show in concrete terms that it has a compelling interest which requires it to be on campus, and that such access is actually the least restrictive alternative.[161] The district court is still free on remand to find in favor of the DoD, although this seems unlikely in light of the panel's thorough analysis of First Amendment law as it applies to this case and its statement of the burden the government must meet on a showing of its interests. In February 2005, the government petitioned for a writ of certiorari, which was granted in May 2002, and it remains to be seen whether the Supreme Court will take a similar view of First Amendment law.

C. Judge Aldisert's Dissenting Opinion in *FAIR*

Judge Aldisert's dissent indicates that other interpretations of relevant case law may be applied to future Solomon challenges. Noting, as the majority does, that the right to expressive association is not absolute, Judge Aldisert goes on to address why *Dale* was not the appropriate vehicle for addressing FAIR's claims and he then undertakes a different balancing of the two principal interests that are in conflict.[162]

First, Judge Aldisert points out several critical differences that may make *Dale* inappropriate for application to the facts of the case. For one, unlike the New Jersey statute that required the Boy Scouts to admit someone as a member of their organization, Solomon does not require that the military have any influence on the membership of the faculty, administration, or student bodies of colleges and universities across the country. Further, unlike the scoutmaster who would have been an official representative of the BSA, military recruiters who occasionally arrive on campus do not purport to speak *for* anyone at the university or its law

158. *Id.*

159. *Id.* at 242.

160. *Id.*

161. *Id.*

162. *Id.* at 246–47 (Aldisert, J., dissenting) ("Although I have myriad problems with the fundamental contentions presented by the Appellants and the host of supporting amicus curiae briefs, essentially my disagreement is with the all-pervasive approach that this is a case of First Amendment protection in the nude. It is not.").

school.[163] There is no corruption of the law schools' message because the military recruiter remains a visitor who arrives on campus intermittently.[164]

Another key distinction from *Dale* is that in arriving on campus, military recruiters' activities can be thought of as expression that is merely incidental to the primary recruiting mission.[165] Their purpose on campus is arguably not to promote any message or "instill values" in anyone, but to show an interest in enlisting the services of qualified men and women.[166] Such an instrumental interest, similar to all the other employers who come to campus, is vastly different than the expressive nature of associations that *Dale* purported to protect.[167]

Secondly, Judge Aldisert argues that the majority's analysis is deficient in that it does not properly characterize Solomon as regulating expressive conduct.[168] The Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[169] Since Solomon is aimed at conduct which inhibits the ability of recruiters to access campus, and does not directly regulate speech by any college or university actors, Judge Aldisert reasoned that Solomon should be judged under the more liberal standard of scrutiny for nonspeech regulation articulated in *United States v. O'Brien*.[170] Under that standard, the government would not be required to show that it is employing the least restrictive alternative to further its interest.

In beginning his *O'Brien* analysis, Judge Aldisert noted that Congress had clearly expressed that military readiness is a vital interest and the courts have consistently given a great amount of deference to that body's decisions on what is needed for the national defense.[171] Judge Aldisert argued that the proper balancing

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163. *Id*. at 260.

164. *Id*.

165. *Id*.

166. *Id*.

167. Judge Aldisert in dissent argues that "the fundamental goal of the relationship between adult leaders and boys in the Boy Scout movement is '[t]o instill values in young people,' a goal that is pursued 'by example' as well as by word." *Id.* In contrast, he asserts that military recruiters are not really speaking for anyone in the fullest sense of the term:

> Military recruiting is not intended to "instill values" in anyone, nor is it meant to convey any message beyond the military's interest in enlisting qualified men and women to serve as military lawyers and judges. As a result, the burden on the law schools' associational interests is vastly less significant than the burden placed on the BSA by the statute in *Dale*.

Id. (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 649–50 (2000)).

168. *Id*.

169. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (holding that a federal statute which prohibited the destruction of military draft cards was not a violation of free speech with regard to a person who burned his card in symbolic protest of the Vietnam conflict).

170. The *O'Brien* Court held that regulation of conduct which contains both speech and non-speech elements, albeit incidentally burdening expression, was constitutional if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest." *Id.* at 377.

171. *FAIR*, 390 F.3d at 254 ("The case arises in the context of Congress's authority over

of interests would take into account this strong constitutional mandate given to Congress by virtue of the Spending Clause, the power to raise armies and navies, and the Necessary and Proper Clause.[172]

Solomon arguably places only an incidental burden on speech in advancing this powerful governmental interest. After all, Solomon's purpose is "manifestly unrelated to the *suppression* of anyone's expression."[173] As the majority pointed out, voices of dissent on college and university campuses to the military's policies have hardly been stifled by Solomon.[174] Judge Aldisert argued that, on balance, the intrusion of military recruiters a few days a year must be allowed as the means no greater than essential to achieve compelling state interests unrelated to the suppression of ideas.[175]

V. THE FUTURE OF SOLOMON

Rumors of Solomon's demise have perhaps been greatly exaggerated. Not only are there weaknesses in the Third Circuit's application of *Hurley* and *Dale*, but one could argue that the protections provided are counter to one of the overarching themes of the Court's recent expressive association jurisprudence. Further, the Court seems to be facing a reckoning of the competing deference that has traditionally been granted to both the military and the academy. With neither side willing to compromise its position, the Court's decision over which body takes precedence may result in undesirable results regardless of which one is accorded greater deference. While it is uncertain how the Supreme Court will resolve the issues presented, I would like to suggest some possible influences on their analysis of the constitutionality of Solomon.

A. Distinguishing *Hurley* and *Dale*

Several key distinctions make these two cases inappropriate grounds to support the law school's strongest claim for First Amendment relief, namely that Solomon affects their right to express themselves through membership in their organization by requiring the admittance of military recruiters.

First, it is important to note that both *Hurley* and *Dale* were based on a factual

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national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference.") (quoting Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981)). In light of this traditional deference to congressional action where the military is concerned, Judge Aldisert noted that this is the first instance of an act of Congress "predicated on supporting the military" being declared unconstitutional by "application of the seminal doctrine that '[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .'" *Id.* at 249–50.

172. U.S. CONST. art. 1, § 8, cl. 1.

173. *FAIR*, 390 F.3d at 262.

174. *Id.*

175. The critical distinction in applying an *O'Brien* analysis is that the government is no longer subject to a showing of using the least restrictive alternative. Instead, only three elements must be shown: the law must further an important or substantial government interest, it must be unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms must be no greater than essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

finding that including the parties who were denied membership would force their respective messages to be attributed to the organization who opposed that message. The fact that the law schools' opposition to the military's discriminatory employment policy is so well known is precisely what weakens their argument that the discriminatory message will be attributed to them. Unlike the bystanders along the parade route or the youths charged to Dale's supervision by the Boy Scouts, law schools in general, and YLS and Rutgers in particular, are not in danger of having anyone assume that their message coincides with that of the military if they were required to put the military's glossy brochures next to all the others. The various statements and ameliorative measures that are present in law schools across the country attest to the vibrant disregard that the academy as a whole bears toward the armed services "Don't Ask, Don't Tell, Don't Pursue" policy. Because Solomon does not force law schools to disseminate a message contrary to their own, it cannot be said to compromise the autonomy of their Free Speech in a way that reaches the violations found in the previous cases.

Second, *Hurley* and *Dale* involved a special role of actors within the organization that is not even closely approximated by the challenges brought in the aforementioned lawsuits. Allowing GLIB to march in the parade would have placed the contested group on an equal footing with all other units that made up the overall message being presented by the parade organizers, and including James Dale as a Scoutmaster would have placed the contested speaker in a direct leadership role within the organization whose views were antithetical to his own. Dale would simultaneously be recognized in the community as a leader in gay rights activism and in the Boy Scouts of America. The nature of these roles led the Court to find that the message of the respective organization would be corrupted if inclusion were mandated.

By contrast, Solomon does not mandate the inclusion of anyone into the membership of the college or university community. Solomon does not require the presence of a single viewpoint on the faculty, administration, or student body of any institution, nor does it require any speaker to be placed in a position of authority on campus. Although the required support for ROTC programs comes closest to including the military as an integrated part of the academic community, this argument has not been advanced in any of the cases to date. Instead, the plaintiffs have argued that the presence of uniformed recruiters on campus results in the military's message being attributed to the institution, its faculty, and students.[176]

Not only does this transform the nature of the protections guaranteed by *Hurley* and *Dale*, it is simply not borne out in practice. The overwhelming aversion to military recruiters in the form of protests and vocal opposition on campus was enough to cause the *FAIR* majority to note that the military might be more effective at recruiting on campus without Solomon. Regardless of the wisdom of

176. *See* Daniel A. Farber, *Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1501 (2001) (asserting that expressive association cases to date have focused on a strong nexus between membership and the choice of speakers, thus calling into question whether the law could support discrimination in membership). The case for applying expressive association law is even weaker, since the military is not included in membership, let alone leadership.

the Third Circuit's suggestion, it evidences the fact that Solomon has not led to any misgivings about a connection between the military and the institutions from which they seek future talent.

Third, the application of Solomon itself is distinguishable from the unconstitutional application of the earlier state statutes involved in *Hurley* and *Dale*. In those cases, state courts interpreted the statutes as mandating inclusion of the respective parties involved in no uncertain terms. If such application of the laws was consistent with the First Amendment, the parade organizers and Boy Scouts of America could not have avoided inclusion in any way short of disbanding their organization. The *Hurley* Court went so far as to point out how such a statute could expose all manner of protected groups being admitted to the parade against the organizers' wishes.[177]

By contrast, each of the institutions alleging that Solomon compromises their chosen message is free to exclude whomever they choose, as long as they are willing to forgo federal funds. Where the *Dale* and *Hurley* plaintiffs lacked the ability to control who would officially be included in their organization and who would speak for them, law schools inherently have the ability to control both by simply rejecting the governments offer of funds thereby avoiding Solomon altogether. Because of this difference, the Supreme Court may not look as favorably upon FAIR's attempt to claim the benefit of government funding without employing any of the accompanying restraint that would allow them to maintain their ideological independence.

Finally, the Third Circuit's application of the Supreme Court's recent expressive association jurisprudence does not take into account one of its overarching themes: protection of the minority speaker's views is important to discourse in our society.[178] In the two cases most heavily relied on by the Third Circuit, for example, the Court makes a point of not evaluating the morality of the message being offered by the organization involved. It is concerned only that the particular message they intend to convey be allowed to reach the public square.

In the case of the law school challenges, such a theme is not served by finding a violation. Ironically, it is the military who espouse the unpopular opinion in danger of being drowned out by the majority, at least on college and university campuses. Even if the Court is not inclined to uphold the law as a guarantee that the government's message continues to be heard on campuses across the country, striking it down would not serve to prevent the law schools' views from being offered. As has been consistently pointed out, if Solomon has had any effect on their message, it is to strengthen it rather than to diminish its fervor.

The plaintiffs' compelled speech claim, the second basis for declaring Solomon unconstitutional, seems doomed to fail for many of the same reasons as the expressive association claim. The two are linked in the sense that if the law

177. Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995).

178. *See* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1860–64 (2001) (asserting that one of three common themes of the Supreme Court's recent expressive association jurisprudence is a protection of "Reasonable Pluralism," which prevents the government from placing limits on those who would present a different or unpopular view from that of the majority).

schools' message is not being affected by the government, and their leaders are not being chosen by the government, they can hardly be said to be delivering the government's message. There is a further distinction, though, in that the military is not on campus as a way to express support for its policies. Like every other employer who comes to campus, it is there to offer positions to qualified individuals. The assistance law schools provide to the military in that endeavor no more constitutes an endorsement of their message than it does the myriad other firms, public interest groups, corporations, and agencies who visit campus each year. They vary in purpose, mission, and vision to such a great extent that the only speech they compel of the college or university is the approval of students obtaining their choice of employment.

In light of these distinctions, and of the inconsistency with a broader purpose which could be inferred from recent expressive association decisions, there is ample opportunity for the Supreme Court to find that Solomon does not violate the law schools' First Amendment rights to expressive association and freedom from compelled speech. Since these claims have been evaluated as the strongest on the merits, and in fact formed the basis for both judgments against the government, an analysis similar to the one undertaken here could extend Solomon's vitality.

B. Conflicting Deference

Although it appears likely that when the Supreme Court applies its own expressive association precedent to Solomon it will hold Solomon constitutional on that basis, the Court's decision may also signal what degree of judicial deference it intends to accord either the academy or the military in future. These two bodies have both traditionally been accorded wide latitude in the internal practices which govern their unique spheres, and a decision on Solomon could force the Court to consider which deference should be accorded more weight. It is impossible to predict which difference will prevail, but it is worth considering the history and extent of the deference that has been traditionally been accorded to each by the courts.

1. Military Deference

The Supreme Court has long used a more lenient standard than would apply to other government action to review decisions and regulations that affect the constitutional rights of members of the armed services.[179] The Court has justified what has come to be known as the doctrine of military deference on the basis that military effectiveness in war necessitates latitude in military policies both in peacetime and in time of war. This deference is based on three main premises: (1) Congress is vested with the particular power to regulate the military; (2) the military is a "separate society" which requires a degree of autonomy in its regulations; and (3) the courts have limited competence in evaluating what is

179. For a comprehensive history of judicial deference to the military, beginning in the nineteenth century tenets of non-interference, see John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

necessary to maintain an effective fighting force.[180]

Cases in which the Court has deferred to the military's judgment have traditionally involved legal challenges to internal military regulations or the constitutional rights afforded to servicemembers subject to courts-martial or military justice proceedings.[181] Where limits have been placed on a member of the military's constitutional rights, the Court has repeatedly said that it is not willing to substitute its judgment for that of the Congress where the challenged policy has a rational basis in preserving order within the ranks or promoting military discipline.

With such firm roots in deferring to the military's judgment on matters affecting the regulation of members of the military, the problem with the government's claim that Solomon is necessary for military recruiting is that it requires a degree of latitude outside of that unique sphere in which the military departments have been thought to exercise special ability. The government does have a very pressing need for talented military lawyers, but that does not mean it should be given free rein in deciding when its needs should overcome the decisions of civilian institutions.

In most military deference cases, it is servicemembers who suffer the costs involved. If, in this case, however, the Court defers to Congress and the military and subjects Solomon to lenient review, it will be civilians whose First Amendment rights are adversely affected. Allowing the doctrine of military deference to limit review of violations of the constitutional rights of civilians, outside of military installations or operations, could be perceived as a substantial widening of deference to the military.[182] By deferring to the DoD's judgment where Solomon is concerned, the Court would go well beyond the respect heretofore given to the military's decisions on what is necessary for national security.

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180. *See* Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1277–79 (1996).

181. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974) (challenging military criminal statutes on due process grounds); Schlesinger v. Ballard, 419 U.S. 498 (1975) (challenging military promotion and discharge procedures); Greer v. Spock, 424 U.S. 828 (1976) (challenging military regulations as violations of First Amendment free speech protection); Middendorf v. Henry, 425 U.S. 25 (1976) (challenging courts-martial convictions on Fifth and Sixth Amendment grounds); Goldman v. Weinberger, 475 U.S. 503 (1986) (challenging military regulations forbidding the yarmulke from being worn in uniform as violating First Amendment freedom of religion); Weiss v. United States, 510 U.S. 163 (1994) (challenging appointment of military judges to hear courts-martial).

182. The case that comes closest to deferring to a judgment of military necessity in recruiting such as the one in Solomon is *Rostker v. Goldberg*, 453 U.S. 57 (1981). In *Rostker*, the Court rejected an equal protection challenge to the Military Selective Service Act, which required males and not females to register for the possibility of being drafted into military service. Despite the impact on civilians, the Court held that Congress was entitled to great deference where matters of national security, military necessity, and mobilization of personnel were concerned. *Id.* at 64–69. Although the Court upheld the ability of military commanders to restrict the public speaking rights of civilians in *Greer v. Spock*, 424 U.S. 828 (1976), it did so when the plaintiffs sought to engage in political speech and distribute campaign materials on a military reservation in violation of regulations that were applied without regard to viewpoint.

2. Academic Deference

At the same time, the Court must approach the constitutionality of Solomon in light of a precedent of deference to colleges and universities in decisions relating to academic judgment.[183] Although a substantial component of this doctrine is the right of individual faculty members to make decisions on core academic functions and exercise a degree of autonomy within their classrooms,[184] challenges to Solomon depend on deference to decisions by institutions concerning how students will be taught and what lessons are necessary to fulfill an institution's educational mission. This facet of deference recognizes both the unique role that those institutions play in our society and courts' particular lack of expertise in determining how best to educate students.[185] When academic institutions are exercising judgment related to matters with which they have a special competence, courts will typically review challenges to those decisions for indications of "arbitrary and capricious" conduct on the part of the governing body or a "substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."[186] That is, so long as the institution is within an area that academics are particularly competent to address, a court will interfere only where it appears that no judgment was actually used. In allowing colleges and universities greater latitude in determining what is necessary to successfully fulfill their unique mission, the Supreme Court has provided a degree of deference comparable to that enjoyed by the military.[187]

Colleges and universities enjoy the greatest latitude in their judgments concerning what should be taught, who should teach it, and who should be admitted to study. In terms of what should be taught, the Court has been unwilling to overrule institutional support for a broad range of messages simply because some individuals find those messages offensive.[188] Additionally, the Supreme Court has been unwilling to overrule academic institutions' decisions in the employment context when challenges are brought by faculty whose teaching

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183. *See* Byrne, *supra* note 38, at 142 ("Constitutional academic freedom provides colleges and universities breathing space to make educational and scholarly policy without political interference.")

184. The Court has traditionally given considerable autonomy to individual professors as long as they are exercising their professional judgment in academic matters as evidenced by its decisions in *Ewing* and *Horwitz*. "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions." Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

185. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978) ("Courts are particularly ill-equipped to evaluate academic performance.").

186. *Ewing*, 474 U.S. at 227–29.

187. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003):

> Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.

188. *See* Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217 (2000) (upholding the right of state university to charge mandatory student activities fee used to support student extracurricular speech where funds are distributed in viewpoint-neutral manner).

contracts are not renewed. Without an explicit or implicit provision which guarantees continuing employment, professors' claims that they are being dismissed for political or ideological reasons have not been well received.[189] Courts have generally said that they will not substitute their judgment of a professor's teaching and scholarly abilities for that of the institution, thus limiting the ability of individuals to challenge their inability to obtain employment.[190]

Courts have traditionally considered themselves to be unsuited to evaluating who should be taught, both in terms of individual academic qualifications and in the optimal mix of student body diversity to facilitate learning. Where the institution is making a good faith decision on who is academically qualified to be admitted to college or university programs,[191] which students are no longer worthy of continued enrollment,[192] and, to a lesser extent, when disciplinary dismissals are warranted,[193] the Court has not relished having to second-guess those judgments. As cases such as *Bakke*[194] and *Gratz*[195] illustrate, when the Court finds fault with institutional decisions, it is generally not in the overarching policies themselves, but in the manner in which they were carried out.

If the Court were to defer to the law school on what is necessary to maintain their academic integrity with respect to employment interviews conducted by the military, it would be expanding previous notions of what is the particular purview

189. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972) (holding that untenured professor had no right to hearing prior to college's failing to re-hire him for the following year); Perry v. Sindermann, 408 U.S. 593 (1972) (holding that untenured professor with no contractual provision for continued employment could not allege a due process violation when he was dismissed without notice or hearing).

190. *See* Harry F. Tepker, Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983) (arguing that a policy of deference to higher educational institutions' decisions on political, philosophical, or academic policies should not be a license to discriminate in employment). *But see* Jeffrey I. Slonim, *Employment Discrimination in Higher Education: A Survey of the Case Law from 2001*, 29 J.C. & U.L. 327 (illustrating how colleges and universities are increasingly having to litigate substantive employment decisions).

191. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing institutions to consider students' racial or ethnic group as one factor contributing to the individual's suitability for admittance to medical school); Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that a law school's educational judgment that racial diversity is an essential component of higher education is entitled to deference in application of strict scrutiny for racial preferences).

192. *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (holding that decision to dismiss medical student without opportunity to re-take examination, which was made with deliberation and in consideration of his entire academic record, did not violate the student's right to due process); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (holding that student's substantive due process was protected when she was dismissed from medical school after being made aware of deficiencies in her clinical performance).

193. For a discussion of the different approaches courts have taken to disciplinary decisions as opposed to purely academic ones, see Fernand N. Dutile, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003).

194. *Bakke*, 438 U.S. 265.

195. Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that university's policy of giving preference to minority applicants was not narrowly tailored to achieve a compelling state interest in diversity).

of the administrators of colleges and universities. Their judgment has traditionally been at its height when they are making decisions affecting the education of students, and the presence of military recruiters simply does not fit into that tradition. Employers, by their very purpose, are different from a speaker invited to give a talk on campus or a professor hired to deliver lectures. Solomon does not seek to influence what is taught in the classroom, nor who is admitted to an institution (in either the capacity of faculty or student), and therefore operates outside the traditional bounds of educators' special competence. If the Court grants law schools wide latitude in their view that the symbolism of banning the military from campus is essential to the mission of educating students, it will be interpreting "the four essential freedoms of a university" in an entirely new fashion.[196]

By asserting a claim to deference in their judgment that Solomon impedes their educational mission, law schools would also break with the traditional goal of the doctrine, which is to keep students and faculty "free to examine all options, no matter how unpopular or unorthodox . . ." and to foster "that robust exchange of ideas which discovers truth."[197] Here, far from presenting unorthodox sentiments, the institutions' position is intended to close off unpopular sentiments on college and university campuses, and to dictate what students will hear while there. Rather than using academic freedom to expose students to as many different viewpoints as possible and to allow them to reach their own conclusions, the plaintiffs in Solomon challenges seek to limit the government's ability to add to the discussion. It is one thing to say that academic institutions know best how to foster students' academic development and another to say that they must be protected from the mere presence of a distasteful employer.

In light of the fact that both the military and academia have traditionally been recognized as having a special sphere that courts are hesitant to intrude upon, it remains to be seen which interest trumps the other when they are in conflict, or even if they are applicable in a challenge to Solomon. Both institutions are recognized for the unique mission they have in American society, and courts have been willing to give them wide latitude in exercising judgments concerning how best to carry out their respective roles. Predicting the outcome of such dueling deference is further complicated by the fact that Solomon seems to have placed both institutions at the boundary of any previous understanding of the deference they are entitled to by the courts. The Court's decision on Solomon could thus have a far-reaching impact than on more than the law of expressive association alone.

CONCLUSION

Law schools that have felt stifled by the requirements of Solomon since its enactment may finally be vindicated by the results of recent challenges and of those still pending. The path leading to this point is pitted with ironies. The military, which now argues that Solomon is a vital part of recruiting for the

196. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

197. Tepker, *supra* note 190, at 1048 n.5 (quoting Kunda v. Muhlenberg Coll. 621 F.2d 532, 547–48 (3d Cir. 1980)).

national defense, originally opposed its enactment. Colleges and universities, which have traditionally required the academic freedom to present varying viewpoints to students, argue that the military's view has no place on campus until it changes its employment policies. And most recently, the Third Circuit has employed two cases which effectively limited rights of homosexual persons to vindicate the rights of homosexuals on college campuses.

When the Supreme Court considers the constitutionality of Solomon, perhaps in light of some of these ironies, it will be weighing not only the future of expressive association but of the latitude that will be accorded to two institutions that have traditionally enjoyed great freedom in the decisions they make regarding their unique missions. By striking down the Act and its requirement of equal access to campus for military recruiters, the Third Circuit may have misinterpreted the Supreme Court's expressive association precedent and misjudged the extent to which the Court is willing to defer to judgments of military necessity, especially in times of war. If so, there is reason to believe that for those who oppose the military's policies, on campus and otherwise, vindication may be short-lived. If Solomon's reign is truly at an end, only time will tell.

EPILOGUE

As this article was going to press, the Supreme Court granted certiorari in *FAIR v. Rumsfeld*,[198] in which Solomon's fate will be determined. The case is expected to be heard in the Court's October 2005 term.

198. No. 04-1152, 2005 WL 483339 (May 2, 2005).

NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

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THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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