# 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.

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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.