

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

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

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

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

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

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

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

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

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

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

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

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

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

restraints.

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

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

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

over private commercial activities on campus.⁷

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

As jurisprudence goes, the forum doctrine is relatively simple and elegant. The Court grounded the doctrine on the principle that “the Government, ‘no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,’” and it developed “a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.”¹¹

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

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

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

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

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

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

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

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

“Traditional public fora are defined by the objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’”¹⁴ Speakers may be excluded from traditional public fora based on the content of their speech only when the exclusion “is necessary to serve a compelling state interest and that [the exclusion] is narrowly drawn to achieve that end.”¹⁵ They may also be excluded from traditional fora pursuant to “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹⁶

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

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

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

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

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

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

16. *Id.*

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

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

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

either limited or unlimited in character)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 692 (internal citations omitted).

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

This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. *See generally* *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965). “The college classroom with its surrounding environs is peculiarly ‘the marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual “to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.” *Id.* at 181–182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the “denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes” must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.* at 181, 184. At the same time, however, our cases have recognized that First Amendment rights must be analyzed “in light of the special characteristics of the school environment.” *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

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

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

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

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

26. Justice Harlan described the police power thusly:

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

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

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

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

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

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

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

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

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

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

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

(1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

zone” . . . than if the boundaries of the forbidden areas were clearly marked.⁶⁵

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

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

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

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

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

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

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

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

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

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

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

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

70. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). In *Kolender*, the Court stated: Although the doctrine focuses both on actual notice to citizens and arbitrary

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

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

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

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

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law

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

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

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

72. *Grayned*, 408 U.S. at 108–09.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

79. *Id.*

80. *Brister v. Faulkner*, 214 F.3d 675, 683 (5th Cir. 2000). In *Brister*, the court stated: While the district court did hold that the Erwin Center’s grounds, between the base of the building and the curb of Red River Street, were a public forum, it nevertheless left the university the option of reasonable time, place, and manner restrictions. Thus, the university still can remove anyone who interferes with the flow of traffic to and from the Erwin Center, thereby ensuring that the university’s interests retain some protection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to examination as prior restraints.¹⁰⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

105. See *infra* notes 106–117.

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

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

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

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

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

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

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

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

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

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

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

Id.; *Black*, 538 U.S. at 361–62:

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

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

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

The framers of the Constitution:

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

issue . . . is proscribable.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Indeed, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence. See *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 228–229 (1989).

The Court also has recognized that a State “indisputably has a compelling interest in preserving the integrity of its election process.” *Id.*, at 231. The Court thus has “upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9 (1983) (collecting cases). In other words, it has recognized that a State has a compelling interest in ensuring that an individual’s right to vote is not undermined by fraud in the election process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

136. *Ashcroft v. A.C.L.U.*, 542 U.S. ___, 124 S.Ct. 2783, 2791 (2004) (quoting *Reno v. A.C.L.U.*, 521 U.S. 844, 874 (1997)).

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

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

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

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

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

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

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

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

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

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

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

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

has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”¹⁴² The Court seeks to assure that government has not “adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”¹⁴³ Where “the ‘predominate concerns’ motivating the [regulation] ‘were with the secondary effects of [speech], and not with the content of [speech],’” the Court will likely find the regulation to be content-neutral¹⁴⁴

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

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

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

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

143. *Ward*, 491 U.S. at 791; *Hill v. Colorado*, 530 U.S. 703, 720 (2000). See *infra* note 148 and accompanying text.

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

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

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

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

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

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

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

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

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

The insight that representative government must resolve problems of ordinary

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

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

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

life within society informs the Court's approach to the identification of substantial government interests. The Court looks to the social setting in which controversies arise and considers the possible role that government might play in avoiding conflicts that could disrupt social order or compromise the effectiveness of government programs.¹⁵² The circumstances that can justify governmental action are as diverse as are the substantial problems and annoyances that can set one person against another, ranging from matters involving public safety and health¹⁵³ to matters involving aesthetics or an educational rather than a commercial atmosphere in university residence halls.¹⁵⁴ The substantiality of government interests in regulating economic matters is well established, as would be expected, given the pervasive influence of economic interests on social life. The Court has recognized substantial government interests in measures intended to protect property values,¹⁵⁵ strengthen the national economy,¹⁵⁶ provide fair and efficient

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 438–39.

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

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

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

169. *Id.* at 442.

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

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

The alternative avenues of communication standard for zoning regulations would present very daunting problems in contexts involving regulations that apply, not to the lands within a political subdivision, but within an institution or grounds operated by a government agency. It is one thing to require that a municipality permit the operation of adult entertainment establishments somewhere within the physical boundaries of its jurisdiction; it is quite another to suggest that the Supreme Court, for example, must reserve a portion of its grounds¹⁷¹ for adult entertainments, or the National Park Service a portion of the National Mall¹⁷² for such purposes, or the Board of Education of Perry Township, Indiana, a portion its public school facilities¹⁷³ for such enterprises.

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

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

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

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

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

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

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

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

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

advertisements promoting personal religious beliefs).

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

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

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

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

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

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

facilities.¹⁷⁹

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

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

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

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

180. *See supra* notes 64–76.

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

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

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

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

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

186. *Id.* at 110.

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

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

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

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

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

188. *Id.* at 194.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from “pure speech” toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful,

Even where protected speech is affected by a regulation, the Court seeks a balance. It requires that the regulation apply to a substantial amount of speech both “in an absolute sense” and “relative to the scope of the law’s plainly legitimate applications.”²⁰⁰ An overbroad regulation is substantially overbroad—i.e., it “sweeps too broadly . . . [and] penaliz[es] a substantial amount of speech that is constitutionally protected.”²⁰¹ In *Hicks*, the Court stated:

The showing that a law punishes a “substantial” amount of protected free speech, “judged in relation to the statute’s plainly legitimate sweep,” suffices to invalidate *all* enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression [i.e., in relation to its proper application to unprotected expression or conduct.]²⁰²

The Court normally does not strike down a statute on First Amendment grounds “when a limiting construction has been or could be placed on the challenged statute.”²⁰³ Nevertheless, courts may not rewrite regulations to conform them to constitutional requirements.²⁰⁴

Overbreadth analysis is fully applicable to commercial expression and to expressive products.²⁰⁵ Nevertheless, overbreadth analysis is inappropriate in

constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Broadrick, 413 U.S. at 615. This reluctance also reflects the Court’s appreciation for the fact that a person whose conduct may be outside the protections of the First Amendment and fully within the regulatory power of government may, nevertheless, escape the rule if an overbreadth challenge succeeds. *Fox*, 492 U.S. at 483; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462 (1978); *Broadrick*, 413 U.S. at 610. Where a Court declines to permit an overbreadth challenge, a plaintiff may still pursue an “as-applied” challenge to the regulation. *Hicks*, 539 U.S. at 124. An “as-applied” challenge consists of a challenge to a regulation’s application only to the party before the court. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758–59 (1998).

200. *Hicks*, 539 U.S. at 119–20; *New York v. Ferber*, 458 U.S. 747, 771 (1982) (“[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications”); *Broadrick*, 413 U.S. at 615 (“[I]t is not enough for a plaintiff to show ‘some’ overbreadth. Our cases require a proof of ‘real’ and ‘substantial’ overbreadth.”).

201. *Reno v. A.C.L.U.*, 521 U.S. 844, 894 (1997) (O’Connor, J., concurring in part and dissenting in part) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).

202. *Hicks*, 539 U.S. at 118–19 (quoting *Broadrick*, 413 U.S. at 615).

203. *Broadrick*, 413 U.S. at 613.

204. *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988).

205. *See Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989). The litigation involving the Communications Decency Act of 1996 (“CDA”) and the Child Online Protection Act, 47 U.S.C. § 231 (framing prohibitions to reach internet transactions involving provision of obscene material to minors), also involved the regulation of commercial speech, and pivoted on the application of congressional rules to noncommercial speech. *Ashcroft v. A.C.L.U.*, 542 U.S. ___, 124 S.Ct. 2783 (2004). *See also Reno*, 521 U.S. at 865 (distinguishing the Communications Decency Act from New York state legislation prohibiting the sale of obscene magazines to minors on the basis, in part, that the CDA was not limited in its reach to commercial transactions); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150,

connection with commercial speech, i.e., to speech that is involved in proposing or effecting commercial transactions.²⁰⁶ The Court regards commercial speech as less susceptible to the chilling effects of a potentially overbroad regulation. The Court reasons that since commercial speech is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation.²⁰⁷

In the context of content-based, as opposed to content-neutral, commercial regulations, overbreadth also factors into the assessment whether the regulatory means are narrowly tailored to provide the least restrictive, effective measures.²⁰⁸ Defense of an overbroad regulation “imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective.”²⁰⁹

3. Exemptions written into commercial regulations may trigger concerns that the regulations’ underinclusiveness gives effect to an impermissible purpose.

Regulations are said to be underinclusive when the entities or individuals exempted from their application are similarly situated to those who are subject to the regulation. Underinclusiveness may become an issue when evaluating content-neutral rules under an intermediate standard of review, as well as content-based regulations under a strict scrutiny standard of review.²¹⁰

165–66 (2002) (faulting a solicitation permit ordinance that might have been constitutional if applied only to commercial solicitation for reaching protected political, religious or informal speech); *Ferber*, 458 U.S. at 752 (sale of films); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975) (theatrical production); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59–61 (1976) (commercial zoning).

206. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 619 n.12 (1998) (Souter, J., dissenting) (“[O]verbreadth doctrine does not apply to commercial speech.”) (internal citations omitted). Narrow tailoring of content-neutral requirements resemble the application of overbreadth analysis to the extent that narrowly tailored regulations may not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

207. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380–81 (1977) (advertising). *See infra* notes 224 and 263 and accompanying text.

208. Although overbreadth and narrow-tailoring analyses reflect similar concerns, they also harbor important differences. Overbreadth claims allege that a regulation is invalid in all its applications, while narrow-tailoring claims allege that a regulation is invalid as applied to the plaintiff. *Fox*, 492 U.S. at 482–83. The overbreadth challenge operates as an exemption to standing requirements. *Id.* Standing is relaxed on the theory that an overbroad statute might serve to chill protected speech through fear of punishment for violating the statute. *Bates*, 433 U.S. at 380. Positing an inherent link between commercial well-being and commercial speech, the Court found the essential rationale for relaxing standing requirements inapplicable in the commercial speech context. *Id.*, at 380–81. Hence, individuals may only challenge a commercial regulation if it has been applied to them.

209. *Reno*, 521 U.S. at 879.

210. *City of Ladue v. Gilleo*, 512 U.S. 43, 51–53 (applying intermediate scrutiny and assuming content neutrality); *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 376, 396 (1984) (applying intermediate scrutiny); *Republican Party of Minn. v. White*, 536 U.S. 765, 774, 780 (2002) (applying strict scrutiny); *Fla. Star v. B.J.F.*, 491 U.S. 524, 533–34, 540 (1989) (applying strict scrutiny).

Underinclusive regulations may trigger the First Amendment concerns in any of three ways.²¹¹ First, exemptions or exemptions combined with the reach of a regulation may reflect an effort to control the course of public debate by favoring one side over another or by limiting the substantive issues that may be raised.²¹² Second, exemptions may permit forms of expression that suggest that the regulation's stated purpose, however proper it may be, is not its real purpose, and that the real purpose may be to silence disfavored speech.²¹³ Third, means selected to serve the regulation's stated purpose may be so ineffective as to suggest that the regulation's stated purpose, however proper it may be, is not its real purpose.²¹⁴

211. *National Federation of the Blind v. Federal Trade Commission*, 303 F. Supp. 2d 707 (D. Md. 2004), identifies three ways in which regulations may be underinclusive:

(1) where underinclusiveness indicates that the regulation is intended to give one side of a debate an advantage over another; (2) where the regulation excludes so much speech that it undermines the likelihood of a genuine governmental interest; and (3) where the underinclusiveness is so severe as to cast doubts on whether the government is actually serving the interests that are supposed to justify the regulation.

Id. at 720–21 (internal citations omitted). The third prong of this analysis suggests that it provides but another avenue of testing the actual purpose of the regulation, but this construction would render the third prong as a mere variant on the second; a better formulation might suggest that underinclusiveness of means bears upon their ability to meet the requirement that means be, at minimum, narrowly tailored to achieve substantial purposes.

212. *Gilleo*, 512 U.S. at 51 (“[A]n exemption from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people’”) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–786 (1978)); *Id.* (“[T]he combined operation of a general speech restriction and its exemptions, the government might seek to select the ‘permissible subjects for public debate’ and thereby to ‘control . . . the search for political truth.’”) (quoting *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 538 (1980)).

213. *Nat’l Fed’n of the Blind*, 303 F. Supp. 2d at 720–21; *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J. concurring) (“It is also intuitively implausible to think that Stratton’s ordinance serves any governmental interest in preventing such crimes. As the Court notes, several categories of potential criminals will remain entirely untouched by the ordinance.”); *See also League of Women Voters of Cal.*, 468 U.S. at 396:

[I]t seems doubtful that § 399 can fairly be said to advance any genuinely substantial governmental interest in keeping controversial or partisan opinions from being aired by noncommercial stations. Indeed, since the very same opinions that cannot be expressed by the station’s management may be aired so long as they are communicated by a commentator or by a guest appearing at the invitation of the station during an interview; see also *Accuracy in Media*, 45 F.C.C.2d 297, 302 (1973), § 399 clearly “provides only ineffective or remote support for the government’s purpose.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

Id.; *Bellotti*, 435 U.S. at 817 n.13 (“The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject.”).

214. *Florida Star* links underinclusiveness with the selection of means that are ill suited to achieve the stated objective:

[T]he facial underinclusiveness of § 794.03 raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance. Section 794.03 prohibits the publication of identifying information only if this information appears in an “instrument of mass

In the end, underinclusiveness does not involve an independent constitutional infirmity. Rather, questions of underinclusiveness involve evidentiary matters that arise under content-based strict and content-neutral intermediate scrutiny tests, since these tests inquire into governmental purposes and the relation between those purposes and the means selected to achieve them. Underinclusiveness comes into play on issues of whether government acted to achieve a permissible purpose or acted in ways reasonably calculated to achieve that purpose.

4. Commercial regulations that place prior restraints upon expression or expressive conducts or products will be subject to strict scrutiny if they are content-based or intermediate scrutiny if they are content-neutral.

Prohibiting government regulations designed to censor speech has long been recognized as the chief objective of the Free Speech Clause of the First Amendment.²¹⁵ Prior restraint doctrine springs from the abiding First Amendment

communication," a term the statute does not define. Section 794.03 does not prohibit the spread by other means of the identities of victims of sexual offenses. An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.

Fla. Star, 491 U.S. at 540. The reference to the disparity between declared purpose and the effect of the regulatory means does not appear meant to insinuate a different purpose so much as an impermissibly ineffective means to achieve that purpose. *Id.* at 541. ("Without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose."). See also *Ashcroft v. A.C.L.U.*, 542 U.S. ____, 124 S.Ct. 2783, 2793 (2004) (upholding a preliminary injunction, in part, based upon the government's failure to document the effectiveness of the means selected to enforce its prohibition; no "evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive").

215. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731–33, § 1874 (1833) ("[T]he language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint."). The doctrine of prior restraints derives from English common law and follows English precedent in distinguishing between previous restraints "on publications," which are not permitted, and punishments or sanctions after publication, which are permitted. *Alexander v. United States*, 509 U.S. 544, 553–54 (1993) (Rehnquist, C.J., for the Court); *Id.* at 567 (Kennedy, J. dissenting) (quoting 4 W. BLACKSTONE, COMMENTARIES *151–*152). The English doctrine arose to counter legislation under which all printing presses and printers were licensed by the government, and nothing could lawfully be published without the prior approval of a government or church censor. See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002); *Alexander*, 509 U.S. at 553, n.2 (Rehnquist, C.J., for the Court) (citing T. Emerson, SYSTEM OF FREEDOM OF EXPRESSION 504 (1970)); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988) (citing 4 W. BLACKSTONE, COMMENTARIES *152)). Although the common law system constrained only administrative censorship, American practice extended the limitation on prior restraint to the exercise of judicial power as well. *Alexander*, 509 U.S. at 553, n.2 (stating that the protection against prior restraint at common law barred only a system of administrative censorship, but, since, *Near v. Minnesota*, 283 U.S. 697 (1931), the First Amendment protections have also encompassed judicial action) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389–90 (1973)).

concern to avoid empowering censors or chilling free expression. It has long held that “placing unbridled discretion [to grant or to deny a license or permission] in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”²¹⁶ The Court fears that “the mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.”²¹⁷

Concerns with government censorship of expressive commercial activity may arise where the right to engage in a commercial activity requires a license or other prior authorization. Such licensure or authorization regulations may be subject to challenge as prior restraints, i.e., as “administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”²¹⁸

Prior restraint analysis arises in the commercial context only where regulated “conduct with a significant expressive element . . . drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity.”²¹⁹ Four additional factors enter into consideration when determining whether a regulation responsive to express content or with a disparate effect on expressive content is subject to scrutiny as a prior restraint. Regulations will be found to impose prior restraint where: (1) Persons who seek to exercise First Amendment rights must apply to the government for permission; (2) The government is empowered to determine—on the basis of the content of the proposed expression—whether it should grant the applicant permission to speak; (3) Permission to speak depends on the government’s affirmative action; and (4) Approval is not a routine matter, but requires the government to examine facts, exercise judgment, and form opinions.²²⁰

216. *City of Lakewood*, 486 U.S. at 757. See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969):

[T]he prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. “It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”

Id. (quoting *Staub v. Baxley*, 355 U.S. 313, 322 (1958)).

217. *City of Lakewood*, 486 U.S. at 757.

218. *Alexander*, 509 U.S. at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, p. 4.14 (1984)).

219. *Alexander*, 509 U.S. at 557 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986) (quoting *United States v. O’Brien*, 391 U.S. 367 (1968); *Minneapolis Star & Tribune Co. v. Comm’r of Revenue*, 460 U.S. 575 (1983))).

220. *Westbrook v. Teton Cty. Sch. Dist. No. 1*, 918 F. Supp. 1475, 1481 (D. Wyo. 1996) (citing *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975)). In *Southeastern Promotions*, one seeking to use a theater was required to apply to the board. *Id.* The board was empowered to determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of its review of the content of the proposed production. *Id.* Approval of the application depended upon the board’s affirmative action. *Id.* Approval was not a matter of routine; instead,

Prior restraint analysis may take two different courses, depending upon the nature of the regulation. Prior restraints that pivot on the content of the speech are subject to strict scrutiny and exacting procedural requirements.²²¹ Prior restraints that are content-neutral are examined under an intermediate level of scrutiny and are not subject to procedural requirements.²²²

a. Content-based prior constraints will be subject to strict scrutiny.

Content-based prior restraints are not unconstitutional per se, but they are subject to a heavy presumption against their constitutionality.²²³ To be upheld, a prior restraint must satisfy strict scrutiny, and it must be “accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech.”²²⁴ Required procedural safeguards include:

- (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;
- (2) expeditious judicial review of that decision must be available; and
- (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.²²⁵

it involved the “appraisal of facts, the exercise of judgment, and the formation of an opinion” by the board. *Id.*

221. *S.E. Promotions*, 420 U.S. at 559; *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

222. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002).

223. *S.E. Promotions*, 420 U.S. at 558; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

224. *S.E. Promotions*, 420 U.S. at 559. *See also* Rodney A. Smolla, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 8.01[4] (1994):

The [Supreme] Court has tended to recognize only a narrow number of situations in which prior restraints might be permissible, such as restraints against obscenity, or to protect imminent threats to national security, or as a last resort to protect a defendant’s right to a fair trial, and has suggested that outside these narrow ‘exceptions,’ no prior restraints at all should be permitted.

Id.

It has been suggested that the strictures of the prior restraints doctrine may be relaxed when advertising or similar restrictions are at issue. *Zauderer v. Supreme Court of Ohio*, 471 U.S. 626, 668, n.13 (1985) (Brennan, J., concurring in part and dissenting in part) (writing that traditional prior restraint principles do not fully apply to commercial speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 571, n.13 (1980) (stating that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it). The Court understands that regulation of speech that merely proposes commercial transactions may be more resilient than other forms of speech, since speech is intrinsic to many forms of economic activity and hence subject to incentives. *Va. Pharmacy Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72, n.24 (1976) (“Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.”). It also recognizes the need to impose additional requirements on such speech to avoid deception or to achieve other policy goals. *Id.* (“[Government] may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive”). Commercial speech doctrines are discussed at greater length below. *See infra* notes 256–311 and accompanying text.

225. *Thomas*, 534 U.S. at 321 (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990))

These procedural requirements apply fully to commercial activities conducted in traditional public fora and, as to persons entitled to their use, in designated or limited public fora.²²⁶

b. Content-neutral prior constraints will be subject to intermediate scrutiny.

Time, place, and manner restrictions, zoning regulations, and permit and licensing requirements are the most common forms of content-neutral prior restraints.²²⁷ To satisfy constitutional requirements, time, place, and manner “must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.”²²⁸ Time, place, and manner regulations need not employ the least restrictive or least intrusive means of achieving their ends, so long as they promote “a substantial government interest that would be achieved less effectively absent the regulation.”²²⁹

The Court relaxes procedural requirements where time, place, and manner regulations operate in a content-neutral fashion, but it scarcely abandons its concern with the application of such regulations.²³⁰ The Court recognizes that sound, neutral regulations may still be applied in an unconstitutional fashion. If “the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on

(citing *Freedman*, 380 U.S. at 58–60)).

226. *S.E. Promotions*, 420 U.S. at 560 (“If a scheme that restricts access to the mails must furnish the procedural safeguards set forth in *Freedman*, no less must be expected of a system that regulates use of a public forum.”) (discussing decision of municipal board managing a city auditorium and a city-leased theater to reject commercial promoter’s application to perform the rock musical “Hair”).

227. *Thomas*, 534 U.S. at 322; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (treating zoning ordinances as a species of time, place, and manner restrictions); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002) (suggesting that a permit requirement limited to commercial speech may be permissible); *City of Lakewood v. Plain Dealer Publ’g*, 486 U.S. 750, 753 (1988). For ease of reference, these different sorts of regulatory schemes will hereafter be designated as time, place, and manner regulations.

228. *Thomas*, 534 U.S. at 323, n.3 (quoting *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) and referring to *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293). *See also Reno v. A.C.L.U.*, 521 U.S. 844, 879 (1997) (holding that time, place, and manner regulations may not regulate speech based on its content).

229. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). *See also Hill v. Colorado*, 530 U.S. 703, 726, 726 n.32 (holding that when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal); *Id.* at 726 n. 32 (“Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.”) (quoting *Ward*, 491 U.S. at 798).

230. *Thomas*, 534 U.S. at 321.

its content.”²³¹

Indeed, even though content-neutral time, place, and manner regulations are subject to intermediate scrutiny, the Court looks favorably upon rules that contain substantive and procedural restrictions on regulator discretion like those applicable to content-based time, place, and manner regulations. Regulators should be permitted to act only on grounds that are narrowly drawn, “reasonably specific and objective, and do not leave the decision to the whim of the administrator.”²³² The Court also approves of regulations that limit the time allowed for acting on an application.²³³ Regulatory schema may be further reinforced by requiring regulators to explain clearly their reasons for denying any requests for permits or licenses and by permitting both the administrative and judicial review of appeals from initial decisions.²³⁴

- F. Colleges and universities seeking to regulate private commercial endeavors involving expressive products or activities should focus their efforts on protecting substantial institutional interests through narrowly tailored, content-neutral policies.

College and university efforts to regulate expressive commercial endeavors and products should be organized around the protection of substantial institutional interests through content-neutral regulations.²³⁵ The ample authority that

231. *Id.* at 323.

232. *Id.* at 324 (quoting *Forsyth County*, 505 U.S. at 133). In *Thomas*, e.g., the Court noted with approval that park officials could deny an application:

[W]hen the application [was] incomplete or contains a material falsehood or misrepresentation; when the applicant [had] damaged Park District property on prior occasions and [had] not paid for the damage; when a permit [had] been granted to an earlier applicant for the same time and place; when the intended use [presented] an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant [had] violated the terms of a prior permit.

Id. at 324. The Court observed that the regulations themselves were content neutral.

None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park. The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District’s rules, and to assure financial accountability for damage caused by the event.

Id. at 322.

233. *Id.* at 324 (approving a Chicago park ordinance that required action within twenty-eight days). *See also* *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1260–61 (10th Cir. 2004) (approving 240 day delay in processing a request for demonstration permit where the regulation was content neutral and the delay was due to the delay in selecting venues for the 2002 Winter Olympics).

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

235. Once again, the range of possibilities is as wide as the imagination of entrepreneurs and students, but clearly might include tutoring, street performers or “theatrical” efforts, sales of t-shirts or artworks, baked goods or candies that have been shaped to have expressive content or

recognizes that governmental institutions have substantial interests in assuring their effective operation should lend strong support for regulations that are truly content neutral.²³⁶

Colleges and universities may also incorporate into their regulations, as appropriate, content-based proscriptions on unprotected commercial expression or expressive products.²³⁷ The academic mission of the college or university may encompass the study of proscribable expression and merchandize, but the research and teaching functions of the college or university would not likely be furthered by permitting, or hindered by prohibiting, trade in proscribed expression or expressive products.

The educational institution's mission certainly permits it to make content-based decisions to protect the rigor of academic, scholarly, artistic, and research processes.²³⁸ Nonetheless, the institutional considerations that support such decision-making are not likely to extend either to viewpoint-based regulations or to other content-based rules governing expressive commercial endeavors on campus.²³⁹ Once the college or university has decided, for instance, that registered student organizations may sell t-shirts in the student union to raise funds, the basis for insisting upon institution-determined standards of good taste in private expression becomes more attenuated.²⁴⁰

that are sold, e.g., in conjunction with the marketing of some expressive activity such as a play.

236. See *supra*, notes 37, 38, 84, and 161–163 and accompanying text.

237. To the extent that a university might wish to ban certain forms of commercial activity entirely, e.g., fundraising by showing obscene films, it must also hew to the distinctions that are drawn in the relevant substantive law. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) (overturning ban on outdoor movie theaters screening movies containing nudity where the scenes did not involve obscenity); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (ruling that a film that is not obscene under the standards of *Miller v. California*, 413 U.S. 15 (1973) is entitled to First Amendment protection).

238. See *supra*, notes 87 and 88, and *infra* notes 405–413 and accompanying text.

239. To the extent that a forum has not been opened to private expression by students or others, a university might still make limited content-based decisions concerning the topics for which it may be used. See *supra*, notes 17–21 and accompanying text. Even conceding that in matters of pedagogy and research universities may make viewpoint-based distinctions, e.g., grading down responses on geography examinations that affirm that the earth is flat or discounting research proposals that seek to prove terrestrial flatness, any effort to translate the power that a university may make viewpoint-based distinctions in academic matters to its oversight of student activities should be avoided. See *infra*, at notes 405–413. Cf. *Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) (holding that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students).

240. University control over student expression in the context of coursework does not typically extend to expression that involves no direct university control. *Kincaid v. Gibson*, 236 F.3d 342, 352 (Ky. 2001) (holding that a university yearbook was a limited public forum for purposes of student speech) (noting that a college yearbook is not a closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a university official edits content); *Student Gov't Ass'n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1989) (questioning the applicability in the university setting of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 and 273 n.7 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns, but reserving the question “whether the same degree of deference is appropriate with

The kinds of consideration that might ground content-based regulations, such as the necessity of balancing constitutional interests or of protecting minors or zones of privacy,²⁴¹ are unlikely to provide much support for college or university commercial regulations. Student organization t-shirt sales are unlikely to conflict with the right of franchise or other constitutional values.²⁴² Given the fact that an educational institution's rules will ordinarily not extend beyond its grounds, content-neutral time, place, and manner restrictions should be effective in preventing commercial intrusions upon childcare centers or laboratory schools frequented by minors, upon residential areas or infirmaries or hospitals.²⁴³ Hence, it would become difficult, in the institutional setting, to show that content-based restrictions present the least restrictive means of protecting such interests.²⁴⁴ For all these reasons, colleges and universities should avoid content-based regulations of expressive commercial endeavors and products. Viewpoint-based regulations, of course, should be avoided in all circumstances.²⁴⁵

Content-neutral approaches hold the greatest promise for constitutionally firm regulation of commercial expression on campus. Colleges and universities should consider six general ranges of doctrinal issues, five relating to the substance or form of the regulations and one relating to the procedures through which they are applied.

First, consider carefully what interests may be affected by an activity, based on the objective characteristics of the activity, its time and place. Determine whether they are substantial. This may specifically include actions intended to preserve an educational rather than a commercial atmosphere.²⁴⁶ But the complex college or university setting provides numerous instances in which regulations that balance competing interests may also be appropriate.²⁴⁷ Regulations should recite the purposes to be protected or the harms to be avoided, or that otherwise permit the ready and certain identification of the purposes that the rules are to achieve.

Second, draw distinctions that will have a material effect in protecting those interests or avoiding those harms, and draw them to minimize the likelihood that the restrictions will impinge on greater protected activity than is required to achieve the purpose. Where a college or university believes that a rule is necessary to preserve an institutional goal—such as preservation of an educational atmosphere—it should consider both what sorts of activities normally support

respect to school-sponsored expressive activities at the college and university level”). A different rule may apply to the extent that a university operates an enterprise as a nonpublic forum in which limited private speech is permitted. *See infra* notes 312–384 and accompanying text.

241. *See supra* notes 128, 129 and 161 and accompanying text.

242. *See supra* notes 125–127 and accompanying text.

243. *See supra* notes 128, 129, and 161 and accompanying text.

244. *See supra* notes 131–139 and accompanying text.

245. *See supra* notes 106–117 and accompanying text.

246. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (ruling that university had a substantial interest in promoting an educational rather than a commercial atmosphere in its residence halls).

247. As noted *supra* at notes 78–82, universities with their multiple residences and affiliated enterprises, encounter many of the concerns for the flow of traffic, security and public health that shape the expectations placed upon states and their political subdivisions.

those interests and what aspects of the commercial endeavor would impair them.²⁴⁸ Where the college or university believes that the secondary effects of a commercial endeavor present safety or security challenges, or other evils of the sort commonly addressed through police power regulations, it should seek documentation both that the secondary effects would be likely to attend the activity and that they would likely interfere with specific institutional interests.²⁴⁹

Third, make sure that policies reflect the differences in the places or expressive activities to be regulated.²⁵⁰ Different forms of expressive commercial products or activities present different ranges of First Amendment issues, and it is critical that policies be crafted to reflect those differences.²⁵¹

Fourth, where activities lend themselves to regulation based on time, place, or manner of the activity, adopt this approach to formulating the regulations.²⁵² No college or university has an unlimited number of venues suited to support commercial activities, so each institution will have to consider how best to differentiate among places that are suitable for commercial activities and those that are not, how to allocate access to places that are suitable, and whether additional time or manner requirements are necessary at those venues to prevent interruption of other functions.²⁵³

248. The Court's analyses in *Heffron v. ISKCON*, 452 U.S. 640, 650–51 (1981), and *ISKCON v. Lee*, 505 U.S. 672, 683–85 (1992), illustrate the necessary approach.

249. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (Souter, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) and citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991)). See also *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000) (stating that whether the harm is evident to our "intuition," is not the proper inquiry, but government officials may rely upon their own experience that harms materialize).

250. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (declaring that each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems); *Heffron*, 452 U.S. at 650–51 (noting that consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved).

251. For instance, student sponsored dances, concerts, or lectures may pose the necessity of regulating the amplification of sound in certain venues, *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989), while such considerations may have little importance in conjunction with transactions involving visual expression, such as t-shirt sales or solicitation where interference with building accessibility may be a larger concern. Cf., *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1287–88 (11th Cir. 1999) (noting that a single table staffed by an organization vending for profit or nonprofit goods and distributing information aims at causing people to stop, loiter, perhaps bargain, engage in dialogue, or obtain the correct change, all of which potentially impedes the efficiency of the pedestrian path created by the city and interfere with the historic and aesthetic ambience that the municipality seeks to maintain).

252. Colleges and universities may reasonably require students who wish to engage in fundraising sales involving t-shirts, for instance, to confine their activities to places and times that comport with other expected uses of facilities. See *supra*, at notes 227–234. They may allocate space among student organizations on first come first serve or other objective criteria unrelated to content. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

253. *Widmar*, 454 U.S. at 277 ("Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.").

Fifth, where activities may be subjected to requirements akin to licensure, do not hesitate to adopt such rules.²⁵⁴ It may be reasonable, for instance, to require that would-be tutors demonstrate their competency in the academic discipline in which they wish to offer their services.²⁵⁵

Sixth, design the procedural aspects of the regulations to require administrators to give rule-based reasons for their decisions, permitting private parties to obtain clarification of the rules and to appeal decisions implementing the rules. Such practices will help to assure a fundamental continuity between institutional regulations of expressive commercial endeavors and other forms of commercial activity, and will provide some assistance in avoiding problems with vagueness or prior restraint doctrines.

III. COLLEGES AND UNIVERSITIES MAY REGULATE PRIVATE COMMERCIAL ENDEAVORS INVOLVING COMMERCIAL SPEECH SO LONG AS THEIR REGULATIONS PROSCRIBE ONLY UNLAWFUL OR MISLEADING SPEECH OR OTHERWISE ADVANCE SUBSTANTIAL INSTITUTIONAL INTERESTS DIRECTLY AND WITHOUT INTRUDING ON MORE PRIVATE SPEECH THAN IS NECESSARY TO SERVE THOSE OBJECTIVES.

Colleges and universities have substantial latitude to regulate private commercial speech. Practices that conform to the Court's requirements for such regulations share common features with regulations of commercial endeavors in general—and of expressive commercial products or activities in particular—facilitating a consistent approach to policy development and administration.

The Court's First Amendment jurisprudence involving speech and expressive activities inherent in commerce differentiates between, on the one hand, expressive products or activities that may be the subject matter of commercial transactions and, on the other hand, the expression that is involved in proposing and effecting the commercial transaction itself. The Court uses the phrase "commercial speech" to designate the latter forms of expression.²⁵⁶ Commercial speech relates solely to the economic interests of the speaker and its audience, proposes a commercial transaction, and occurs in an area traditionally subject to government regulation.²⁵⁷

254. Some qualifications may be relatively objective. For instance, tutors could reasonably be expected to have achieved advanced standing and high grades in the subject matter that they wish to tutor. Still, there may be times when there may be occasions for the exercise of academic judgment, as when a prospective language tutor has a solid command of a written language but poor oral skills. There may be circumstances where universities could properly rely upon academic judgment. *See generally, infra*, notes 404–413. Of course, licensing an organization to operate a coffee concession could present a very different matter.

255. *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002) (recognizing state payment available for tutoring from registered tutors); *Minn. Fed'n of Colls. v. Minn. Bd. of Technical Colls.*, 1993 WL 480185, No. CO-93-998 (Minn. Ct. App. Nov. 23, 1993) (discussing board licensed post-secondary technical tutors); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) (discussing tutors approved by school administration).

256. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (ruling that tutoring, legal advice, and medical consultation provided—for a fee—in students' dormitory rooms would consist of speech for a profit; they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech).

257. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–63 (1980); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001)

Advertising that refers to a specific product and that is prompted by the speaker's economic motive is commercial speech.²⁵⁸ Commercial speech that is inextricable from, or deeply intertwined with, protected speech may be subject to the rules governing communicative activities discussed above in Part II.²⁵⁹

The rationale for protecting commercial speech under the First Amendment draws out fundamental connections between commercial speech and the quintessential First Amendment concerns to protect the social and political underpinnings of popular democracy.²⁶⁰

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and

258. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

259. *See Nike, Inc., v. Kasky*, 539 U.S. 654, 675 (2003) (dismissing writ of certiorari as improvidently granted) (Breyer, J., dissenting) (asserting that a letter to university presidents did not appear in the customary format of advertisements, did not propose commercial transactions and purported to provide additional information for persons interested in controversies involving Nike Inc.); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795–96 (1988) (concerning a state law that required professional fundraisers working on behalf of nonprofit charities to disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity and mandating speech that a speaker would not otherwise make necessarily alters the content of the speech and must therefore be analyzed as a content-based regulation of speech). The Court stated:

[E]ven assuming, without deciding, that such speech in the abstract is indeed merely “commercial,” we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

Id. *Fox* involved a sales pitch at a Tupperware party that included discussions of how to be financially responsible and how to run an efficient home. *Fox*, 492 U.S. at 473–74. The *Fox* Court rejected the contention that the financial components of the pitch were inextricable from the sales pitch, reasoning that such noncommercial components no more converted the pitch into educational speech than would opening the Tupperware parties with prayers or the Pledge of Allegiance have converted the sales pitch into religious or political speech. *Id.* at 474–75. Moreover, mere links between advertising and current public debates will not convert advertising to noncommercial speech. *Id.* at 475 (citing *Cent. Hudson*, 447 U.S. at 563 n.5). Nevertheless, the intertwining of commercial speech and noncommercial speech may be material to the First Amendment analysis applied to the facts before the Court. *Fox*, 492 U.S. at 481–86 (remanding for consideration of both the commercial and noncommercial components of the speech to determine whether the regulation could be upheld as narrowly tailored and, if so, whether it was overbroad). *See also Nike*, 539 U.S. 654, 665 (Breyer, J., dissenting from denial of certiorari) (urging heightened scrutiny where the speech at issue differed from traditional commercial speech in its form, in its predominant noncommercial content and enforcement). Justice Breyer argued:

The speech here is unlike speech—say, the words ‘dolphin-safe tuna’—that commonly appears in more traditional advertising or labeling contexts. And it is unlike instances of speech where a communication’s contribution to public debate is peripheral, not central At the same time, the regulatory regime at issue here differs from traditional speech regulation in its use of private attorneys general authorized to impose ‘false advertising’ liability even though they themselves have suffered no harm.

Id. at 678.

260. The ineluctable tie between the First Amendment and the integrity of the political process figures in a broad range of contexts. *See supra* notes 113 and 114 and accompanying text.

selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.²⁶¹

In the Court's view, the free flow of commercial information is essential to the efficient operation of free markets and ultimately the effective regulation of markets within a democratic system; hence, it must be protected under the First Amendment.

A. Commercial speech may be subject to certain forms of prior restraint under regulations that satisfy modified intermediate scrutiny tests.

Regulations that govern commercial speech differ from other government rules that protect First Amendment interests. Commercial speech regulations may be content-based, and even may go so far as to prohibit false or misleading speech or speech that proposes unlawful transactions.²⁶² Even though commercial speech regulations may be content-based, they are not subject to strict scrutiny, but are tested under intermediate scrutiny standards that "are substantially similar" to time, place, and manner analysis.²⁶³

261. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (internal citations omitted). *See also* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 365 (2002). The connection between economic prosperity, well-regulated markets and political stability would have been immediately obvious to the 1976 Court, whose members, tempered by the Great Depression, doubtless knew too well the hardships and dangers of economic collapse exacerbated by unregulated investment markets.

262. *Cent. Hudson*, 447 U.S. at 566 (deciding that for commercial speech to be protected under the First Amendment, "it at least must concern lawful activity and not be misleading"). The emphasis on facilitating the flow of information needed to support the economy noted above at note 261 also provides a justification for regulations of commercial speech designed to prevent communications that interfere with market forces. "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 485 (1996); *See also* *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("[The State] may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of 'purely factual and uncontroversial information.'").

263. *Lorillard*, 533 U.S. at 554 (stating the framework for analyzing regulations of commercial speech is substantially similar to the tests for time, place, and manner restrictions) (citing *Fox*, 492 U.S. at 477); *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 492 n.6 (1997) (Souter, J. dissenting) ("Regulation of commercial speech necessarily turns on some assessment of content . . . yet that fact has never been thought sufficient to require a standard of

The less stringent restriction on government regulation of commercial speech reflects the Court's recognition that more exacting tests might impair the power to regulate commercial conduct. If the state is to protect consumers or to proscribe conduct that interferes with the market, it must have the power to regulate the speech uttered or published in the course of proposing or completing regulated commercial transactions.²⁶⁴ Commercial speech is the means through which the commercial transaction is consummated; hence, commercial speech must be subject to regulation or the state would be unable to regulate the commercial transaction, and the whole area, speech and underlying transaction, is traditionally subject to government regulation.²⁶⁵

The framework for testing the constitutionality of commercial speech regulations has been well defined, since 1980 when the Court presented it in the *Central Hudson* case.²⁶⁶ Commercial speech that concerns unlawful activity or is misleading is not protected under the First Amendment.²⁶⁷ If the speech concerns

strict scrutiny.") (citing *Va. Pharmacy Bd.*, 425 U.S. at 761). See also *Cent. Hudson*, 447 U.S. at 564 n.6:

Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."

Id. (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

264. 44 *Liquormart*, 517 U.S. at 499 ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions.") (citing *Friedman v. Rogers*, 440 U.S. 1, 10, n. 9 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

265. 44 *Liquormart*, 517 U.S. at 499 ("The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services") (citing with approval LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-15, p. 903 (2d ed. 1988)). See also *Lorillard*, 533 U.S. at 554 (recognizing "the 'distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'") (quoting *Cent. Hudson*, 447 U.S. at 562).

266. See *Lorillard*, 533 U.S. at 554. The analysis contains four elements:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. (quoting *Cent. Hudson*, 447 U.S. at 566). Notwithstanding the reservations of several justices, the Court has rejected repeated efforts to persuade it to abandon this intermediate standard and to apply strict scrutiny. *Thompson*, 535 U.S. at 367-68; *Lorillard*, 533 U.S. at 554.

267. *Nike, Inc. v. Kasky*, 539 U.S. 654 (Stevens, J. concurring) (holding that the First Amendment, while offering protection to truthful commercial speech, does not protect false or misleading commercial speech) (citing *Central Hudson*, 447 U.S. at 563); *Greater New Orleans Broad. Ass'n, Inc., v. United States*, 527 U.S. 173, 183 (1999) (quoting *Cent. Hudson*, 447 U.S. at 566 ("For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading")). "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity

lawful activity and is not misleading, the regulations must be shown to satisfy each of three additional requirements. The asserted governmental interest must be substantial; the regulations must directly advance the governmental interest asserted; and they may not be more extensive than is necessary to serve that interest.²⁶⁸ The government bears the burden of defending the regulation.²⁶⁹ If the regulation bans altogether a range of truthful, non-misleading commercial speech, the regulations will be approached with skepticism.²⁷⁰ Where regulations specifically target the content of truthful, non-misleading commercial speech, government must demonstrate that it could not “achieve its interests in a manner that does not restrict speech, or that restricts less speech.”²⁷¹

itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389 (1973) (upholding a ban on sex-segregated employment advertising). Regulations that govern the marketing of items whose labels reveal that they “may be used for an illicit purpose” involving unlawful drug use do not embrace commercial speech, or, if they do, they propose an illegal transaction and such speech may be regulated or banned entirely. *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) (discussing an ordinance requiring license to sell drug paraphernalia if sold in proximity to literature advocating illegal drug use and requiring licensees to record the product purchased and name and address of each person purchasing a regulated product and to make such records available for police inspection).

268. See *Lorillard*, 533 U.S. at 554; *Greater New Orleans Broad. Ass’n*, 527 U.S. at 183; *Central Hudson*, 447 U.S. at 566.

269. See *44 Liquormart*, 517 U.S. at 505; *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

270. *Thompson*, 535 U.S. at 375 (“[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”) (quoting *44 Liquormart*, 517 U.S. at 503). In *Gilleo* the Court voiced similar misgivings about broad prohibitions of expressive commercial activities, even when these arose in the guise of content-neutral regulations:

Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality, handbills on the public streets, the door-to-door distribution of literature, and live entertainment. Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.

City of Ladue v. Gilleo, 510 U.S. 43, 55 (1994) (internal citations omitted). Hence, the Court’s deep-rooted antipathy to interfering with the free flow of information would doubtless lead it to examine blanket bans using strict scrutiny. See *Gilleo*, 514 U.S. at 60 (O’Connor, J. concurring) (arguing that the Court should not have assumed that the blanket prohibition on signs on residential property was content-neutral, but rather should have examined the regulations at issue under the strict scrutiny standards applied to content-based rules).

271. *Thompson*, 535 U.S. at 371.

- B. Measures to protect the integrity of markets, to regulate transactions that may be lawful for adults but harmful and unlawful for children, or to protect the effective operation of governmental institutions will satisfy the substantial government interest test for purposes of supporting commercial speech regulations.

The substantial government interest prong of the *Central Hudson* test may be satisfied by traditional police power considerations incidental to protecting the integrity of markets, such as, “the prevention of fraud, the prevention of crime, and the protection of residents’ privacy.”²⁷² The Court also recognizes the propriety of regulations that limit speech that encourages transactions that are lawful for adults but that may be harmful to children and unlawful where children are involved.²⁷³

Not all police power concerns will support commercial speech regulations. The “power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.”²⁷⁴

Some police power purposes, such as solicitude for the sensibilities of listeners who disapprove of indecent, but lawful, speech, conflict so directly with First Amendment principles that they are unlikely to constitute a substantial government interest.²⁷⁵ The substantial government interest test may be satisfied, nonetheless, by considerations that advance the mission of a government agency, such as “promoting an educational rather than commercial atmosphere on [campus], promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.”²⁷⁶ In a more complex setting, the substantiality

272. *Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150, 164–65. Congressional judgments involving policies intended to advance the general welfare may also be deemed to reflect substantial government interests. *See, e.g., Greater New Orleans Broad. Ass’n*, 527 U.S. at 185–86 (concluding that the federal government may have substantial interests in “(1) reducing the social costs associated with ‘gambling’ or ‘casino gambling,’ and (2) assisting States that ‘restrict gambling’ or ‘prohibit casino gambling’ within their own borders”); *Lorillard*, 533 U.S. at 555 (preventing the use of tobacco products by minors).

273. *Lorillard*, 533 U.S. at 555 (“[N]one of the petitioners contests the importance of the State’s interest in preventing the use of tobacco products by minors.”). The Court also insists that “the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.” *Id.* at 564 (“The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”) (quoting *Reno v. A.C.L.U.*, 521 U.S. at 844, 875 (1997) and citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983)). *See also* *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (“The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.”).

274. *Greater New Orleans Broad. Ass’n*, 527 U.S. at 193.

275. *See* *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813–14 (2000) (concluding that where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails; government need not be indifferent to unwanted, indecent speech that comes into the home without parental consent, but the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative). *See also* *Thompson*, 535 U.S. at 374–75 (“We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”).

276. *Fox*, 492 U.S. at 475.

prong could be satisfied where the government purpose is tied to protecting the effectiveness and integrity of its decision-making processes.²⁷⁷

When applying the *Central Hudson* test, the Court will limit its review of the regulatory purpose to the asserted purposes for the regulation.²⁷⁸ The Court will not uphold a commercial speech regulation based upon hypothetical governmental purposes that might have sufficed to establish a rational basis for the rule; *Central Hudson* analysis is more exacting than rational basis analysis.²⁷⁹

- C. Measures that regulate commercial speech must address real harms and must alleviate them to a material degree.

The *Central Hudson* requirement that regulations “directly advance the governmental interest asserted” focuses upon the effectiveness of the means selected to advance the governmental purpose. “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”²⁸⁰ Regulations that provide “only ineffective or remote support for the government’s purpose,” or that have little chance of advancing the purpose, cannot be upheld.²⁸¹ The Court does not require expansive empirical data to demonstrate the existence of a harm and the efficacy of the remedial measures. It has “permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’”²⁸² By the same token, the failure of a regulation may not be a function of empirical deficiencies.²⁸³ Regulations that accord different treatment to “speakers conveying virtually identical messages” are unlikely to be found to have “any meaningful relationship to the particular interest[s] asserted.”²⁸⁴

- D. Measures that regulate commercial speech may be no more extensive than is required to achieve their ends.

The final element in the *Central Hudson* analysis requires a reasonable fit

277. *Thompson*, 535 U.S. at 369.

278. *Id.* at 373–74.

279. *Id.*

280. *Greater New Orleans Broad. Ass’n*, 527 U.S. at 188 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

281. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (citing *Edenfield*, 507 U.S. at 770 (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564) and *Greater New Orleans Broad. Ass’n*, 527 U.S. at 193)).

282. *Lorillard*, 533 U.S. at 555 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

283. The existence of harms or the efficacy of regulations may be challenged on empirical grounds, of course. See *Lorillard*, 533 U.S. at 556–61 (discussing studies that purport to document the link between teenage smoking and advertising practice, together with the efficacy of limiting exposure to advertising as a means to decrease the use of tobacco products).

284. *Greater New Orleans Broad. Ass’n*, 527 U.S. at 193–95.

between the means and ends of the regulatory scheme.²⁸⁵ This requirement complements the requirement that regulations directly advance the government purpose by “asking whether the speech restriction is not more extensive than necessary to serve the interests that support it.”²⁸⁶ In recent years, the Court has come to differentiate between two species of commercial speech regulations when applying the final *Central Hudson* test. The Court distinguishes between regulations that serve to protect the integrity of markets, products, and market mechanisms, and regulations that seek to suppress certain messages or to limit their effectiveness. The Court takes the view that there is an essential continuum between the social mechanisms that the First Amendment protects in political, social, and intellectual spheres and the mechanisms that influence commercial speakers:

The commercial marketplace, like other spheres of our social, and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.²⁸⁷

Consequently, the Court is less exacting where regulations protect consumers

285. *Lorillard*, 533 U.S. at 561 (citing *Cent. Hudson*, 447 U.S. at 569). The Court has explained the difference between an as applied narrow tailoring defense and an overbreadth defense as follows:

The person invoking the commercial-speech narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover. As we put it in *Ohralik v. Ohio State Bar Assn.*, he “attacks the validity of [the statute] not facially, but as applied to his acts of solicitation,” whereas the person invoking overbreadth “may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him.”

Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 468, 482–83 (internal citation omitted).

286. *Lorillard*, 533 U.S. at 556 (quoting *Greater New Orleans Broad. Ass’n.*, 527 U.S. at 188).

287. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. at 484, 503–04 (1996) (quoting *Virginia Pharmacy Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). *Cf.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (holding that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all”) (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In *Sweezy*, Chief Justice Warren wrote:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id.

from misleading, deceptive, or aggressive sales practices, or require the disclosure of beneficial consumer information and more exacting where a state prohibits or inhibits truthful, non-misleading messages about lawful transactions.²⁸⁸

1. Content-neutral measures regulating commercial speech and measures that protect the integrity of markets must be reasonable and proportionate to the ends served.

When addressing commercial speech regulations that protect the integrity of market processes or that operate without regard to content of speech, the Court specifically rejects a least restrictive means standard, but, instead, requires a reasonable fit “between the legislature’s ends and the means chosen to accomplish those ends . . . means narrowly tailored to achieve the desired objective.”²⁸⁹ A government regulation can be considered narrowly tailored so long as the government interest “would be achieved less effectively absent the regulation.”²⁹⁰

In general, this means the regulation need not be a perfect fit for the government’s needs, but it must be reasonable and proportionate to the interests served; it cannot burden substantially more speech than necessary.²⁹¹ The Court has come to expect that regulations be “unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.”²⁹² Even though commercial speech regulations are not subject to the least restrictive means test, “if there are numerous and obvious less burdensome alternatives to the restriction on

288. The Supreme Court has noted:

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

44 Liquormart, 517 U.S. at 501. See also *Lorillard*, 533 U.S. at 565 (invalidating some, but not all, regulations that included broad advertising bans and limitations on various tobacco products and that failed to differentiate among the distinctive practices involving advertising for different tobacco products) (“[A] speech regulation cannot unduly impinge on the speaker’s ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about products.”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (“A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information’s effect upon its disseminators and its recipients.”).

289. *Lorillard*, 533 U.S. at 556 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *Fox*, 492 U.S. at 480)).

290. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

291. *Id.* at 800; *Fox*, 492 U.S. at 480.

292. *Lorillard*, 533 U.S. at 570 (upholding regulations on sales practices that would provide minors with access to tobacco products, e.g., unattended displays or providing product samples: “The means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.”).

commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.”²⁹³

There are matters of degree here. Provisions that reach marginally beyond what would adequately serve the governmental interest will ordinarily be upheld.²⁹⁴ Where a regulation provides only minimal relief from the evils that government seeks to avoid, the presence of “numerous and obvious less burdensome alternatives” to the chosen means, will support a finding that the fit between ends and means is unreasonable and the regulation invalid.²⁹⁵

2. Content-based measures regulating lawful, non-misleading commercial speech may be supported if government objectives can only be achieved by regulating speech.

When reviewing content-based regulations that do not address market integrity concerns, the Court will expect to find evidence that the regulation protects the interests of commercial speakers in conveying truthful information about their products, sales terms and locations, and the interests of consumers in receiving such information.²⁹⁶

Regulations that close access to otherwise available advertising venues based upon content or that deny the use of advertising means that are customarily used to market like products are unlikely to be found to be narrowly tailored.²⁹⁷ Regulations that fail to recognize market differences based upon geographical or demographic circumstances or upon the characteristics or uses of distinct, though

293. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, n.13 (1993).

294. The Court has gone so far as to suggest:

None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson’s* fourth prong have been substantially excessive, disregarding “far less restrictive and more precise means.”

Fox, 492 U.S. at 479.

295. The *Discovery Network* Court observed that the benefit “derived from the removal of 62 newsracks while about 1,500–2,000 remain in place was considered ‘minute’ by the District Court and ‘paltry’ by the Court of Appeals.” 507 U.S. at 417–18. The Court concluded that the benefit was too attenuated to justify “the discrimination against respondents’ use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city’s sidewalks,” and held that such a de minimis benefit could not constitute a reasonable “‘fit’ between the city’s goal and its method of achieving it.” *Id.* at 618.

296. *Lorillard*, 533 U.S. at 564–66.

297. In *Lorillard*, the Court considered a complement of Massachusetts rules designed to reduce smoking among children by restricting their exposure to tobacco advertising. It struck down a Massachusetts ban on outdoor advertising of smokeless tobacco and cigar advertising within one-thousand feet of schools or playgrounds, in part, because the prohibition would have prevented “advertising in 87% to 91% of Boston, Worcester and Springfield, Massachusetts.” *Id.* at 561–62. The Court found no basis for a ban on outdoor oral communications involving the product, as though a merchant would only be barred from answering consumer questions about product availability if the conversation occurred out of doors. *Id.* at 563. It noted, too, that because the ban reached indoor advertising that was visible from the street, it also interfered with merchant’s ability to advertise to passers-by the availability of tobacco products. *Id.* at 565.

related, products are unlikely to be found to be narrowly tailored.²⁹⁸ Regulations that embody unreasonable assumptions about potential consumers are unlikely to be found to be narrowly tailored.²⁹⁹

Where non-speech related regulations could be effective to achieve its purposes, government may not prefer regulations that restrict commercial speech, “regulating speech must be a last—not first—resort.”³⁰⁰ In sum, where regulations reach the content of lawful, non-misleading commercial speech, “if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”³⁰¹

- E. College or university regulations of private commercial speech should be drafted to meet the standards applied to content-neutral regulations of commercial expression.

Since commercial speech regulations are tested under intermediate scrutiny standards that resemble time, place, and manner analysis,³⁰² college or university regulations addressing commercial speech should be framed and administered in ways that resemble the practices discussed above in connection with regulations of commercial endeavors involving expressive products or activities.³⁰³ A principal difference between the regulation of commercial speech and the regulation of commercial endeavors involving expressive products or activities will lie in the additional latitude to proscribe commercial speech based on content that is false or misleading or that proposes an illegal transaction. Many universities may wish to consider such authority to proscribe advertising related to the sale of term papers, or similar products designed to enable academic fraud, or advertising related to the sale of illegal drugs or comparable unlawful goods or services.³⁰⁴

Banning news-media delivered advertising for goods or services that may be lawfully acquired or used by some college or university students or staff, but that are nonetheless disruptive to the institution, present serious difficulties. In *Pitt News v. Pappert*,³⁰⁵ the Third Circuit struck down a Pennsylvania statute that banned publication of alcohol advertisements in student papers throughout the

298. *Id.* at 563–65 (faulting the Massachusetts’ rule for failing to reflect differences in rural and urban environments or to reflect differences in markets for smokeless tobacco products and cigars).

299. *Id.* at 566 (rejecting a rule that required indoor tobacco products advertisements to be five feet above floor level, since not all children were less than five feet tall and since those that were less than five feet tall could still see advertising placed above that height).

300. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371–73 (2002).

301. *Id.* at 371.

302. *Lorillard*, 533 U.S. at 554; *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

303. *See supra* notes 235–254 and accompanying text.

304. *See supra* note 89 for authority relating to the sale of term papers. The proscription of advertisements for illegal drugs, specifically permitted under *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) (holding that speech proposing an illegal transaction may be regulated or banned entirely) would also further institutional obligations under the Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2000), and the Drug and Alcohol Abuse Prevention regulations. 34 C.F.R. pt. 86 (2005).

305. 379 F.3d 96, 107 (3d Cir. 2004).

state. The Court concluded that such an on-campus advertising ban could not be shown to combat “underage or abusive drinking ‘to a material degree,’ or [to provide] anything more than ‘ineffective or remote support for the government’s purposes,’” given the multiple media sources for precisely such advertising that were readily available on campus.³⁰⁶ Educational institutions, no less than states, would have trouble enforcing such blanket bans on news-media advertising for lawful activities.

The difficulties that colleges and universities may encounter in justifying a prohibition of news-media advertising for lawful, though disruptive, activities do not imply that colleges and universities have no power to regulate other forms of advertising for activities that they have prohibited on campus.³⁰⁷ Although prohibitions on news-media based advertising may provide only ineffective or remote support for the institution’s purposes, prohibitions on the use of other forms of media based on campus or distributed in conjunction with campus activities may still be sufficiently effective to pass constitutional muster. Educational institutions that receive federal funds, for example, have substantial interests in complying with their obligation under the Drug-Free Schools and Communities Act of 1989 to prohibit the “unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on the institution’s property or as part of any of the institution’s activities.”³⁰⁸ Colleges and universities have a specific duty under this spending power legislation to prohibit unlawful alcohol distribution by students on campus. A prohibition on the use of campus facilities, such as bulletin boards or sidewalks, or institutional activities to advertise such prohibited transactions would appear to be narrowly tailored to achieve that substantial end, even if parallel prohibition could not be extended with like degrees of effectiveness to news-media borne advertising.

College and university regulators should be sensitive to the possibility that one medium or another, or one sales tactic or another, may present unique challenges in different institutional settings. College and university regulations may properly reflect such differences. Considerations that were material in conjunctions with the expressive commercial endeavors themselves may also be material in conjunction with commercial speech. In various settings colleges and universities may wish, for example, to consider noise, obstruction of pedestrian traffic, or abuse of sales prospects in framing regulations that affect the manner in which

306. *Id.* at 107 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm’n of N.Y.*, 447 U.S. 557, 564 (1980)). The *Pitt News* Court held:

Even if Pitt students do not see alcoholic beverage ads in *The Pitt News*, they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*.

Id.

307. *Lorillard*, 533 U.S. at 534 (discussing regulations of outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.)

308. 20 U.S.C. § 1011i (a)(1)(A) (2000).

sales are proposed or conducted.³⁰⁹

As with regulations of commercial endeavors involving expressive products or activities, care should be exercised to identify the specific aspects of a kind or medium of commercial speech that could interfere with the normal operation of the college or university or otherwise adversely affect its interests. Where there are reasonable grounds to believe that the interests affected would be regarded as substantial institutional interests, close attention should be given to assuring that the means chosen to protect those interests are effective and leave ample alternative avenues, even if these are located off campus, to disseminate the advertising or to conduct the sales.³¹⁰ To the extent that regulations can be targeted at content-neutral secondary effects of particular media or means, the enforceability of the regulations can be enhanced. To the extent that the regulations necessarily consider content, the regulations should focus closely upon the particular media or means that adversely affect the substantial institutional interest.

Once again, creation of administrative procedures to permit the clarification of the regulations, assure consistent application to like cases, constrain decision-makers by requiring them to provide rule-based reasons for their decisions or for review of their decisions, can provide some degree of protection in the face of vagueness or prior restraint challenges.³¹¹

IV. COLLEGES AND UNIVERSITIES SHOULD OPERATE INSTITUTIONAL ADVERTISING VENUES AS NON-PUBLIC FORA MANAGED TO ENHANCE THE EFFECTIVENESS OF THE FACILITIES, SERVICES, OR PROGRAMS WHERE THE ADVERTISING VENUES ARE SITUATED, TO MAXIMIZE ADVERTISING REVENUES OR TO ACHIEVE BOTH PURPOSES.

A. Courts use forum analysis to assess the constitutionality of regulations that govern access to publicly owned advertising venues.

Access to college and university advertising venues involves access to institutional properties or programs; hence, the special rules of forum analysis play controlling roles in developing policies to govern access to college or university

309. *Cf.*, *ISKCON v. Lee*, 505 U.S. 672, 683–85 (1992) (discussing the interference of pedestrian traffic, abusive sales techniques, and fraud); *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (avoiding intrusion of noise on other users of public grounds and facilities); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464 (1978) (holding that face-to-face solicitation is “rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud”).

310. *Friends of the Vietnam Veterans Mem’l v. Kennedy*, 116 F.3d 495, 497 (D.C. Cir. 1997) (finding alternative avenues where expressive t-shirts could be given away or sold near the National Mall); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 958 (D.C. Cir. 1995) (finding alternative avenues where ban on sales did not prevent religious groups from disseminating their messages on the National Mall through chanting, speaking or donating its paraphernalia).

311. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 493 (1982) (noting, in passing, that Flipside neglected to clarify the meaning of regulations that it subsequently challenged on overbreadth and vagueness grounds).

advertising venues.³¹² The general public forum classifications and principles discussed above apply to government owned advertising venues.³¹³ The Court distinguishes among three types of forum, the traditional public forum, the public forum by designation, and the nonpublic forum.³¹⁴ The categorization of an

312. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding that advertising space on municipal buses constituted a nonpublic forum); *Ridley v. Massachusetts Bay Transp. Authority*, 390 F.3d 65 (1st Cir. 2004) (holding that advertising spaces on transportation system constitute a limited or nonpublic forum); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278–79 (holding that advertising space on bus benches constituted a nonpublic forum); *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Cir. 2003) (holding that a voter’s guide constituted a nonpublic forum); *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000) (holding that a municipality that allowed commercial advertisers to link to its website could not refuse to link a tabloid and internet publisher who sought to expose municipal wrongdoing); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (holding that state could not constitutionally prohibit Klan participation in Missouri’s Adopt-A-Highway program); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (declining to apply forum analysis to acceptance of donation and on-air recognition as a public broadcasting sponsor, which are properly considered governmental speech); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (holding that high school bulletin boards served as an expressive vehicle for the school board’s policy of “Educating for Diversity,” and thus constituted government speech, not a forum); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (holding that commercial advertising on baseball diamond outfield fence constituted a nonpublic forum); *United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 364–65 (6th Cir.1998) (holding that an attempt to regulate advertising as nonpublic forum state agency that permitted advertising on public policy issues, including pro-union advertising, barred from rejecting ad that showed union members protesting outside a meeting of management side labor attorneys); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (stating that municipality may restrict bus advertising to commercial transactions and may reject an antiabortion advertisement that had been re-worked to appear in the guise of an invitation to purchase an antiabortion bumper sticker); *Christ’s Bride Ministries, Inc. v. S.E. Pa. Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998) (holding that a state agency may not reject antiabortion advertising in subway system based upon alleged inaccuracies where it has accepted public service advertising relating to abortion and family planning); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 128 (2d Cir. 1998) (holding that a public corporation owning buses in New York rejected advertising that referred to Mayor Giuliani’s first name on the authority of a criminal statute that prohibited the use of individuals’ names without their permission); *Families Achieving Independence and Respect v. Neb. Dep’t of Soc. Services*, 111 F.3d 1408 (8th Cir. 1997) (holding that bulletin boards in welfare office are a nonpublic forum); *Lebron v. Nat’l R.R. Passenger Corp.*, 69 F.3d 650, 656 (2d Cir. 1995) (holding that a billboard at Penn Station was a nonpublic forum and could be closed to political advertisements); *Air Line Pilots Ass’n, Int’l v. Dept. of Aviation*, 45 F.3d 1144 (7th Cir.1995) (holding that access to display cases in O’Hare Airport terminal could be restricted); *Nat’l A-1 Advertising v. Network Solutions, Inc.*, 121 F. Supp. 2d 156 (D.N.H. 2000) (holding that second level domain names are not a forum); *Henderson v. Stadler*, 112 F. Supp. 2d 589 (E.D. La. 2000) (holding that vanity license plates were a forum).

313. *See supra*, notes 9–29 and accompanying text.

314. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 668, 677–78 (1998). *See also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990); *ISKCON*, 505 U.S. at 678–79; *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund*, 473 U.S. 788, 800, 803 (1985); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45–46 (1983); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981). The forum doctrine has been applied, or reviewed, in many contexts, not all of which involve access to public property. Cases such as *Locke v. Davey*, 540 U.S. 712, 721 n. 3 (2004); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 230 (2000); *National Endowment*

advertising venue as one kind of forum or another dictates the level of scrutiny that is applied to government actions to exclude would-be advertisers from the venue.³¹⁵ In essence, the Court applies strict scrutiny to government policies that exclude speakers from traditional public fora, from fora by designation that have been opened to the public at large, or from fora by designation that have been opened to limited classes of speakers or for limited topics where the speakers or their topics number among the speakers or topics that are permitted in the forum; all subject to exclusions permitted pursuant to valid time, place, and manner regulations.³¹⁶ The Court employs an intermediate scrutiny standard of review when examining content-neutral policies that restrict access to fora to designated speakers or for the discussion of limited topics.³¹⁷ The Court employs a variant on rational basis scrutiny when considering the exclusion of speakers from nonpublic fora.³¹⁸ Irrespective of the nature of the forum, government actions to exclude

for the Arts v. Finley, 524 U. S. 569, 585 (1998); and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), all involved the question whether governmental funding problems should be analyzed using forum analysis.

315. See *supra*, notes 13–22.

316. In *Perry*, 460 U.S. at 45, the Court said:

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

Id. (internal citation omitted). See *Ark. Educ.*, 523 U.S. at 677.

317. In *Good News Club*, the Court said:

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified “in reserving [its forum] for certain groups or for the discussion of certain topics.” The State’s power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be “reasonable in light of the purpose served by the forum.”

Id. at 106–07 (internal citations omitted).

318. In *Cornelius*, the Court held:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . [A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created.

473 U.S. at 806 (internal citations omitted). See *Ark. Educ.*, 523 U.S. at 677–78; *Perry*, 460 U.S. at 45–46, 49.

The Court regards the less exacting treatment that it accords government regulations of nonpublic fora as an inducement to government to open property to expressive activities:

By recognizing the distinction [among public and nonpublic fora], we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Ark. Educ., 523 U.S. at 680.

speakers based upon the content of their speech are subject to strict scrutiny, and government actions to exclude speakers based upon the viewpoint that they express are invalid per se.³¹⁹

- B. Advertising venues are unlikely to be classified as traditional public fora, and they are unlikely to be classified as public fora by designation absent a specific action to make them operate as such.

Advertising venues simply do not have the characteristics that would justify their classification as traditional public fora and are unlikely to be subject to the regulations governing such places. A traditional public forum has the physical characteristics of a public thoroughfare,³²⁰ has the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct,³²¹ and by history and tradition has been used for expressive conduct.³²² The physical characteristics of electronic message centers, scoreboards, billboards or advertising placards on benches or buses have little in common with the physical characteristics of thoroughfares, sidewalks and parklands that are the quintessential public fora.³²³ Hence, the critical issues in classifying an advertising venue forum generally revolve around the question whether a government agency has opened the venue to the public, and if so, has the

319. *Perry*, 460 U.S. at 46 (“In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”); *Cornelius*, 473 U.S. at 806; *Ark. Educ.*, 523 U.S. at 677–78; *Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993). Efforts to suppress speech are per se suspect and subject to strict scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434, 441 (2002) (holding that content-based regulations would be considered presumptively invalid and subject to strict scrutiny). See *supra* notes 106–117 and accompanying text.

320. *Warren v. Fairfax County*, 196 F.3d 186, 191 (4th Cir. 1999) (en banc) (citing *United States v. Kokinda*, 497 U.S. 720, 727 (1990)). But note: “mere physical characteristics of the property cannot dictate forum analysis.” *Kokinda*, 497 U.S. at 727. Where public property that has physical characteristics of traditional public forums serves special uses, it may not be subject to rules governing traditional public forums. *Id.* (holding that a postal sidewalk constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office does not have the characteristics of public sidewalks traditionally open to expressive activity); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that the business of a military installation is to train soldiers, not to provide a public forum).

321. *Warren*, 196 F.3d at 191 (citing *Ark. Educ.*, 523 U.S. at 678).

322. *Id.* (citing *Perry*, 460 U.S. at 45) (stating that traditional public fora are defined by the objective characteristics of the property, such as whether, “by long tradition or by government fiat,” the property has been “devoted to assembly and debate”).

323. Bulletin boards or similar structures where all and sundry may post notices may be thought to present a closer call if they are generally open to the public and postings are unregulated, but bulletin boards are not per se fora and are typically not held to be traditional fora. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 130 n.6 (1981) (holding that a bulletin board in a cafeteria on a military post was not a public forum merely because it was used for speech); *Desyllas v. Bernstine*, 351 F.3d 934, 943 (9th Cir. 2003) (stating that only campus bulletin boards designated as public fora under university policy were free speech fora); *Giebel v. Sylvester*, 244 F.3d 1182, 1185 (9th Cir. 2001) (holding that university policy opened bulletin board to members of the public at large).

venue been opened only to certain advertisers or only to certain classifications of advertisements.

Whether an advertising venue operates as a nonpublic forum or as a public forum by designation hinges upon the intention of the government agency that operates the venue.³²⁴ The Court assumes that government property has intended purposes independent from communication and that government dedicates the property to those purposes.³²⁵ Properties that government uses to conduct its functions, including the provision of public services, are ordinarily considered to be nonpublic fora or not fora at all.³²⁶ Given this assumption, the touchstone question in determining how to classify an advertising venue becomes whether government has decided to devote the property to the additional purposes of providing a forum for communication of private views.

Intention is the key. The mere fact that a venue is used for the communication of ideas does not make it a public forum.³²⁷ Government may permit expressive activities in nonpublic fora without thereby converting them into designated public fora.³²⁸ Government does not create a public forum by designation by inaction or

324. Even if advertising is handled by third party contractors, their practices may be subject to constitutional scrutiny where governmental authority dominates an activity. In *Lehman*, a contractor operated the advertising venues. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 309–10 (1974) (holding that although advertising space was available and Lehman’s proposed advertisement met Metromedia’s copy standards, rental space was nevertheless denied Lehman on the sole ground that Metromedia’s contract with the city forbids acceptance of political advertising). See also *Air Line Pilots Ass’n Int’l v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1149–50 (7th Cir. 1995) (holding that state action exists if the government has exercised coercive power or has provided significant encouragement, either overt or covert, in effecting the challenged action) (finding state action where a municipality had both the express authority and the stated desire to influence the content of the display case).

325. *Warren*, 196 F.3d at 193 (holding that the forum decisions assume nonpublic government property has been dedicated to some objective use or purpose—i.e., a use or purpose independent of any speech restrictions). These assumptions undergird the rationale, noted above at notes 11 and 37–39, that the Court advanced to ground forum analysis on the principle that “the Government, ‘no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,’” and it developed “a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.” *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (quoting *Greer*, 424 U.S. at 836).

326. *Ark. Educ.*, 523 U.S. at 677 (describing traditional and designated public fora, then noting that “[o]ther government properties are either nonpublic fora or not fora at all.”); *ISKCON v. Lee*, 505 U.S. 672, 678–79 (1992) (describing traditional and designated public fora, then noting that “[f]inally, there is all remaining public property.”).

327. *Perry*, 460 U.S. 49, n.9 (“Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.”) (quoting *Lehman*, 418 U.S. at 304).

328. *Ark. Educ.*, 523 U.S. 666 (examining a candidate forum on public television limited to the major party candidates or any other candidate who had strong popular support); *Cornelius*, 473 U.S. 788 (examining approved charities soliciting contributions in federal workplaces); *Perry*, 460 U.S. 37 (granting to bargaining representative access to school internal mailboxes); *Jones v. N.C. Prisoners’ Union*, 433 U.S. 119 (1977) (discussing Jaycees and Alcoholics Anonymous speakers and activities in prison); *Lehman*, 418 U.S. 298 (discussing advertising

by permitting limited discourse.³²⁹ Government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it.³³⁰ A public forum by designation may be created only when government purposively opens a nontraditional public forum for public discourse.³³¹ It must intend to make the property generally available for expressive purposes to a class of speakers.³³² Actual practice may establish such an intention where government grants permission as a matter of course to all who seek access to its property for expressive purposes.³³³

C. Policies that regulate advertising venues to maximize revenues are unlikely to be deemed to create public fora.

To distinguish between government created public fora and nonpublic fora that government has opened to limited expression, attention must focus on the policies that govern access to government property.

In *Perry*, for example, the Court held a school district's internal mail system was not a designated public forum even though selected speakers were able to gain access to it.³³⁴ The basis for the holding in *Perry* was explained by the Court in *Cornelius*: "In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to

space on municipal buses); *Greer*, 424 U.S. 828 (discussing invited speakers of various sorts on a military base). A forum may be a designated public forum as to certain groups yet a nonpublic forum as to others. *Perry*, 460 U.S. at 48 (stating that while the school mail facilities might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to a teacher union, which is concerned with the terms and conditions of teacher employment); *Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Auth.*, 148 F.3d 242, 256 (3d Cir. 1998).

329. *Greer*, 424 U.S. at 838 n.10 ("The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever."); *Cornelius*, 473 U.S. at 802.

330. *Ark. Educ.* 523 U.S. at 679.

331. *Cornelius*, 473 U.S. at 802.

332. *Ark. Educ.* 523 U.S. at 678-79 (citing *Widmar v. Vincent*, 454 U.S. 263, 264 (1981) and *Perry*, 460 U.S. at 45). Merely allowing public access to a venue does not suffice. It is a mistake to conclude "that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer*, 424 U.S. at 836. The First Amendment does not mean "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Id.* (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

333. In *Perry*, the Court found it material that there was no evidence that, in actual practice, the school district granted access to its internal mail system "as a matter of course to all who seek to distribute material." *Perry*, 460 U.S. at 47.

334. *Perry*, 460 U.S. at 47.

communicate with teachers was granted.”³³⁵

And in *Cornelius* itself, the Court held the Combined Federal Campaign (“CFC”) charity drive was not a designated public forum because “[t]he Government’s consistent policy ha[d] been to limit participation in the CFC to ‘appropriate’ [i.e., charitable rather than political] voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials.”³³⁶

Policies that create rights of access to government property for the public at large create public fora that have all the attributes of traditional public fora.³³⁷ Policies that create rights of access to all members of a class, as did the university policies at issue in *Widmar* that afforded all students access to facilities, or that create rights of access to discuss certain topics, as was the case in *City of Madison Joint School District No. 8 v. Wisconsin Public Employment Relations Commission*,³³⁸ which assured public access to discuss school board business, create fora that operate as public fora open to all who fall within the designated categories of persons having rights of access or who wish to address the topics for which the forum has been opened.³³⁹ Provisions for “general access” to a venue indicate that “the property is a designated public forum,” while provision for “selective access” . . . indicates [that] the property is a nonpublic forum.”³⁴⁰

The Court will not find that a public forum has been created in the face of clear evidence of a contrary intent.³⁴¹ “In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.”³⁴²

The Court has specifically acknowledged that these principles weigh against holding governmental advertising venues to be public fora. It characterized *Lehman* as resting on a finding “that the city’s use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum.”³⁴³ The Court recognizes that when government opens venues to

335. *Cornelius*, 473 U.S. at 803.

336. *Id.* at 804; *Ark. Educ.* 523 U.S. at 679.

337. *Ward v. Rock Against Racism*, 491 U.S. 781, 790–791 (1989) (stating that the municipal “bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government’s right to regulate expression is subject to the protections of the First Amendment”); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (holding that leased municipal theater is a public forum); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (holding that state fair is a public forum); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (holding that grounds of state capitol are a traditional public forum).

338. 429 U.S. 167 (1976).

339. *Perry*, 460 U.S. at 46, n. 7 (citing *Widmar*, 454 U.S. 263; *Madison Joint Sch. Dist.*, 429 U.S. 167).

340. *Ark. Educ.*, 523 U.S. at 679 (quoting *Cornelius*, 473 U.S. at 803, 805).

341. *Cornelius*, 473 U.S. at 803–04 (noting that the evidence in *Lehman* demonstrated that Shaker Heights intended to limit access to the advertising spaces on municipal buses, since it had done so for twenty-six years and had written requirements for limitations into its management contract).

342. *Cornelius*, 473 U.S. at 804.

343. *Id.*

advertising it is engaged in commerce and that, to manage the venture successfully, government must have substantially the same latitude in making business decisions that is accorded to private entities:

[T]he city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.³⁴⁴

The Court concluded that reasonable choices might include preference of steady revenue from long-term commercial advertisements over short-term political candidacy or issue-oriented advertisements, rejection of classes of advertising that might impose political propaganda on riders, avoidance of potential favoritism charges that would arise inevitably as politicians vied for access to limited advertising space.³⁴⁵ It characterized such decisions as being as inherent in the operation of the venture as those involved in setting fare rates or deciding on the location of routes and bus stops and concluded that “the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation.”³⁴⁶

In essence, as *Cornelius* recognized, the *Lehman* Court concluded that the inherent communicativeness of advertising did not justify the conclusion that Shaker Heights opened the buses to advertising in order to create a forum for the free expression of private speech. The municipal purpose for permitting advertising on its buses was rather to generate revenues for the government. Hence, the advertising facilities, despite their expressive character, did not constitute a public forum at all and were subject only to a rational basis type scrutiny.³⁴⁷

344. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). See also *ISKCON v. Lee*, 505 U.S. 672, 682 (1992) (holding that as commercial enterprises, airports must provide services attractive to the marketplace; in light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting the free exchange of ideas). *Lehman* arose when a candidate for the Ohio House of Representatives sought to purchase car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. *Lehman*, 418 U.S. at 299–300. The contractor that operated the advertising spaces on the municipal transit rejected the ad pursuant to its contract with the city that prohibited the placement of political advertising on transit cars. *Id.*

345. *Lehman*, 418 U.S. at 304.

346. *Id.*

347. The *Lehman* Court wrote:

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Id.

- D. Regulations that permit routine access to advertising venues by all advertisers are likely to be deemed to be public fora by designation, irrespective of any policy declarations to the contrary.

Government agencies commonly regard advertising venues in their revenue-producing ventures as nonpublic fora, but this characterization never ends the matter.³⁴⁸ Although, following the logic of *Lehman*, the starting point for the forum analysis of government advertising venues is that they may be nonpublic fora, the analysis cannot end with the simple review of substantive provisions of policy documents. The procedures and practices through which the policies are administered must also be heeded closely, for if a government grants access to a venue as a matter of course, its practice will not confirm that its stated intent is its true intent.³⁴⁹ Any approach that ignored policy administration would permit government to “circumvent what in practice amounts to open access simply by declaring its ‘intent’ to designate its property a nonpublic forum in order to enable itself to suppress disfavored speech.”³⁵⁰ “What matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted.”³⁵¹ Occasional lapses in implementing a policy will

348. See *supra* note 312 and accompanying text.

349. The Court “has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.” *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998). The Court’s conclusions about the intention of Shaker Heights was grounded on the fact that for twenty-six years, it refused to accept political or public issue advertising. *Lehman*, 418 U.S. at 300–01. In *Perry*, the Court found it material that there was no evidence that, in actual practice the school district granted access to its internal mail system “as a matter of course to all who seek to distribute material.” *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 47 (1983).

The combination of “significant substantive content limitations and procedural limitations” consistently administered negates the affirmative intent “to create a public forum.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004). Nonetheless, procedural limitations are not essential to the administration of a nonpublic forum. In *Griffen v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1328 (Fed. Cir. 2002), the Court said:

To the extent its concerns are not subsumed into the unbridled discretion analysis, the procedural safeguards requirement provides little or no independent basis for striking down a regulation in a nonpublic forum. While some courts identify the lack of procedural safeguards as an added liability of schemes they condemn for unbridled discretion, we are aware of no case demanding procedural safeguards as an independent requirement in a nonpublic forum.

Id. The application of the purported standards and procedures is the critical factor in determining whether a forum that appears on paper to be nonpublic forum operates as one in practice. The requirements for substantive content standards are discussed below in Part IV.E.

350. *United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 353 (6th Cir. 1998); *Ridley*, 390 F.3d at 102 (Torruella, J., concurring in part and dissenting in part) (writing that such a self-serving approach would allow the government to simply declare property a non-public forum whenever conflicts arose) (citing *ISKCON v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring)); *Air Line Pilots Ass’n v. Dept. of Aviation of Chi.*, 45 F.3d 1144, 1153 (7th Cir. 1995) (holding that government’s stated policy, without more, is not dispositive with respect to the government’s intent in a given forum).

351. The Court in *Hopper v. City of Pasco* wrote:

[C]onsistency in application is the hallmark of any policy designed to preserve the non-

not render the administration of a policy so inconsistent as to defeat the claim that an agency did not intend to establish a public forum.³⁵² Nevertheless, acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government's intent to create an open forum.³⁵³ The timing of policy development may also be relevant. Policies adopted after a request has been made for access to a forum may be reviewed with especial attention.³⁵⁴

public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted.

241 F.3d 1067, 1076 (9th Cir. 2001). *See also* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 966 (9th Cir. 1999) (holding that where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public forums); *Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Auth.*, 148 F.3d 242, 252 (3d Cir. 1998) (finding city's practice of permitting virtually unlimited access to forum created a designated public forum); *United Food & Commercial Workers Union*, 163 F.3d at 353 (holding that courts must closely examine whether in practice a public entity has consistently enforced its written policy in order to determine whether its stated policy represents its actual policy); *Air Line Pilots Ass'n*, 45 F.3d at 1154 (holding that actual policy—as gleaned from the consistent practice with regard to various speakers—shows whether a state intended to create a designated public forum); *Grace Bible Fellowship, Inc. v. Me. Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) (finding that in determining whether the government has designated public property a public forum, "actual practice speaks louder than words").

352. *Ridley*, 390 F.3d at 78 (noting that one or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum) ("By consistently limiting advertisements it saw as in violation of its policy, even if doing so imperfectly, the MBTA evidenced its intent not to create a designated public forum."); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 22 (1st Cir. 2002) (finding no government intent to create a designated forum exists "even if [government's] policy of restricted access is erratically enforced").

353. *United Food & Commercial Workers Union*, 163 F.3d at 355; *Christ's Bride Ministries*, 148 F.3d at 252.

354. Longstanding policy and practice supports the finding that a policy is thought to be related to recognized purposes of the forum. *See supra* notes 335, 340 and 348 and accompanying text. An agency that receives a request to place an advertisement and subsequently adopts a policy that would require the rejection of the advertisement invites a challenge to its motives. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845–46 (6th Cir. 2000) (holding that although the lack of an established policy in an area of evolving technology is not fatal, the city's adoption of a new policy, which was at least stimulated by an advertiser request, and which was then used to deny the requested link to the city's Web page, and which, in some respects, appears less clearly relevant to the purpose of the city's Web site, presents a question of fact whether the action reflected viewpoint discrimination). *But see* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999) (holding that government has an inherent right to control its property, which includes the right to close a previously open forum so closing a forum after a request to post a religious message has been received in order to avoid potential Establishment Clause problems is not viewpoint discrimination); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (upholding standards adopted after a request to place pro-life advertisements on city buses was received and then used to deny request).

- E. Retention of a right to review advertising will weigh in favor of treating an advertising venue as a nonpublic forum, but absent standard-based decision-making to evaluate judgments about acceptable advertising, decisions will be closely scrutinized to assure that they do not reflect hostility towards excluded messages.

Retaining the right to review advertising will support a finding that government operates the venue as a nonpublic forum where the review is conducted pursuant to clear standards that have been designed to prevent interference with the forum's designated purpose.³⁵⁵ Absent standard-driven decision-making, courts will scrutinize governmental action closely to assure that it does not reflect hostility toward the message of those seeking access to a forum.³⁵⁶ Absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship.³⁵⁷ "[T]he more subjective the standard used, the more likely that the category will not meet the requirements of the first amendment."³⁵⁸ Where advertising occurs in a larger business setting and where advertising practices may reasonably be thought to affect that business, government standards that attempt to assure that advertisements will not diminish the customer base in the larger business may be reasonable, notwithstanding some reliance on concepts such as "prevailing community standards" to differentiate among proposed advertisements.³⁵⁹

355. *Ridley*, 390 F.3d at 77 (holding that significant content limitations and procedural limitations on access weigh against finding an advertising venue to be a public forum); *United Food & Commercial Workers Union*, 163 F.3d at 352 (holding that in determining government intent to operate advertising as a nonpublic forum, courts should look, in part, "to whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose"); *But see Christ's Bride Ministries*, 148 F.3d at 251 (holding that the fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum) (finding that reservation of the right to reject any ad for any reason does not conclusively show that the governmental entity intended to keep the forum closed).

356. *Cf. Christ's Bride Ministries*, 148 F.3d at 251 (stating that courts must scrutinize more closely the speech that the government bans under such a protean standard).

357. *Hopper v. City of Pasco*, 241 F.3d 1067, 1077 (9th Cir. 2001) (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 244–45 (1990) (holding that generalized definition of permissible content poses risk of arbitrary application); *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845–46 (Tenn. 2000) ("[B]road discretion [given] to city officials [raises the] possibility of discriminatory application of the policy based on viewpoint").

358. *Hopper*, 241 F.3d at 1077 (citing *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir.1984); *Christ's Bride Ministries*, 148 F.3d at 251 (holding that suppression of speech under defective standard requires closer scrutiny)).

359. *Cf. Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 95 (Mass. 2004):

The MBTA's regulatory guidelines, which . . . reject any advertisement that "demeans or disparages an individual or group of individuals" and which use "prevailing community standards" to determine whether advertisements fall afoul of this standard, are not unreasonably vague or overbroad, given the nature of the MBTA's advertising program and its chief purpose of raising revenue without losing ridership. Some kinds of advertisements that will be consistent with this purpose may be difficult to pinpoint with exact precision; some degree of interpretation, and some reliance on concepts like 'prevailing community standards,' is inevitable.

In addition to seeking clarity in the standards that govern access to advertising venues, courts will inquire whether the standards relate to the venues' purpose.³⁶⁰ Courts scrutinize government-imposed restriction on access to advertising venues carefully to assure themselves that the restrictions are truly part of "the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property."³⁶¹ Where there is only an attenuated relationship between a rule governing the venue and the governmental purposes for maintaining the venue, courts may infer an intent to create a public forum.³⁶²

The policy judgments inscribed in the standards need only be reasonable; they need not be the most reasonable or the only reasonable limitations.³⁶³ Assuming that a policy is itself reasonable, the reasonableness of excluding a particular advertisement requires a determination of whether the proposed conduct would "actually interfere" with the forum's stated purposes, as set forth in the advertising policy.³⁶⁴ It may be reasonable to exclude an advertisement on a public policy

Id.

360. The Court assumes a close connection between the purposes that the government has in operating a facility and the effects that proscribed expressive conduct might have on the operation of the facility. *Cf.* *ISKCON v. Lee*, 505 U.S. 672, 683–85 (1992) (upholding a ban on solicitation in airports after discussing in detail how solicitation in airports might interfere with the flow of travelers through such facilities, expose harried or hurried travelers to duress or deception and permit wrongdoers to avoid detection since travelers would be unlikely to report misconduct); *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985) ("[Consolidated federal fundraising campaign] was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property").

361. *United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Authority*, 163 F.3d 341, 351–52 (Ohio 1998) (citing *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983)). A rule that "focused solely on whether a speaker must obtain permission to access government property 'would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.'" *United Food & Commercial Workers Union*, 163 F.3d at 351 (quoting *N.Y. Magazine v. Metro Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998)).

362. *United Food & Commercial Workers Union*, 163 F.3d at 351 (citing *S.E. Promotions, Ltd.*, 420 U.S. at 555 (applying heightened scrutiny where the reason for exclusion of plaintiff was not related to the public forum's purpose or the preservation of rights of other individuals); *Christ's Bride Ministries, Inc. v. S.E. Pa. Transp. Authority*, 148 F.3d 242, 251 (3d Cir. 1998) (holding that transit authority's advertising space was a public forum where standards for inclusion and exclusion were promulgated "without reference to the purpose of the forum"); *N.Y. Magazine*, 136 F.3d at 129–30 (holding that transit authority's restriction on access to its advertising space was unrelated to transit authority's proprietary interests, advertising space was a designated public forum)).

363. *ISKCON*, 505 U.S. at 678; *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978–79 (9th Cir. 1998). Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. *ISKCON*, 505 U.S. at 678 (citing *United States v. Kokinda*, 497 U.S. 720, 725 (1990)).

364. *United Food & Commercial Workers Union*, 163 F.3d at 358 (holding that acceptance of pro-union advertising could not be shown to interfere with a forum's stated purpose where such advertising had been accepted previously). *See also* *Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Authority*, 767 F.2d 1225, 1231 (7th Cir. 1985) (affirming district court's finding that transit authority's justification for rejecting plaintiff's advertisement could not be credited where

topic not otherwise within the range of permitted topics in order to avoid, as a consequence, triggering litigation or diminishing the financial benefit derived from advertising revenues.³⁶⁵ The predictions about the consequences of accepting a range of advertising need not rest on an extensive empirical record: inferences supported by common sense will suffice.³⁶⁶ The reasonableness of a restriction will be enhanced where it is clear that the affected advertisers have alternate means to reach their audiences.³⁶⁷

A broad range of objectives may enter into play when framing advertising policies. Advertising policies may restrict advertising that would have reduced First Amendment protections, because it is obscene or libelous.³⁶⁸ Aesthetic considerations may constitute legitimate governmental interests,³⁶⁹ though incorporating an aesthetic criterion into a policy without specifying standards to guide the application of the criterion may not prove to be acceptable.³⁷⁰ Government may shape advertising policies that both enhance the profitability of the advertising venue and provide a showcase for enterprises whose success

it was “entirely speculative” as to whether acceptance of the advertisement would adversely affect the transit authority’s commercial interests)); *Air Line Pilots Ass’n v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1156 (7th Cir. 1995) (concluding that where the advertising space at issue “[has] contained ‘political’ or other public interest messages in the past, the City cannot now claim that those messages are incompatible with the purpose of the forum”).

365. *DiLoreto v. Downey United Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999).

366. *Kokinda*, 497 U.S. at 734–35 (holding that common sense is sufficient to uphold a regulation under reasonableness review); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1278, 1280 (Fla. 2003) (stating that we need only ask whether it is intuitively obvious or commonsensical that the City’s limitation on bus bench advertising is reasonable).

367. *Uptown*, 337 F.3d at 1281 (holding that the presence of numerous alternative channels for pawnshop advertisements also supports the conclusion that the city’s proprietary decision to limit advertising on bus benches is reasonable) (citing *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 53–54 (1983)). The *Uptown* court noted:

[T]he reasonableness of the limitations on PLEA’s access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place The variety and type of alternative modes of access present here compare favorably with those in other nonpublic forum cases where we have upheld restrictions on access.

Id.

368. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 75 (Mass. 2004); *United Food & Commercial Workers Union*, 163 F.3d at 355 (holding that public entities may limit obscene or offensive material if narrowly tailored to include only less protected speech) *Cf.*, *Christ’s Bride Ministries, Inc v. S.E. Pa. Transp.*, 148 F.3d 242, 251 (3d Cir. 1998) (noting that the government policy proscribed acceptance of advertisements deemed libelous or obscene).

369. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (requiring that the city’s aesthetic interest must be sufficiently important or substantial to justify a prohibition against certain forms of speech in a public forum); *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1045 (9th Cir. 2002) (holding that aesthetics can be a substantial governmental interest); *Jacobsen v. City of Rapid City*, 128 F.3d 660, 662 (8th Cir. 1997) (holding that city’s restrictive policy based in part on aesthetic considerations need only be “reasonable”). *But see* *Multimedia Publ’g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 161 (4th Cir. 1993) (applying “sufficiently substantial” standard to airport commission’s aesthetic rationale).

370. *United Food & Commercial Workers Union*, 163 F.3d at 358 (holding that the assertion that an advertisement is not aesthetically pleasing, without more, is insufficient to permit the restriction of protected expression absent aesthetic standards or guidelines).

improves the economic well-being of the community.³⁷¹ Government may reasonably limit advertising in order to minimize the appearance of favoritism.³⁷²

Advertisement policies may seek to avoid controversy.³⁷³ In the context of a commercial venture, government “has a legitimate interest in not offending [customers] so that they stop their patronage.”³⁷⁴ Standing alone, the term “controversial” vests the decision maker with an impermissible degree of discretion.³⁷⁵ A standard that identifies how the consequences of a controversy may compromise a forum may pass the constitutional muster.³⁷⁶ Although

371. *Uptown*, 337 F.3d at 1280–81 (holding that the city was not unreasonable in limiting advertisers “on Gateway bus benches in an effort to protect the revenue stream and ‘market those businesses which [the City] is most proud of, and which are thought to be consistent with its long-term economic health’”).

372. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (noting that avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum); *Lebron v. Nat’l R.R. Passenger Corp.*, 69 F.3d 650, 658 (2d Cir. 1995) (upholding reasonableness of policy rejecting displays favoring any political view).

373. *Cornelius*, 473 U.S. at 811:

Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Id.; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965–68 (9th Cir. 1999) (holding that disruption and potential controversy are legitimate reasons for restricting the content of the advertisements, given the purpose of the forum and the surrounding circumstances of the public secondary school); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (maintaining a position of neutrality on political and religious issues is an especially strong rationale); *Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir.1992) (holding that reasonable grounds for content-based restrictions include the desire to avoid controversy); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir.1991) (en banc) (holding that “avoidance of controversy” constitutes a reasonable justification for refusing plaintiff’s potentially controversial advertisement where publication of an ad in the defendant-school district’s yearbook and newspaper could create the perception of sponsorship and endorsement by the schools, thereby compromising the school’s interest in maintaining its position of neutrality).

374. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 85 (Mass. 2004).

375. *United Food & Commercial Workers Union*, 163 F.3d at 359 (citing *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (concluding that the terms of a provision directing the National Endowment for the Arts to take into consideration general standards of “decency and respect” for diverse beliefs and values of the American public “are undeniably opaque, and . . . could raise substantial vagueness concerns” if appearing as part of a regulatory scheme); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (holding that Cincinnati Reds’ ban on ballpark banners that are not in “good taste” is unconstitutional because the policy “leaves too much discretion in the decision maker without any standards for that decision maker to base his or her determination”).

376. *United Food & Commercial Workers Union*, 163 F.3d at 359 (holding that where a policy limits the ban on controversial advertisements to cases where the advertisements adversely affect Southwest Ohio Regional Transit Authority’s (“SORTA”) image or ridership, the question becomes whether in linking the term “controversial” to commercial interests, renders the term sufficiently precise so as to constrain the decision maker’s discretion and protect those seeking access to SORTA’s advertising space from arbitrary or discriminatory treatment). The Court held:

Here there is no established causal link between SORTA’s goal of enhancing the

government need not wait for disruption to occur before acting to avoid controversy,³⁷⁷ government should be able to identify an established causal link that would indicate that controversy might interfere with the purposes for which it established a forum.³⁷⁸

Where a public entity controls multiple similar advertising venues, the advertising practices allowed in forums other than the one requested will not control its policies with respect to the forum for which access has been requested.³⁷⁹

- F. Even in a nonpublic advertising forum that permits limited content-based decision making, government may not discriminate on the basis of viewpoint, or adopt rules that are overbroad, vague or irrational.

Even if a decision to reject a proposed advertisement is consistent with an unambiguous, objective policy and with well-established past practice under the policy, it may be subject to challenge if the decision reflects disapproval of the viewpoint of the proposed advertisement.³⁸⁰ A rule excluding a class of speech from an advertising venue will not run afoul of viewpoint discrimination doctrines

environment for its riders, enhancing SORTA's standing in the community, and enabling SORTA to attract and maintain its ridership, and its broad-based discretion to exclude advertisements that are too controversial or not aesthetically pleasing. Although political and public-issue speech is often contentious, it does not follow that such speech necessarily will frustrate SORTA's commercial interests. Rather, it may be the case that only in rare circumstances will the controversial nature of such speech sufficiently interfere with the provision of Metro bus services so as to warrant excluding a political or public-issue advertisement.

Id. at 354–55. *Cf. Air Line Pilots Ass'n v. Dept. of Aviation of Chi.*, 45 F.3d 1144, 1157 (7th Cir. 1995) (stating that “there is no indication that political or public interest messages would generally disrupt air travel services” if displayed in airport terminal's display cases).

377. *See Cornelius*, 473 U.S. at 810 (“[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum.”) (citing *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 52 n.12 (1983)).

378. *United Food & Commercial Workers Union*, 163 F.3d at 354. *Cf. Air Line Pilots Ass'n*, 45 F.3d at 1157 (stating that “there is no indication that political or public interest messages would generally disrupt air travel services” if displayed in airport terminal's display cases).

379. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999) (holding that the fact that another high school within the district accepted advertisements for ESP Psychic Readings and the local Freemason organization does not indicate that the Downey High School fence was a designated public forum open to advertisements promoting personal religious beliefs) (noting that advertising at other sites was commercial or non-religious in character).

380. *DiLoreto*, 196 F.3d at 969; *United Food & Commercial Workers Union*, 163 F.3d at 356. *See also Lebron v. Nat'l R.R. Passenger Corp.*, 69 F.3d 650, 658 (2d Cir. 1995) (suggesting that if Amtrak excluded controversial political advertisements from its advertising billboards, a nonpublic forum, its policy would be void for viewpoint bias); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996) (arguing that government actions that discriminate against speech deemed “controversial” violate the principle of viewpoint neutrality); *Cf. Air Line Pilots Ass'n v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1157 (7th Cir. 1995) (stating that airport authority's exclusion of plaintiff's advertisement on the grounds that it undermined its commercial interests by offending the airport authority's largest airline customer was “troubling” because advertisement was objectionable only when considered in the context of the viewpoint the plaintiff wished to express).

unless it “targets not subject matter, but particular views taken by speakers on a subject.”³⁸¹ Such considerations may justify viewpoint-neutral exclusion of advertising involving religious or political topics where such advertising may be thought to interfere with revenue generation or with the effective operation of the program or facility in which the advertising venue is located.³⁸² Government may exclude religious or political advertising to avoid a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded “from using the same forum commonly used by those wishing to communicate primarily political or religious messages.”³⁸³

381. *Ridley v. Mass. Bay Transp. Authority*, 390 F.3d 65, 87–89 (Mass. 2004) (stating that rejection of advertisements submitted by organization advocating revision of drug laws reflected hostility for the organization’s viewpoint); *DiLoreto*, 196 F.3d at 969 (“Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic.”). See also *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 981 (9th Cir. 1998) (finding that limiting the forum to commercial advertisements was a permissible content-based restriction). In contrast, impermissible viewpoint discrimination is a form of content discrimination in which the government “targets not subject matter, but particular views taken by speakers on a subject.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

382. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding a policy that precluded political advertising on specified routes on the basis that the city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience); *Ridley*, 390 F.3d at 75 (upholding policies that excluded from transit system political advertising and broad ranges of advertising that disparaged groups whose members may number among the transit system riders); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278–79 (Fla. 2003) (city had previously accepted advertisements from pawnbrokers, but adopted a new policy prohibiting those advertisements in hopes of increasing revenues by attracting a high class of advertisers); *DiLoreto*, 196 F.3d at 965, 968 (rejecting advertisement that merely stated the ten commandments) (government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech) (excluding certain subjects from the advertising forum as sensitive or too controversial for the forum’s high school context, e.g., the District rejected advertisements for alcohol or taverns, as well as an advertisement for Planned Parenthood); *Children of the Rosary*, 154 F.3d at 978 (finding no public forum when the city consistently enforced policies restricting bus advertisements to commercial advertising); *Christ’s Bride Ministries, Inc. v. S.E. Pa. Transp. Authority*, 148 F.3d 242, 251, 253 (3d Cir. 1998) (holding that SEPTA may specify a few areas in which it will not freely accept advertising—e.g. alcohol and tobacco advertising beyond a specified limit and advertisements deemed libelous or obscene) (holding that the improperly rejected advertisements addressed topics permitted under the advertising policy as implemented); *N.Y. Magazine v. Metro Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (disallowing political speech and allowing commercial speech only).

383. *Children of the Rosary*, 154 F.3d at 979. See also *Lehman*, 418 U.S. at 304 (stating that revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards); *Ridley*, 390 F.3d at 92 (holding that the goal of the guidelines has nothing to do with censoring religious speech, the purpose is to maintain a certain minimal level of decorum in all advertisements); *Uptown*, 337 F.3d at 1278–79 (stating that city may prohibit advertisements from pawnbrokers where it had accepted them previously as part of a new policy aimed at increasing revenues by attracting a higher class of advertisers); *DiLoreto*, 196 F.3d at 969 (finding it reasonable to avoid triggering litigation or diminishing the financial benefit derived from advertising revenues by necessitating their expenditure to cover litigation costs).

Rules governing access to advertising venues will also be subject to First Amendment restrictions against vagueness and overbreadth, as well as Fourteenth Amendment restrictions on unreasonable, arbitrary, capricious, or invidious action.³⁸⁴

- G. Colleges and universities should structure their regulations and administrative practices to assure that their advertising venues operate as nonpublic fora managed to enhance the effectiveness of the facilities, services or publications where the venues appear or managed to assure that their advertising venues operate as profit centers.

To assure that their advertising venues are classified as nonpublic fora, colleges and universities should adopt policies that contain “significant substantive content limitations and procedural limitations on the advertisements” that they will accept.³⁸⁵ Taken in tandem, content and procedural limitations negate the inference that the institution affirmatively intended to create a public forum by opening the venues for some range of unrestricted private speech.³⁸⁶

Substantive content limitations should be crafted to accomplish either, or both, of two objectives. They should enhance the effectiveness of the facilities, services or publications where the venues appear or they should assure that advertising venues operate as profit centers.

1. Substantive content limitations on access to advertising venues may be crafted to advance the institutional purposes in maintaining the facility, service or publication where the advertising venue is located.

Advertising does not occur in isolation. Advertising is time and place specific, and times and places are chosen in order to maximize the number of people who will encounter the advertising. The primary function of outfield fences is scarcely to serve as advertising venues, but, because ballgames draw crowds, advertisers find fences to be desirable advertising venues.³⁸⁷ The same is true of the places on transportation systems cards, stations and benches, magazines and webpages. Certain places lend themselves to advertising because large numbers of people pass by those places or because large numbers of people are drawn to those places. The utility of such places for advertising purposes is incidental to their primary

384. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (finding overbreadth); *Ridley*, 390 F.3d at 93–95 (suggesting that the vagueness inquiry in the context of a nonpublic forum might be less exacting than where the regulatory scheme involves licensing or a traditional nor a designated public forum); *United States v. Kokinda*, 497 U.S. 720, 725–26 (1990) (finding that government action as proprietor restricting access to property is valid unless it is unreasonable, or “arbitrary, capricious, or invidious”) (quoting *Lehman*, 418 U.S. at 303); *Greer v. Spock*, 424 U.S. 828, 846 (1976) (finding no evidence that rules governing access had been applied irrationally, invidiously, or arbitrarily).

385. *Ridley*, 390 F.3d at 77.

386. *Id.*

387. *DiLoreto*, 196 F.3d 958 (holding that certain high school baseball diamond outfield fences were not public fora).

functions, whether those be providing directions to hurried travelers or serving as pasturage for Dutch Belted cattle.

The Court's analytical approach to rules governing advertising reflects its understanding that government operation of advertising venues is incidental to its conduct of some other government activity. The validity of rules governing access to a nonpublic forum is tested by determining whether "the distinctions drawn are reasonable in light of the purpose served" by the larger government property or activity within which the private party seeks access for advertising purposes.³⁸⁸ Hence, college or university rules governing access to advertising venues operation should complement the overarching functioning and purpose of the facilities, service or publications that contain them.

2. Substantive content limitations on access to advertising venues may be crafted to maximize advertising revenues.

The Court has recognized that advertising venues may be regulated, not only as incidental parts of a larger commercial venture, but also as independent commercial ventures in which government managers decide among advertisements based upon the likelihood that certain classes of advertisers will maximize revenues.³⁸⁹ Colleges and universities may consider, for example, the possibility that short-term advertising revenues are less certain than those derived from long-

388. *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805–06 (1985). Although *Cornelius* frames the issue as involving access to the "forum," i.e., to the specific place or program where access is sought, it clearly anticipates a relationship in which the forum is part of a larger workplace or undertaking, just as the fund drive occurred in federal workplaces designed to accomplish tasks unrelated to the fund-related speech. *Id.* The cases that *Cornelius* cited as authority all recognized that First Amendment rights should be extended in ways that preserve government's ability to complete the functions for which property has been acquired or operated. *Id.* (citing *Greer*, 424 U.S. at 838 ("[T]he business of a military installation [is] to train soldiers, not to provide a public forum")); *Connick v. Myers*, 461 U.S. 138, 150–51 (1983) ("[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."); *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part) (holding that removal of a public employee without a prior trial-like hearing does not deprive the employee of due process or chill protected speech) ("Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 128–29 (holding that inclusion of a mail drop as an "authorized depository" under postal regulations does not convert the mailbox into a public forum). Congress may prohibit the deposit of unstamped letters into mailboxes in order "to protect mail revenues while at the same time facilitating the secure and efficient delivery of the mails." *Id.* at 129.

389. The Court in *Lehman* held:

Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation.

Lehman, 418 U.S. at 304.

term advertisements.³⁹⁰ Colleges and universities may reasonably consider the possibility that opening venues to certain advertisements or advertisers may dissuade other advertisers from patronizing college or university venues. Banks and hospitals and major corporations with deep pockets long-term interests in higher education may not wish to have their advertising share space with advertisements promoting “liquor, tobacco, X-rated movies, adult book store, massage parlor, pawn shop, tattoo parlor or check cashing” sales or services.³⁹¹ Thus, colleges and universities may take such factors into account and may draw distinctions among its substantive content limitations that are reasonable in light of its purpose to maximize the advertising revenues.³⁹²

3. Substantive content limitations on access to advertising venues should reflect differences among venues, and may advance substantial institutional values.

Standards should reflect differences among the venues.³⁹³ It may be proper to restrict advertising for venues on a bus or in a residence hall in ways that will avoid discouraging persons from using that mode of transportation or taking up residence in those facilities.³⁹⁴ It may be proper not to accept issue advertising in a sporting facility whose primary purpose is not the open discussion of ideas; such measures help to avoid drawing the college or university into disputes with fans or other advertisers over the polemical content of issue advertising.³⁹⁵ It may be

390. *Id.*

391. *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1277 (Fla. 2003) (listing kinds of “less desirable” advertisers whose advertisements were not to be permitted on municipal bus system).

392. *Cornelius*, 473 U.S. at 805–06 (upholding distinctions in a nonpublic forum where “the distinctions drawn are reasonable in light of the purpose served”); *Uptown*, 337 F.3d at 1280–81 (finding substantive content limitations reasonable where they were drawn in an “effort to protect the revenue stream and ‘market those businesses which [the City] is most proud of, and which are thought to be consistent with its long-term economic health’”); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1999) (finding it reasonable to exclude religious or political advertising to avoid “a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded ‘from using the same forum commonly used by those wishing to communicate primarily political or religious messages.’”).

393. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999) (noting that different advertising venues operated by a school district could properly have different rules).

394. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (“The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.”); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 85 (Mass. 2004) (“MBTA has a legitimate interest in not offending riders so that they stop their patronage”). The *Ridley* court went on to note:

[MBTA has a legitimate interest in] ‘maximiz[ing] revenue’ by making money through advertisements while not reducing ridership through offensive advertisements, ‘maintaining a safe and welcoming environment’ for its riders (including children), and avoiding its identification with the advertisements it displays. A guideline preventing demeaning or disparaging advertisements is likely to serve these purposes well and is consistent with the MBTA’s own ‘Courtesy Counts’ program.

Id. at 93.

395. *DiLoreto*, 196 F.3d at 968 (“The District essentially offers two reasons for excluding the

proper to craft content-based regulations that are sensitive to the audience for its advertisements, including reasonable, informed assumptions about how the particular audience would understand a particular advertisement and whether the audience reaction might interfere with the intended function or purpose of the facility, service, or publication where the advertising is located or render the venue less desirable to other advertisers.³⁹⁶

Colleges and universities may adopt standards that justify rejection of advertising that proposes unlawful conduct.³⁹⁷ Colleges and universities may

subject of religion from the forum. The District's first concern was disruption. The District feared controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post. The District's second concern was the potential Establishment Clause violation presented by posting the Ten Commandments in a public high school." See also *Uptown*, 337 F.3d at 1281 ("[C]ommon sense supports the idea that it is reasonable for the City to limit 'less desirable' businesses' access to bus bench advertising in hopes that the limitation will encourage 'more desirable' advertisers").

396. *Ridley*, 390 F.3d at 75 (upholding against vagueness and overbreadth challenges to the following standard:

The advertisement contains material that demeans or disparages an individual or group of individuals. For purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals.

Id. See *Uptown*, 337 F.3d at 1281 (permitting reasonable consideration of advertiser willingness to use venues based upon other advertisements permitted on venues). See also *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 751–53 (1996) (upholding an F.C.C. regulation that permitted cable operators, who were otherwise obliged to accept programming on leased channels without editing, to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards") (noting that this standard tracked the tests for obscenity that had been adopted in *Miller v. California*, 413 U.S. 15, 24 (1973) ("(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.")); *Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) (acknowledging both that avoidance of controversy may trigger viewpoint discrimination concerns and that public entities have legitimate concerns to reflect community standards) (suggesting that "community standards of decency [may] have [a] place in the regulation of government property . . . [if they are] reduced to objective criteria set out in advance"); *But see United Food & Commercial Workers Union v. S.W. Ohio Regional Transit Auth.*, 163 F.3d 341, 361–62 (6th Cir. 1998) (criticizing a rule against controversial advertising by suggesting a reliance on community standards and hence viewpoints) (noting that policies that purport to avoid contention may enable viewpoint discrimination since an "opinion that conforms with prevailing community standards is unlikely to prove contentious." The court reasoned that a "viewpoint challenging the beliefs of a significant segment of the public . . . frequently will generate discord," and concluded that because "an ad's controversy often is inseparable from the viewpoint it conveys," policies that restrict access to advertising fora based on potential for controversy implicitly rely upon a viewpoint sensitive, and hence unlawful, criterion—prevailing community standards).

397. *Ridley*, 390 F.3d at 85 (holding that rejection of advertisements that promote illegal

adopt standards that permit rejection of advertising that proposes conduct that would be prohibited under other policies governing commercial activity on campus.³⁹⁸

If colleges and universities adopt content-based policies that restrict based on aesthetic or other value-related objectives, the policies should be specified as objectively as possible, the distinctions drawn should relate to values that the college or university fosters in its programs, and administrators should be provided guidance to the proper application of policy requirements.³⁹⁹

4. Substantive content limitations must require that administrators remain viewpoint neutral when making access decisions.

The distinctions drawn between acceptable advertising content and unacceptable content must not only be “reasonable in light of the purpose served by the forum,” but they must also be “viewpoint neutral.”⁴⁰⁰ The latitude given administrators to consider advertising content should never be so great as to allow them to reject otherwise proper advertisements based upon hostility toward the views that they express.⁴⁰¹

activity, particularly among children, is constitutional).

398. If the institution can ban conduct such as the sale of examination questions or term papers because it compromises institutional policies, reasons that support the ban should satisfy the rationality test for purposes of rejecting advertising that would interfere with university operations. *See supra* note 89 and accompanying text; *supra* Parts I.C, II.F and III.E.

399. *Ridley*, 390 F.3d at 93:

The MBTA’s stated purposes in running its advertising program include “maximiz[ing] revenue” by making money through advertisements while not reducing ridership through offensive advertisements, “maintaining a safe and welcoming environment” for its riders (including children), and avoiding its identification with the advertisements it displays. A guideline preventing demeaning or disparaging advertisements is likely to serve these purposes well and is consistent with the MBTA’s own ‘Courtesy Counts’ program. . . . In any event, for purposes of the acceptance or rejection of advertising, words like “demean” or “disparage” have reasonably clear meanings. We recognize that several courts have struck down, on vagueness grounds, school speech codes that incorporated somewhat similar terms. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183–84 (6th Cir.1995); *UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178–81 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866–67 (E.D. Mich. 1989). *Cf.* *UWM Post*, 774 F. Supp. at 1179–80 (holding that in the context of a university hate speech regulation, the word “demean” is not “unduly vague,” since it has a “reasonably clear” meaning: “to debase in dignity or stature.”).

Id. at 93–95.

400. *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

401. *Ridley*, 390 F.3d at 88–89 (holding that rejection of advertising advocating the legalization of marijuana on the basis that it might confuse teenagers about the legality of marijuana use embodied viewpoint discrimination in the form of attempting to shift the political balance and lacked a reasonable grounding in common experience, given the amount of anti-drug use advertising addressed to young people) (“Its judgments must be reasonable and it would not be reasonable to think that juveniles were exposed to no other information about drugs. Indeed, the MBTA has itself a long history of running advertisements stressing that drug use is illegal and that drug laws should be obeyed.”). *See supra*, notes 379–382 and accompanying text.

5. Procedural requirements for access to advertising venues should be crafted to assure prior review of advertisements pursuant to published guidelines and should provide for limited internal review of decisions.

College or university policies should allow selective access for individual speakers rather than general access for a class of speakers.⁴⁰² Colleges and universities should only allow access to their institution's advertising venues to advertisers who have sought permission to access the venues, whose advertisements have been reviewed and approved under regulations that identify permitted content in the requested advertising venue and that provide for administrative review of decisions applying the regulations.⁴⁰³

Colleges and universities should not skimp on their investment in policy creation and administration. The decision to permit advertising on college or university grounds, premises or websites, if poorly implemented, will result in forum by designation rather than a nonpublic forum, and colleges and universities may find that their own venues are open to disgruntled employees, activists of all sorts, and all manner of persons whose sense of good taste and decorum diverges from the example that the institution wishes to set.⁴⁰⁴

V. CONCLUSION: COLLEGES AND UNIVERSITIES HAVE SUBSTANTIAL AUTHORITY TO REGULATE COMMERCE AND EXPRESSIVE COMMERCIAL ACTIVITIES ON CAMPUS, BUT REGULATIONS OF EXPRESSIVE COMMERCIAL ACTIVITY MUST BE ASSEMBLED THOUGHTFULLY AND IMPLEMENTED INTELLIGENTLY.

At the very dawn of the Western university, governmental authorities empowered institutional officials to regulate commercial activities that are incidental to an educational institution's operations. For a host of practical, programmatic and financial reasons, control over commercial activity on campus continues to be a significant concern for all colleges and universities. With respect to the importance of controlling various forms of commercial activity within campus precincts, college or university administrators differ little from other government officials for whom regulation of commercial activity is a daily necessity.

The legal doctrines that the Court has developed to define the bounds of permissible governmental regulation of commercial activity reflect the Court's

402. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.").

403. This is a prudential recommendation. As noted above in note 349, such restrictions are not strictly required in the nonpublic forum setting. Nonetheless, procedural clarity will help to assure the consistent administration of substantive policy that corroborates the intent to operate a venue as a nonpublic forum. See *supra* notes 348–353 and accompanying text; *Ridley*, 390 F.3d at 74, 77 (noting the "comprehensive review procedure with four different layers of scrutiny[,] by Viacom, the MBTA Contract Administrator, the MBTA General Counsel, and the MBTA General Manager[,] before any advertisement could be rejected based on the guidelines") (noting that the combination of significant substantive and procedural limitations on access to a forum negates the inference of a public forum).

404. See *supra* notes 348–353 and accompanying text.

understanding that government must be able to adopt effective rules if it is to satisfy the demand for public order and for the efficient administration of government agencies and institutions. Despite their superficial heterogeneity, the many doctrines that comprise the Court's jurisprudence of commercial regulation share a common phylogeny and exhibit common patterns.

At its most general level, and reflecting the due process origin of its commercial activity jurisprudence, the Court has established two sets of requirements, one substantive and one procedural. The substantive component of the Court's doctrine focuses upon the need to establish that the regulator has acted to achieve a proper governmental end and has selected means that are appropriate to that end and that do not unnecessarily interfere with related activity. The procedural component of the Court's doctrine adopts the standpoint of the person who is to abide by the rules and seeks assurance that the rules are understandable, that those who must conform to them can obtain assistance in clarifying their meaning, that administrators are bound to apply the rules, and that their application of the rules can be tested through the appeal and review of their decisions.

Colleges and universities enjoy ample power to regulate commercial activities on campus, even activities that involve expression, so long as they exercise their power in a reflective fashion that accords due consideration to what purposes they truly need to achieve and to how those purposes can be gained without unnecessarily trammeling private commercial activity on campus and, in matters involving regulation of expressive activities, without ever giving in to the temptation to quash views deemed objectionable. The courts are likely to support sound regulations, so long as colleges and universities carry through with their efforts by investing in the administration of policies to assure that they are applied evenhandedly and consistently over time.

VI. A FINAL WORD OF CAUTION: AVOID THE TEMPTATION TO BELIEVE THAT THE CASES ACCORDING DEFERENCE TO COLLEGE AND UNIVERSITY ACADEMIC JUDGMENTS WILL EXTEND TO DECISIONS ABOUT THE SUBSTANTIALITY OF INSTITUTIONAL INTERESTS THAT ARE IMPLICATED BY COMMERCIAL ACTIVITIES ON CAMPUS.

The Court has often recognized that higher education plays a special role in society, a role that involves internal decision processes that are integral to acquiring critical judgment, enlarging knowledge and maintaining rigor.⁴⁰⁵

405. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (noting the Supreme Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits"); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231–34, 238–39 (2000) (Souter, J., concurring in the judgment) (noting that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. at 472 (1989); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. at 226 n.12 (1985); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–91 (1978); *Healy v. James*, 408 U.S. 169, 171 (1972); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 & 608 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Warren, C.J.); *Id.* at 263 (Frankfurter, J., concurring in result) (quoting *The Open Universities in South Africa* 10–12);

Nevertheless, however often the courts grant deference to their academic decisions, college and university administrators should not assume that their predictions concerning the consequences of allowing students to sell t-shirts that deprecate homecoming opponents, or to use bullhorns to hawk them in the student union, will receive similar accommodation. The deference shown to their academic decisions reflects a special exception to the usual prohibitions against content-based decision making, an exception that is unlikely to transfer to predictions involving the secondary effects that various commercial endeavors might have on institutional activities and interests.

The Court has developed sophisticated insights into the necessity of permitting content-based college and university decisions in academic matters. The training that encourages the wide-ranging inquiry that the doctrine of academic freedom is intended to protect also subjects that inquiry to critical examination under accepted academic standards.⁴⁰⁶ The Court recognizes that processes of adjudication are not “suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.’”⁴⁰⁷ The Court also recognizes that it has an obligation under the First Amendment to protect the processes of academic decision making from interference by litigants.⁴⁰⁸ This protection takes the form of a limited deference accorded to academic decision making:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.⁴⁰⁹

Wieman v. Updegraff, 344 U.S. 183, 195 (1952). See also Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 46–57 (2002) (providing additional background for The Open Universities in South Africa).

406. *Horowitz*, 435 U.S. at 91–92.

407. *Ewing*, 474 U.S. at 226:

[Academic] judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. (quoting *Horowitz*, 435 U.S. at 90–91).

408. The *Ewing* Court affirmed that the Court had a “responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment.’” *Ewing*, 474 U.S. at 226 (quoting *Keyishian*, 385 U.S. at 603).

409. *Ewing*, 474 U.S. at 225 (holding that university faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation) (citing *Horowitz*, 435 U.S. at 96, n.6 (Powell, J., concurring)); *Grutter*, 539 U.S. at 309 (noting the Court’s tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits); *Univ. of Pa. v.*

The Court recognizes that accepted academic norms restrict the exercise of professional judgment in ways that are inconsistent with arbitrary or discriminatory action.⁴¹⁰

Institutions hold students and faculty alike to standards of academic method and judgment, based upon the consensus among scholars in the relevant disciplines. It could be no other way. As was the case when Socrates forced Thrasymachus to defend his claim that “justice is nothing but the advantage of the stronger,” the very essence of knowledge involves assembly of evidence and presentation of argument that withstand scrutiny.⁴¹¹ It is no more sensible to suppose that individuals can freely determine what evidence and methods of proof will be acceptable than it is to assume that, in the fashion of Humpty-Dumpty, they can both communicate with others and determine for themselves the meaning of the words that they utter.⁴¹² Even those who challenge the foundational assumptions of their colleagues do so by invoking shared understandings.⁴¹³ The tension

E.E.O.C., 493 U.S. 182, 199 (1990) (affirming applicability of these principles in the context of judgments about the qualifications of faculty members); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) (holding that university decisions are entitled to presumption of legality and legitimate educational purpose, but if that presumption can be overcome by evidence of impropriety, the university must prove that it acted on a legitimate educational purpose).

410. The Court also recognizes that institutions are not immune from social or political pressures that might skew academic judgment. *See Gratz*, 539 U.S. 244 (holding that where admissions criteria expressly consider race, administrative convenience cannot justify failure to give individualized review to applicants); *United States v. Virginia*, 518 U.S. 515, 541–46 (1996) (holding that evidence that “adversative” pedagogy was ill suited for most women would not justify exclusion of all women); *Miss. Univ. For Women v. Hogan*, 458 U.S. 718, 725 (1982) (holding that if statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (holding that a segregated law school excluding substantial and significant segments of society is not substantially equal to that which the plaintiff would receive if admitted to the University of Texas Law School); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 633 (1948) (holding that states must provide legal education in conformity with the Equal Protection Clause); *Missouri v. Canada*, 305 U.S. 337, 351 (1938) (holding that a black law school applicant was entitled to admission to the University of Missouri law school in the absence “of other and proper provision for his legal training within the State”).

411. PLATO, *REPUBLIC*, 338c (Rouse, trans.).

412. *See* Lewis Carroll, *Through the Looking Glass*, *THE BEST OF LEWIS CARROLL* 238 (Castle Books 2001):

“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean, neither more nor less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

413. The Declaration of Independence illustrates this point. Jefferson framed his challenge to the authority of George III in ways that emphasized common ground between the British and the colonists in order to frame a sound argument that would demonstrate that George III had deprived the colonists of rights assured to all British subjects. The Declaration of Independence reiterated principles enshrined in the Magna Carta itself. Jefferson recorded that George III had assented to laws designed “For depriving us, in many cases, of the benefits of Trial by Jury.” *DECLARATION OF INDEPENDENCE* ¶ 20 (1776). That charge tracked the thirty-ninth clause of the Magna Carta, which provides that “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful

between encouraging freedom of inquiry or expression and constraining it with standards for acceptable proof, method, reasoning or judgment is intrinsic to the unique role of the college or university.

Teaching students the nuances of accepted processes of testing ideas provides the training in critical inquiry that is essential to formation of citizens. This process of critical examination also establishes and adjusts the academic norms themselves and minimizes the possibility that decisions informed by accepted academic norms themselves might embody arbitrary or prejudiced standards of decision making.⁴¹⁴

The rub, of course, is that the decisions that colleges and universities must make when estimating the consequences of various commercial activities, whether the sale of deprecatory t-shirts or the use of bullhorns to hawk them, will have adverse affects on institutional interests and are cut from wholly different cloth. Nothing in such decisions enforces academic rigor or advances the reach of human understanding. Rather, the choices that are presented to colleges and universities

judgment of his peers or by the law of the land." MAGNA CARTA cl. 39 (Eng. 1215). To be effective, a challenge to orthodoxy must be understood by adherents and it must be framed in ways that compel their assent, however unwillingly it is given.

414. The Court is well aware of the fact that the academic process involves both the testing of particular assertions and adjustments to the theories or information on which judgments are made:

The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, e.g., Brief of Amicus Curiae Nicolaas Bloembergen et al. at 9, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) ("Indeed, scientists do not assert that they know what is immutably 'true'-- they are committed to searching for new, temporary, theories to explain, as best they can, phenomena"); Brief of Amicus Curiae American Association for the Advancement of Science et al. at 7-8, *Daubert*, ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original)). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 509 U.S. at 589-90 (1993).

The Court understands that the adjustment of knowledge claims based upon academic processes is central to the justification for accepting certain forms of testimony as sufficiently reliable to present to a jury. Although the Court recognizes that similar processes apply in other academic disciplines, it clearly does not follow that all academic disciplines yield knowledge claims similar to those in science. *Id.* at 590 n.8. Nevertheless, it is sensible to suggest that the processes of scholarly debate reliably force a consensus that embodies more than mere subjective belief or unsupported speculation. The Court's understanding that the processes by which academic norms gain acceptance seems implicit in its repeated expressions of deference to the decisions guided by accepted academic norms. Acceptance implies a high degree of reliability and assures that the norms are relatively free of arbitrariness or prejudice.

embody the sorts of practical judgments that are made by fair- or airport-managers or school principals about the effects that permitting the sale of such goods or the use of such methods may have on the orderly functioning of their events, facilities, and institutions. In matters involving the regulation of commercial activities on campus, college and university authorities should not expect different treatment than their fellow public servants.

