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# HAWKERS, THIEVES AND LONELY PAMPHLETEERS: DISTRIBUTING PUBLICATIONS IN THE UNIVERSITY MARKETPLACE

ERIK FORDE UGLAND\*

## INTRODUCTION

At the University of Minnesota two years ago, the College Republicans organization was ordered to stop distributing fliers containing jokes that school officials thought might offend some women and homosexuals. In defense of the action, University Vice President Marvalene Hughes insisted: "This is not a free speech issue."<sup>1</sup> At Monmouth College in West Long Beach, New Jersey, Student Affairs Vice President Mary Anne Nagy said she "only [was] acting in the best interest of the school" when she removed 2,500 copies of a campus paper from distribution bins to prevent visiting parents from seeing an article about an assault on campus.<sup>2</sup> And at Dartmouth College, after copies of a conservative campus paper repeatedly had been stolen, College Spokesman Alex Huppe said the College considered the stolen papers to be litter and abandoned property, deserving of no more protection than "menus and free samples of soap."<sup>3</sup> Dean of Students Lee Pelton added that the problem was "a distribution issue, not a free speech issue."<sup>4</sup>

What Pelton, Hughes, Nagy and far too many other university administrators apparently do not understand is that distribution issues very often are free expression issues. No message is viable without some kind of distribution or amplification, which makes protecting the dissemination of ideas as important as protecting their creation. Too

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1. Free Speech: A Course the 'U' Should Consider Taking, *STAR TRIB.*, Sept. 21, 1993, at 12A.

2. The Education of Ideas, *STUDENT PRESS LAW CENTER REPORT*, Winter 1994-95, at 4; Hindsight is Always 20/20: Administrator Apologizes for Snatching Newspapers, *STUDENT PRESS LAW CENTER REPORT*, Winter 1994-95, at 9.

3. Good Enough to Steal: College Papers Are Stolen Across the Nation as Students Dispose of Words Rather Than Disprove Them, *STUDENT PRESS LAW CENTER REPORT*, Fall 1993, at 9.

4. Greg Miller, Bonfire of the Profanities: Campus Thefts Protest Press, *L.A. TIMES*, July 28, 1993, at A5.



often, that protection is denied by university officials who treat distribution and access as merely administrative, not constitutional, problems. As the United States Supreme Court consistently has recognized,<sup>5</sup> however, the distribution of publications is expressive activity and restrictions on distribution are subject to First Amendment limitations.<sup>6</sup> Unfortunately, these principles are not always apparent. They have become lost in a thicket of disjointed court decisions. This article attempts to make sense of those decisions and to offer an alternative approach. The article identifies and analyzes the most common practical and constitutional pitfalls that accompany university restrictions on the distribution of publications,<sup>7</sup> and urges that the best approach is one founded on educational principles rather than existing legal principles.

As the number of new publications expands, distribution problems at public universities are increasingly common. The explosion of desktop publishing technology has made it easy for individuals lacking access to more traditional media to create their own publications. These underground newspapers and "zines"<sup>8</sup> have become important and pervasive vehicles for fringe expression,<sup>9</sup> especially among college students who have the time, energy and computer access to produce them. Formal and informal student groups also are taking advantage of this technology to produce publications through which they can advance their causes and promote their activities. In addition to these smaller and more discrete publications, major alternative publications have emerged on some campuses and are competing directly with the established, university-supported papers. In fact, many of these publications began as more obscure "zines."<sup>10</sup>

5. See, e.g., *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2563 (1981); *Gillette v. United States*, 401 U.S. 437, 462, 91 S. Ct. 828, 842 (1971); *Martin v. Struthers*, 310 U.S. 141, 143, 60 S. Ct. 879, 880 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 111-12, 63 S. Ct. 870, 874 (1943); *Schneider v. New Jersey*, 308 U.S. 147, 160, 60 S. Ct. 146, 150 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 669 (1938).

6. Of course, the limitations imposed by the First Amendment only apply to officials at public colleges and universities. The First Amendment is almost never a barrier to restrictions on expressive activity on private college campuses by private college administrators. See *infra* note 181.

7. The term "publication" is defined broadly in this article; the term encompasses traditional newspapers and magazines, as well as fliers, newsletters, catalogs, coupon books, business cards and virtually anything else that contains words or pictures on a page.

8. A "zine" generally is a homemade publication produced on a personal computer by an individual writer/publisher. Zines typically are specialized publications that deal with either particular topics or particular viewpoints. See generally Kristin Tillotson, *Zine Scene: Anything-Goes Zines Give Specialty Publishing a Whole New Twist*, *STAR TRIB.*, April 20, 1995, at 1E.

9. See *Weird Reading Zines are Bright, Brash, Passionate and Different*, *S.F. CHRON.*, April 10, 1991, at Z1/6 (describing the content of dozens of zines); Jennifer Werner, *Magazines With an Edge*, *PHILADELPHIA INQUIRER*, Feb. 5, 1995, at K1 (noting that there are an estimated 20,000 to 50,000 homemade publications distributed in the United States).

10. See Pay Guy, *These Mags Began as Zines*, *U.S.A. TODAY*, Aug. 3, 1992, at B6.



In addition to student publications, there are scores of nonstudent or off-campus publishers who seek to distribute on campus. Some are producers of alternative publications in search of a diverse and educated audience. Other publishers are large local and national distributors of high-circulation papers, such as the *New York Times* and *USA Today*. Still others are non-campus organizations who seek to advance in part their social or political agenda through internally produced publications. Finally, on college campuses, like anywhere else, there always are industrious capitalists who advertise their products and services through printed pamphlets, coupon books and shoppers.

The publications that turn up on university campuses range from single-sheet fliers to full-color catalogs, and they are distributed by every conceivable means: hand-to-hand, newsracks, mailboxes, vending machines, bookstores and bulletin boards. In light of all these variables and the number and diversity of publishers seeking access to university campuses, administrators should anticipate and prepare for conflicts, both between publishers and the university, and among the publishers themselves. What types of publications should be distributed on campus? Can a university require prior review of publications as a condition of distribution? Can the university give preferential access to certain publications? Can the university completely ban the distribution of publications? In what ways can a university properly regulate the time, place and manner of distribution? What response is warranted when publications are stolen by other students? These are just some of the questions that publishers should consider and that administrators must be prepared to answer.

In order to answer these questions, administrators need to consider some more fundamental issues, such as the nature of public universities, the goals of public education and the importance of free expression in the educational process. Administrators additionally must recognize and balance the interests of all relevant parties—those of the university, the students and the taxpaying public. Part I of this Article addresses these fundamental questions and attempts to identify the important parties and their interests. It also contains a discussion of First Amendment theory and suggests that providing liberal access to publications distributors through a “marketplace” approach is consistent with the interests of all affected parties. Part II contains an analysis of the constitutional and practical problems created by various restrictions on distribution. It attempts to characterize the likely judicial treatment of restrictions on distribution, and also contrasts the courts’ approaches with the more permissive “marketplace” approach. This section should serve as a checklist for administrators dealing with these issues and also should give publishers some sense of the scope of their rights and the limitations of existing court precedents. Part III, the final section of this Article, contains a discussion of an important distribution problem that recently has infected campuses across the country: newspaper theft. Although newspaper theft generally is not a constitutional



issue,<sup>11</sup> it is a free expression issue that both distributors and administrators may encounter.

# I. ANALYSIS OF INTERESTS: THE FALSE DICHOTOMY BETWEEN OPEN EXPRESSION AND EFFECTIVE PUBLIC EDUCATION

Before analyzing the specific practical and constitutional problems that accompany restrictions on the distribution of publications, it is important for university officials to try to find a unifying justification for whatever approach they take. Administrators are also educators, and consequently need to make policy decisions that take into account the objectives of public education and the value of free expression. School policies regarding the distribution of publications and free expression generally are as much educational policies as they are administrative. Also, while a policy may be rational and efficient, it may nevertheless be inappropriate in light of the school's educational mission.

In addition to recognizing the distinction between a sound administrative policy and a sound educational policy, it is also important for school officials to differentiate between what is legally permissible and what is educationally necessary. It is a mistake to devise a distribution or free expression policy by relying too heavily on court precedents. First, the court decisions in this area, as the next section should make clear, do not yield a simple and uniform set of guidelines. The decisions are inconsistent, and they only address distribution problems indirectly. There are no Supreme Court cases that have dealt with the distribution of publications at public universities, so any approach founded on court cases would be incomplete at best. Second, and more importantly, what the Supreme Court permits and what students and taxpayers deserve are two different things. It is true that, despite the First Amendment, public university officials have considerable discretion in running their campuses. As the Eighth Circuit Court of Appeals noted:

We do hold that a college has the inherent power to promulgate rules and regulations; that it has the power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.<sup>12</sup>

Having concluded that a university policy is jurisdictionally and constitutionally permissible, however, only begins the policymaking proc-

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11. This is true unless, of course, public university officials are the ones stealing. See *supra* note 2.

12. *Esteban v. Central Missouri St. C.*, 415 F.2d 1077, 1089 (8th Cir. 1969), cert. denied, 398 U.S. 965, 90 S. Ct. 2169 (1970). See also *Greer v. Spock*, 424 U.S. 828, 836, 96 S. Ct. 1211, 1217 (1976) (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 . . .").



ess. The administrator must go a step farther and find an approach that advances the university's educational obligations in addition to satisfying constitutional requirements.

The most important question for university administrators to ask in each situation is not whether they have the legal authority as educators and property owners to prohibit or restrict the distribution of certain publications. The fundamental question is whether it would undermine the university's basic educational mission to permit such distribution.

#### A. *The Public University and Free Expression*

America's public universities are essential institutions. In addition to their educative role, they also serve as important public resources by providing access to their facilities and by serving as centers for research and innovation. Public universities also serve many other functions, both instrumental and symbolic. For example, public universities can become crucial centers of pluralism and integration in communities otherwise burdened by physical and cultural separation. In addition, public universities often are bastions of unorthodox thinking and even radicalism in communities whose political dialogue is mired in the middle. Public universities also are valuable venues for public expression and protest. The public university is, in the words of the Supreme Court, "peculiarly the marketplace of ideas."<sup>13</sup>

These characteristics suggest that as public institutions, universities should provide the greatest possible latitude for both students and nonstudents to use the university campus as a venue for expressive activity and, ideally, as a forum for dialogue. Public universities are symbols of openness and equal opportunity and should accommodate as much speech by as many people as possible. As some university officials likely would point out, however, public universities are charged first and foremost with educating students, a task that must precede all other concerns. While this certainly is true, administrators must not make the faulty assumption that a liberal distribution policy is inconsistent with their educational obligations. Indeed, a public education requires the broadest possible access to information.

A public university education is a unique learning experience. At a public university, students are expected to teach themselves to a much greater degree than they are at many private colleges. The learning process tends to be more dependent on individual initiative and self-discovery. This is slightly less the case at some private colleges where the process tends to be more value-laden and inculcative. Students at public universities expect to be around different types of people and expect to have substantial interaction with others, including those with whom they disagree. This engagement and confrontation with others is an essential component in the process of public education. Even the

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13. *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 2346 (1972).



Supreme Court has acknowledged the inseparability of open expression and learning. In *Tinker v. Des Moines Independent Community School District*,<sup>14</sup> for example, the Supreme Court noted that "wide exposure to that robust exchange of ideas" is an "important part of the educational process" and should be nurtured.<sup>15</sup> As a result, a policy that affords broad access to diverse sources of information is essential to fulfilling the promises of a public education. The marketplace theory described below is one approach that achieves those objectives.

#### B. The Marketplace Approach to Publications Distribution

The marketplace approach is based largely on the "marketplace of ideas" theory, which goes back at least as far as John Milton's *Areopagitica*, in which Milton argued that licensing and censorship of the press were barriers to the discovery of truth.<sup>16</sup> The phrase "marketplace of ideas" was first expressed by Justice Oliver Wendell Holmes in his dissenting opinion in *Abrams v. United States*.<sup>17</sup> Although he used it as a simple metaphor, it has evolved into a ubiquitous rationale for free expression over the past 87 years.

The marketplace approach described here starts from the premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>18</sup> The core of the marketplace of ideas concept is the notion that truth more easily is discovered when ideas are allowed to be freely expressed. In this sense, the marketplace approach has an instrumental function. That is, where people are allowed to contribute freely to public discourse without government mediation, public policy is enriched and more abuses are exposed. This approach does not require, however, that everyone have equal access to all communicative facilities, nor that every idea be given equal exposure in the marketplace. What it does mean is that people who have the desire and the means to express themselves will not be denied the opportunity to do so by the government without a compelling justification.

While the marketplace theory has remained prominent in First Amendment jurisprudence for decades, it is by no means universally

14. 393 U.S. 503, 89 S. Ct. 733 (1969).

15. *Id.* at 512, 89 S. Ct. at 739-40. See also *Hall v. Board of Comm'rs of Mobile County*, 681 F.2d 965, 967 (5th Cir. 1982) ("[F]ree expression is itself a vital part of the educational process . . ."); *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) ("[I]nterstudent communication does not interfere with what the school teaches; it enriches the school environment for the students . . .").

16. JOHN MILTON, *Areopagitica*, in MILTON'S PROSE WRITINGS (1958) 181 ("[W]ho ever knew Truth put to the worse, in a free and open encounter?"). See also JOHN STUART MILL, *ON LIBERTY* (1972).

17. 250 U.S. 616, 630, 40 S. Ct. 17, 22 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

18. *Associated Press v. United States*, 326 U.S. 1, 20, 65 S. Ct. 1416, 1424-25 (1945).



accepted. The most common criticism of the marketplace theory is that it does not take account of preexisting social and economic inequities. "Market failure" theorists point out, for example, that while every person has the means to express himself or herself on some level, only certain groups have access to the mass media. As a result, mainstream voices dominate the marketplace, while others are marginalized into virtual silence.<sup>19</sup> Whatever validity these criticisms have in the national communications marketplace, they are much less salient in the context of a public university. It is much easier for someone, whether or not a student, to counteract someone else's expression when it takes place within the confines of a university campus. Also, much of the market failure critiques focus on macro-level problems such as concentrated media ownership. A public university, however, is a much more discrete, educated and intimate community where one can be heard without access to a major media outlet.<sup>20</sup> While the marketplace theory may be limited as a universal First Amendment paradigm, it provides an ideal framework for dealing with free expression problems on public university campuses.

In the university context, the marketplace approach has an instrumental function in that it can strengthen public and campus policy, and can foster students' personal and intellectual growth. Having access to "diverse and antagonistic" sources of information is essential to learning.<sup>21</sup> Students need to have their values, beliefs and knowledge routinely questioned, which, in a true marketplace environment, is certain to occur. Perhaps even more important than being exposed to diverse sources of information and ideas is being permitted to freely express oneself in the marketplace.<sup>22</sup> The Supreme Court has recognized:

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.<sup>23</sup>

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19. See, e.g., BEN BAGDIKIAN, *THE MEDIA MONOPOLY* (4th ed. 1992) (detailing how ownership of the nation's media is becoming increasingly concentrated and how this has a sanitizing effect on content); Jerome Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (identifying the same inequities and suggesting remedies, such as a public right of reply).

20. See *supra* notes 8-10.

21. See *supra* note 15.

22. Many authors have recognized the essential value of individual self-expression as a tool for identity creation and self-fulfillment. See, e.g., ERIC BARENDT, *FREEDOM OF SPEECH* 14-20 (1985) (referring to individual self-fulfillment as one of the essential purposes of free expression); LUCAS A. POWE, *THE FOURTH ESTATE AND THE CONSTITUTION* 238-41 (1991).

23. *Procunier v. Martinez*, 416 U.S. 396, 427, 94 S. Ct. 1800, 1818 (1974) (Marshall, J., concurring), overruled by *Thornburg v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989).



By implementing broad free expression and distribution policies on university campuses, university officials benefit their students in these processes.

Under the marketplace approach, it is not the obligation of the university to create a "halcyon educational setting"<sup>24</sup> where students are shielded from the rest of the world. This may be the *modus operandi* of some private colleges that have a more focused curriculum and educational approach; public universities, however, must remain public.<sup>25</sup> Public universities should be forums for "uninhibited, robust and wide open"<sup>26</sup> debate, even to the extent of permitting speech on campus that some find offensive. Those who adopt a true marketplace approach must have faith in the importance of conflict as a source of growth, and in the general value of tolerance.<sup>27</sup> They also must have faith in the "more speech" remedy.<sup>28</sup> There is very little that can be expressed in words that cannot effectively be rebutted by more speech, especially at a public university, where, again, being heard is not as difficult as it is in the larger marketplace. A liberal distribution policy ensures that these channels for rebuttal remain open.

Finally, adoption of the marketplace approach is consistent with a public university's need to serve as a resource for taxpaying citizens as well as for the students and faculty who regularly inhabit the campus. Under a marketplace approach, access questions are often irrelevant because each speaker's message is valued equally and each speaker is given equal access to most areas of campus. The only exceptions are for classrooms, libraries, administrative offices and other areas to which access must be limited in order for the university to carry out its primary educational responsibilities. Most other areas of campus, however, must be made available for the dissemination of publications, without regard to the identity of the publisher or the distributor, and without regard to the content of the publication.<sup>29</sup>

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24. *Glover v. Cole*, 762 F.2d 1197, 1202 (4th Cir. 1985).

25. Of course, the university can and should create places on campus where students can study, and certainly the university can and should ensure that classrooms and offices are not intruded on or otherwise disrupted. Nevertheless, it is counterproductive for a university to try to turn its grounds into a placid sanctuary.

26. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

27. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 201 (1986) ("Under the general tolerance perspective, the key concern . . . is that we give those wishing to confront us with unpopular speech activity a serious and meaningful opportunity to do so.").

28. See *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649 (1927) (Brandeis, J., concurring), overruled by *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

29. Exceptions might apply for publications that are not protected by the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73, 62 S. Ct. 766, 769-70 (1942); *Brandenburg v. Ohio*, 395 U.S. 444, 447 S. Ct. 1827, 1829 (1969) (holding that speech that incites violence or imminent lawless action is not protected); *Miller v.*



The precise application of the marketplace approach is discussed in the next section, which attempts to outline the most important First Amendment questions that administrators must answer before implementing or enforcing restrictions on publications distribution.

## II. RESTRICTIONS ON DISTRIBUTION: CONSTITUTIONAL REQUIREMENTS AND MARKETPLACE CONSIDERATIONS

In order to determine the precise scope of distribution rights on public university campuses, several questions must be answered, each having its own body of precedent and each, ultimately, affecting the extent of the distributor's rights. In order to assess the constitutionality of restrictions on publications distribution, there are three primary questions that must be answered:

- (1) What is the nature of the forum in which the publication is being distributed?
- (2) What is the nature of the content of the publication?
- (3) When, where and by what means is the publication being distributed?

Each of these questions, as well as several important peripheral questions, will be examined below. Alternative approaches to these questions will also be suggested, consistent with the adoption of a marketplace approach.

### A. Nature of the Forum

One of the most pervasive analytical constructs in First Amendment jurisprudence is the "public forum doctrine," or "forum analysis."<sup>30</sup> In addition to analyzing the content of people's expression, courts also will consider where the speech occurred, assuming that speech restrictions are inherently more reasonable in some places than in others. While several early Supreme Court decisions gave consideration to the location of speech,<sup>31</sup> it was not until 1983 that the Court attempted to devise a framework for analyzing the context of speech.<sup>32</sup>

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California, 413 U.S. 15, 93 S. Ct. 2607 (1973) (finding exception for publications that are legally obscene); *Schenck v. United States*, 249 U.S. 47, 39 S. Ct. 247 (1919) (finding exception for publications that pose imminent threats to national or domestic security).

30. The Supreme Court explained in *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448 (1984), that forum analysis was adopted "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."

31. The Supreme Court first considered location in assessing the constitutionality of speech restrictions in *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16, 59 S. Ct. 954, 964 (1939) (holding that public streets and parks are open to the public for expressive activity because they have been used for those purposes "time out of mind").

32. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49, 103 S. Ct. 948, 954-57 (1983).



Unfortunately, public forum analysis has grown increasingly muddled over the past decade. Lower court applications of the doctrine have been inconsistent and have revealed the doctrine's weaknesses. This is especially true in cases involving speech restrictions at public secondary and post-secondary schools. In these cases, application of the public forum doctrine has produced different results in similar cases. Courts handling these cases, moreover, have taken different approaches when reconciling the public forum analysis with the analysis required under *Tinker v. Des Moines Independent Community School District*,<sup>33</sup> the Supreme Court decision which governs the boundaries of student expression in public schools. As a result, two key questions must be answered: First, how is forum analysis typically applied, and how should it be applied in the public university setting, if at all? Second, what is the applicability of the *Tinker* standard in public university cases, and how does its application comport or conflict with forum analysis?

### 1. Basic Contours of Forum Analysis

The Supreme Court has identified three different types of forums which afford speakers varying levels of First Amendment protection. The first of these are "traditional" or "quintessential" public forums, including public parks, streets, sidewalks and other places that "time out of mind [have] . . . been used for purposes of . . . communicating thoughts between citizens, and discussing public questions."<sup>34</sup> In traditional public forums, speakers have the highest level of First Amendment protection. Content-based restrictions<sup>35</sup> on speech in public forums are subject to strict judicial scrutiny and are constitutional only if they serve a compelling government interest and are narrowly drawn to achieve that end.<sup>36</sup> The government may impose content-neutral regulations affecting the time, place and manner of expression in a public forum; however, the state must show that those regulations are narrowly

33. 393 U.S. 503, 89 S. Ct. 733 (1969). In *Tinker*, the Supreme Court held that public school students could not be prevented from wearing black armbands as symbolic protests against the Vietnam War, absent evidence that such speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513, 89 S. Ct. at 740.

34. *Hague*, 307 U.S. at 515, 59 S. Ct. at 964. See also *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S. Ct. 2495, 2500 (1988) (holding that residential streets are a public forum); *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702 (1983) (holding that sidewalks around United States Supreme Court building are public forums). But see *United States v. Kokinda*, 497 U.S. 720, 110 S. Ct. 3115 (1990) (holding that sidewalk around postal office was not a public forum because it was created solely to serve as a passageway for postal workers).

35. Content-based restrictions target either the subject-matter of speech (e.g., no distribution of publications discussing prayer in school) or the viewpoint of speech (e.g., no distribution of publications supporting or opposing prayer in school).

36. See *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S. Ct. 2286, 2290-91 (1980).



tailored to serve a significant government interest and that they leave open ample alternative channels for expression.<sup>37</sup>

In addition to establishing traditional or quintessential public forums, a state also may create a "limited" or "semi-" public forum, access to which may be restricted to certain groups<sup>38</sup> or to discussion of certain topics.<sup>39</sup> A limited public forum is created only where a state "intentionally open[s] a nontraditional forum for public discourse;"<sup>40</sup> it cannot be created by government inaction.<sup>41</sup> As a result, when deciding whether a limited public forum has been created, courts look to the policy and practice of the government to determine its intent.<sup>42</sup> In creating a limited public forum, the government may limit access to certain people, issues or modes of expression. Once the government has opened a forum for communication, however, it is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.<sup>43</sup> Where a limited public forum has been created, expression in that forum is given the same First Amendment protection as expression in a public forum.<sup>44</sup> The state is not obligated to indefinitely maintain the open status of a forum; nevertheless, "as long as it does so it is bound by the same standards as apply in a traditional public forum."<sup>45</sup>

The third type of forum identified by the Supreme Court is the nonpublic forum. A nonpublic forum is government property that neither traditionally has been used for public discourse, nor specifically has been designated for such purposes.<sup>46</sup> Examples of public properties the courts have found to be nonpublic forums include: racetracks,<sup>47</sup>

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37. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989).

38. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981) (holding that access to school facilities was limited to student groups).

39. See, e.g., *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S. Ct. 421 (1976) (limiting discussion to school board business).

40. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449 (1985).

41. *Id.*

42. *Id.* at 802-03, 105 S. Ct. at 3449. Note that while a limited public forum cannot be created by government inaction, this does not mean that one only can be established through formal written decree. Intent may be inferred from government actions or inaction.

43. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S. Ct. 2286, 2289-90 (1972).

44. See *Cornelius*, 473 U.S. at 800, 105 S. Ct. at 3448. Thus, content-based restrictions in limited public forums, just as in traditional public forums, are unconstitutional unless they serve a compelling government interest and are narrowly tailored to achieve that objective; content-neutral regulations affecting the time, place and manner of distribution are unconstitutional unless they are narrowly tailored to serve a substantial government interest and leave open ample alternative channels for expression.

45. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955 (1983).

46. *Id.*

47. See *International Soc'y for Krishna Consciousness v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).



airports,<sup>48</sup> prisons,<sup>49</sup> military bases<sup>50</sup> and postal offices.<sup>51</sup> In nonpublic forums, expression is given substantially less First Amendment protection than in public or limited public forums; nevertheless, regulation therein still must be reasonable and not based on the speaker's viewpoint.<sup>52</sup> In determining whether a regulation is reasonable, courts examine whether the expression in question is consistent with the purposes for which the forum was created.<sup>53</sup> Some courts also consider the actual use of the property.<sup>54</sup>

## 2. Divergent Approaches to Public Forum Analysis In the Public University Setting

Three key questions arise in the application of the forum analysis to the public school or university setting. First, is forum analysis appropriate under the circumstances? Second, and more generally, how should forum analysis be applied? Courts have suggested different versions of forum analysis, some providing more speech protection than others. Third, is the "substantial disruption" test from *Tinker*<sup>55</sup> applicable, and if so, can its application be reconciled with forum analysis?

The Supreme Court addressed the public nature of university campuses more than 20 years ago in *Healy v. James*.<sup>56</sup> The Healy court recognized that "[T]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'"<sup>57</sup> A decade later, the court was more specific: "[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum."<sup>58</sup> Since then, however, the Court has not addressed directly the nature of public universities as public forums. Many lower courts have done so, however, with inconsistent results. Additionally, there have been some Supreme Court decisions, and scores of lower court decisions, dealing with free expression in public secondary schools, some of which are instructive with respect to public universities.

One of the most important questions in these cases is whether the public forum doctrine is applicable. The federal courts have split over

48. See *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992).

49. See *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 97 S. Ct. 2532 (1977).

50. See *Greer v. Spock*, 424 U.S. 828, 96 S. Ct. 1211 (1976).

51. See *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 101 S. Ct. 2676 (1981), *cert. denied*, 413 U.S. 917, 101 S. Ct. 3150 (1981).

52. *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451.

53. See *Perry Educ. Ass'n*, 460 U.S. at 50-51, 103 S. Ct. at 958.

54. See *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993).

55. *Tinker v. Des Moines Indep. Comm'y Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969). See *supra* note 33 for a discussion of the substantial disruption test.

56. 408 U.S. 169, 180, 92 S. Ct. 2338, 2345 (1972).

57. *Id.* at 180, 92 S. Ct. at 2346.

58. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5, 102 S. Ct. 269, 274 n.5 (1981).



this issue. Some courts presume that the nature of the forum is a necessary threshold inquiry whenever the speech in question takes place on public property. Other courts, however, argue that forum analysis is essentially an access question, and that when the speech in question is by students, faculty or other people who have the right to be on that property, forum analysis is irrelevant.<sup>59</sup> These courts generally hold that the constitutionality of restrictions on speech by students should be assessed solely by application of the *Tinker* substantial disruption test<sup>60</sup> or, as some other courts have held, by application of the traditional paradigms applicable to restrictions on speech in non-school contexts.<sup>61</sup> In short, these courts suggest that forum analysis is misplaced with respect to student speech,<sup>62</sup> and only is applicable with respect to speech by outside entities.<sup>63</sup>

Courts applying these alternative approaches to forum analysis have argued that, at least in the high school context, the *Tinker* standard and forum analysis are mutually exclusive tests: the former is to be applied to student expression and the latter to nonstudent expression. In *Slotterback v. Interboro School District*,<sup>64</sup> for example, the United States District Court for the Eastern District of Pennsylvania held that "[F]orum analysis is irrelevant when neither access to public property nor state action is at issue."<sup>65</sup> In most cases involving public universities, courts have relied on forum analysis and have avoided *Tinker*. The problem with this is that once a court has determined that a particular part of a school or university campus is a nonpublic forum, then university restrictions need only be reasonable and not based on viewpoint.<sup>66</sup> As a result, regulations that are subject-matter based or

59. See, e.g., *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 290 (E.D. Pa. 1991).

60. See *infra* notes 95-99 and accompanying text for a discussion of *Tinker*.

61. These courts apply, for example, strict scrutiny review to content-based restrictions and intermediate scrutiny review to content-neutral time, place and manner restrictions.

62. "Student speech" has been defined as students' personal speech; that is, speech that is voluntary and is not dictated by another individual or group. See *Board of Educ. of Westside Comm'y Sch. v. Mergens*, 496 U.S. 226, 288 n.22, 110 S. Ct. 2356, 2392 n.22 (1990) (Stevens, J., dissenting); *Katz v. McAulay*, 438 F.2d 1058, 1061 (2d Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 930 (1972).

63. See *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988) (refusing to apply forum analysis); *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189, 1193 (D. Colo. 1989) (noting that the Supreme Court in *Tinker* did not discuss the forum status of public schools).

64. 766 F. Supp. 280 (E.D. Pa. 1991).

65. *Slotterback*, 766 F. Supp. at 290. Note that the "state action" phrase as used by the court does not refer to state-imposed restraints of speech; it refers to government-sponsored speech or speech which otherwise would carry the explicit or implicit imprimatur of the school. Such speech can be regulated more freely by administrators. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988).

66. See *Cornelius*, 473 U.S. at 806, 103 S. Ct. at 3451. For an example of an unconstitutionally viewpoint-based regulation, see *San Diego Comm. Against Registration and the Draft (CARD) v. Grossmont Union High Sch. Dist.*, 790 F.2d 1471 (9th Cir. 1986) (striking down state-funded newspaper's policy of accepting military ads but not anti-



speaker-based are not subject to heightened judicial scrutiny, even where they restrict speech that in no way disrupts the school environment. This simply does not afford speech the level of protection it deserves. Courts too frequently fixate on the location of speech and permit subject-matter-based restrictions that would be unconstitutional under either the *Tinker* standard or the standards applicable outside the school or university.

Some courts have sought to remedy this problem by applying a more exacting version of the public forum doctrine. In cases involving speech in nonpublic forums, for example, the government generally only need show that its regulation is viewpoint-neutral and reasonable.<sup>67</sup> The Fourth Circuit recently held, however, that the reasonableness standard in public forum cases should be more of a "reasonableness with teeth" standard.<sup>68</sup> Specifically, the Court held that even though the speech in question occurred in a nonpublic forum (an airport), it was not enough for the government to show that its regulation was rationally related to a legitimate government objective. More demanding scrutiny was necessary because the regulation affected First Amendment activity "that is entitled to special solicitude even in [a] non-public forum."<sup>69</sup>

This begs the question: would such a standard support the imposition of subject-matter-based and speaker-based regulations, even though they are not expressly prohibited in nonpublic forums? In other words, under the more exacting "reasonableness with teeth" standard, could a plaintiff successfully argue that subject-matter- and speaker-based regulations are inherently unreasonable? This is a question that has yet to be resolved. Indeed, most courts have not adopted the "reasonableness with teeth" standard. Nevertheless, the Fourth Circuit's approach illustrates the confusion and disenchantment over the boundaries of public forum analysis and suggests that perhaps the public forum doctrine must either continue to evolve or be abandoned in favor of a more coherent approach. The *Tinker* "substantial disruption" test is a better approach in that it focuses on whether the speech in question actually undermines the educational process. Unfortunately, it also falls short of a true "marketplace" standard because it does not provide adequate protection to speech by nonstudents.

### 3. Forum Analysis Applied

Having outlined some of the basic problems with forum analysis and its intersection with other constitutional standards, it is important to

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military ads). For an example of an "unreasonable" regulation, see *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993).

67. See *Cornelius*, 473 U.S. at 806, 103 S. Ct. at 3451.

68. *Multimedia Publishing*, 991 F.2d 154 (striking down airport regulation that banned all newsracks, even though airport was a nonpublic forum, on grounds that the regulation was not "reasonable" in light of the purpose and actual operation of the airport).

69. *Id.* at 159.



look at how these standards have been applied, or how they likely would be applied, in the public university setting.

One of the first Supreme Court cases involving the forum status of public universities was *Widmar v. Vincent*,<sup>70</sup> decided in 1981. In a footnote, the *Widmar* court held that public universities are different from traditional public forums such as streets or parks in that:

[A] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.<sup>71</sup>

This quote from the Court is instructive in several respects. First, it implies that forum analysis is appropriate in this context, even though the Court's decision precedes *Perry* by two years. Second, it seems to suggest that universities generally are not presumed to be traditional public forums. Third, it suggests that access to certain areas of campus can be completely closed, even to students. And finally, it establishes a principle that other courts have supported, which is that a public university legitimately may draw distinctions between students and nonstudents where speech rights on campus are concerned. These principles, for the most part, still characterize the current judicial approach.

Most cases involving restrictions on expression or distribution at public universities have been resolved in part through application of the public forum doctrine.<sup>72</sup> The nature of these applications has varied with the results, but most courts deciding these cases generally hold that forum analysis is appropriate, even where the restrictions involved only affect student speech.<sup>73</sup>

While some courts have suggested that parts of public universities might be considered traditional public forums,<sup>74</sup> most courts have held,

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70. 454 U.S. 263, 102 S. Ct. 269 (1981).

71. *Id.* at 268 n.5, 102 S. Ct. at 273 n.5.

72. There are some rare exceptions. See, e.g., *American Future Sys. Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 863 (3d Cir. 1985), *cert. denied*, 473 U.S. 911, 105 S. Ct. 3537 (1985) (eschewing forum analysis altogether after concluding that university dormitories were neither public nor nonpublic forums).

73. Similarly, the courts generally do not apply *Tinker* in the university context, even where the speech involved is solely the personal speech of students.

74. See, e.g., *Hays County Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993) (holding that all areas "outdoors, on grounds owned or controlled by the University" are public forums). See also *Bacon v. Bradley-Bourbonnais High Sch. Dist.*, 707 F. Supp. 1005 (C.D. Ill. 1989) (holding that sidewalk surrounding public high school is traditional public forum). *Bacon* suggests that there are at least some areas around campus that courts might consider traditional public forums. Generally, however, as one moves inward from the perimeter of the school grounds, the public nature of the property decreases.



or have intimated, that public universities are public only for students and for others who are permitted or required to be on the campus.<sup>75</sup>

There seems to be little doubt that public universities are at least limited public forums for use by students. As the Supreme Court noted in *Tinker*, the dedication of public property to serve specific purposes, such as educating students, "does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property."<sup>76</sup> Furthermore, as one court succinctly expressed in another high school case, "[G]overnment intent to create public secondary schools as limited public fora, during school hours, for the first amendment personal speech of the students who attend those schools, is intrinsic to the dedication of those schools."<sup>77</sup> Although *Tinker* and *Slotterback* are both high school cases, these principles presumably would be even more salient in the college context where students generally are given greater freedom from university control.<sup>78</sup>

While university campuses often are held to be limited public forums for student expression, this designation almost certainly does not apply to all areas of campus.<sup>79</sup> Clearly, outdoor areas around campus, such as plazas, sidewalks and other open and accessible areas, would be considered public, at least for students. At the other extreme, classrooms and offices likely would be considered nonpublic forums, even for students. There are other campus areas, such as lobbies, hallways and other common areas indoors whose forum status is more difficult to determine. These areas do not typically come to mind when one thinks of traditional public forums; nevertheless, the areas share many of the same characteristics as sidewalks and plazas. Furthermore, if one subscribes to the *Slotterback* court's holding that protection of student speech is intrinsic to the creation of schools, then these areas must be

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75. See, e.g., *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1209 (D. Utah 1986) (holding that "the university campus is available to students [and student groups] as a public forum"); *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985) (holding that campus is limited public forum for students). Note also the Supreme Court's important qualification in *Widmar*, that the campus of a public university, at least for its students, possesses many characteristics of a public forum. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 102 S. Ct. 269, 273 n.5 (1981) (emphasis added).

76. *Tinker*, 393 U.S. at 513 n.6, 89 S. Ct. at 740 n.6 (emphasis added).

77. *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 293 (E.D. Pa. 1991) (emphasis added).

78. See *Katz v. McAulay*, 438 F.2d 1058, 1061 n.5 (2d Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 930 (1972) ("[W]e proceed from the premise that a state may decide that the appropriate discipline which requires the restriction of certain communicative actions may differ in the cases of university students from that called for in the cases of younger secondary school pupils in relatively similar circumstances.").

79. See *United States Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685 (1981) (noting that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 102 S. Ct. 269, 273 n.5 (1981) (noting that public university need not open up all of its facilities for public use).



included as limited public forums. Note, however, that expression in these areas would still be subject to time, place and manner restrictions.<sup>80</sup>

While courts generally hold that common areas of campus are limited public forums for student speech, there is some disagreement about what constitutes "student speech." There are some cases that suggest that student speech should be limited to a student's own "personal" speech and should not extend to the distribution of publications produced by others. Other cases, however, including at least one university case, have rejected this distinction. In *Hedges v. Wacounda*,<sup>81</sup> the Seventh Circuit criticized a high school restriction that applied only to "nonstudent prepared materials."<sup>82</sup> The court held, "[I]t is unreasonable, contrary to the school's educational mission, and downright arbitrary to prohibit students from distributing material that is prepared by others but that the distributor wishes to adopt as his or her own."<sup>83</sup> Similarly, the Fifth Circuit has suggested that if university students were involved with either the production or distribution of a publication, it should be treated as student expression.<sup>84</sup> As a result, in most cases, any restriction on speech that is distributed by a student likely will be considered student speech.

While it is true that most public universities are not presumed to be anything more than limited public forums for student speech, this does not mean that nonstudents or nonstudent groups are prohibited access to public universities for publications distribution. Nonstudents and nonstudent groups can gain access in one of two ways. First, the university might by policy or practice create limited public forums on campus which either are dedicated specifically to nonstudent speech or whose boundaries of access encompass nonstudent speech. For example, where a university authorizes or persistently acquiesces to the distribution of some nonstudent publications, the university might have created a limited public forum for these types of publications, access to which may not be denied to similar nonstudent publications. In these situations, the scope of access to the new forum is limited by the scope of access previously authorized or permitted. For example, if the university authorizes the distribution of a publication advocating abortion rights, it still might be able to restrict the distribution of commercial fliers for a local night club. The two types of publications are different and, arguably, the scope of the forum created by the university only

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80. Because of concerns over congestion and safety and because of the proximity of these areas to classrooms and offices, time, place and manner restrictions are much more likely to be upheld in these areas.

81. 9 F.3d 1295 (7th Cir. 1993).

82. *Id.* at 1301.

83. *Id.*

84. *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993).



covers political publications. Even if this argument works,<sup>85</sup> the university then could not deny access to other political publications,<sup>86</sup> and it certainly could not deny access to a pro-life political newspaper.<sup>87</sup> If university officials were stubborn, they could deny access to all non-student publications and in a sense thereby close the forum;<sup>88</sup> as long as the forum is open, however, they could not give differential access to similar publications.<sup>89</sup>

Aside from creating limited public forums, university officials also may be required to permit access to nonstudent publications where university restrictions on these publications are found to be "unreasonable." It was mentioned previously that restrictions on expression in nonpublic forums must be reasonable and viewpoint-neutral. In determining whether a restriction is reasonable, courts look at the compatibility of the speech with the forum's intended use. Courts typically have applied the reasonableness standard in a way that is highly deferential to the government, considering only the relationship between the speech and the purposes of the forum. More recent court decisions have recognized the need for a less literal approach (i.e., a "reasonableness with teeth" approach). The Supreme Court, for example, pointed out in *Board of Airport Commissioners v. Jews for Jesus*<sup>90</sup> that "much non-disruptive speech — such as the wearing of a T-shirt or button that contains a political message — may not be 'airport-related,' but is still protected speech even in a nonpublic forum."<sup>91</sup> Taking this one step farther, the Fourth Circuit recently held, "[W]ith respect to a nonpublic forum's intended use, the proof is in the pudding. We look not simply at the government's assertions of purpose, but also at the facility's actual operation."<sup>92</sup> The Fourth Circuit highlighted Justice O'Connor's concurring opinion in *International Society*

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85. See *infra* notes 45-53 and accompanying text for a discussion of the reasonableness of restrictions in nonpublic forums.

86. See *Widmar*, 454 U.S. at 271, 102 S. Ct. at 275 (holding that once a university had opened its classrooms for use by registered student groups, all registered student groups had to be given equal access to those areas). See also *Gay Student Services v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984), cert. denied, 471 U.S. 1001, 105 S. Ct. 1860 (1985).

87. This would be a viewpoint-based restriction expressly prohibited by the First Amendment. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955 (1983).

88. See *id.* at 46, 103 S. Ct. at 955-56.

89. See, e.g., *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993) (striking down a university regulation restricting distribution of publications containing advertising where university permitted distribution of *The New York Times*, *USA Today* and a university-supported newspaper, all of which contained advertisements).

90. 482 U.S. 569, 107 S. Ct. 2568 (1987).

91. *Id.* at 576, 107 S. Ct. at 2573.

92. See *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993).



for *Krishna Consciousness v. Lee*,<sup>93</sup> in which she stated that "compatibility" is not the proper focus; instead, courts should consider whether permitting speech would be incompatible, or "might actually interfere" with the functions of the property.<sup>94</sup>

Where a court applies this more exacting "reasonableness with teeth" standard, almost any regulation could be struck down, depending on the court's aggressiveness. For example, it is conceivable that a university's denial of access to nonstudent publications could be considered unreasonable since the distribution of those publications would not interfere with the functioning of the university, especially in light of the fact that the university may still impose time, place and manner restrictions on the distribution of such publications. It is possible that continued application of this more exacting reasonableness requirement could open the door for publications seeking access to public universities. While no court has embraced a pure marketplace approach, it is encouraging that some courts are at least beginning to make the proper inquiry. Specifically, some courts, such as the Fourth Circuit, are beginning to ask not whether the speech in question advances the purposes of the forum, but whether its expression would undermine the purposes of the forum. This is the key inquiry under the marketplace approach.

#### 4. Forum Analysis v. The Marketplace Approach

As the preceding sections illustrate, public forum analysis is riddled with inconsistencies and provides minimal guidance to administrators and potential distributors of publications. Most of this confusion could be eliminated, however, if courts and/or university officials adopted a marketplace approach to publications distribution. Under a marketplace approach, forum analysis is unnecessary. There is no need to determine who is entitled to be on the property because every citizen has a right to be on most parts of the campus. There also is no need to consider the type or content of the publications that seek to distribute because all publications are valued equally. Furthermore, there is no reason to try to characterize and classify the forum because public universities are presumed to be appropriate forums for the dissemination of all of publications.

While no court has adopted a marketplace approach to publications distribution, the "substantial disruption" test from *Tinker*<sup>95</sup> comes close, although it too has been watered down by lower court applications. In *Tinker*, the Supreme Court held that student expression in a public high school could be restricted only where school officials could

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93. 112 S. Ct. 2711 (1992).

94. *Id.* at 2713-14 (O'Connor, J., concurring).

95. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 740 (1969).



demonstrate that the speech was substantially disruptive of educational activities or intruded on the rights of others. The Court added that school administrators must be able to show that their restrictions of expression are motivated by more than just "a desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>96</sup> School officials must demonstrate factual evidence of a disruption. It is not enough that the expression in question "could" or "might" cause a disruption.<sup>97</sup>

This is a demanding standard that at first glance seems to embody the marketplace approach by focusing on whether the speech in question actually undermines the school's educational activities.<sup>98</sup> As currently applied by the courts, however, the *Tinker* standard falls short of the level of protection required under a true marketplace approach. Most importantly, courts have interpreted the phrase "substantial disruption" to encompass not only physical disruption, but also speech that is so politically or emotionally charged that it creates disruption because of its effect on others. Under a marketplace approach, the offensiveness or volatility of speech almost never is a sufficient justification for its restriction.<sup>99</sup> The other problem with the *Tinker* standard in its current form is that it generally only applies to student expression. As a result, it leaves the door open to greater restrictions on nonstudent speech. Finally, perhaps the greatest weakness of the *Tinker* standard is that courts have been reluctant to apply it in the university context; it is still almost exclusively a secondary school precedent.

While the substantial disruption test of *Tinker* would be a better standard in the college context than the current judicial approach, it needs to be strengthened before it can be considered a true marketplace standard. The best approach would be to presume that public universities are open for the dissemination of publications, regardless of the type of publication involved, the content of the publication and the identity of the distributor or publisher. The only restrictions that would be legitimate under a marketplace approach consequently would be reasonable regulations governing the time, place and manner of distribution.

#### B. *Content of the Publication*

If it is determined that relevant parts of a university campus are public or limited public forums for expressive activity, all those who

96. *Id.* at 509, 89 S. Ct. at 738.

97. *Id.* at 508, 89 S. Ct. at 737.

98. See *supra* text accompanying note 12.

99. As mentioned earlier, however, exceptions would apply for speech that could be restricted outside the university, such as speech that incites "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 1829 (1969), or that speech contained "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769 (1942). Government restrictions based on these precedents, however, are extremely rare.



rightfully have access to the forum are given full First Amendment protection. What this means, first and foremost, is that content-based restrictions on speech will be subject to strict judicial scrutiny.<sup>100</sup> Such regulations will only be upheld if they are narrowly tailored to serve a compelling government interest.<sup>101</sup> As a practical matter, courts rarely uphold such laws.<sup>102</sup>

Content-based restrictions come in one of two forms: they either are viewpoint-based<sup>103</sup> or subject-matter-based.<sup>104</sup> It has been argued that only viewpoint-based laws should be subject to strict scrutiny;<sup>105</sup> at the other extreme, it has been contended that the distinction between content-based and content-neutral laws should be eliminated altogether.<sup>106</sup> The Court's current approach, however, provides that both types of content-based regulations (viewpoint and subject matter) are subject to strict scrutiny.<sup>107</sup> Regulations can be classified as content-based in one of two ways, according to Professor Laurence Tribe: (1) if, on their face, they target particular ideas or information, or (2) they are neutral on their face, but are adopted for a content-based purpose.<sup>108</sup>

There is an indefinite number of potential content-based regulations that a university might seek to impose on distributors of publications. The most obvious are regulations that, for example, prohibit the dissemination of information regarding abortion, affirmative action or the Gulf War, all of which likely would be unconstitutional because they prohibit discussion of particular subjects. More subtle regulations that are neutral on their face but that are selectively applied are also likely to be unconstitutional. For example, a regulation prohibiting the dissemination of newspapers containing advertisements would be uncon-

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100. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 2290 (1972) ("[A]bove 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.").

101. *Id.* at 95-96, 92 S. Ct. at 2290-91.

102. There are exceptions, but usually only where some other fundamental right, such as voting, is involved. See *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992) (upholding a law that prohibited the solicitation of votes and the dissemination of campaign materials within 100 feet of a polling place).

103. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286 (1972) (law prohibited picketing in certain area, but exempted labor picketing).

104. See, e.g., *Simon & Schuster v. New York Crime Victims*, 502 U.S. 105, 112 S. Ct. 501 (1991) (law requiring the seizure of profits of books written by authors seeking to profit from their crimes).

105. See generally JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 34-35 (1993).

106. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 *STAN. L. REV.* 113 (1981).

107. The Court regularly has struck down laws as content-based, even when the laws were not based on viewpoint. See, e.g., *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157 (1988); *Simon & Schuster v. New York Crime Victims*, 502 U.S. 105, 112 S. Ct. 501 (1991); *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992).

108. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 794 (2d. ed. 1988).



stitutional if applied against the *New York Times* but not against a local daily paper or the university's student paper.

Other regulations that target particular publications for special treatment (not necessarily because of their content) or that otherwise apply dissimilar treatment to similar publications are also subject to strict scrutiny. Under forum analysis, similar publications cannot be denied access to the same forum, unless the university can prove that the restricted publication is somehow different from the non-restricted publication(s) and that it is neither the policy nor the practice of the university to grant access to those types of publications. For example, a university could not permit the distribution of *Newsweek* but restrict the distribution of *Cosmopolitan* unless it could show that only news publications are permitted on campus. Nor could the university permit a university-supported newspaper to distribute on campus but not permit a newspaper produced by some outside entity to do the same. Again, for these types of regulations to survive, the university would have to rely on forum analysis and prove that the forum in question was created only to serve these types of publications. If this is not the case, however, these regulations are unconstitutional because they apply dissimilar treatment to legally similar publications. In other words, the regulations force particular publications or types of publications to bear special burdens.<sup>109</sup>

While most content-based and speaker-based restrictions are unconstitutional, there are circumstances in which they might be upheld. First, the university might be able to demonstrate a compelling government interest to justify content- or speaker-based regulation. This, however, is unlikely.<sup>110</sup> Second, there are certain categories of speech that are afforded less First Amendment protection, even against content-based restrictions. For example, speech that is legally obscene,<sup>111</sup> contains "fighting words",<sup>112</sup> or is "likely to incite imminent lawless action"<sup>113</sup> is speech that is not protected by the First Amendment. In addition, commercial speech, while still protected expression, is subject to greater government regulation. Regulations targeting commercial publications are probably the most common content-based regulations in this area, and they warrant some elaboration.

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109. See, e.g., *Grosjean v. Amer. Press Co.*, 297 U.S. 233, 56 S. Ct. 444 (1936) (striking down a tax law that applied a special tax to newspapers of a certain size); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S. Ct. 1365 (1983) (striking down state "ink" tax that was applied differently based on the size of the publication); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722 (1987) (striking down sales tax that gave preferential treatment to certain types of publications).

110. See *supra* note 102.

111. See *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973).

112. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766 (1942).

113. See *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 1829 (1969).



### 1. Commercial Speech and Commercial Solicitation

University officials have greater flexibility in restricting commercial speech. Commercial speech can loosely be defined as speech that does no more than propose a commercial transaction.<sup>114</sup> Publications are difficult to characterize as either commercial or political (non-commercial) because they often contain both commercial and political messages. However, it is settled that where political and commercial speech are "inextricably intertwined," the speech will be given the same protections as purely political speech.<sup>115</sup>

Thus, most publications that sell ads merely to finance the publication of their non-commercial messages would not be subject to the less protective standards for commercial speech. However, publications that consist entirely of advertisements, such as shoppers or coupon books or advertisements reproduced on fliers or in pamphlets, would be given less protection. The Supreme Court has also made clear that commercial speech will not receive greater First Amendment protection merely because it contains some political speech.<sup>116</sup> As a result, the purveyor of an otherwise purely commercial publication will not receive greater First Amendment protection by adding one or two token political messages. Conversely, publications cannot be characterized as commercial merely because they are sold rather than given away.<sup>117</sup>

In 1980, the Supreme Court established a test for assessing the constitutionality of restrictions on commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>118</sup> the Court held that in order for commercial speech to be protected, it must concern lawful activity and must not be misleading. If these criteria are met, the government must also show that its interest in restricting the speech is substantial, that the restriction directly advances its asserted interest and that the restriction is no more extensive than necessary to serve that interest.<sup>119</sup>

Blanket prohibitions on the distribution of commercial speech likely are not constitutional under *Central Hudson*. First, while it does not receive the same level of protection as political speech, commercial speech is protected by the First Amendment and "cannot be banned because of an unsubstantiated belief that its impact is detrimental."<sup>120</sup>

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114. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S. Ct. 2523, 2558 (1973).

115. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796, 108 S. Ct. 2667, 2677 (1988).

116. See *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 474-75, 109 S. Ct. 3028, 3031-32 (1992).

117. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2563 (1981).

118. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980).

119. *Id.* at 566, 100 S. Ct. at 2351.

120. *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 92 n.6, 97 S. Ct. 1614, 1618 n.6 (1977).



Second, the Supreme Court has held that citizens have a right to receive information,<sup>121</sup> and that this right is especially important for students.<sup>122</sup> Thus, the First Amendment protection afforded commercial speech must be outweighed by the state's asserted interests in order for restrictions on commercial speech to survive. For instance, in *Board of Trustees of State University of New York v. Fox*,<sup>123</sup> the Supreme Court held that a public university's interests were substantial enough to prohibit the door-to-door sale of housewares in university dormitories. In *Fox*, two state interests were implicated by the plaintiff's distribution: the right of the university to control the use of its property and the right/obligation of the university to secure a peaceful and studious environment for students living in the dormitories.<sup>124</sup> It is doubtful, however, that *Fox* could be expanded to prohibit the passive distribution of noncommercial publications in campus dormitories, which is obviously less intrusive than is face-to-face commercial solicitation. In addition, *Fox* would not be decisive with respect to restrictions on distribution in more public areas of campus where the university's interests as a property owner are less compelling.

While purely commercial publications are given less First Amendment protection, school officials must still demonstrate a substantial interest in restricting them, which is not always easy. It is difficult to conceive of a government interest that would justify restricting the distribution of commercial publications in public or limited public areas of campus. Some have argued that the university has an interest in protecting students from harassment and fraud.<sup>125</sup> Although this may be true, prohibiting the distribution of commercial publications is an ineffective, or at least overreaching, remedy. Commercial speech is not inherently fraudulent, as some government officials seem to believe, and there is no reason to think that the distribution of such publications is any more harassing than the distribution of political publications. Furthermore, it is an insult to students' intelligence to suggest that they are less capable than school officials of identifying fraudulent publications. Concerns over harassment and fraud can, and should, be addressed through regulations prohibiting harassment and fraud.

Another common rationale for restricting commercial publications is that such regulations are necessary to prevent the university grounds from being inundated with commercial publications distributors.<sup>126</sup> These types of crowd control arguments, however, are easily addressed through

121. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8, 106 S. Ct. 903, 907 (1986).

122. *Board of Educ. v. Pico*, 457 U.S. 853, 868, 102 S. Ct. 2799, 2808-09 (1982) (Brennan, J., plurality opinion).

123. 492 U.S. 469, 109 S. Ct. 3028 (1989).

124. *Id.* at 472, 109 S. Ct. at 3030.

125. See, e.g., *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985).

126. See, e.g., *Texas Review Soc'y v. Cunningham*, 659 F. Supp. 1239 (W.D. Tex. 1987).



content- and speaker-neutral time, place and manner regulations. Administratively, it may be convenient to target distributors of commercial publications in order to reduce traffic on campus, but convenience alone cannot support these kinds of content- and speaker-based distinctions.

Some courts may be sympathetic to the university's concerns over the dissemination of commercial publications. In most cases, however, the restrictions will likely be struck down unless the distribution is coupled with some other behavior, or where the distribution takes place in less public areas of campus, such as dormitories, where the university's interests are heightened. Determined school officials are more likely to succeed in enforcing restrictions on commercial publications by arguing that these are not the types of publications included within the university's *limited* public forums. In other words, if one could show that the areas of campus in question were never intended to accommodate commercial publications and that the university has never treated those areas as being open to those types of publications, the regulations might be upheld. An even better tactic, however, would be to adopt the marketplace approach, which recognizes the value of such publications, respects the intelligence of students and permits the distribution of all publications, regardless of their content or character.

## 2. Content-Based Regulations and The Marketplace Approach

It probably goes without saying that content-based regulations are particularly contemptible under the marketplace approach. The marketplace approach is committed to the notion that all publications, regardless of their content, have value and, subject only to reasonable time, place and manner restrictions, should be freely distributed on public university campuses. This applies equally to commercial publications. Commercial publications have value to students for several reasons. First, they are vehicles for the transmission of commercial information, which students need as consumers. Second, commercial publications are often sources of important social, cultural, and political messages, even though their primary objective may be commercial. Also, by permitting the distribution of commercial publications on campus, university administrators are fulfilling the university's obligation to the public to serve as a forum for all expression. As an added bonus, administrators need not agonize over how to characterize particular messages because all publications are treated equally under a marketplace approach. Administrators' arbitrary assessments of the character, genre or value of speech generally are not helpful under the marketplace approach, and indeed they are often antithetical to it.

In summary, any regulations that make distinctions based on the subject matter or viewpoint of a publication, or that apply differential treatment to publications, are inconsistent with the marketplace approach. Furthermore, because forum distinctions are not relevant under



the marketplace approach, content-based and speaker-based restrictions are not justifiable even in areas that courts might consider nonpublic forums. The only regulations that are consistent with the marketplace approach are content-neutral and speaker-neutral regulations directed at the time, place, and manner of distribution. These restrictions are discussed in more detail in the next section.

### C. Time, Place and Manner of Distribution

Despite the fact that a particular publication is entitled to First Amendment protection and is distributed in a public forum, the university may nevertheless impose reasonable time, place and manner restrictions on its distribution.<sup>127</sup> Courts have acknowledged that university officials have the right to control the use of their property and may impose housekeeping regulations, even where those regulations indirectly affect students' speech, provided the regulations do not target speech.<sup>128</sup> Such regulations must also be narrowly tailored to serve a substantial government interest and must leave open ample alternative channels of communication.<sup>129</sup>

Time, place and manner regulations (TPM's) are given greater deference by courts because their ostensible purpose is not to single out particular ideas, content or speakers for disparate treatment. In other words, any restriction on speech imposed by these regulations is incidental to the government's legitimate objectives. At the same time, however, while some regulations are facially neutral, they have a substantial effect on particular speakers or groups of speakers. For example, regulations requiring that all publications be distributed in certain areas of campus may have the effect of a total ban if either the area is not highly populated or is segregated from the distributor's target audience. All of this suggests that from the standpoint of publications distributors, TPM's should not be taken lightly; TPM's can be as prohibitory as content-based or speaker-based regulations while at the same time being less vulnerable to First Amendment challenge.

Among the most common types of TPM's in this context are: (1) regulations that either prohibit the installation of newsracks or restrict their placement; (2) regulations that establish a licensing or prior review system for distribution of publications; (3) regulations that restrict "hawking" and other direct solicitation; and (4) regulations that restrict publications for the ostensible purpose of preventing litter. Each of these will be discussed in turn.

#### 1. Newsracks

The Supreme Court has held that the distribution of literature is protected by the First Amendment.<sup>130</sup> This principle has been applied

127. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989).

128. See *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968).

129. See *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753.

130. *Lovell v. Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 669 (1938).



equally to the distribution of newspapers via newsracks.<sup>131</sup> Blanket prohibitions on the installation of vending machines or distribution boxes on public university property likely would be unconstitutional. It is unlikely that university officials could demonstrate a sufficiently substantial interest to justify such a rule.<sup>132</sup> If university officials could show that newsrack distribution was "incompatible with the normal activity of a particular place," the regulation might be constitutional.<sup>133</sup> This, however, is unlikely to occur in areas of campus that are public or limited public forums. These areas are by their very nature appropriate locations for the dissemination of information. Furthermore, even in those areas that are nonpublic forums, a complete ban may be unconstitutional if the regulation poses too great a burden on speech<sup>134</sup> or if the regulation is unreasonable in light of the ways in which the forum has been used.<sup>135</sup>

Regulations affecting the placement of newsracks are much more likely to be constitutional than complete bans.<sup>136</sup> For example, regulations that prohibit "structures" from being left on public lawns,<sup>137</sup> or that prohibit the placement of newsracks in areas that would pose a threat to public safety,<sup>138</sup> are not uncommon. These types of regulations are typically upheld, provided they do not burden "substantially more speech than is necessary to further the government's legitimate interests,"<sup>139</sup> and provided they produce significant gains in safety and aesthetics.<sup>140</sup> Of course, these regulations might not be constitutional if they singled out certain publications because of their content or applied different treatment to similar types of publications.

In *City of Cincinnati v. Discovery Network*,<sup>141</sup> the Supreme Court struck down a municipal regulation that prohibited the distribution of "commercial handbills" on public property, which was used as the basis for ordering the removal of certain newsracks in the city. Even though the city had a substantial interest in safety and aesthetics, it could not seek to weed out the number of newsracks by targeting lower-level speech. The Court held that the content-based distinctions were

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131. *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984).

132. See, e.g., *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107 (D.R.I. 1987) (holding that government's concerns over aesthetics were insufficient to justify a prohibition of newsracks).

133. *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S. Ct. 2294, 2303 (1972).

134. See *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (striking down city ordinance prohibiting all lawn signs on grounds that city's asserted interest in aesthetics was insufficient to justify restricting an entire medium).

135. See *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993).

136. See, e.g., *Jacobsen v. Crivaro*, 851 F.2d 1067 (8th Cir. 1988).

137. *Students Against Apartheid Coalition v. O'Neil*, 838 F.2d 735 (4th Cir. 1988).

138. *Washington Post Co. v. Turner*, 708 F. Supp. 405 (D.D.C. 1989).

139. *Ward v. Rock Against Racism*, 491 U.S. 791, 799, 109 S. Ct. 2746, 2758 (1989).

140. *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1509 (1993).

141. 113 S. Ct. 1505 (1993).



not justified and did not constitute a reasonable fit between the harm (aesthetics and safety) and the remedy (ban on commercial handbills) where both commercial and non-commercial publications contributed equally to the problem.<sup>142</sup>

For university administrators, this suggests that they may not target commercial publishers, as they are wont to do, unless the commercial publishers are more responsible for the harm sought to be remedied. Again, however, the university might be able to make such distinctions if it can show that the forum in question is not a public or limited public forum for commercial publications.

## 2. Licensing and Prior Review

Regulations that establish a distribution licensing system or any sort of prior review are constitutionally suspect, although not necessarily unconstitutional. In *Lakewood v. Plain Dealer Publishing Co.*,<sup>143</sup> the Supreme Court held unconstitutional a licensing scheme that gave a particular government official "unfettered discretion" to decide which vendors may place their newspaper vending machines on public property. The Court held that while the state has an interest in directing the placement of structures on public property, any regulations must establish precise criteria on which applications are to be reviewed.<sup>144</sup> Otherwise, the Court held, it would be impossible for a rejected distributor to prove that a denial of permission was based on the content or viewpoint of the publication.<sup>145</sup>

Any system of prior review or licensing must be content- and viewpoint-neutral in addition to containing precise criteria for the imposition of any pre-publication requirements. These criteria must be even more precise than what is required under the Due Process Clause for regulations authorizing subsequent punishments.<sup>146</sup> Examples of predistribution regulations that have been upheld by the courts with respect to the placement of newsracks include the payment of licensing fees,<sup>147</sup>

142. *Id.* at 1507. See also *Forsythe County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992).

143. 486 U.S. 750, 108 S. Ct. 2138 (1988).

144. *Id.* at 772, 108 S. Ct. at 2152.

145. *Id.*

146. See *Burch v. Barker*, 861 F.2d 1149, 1155-56 (9th Cir. 1988). The Burch court explained, "[A] system of prior restraints is in many ways more inhibiting than a system of subsequent punishments: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." *Id.* at 1155 (citing THOMAS EMERSON, *THE SYSTEM OF FREE EXPRESSION* 506 (1970)).

147. *Gannett Satellite Info. Network v. Metropolitan Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984). Note that a licensing fee may only be used to offset costs incurred by the state in providing access to its public rights of way, e.g., maintenance costs. See *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991).



requirements that vending machine owners purchase liability insurance,<sup>148</sup> and regulations requiring that newsracks meet certain appearance standards.<sup>149</sup> Similar regulations aimed at publications being hand-distributed would be much more difficult to enforce. The government's interest is clearly heightened when permanent or semi-permanent structures are being used.<sup>150</sup>

What is clearly prohibited is a system of prior review in which administrators retain discretion to prohibit, restrict, edit or in any way modify the content of the publication being reviewed. This is a classic system of prior restraint that is at the apex of the First Amendment's prohibitions.<sup>151</sup> The presumption against the constitutionality of prior restraints applies in public schools and universities as it does elsewhere.<sup>152</sup> Also, it does not matter that a university's practice is not to interfere with the content of the publications it reviews; as long as the university retains that authority, it likely will be unconstitutional. As the Supreme Court has pointed out, "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."<sup>153</sup> Similarly, the fact that a university claims that a system of prior review is being instituted solely to identify publications containing unprotected speech (such as obscenity) does not save it from the presumption against prior restraints; such a system makes protected expression "vulnerable to gravely damaging yet barely visible encroachments."<sup>154</sup>

Finally, the Supreme Court generally has found unconstitutional any system in which the government serves as an unwanted intermediary between a speaker and a listener. For example, the Court in *Lamont v. Postmaster General*,<sup>155</sup> struck down a federal law that allowed the post office to withhold and eventually destroy "communist political propaganda" unless the addressee affirmatively requested that the information be delivered.

Given all of these precedents, it is likely that any system of prior review will be unconstitutional where it gives university officials the

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148. *Jacobson v. Harris*, 869 F.2d 1172 (8th Cir. 1989).

149. *Gold Coast Publications v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994).

150. *Packer Corp. v. Utah*, 285 U.S. 105, 52 S. Ct. 2140-41, (1932).

151. See *New York Times v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141 (1971) (per curiam) (holding that prior restraints are presumptively unconstitutional). The Supreme Court has suggested that only three types of publications may warrant the imposition of a prior restraint: publications that are obscene, incite violence or jeopardize national security. See *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931). The Court also has upheld prior restraints in cases involving Sixth Amendment fair trial rights. See *Cable News Network v. Noriega*, 498 U.S. 976, 111 S. Ct. 451 (1990).

152. See, e.g., *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988); *Ysleta Fed'n of Teachers v. Ysleta Indep. Sch. Dist.*, 720 F.2d 1429 (5th Cir. 1983); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970).

153. *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 742 (1940).

154. *Antonelli v. Hammond*, 308 F. Supp. 1329, 1335 (D. Mass. 1970) (citing *Bantam Books v. Sullivan*, 372 U.S. 58, 66, 83 S. Ct. 631, 637 (1963)).

155. 381 U.S. 301, 85 S. Ct. 1493 (1965).



authority to interfere with the content of publications, or to restrict the distribution of those publications based on their content. The only systems of prior review that might be permissible are those that focus solely on the means of distribution, such as those dealing with the appearance, placement and maintenance of newsracks.

### 3. Hawking and Commercial Solicitation

While the Supreme Court has acknowledged that soliciting funds—at least for political purposes—falls within the core protections of the First Amendment,<sup>156</sup> many lower courts recognize distinctions between distribution and solicitation. The Eleventh Circuit has held that a state can restrict commercial solicitation on public property even where it allows distribution, because solicitation and distribution are distinct activities.<sup>157</sup> This distinction has been upheld in the public university context as well. In *Glover v. Cole*,<sup>158</sup> the Fourth Circuit held that even though a public university was a limited public forum, the state's interest in protecting students from harassment and fraud was sufficient to justify a ban on commercial or political solicitation by nonstudent groups. At least one federal district court also has upheld limitations on commercial solicitation on a public university campus.<sup>159</sup>

Whatever limitations might be imposed on commercial solicitation should not have much impact on the distribution of publications. The Supreme Court has recognized that publications do not lose full First Amendment protection merely because they are sold rather than given away.<sup>160</sup> Nevertheless, some universities have placed limitations on "hawking" — that is, the face-to-face sale of publications. University officials have argued, and some courts have agreed, that hawking poses dangers of disruption, congestion, harassment and duress.<sup>161</sup> Whether these concerns are substantial enough to warrant restrictions on hawking on public university campuses is not clear. However, one federal district court has upheld prohibitions on hawking in campus areas reserved for tables for student organizations.<sup>162</sup>

It is difficult to see how the Supreme Court's statement in *Heffron* that publications are protected whether sold or given away can be reconciled with a restriction on hawking, which by definition is simply the sale of publications. If the Supreme Court's statement in *Heffron* means what it says, then can the hawker be distinguished from the

156. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S. Ct. 826, 833 (1978).

157. *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986).

158. 762 F.2d 1197 (4th Cir. 1985).

159. *Texas Review Soc'y v. Cunningham*, 659 F. Supp. 1239 (W.D. Tex. 1987).

160. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2563 (1981).

161. See *Hays Co. Guardian v. Supple*, 969 F.2d 111, 119-21 (5th Cir. 1992).

162. *Texas Review Soc'y v. Cunningham*, 659 F. Supp. 1239 (W.D. Tex. 1987).



"lonely pamphleteer"<sup>163</sup> who traditionally has been afforded substantial protection?<sup>164</sup> Is it possible to reconcile this distinction with the Supreme Court's statement in *Discovery Network* that distinctions between different types of speech are unconstitutional where each type of speech contributes equally to the harm sought to be remedied?<sup>165</sup> This is a question that courts may have to address in the future. For now there is at least some judicial authority to support certain university restrictions on hawking.

#### 4. Litter and Other Considerations

One of the most common justifications for TPM restrictions on the distribution of publications is the prevention of litter. While this is a pervasive justification, it is routinely rejected by courts. In fact, one of the first TPM cases decided by the Supreme Court involved a city ordinance that banned leafletting on city streets, ostensibly to prevent litter.<sup>166</sup> The Court struck down the ordinance because the government's objectives could be achieved through less restrictive means. As the Court succinctly stated, "There are obvious methods of preventing litter. Amongst these is the punishment of those who actually throw papers on the street."<sup>167</sup> Given this unequivocal precedent, university administrators will find it difficult to sustain regulations that restrict distribution for the purpose of preventing litter. More generally, university administrators will have to show that all of their TPM regulations are sufficiently precise so as not to burden too much speech. As the Court noted in *Frisby*, a regulation "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."<sup>168</sup>

Under the marketplace approach, the primary concerns with respect to TPM's are that they do not inordinately burden speech and that they are not used as fronts to disguise more nefarious objectives. The marketplace approach is not concerned with the imposition of TPM's; it is only concerned with their precision.

### III. NEWSPAPER THEFT

To those who publish and distribute publications on university campuses, one of the most maddening problems to have emerged over the past few years is newspaper theft. With increasing frequency, university students (and occasionally faculty and administrators) are addressing their concerns over content by resorting to the most desperate form of

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163. *Branzburg v. Hayes*, 408 U.S. 665, 704, 92 S. Ct. 2646, 2668 (1972).

164. See *Lovel v. Griffin*, 303 U.S. 444, 58 S. Ct. 666 (1938).

165. *Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1509 (1993).

166. *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146 (1939).

167. *Id.* at 162, 60 S. Ct. at 151.

168. *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 2503 (1988).



censorship. While newspaper theft is not a new problem, especially to those who distribute free publications, it seems to have escalated recently on college campuses around the country. The Student Press Law Center (SPLC) in Washington, D.C., which monitors censorship in colleges and high schools, reported that from 1992 to 1994, about 140,000 papers were stolen at 36 different universities.<sup>169</sup> Newspaper theft has become so common that editors often may have more to fear from angry readers than from university administrators.

Newspaper thieves are a diverse group. They come from every conceivable social, political and ideological faction, and they attack the entire spectrum of publications. For example:

- At the University of Maryland and Dartmouth College, papers were stolen by groups protesting racism;<sup>170</sup>
- At Southeastern Louisiana University and Trenton State University, papers were stolen in response to student government and election stories;<sup>171</sup>
- At the University of Florida, papers were stolen to protest coverage of conflicts among the campus College Republicans;<sup>172</sup>
- At Penn State University, papers were burned to protest their allegedly sexist and homophobic content;<sup>173</sup> and
- At the University of Central Arkansas, papers were hoarded to prevent people from learning the name of a student accused of rape.<sup>174</sup>

These are just a smattering of the issues that have motivated recent newspaper thefts.

The problem of newspaper theft began to receive some national attention three years ago during the confirmation hearings of Sheldon Hackney, President Clinton's nominee to head the National Endowment for the Humanities. Hackney, then President of the University of Pennsylvania, was under attack for his feeble response to a massive newspaper theft at Penn. After a group of students calling themselves "The Black Community" stole nearly 14,000 issues of the *Daily Pennsylvanian* to protest its allegedly racist content, Hackney issued a hollow statement

169. Richard Daigle, *Analysis: Collegiate Censorship by Theft*, ATLANTA CONST., March 6, 1994, at F1. Obviously, this is only the number reported to the SPLC. There likely were many more thefts that were not brought to the SPLC's attention.

170. *Censorship by Theft Vexes Colleges*, CHI. TRIB., June 3, 1993, at A20.

171. *Id.*

172. *Good Enough to Steal: College Papers are Stolen Across the Nation as Students Dispose of Words Rather Than Disprove Them*, STUDENT PRESS LAW CENTER REPORT, Fall 1993, at 4.

173. Mary Jordan, *Students Who Set Off Penn Newspaper Censorship Uproun Won't Be Punished*, WASH. POST, Sept. 15, 1993, at A12.

174. *Id.*



in which he merely noted, "two important university values, diversity and open expression, appear to be in conflict."<sup>175</sup> Students, faculty and others outside the University vigorously protested Hackney's nonchalance.<sup>176</sup> Hackney later said in an interview that he "did not condone" the newspaper theft, but he did not offer any public condemnation of the act either, nor did he impose any punishment on those involved in the theft.<sup>177</sup> In fact, one year after the incident, the participants declared victory and reflected on the theft as some sort of watershed act of heroism. Kaplan Mobry, one of the organizers of the theft, called the operation "social cosmetic surgery," insisting that the "the internal substance of the actions has produced an immediate impact that will carry Penn into the year 2000."<sup>178</sup>

To anyone concerned with free expression, Mobry's braggadocio should stand out as a particularly callous celebration of censorship. Whatever the validity of his group's underlying claims, their methods reflect a contempt for dialogue and a disturbing indifference to anything but the immediate attention they received. While Mobry and other newspaper thieves often profess some noble objective to justify their actions, newspaper theft at its core is nothing more than a prior restraint of the press. It is the press counterpart to the "heckler's veto."<sup>179</sup> Unfortunately, while government-imposed or -sanctioned prior restraints are presumptively unconstitutional under the First Amendment,<sup>180</sup> there is no constitutional recourse when the culprits are private persons. The First Amendment cannot be invoked in the absence of state action,<sup>181</sup> and without any kind of prophylactic constitutional

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175. Dale Russakoff, *At Penn, the Word Divides as Easily as the Sword*, WASH. POST, May 15, 1993, at A1.

176. See, e.g., Jordana Horn, *When Being Politically Correct Makes a Mockery of Justice*, L.A. TIMES, May 16, 1993, at M3. See also RUSSAKOFF, *supra* note 175 (noting that a group of fifteen University of Pennsylvania law professors wrote an open letter to Hackney criticizing him for not taking a stronger stand on free expression).

177. Hackney's replacement at the University of Pennsylvania also refused to punish the students involved. See JORDAN, *supra* note 173, at A12.

178. Howard Goodman, *A Changed Penn, and Yet . . . It's Been a Year Since the "Water Buffalo" Case: The Controversy Still Simmers*, PHILADELPHIA INQUIRER, May 15, 1994, at C1.

179. See *Brown v. Louisiana*, 383 U.S. 131, 133, 86 S. Ct. 719 (1966), (citing HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140-60 (1965)). For a case involving the "Heckler's Veto," see *Feiner v. New York*, 340 U.S. 315, 71 S. Ct. 303 (1951) (upholding police arrest of speaker in response to audience's hostile comments).

180. *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141 (1971) (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

181. The First Amendment of the United States Constitution states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I (emphasis added). This prohibition on Congressional action was incorporated via the Due Process Clause of the 14th Amendment to apply equally to actions by state governments. See *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931) (striking down a state public nuisance statute, as applied to the press, as a violation of



barrier, victims of newspaper theft are usually left without a remedy.

Although legal remedies are available, such remedies vary across jurisdictions. Even where specific criminal statutes are in place, they are rarely invoked by police and district attorneys. As of 1993, the SPLC had heard of only one criminal prosecution for newspaper theft. In that case, four students at the University of Florida were required to serve 25 hours of community service and pay court costs after they were caught stealing copies of the *Florida Review*, a conservative campus newspaper.<sup>182</sup> More recently, two students at Penn State University agreed to go through a rehabilitation program after being charged by the local district attorney with theft, receiving stolen property and criminal conspiracy.<sup>183</sup> In addition, the student who organized the confiscation of papers at Southeastern Louisiana University was eventually charged with criminal mischief,<sup>184</sup> but his case was dismissed after a judge decided that it was not a crime to take something that was free.<sup>185</sup> The fact that student papers are often distributed for free is one of the key obstacles to using criminal sanctions against newspaper thieves. At least one state has sought to remedy that problem. The Maryland Legislature recently passed a law that makes it a misdemeanor to take more than one free newspaper for any kind of censorial purpose.<sup>186</sup> While this type of legislation is laudable, it is unlikely to have any impact until police, district attorneys and judges begin to view newspaper theft as something more than a college prank.

In the absence of any dependable legal or constitutional remedies in this area, the role of university administrators has special significance. Administrators are often the only remaining source of authority capable of imposing some kind of sanction on newspaper thieves. Unfortunately, many administrators have mirrored Hackney's feckless approach. Rather than get in a political imbroglio, many administrators either have ignored the incidents on their campuses or have acknowledged a conflict and walked away. The University of Wisconsin and the University of Central Arkansas are among dozens of schools whose administrators have refused to get involved after papers were stolen on campus;<sup>187</sup> no one was punished for the thefts at these universities. Meanwhile, at Dartmouth College, the administrative response went beyond indifference and amounted to a tacit endorsement of newspaper

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the First Amendment). The First Amendment, however, is not a barrier to actions by non-government people or organizations.

182. *There for the Taking? College Journalists Do Have Options for Stopping Newspaper Thieves*, STUDENT PRESS LAW CENTER REPORT, Fall 1993, at 13.

183. *A Crime Wave: The Trend Continues as College Newspapers are Stolen From Coast to Coast*, STUDENT PRESS LAW CENTER REPORT, Winter 1993-94, at 30.

184. MILLER, *supra* note 4, at A5.

185. DAIGLE, *supra* note 169, at F1.

186. *Maryland Law Makes Taking Newspapers a Misdemeanor*, STUDENT PRESS LAW CENTER REPORT, Spring 1994, at 33.

187. *Good Enough to Steal: College Papers are Stolen Across the Nation as Students Dispose of Words Rather Than Disprove Them*, STUDENT PRESS LAW CENTER REPORT, Fall 1993, at 5.



theft. After issues of the conservative *Dartmouth Review* were stolen on several occasions, Dean of Students Lee Pelton issued a press release stating that the students had "neither broken any laws nor violated the College's Code of Conduct."<sup>188</sup> Pelton also said that the *Dartmouth Review* is "a newspaper and it has value, but we treat it as abandoned property. There's no rule that says how many copies you can pick up."<sup>189</sup>

The internal struggle that administrators likely experience in these situations is understandable. They often are presented with a "Hobson's Choice:" punish the thieves and be labeled callous authoritarians, or refuse to punish them and be lampooned as politically correct jellyfish. Still, university administrators are not politicians; they are leaders who should be expected to take stands, regardless of the personal consequences. Toward this end, administrators actually have plenty of tools at their disposal.

The first of these tools is the student disciplinary system. Some university administrators have no direct control over student discipline; at most universities, however, there is at least some material administrative role. When such authority exists, it should be exercised, much like it was recently at the University of Maryland. At UMA, two students were punished through the student disciplinary system for stealing 10,000 copies of the campus paper. The students were placed on probation and were required to perform community service and write papers summarizing the Supreme Court's rulings on censorship.<sup>190</sup>

Another approach, which is more symbolic but often equally effective, is to use the bully pulpit to make clear to students that newspaper theft will not be tolerated. This is especially important when the perpetrators have not been caught (and usually they are not).<sup>191</sup> Larry Benedict, Dean of Student Services at Johns Hopkins University, was quick to denounce the theft of newspapers at his university even while criticizing the paper's content in the same breath.<sup>192</sup> Benedict's response illustrates a recognition that supporting free expression is not a partisan act. In fact, it is largely value-neutral, or at least politically neutral. The fact that some people might misconstrue such support should not deter any university administrator committed to free expression on his or her campus.

In addition to simply speaking out on these issues, administrators also should consider reinforcing their rhetoric with actual school policies identifying newspaper theft as a punishable act. It is always best to put students on notice of any conduct thought to be unacceptable,

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188. *Id.* at 9.

189. MILLER, *supra* note 4, at A5.

190. Retha Hill, 2 Students at U-Md. Disciplined, WASH. POST, Feb. 25, 1994, at C3.

191. Newspaper Theft's Cure is Action, STUDENT PRESS LAW CENTER REPORT, Fall 1993, at 3.

192. Brooke A. Masters, At Johns Hopkins, Fury Over Racial Cartoon: Student Newspaper Assailed for Publishing Slur Against Asians, WASH. POST, Oct. 2, 1993, at B5.



especially when punishment from other sources is uncertain at best. These are just a few of the possible responses to newspaper theft that administrators can take, each of which is acceptable. The only unacceptable approach is for administrators to ignore the problem altogether. To do so is to effectively condone what is a conspicuous act of disrespect and intolerance.

#### CONCLUSION

The distribution of a publication from one person to another is one of the most basic kinds of expressive activity. This kind of communication, deserving of the highest level of First Amendment protection, applies equally, and perhaps especially, on the campus of a public university. The Supreme Court has recognized that the public university is peculiarly the marketplace of ideas. This is true not merely because public universities traditionally have served as centers of expression and debate, but also because by allowing diverse access to its facilities for expressive activity, public universities fulfill a basic educational objective.

The legal boundaries governing restrictions on the distribution of publications are not easy to discern. Administrators who rely on court precedents to set their policies will encounter a certain amount of inconsistency. But more importantly, they will inevitably adopt policies that are too restrictive and that do not respect the values of diversity, conflict and student independence. Administrators should not take cues from the federal courts because courts deal only with what is constitutionally permissible, not with what is educationally sound.

The alternative approach suggested here is one that is consistent with the basic educational mission of most public universities; it is a liberal policy that respects all expression and is grounded in the belief that tolerance and more speech are the most rational remedies to expression that is inaccurate, caustic, offensive or annoying. Under this approach, distributors of publications are given full access to most areas of campus; they are not restricted in any way by regulations targeting the content or sponsorship of their speech; and they are not subjected to content-neutral regulations that pose too great a burden on their expression. Finally, under this approach, administrators have an affirmative obligation to take action against newspaper thieves and others who seek to tyrannize public expression. In the end, the marketplace approach is the only approach that truly advances the goals of public education.