

**FORUM ANALYSIS IN PUBLIC SECTOR  
HIGHER EDUCATION**

**Presenter:**

**JOSEPH C. BECKHAM, JR., Ph.D.**  
**Director of the Institute for Studies in Higher Education**  
**Professor of School Law**  
**Florida State University**  
**Tallahassee, Florida**

**Stetson University College of Law:**

**16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE**  
**Clearwater Beach, Florida**  
**February 12-14, 1995**

# FORUM ANALYSIS IN PUBLIC SECTOR HIGHER EDUCATION

Joseph Beckham  
Florida State University

While governmental entities do not have absolute control over public speech on their property [*Hague v. CIO*, 307 U.S. 496 (1939)], it has been recognized that heightened judicial scrutiny would only apply to instances in which a governmental entity sought to deny speech in an area which qualified as a public forum [*Lehman v. Shaker Heights*, 418 U.S. 298 (1974)]. Determining the nature of the forum will be determinative of the standard of review in cases in which the state seeks to limit free speech on state property.

Forum analysis originated as an analytical construct intended to balance the individual's right to speak in public places and the state's interest in preserving some areas for specific or unique governmental purposes. If the state may restrict the scope of property considered to be a public forum, then it may limit expressive activity. When property is so restricted, a standard of reasonableness applies to regulation of speech in that area. [See Alexander, "Trouble on Track Two: Incidental Regulations on Speech and Free Speech Theory," 44 *Hastings L.J.* 921-62 (April, 1993).]

The United States Supreme Court identified the consequences of designations that include "public forum," "limited public forum," and "non-public forum" in the case of *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* [460 U.S. 37, 45-46 (1983)]. The Court majority upheld a school board's policy of selective access to teachers' mailboxes and the school district's mail system as reasonable. The school district's policy of allowing access to the teacher's union that had been elected the exclusive bargaining unit, but denying access to a rival organization, was considered to be based on the status of the respective unions rather than the substantive views they might espouse. The majority concluded that the mail system was a nonpublic forum, and held that restrictions on speech in nonpublic

forums need only be reasonable and not an effort to suppress views with which public officials disagree [Id. at 46].

In Perry, the Court reaffirmed that a traditional public forum, such as public streets and parks, would include property used for expressive activity by virtue of long tradition or governmental fiat. The Court distinguished designated public forums as those which the state has opened for use by the public as a place for expressive activity [Id. at 46]. The state may impose narrowly drawn regulations relating to time, place and manner of speech in traditional public fora and designated public fora in order to serve significant governmental objectives unrelated to the speaker's message. The state may not bar speech entirely from such public fora, nor impose a content-related exclusion of speech unless the content-related ban is narrowly tailored to serve a compelling state interest [Id. at 45]. However, if a facility is a nonpublic forum, the government may bar speech entirely or selectively so long as the regulation is reasonable and "is not an effort to suppress expression merely because public officials oppose the speaker's view" [Id. at 46].

In Cornelius v. NAACP Legal Defense and Educ. Fund, Inc. [473 U.S. 788 (1985)], Justice O'Connor, for a plurality of four justices, set forth the principle that the existence of a "limited public forum" is to be ascertained entirely by reference to the government's intent to open a forum to expressive activity [Id. at 802-04]. The Court held that the federal government could exclude legal defense and political advocacy organizations from participation in a charity drive directed at federal employees.

When federal courts adopt the view that the state has created a nonpublic forum, forum analysis typically favors the state. [See, for example, United States v. Kokinda, 497 U.S. 720 (1990), in which a plurality of four Justices agreed that the government had not intended to open a sidewalk on postal property for expressive activity (soliciting) and International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701 (1992)] in which a publicly operated airport terminal was held to be a nonpublic forum.] However, there are exceptions to this principle. [See Schneider v. State, 308 U.S. 496 (1939) in which the Court struck down an anti-littering ordinance as applied to the passing out of pamphlets,

and *Lee v. International Soc'y of Krishna Consciousness, Inc.*, 112 S.Ct. 2709, at 2714 (1992)], in which a ban on distribution of literature in airport terminals was held to be unconstitutional based on the failure of the airport authority to provide any independent justification for restricting peaceful pamphleteering in the airport terminal's "multipurpose environment."]

In an education case illustrating the conceptual analysis associated with a nonpublic forum, *Hazelwood School Dist. v. Kuhlmeier* [484 U.S. 260 (1988)], a principal's censorship of a high school sponsored newspaper was regarded as reasonable in that it had a legitimate pedagogical purpose. The majority concluded that a public high school's facilities are public forums only when authorities have, by policy or practice, opened these facilities for use by the general public or by some segment of the public. If the facilities have been reserved for "other intended purposes," then the forum is not a public one, and the school may impose reasonable restrictions on the speech occurring there by members of the school community.

One federal district court anticipated the reasoning in *Kuhlmeier* as applied to a higher education setting. In *Sinn v. Daily Nebraskan* [638 F.Supp. 143 (D.Neb. 1986)] the federal district court upheld the decision of editors of the university supported campus newspaper who refused to print roommate advertisements in which advertisers stated their gay or lesbian orientation. Assuming the existence of state action, the court found the newspaper to be a nonpublic forum and upheld the editor's policy as reasonably related to the paper's policy opposing discrimination on the basis of sexual orientation. As will be emphasized later in this paper, is important to note that no evidence was presented that the advertisements were rejected because the expression of a homosexual orientation was offensive to the editors.

Despite the consistency reflected in the holdings in *Sinn* and *Kuhlmeier*, the application of forum analysis to public institutions of higher education remains problematic. "Legitimate pedagogical concerns" at the college and university level may be

limited by the age and maturity of students and the close relationship between the advocacy of ideas and institutional mission. Courts have consistently acknowledged that the free exchange of ideas is central to the mission of higher education institutions and recognized that students in public institutions of higher education enjoy constitutional protection on a footing equal to other citizens. [See, for example, *Healy v. James*, 408 U.S. 169 (1978), in which the United States Supreme Court made clear that First Amendment protections "should apply with no less force on college campuses than in the community at large" and added "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Id.* at 180) and *Papish v. University of Missouri Curators*, 410 U.S. 667 (1973), invalidating a student's expulsion on the basis that the mere dissemination of ideas on a public university or college campus may not be suppressed in the name of "conventions of decency" (*Id.* at 670).]

Widmar v. Vincent [454 U.S. 263 (1981)] is reflective of the extension of First Amendment protection to students in public institutions. In this case, the United States Supreme Court held that once a public university makes its meeting facilities generally available for use by student groups, it can not deny to student religious groups the right to meet based on the content of the group's proposed speech. The Court emphasized that, as to students, the public university campus "possesses many of the characteristics of a public forum," [*Id.* at 267] but noted that in educating students the university need not "grant free access to all of its grounds and buildings" [*Id.*].

In addition to the judicial characterization of higher education institutions as citadels of free speech and inquiry, forum analysis is problematic for another reason. Federal courts have offered little direction for determining appropriate criteria to be used in defining a forum for First Amendment analysis. As one commentator has pointed out, "while forum analysis began as an objective inquiry, over time it has developed into a largely subjective analysis resulting in the dissipation of First Amendment rights in public places" [Dixon, "*International Society for Krishna Consciousness, Inc. v. Lee*," 37 St. Louis Univ. L.J. 437, 443 (Winter, 1993)].

## TRADITIONAL AND "LIMITED" PUBLIC FORUMS

Any content-based restriction on speech in a public forum remains subject to exacting judicial scrutiny. While a reasonable forecast of classroom disruption, interference with university sponsored activities or actual physical damage to university property might justify the suppression of free speech on a public campus, public institutions have tolerated a high degree of free speech protection consistent with their mission, and crafting any restriction on free speech is difficult.

Restrictions on the time, place and manner of speech in a public forum speech requires that regulations be reasonable, narrowly tailored to realize significant institutional objectives, and allow for alternative communication channels. Reasonable regulations will be content-neutral in that they are not based upon the content or subject matter of the speech [Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981)]. In a public forum, reasonable and "narrowly tailored" content-neutral restrictions are legitimate, but restrictions need not be the "least restrictive" [Board of Trustees v. Fox, 492 U.S. 469 (1989)]. A narrowly tailored restriction is one that does not "burden substantially more speech than is necessary to further the government's legitimate interests" [Ward v. Rock Against Racism, 109 S.Ct. 2746, 2758 (1989)].

## DISTRIBUTION AND SOLICITATION IN PUBLIC AREAS

Federal courts have recognized limitations on commercial speech in institutions of higher education [Fox, supra], but carefully evaluate restrictions on the distribution of literature. In Hays County Guardian v. Supple [969 F.2d 111 (5th Cir. 1992)] Southwest Texas State University regulations which prohibited solicitation on the campus were held to impermissibly restrain free expression when applied to prohibit the handing out of newspapers containing advertisements. The regulation, which restricted the individual's ability to hand out political commentary to the passing public on the campus, could not be justified on the basis of speculative notions of inconvenience to students or litter reduction [Id. at 118-119]. The court recognized that restricting commercial solicitation to prevent

disruption of traffic and harassment by hawkers may be a legitimate interest of the university, but the application of the anti-solicitation regulation to distribution of a newspaper was incompatible with that legitimate interest. [Id. at 121. But see *Texas Review Soc. v. Cunningham*, 659 F.Supp. 1239, 1245-46 (W.D.Tex. 1987) in which the court found a similar restriction to be reasonable and narrowly tailored to serve a significant governmental interest.]

#### SYMBOLIC SPEECH IN PUBLIC AREAS

The time, place and manner test is similarly applicable to instances of symbolic speech on the university campus, particularly when regulations are related to ensuring public safety, protecting public resources, or maintaining campus safety and security. In *University of Utah Students against Apartheid v. Peterson* [649 F.Supp. 1200 (D.Utah 1986)] a section of the commons area on the public university campus was recognized as a limited public forum which the institution had opened for use as a place for expressive activity. The federal district court noted the institution's past practice of allowing various rallies and demonstrations in the area and emphasized that the institution's "Student Bill of Rights," guaranteed speech and assembly without prior restraint or censorship. When the public university sought to remove shanties erected to protest policies of the government of South Africa, the court noted that no formal regulations had been developed which could be used to define reasonable time, place and manner restrictions applicable to the forum, and held the university's attempt to remove the shanties impermissible.

However, in *Students Against Apartheid Coalition v. O'Neil* [838 F.2d 735 (4th Cir. 1988)] the federal appeals court upheld the removal of student erected shanties from the lawn of the University of Virginia's rotunda after the institution developed a lawn use policy that emphasized esthetic interests. The court found the new restrictions to be sufficiently content neutral and narrowly tailored, and emphasized that it left open ample alternative channels of communication to justify the shanty's removal.

## NONPUBLIC FORUMS

Public institutions of higher education may vigorously assert a nonpublic forum when clear educational purposes are projected. Speech disseminated under the sponsorship or auspices of the institution has significant weight in a finding of nonpublic status. When programs are sponsored by the institution, emphasize specific educational goals, and individuals and groups are invited to attend, then a nonpublic forum has generally been recognized. [See, for example, *Martin-Trigona v. University of New Hampshire*, 685 F.Supp. 23 (D.H.N. 1986), in which the university was free to be selective in inviting better-known presidential candidates to a debate, absent any evidence of discrimination based on political views. However, even if a nonpublic forum is recognized, federal courts have been alert to the possibility that institutional administrators sought to suppress speech.

In *DiBona v. Matthews* [269 Cal.Rptr. 882 (Cal.App. 1990)] the administrative cancellation of a drama class which included the presentation of a controversial play was found to violate free speech. The instructor was authorized to select curricular materials, and administrators became interested in the subject matter of the course only after opposition from religious representatives in the community was brought to their attention. The court's ruling was predicated on the view that the cancellation of the class was an attempt to suppress speech with which the administrative officials disagreed.

Similarly, in *Brown v. Board of Regents of the University of Nebraska* [640 F.Supp. 674 (D. Neb. 1986)] the university's cancellation of a scheduled showing of a film entitled "Hail Mary" was regarded as a violation of the constitutional rights of persons wishing to view it. The cancellation occurred after members of the public and a state legislator complained that the film blasphemed certain religious groups. When considering the constitutional interest implicated by an administrative decision interfering with the right to receive ideas, the court ruled that cancellation could not be justified merely to avoid a controversy that might result from the expression of ideas [Id. at 679].



In Aldrich v. Knab [858 F.Supp. 1480 (W.D.Wash. 1994)] a federal district court ruled that a public radio station operated by the university was a nonpublic forum, yet vindicated the right of workers at the station to undertake on-air criticism of the station's policies and operations despite a policy prohibiting such criticism. The court found that the "no criticism" policy was an unconstitutional, content-based suppression of viewpoints protected by the First Amendment [Id. at 1494].

#### FUNDING OF RECOGNIZED STUDENT GROUPS

When considering the authority of institutions to place limitations on the recognition of student groups, courts have traditionally invoked "limited" public forum analysis. For example, in Gay Student Servs. v. Texas A. & M. Univ., 737 F.2d 1317 (5th Cir. 1984) the court recognized a distinction between a "designated public forum" open to the general public and a "limited public forum by designation" that is open to certain groups or for the discussion of certain subjects.

Federal courts have distinguished recognition of student groups from the funding of student groups, finding that the denial of funding is more appropriately evaluated under a nonpublic forum analysis. In Gay and Lesbian Students Ass'n v. Gohn [850 F.2d 361 (8th Cir. 1988)], the federal appeals court recognized that while student organizations have a qualified right to recognition and use of public university facilities on a nondiscriminatory basis, these organizations have no clearly established right to receive university funds. However, the court found that the student senate had denied funding to a gay and lesbian student organization based on the content of the ideas which the student group wished to express, and ruled that the denial of funding violated the First Amendment.

In Rosenberger v. Rector and Visitors of the University of Virginia [795 F.Supp. 175 (W.D.Va. 1992), *aff'd*, 18 F.3d 269 (4th Cir. 1994)], the federal district court granted a university motion for summary judgment in a case in which a student organization which published a religious magazine was denied student activity funds. The court found that the student activities fund was a non-public forum, and held a restriction

excluding religious organizations from eligibility for funds generated from student fees was reasonable to prevent excessive entanglement with religion [Id. at 180-82]. The University's Student Council guidelines prohibited several categories of student organizations from receiving funds, including fraternities and sororities, political and religious groups and those organizations in which membership is exclusionary.

In Tipton v. University of Hawaii [15 F.3d 922 (9th Cir. 1994)], a newly adopted written policy applicable to the funding of student organizations was challenged as a violation of free speech and association. The policy expressly called for the application of the three-pronged test articulated in Lemon v. Kurtzman [430 U.S. 602, 612-613 (1971)] to determine whether student government funding for student organizations comported with the Establishment Clause of the First Amendment. Ruling that the university is under no obligation to fund the exercise of constitutional rights, the court emphasized that the institution has wide latitude in adopting a funding policy to allocate the limited resources available to promote student extracurricular activities [Id. at 926]. The federal appeals court emphasized that whatever policy the institution adopted with regard to funding or promoting the extracurricular activities of students, the policy must be applied uniformly to all qualified student groups.

One federal appeals court has rejected the application of forum analysis in the context of funding student organizations. In Student Government v. Board of Trustees of the University of Massachusetts [868 F.2d 473 (1st Cir. 1989)], the First Circuit Court of Appeals held that the governing board's decision to terminate a student government subsidy to fund a legal services office did not violate free speech, as the institution was not restricting First Amendment rights, rather it merely elected not to subsidize those rights. The court reasoned that although government may not place obstacles in the way of an exercise of free speech, it need not remove obstacles not of its own creation, and held that refusal to fund cannot be equated with the imposition of a restriction on free speech.

## COMPUTER NETWORKS ON PUBLIC CAMPUSES

Uncertainty surrounds the application of the First Amendment to computer networks. While computer bulletin boards exist primarily as forums for users, the nature of the use and the number of users may vary significantly. As computer bulletin boards rapidly supplant other forms of media, two issues for arise for public colleges and universities. First, what are the rights of individual users to communicate and receive ideas? Second, what are the institution's interests in controlling both access and the content of communications.

The public message area of the computer bulletin board may be analogized to the public "streets and parks" to which the First Amendment guarantees access. Like streets and parks, computer bulletin board provide users access to a low cost, efficient means of communicating ideas. Communications may be broadly disseminated, interactive and uninhibited by formalities. One author has suggested that these bulletin boards may replace streets and parks as the quintessential public forum. [Naughton, "Is Cyberspace a Public Forum?" 81 Georgetown L.J. 409-41 (December 1992).]

There are distinctions between these boards and traditional public fora. These boards do not carry the long-standing tradition of a public forum because they are a new technological innovation. The relationship between network operators and users is usually governed by a licensing or subscription agreement, and the operator may reserve the right to reject messages or terminate a user's privilege to access the board. The contractual relationship that governs access to commercial bulletin boards distinguishes the user from one who would access a public street or a shopping mall, but this distinction may not hold true for the vast number of public college and university bulletin boards operated as a service to students, staff and faculty. In most of the latter cases, where restrictions do apply, the user may not be able to argue that the right of free speech is effectively denied, since there may be other bulletin boards the user may access to reach an audience.

## CONCLUSIONS

The vitality of forum analysis is subject to question, particularly in the public higher education setting. Regulation of the forum by the institution will often hang on the characterization of a "nonpublic forum" or on carefully crafted, reasonable restrictions on time, place and manner of speech that are applicable to an open or "limited open" forum. With respect to the nonpublic forum, while courts do not readily look for evidence of viewpoint discrimination in a purportedly neutral, nonpublic forum policy, evidence of viewpoint discrimination can defeat the policy.

Funding for student organizations may be decided on the basis of objective criteria (priority funding for large, on-going programs like newspapers, refusal to fund costs for office supplies, honoraria, or philanthropic contributions) and on subjective, but reasonable considerations such as educational merit and breadth of benefit to the campus community. However, denial of funding based on extrinsic considerations such as the organization's political, philosophic or religious views will implicate a content-related restriction on free speech. Federal courts have uniformly held that viewpoint discrimination will not be tolerated, whether in a public forum, limited public forum or non-public forum.

Institutions should designate an area that constitutes its "limited open forum," where members of the college or university community may express themselves freely on all subjects, within the limits of applicable laws and regulations, with or without advance notice. While some regulation of free speech will always be essential, such as dealing with a situation involving multiple speakers attempting to use a forum simultaneously, provisions should consider form and context of expression rather than the content of the speech.

Institutional permit requirements remain appropriate, but need not be rigidly enforced. The value of permitting is that location and time period are specified and the activity can be harmonized with other events on the campus. Arrangements for clean-up can be specified in the permitting process, and permits can limit the time period for the

activity. The permit should contain provisions requiring the holder to pay for any damage to the site and a hold harmless provision for any assessed damages or liabilities. [For a useful discussion of symbolic speech issues and institutional policies, see Firmage, "The Shanties, Symbolic Speech and the Public Forum," 1990 Utah L.R. 889-915, Spring, 1990.]

Reasonable requirements should emphasize that the demonstration or speech activity must not create an unreasonable safety hazard, impede normal institutional operations, block or impede entry to any building, interfere with normal pedestrian or vehicular traffic, or inflict unreasonable damage upon landscaping.

Commercial activities, such as soliciting, can be restricted effectively, but distribution of newspapers and pamphleteering present special cases in which federal courts have repeatedly recognized implications for free speech rights. Regulations should be drawn so as to distinguish between distribution of materials and commercial activities.

Creative solutions to free speech problems continue to emerge. In Piarowski v. Illinois Community College [759 F.2d 625 (7th Cir. 1983)], the federal appeals court upheld a college's decision to remove certain sexually graphic artworks from a display on a central campus mall and place it instead in a less conspicuous location. The court assumed that college could not constitutionally prohibit the display of the art on campus, but concluded that the college was not obligated to subject unwitting passers-by to expressive displays some might find offensive under circumstances which might imply college approval.

