THE FIRST AMENDMENT ON CAMPUS: REVISTING SPEECH AND RELIGION ISSUES

Presenter:

PETER H. RUGER
Attorney at Law
Peper, Martin, Jensen, Maichel and Hetlage
St. Louis, Missouri

Stetson University College of Law:

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I. INTRODUCTION

Much of the jurisprudence balancing institutional requirements with constitutional doctrines occurred as a result of the impact of the civil rights and Vietnam eras on campuses. Although student unrest is now slight, decades old policies concerning campus space use, including those dealing with the recognition and funding of student groups, certainly warrant review. This outline will address the principal First Amendment issues applicable to the use of campus facilities and resources.

Central to the management of speech on campus are time, place and manner restrictions. If they serve a significant governmental interest, leave open ample alternative channels for communication of the "speech," and are not based on the speech's content or subject matter, the restrictions will usually be sustained. Heffron v. Int'l. Society for Krishna Consciousness, 452 U.S. 640 (1981).

II. LIMITATIONS ON THE MANAGEMENT OF INSTITUTIONAL PROPERTY

A. Introduction:

For public institutions of higher education, the First Amendment of the U.S. Constitution has significant effect. Access to campus, use of campus facilities,

the nature of permissible activities and the validity of the institutional response are governed by First Amendment considerations.

B. Private Institutions:

Principles of contract and property law govern the private college or university's ability to manage its property. State constitutional provisions may have an impact. Policies and principles governing space use should be clear and emphasize priority for academic purposes. Discretion should be retained. In order to avoid potential tax and community relations problems, significant use of institutional property for unrelated purposes should be avoided.

C. Public Institutions:

1. Public Forum: The judicially created concept of the "public forum" imposes a limitation on the ability of public institutions to control their space.[1] The greater protection afforded activities occurring in a public forum clearly has an impact on the ability of public universities to control and restrict demonstrators.

Widmar v. Vincent, 454 U.S. 263 (1981), addressed the question whether the University of Missouri, which made its facilities generally

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[1]This concept does not eviscerate the ability of a public university to control its property. The opinion in Widmar v. Vincent, 454 U.S. 263 (1981), states: "A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings." 454 U.S. at 268 n. 5.

available for the activities of registered student groups, could preclude a registered student religious group from using campus facilities for worship and religious discussion. The Supreme Court rejected the University's establishment clause argument and held that the University, by opening its facilities to student groups, could not exclude the religious group because of objections to the content of its speech. Property that traditionally has been open to the public for expressive activity, or has been expressly dedicated by the government to speech activity, will be deemed a public forum, and limitations on speech activity will be subject to strict scrutiny. Widmar; Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

2. Standard of Review for the Non-Public Forum: Where the property is not a traditional public forum and the property has not been dedicated to First Amendment activity, regulation of speech will be examined only for reasonableness. U.S. v. Kokinda, 497 U.S. 720 (1990). In Kokinda, the Court held that a sidewalk on postal service property, leading from the parking area to the post office, was not like a municipal sidewalk because it (the postal sidewalk) "was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." Kokinda, supra

(quoting U.S. v. Grace, 461 U.S. 171, 179-80 (1983)). The postal service had a history of prohibiting solicitation on its premises and successfully argued that it was reasonable to restrict access of postal premises to solicitation because solicitation is inherently disruptive of the postal service's business. The dissent argued, unsuccessfully, that all sidewalks are public fora.

The Kokinda decision reinforces traditional concepts of institutional control of property. It suggests that more stringent regulations governing First Amendment activity will be upheld for portions of the campus that have traditionally not been open to expressive activity.

III. CAMPUS DISRUPTIONS

A. Private Institutions:

1. At private institutions of higher education, in addition to traditional civil and criminal remedies, such as the law of trespass, student conduct policies provide a basis for imposing discipline.

2. At many private institutions, the codes or policies, were developed as a result of Vietnam era protests. Prohibitions related to possible campus disruptions at a leading private university included the following:

   a. Conduct on campus which injures or endangers the safety or health of any member of the University community or visitor to the University;

b. Interference on campus with the rights of other members of the University community or visitors to the University to pursue their educational, recreational, residential, administrative, professional, business, and ceremonial activities or other functions;

c. Intentional interference with or interruption of any class, lecture, seminar, concert, play, debate, convocation, ceremonial event, scheduled interview, judicial proceeding, scheduled athletic event, or other function on campus, or officially arranged University activity off campus;

d. Occupation of any office, classroom, laboratory, library, resident hall, athletic building, or other facility on campus beyond a time for dispersal reasonably fixed and announced by an appropriate official, when the effect of the occupation is to interfere with the conduct of any University business, function, or activity;

e. Willful physical obstruction of entry into or exit from any building, place, room or roadway by any form of blockade on campus;

f. Breach of written conditions, disclosed in advance, governing use of any facility on campus;

g. Disorderly conduct on campus;

h. Failure to observe building rules or regulations properly established and promulgated for use of dormitory facilities and all other University facilities by the appropriate bodies.

i. A concept of collective responsibility is imposed on student groups: A student group or organization and its officers may be held collectively or individually responsible when violations of this Code by those associated with the group or organization have received the tacit or overt consent or encouragement of the group or organization or of the group's or organization's leaders, officers or spokespersons.

B. Public Institutions:

Regulation of protest demonstrations in a university setting will be measured against standards applicable to time, place and manner restrictions. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Even protected expression is subject to reasonable regulation so long as the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. Clark, supra.

C. Restrictions were recently upheld in:

1. Students Against Apartheid Coalition v. O'Neil, 671 F. Supp. 1105 (W.D. Va. 1987), aff'd, 838 F.2d 735 (4th Cir. 1988). Through its Lawn Use policy, the University of Virginia prohibited the erection of

shanties to protest apartheid on its historic Lawn area, in front of its Jeffersonian Rotunda. The policy (appended to the decision) was found to be valid because it was content neutral, was related to the University's "aesthetic concern in architecture" and allowed students other means of communication.

2. Auburn Alliance for Peace and Justice v. Martin, 684 F. Supp. 1072 (M.D. Ala. 1988). The Court upheld Auburn's regulations for speeches and demonstrations and the University's refusal to allow a daily, round the clock "camp out" at Auburn's designated public forum. The Court applied the Clark analysis to uphold Auburn's actions. The use of the designated forum for 24 hours was balanced against the opportunity of other students to use the site and the possibility of disruption for nearby dormitory students.

D. Traditional remedies, such as trespass, and utilization of student conduct or discipline codes are available to public colleges and universities also.

IV. APPLICATION OF TIME, PLACE AND MANNER REGULATIONS TO CAMPUS SPEECH

A. Basic Principles: Impact of Tinker[2] and Healy[3]

1. Tinker: Although a pre-college case, Justice Fortas observed that "it can hardly be argued that either students or teachers shed their

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[2]Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969).

[3]Healy v. James, 408 U.S. 169 (1972).

constitutional rights to freedom of speech or expansion at the schoolhouse gate." Tinker, 393 U.S. at 506. While acts that "materially and substantially disrupt the work and discipline of the school" need not be tolerated, Id. at 513, mere suspicion, fear, apprehension or diligence from majority norms are insufficient to curtail freedom of expression. Id. at 508-09. If evidence exists that leads to a good faith belief that substantial disruption is imminent, the activity producing it can be controlled or terminated.

2. Healy: This Supreme Court decision arose from the denial by a state college of official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS). While delineating associational rights derived from First Amendment freedoms of speech, assembly and petition, it provides general guidance concerning the issue of who may speak on campus and under what circumstances.

President James of Central Connecticut State College denied recognition to the SDS as a campus organization. The district court affirmed James' decision, holding that the SDS students had received procedural due process, that they failed to show they could function without control by the national SDS organization and that the students' First Amendment rights were not violated as the college president found their conduct "likely to cause violent acts of disruption." See

Healy, 408 U.S. at 179. The Court of Appeals affirmed, noting that the students were only denied the "administrative seal of official college respectability."

The Supreme Court reversed and remanded, emphatically disagreeing with the analysis proffered by the lower courts. Finding President James' justifications to be without merit, it suggested another permissible ground and remanded for findings on that issue. Affiliation with an unpopular national organization was insufficient reason to deny recognition as was James' "mere disagreement" with the group's philosophy. 408 U.S. at 187. Relying on Tinker, the Supreme Court observed that "associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. Having said that, the Court then found that no facts supported James' conclusion concerning disruption. 408 U.S. at 190-191. The Court then suggested a basis for denial of recognition -- i.e., the apparent unwillingness of the SDS to be bound by reasonable school rules governing conduct.

B. Elements of Valid Time, Place and Manner Regulations

Healy, supra, also affirmed the ability of public institutions to adopt "reasonable regulations with respect to the time, the place, and the manner in

which student groups conduct their speech-related activities. 408 U.S. at 192-93. To be valid, the regulations restricting speech must:[4]

1. cover only times, places, or manners of speech that are basically incompatible with the normal activities of a particular place at a particular time;

2. determine incompatibility by the physical impact of the activity, not the message or content of the speech;

3. be drafted with narrow specificity and inform the campus community of the prohibited conduct (not be vague or overbroad);

4. have the least restrictive impact on free expression.

C. Application of Time, Manner and Place Restrictions

Three cases involving the distribution of printed speech on campuses reflect the application of time, place and manner principles to attempts by universities to ban the distribution of literature and periodicals.

1. Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985). The West Virginia Board of Regents enacted a policy prohibiting on-campus sales and fund-raising activities by groups not sponsored by students or a system college. The policy was unsuccessfully challenged by a socialist group that sought to solicit donations and sell periodicals on campus. The plaintiffs had been allowed on campus to talk to students and provide

[4] W. Kaplin, Law of Higher Education, 315-320 (1985); Grayned v. Rockford, 408 U.S. 104 (1972).

free information. The college had consistently refused to allow other outside groups to sell periodicals or solicit donations. The district court found that, while the proposed activity was protected by the First Amendment, the Regents' policy was a reasonable time, place and manner restriction and served a significant governmental interest in maintaining an orderly flow of campus traffic and in preserving the peaceful enjoyment of the campus for legitimate educational objectives. The Court of Appeals,[5] in affirming, was influenced by the college's willingness to allow expressive activity and characterized the ban on solicitation a "sensible" manner restriction, furthering the college's educational and cultural activities. The consistent application of the regulation supported the outcome.

2. Alabama Student Party v. Student Govt. Ass'n. of the Univ. of Alabama, 867 F.2d 1344 (11th Cir. 1989). University regulations restricted distribution of campaign literature to three days prior to the election and only at student residences or outside of campus buildings. Also, campaign literature could not be distributed on election day and limitations on election debates existed. In upholding the validity of the regulations, the Court of Appeals answered affirmatively the question "whether it is unconstitutional for a university, which need not have a student government association at all, to regulate the manner in which

[5] The brevity and utility of the decision commends its attachment to this outline.

the Association runs its elections." 867 F.2d at 1346. The Court concluded that the election process could not be equated to public forum activities but, rather, was a "forum reserved for . . . a supervised learning experience for students interested in politics and government." Id. at 1347. Once characterized as part of the educational experience, upholding the regulations become easier for the Court as it then involved the deference to university judgment in academic matters standard to uphold the regulations.[6]

3. Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992). Hays presents an interesting contrast to Glover, supra. Here, a regulation prohibiting student distribution on campus of a free newspaper containing advertising unless the student belonged to a registered student group that agreed to "sponsor" the newspaper violated the First Amendment. Central to the Court's decision was the existence and widespread distribution of the university's own campus newspaper which contained advertising. The Court rejected the university's contention that the outside areas of the campus were not a public forum because of its prior tolerance of forum activities throughout campus. Justifications such as litter, security, congestion and privacy concerns were unfounded or too minimal to justify a restriction on speech. In

[6] The most frequently cited articulation of this rationale is derived from Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985).

determining that the Guardian was entitled to the same access to the campus as publications distributed without charge that do not contain advertising, the Court observed that the university could not enhance the popularity of its own student newspaper by burdening distribution of other publications.

V. CURRENT RELIGIOUS ISSUES

A. Funding of Student Religious Groups

Two 1994 decisions (Tipton v. University of Hawaii, 15 F.3d 922 (9th Cir. 1994) and Rosenberger v. Rector and Visitors of the Univ. of Virginia, 18 F.3d 269 (4th Cir. 1994)) upheld the refusal of the University of Hawaii and the University of Virginia to fund certain activities of student religious groups. The student government of the Univ. of Hawaii of Manoa had allocated funds to registered organizations, including religious groups. Following the threat of litigation from the ACLU, the student government agreed to apply the Lemon[7] test to future funding requests. Applying that test, it declined to fund sectarian activities. In upholding the denial of funding, the Court recognized that the Lemon test was simply being applied and, to the extent it was exceeded, so long as the policy was uniformly applied to all student groups, it could withstand challenge.

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[7]Lemon v. Kurtzman, 403 U.S. 602 (1971), established a 3-pronged test to determine compliance with the First Amendment: (1) Does the policy have a secular purpose? (2) Does the primary effect of the policy advance or inhibit religion? (3) Does the policy cause excessive entanglement between the university and religion?

Like Tipton, Rosenberger challenged the denial of funding for the avowedly religious publication, Wide Awake, on First Amendment free speech and free exercise grounds. In its decision upholding the denial of funding, the Court applied the Lemon test and found the third prong to be particularly troubling. The Court recognized a significant difference between denial of access to university facilities based on the content of a group's speech and direct monetary subsidization of religious organizations. The latter was termed "a beast of an entirely different color." 18 F.3d at 206. A compelling state interest in avoiding entanglement with religion and avoiding advancing religion made the restriction constitutionally valid.

B. Religious Freedom Restoration Act of 1993

1. Enacted November 16, 1993; Public Law 103-141 (42 U.S.C. § 2000 (b)(b).

2. Purpose: Overrule Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

a. Smith held that Oregon's prohibition of use of drug peyote in a religious ceremony did not violate the free exercise of religion clause of U.S. Constitution's First Amendment.

b. In a 5-4 decision authored by Justice Scalia, the Court held that generally applicable, religion-neutral criminal laws that have the effect of burdening a particular religious practice need not be

justified, under the free exercise of religion clause, by a compelling governmental interest.

3. Key Provisions of Act

a. Findings and Declared Purpose

(1) "Governments should not substantially burden religious exercise without compelling justification."

(2) Restore the compelling interest test as set forth in prior federal court rulings, Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).

b. Protection Created: Government may "substantially burden" exercise of religion only if it "is in furtherance of a compelling governmental interest; and [it] is the least restrictive means of furthering that compelling governmental interest." (emphasis added).

c. Attorney's Fees: Can be obtained.

d. Applicability: Applies to all federal and state laws in existence now or to be enacted in the future.

e. Establishment Clause Unaffected: "Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion."

4. Additional References

a. IX A Word On ... 4 (Fall 1993).

b. Senate Report No. 103-111; 11 U.S. Code Cong. & Adm News 1892 (1994).

c. Rosen, Blood Ritual, First Amendment Law Handbook, 1993-94 ed., at 329.

d. Durham, et al. For the Religious Freedom Restoration Act, First Amendment Law Handbook, 1992-93 ed., at 407.

e. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1416 (1990).

VI. USE OF SPACE FOR POLITICAL PURPOSES

A. Effect of Section 501(c)(3)[8]: In order to permit donors to receive an income tax deduction, virtually all private institutions of higher education, and many public institutions, seek Section 501(c)(3) status. An organization may obtain the status if it is organized and operated exclusively for religious, charitable or educational purposes.

B. Organizational and Operational Tests:

The articles of incorporation of an entity seeking §501(c)(3) status must disavow authorization of legislative or political activities. The articles should state that the nonprofit organization will not:

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[8]26 U.S.C. 501(c)(3).

1. Devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise;

2. Directly or indirectly participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of or in opposition to any candidate for public office; or

3. Have objectives and engage in activities which characterize it as an "action" organization . . . . (Regulation 1.501(c)(3)-1(b)(3)(iii))

C. Operational Test:

1. The Internal Revenue Service can scrutinize the activities of an exempt organization. With respect to participation in a political campaign, the prohibition is absolute.[9]

2. Avoid providing facilities to groups or persons endorsing any candidate for public office, even if the candidate is viewed as "non-partisan." A local bar association did not qualify as a tax-exempt charitable and educational organization because it rated candidates for judgeships. The ratings, which were communicated to members of the association and the public, were held to constitute indirect political activity and thus violated the prohibition against intervention or participation in political campaigns. The Court rejected the association's argument that the political activity must form a "substantial part" of the organization's

[9]Reg. §1.501(c)(3)-1(c)(1)(iii).

activities before exempt status is lost. Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988).

D. Education Activities: Involving candidates for political office are permissible:

1. Sponsoring debates between Democratic and Republican party candidates was part of an organization's exempt purpose of educating and informing votes. Fulani v. League of Women Voters' Education Fund, 882 F.2d 621 (2d Cir. 1989).

2. A university offered a political science course that required the student's participation in political campaigns of candidates chosen by the students. It was found not to violate Section 501(c)(3). Rev. Rul. 72-512.

3. In Revenue Ruling 72-513, the provision of facilities and faculty advisors for a campus newspaper that published the students' editorial opinions on political and legislative matters did not constitute impermissible political action.

E. Lobbying By Exempt Organizations

1. Section 501(h), 26 U.S.C. § 501 provides a safe harbor for lobbying activities. To clarify the prohibition against an exempt organization devoting a substantial part of its activities to attempting to influence, Section 501(h) creates an expenditure test.

2. What constitutes "substantial" activity to influence legislation is reviewed on a case by case basis, but it is unlikely that the degree of legislative activity engaged in by colleges and universities, or groups affiliated with them, would meet the "substantial" test. (See, e.g., Christian Echoes National Ministry, Inc. v. U.S., 470 F.2d 849 (10th Cir. 1972); Regan v. Taxation with Representation of Washington 1997, 461 U.S. 540 (1983)).

Therefore, few if any, institutions of higher education have made the 501(h) election.

GLOVER v. COLE, 762 F. 2d 1197 (4th Cir. 1985)

I

Louise Glover and Ned Measel seek an injunction against Thomas W. Cole, president of the West Virginia State College, insuring them the right to solicit donations on campus and sell newspapers and other literature on behalf of the Socialist Workers Party and the Young Socialist Alliance. The United States District Court for the Southern District of West Virginia held that Cole's enforcement of a state-wide policy, prohibiting on-campus sales and fund raising activities by groups not sponsored by students or the college, did not violate the First Amendment rights of Glover and Measel.

The essential facts were stipulated at a hearing on plaintiffs' motion for injunctive relief. Glover and Measel are members of the Socialist Workers Party and the Young Socialist Alliance. For about one year prior to the present action, the two organizations—none of whose members attend the West Virginia State College—had been allowed to set up an information table adjacent to the student union building of the West Virginia State College, in Institute, West Virginia. The table has served as the principal place where plaintiffs engage passers-by in discussions of political and social issues and distribute free copies of socialist newspapers and related reading materials. Plaintiffs admit that the college has allowed them freedom to espouse their political and social beliefs throughout the college campus. They concede there has been no direct infringement on their ability to speak.

A dispute began when plaintiffs were observed attempting to sell their newspapers. After being compelled to discontinue newspaper sales by a security guard, plaintiffs requested permission from the college administration to sell newspapers and political pamphlets, including *The Militant* and *Young Socialist*, and to solicit donations on behalf of their organizations. President Cole, acting through an assistant, denied the request based on a statewide policy directive from the West Virginia State Board of Education, which prohibits "all solicitation and selling of products and articles upon property under the jurisdiction of the West Virginia Board of Education ... except by organizations and groups directly connected with the institution and upon

written approval of the respective presidents or superintendents."[1] Neither group here is connected with the college.

The college administration, acting pursuant to another policy statement—West Virginia Board of Regents Policy Bulletin No. 55—had opened its facilities to non-campus organizations on certain conditions, including a lease from a campus sponsor and evidence of adequate insurance protection.[2] The administration grants permission to all groups without regard to political philosophy, race, or religion. In the past, the college sponsored a lecture series, a religious elementary school held a concert, and eastern mystics gave a talk about their beliefs. In addition to opening its facilities for use by the general public, the West Virginia State College maintains a campus generally open to the public for political debate.[3] No group, however, has ever been given permission to solicit donations or sell any items on campus.

At the hearing, Cole asserted that the solicitation ban was necessary to preserve the campus area for the peaceful enjoy-

1. The quoted regulation, known as "Administrative Memorandum No. 6," was promulgated in 1952. Although the college is now controlled by the West Virginia Board of Regents, President Cole reasonably concluded that he was bound by Administrative Memorandum No. 6 because the rule had not been directly contravened or superseded by the Board of Regents. On June 12, 1984, Policy Bulletin 55 of the Board of Regents was amended to incorporate the quoted anti-solicitation rule. In addition, both sides agree that the policy directive operates as a complete ban against all solicitation by non-college groups and that college groups can engage in fund raising activities only with written approval from the administration.

2. Policy Bulletin 55 was promulgated by the West Virginia Board of Regents on September 10, 1982. The directive provides, in pertinent part:

> **POLICIES ON USE OF INSTITUTIONAL FACILITIES**
>
> Facilities of institutions under the governance of the West Virginia Board of Regents are intended for use in the conduct of its educational programs. As such, first priority for the use of facilities will be given to the academic, administrative and student functions at each institution.
>
> In its many aspects of service to the public, the Board of Regents also recognizes the need and permits the use of facilities which may provide benefits otherwise not available in the community. Consideration of requests from campus and off-campus groups will be guided by the following policy statements.
>
> A. *By Off-Campus Groups or Individuals* (Non-State Employee)
>
> It is the policy of the Board of Regents to permit the use of facilities by the general community in a manner which does not compete with the ongoing programs of the colleges and universities of the State. The community use of a college or university facility must have an educational or cultural purpose and must have a campus sponsor. The facilities that will be made available to non-campus groups will tend to be of a nature which is unique in the community.
>
> Use of campus facilities by non-campus individuals or organizations will be permitted within the following guidelines:
>
> 1. Facilities and support services will be made available only to the extent that their proposed use is not in conflict with the regular programs of the institution.
>
> 2. The nature of the activities of the non-campus users shall not be potentially physically disruptive of the campus. For instance, local noise ordinances must be obeyed. While this policy may not be construed to preclude use of facilities based on political philosophy, race, religion, or creed of the sponsor, the nature of the activities to be conducted on the campus shall not be illegal under the Constitution or laws of the State of West Virginia or the United States.
>
> 3. A standard rental/lease agreement (attached) accompanied by evidence of such insurance protection as may be required to adequately protect the institution shall be executed by the campus sponsor and also be signed by a responsible officer of the non-campus organization desiring to use a campus facility.

3. Glover and Measel were not formally operating under the aegis of the above policy statement, which primarily governs the rental of college facilities. Dr. Floydelh Anderson, an executive assistant to President Cole, testified at a hearing on plaintiffs' motion for a permanent injunction that the administration traditionally operates an open campus. He further explained that the college never had to "approve" plaintiffs' on-campus political activity, although he noted that plaintiffs' organizations were welcome and, in fact, had participated in some college classes. Plaintiffs became entangled with the bureaucratic machinery only after a security guard interceded to block an attempted sale of literature.

ment by students and faculty members.[4] Defendant further asserted that if the ban was lifted, the campus would become inundated by those seeking to solicit donations or sell products, interfering with the college's ability to provide educational services as well as its ability to provide security for students, faculty, and staff.[5] Plaintiffs, in response, did not seek to prove that other non-college groups have received more favorable treatment. There was no showing that others are permitted to sell newspapers or other materials.[6] There has been no suggestion that other groups unconnected with the college have been permitted to do any of the things plaintiffs insist they are constitutionally entitled to do. Furthermore, no showing has been made that any group not connected with the campus has been permitted to conduct activities with commercial overtones even if they had entered a lease, provided evidence of insurance protection, or identified a campus sponsor. Instead the plaintiffs' proof was restricted to establishing that several student groups directly connected with the West Virginia State College have engaged in limited fund-raising activities both inside and outside of school buildings.

Based on the above stipulated record, the district court denied plaintiffs' motion for a permanent injunction and declaratory relief and entered judgment in favor of President Cole. The court found that, although plaintiffs' proposed activity was protected by the first amendment, the policy was a reasonable time, place, and manner restriction and served a significant governmental interest in maintaining an orderly flow of campus traffic and in preserving the peaceful enjoyment of the campus for legitimate educational objectives, free from the possible harassment by plaintiffs' proposed additional activities.

II

[1] By now, our constitutional jurisprudence has settled that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266 (1972). Indeed, experience and basic sense teach 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, 70 L.Ed.2d 440 (1981). A college milieu is the quintessential "marketplace of ideas."

In the face of these respected constitutional tenets, President Cole suggests that the dispute can be resolved by analogy to the "commercial solicitation" cases. He contends that plaintiffs' sales activity does not enjoy the full panoply of first amendment protection, but instead is subject to the "intermediate scrutiny" peculiar to commercial speech. *E.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). All the college has prohibited, says Cole, is the exchange of money, a restriction on a purely commercial transaction.

[2] There is, however, no certain refuge in platitudes from the commercial speech

4. The college is located on an 83 acre parcel of land and contains numerous buildings, including classrooms, administrative facilities, student union, and residence halls. During any regularly scheduled class period, there may be as many as 1300 students on campus or as few as 50.

5. Cole's concern about a flood on the campus was based, in part, on a series of incidents over the years by various people trying to sell items on the college campus.

6. At oral argument counsel for appellants asserted that other newspaper vendors are allowed to sell on campus. First, there is no suggestion that the other vendors additionally solicit donations. Second, the point can only be made by going outside the record, something we are unwilling to do, especially since newspaper contents, while generally protected by the first amendment, cannot be assumed, in the total absence of proof, or absence of any opportunity on the part of the defendants to advance proof, to possess such status. Judicial notice is an inappropriate device for remedying a failure of proof.

cases. The fallacy in applying that approach here is the somewhat plastic distinction between plaintiffs' "pure speech" and their commercial activity. As plaintiffs point out, fund raising may be part and parcel of their political advocacy. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 100 S.Ct. 826, 833, 63 L.Ed.2d 73 (1980) (soliciting funds for political purposes falls within core first amendment protection and traditionally has not been dealt with as a variety of commercial speech). In addition, plaintiffs' distribution of literature does not lose first amendment status simply "because the written materials sought to be distributed are sold rather than given away, or because contributions or gifts are solicited in the course of propagating the faith." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981). Their message may be different, but street corner pamphleteers are in the mold of Thomas Paine. To treat them as mere commercial actors, relegated to a subordinate role in our constitutional scheme, is to deny an essential part of our political history.

[3] What the case is about is not whether plaintiffs are engaged in core first amendment activity. Nor is the case about whether non-students have the right to enter the college campus to espouse a particular political view; plaintiffs have already been allowed to speak freely. Rather, the case involves the narrowly focused issue of whether the state properly exercised its right a) to regulate the manner by which third parties may make use of its educational institutions and b) to restrict essentially unregulated approaches to students who are at a stage in life where the primacy of education in its claim to their attention rather sets them apart from the body politic, indiscriminately viewed.

Both sides to the dispute seem to have conceded that the campus area is a "limited" public forum. *See Perry Educational Association v. Perry Local Educators*, 460 U.S. 37, 103 S.Ct. 948, 955 & n. 7, 74 L.Ed.2d 794 (1983).[7] The plaintiffs have stipulated that the anti-solicitation policy has been applied even-handedly to all non-student groups and have conceded in their brief that the rule is a content-neutral time, place, and manner restriction which only incidentally restricts first amendment activity. So viewed, the regulation will be upheld as long as Cole demonstrates that the restriction is narrowly tailored to serve a significant governmental interest and that there are ample alternative channels of communication. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. at 647–48, 101 S.Ct. at 2563–64, *quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976).

Unquestionably, the regulation furthers the state's recognized interest in regulating the manner by which third parties make use of its educational facilities. As the Supreme Court opined in *Widmar v. Vincent*, 454 U.S. at 267–68 n. 5, 102 S.Ct. at 273–74 n. 5:

> [O]ur cases have recognized that First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.' A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regula-

7. We agree with the concession. In the case of the defendant, as Dr. Johnson testified, the West Virginia State College has always been operated as an "open campus." Thus, according to the record the campus by tradition was dedicated by the college administration to free and open expression by all members of the public for the purpose of enriching the educational community. There is no evidence, however, that the campus was open for indiscriminate use by the public. For non-student groups, the campus has never been opened for fund raising activities. *See Perry*, 103 S.Ct. at 956.

> tions 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 non-students alike, or that a university must grant free access to all of its grounds or buildings.

Although its campus is open, West Virginia has set aside the campus as an area for peaceful use by students and faculty. Those in charge of the state college thus have a significant interest in protecting the students from the harassment of insistent hawkers and possibly fraudulent solicitations and in preventing the area from becoming overrun and overcrowded. The state college is dedicated to the pursuit of vigorous debate in a halcyon educational setting. To that end, the Board of Regents, and the college itself, have taken rather commendable steps to open the campus, allowing both on- and off-campus groups the use of school facilities for educational and cultural activities. However, the college fastidiously has avoided transforming the campus area into an unlimited arena for charitable, political, or commercial solicitation. It had a right to take steps to safeguard the traditional academic atmosphere. *See Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) (the nature of a place and pattern of its normal activities dictate which time, place, and manner regulations are reasonable).[8]

The exception allowing sales or solicitation on behalf of student groups, upon prior written approval, does not set up an arbitrary distinction sufficient to create any doubt about the sincerity of the reason for imposing a blanket prohibition on non-college groups. For students, the campus is the only forum where, as a practical matter, they can raise funds to sponsor their education oriented activities, many of which are directly related to college life. More importantly, the college obviously has more control over student groups and can, with little cost or effort, monitor their activities and impose necessary sanctions without the formality which would attend sanctions and regulation of third party soliciting groups. In short, the distinction drawn by the Board of Regents is rational and consistent with the goal of preserving the campus for the educational objectives of the students.

Glover and Measel recognize that the college administration can enforce time, place, and manner restrictions on the use of the campus, but insist that the rule is unconstitutional as applied to them. Glover and Measel point out that the record is "devoid of any suggestion" that they have disrupted the campus or that their organization is fraudulent in any way. Consequently, while the solicitation regulation furthers a significant interest, none of those interests, according to Glover and Measel, justify the application of the rule against their limited activities.

In support of their "as applied" argument, Glover and Measel principally rely on *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) for the proposition that "undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Id.* at 508, 89 S.Ct. at 737. *Tinker*, however, offers no support for plaintiffs' position and, in fact, the differences in that case only highlight the weakness in the present attack. *Tinker* involved the rights of students to engage in a symbolic protest of the Vietnam war. At issue was invidious state suppression of particular expressive activity, activity which was unpopular in the local community. Consequently, the Court held that the "mere desire to avoid the discomfort and unpleasantness that always accompany an

8. The evenhandedness of the college's approach to the problem does nothing to condemn it in a constitutional sense. While compliance with the equal protection strictures of the Fourteenth Amendment does not excuse violation of another constitutional protection, it does lessen the likelihood of such a violation.

unpopular viewpoint" was no justification for eliminating student activity which was not in any way incompatible with the function of the school.

The present dispute is a far cry from *Tinker*. Unlike *Tinker*, here, only a neutral time, place, and manner restriction has been challenged. The regulation has not singled out solicitation and fund raising on behalf of socialist organizations. In addition, it is undisputed that Cole operates an open campus and encourages free and robust debate. Most importantly, *Tinker* nowhere suggests that everyone has an absolute right to use all parts of a public school for unlimited purposes. No Supreme Court case has so held.

Glover and Measel also challenge the regulation because it was not narrowly drawn to further the designated state interests. Several possibilities are offered. If traffic and peaceful harmony are the concern, they argue that fund-raising can be banned in the more congested areas and can be limited to certain hours. In addition, if fraud is a concern, the college could impose some form requiring registration or disclosure of interests.

Although we recognize that a more tailored approach is theoretically possible, we hold that the school acted within bounds in deciding that its limited resources are not well spent on policing a regulation for the benefit of third parties rather than on enhancing the principal objective, *i.e.*, education. Moreover, although Glover and Measel have brought an "as applied" challenge, the court cannot limit its analysis to the effect of granting what essentially would be an exemption for their organization. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. at 652–54, 101 S.Ct. at 2566–67. If the restriction is invalid as applied to Glover and Measel, it is no more valid if applied to other *bona fide* political or charitable organizations seeking to use the campus on the same basis. Viewed in the aggregate, the solution to the problem was reasonable. *See Clark v. Community For Creative Non-Violence*, — U.S. —, 104 S.Ct. 3065, 3079–71, 82 L.Ed.2d 221 (1984).

III

There has been no direct infringement on Glover's and Measel's expressive activity, simply a prohibition against sales and fundraising on campus. Since the campus area is generally open for all debate and expressive conduct, we do not find that first amendment interests seriously are damaged by the administration's decision to limit the use of its property through uniform application of a sensible "manner" restriction. Plaintiffs' activities may be at the core of the first amendment, but the college has a right to preserve the campus for its intended purpose and to protect college students from the pressures of solicitation. In so ruling, we note that plaintiffs have more than ample alternative channels available to tap the student market for fund raising. The literature itself sets out in plain English requests for donations for the cause. Anyone interested enough to peruse the material learns that the preparation of the materials costs something and that the group is in need of financial (as well as moral and political) support. In addition, if the campus is plaintiffs' key market, they can organize a student group or obtain a student sponsor to raise funds on campus. In light of the limited restriction on plaintiffs' activities, we will uphold the decision of the district court.

AFFIRMED.