FORUM ANALYSIS IN PUBLIC COLLEGES AND UNIVERSITIES

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Forum doctrine, or forum analysis, is a test American courts apply in determining the extent to which a governmental entity may regulate speech of a public nature on premises that entity controls. It aspires to gauge whether the state may impose regulations whose alleged effect--intended or otherwise--is to limit public expression.

The forum doctrine is fundamental to analysis of First Amendment issues that arise in a public college or university setting; yet its application in American courts often seems discordant. Students, faculty, advocacy groups, and private citizens rely upon the doctrine in defense of their professed right to be heard on campus. The doctrine's intent has traditionally been to balance the interests of the government in controlling the use of public settings (such as parks, street corners, schools, colleges and universities) with those supporting the right of free expression. It protects not only speeches on the street corner, but also such forms of expression as art displays, college yearbooks, and even student activity fees.

Certainly not all free speech issues warrant a forum analysis. Claims involving academic freedom or workplace speech, for example, are inapposite to the forum doctrine. It is essential, however, that decision makers in the academy understand the doctrine as they craft and enforce policies affecting the academic community.

I. The elements of forum doctrine

In *Healy v. James*, 408 US 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), the US Supreme Court addressed a challenge against a public college over its refusal to allow students there to establish a local chapter of the Students for a Democratic Society. Speaking for the court, Justice Powell acknowledged “the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process” and the “equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order.” 92 S.Ct. at 2341. While *Healy* predates the modern forum doctrine as formulated by the high court, Justice Powell's concerns recognize an underlying issue common to virtually all cases out of higher education in which the forum analysis is used.

Perry Education Association v. Perry Local Educators’ Association, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) involved a school district’s collective bargaining

agreement with its teachers that afforded the teachers union the authority to use the intra-district mail system and teacher mailboxes to distribute union literature. When the school board denied a rival union similar access to the mail system, that union challenged the decision in federal court, arguing that access was required under the First Amendment.

On behalf of the court, Justice White noted that, for locations "which by long tradition or by government fiat have been devoted to assembly and debate," there exists a spectrum of rights that authorize the state to "limit expressive activity." At one end of the spectrum is the public forum: settings which traditionally have been held in trust for the use of the public and, "time out of mind," used for assembly and public discussion. In the public forum, the state may not prohibit expression. Any sort of restrictions based on content of expression must be narrowly drawn to serve a compelling state interest. The state may enforce regulations based on the time, place, and manner of expression, but those must be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

The second category Justice White articulated is public property that the state has chosen to be open for public use "as a place for expressive activity." Even though the state is not required to create this forum for expressive activity, this limited public forum is governed by the same standards as those governing the traditional public forum: "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."

Different standards apply to the third type of forum Justice White recognized. This category—generally known now as a non-public forum—is public property "which is not by tradition or designation a forum for communication." For such a setting, the state may impose time, place and manner restrictions and "reserve the forum for its intended purposes." It may not, however, regulate speech "in an effort to suppress expression merely because public officials oppose the speaker's view." 103 S.Ct. at 954-955.

Under this analysis, then, any governmental regulation based on content of expression in either a public forum or a limited public forum must be narrowly tailored to serve a significant government interest, and must afford alternative means of

communication. “A regulation is ‘narrowly tailored’ when it does not ‘burden substantially more speech than is necessary to further the government’s interests.’ . . . At a minimum, a regulation cannot be narrowly tailored unless the cost to speech is ‘carefully calculated’ and the fit between the burden and the state interest is ‘reasonable.’” *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir., 1992). Moreover, in none of the fora may the government regulate speech based on viewpoint.

The US Supreme Court’s most prominent application of forum analysis in a college or university came in *Widmar v. Vincent*, 454 US 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), which the court handed down more than a year before *Perry*. In *Widmar*, the court considered the University of Missouri at Kansas City’s decision to exclude a student group known as Cornerstone (evangelical Christian students from various denominations) from holding its meetings in University facilities. While the University had previously allowed Cornerstone to meet on campus for nearly four years, it based its subsequent decision on an existing regulation barring the use of University facilities for the purpose of religious worship or teaching.

The University had long adhered to a practice of opening its facilities generally to recognized student groups. Accordingly, the majority (through Justice Powell) held that the institution had created a limited public forum: “The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.” 102 S.Ct. at 273. The court further found the compelling state interest upon which the University based its regulation—“maintaining strict separation of church and State"—insufficient to justify the regulation. 102 S.Ct. at 275.

Forum analysis entails three forum classifications: public forum, limited public forum, and nonpublic forum. In discussing the concept of a limited public forum, however, courts have also variously used the terms “designated public forum,” “created public forum,” and “designated open public forum.” “Limited public forum,” however, is the term most commonly used. *See* Gail Paulus Sorenson, *The "Public Forum Doctrine" and its Application in School and College Cases*, 20 J.L. & Educ. 445 (1991).

II. Applicability of forum analysis

The forum doctrine is a framework to test the validity of government regulations and practices affecting free expression in a public setting. While the test as articulated in *Perry* seems lucid and straightforward, its application in public higher education contexts beyond the conventional sidewalk case has, at times, been problematic for American courts.

A. What is a forum? Which public?

Attempts to dissect the forum doctrine by defining its key terms are troublesome. Traditionally, a forum in forum analysis has had a physical situs; however, the concept of a forum now extends to intangible channels of communication (such as the internal mail system in *Perry*). *Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473 (1st Cir. 1989). Indeed, the US Supreme Court has applied forum analysis to a setting that it deemed "a forum more in a metaphysical than a spatial or geographic sense." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 US 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

Forum analysis would have seemed wholly appropriate in *Alabama Student Party v. Student Government Association of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). There a group of students challenged the University of Alabama's regulations concerning campaign activities in connection with student government. Those regulations restricted the distribution of campaign literature to three days prior to a student government election, outlawed distribution of such literature on election day, and mandated that open forums or debates among student government candidates take place only during the week of the election. In upholding the University's regulations, however, the Eleventh Circuit determined that forum analysis was inappropriate.

The court held that forum analysis would have been the correct test if the issue had been access to the campus. However, the Alabama students already had access; their only concern was the alleged undue restriction on free expression that the University's regulations represented. Citing the right of a public institution of higher education to "make academic judgments as to how best to allocate scarce resources," the court rejected

a forum approach in upholding the regulations: "The proper analysis centers on the level of control a university may exert over the school-related activities of its students." 867 F.2d at 1346.

Just as perplexing as trying to determine whether a forum exists (and how forum analysis should then be applied) is trying to determine the existence of a public--more specifically, the character of the parties who are either conveying or receiving the expression at issue. In an important footnote, the *Perry* court held that a public forum may be created for a limited purpose, such as use by certain groups or for discussion of particular topics. A "public," then, may consist of a particular group, such as students at a public college or university.

It is not difficult to see, then, the applicability of forum analysis in *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001), which stemmed from what the court described as "an acrimonious process similar to that which frequently occurs in institutions of higher education at the time of the initial hiring of a faculty member or an award of tenure . . .." 244 F.3d at 1185. Giebel had been a Montana State University-Northern professor until the University failed to renew his contract; Sylvester was Giebel's department chair, and figured prominently in the non-renewal decision.

Although his contract had not been renewed, Giebel was nevertheless invited to speak at a University-sponsored conference on "Intellectual Freedom." Giebel posted his own handbills on campus bulletin boards announcing his upcoming speech. Sylvester then (according to Giebel) removed the handbills. The University had made its bulletin boards available for use by the public--including persons not associated with the University--to communicate with the students and others at the University, as well as the general public. Consequently, the Ninth Circuit found the bulletin boards to be a limited public forum.

The public access to artistic expression, however, was not enough to justify application of forum doctrine in *Piarowski v. Illinois Community College District*, 759 F.2d 625 (7th Cir. 1985). Piarowski was the chairman of the art department at Prairie State College. Annually, the College sponsored an "Art Department Faculty Exhibition," which was held at a gallery adjacent to the mall on the campus. While the gallery was

open to the public, the Exhibition was intended for the display solely of artistic works by faculty.

Piarowski contributed eight stained-glass works to the Exhibition. While most were abstract, several were representational; all of the latter, however, depicted naked women in various poses that proved to be controversial. (The court observed that the windows, "when described in words . . . sound pretty obscene"; it ultimately concluded, however, that the windows were not "obscene in the legal sense." 759 F.2d at 627.) At first, the College did not remove the windows; it merely asked Piarowski to move them to a different location within the gallery that, while accessible to the public, was less conspicuous. When Piarowski refused, the College closed the exhibit a week early.

The court disagreed with Piarowski's claim that the College had created a limited public forum. While it acknowledged that the First Amendment protects artistic works as well as political expression, it declined to decide the case on the basis of forum doctrine. Despite the fact that the museum was accessible to the public and not just the College community, Piarowski's status as an employee of the College rendered forum analysis inapposite: "Faculty, unlike students, are employees, and it would make nonsense of the concept of public forum to say that because the employees of a public employer naturally have the use of the employer's property, which is where they work, it is a public forum. They are not members of the public." 759 F.2d at 629. Instead, the court cited academic freedom--and, in particular, the freedom of the College to choose what faculty works it would allow for display in its gallery--in upholding the College's action.

On the other hand, the student yearbook at issue in *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) did not include the general public among either its authors or its intended audience. Rather, the Kentucky State University yearbook was produced by students (albeit with oversight by a committee that included students, faculty, and University officials) for a student audience. Nevertheless, the Sixth Circuit deemed a forum analysis appropriate in considering the University's decision to withhold the yearbook from distribution.

B. Creation of a forum

Forum doctrine decisions are clear that the government is not required to "hold open all government-owned or government-controlled property to all forms of speech." *Hays County Guardian*, 969 F.2d at 116. Accordingly, the law does not require that a public college or university structure its policies or practices in such a way that its premises would inevitably be deemed a limited public forum (and thereby held to the requirements of a public forum). Nevertheless, in a frequently-quoted footnote, the *Widmar* court acknowledged the public nature of the typical campus:

> This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. [citations] "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" [citation] Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." . . . We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint."

102 S.Ct. at 273, n. 5.

No doubt most, if not all, public colleges and universities are committed to serving as "marketplaces of ideas" where students learn in an environment conducive to the free exchange of ideas. Nevertheless, frequently in the course of litigation, institutions find themselves (as did, for example, Kentucky State University in *Kincaid*) urging that the forum in question should not be deemed a limited public forum. An institution's actual intent in creating (or not creating) a limited public forum, then, may be immaterial. Courts might often say (as did the Fifth Circuit in *Hays County Guardian*) that a public entity "may also create public fora on property not traditionally used for public

expression by *intentionally* opening it for public discourse." 969 F.2d at 116 (emphasis supplied). More realistically, however, a limited public forum will be created when "the government opens a forum to the public and does not 'consistently enforce[] . . . restrictions on the use of the forum' . . .." *Giebel*, 244 F.3d at 1188.

Whether a forum may be said to exist will be determined "by the objective characteristics of the property." *Brister v. Faulkner*, 214 F.3d 675, 681 (5th Cir. 2000). In light of *Widmar*'s depiction of the traditional college or university setting, it might even be safe to presume that a forum analysis is generally appropriate to cases involving expression of a public nature on the campus of a public institution. When campus communication is open for communication by the general public to the general public--as with the bulletin boards in *Giebel*, for example--a limited public forum likely has been created.

Even if the parties to the expression are merely portions of the public, however, an alleged restriction on expression may be subject to forum analysis as well. The yearbook in *Kincaid* was authored by students for students; but as *Perry* holds, a public forum may nevertheless exist even if it is created only for certain groups.

However, when it comes to expression by college or university employees--most typically faculty--courts seem inclined to avoid forum analysis, and rely instead on holdings based on the law regarding academic freedom. Even though the faculty artwork in *Piarowski* was intended for display in a public setting, pursuant to established institutional custom, a forum analysis was rejected

On this point, *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998) is further instructive. Edwards had taught a course at the University entitled "Introduction to Educational Media." His syllabi included emphases on, among other things, religion and humanism. One student eventually complained to University officials that Edwards was using the class to advance religious ideas. After a meeting with Edwards, University officials advised him in writing to "cease and desist" the use of "doctrinaire material[s] of a religious nature."

Over the ensuing years, Edwards's department chair became increasingly concerned over his use of religion in the classroom. The University finally re-arranged

his scheduled and assigned him to teach additional courses. Relations between the University and Edwards deteriorated until he was ultimately suspended. When he challenged the University's actions on First Amendment grounds, however, the trial court ruled in favor of the University, and the Third Circuit affirmed the decision. The court noted that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." 156 F.3d at 491. Likewise, the court reasoned, the First Amendment does not preclude a public university from placing controls on its curriculum; it concluded that "the University was acting as speaker and was entitled to make content-based choices in restricting Edwards's syllabus." 156 F.3d at 492.

Likewise, the Ninth Circuit, in *Brown v. Li*, 299 F.3d 1092 (9th Cir. 2002) rejected forum analysis in a case involving student speech of a non-public nature. Brown, a graduate student at the University of California at Santa Barbara, was a master's degree candidate and submitted his thesis to his committee. The University's Graduate Student Handbook required that theses and dissertations conform to format requirements contained in a published guide. According to the Handbook, faculty would not approve a thesis that did not conform to department standards.

The guide allowed a student to include in a thesis a section for acknowledgments, and prescribed in some detail the format of that section. Brown, however, insisted that his thesis contain a section entitled "Disacknowledgements," which began: "I would like to offer special *F**** *YOU*'s to the following degenerates for being an ever-present hindrance during my graduate career . . .." Brown later submitted an amended "Disacknowledgements" section omitting the profanity. While his committee advised him that it would accept his thesis if he removed the "Disacknowledgements" section--and therefore allow him to receive his degree--Brown refused. He later sued the University, claiming that its decision to withhold his degree violated his First Amendment rights.

The Ninth Circuit's opinion notes that the "First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard." 299 F.3d at 1102. Moreover, it rejected the suggestion by a dissenting judge that a forum analysis be used in considering whether the First Amendment protected Brown's speech.

Instead, the court drew a distinction between extracurricular and curricular speech, and acknowledged that First Amendment protections are not so extensive for the latter.

In a higher education setting, then, courts limit the application of forum analysis to traditional traits highlighted by *Widmar*: the "marketplace of ideas" in the classroom and, especially, the "surrounding environs." Those traits also include an environment fostering "campus debate" and allowing the "use of campus facilities for meetings and other appropriate purposes." Courts also will be more inclined to apply a forum analysis in cases of student speech rather than those involving speech by faculty or other employees. Forum analysis will likely not be appropriate for student expression in the more intimate academic, or "curricular," setting

III. Forum Analysis in Classic College and University Settings

Most decisions invoking the forum doctrine concern fora that have consisted of a physical situs (referred to generally in this outline as "sidewalk cases"). Forum analysis has also come to be used in considering student publications, student activity fees, and public institutions' efforts to balance potentially competing obligations under the First Amendment: that respecting free expression, and that respecting the Establishment Clause.

A. Sidewalk cases

Commercial expression. In *Hays County Guardian v. Supple*, the Hays County Guardian, a local newspaper that concentrated on "environmental, peace, and social justice issues," sought distribution on the campus of Southwest Texas State University. The newspaper was distributed free of charge, and depended on donations and advertising revenue for its existence. The University's policies generally permitted the distribution of pamphlets, newspapers and other literature that did not contain advertising.

The University's policies prohibited most commercial solicitation; however, those policies did permit the sale of newspapers by means of a vending machine in pre-designated areas. They also allowed solicitation activities under the sponsorship of a

student organization. The Guardian, however, sought to distribute copies of its newspaper in academic departments, inside the student center, and in the campus's quad area.

The Fifth Circuit concluded first that the University was a limited public forum (mainly in light of its trustees' rule authorizing persons to "assemble and engage in free speech activities on the grounds of the campus" and admonishing administrators "to adopt reasonable nondiscriminatory regulations as to time, place and manner of such activities"). Additionally, the court assumed *arguendo* that the University's policies prohibiting solicitation were content-neutral.

Nevertheless, the court noted that the supposedly content-neutral regulations were not narrowly tailored to serve a compelling governmental interest. The University suggested a host of legitimate interests in support of its policies, including security, preserving the campus's appearance, and fraud and deception; however, the court rejected them all. It found nothing inherently unsafe about the presence of a free newspaper on campus. Likewise, it was skeptical about the supposed threat to campus appearance: "If the University wishes to prevent litter, it should prohibit littering." 969 F.2d at 119. Finally, the court rejected the claim that allowing commercial solicitation through the free distribution of newspapers containing advertisements justified the restrictions. Rather, it found the distribution of literature a more narrowly-tailored alternative to the physical (and more obtrusive) presence on campus of hawkers or salespersons.

Commercial activity. *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985) involved policies of West Virginia State College as they applied to non-student solicitors. For months, the College had allowed non-student representatives of the Socialist Workers Party and Young Socialist Alliance to set up an information table near its student union. There the representatives would engage in discussions on political and social issues and distribute free copies of socialist newspapers. The College objected, however, when the representatives began to sell their newspapers. A College policy prohibited "all solicitation and selling of products and articles" on College property "except by organizations and groups directly connected with the institution and upon written approval of the respective presidents or superintendents."

The Fourth Circuit acknowledged--and the parties stipulated--that the College campus was a limited public forum. Moreover, the court refused to acknowledge what it termed the "plastic" distinction between pure speech and commercial activity (noting that fund raising activities may indeed be an integral part of political advocacy). Nevertheless, the court stated the issue as "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." 762 F.2d at 1201.

The *Glover* court all but rejected an inquiry into whether the College's restrictions were narrowly tailored to meet a compelling governmental interest, and opted instead for a balancing approach; and in the end, the College prevailed. The organization's activities, it reasoned, "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." 762 F.2d at 1203.

Informative vs. persuasive speech. In *Giebel v. Sylvester*, in which the University department chair removed postings on campus bulletin boards that had been placed there by a former professor, the Ninth Circuit readily acknowledged that the bulletin boards--on which any member of the public could post notices--constituted a limited public forum. The court further considered whether the handbills--which only served to advise the public of a conference--were subject to First Amendment protection. Holding that the First Amendment protects speech "even if it is merely informative and does not actually convey a position on a subject matter," the court refused to draw a distinction between persuasive speech and informative speech. "It is not the role of the courts," it reasoned, "to weigh the importance of the information conveyed, and we do not do so here." 244 F.3d at 1187.

Public sidewalks. *Brister v. Faulkner* on its face deals with expression taking place on university sidewalks that are adjacent to public sidewalks; however, the decision presents a host of other issues. The case involved both student and non-student members of the Austin Greens political party who were attempting to distribute leaflets outside the

Erwin Center, a public events arena on the campus of the University of Texas at Austin. This leafleting was occurring as guests arrived at the Center to attend a reception sponsored by the Austin Chamber of Commerce. A portion of the University property where the Center was located consisted of a gravel area paved with small stones; this paved area blended in with the city's sidewalks, and there was no physical demarcation indicating where the University's property ended and the city's began.

University police officers approached one of the students distributing the leaflets and advised him that, since the leaflets did not contain the student's name or the name of a student organization, he was violating University policy. The officers suggested that the leafleting occur off University property on the public sidewalk, and threatened arrest if the leafleters did not move.

Ultimately, both students and non-students brought suit against the University in federal court. That court's decision--which the Fifth Circuit affirmed--had the effect of finding against both parties. First, the district court found that the plaintiffs' activity outside the Erwin Center had impermissibly blocked patrons' access to the Center, and that the action against them by the University was justified. The court further ruled, however, that the University paved area adjacent to the public sidewalk was a public forum, and that its policy--which had the effect of banning all leafleting by non-students--violated the First Amendment. Finally, the court ruled that--as the plaintiffs had failed to show any damages by virtue of the University's Constitutional violations--they were denied relief beyond the declaratory judgment as to the University's policy.

The *Brister* holding is notable, and somewhat enigmatic, for several reasons. First, it rejects the generally held notion that public college or university is a limited public forum, in that such property is not necessarily--in the words of *Perry*--"held in trust for the use of the public." Under forum analysis, the same restrictions on regulating expression apply to a governmental entity in both a public forum and a limited public forum; nevertheless, a public forum seemingly can now exist not only because the state intends it to be devoted to assembly and debate, but also by virtue of its mere proximity to another public forum.

Additionally, the University raised a legitimate question on appeal: as the trial court had already deemed the plaintiffs' actions in blocking access to the Erwin Center to be unlawful, why did it take the additional step of addressing the University's policy? Arguably, the University was right in asserting that the issue of the policy's Constitutionality was moot; yet the district court nevertheless addressed the policy, and the Fifth Circuit affirmed.

The court's seemingly gratuitous finding as to the University policy renders its ruling on damages even more puzzling. The plaintiffs properly argued that they were entitled --under 42 USC 1983--at least to nominal damages; yet the Fifth Circuit held that damages were not appropriate in that their Constitutional rights were not violated: "Instead, it was the university's policy banning all leafleting by non-students on university property, and not its treatment of the individual plaintiffs, that was unconstitutional." But for the University's policy, however, which the court expressly deemed a violation of the First Amendment, there would have been no "treatment" of the individual plaintiffs. It is easy to question the significance of the court's ruling on the University's policy if the plaintiffs are effectively left without a remedy.

B. Student publications

In *Kincaid v. Gibson*, a student editor was largely responsible for the publication of a student yearbook that officials at Kentucky State University later deemed "inappropriate." The theme of the yearbook--"destination unknown"--described a time of uncertainty. This--plus such other traits as the book's purple cover, the lack of captions under many photographs, and the inclusion of current events that had nothing to do with the University--prompted the University vice president for student affairs to direct that the book be confiscated, and its distribution to students withheld.

Although the University presented arguments to the contrary, the Sixth Circuit nevertheless found "clear evidence" of the University's "intent to make the yearbook a limited public forum." 236 F.3d at 349. Most persuasive for the court was the fact that editorial control of the yearbook was placed, under University policy, with students; the University had limited its oversight to general and administrative matters.

Notably, the court inquired beyond the University's express policies, and examined its practices as well. The court reasoned that, in determining the existence of a limited public forum, "actual practice speaks louder than words," and found it significant that the student affairs vice president "'had never expressed any concern about what the content might be in the yearbook' prior to its publication." 236 F.3d at 351.

C. Religious activity

In *Widmar*, the seminal forum doctrine case in a higher education context, the University of Missouri at Kansas City was challenged over its policy prohibiting the use of University facilities for purposes of religious worship or religious teaching. While its policies no doubt evidenced an intent to create a limited public forum, the University cited to the court what many would deem a fairly compelling governmental interest: compliance with the Establishment Clause of the First Amendment. (The Establishment Clause prevents Congress from making any law respecting an establishment of religion; the Clause is applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 US 296, 60 S.Ct. 900, 84 L.Ed.1213 (1940)) While the *Widmar* court agreed that complying with Constitutional mandates is compelling, it was not sufficient to justify the University's facilities use restrictions. Under the traditional test the US Supreme Court created in *Lemon v. Kurtzman*, 403 US 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the court found that the University's policy would indeed have a secular purpose and avoid entanglement with religion.

The University argued, however, that allowing religious groups to use its facilities would fail the third prong of the *Lemon* test--having the primary effect of advancing religion. Such use, according to the *Widmar* court, constituted "a religious organization's enjoyment of merely 'incidental' benefits." 102 S.Ct. at 276.

Thirteen years after *Widmar*, the US Supreme Court expanded its rationale to a student fees case in *Rosenberger v. Rector and Visitors of University of Virginia.* There, the University had refused to allocate monies from its student activities fund to a religious-based student organization. Employing a forum analysis, the court held that the Establishment Clause did not serve as a compelling governmental interest justifying the

exclusion, and that withholding the funds on that basis constituted unlawful discrimination based on content.

The court's rationale in *Rosenberger* served as the basis for a decision in a sidewalk case out of the Ninth Circuit. In *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001), an anti-abortion protester demanded the right to erect a display on the campus of Olympic Community College. The display included posters that graphically depicted aborted fetuses. A college official advised the protester that he could conduct the demonstration as long as he did not cause a disturbance, interfere with campus activities, or engage in religious worship or instruction. The demonstration ultimately became hostile, and college safety officers and local police ordered the protester to leave. When he refused, he was cited for criminal trespass.

The Ninth Circuit found the first two conditions imposed by the College official to be narrowly tailored to achieve the College's educational purpose. It found the third condition--to refrain from engaging in religious worship or instruction--to be "problematic." Citing *Widmar* and *Rosenberger*, the court held that once the College had allowed the protester on campus to conduct a demonstration, it "could not, consistent with the First Amendment's free speech and free exercise clauses, limit his demonstration to secular content." 272 F.3d at 1216.

IV. Considerations for college and university leaders

Despite the incongruities among forum analysis cases in the higher education arena as that analysis has evolved, institutional decision-makers can still extract some practical conclusions from recent decisions. First, *Widmar*'s effective presumption that a public college or university campus is a limited public forum--and the consequences that would potentially limit an institution's authority to regulate expression--should not suggest that an institution re-think its mission of fostering an environment that will promote free expression. It is arguably more important than ever that the academy serve as a marketplace of ideas. As forum analysis has evolved, however, it is inevitable that creation of new and more innovative media of expression will also create limited public fora--even if those media are "metaphysical."

Consequently, as any new medium of expression comes to create a limited public forum, institutional policies and practices should be studied to remove content-based restrictions, which can be justified only by compelling governmental interests. Certain forms of speech--notably, obscenity and defamation--do not enjoy protection under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). For the rest, there are likely few state interests compelling enough to support a content-based restriction in public college or university policies that affect expression.

Moreover, as content-based restrictions are to be avoided, institutional leaders should pay close attention to the reasonableness of their time, place and manner restrictions. The safety of the academic community is no doubt the most prominent concern in policies that impact expression. In *Healy v. James*, which addressed First Amendment rights in higher education, the court recognized that an institution may legitimately prohibit "actions which 'materially and substantially disrupt the work and discipline of the school.' [citation] 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." 92 S.Ct. at 2350.

Finally, time, place and manner restrictions should be crafted only to achieve these appropriate ends, and not have even the unintended effect--because of dubious bureaucratic requirements--of restricting expression. For example, policies requiring that speakers obtain prior approval from administrators have long been seen as an unlawful prior restraint. *Hammond v. South Carolina State College*, 272 F.Supp. 947 (1967). Restrictions that require compliance with unnecessary processes can have the effect of limiting campus speech, and be deemed a pretext to discourage activity protected under the First Amendment.