Policy-making Challenges in the Marketplace of Ideas

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The American college or university campus is without a doubt the quintessential marketplace of ideas. When they attempt to create or implement institutional policies, however, members of the academy understandably might be wary of the First Amendment's effect on their efforts. The goal of those efforts--to create an academic environment conducive to all aspects of learning--can be frustrated when they unwittingly threaten to limit protected expression. Faculty, trustees, administration, and even students might occasionally wonder whether the marketplace of ideas is too much of a good thing.

I. Commercial speech

Speech that is commercial in nature--typically in the form of newspaper ads, signs in common areas on campus, or other solicitation targeted at students--has long created policy issues for college or university leadership. Such expression can be an important source of information for students, as well as one of revenue for both the institution and student organizations. Frequently, however, institutional decision-makers are uneasy with an on-campus presence of commercial interests attempting to market their wares.

The issues can become even more problematic when a public institution seeks to impose content-based restrictions on advertisements in a forum on campus where free expression is allowed or encouraged. Officials who want to prevent their campuses from becoming bazaars, or who want to shield their students from exploitation by commercial interests, may find their efforts frustrated by the First Amendment.

A. The Central Hudson *test*

The notion that commercial speech is deserving of protection under the First Amendment is relatively new. In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the U.S. Supreme Court felt it was "clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." 316 U.S. at 54. All that changed

with the Court's holding in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), where it held that the First Amendment affords some degree of protection for expression related solely to the economic interests of the speaker and its audience.

Virtually any inquiry regarding the extent to which a public institution may control commercial speech begins with an analysis the Court formulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). In *Central Hudson*, the State of New York's utility regulatory commission had outlawed advertising intended to stimulate consumers' purchase of utility services, or "promotional advertising." Such advertising, the commission felt, would give "misleading signals" to consumers in seeming to encourage the consumption of energy at a time when conservation was necessary. The commission did not ban, however, advertising designed merely to provide factual and informative information.

In striking down New York's ban on promotional advertising by public utilities, the Court announced a four-part analysis by which to gauge a government's attempt to regulate commercial speech. In a threshold inquiry, the government first must determine whether the speech concerns "lawful activity" and is not misleading; expression over illegal activity, or that is misleading, is not entitled to First Amendment protection. The next question asks whether "the asserted governmental interest is substantial." If the speech at issue satisfies both of these tests, the state must then "determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 567.

The *Central Hudson* Court found that the utility's proposed advertising was not misleading, and also acknowledged that New York's interest--to encourage energy conservation--was substantial. Moreover, the Court concluded that the commission's ban on promotional advertising would indeed advance its interests, but it further determined that the ban was more extensive than necessary to achieve those interests. Specifically, the commission could have opted for less restrictive controls on advertising, such as limiting the format or content of the utility's advertising.

In dissent, then-Justice Rehnquist saw the *Central Hudson* holding as a realization of his fear that the Court had--in *Virginia Pharmacy Board*--"unlocked a Pandora's box."

Rehnquist felt the commission's prohibition of promotional advertising was a legitimate economic restriction. He voiced doubt, however, as to whether the marketplace of ideas was well served by elevating commercial speech to expression worthy of First Amendment protection. The free flow of information in the context of political speech, he felt, is important "not because it will lead to the discovery of any objective 'truth,' but because it is essential to our system of self-government." Rehnquist further suggested that relying on the marketplace of ideas to "expose falsehood and fallacies is wholly out of place in the commercial bazaar," since "in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence." 447 U.S. at 598-99.

The U.S. Supreme Court has since clarified various aspects of the *Central Hudson* test. For example, in *Board of Trustees of the State University of New York v. Fo*x, 492 U.S. 469 (1989), it considered efforts by SUNY officials to control the aggressive marketing tactics of American Future Systems (described in greater detail below). Specifically, the SUNY regulation prohibited commercial enterprises from operating on campus other than to provide food, vending, campus bookstore, and other specified services. In concluding that SUNY officials' removal of AFS officials from campus had violated the First Amendment, the U.S. Court of Appeals for the Second Circuit found that the University failed the fourth part of the *Central Hudson* analysis since the regulation did not represent the least restrictive measure that could effectively protect the governmental interest. The Court, however, disagreed.

Writing for the majority, Justice Scalia noted that *Central Hudson* requires the government to show only that its restriction on commercial speech is no more extensive than necessary. That does not imply that the government action at issue be one for which there is no "conceivable alternative"; to hold otherwise would allow courts to unduly second-guess the state's judgment. The fourth element of the *Central Hudson* analysis is satisfied by evidence that there exists a "fit" between the government's action and its substantial interest: "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' . . . ." 492 U.S. at 482.

Finally, in *Edenfield v. Fane*, 507 U.S. 761 (1993), which found that Florida's ban on personal solicitation by certified public accountants violated the First Amendment, the Court focused on the third and fourth parts of the *Central Hudson* analysis which (as subsequent litigation has demonstrated) have proven to be the more critical questions: whether the governmental restriction on advertising serves a substantial state interest and is not more extensive than necessary to serve that interest. Through Justice Kennedy, the Court held that, in support of its controls on commercial speech, the government may not rely on "mere speculation or conjecture," but rather must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 507 U.S. at 771-72.

B. Newspaper advertisements on campus

Innocuous ad content in college or university newspapers will typically not be the subject of First Amendment litigation over commercial speech. Rather, the ad at issue will more likely be in the vein of that addressed in *Lueth v. St. Clair Community College*, 732 F.Supp. 1410 (E.D. Mich. 1990). There, the editor-in-chief of the *Erie Square Gazette* (a college newspaper funded by student fees, and whose staff received academic credit for their work) had printed on the front page of the paper an advertisement for Cheri Champaigne's, a nude dancing club not far from the College across the border in nearby Canada. The ad boasted of the 19-year drinking age, as well as the "total nudity of the dancers." A week after the publication of the issue that contained the ad, the College's dean ordered that the *Gazette* not publish nude dancing ads in the future.

In considering the student editor's First Amendment challenge against the dean's decision, the court concluded that the content of the ads was not deceptive, and accepted as well the College's stated interest underlying its action: that such an ad "was degrading to women, promoted drinking to students at the College not of legal drinking age, and . . . was otherwise inimical to the educational mission of the College." The court all but ignored the third factor of *Central Hudson*--whether the action actually advanced the government interest--and, in ruling against the College, held that prohibiting further ads was more extensive than necessary to serve that interest. Fatal for the College was the fact that the dean's action was not based on any pre-determined standards for advertising, for no such standards existed. The court felt that, without those standards, neither the

College "nor the editors of the *Gazette* can evaluate whether the defendants' regulation on advertising 'burden[s] substantially more speech than is necessary to further the government's legitimate interest." 732 F.Supp. at 1416.

No doubt the most noteworthy case of recent years to address commercial speech in a student newspaper is *Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004), which addressed a Pennsylvania statute prohibiting "any advertisement of alcoholic beverages" in (among other things) "any booklet, program book, yearbook, magazine, newspaper . . . or other similar publication published by, for, or in behalf of any educational institution." Shortly after the statute took effect, the newspaper (a certified student organization at the University of Pittsburgh) pleaded with its alcohol-serving advertisers that they continue to advertise in the paper, but merely refrain from mentioning alcohol in their ads. Gradually, however, those businesses stopped advertising in the *Pitt News* altogether, and the newspaper came to lose thousands of dollars in ad revenue.

The Third Circuit concluded that the Pennsylvania statute, as it applied to the *Pitt News*, violated the First Amendment. Writing on behalf of the panel, Judge Alito acknowledged both that the advertising at issue was not deceptive and the substantial nature of the state interest: the prevention of underage drinking. Judge Alito wrote, however, that the statute "founder[ed]" on the third and fourth prongs of *Central Hudson.* First, the statute did not achieve the state interest because even if Pitt students did not see ads for alcoholic beverages in the pages of the Pitt News, they would "still be exposed to a torrent of beer ads on television and the radio, and . . . see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*." 379 F.3d at 107.

Finally, in determining that the statutory ban on alcoholic beverage advertisements was more extensive than necessary to achieve the state interest, Judge Alito offered a sweeping indictment of postsecondary institutions in general. He suggested that Pennsylvania could "combat underage and abusive drinking by college students" by enforcing "alcoholic beverage control laws on college campuses"; but "studies have shown that enforcement of these laws on college campuses is often half-hearted . . . ." Although Judge Alito cited only one study (a survey of college administrators and security chiefs) to support his claim, he presumed that the University

of Pittsburgh was as guilty as other postsecondary institutions of lax enforcement of liquor control laws.

C. Solicitation--personal and virtual--on campus

The *Central Hudson* test governs not only commercial speech issues in conventional advertising media, but in a direct solicitation context as well. The U.S. Court of Appeals for the Third Circuit upheld Penn State's regulation of such activity in *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3d Cir. 1984). AFS sought to market their products (tableware and cookware) directly to students in their dormitories. The marketing approach was, in the court's words, "similar to the well-known Tupperware party," in which students were "offered a glamorous view of their post-college apartment life, and . . . urged to buy 'quality' tableware, crystal, and cookware without delay." While University officials were willing to allow product demonstrations in certain common areas of the dormitories, they outlawed demonstrations in individual rooms, and similarly prohibited sales in a dormitory room to anyone other than the occupant of that room. Moreover, AFS was free to solicit students by telephone and mail, as well as advertise in the student newspaper.

The court found that Penn State officials had satisfied all four elements of the *Central Hudson* test. AFS's commercial expression concerned lawful activity, and the University's desire that its dormitories not become a "rent-free merchandise mart, coupled with its educational interest (with respect to students)" was a substantial governmental interest. While restricting the direct solicitation indeed advanced the University's interest, the lynchpin of the holding was the court's determination that the University's policy was not excessive since AFS had other means of soliciting to students: "We believe that the existence of ample alternative means for students and vendors to exchange commercial information in the dormitories and elsewhere confirms that Penn State's restriction is carefully tailored to carry out its intended purpose." 752 F.2d at 866.

Commercial speech in the digital age was at issue in *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366 (5th Cir. 2005). There, a private online dating service had sent legal commercial spam to all non-confidential student e-mail addresses at UT Austin. The University had in place a policy to block incoming unsolicited commercial e-mails; when the service refused to respond to a cease-and-desist

letter the University had sent, school officials blocked the service's spam e-mails. In upholding the University's actions, the Fifth Circuit accepted one of the proffered state interests (the time and efficiency of the users), but discounted the other (the efficiency of the University's servers). Consequently, the court found that, under the fourth prong of *Central Hudso*n, the means the University had chosen to achieve its goal (blocking all spam in a content-neutral way) sufficiently addressed the first state interest. Since the spam e-mail could be (and typically was) sent during off hours, when the network servers would not be taxed, the court doubted that the policy truly addressed the server-efficiency interest the University had asserted. It recognized further that each of *Central Hudson*'s four factors "raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." 420 F.3d at 376.

The Fifth Circuit's observation on the inter-relatedness of the four factors in *Central Hudson* is significant for college and university policy-makers; it also highlights the difficulty those policy-makers face in reconciling First Amendment protections of commercial speech with the kind of academic environment they might wish to create. Clearly the final two factors of the analysis--the nature of the governmental interest and the means chosen to give it effect--will determine whether policies that limit commercial expression will pass muster. It is difficult to glean from the cases, however, a reliable formula for success. For example, the availability of alternative means for AFS to advertise its products to Penn State students meant that its limitations on Tupperware-party activities were not unduly restrictive (the fourth *Central Hudson* factor), and therefore withstood judicial scrutiny. In *Pitt Press*, however, that same access to alternative advertising media was fatal to the putative state interest (the third factor in *Central Hudson*); there, the court questioned how removing ads from student newspapers could reduce under-age drinking when students saw beer and liquor ads everywhere else they looked.

Commercial speech decisions in college and university cases impose clear policy structures on institutional leaders. That commercial speech enjoys First Amendment protection is beyond dispute, and students are inevitably inundated with advertisers' messages through a wide variety of media. At best, the courts seem to say, an institution's

desire to filter the commercial message is futile; at worst, it is wrongfully limits access to Constitutionally-protected information.

II. Hate speech

While many would suggest that the legal issues over campus hate speech codes have long been resolved, claims persist that many schools continue to adhere to unlawful policies. Last fall, the Foundation for Individual Rights in Education (FIRE) complained in a letter to the Phi Beta Kappa Society that "so many" of the Society's institutions had codes violative of the First Amendment that they all could not be listed in that missive. Yet claims of racial, ethnic, and religious harassment on campus continue. The Institute for Jewish and Community Research recently complained to the U.S. Commission on Civil Rights about the distribution at San Francisco State University of fliers referring to "the medieval anti-Semitic blood of Jews slaughtering children," and urged Jewish students there to file complaints. *Civil-Rights Panel Hears Complaints of Anti-Semitism on American Campuses*, Chronicle of Higher Education, November 21, 2005.

A. R.A.V. *and viewpoint regulation*

Modern challenges to public college or university policies that outlaw hate speech are based on the claim that such policies are an illegal attempt to control expression based on viewpoint. The seminal case is *R.A.V. v. City of St. Paul, Minnesota*, 505 US 377 (1992). *R.A.V.* was a challenge to an ordinance that made it unlawful to place on public or private property expression such as a symbol or graffiti "including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ." After a juvenile was charged under the ordinance with burning a cross on the lawn of a home owned by an African-American family, the juvenile claimed that the ordinance violated the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the ordinance as a permissible regulation of speech based on content as a prohibition against "fighting words" under *Chaplinsky v. New Hampshire,* 315 US 568 (1942). The U.S. Supreme Court disagreed, however, and struck down the ordinance in that it outlawed otherwise permissible speech solely on the basis of the subjects the speech addresses.

On behalf of the majority, Justice Scalia noted that even though content-based regulations are presumptively invalid, there does not exist an absolute prohibition against content discrimination. When the government may regulate speech--even "fighting words"--based on content, it may not do so "based on hostility--or favoritism--towards the underlying message expressed." 505 US at 386. The St. Paul ordinance outlawed expression that was based on race, color, creed, religion, or gender. Persons who wished to use "'fighting words' in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality--are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." 505 US at 391.

A Colorado statute that regulated expression withstood a Constitutional challenge in *Hill v. Colorado*, 530 US 703 (2000). At issue in *Hill* was a statute that made it a misdemeanor at any health care facility to "knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such person . . . ." The plaintiffs sought a declaratory judgment that the statute violated the First Amendment, claiming that it caused them "to be chilled in the exercise of fundamental constitutional rights" at abortion clinics.

By a vote of 6-3, the U.S. Supreme Court (through Justice Stevens) held that the statute did not regulate expression based on its content. First, Justice Stevens reasoned, the statute regulated not speech, but rather the places where speech might occur. Second, it was not enacted "because of disagreement with the message it conveys." Finally, the State's interest in protecting access and privacy, and providing the police clear enforcement standards, was not related to the content of the demonstrators' speech: "As we have repeatedly explained, government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech." 530 US at 720.

Justices Scalia, Thomas and Kennedy dissented in *Hill*. In his dissent, Justice Scalia first objected that the majority was merely reacting to "a speech regulation directed against the opponent of abortion," and, therefore, the statute "enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever

doctrines of constitutional law stand in the way of that highly favored practice." 530 US at 741. More to the point, however, Justice Scalia noted that a speaker could approach another to convey any message that did not constitute protest, education or counseling without the other's consent: "Whether a speaker must obtain permission before approaching within eight feet--and whether he will be sent to prison for failing to do so--depends entirely on *what he intends to say* when he gets there." 530 US at 742.

Finally, in 2003, a 5-4 majority upheld one portion of an anti-hate speech statute in *Virginia v. Black*, 538 US 343 (2003). The Virginia statute made it "unlawful for any person or person, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." For the majority, Justice O'Connor acknowledged that, while cross-burning is a symbol of hate, it can constitute a purely political message or be meant to intimidate as well. She distinguished the statute from the ordinance in *R.A.V.* in that the former "does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.' . . . It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'" 538 US at 361.

B. Early challenges to campus hate speech codes

The most prominent challenges to student speech codes--raised both pre- and post-*R.A.V.*--were three federal court actions involving codes at the University of Michigan, the University of Wisconsin system, and Central Michigan University. All three challenges attacked in particular the sections of the codes geared at controlling hostile environment activity on such bases as race, religion, ethnicity, or gender.

The first, *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989) is in many respects the most considered opinion. Following several incidents of racial harassment at the University, the Board of Regents adopted an extensive policy on "Discrimination and Discriminatory Harassment." In general, the policy subjected students to discipline for behavior, "verbal or physical," that would stigmatize or victimize an individual based on race, ethnicity, religion, sex, sexual orientation, etc. and (among other things) create an "intimidating, hostile or demeaning environment for

educational pursuits, employment or participation in University sponsored extra-curricular activities."

The court found the policy unconstitutionally vague and overbroad. It looked at particular cases in which students had been disciplined under the policy for speech in the classroom setting, and found the overbreadth violation in that the enforcement had punished protected speech: "The innocent intent of the speaker was apparently immaterial to whether a complaint would be pursued." 721 F.Supp. at 866. The court found the vagueness violation particularly in the use of the terms "stigmatize" and "victimize": "However, both of these terms are general and elude precise definition." 721 F.Supp. at 867.

In *UMW Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F.Supp. 1163 (E.D. Wis. 1991), the Wisconsin Regents adopted a policy that prohibited "expressive behavior" that was racist or discriminatory; directed at an individual; demeaned race, sex, religion, color, etc. of the individual; and created an "intimidating, hostile or demeaning environment." In striking down the policy as overbroad, the court rejected the University's claim that it was a permissible prohibition of fighting words under *Chaplinsky*: "Speech may demean an individual's characteristics without tending to incite that individual or others to an immediate breach of the peace. . . . An intimidating, hostile or demeaning environment certainly 'disturb[s] the public peace or tranquility enjoyed by the citizens of [a university] community.' However, it does not necessarily tend to incite violent reaction." 774 F.Supp. at 1172.

Finally, the court in *Dambrot v. Central Michigan University*, 839 F.Supp. 477 (E.D. Mich. 1993) invalidated the code that served as the basis for the University's dismissal of its basketball coach. The coach had used a racial epithet while he was addressing players in what he termed a "positive and reinforcing" manner. The University's policy outlawed "verbal or nonverbal" behavior that would demean or slur individuals through words or "slogans that infer negative connotations about an individual's racial or ethnic affiliation." The court relied upon both *University of Michigan* and *R.A.V.* to find the policy's exclusive application to race or ethnicity an impermissible content-based regulation based upon viewpoint: "It therefore imposes upon

a speaker the kind of 'special prohibitions' mentioned in *R.A.V.* because he has spoken on an officially condemned topic." 839 F.Supp. at 483.

C. Recent challenges to speech codes

Following the *University of Michigan*, *University of Wisconsin* and *Central Michigan University* decisions, and certainly in light of *R.A.V.*, colleges and universities took a hard look at their respective student speech codes. The lawsuits, however, have continued.

In *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (4th Cir. 1993), for example, a fraternity challenged sanctions the university had imposed over various activities that were racially offensive; it maintained that the activities were expression protected under the First Amendment. The fraternity staged an "ugly woman contest" in which one fraternity member dressed as "an offensive caricature of a black woman." In its disciplinary order, the University concluded that the fraternity had violated the institution's mission statement. Specifically, it alleged that the "ugly woman contest" had violated the statement's commitment to (among other things) "teaching the values of equal opportunity and equal treatment, respect for diversity, and individual dignity."

The Fourth Circuit conceded that a determination of whether the First Amendment protected what it deemed a "crude attempt at entertainment" was rendered "all the more difficult because of its obvious sophomoric nature." Nevertheless, it relied on a line of cases in motion picture, music, and even nude dancing contexts to conclude that entertainment--even of the low-grade variety--is entitled to protection under the First Amendment. Moreover, relying on *R.A.V.*, the court found that action against the fraternity on the basis of the diversity language of the mission statement was illegal content discrimination based on viewpoint: "The mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well." 993 F.2d at 393.

Years later, a federal court in California was twice called upon to consider a community college district's student speech code. In the first review, *Burbridge v.*

Sampson, 74 F.Supp. 940 (C.D. Cal. 1999), the South Orange County Community College District's policy limited gatherings of twenty or more to what it labeled "preferred areas." The areas did not, however, include those where students were prone to assemble, and which had previously been used for public gatherings. Moreover, the policy contemplated prior approval for expressive activities by the college president without prescribing standards by which the president would decide whether to approve those activities. Finally, the policy flatly prohibited the distribution of noncommercial literature.

The court disapproved of all three of these features of the speech code. The limitations of larger gatherings to preferred areas were not narrowly tailored time, place and manner restrictions and did not provide for alternative means of expression. The requirement of approval, without standards for the President's decisions, constituted an unlawful prior restraint on expression.

Furthermore, the blanket prohibition against commercial expression was an unlawful content-based restriction. It doubted the validity of the district's putative substantial interests, *i.e.*, promoting an educational rather than commercial atmosphere on campus and "preventing fraud and harassment of students and employees." 74 F.Supp at 950.

The court revisited the District's student speech code in *Khademi v. South Orange Community College District*, 194 F.Supp.2d 1011 (C.D. Cal. 2002), and the District did not fare much better the second time in litigation than it did the first. Subsequent to the first lawsuit, the District had added considerable detail to its speech policy, but most of that detail--especially that which dealt with content--did not pass muster. Specifically, the policy prohibited commercial advertising for alcoholic beverages, tobacco products, firearms, and explosives. The court found no compelling governmental interest to support the ban on such advertising.

Perhaps more surprising was the court's holding that policies prohibiting speech clearly not protected by the First Amendment were unlawfully content-based as well. The policy outlawed "material which is defamatory and/or which is obscene." In what might be a somewhat dubious conclusion, the court stated: "Given the interest of the faculty and student body in intellectual freedom, the Court cannot find that the District has a

compelling interest in, for example, prohibiting obscenity that justifies these content-based provisions." 194 F.Supp.2d at 1027.

Prior permission was also required under the University of Houston's student speech policies in *Pro-Life Cougars v. University of Houston*, 259 F.Supp.2d 575 (S.D. Tex. 2003). The policies further held that, for activities deemed "potentially disruptive," student groups were required to follow prerequisites prescribed in a "Disruption of University Operations and Events" policy. That policy prescribed time, place and manner restrictions on potentially disruptive gatherings, but failed to define the phrase "potentially disruptive." Nevertheless, the President was empowered to approve or disapprove activities under the undefined standard. The court found the policy to be an unlawful prior restraint, and determined as well that it failed the narrowly-tailored requirement: "To be narrowly tailored, a speech regulation must not burden substantially more speech than is necessary to further the stated legitimate governmental interest, which in this case is the preservation of the University's academic mission." 259 F.Supp.2d at 584.

Finally in *Bair v. Shippensburg University*, 280 F.Supp.2d 357 (M.D. Pa. 2003), the student speech code held that "[a]cts of intolerance directed toward other community members will not be condoned," and while it recognized the right "to express a personal belief system, " it further held that "[t]he expression of one's beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another." Relying principally on *R.A.V.*, the court invalidated the code as overbroad and viewpoint-based discrimination. It held that, while the University's efforts to prohibit discrimination on the basis of "certain immutable characteristics" were "certainly laudable, this ambition still runs afoul of the First Amendment concerns if discrimination policies have the effect of prohibiting protected forms of expression. Simply utilizing buzzwords applicable to anti-discrimination legislation does not cure this deficiency." 280 F.Supp.2d at 372.

D. In defense of speech codes

Despite American courts' apparent inclination to be highly skeptical of campus speech codes, many institutions continue to seek to impose codes against offensive or degrading expression, especially when such expression is based on race, color, ethnicity, religion, or other traditional targets of anti-hate speech regulations. Even in the presence

of compelling arguments based on the First Amendment, public policy concerns that would support speech codes should not be overlooked.

Two of the more prominent scholars who advocate in favor of hate speech codes are Richard Delgado and Mari J. Matsuda. Both have written extensively in law journals and other publications, and both recognize the compelling interests favoring First Amendment protections. Delgado acknowledges the various arguments that have been offered over the years against campus speech codes: they run counter to the notion of the college or university as the center of free thought; they represent a step back toward the institution serving *in loco parentis* by shielding students from unpopular expression; they protect the vulnerable student; they are merely thinly-veiled attempts to advance the left-wing agenda; and they run counter to the preferable way of dealing with racism on campus, in that the best cure for such is to encourage expression and not stifle it. The United States, he argues, is nevertheless out of step with other western nations that long ago enacted laws that prohibit racist expression and incitement to hatred in general. According to Delgado, social scientists agree that the "main inhibiter of prejudice is the certainty that it will be remarked and punished. . . . Moreover, threat of public notice and disapproval operates as a reinforcer--the potential racist refrains from acting, out of fear of notice and sanction." As so much speech does not enjoy First Amendment protection--including that used to defraud a consumer; fix prices; show disrespect to a judge, teacher or military officer; violate a trademark; *etc*.--certainly a society that cherishes the First Amendment can tolerate a measure of regulation of racist or similarly offensive expression. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343, 374 (1991).

Matsuda also notes that other nations have long criminalized racist expression. She proposes a test under which racist speech would be proscribed only if the message is of racial inferiority; directed against a historically oppressed group; and persecutorial, hateful and degrading. Moreover, she contends that "official tolerance" of racist speech in the college or university setting "is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in

coping with the damage wrought." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2371 (1989).

III. Collegiality and the First Amendment

Most institutional decision-makers would no doubt urge that lively discussion among faculty and administrators about a school's mission and values is essential. Many would further argue that discourse on such matters is a key component of academic freedom. Institutional leaders typically insist, however, that such dialog take place in an atmosphere of collegiality. What is a lively discussion for some may, for others, create a toxic environment that frustrates a school's efficiency or effectiveness. If the dialog takes place in a public institution, another factor is introduced: the extent to which that dialog enjoys First Amendment protection.

A. Free expression in the public workplace

In *Connick v. Myers*, 461 US 138 (1983), the U.S. Supreme Court established a test to determine the extent to which the First Amendment protects workplace speech of public employees. The case involved not academics, but lawyers--specifically, lawyers employed in the office of the U.S. Attorney in New Orleans. There, an Assistant District Attorney who was unhappy about her boss's decision to transfer her to a different section of the criminal court circulated a questionnaire among her co-workers. The questionnaire solicited opinions on (among other things) the office transfer policy, office morale, and the level of confidence in supervisors. The U.S. Attorney ultimately fired the lawyer because of her refusal to accept the transfer.

The *Connick* Court developed a two-step process for determining whether an employee's workplace speech is protected by the First Amendment. That test incorporated elements of an earlier test the Court had announced in *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 US 563 (1968). The first step of the process is a determination of whether the expression in question touches on a matter of public concern. Under *Connick*, whether an employee's speech "addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . ." 461 US at 147-148. This first step is a threshold inquiry; if the speech at issue does not touch upon a matter of public concern, there is no First Amendment protection and, therefore, no need for further review. If, however, the speech does bear on a matter of

public concern, the test then proceeds to the next step: "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" 461 US at 142. Whether the speech is protected by the First Amendment depends on how the balance finally tilts.

In *City of San Diego v. Roe*, 543 US 77 (2004), the Court restated the public policy rationale in affording First Amendment protection for some workplace speech as a "recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." The Court also defined "public concern" as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."

B. Matters of public concern and collegiality

Pickering and *Connick* present challenges to (most commonly) faculty who claim in their lawsuits that the penalties over which they have sued (usually employment terminations or tenure denials) were the result of a denial of their First Amendment rights in the workplace. These challenges are daunting at both stages of the *Connick* two-step inquiry. In *Speers v. University of Akron*, 189 F.Supp.2d 759 (N.D. Ohio 2002), a tenured professor had received a list of complaints from students about the professor's department chair, of whom the professor herself had been critical. The professor in turn provided the students with (arguably confidential) student and faculty evaluations of the chair. Ultimately, the chair exercised her discretion to deny the professor a salary increase for the following year. The Ohio federal court found that the professor had satisfied the *Connick* threshold question, recognizing that "'subjects of student discipline and appropriate educational programs to be implemented are undoubtedly matters of concern to the community at large." 189 F.Supp.2d at 771. More typical of cases involving internecine faculty disputes, however, are those holdings that such matters are not of public concern.

In *Keating v. University of South Dakota*, 386 F.Supp.2d 1096 (2005), a physics professor had sent an e-mail to a colleague in which he alleged that his department chair was maintaining a "secret file" about him, and referred to the chair as "a lieing [*sic*]

backstabbing sneak." Months later, the department chair (who had no doubt learned of the professor's comments) met with the professor to discuss the prospect of non-renewing the latter's contract. The professor defended his comments about the chair as being "factually correct." The court rejected the professor's eventual claim that his non-renewal constituted a violation of his First Amendment rights. Unconvinced that the management of the University's physics department was a matter of public concern, and the court deemed the e-mail reference to the department chair "no more than bickering and personal discontent, speech that is not protected by the First Amendment." 386 F.Supp.2d at 1107.

Also failing the public concern test was the faculty speech addressed in *Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992). The *Colburn* plaintiffs were two sociology professors involved in a dispute that had divided faculty within a department into two factions. The dispute centered on the department chair, whom the plaintiffs had opposed; one of the plaintiffs had also sent a note to the administration voicing concern about "the state of the department" and asking for an external review.

The Seventh Circuit denied the plaintiffs' claim that their eventual denial of re-appointment to faculty violated the First Amendment. It was skeptical of their characterization of the dispute as a threat to the "integrity of the University." "No doubt the public would be displeased to learn," the court conceded, "that faculty members at a public university were evaluating their colleagues on personal biases. Nonetheless, the fact that the issue could be 'interesting' to the community does not make it an issue of public concern." 973 F.2d at 586.

C. Connick *and academic freedom*

Professional judgment in how to teach given subject matter--although clearly protected under traditional notions of academic freedom--will typically fail in the balancing test prescribed in *Connick*. In fact, the "special concern" status the courts have afforded academic freedom has often been deemed of minimal importance at the balancing stage. In *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), for example, academic freedom was discounted as a factor in whether Northern Illinois University had violated an instructor's free expression rights when it non-renewed his employment for (among other things) excessive emphasis on sex education in his introductory health survey

course. In upholding the University's decision, the court held that it did "not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution." 474 F.2d at 931.

Deviations from curriculum mandates were not sufficiently protected by academic freedom as well in *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3rd Cir. 1998). Despite prior warnings by University officials, the professor in *Edwards* refused to remove references to "religion and religious questions" from his course on educational media. The Third Circuit, applying the balance test of *Connick*, came out in favor of the University's decision to suspend the professor. The court reasoned that academic freedom "'thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." 156 F.3d at 492.

Even the right to engage in spirited discourse over institutional values and decision-making might not be enough to tip the *Connick* balance in favor of First Amendment protection. In *Schrier v. University of Colorado*, 427 F.3d 1253 (10th Cir. 2005), the University terminated the chairmanship of a medical school professor who had taught there for more than twenty years. The professor had voiced his concerns about fiscal and programmatic implications of a decision to relocate the University's Health Science Center from Denver to nearby Aurora.

The court acknowledged that the subject matter of the professor's speech--"the potential impact a relocation would have on patient care, education and research"--was a matter of public concern. In balancing the University's interests against the professor's interest in free expression, the court came out in favor of the institution. It concluded that the professor's "protected speech impaired harmony among co-workers, detrimentally impacted close working relationships within the School of Medicine, impaired his performance as department chair, and interfered with the University's ability to implement" the Center's relocation. 427 F.3d at 1265.

Conclusion

At one time or another, members of virtually every segment of the academy will find some reason to complain about the First Amendment. Many will want to do what

they can to guard students against exploitation by commercial interests, but the First Amendment affords considerable protection for those interests' marketing tactics. Ethnically- or racially-charged speech can undermine the goal of creating the ideal learning environment, but the First Amendment will allow little by way of controlling it. And many will wonder how the purposes of academic freedom--still a "special concern" of the First Amendment--are served if faculty and other employees fear reprisal for criticizing school policies or practices.

In the environment of shared governance that most colleges or universities aspire to create, leadership is present throughout the institution. American courts' role in shaping the college or university into a marketplace of ideas, however, will inevitably frustrate leadership's efforts on occasion to create and implement sound policy. In articulating the reach of First Amendment protection, the courts are disinclined to engage in policy-making themselves. Their holdings, however, loom large for leadership that must make the hard policy decisions, and that leadership is reliably inclined to favor the free exchange of ideas; ironically, then, institutional policy-makers will sometimes find themselves working to both foster and cope with the marketplace of ideas.