Public Forum Doctrine in Higher Education: Student Rights and Institutional Prerogatives

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PUBLIC FORUM DOCTRINE IN HIGHER EDUCATION:
STUDENT RIGHTS AND INSTITUTIONAL
PREROGATIVES

By

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Dedicated to the Memory of

My Mother, Dorothy Alexander,
My Grandmother, Marguerite Dotson, and
My Sister, Paulette Vann
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ABSTRACT

Historically, public colleges and universities have been thought of as places where free speech and free inquiry abound. Institutional policy makers, however, have occasionally placed restrictions on student expression. When students have challenged these restrictions, courts have used public forum analysis to delineate the balance of student rights to free speech and the institution’s right to self-governance.

Using legal-historical research methods, this study traced the development of the public forum doctrine in the case law and its application to students in higher education. Employing Edward H. Levi’s three-stage evolutionary theory on the development of a legal concept, the study concluded that the public forum doctrine had completed the first two stages, which involved creation, development and classification. The doctrine, however, has not lost its viability, which is Levi’s final stage.

Other conclusions of the study: 1) Institutions have broad authority to make regulations that are consistent with their missions. 2) Despite this authority, policy makers are constrained by First Amendment principles. 3) Forum analysis enables administrators to designate areas for student speech. 4) The protection of student speech on campus is influenced by the context of the speech. 5) Administrators may exercise the greatest control over campus areas characterized as closed fora. 6) Although, the distinction between designated and limited fora remains ambiguous, courts have begun to suggest differences. 7) Content-based and viewpoint-based regulations on public
forum speech are disfavored. 8) Regulations on public forum speech must be narrowly tailored to achieve a compelling government interest. 9) The judicial characterization of student publications as limited fora is undergoing legal challenge. 10) The conflict between the students’ right to free expression and the public institutions’ right to govern is dynamic and ongoing.
CHAPTER 1
INTRODUCTION

In 2003, Texas Tech University law student Jason W. Roberts filed suit against the institution for violating his First Amendment rights when his request to express views on homosexuality on campus but outside of a designated campus forum area was denied by the Center for Campus Life. Tech's designated free-speech forum was a 20-foot-wide gazebo, which held about 40 people and was located northwest of the Student Union building. Those wishing to speak outside this designated area were required to submit such requests at least six working days prior to the day of use. Tech’s denial of Robert’s request, which arrived via e-mail from the Center for Campus Life, asked him to move into the gazebo to express his views. In refusing Robert’s request, officials claimed the speech was "the expression of a personal belief and thus is something more appropriate for the free-speech area, which is the gazebo area."¹

In September 2004, U.S. District Judge Samuel Cummings struck down "free-speech zones" at the university, ruling unconstitutional a requirement that students who wish to give speeches must stay within a designated area. Although Tech's 2004-2005 Student Handbook lists six free speech

areas, Cummings' ruling requires the university to "more
narrowly" define its limitations on free speech.\(^2\)

Designating free speech forums has become more
prevalent on the nation's university campuses.\(^3\) School
officials prefer to allow certain space to students and the
occasional non-student to exercise their First Amendment
rights however they wish, without disrupting the
educational environment. Those who choose to speak outside
the designated areas without permission could be asked to
move their speech elsewhere.

Since 2002, several public colleges and universities
with established free speech zones have been sued by
students who claim that the speech-restrictive policies
violate their rights to free speech. Joining with the
students is the Foundation for Individual Rights in
Education ("FIRE"), which has made it its policy to bring
lawsuits against college and university free speech zones.
In April 2003, the FIRE sued Shippensburg University in
Pennsylvania after the university instituted "a policy
limiting demonstrations and rallies to two specific 'speech
zones' on campus." In May 2003, the FIRE announced its
intent to sue California's Citrus Community College over
free speech zones described as constituting only one
percent of that college's campus. The community college
quickly capitulated. In June 2003, the FIRE sued Texas Tech
over its policy that limited student speeches to a small
"Free Speech Gazebo."\(^4\)

\(^2\) Timmons, supra note 1.
All of these activities have caused higher education administrators to begin reviewing their policies to determine whether they are constitutional under the guidelines provided by the courts. The law governing this area of public speaking is the public forum doctrine, which provides some protection for people who wish to speak on public property. Created by the U.S. Supreme Court in *Hague v. CIO*\textsuperscript{5} in 1939, the doctrine has developed in the Courts over the years into a three-part inquiry providing a range of constitutional protections based on where the speech occurs on the government’s property. The public forum doctrine has even been applied to various locations on the campuses of colleges and universities.

This research traced the evolution of the public forum doctrine in general and its application to higher education in particular. It sought to delineate the balance administrators must achieve between institutional autonomy and the free expression rights of students. This task required an analysis of court decisions that have weighed the rights of students to free expression on campuses of public higher education institutions in relation to the responsibility of administrative leaders in the institution to maintain order and carry out the institution’s mission. Ultimately, this research examined the relationship between public forum analysis and the free speech zones that have been created at several public higher education institutions.

**Purpose**

The purpose of this study was to identify and analyze the judicial precedents that have applied public forum

\textsuperscript{5} 307 U.S. 496 (1939).
analysis to higher education in order to delineate the balance between student rights to freedom of speech and the authority of institutions to restrict the use of campus venues and facilities. Given that speech is so fundamental to student life and institutional culture in public colleges and universities, this study provided an analysis of the issues involved in student speech rights. The study was guided by the following research questions:

1. How has the public forum doctrine evolved and developed in decisions of the U.S. Supreme Court from 1897 to 2003?

2. How has the public forum doctrine been applied in reported state and federal cases involving the First Amendment free speech and association rights of students at public higher education institutions in the United States?

**Significance**

Unlike previous works in this area, this study involved a comprehensive look at the relationship of the public forum doctrine to students in public higher education. To date, a number of scholars have examined the courts’ analyses of the public forum doctrine as it relates to higher education, but they have tended to deal with a single category of expression such as student media, demonstrations or hate speech. Because the public forum doctrine evolved outside of the campus environment and was developed and applied across various categories of speech at higher education institutions, this research fills an important void in the literature. Further, the results of this analysis enhance our conceptual understanding of a
constitutional right that is paramount in democratic systems and contributes to our knowledge of appropriate institutional policy and practice. It addition, it may provide direction for college and university administrators who want to allow for free expression by students while maintaining responsible control of the campus environment. It also provides students with a sense of where the legal boundaries of free expression on campus conflict with the notion of institutional autonomy.

**Operational Definitions**

1. Public forum doctrine -- Created by the U.S. Supreme Court, the doctrine consists of four parts: the traditional, the designated, the limited and the nonpublic. It provides standards for determining when people have a right to free speech on government property.

2. Student expression rights -- These have been determined over time by the courts. Variations on these rights will occur as a result of the institutions making academic policies that serve the interests of their campuses.

3. Public higher education institutions -- All of the colleges and universities that are financially supported by the state at a significant level of funding.

4. On campus -- This limits the scope of the study to those challenges to student free speech violations that occur on the physical campus of the institution.
Conceptual Framework

The central concept under investigation in this legal-historical research study was the public forum doctrine as interpreted by state and federal courts within the United States. The U. S. Supreme Court first enunciated the doctrine in 1939 when it ruled that government could not prohibit speech-related activities such as demonstrations, leafleting, and speaking in public areas traditionally provided for speech. The doctrine has defined three distinct constructs: (1) traditional public forum; (2) limited public forum; and (3) the nonpublic forum. As the doctrine developed, it has been used in numerous cases when courts were called on to determine the power of the government to limit speech on government property.

The researcher applied legal-historical methods to discover and analyze the law that relates to the evolution and development of the public forum doctrine and to delineate its application to public institutions of higher education. To accomplish this, a two-step data collection and analysis process was used. First, all of the legal precedents defining public forum in U.S. Supreme Court opinions were identified and analyzed. This process allowed the researcher to operationally define the doctrine and chart its judicial evolution. Second, those cases applying the forum doctrine to public colleges and universities were given special scrutiny in order to determine whether the application to college and university campuses differs from the application of the doctrine to other governmental units.

A systematic study of the cases that apply to educational institutions enabled the researcher to: (1) extract the current level of the development of the law as
it applies to public higher education institutions; (2) compare the higher education applications with other contexts; and (3) determine the limitations on higher education administrators.

**Limitations**

1) This study was focused on the rights of students to speak freely at public higher education institutions and the authority of those institutions to curb student speech. It reviewed the judicial history and legal development of the public forum doctrine and its application to students at public higher education institutions.

2) Examination of students’ speech rights was limited to the relevant case law reported in official federal and state court reporters and republished by the LEXIS online database.

3) This research was limited to a historical-legal inquiry.

4) A synthesis and analysis of judicial decisions was limited to an examination of how the courts have interpreted the public forum doctrine. Cases that determine student speech issues using grounds or analyses other than the public forum doctrine were not be included.

5) This study also examined how the public forum doctrine applies to institutional autonomy. It does not, however, address the extent of the
freedoms of faculty, staff and administrators to exercise their rights under the First Amendment.

6) For purposes of this research, the public forum doctrine was that rule established by the U.S. Supreme Court for determining the constitutionality of speech regulation on government property. It categorizes the areas as traditional public forum, government-designated forum, limited public forum and non-public forum.

7) The terms “university,” “college,” “institution,” and “postsecondary institution” are used interchangeably throughout this study in reference to public institutions of higher education that award degrees at the associate level or higher.

8) Unless otherwise noted, the term “Constitution” and variations of the term refers to the United States Constitution.

**Summary**

On several university campuses, recent regulations of the location of student speech have been challenged in court by students who feel their First Amendment rights to free expression have been violated. The regulations, which designate certain areas on campus as “free speech zones,” have been used to limit or restrict student speech to areas far removed from the center of controversial events and objects. This study investigated the effects of federal and state court decisions on the free expression rights of
students. That investigation involved a review of case law and an analysis of the results of judicial interpretation based on the public forum doctrine. The public forum doctrine, which was first developed more than 60 years ago by the U.S. Supreme Court, has been applied to public higher education institutions for the last quarter century. Using legal-historical methods, the researcher identified and synthesized the law related to the public forum doctrine and analyzed the balance between the students’ rights and the institution’s responsibilities.

Chapter 2 reviews the literature that surrounds this area of the law and higher education. It begins with an examination of the cases that involved public speech in the 19th Century and traces the development of the law to the landmark ruling that recognized the public forum doctrine. Chapter 3 discusses the methodology and conceptual framework used for this study. Chapter 4 reviews and analyzes the U.S. Supreme Court public forum cases that involved alleged violations of speakers’ First Amendment rights on government property in general. Chapter 5 reviews and synthesizes the public forum cases that involved alleged violations of student speakers’ First Amendment rights on the campuses of public colleges and universities. Chapter 6 offers conclusions and recommendations based on an analysis and synthesis of the cases used in this study.
CHAPTER 2

LITERATURE REVIEW

The public forum doctrine was first articulated by the U.S. Supreme Court in a 1939 case. The roots of the doctrine, however, started to appear first in this country in the 19th Century activities that took place outdoors in the cities involving assembling, marching and speaking in public. During that period, courts did not treat such expressions as fundamental freedoms that deserve significant protection. This review of the literature begins with a discussion of the evolution of the doctrine, highlighting some of the major factors in the courts that contributed to the judicial recognition of these freedoms. After reviewing the doctrine, this section then examines institutional autonomy, which has been a source of conflict for the implementation of the doctrine at higher education institutions.

Evolution of the Public Forum Doctrine

The First Amendment provides protection against government interference with various forms of free expression. One of the early forms of expression sought in this country was the ability to gather together to communicate with each other. This desire was captured in the text of the First Amendment, which provides for “the right of the people peaceably to assemble.”\(^6\) The first major U.S. Supreme Court case on freedom of assembly was United States v. Cruikshank,\(^7\) which was decided in 1876. Cruikshank and others were charged with conspiring to

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\(^6\) U.S. CONST. amend. I.
\(^7\) 92 U.S. 542 (1876).
violate the rights of several persons of color by hindering them from assembling peaceably. The charges were based on the Enforcement Act of 1870, which was designed to protect black voters by empowering those who witnessed voting rights violations to testify. The Act under which they were charged only applied to the deprivation of the federal statutory and Constitutional right to be free from voting interference, and the Act did not apply to the states because the Court had not yet incorporated the Bill of Rights to apply to the states. Consequently, the Court dismissed the indictment.

Chief Justice Morrison Waite gave a general statement of the intent of the First Amendment’s assembly clause:

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact it is and always has been one of the attributes of citizenship under a free government. . . . It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it

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8 The absence of protection in the national Constitution against the state mentioned here disappeared in 1925 when the U.S. Supreme Court incorporated the First Amendment freedoms into the Fourteenth Amendment guarantee of “liberty,” which protects people against abridgement of assembly rights by the states. Gitlow v. New York, 268 U.S. 652 (1925).
The right of assembly guaranteed by the First Amendment was limited by the law of unlawful assembly. The American law regarding unlawful assemblies was a modification of the English common law and statute on the subject. Beginning with the earliest legislation in fourteenth century England and following the custom of the times, the government passed statutes prohibiting riots and unlawful assemblies.\textsuperscript{10}

In his book, \textit{The Right of Assembly and Association}, Glenn Abernathy noted, however, that there was no right in England to hold a meeting on a public street.\textsuperscript{11} This was also the law in the United States prior to the turn of the twentieth century; therefore, assemblies on municipal streets in this country have been a source of frequent legal and physical clashes between police and the individuals assembled. Even though there was no right to meet in the streets, it did not mean that all of the assemblies were to be handled as per se nuisances or unlawful meetings. The Pennsylvania Supreme Court made this point clear in the 1872 case of \textit{Fairbanks v. Kerr}.\textsuperscript{12}

A street may not be used, in strictness of law, for public speaking; even preaching or public worship, or a pavement before another’s house may not be occupied to annoy him; but it does not follow that everyone who speaks or

\begin{footnotes}
\footnotetext[9]{Cruikshank, 92 U.S. at 551-552.}
\footnotetext[10]{Glenn Abernathy, \textit{The Right of Assembly and Association} 20 (1961).}
\footnotetext[11]{Id. at 50.}
\footnotetext[12]{70 Pa. 86 (1872).}
\end{footnotes}
preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offense of a nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance per se. Such a stringent interpretation ... is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary.\textsuperscript{13}

Street parades present a different phase of the right to assemble peacefully. The problems that accompany street parades were urban in nature. As a result, the decision to hold a demonstration on a busy thoroughfare could substantially interrupt the flow of traffic. Municipalities have used the permit as a means of controlling the flow of traffic and maintaining the peace in the community. Their governmental authorities have required parade organizers to obtain permits or licenses from a municipal official before holding a parade.\textsuperscript{14}

Some of the early court cases in the United States involving speech on government property involved the licensing of parades and demonstrations in the 19th

\textsuperscript{13} Id. at 92.
\textsuperscript{14} ABERNATHY, supra note 10 at 85.
Century. Municipal officials used these permits in a discriminatory manner against the Salvation Army, an evangelical and philanthropic group founded in England in 1865 by William Booth. The Salvation Army had sent Salvationists across American cities proselytizing those who did not attend church. They marched in parades that included singing and music from instruments such as trumpets and tambourines. As a result, they became targets of newly-enacted parade licensing ordinances. In some instances, a general application ordinance was used to effect a discriminatory action. The practice was for the official to grant all licenses automatically with the exception of those sought by the Salvation Army. In other municipalities, officials attempted to phrase the ordinance so as to cover the Salvation Army but to except from its provisions organizations thought to be more acceptable.

The Salvationists regarded these licensing requirements as an interference with their religious liberty. In a series of cases brought in the last two decades of the 19th Century, four state supreme courts ruled that the regulation of parades must be impartial, meaning that the

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16 ABERNATHY, supra note 10 at 84-85.
18 See Lee, supra note 15 at 1226-1227.
19 ABERNATHY, note 10.
20 Lee, supra note 15 at 1227.
city’s decision of whether to grant a parade permit could not be arbitrary.\textsuperscript{21}

Whether the speech occurs in a government regulated street, park, or building, the constitutional power to restrict infringements on that speech will all come from a common source—the First Amendment law that governs public fora. But in the 19\textsuperscript{th} Century, there was no commonly shared right to speak or express oneself in public.

Richard T. Pfohl noted that while virtually every state constitution in the 19\textsuperscript{th} Century included a provision for protection of freedom of speech, there were no cases protecting speech as “public speech.”\textsuperscript{22} Instead, current First Amendment-protected public speech would have been considered under the powers of municipal corporations.

Pfohl offered three reasons for what he called a displacement of speech. First, because there were few instances of federal infringement of speech between the passage of the Alien and Sedition Acts of 1789 and the Espionage Acts of 1917, there were few federal cases to look to for guidance. Second, the First Amendment was not incorporated as a limit on state power to regulate speech until 1925, when \textit{Gitlow v. New York} gave rise to a string of cases applying the First Amendment to the states through

\textsuperscript{21} The cases, which were decided between 1886 and 1893, included: \textit{In re Frazee}, 30 N.W. 72 (Mich. 1886); \textit{Anderson v. City of Wellington}, 19 P. 719 (Kan. 1888); \textit{City of Chicago v. Trotter}, 26 N.E. 359 (Ill. 1891); \textit{In re Garrabad}, 54 N.W. 1104 (Wis. 1893).

the Fourteenth Amendment Due Process Clause. Third, freedom of speech was conceived of not as an individual right, but as a product of the limits of government power. Noticeably absent from the pre-World War I public speech cases was the language of individual rights. Individual rights were not a force in American jurisprudence until economic substantive due process rights began to surface in the *Lochner v. New York* era.

The major public speech case that reached the U.S. Supreme Court in the 19th Century was *Davis v. Massachusetts*. In that case, the Court upheld a Boston city ordinance that forbade “any public address” on any publicly owned property except in accordance with a permit from the mayor. William F. Davis, a Boston preacher, insisted on exercising his free speech and free exercise of religion rights on the Boston Common, one of the oldest parks in the United States. He was arrested and convicted of violating the ordinance that prohibited public addresses without a permit.

Davis argued that the ordinance was a form of censorship that infringed on his freedom to speak, assemble and worship in public. He contended that the justifications asserted by the city—dangers of breaches of the peace and damage to the public grounds—were improbable. He accused city officials of violating the equal protection clause of the Fourteenth Amendment by enforcing the ordinance solely

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23 Id. The First Amendment was not applied to state regulation or curtailment of public speech until *Hague v. CIO* in 1939.
24 198 U.S. 45 (1905).
25 Pfohl, *supra* note 22 at 540
26 167 U.S. 43 (1897).
against those who preached the gospel and ignoring the many other people who had made speeches on the common without obtaining a permit.\footnote{28} In a reply to Davis’ claims, the attorney general of Massachusetts denied that the ordinance was administered unjustly and asserted that the First Amendment protects “freedom as to substance, rather than as to place.”\footnote{29}

In the state court opinion, written by Oliver Wendell Holmes before his appointment to the U.S. Supreme Court, the court held that the legislature had the absolute right to prohibit the use of streets and parks for expressive activities.\footnote{30} By that reasoning, “the power to close the park or highway denying all public access implied the lesser power to limit the use of the facility to specified activities.”\footnote{31} As a consequence, the state was entitled to prosecute the preacher on the Boston Common.\footnote{32} In upholding Davis’ conviction, the Court concluded that the Constitution does not give citizens the right to use public property in defiance of state law. Because the park was public property, Davis did not have any free speech while in the park.\footnote{33}

The U.S. Supreme Court repeated verbatim a sentence from the decision in the case by the Supreme Judicial Court of Massachusetts. “For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house

\footnote{28} {David M. Rabban, Free Speech in Its Forgotten Years 166 (1997).}
\footnote{29} {Id. (citing the Brief of Defendant in Error at 10).}
\footnote{30} {Davis, 39 N.E. at 113.}
\footnote{31} {Daniel A. Farber, The First Amendment 168 (1998).}
\footnote{32} {Davis, 39 N.E. at 113.}
\footnote{33} {Davis, 167 U.S. at 47.
to forbid it in his house.”  

The Court noted that the mayor’s power to exclude anyone from the public grounds included the lesser power to issue permits for their use. The Davis decision stands for the proposition that the government as proprietor may have additional interests in restricting speech than does the government as regulator. The Davis case is a good example of the pre-20th Century case law that viewed the government as the owner of public streets and public parks that belonged to the state. As owners of the land, state officials had absolute control over public speaking in public streets and parks.

Interestingly, with the exception of Massachusetts, which followed the Holmes ruling in Davis, state courts during this period “held that parading peacefully and lawfully was a fundamental right of Americans and could not be abridged by the municipal requirement of a permit.”

Forty years later, the Court reversed its position on free speech on government property. However, there were several factors related to constitutional interpretation that occurred in the interim, leading the High Court to remove limitations on the suppression of expression in public streets, sidewalks and parks.

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34 Id. (citing Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895)).
37 Abernathy, supra note 10 at 93.
Contributions of Legal Standards to the Court’s Recognition of Freedom in the Public Forum

Several U.S. Supreme Court developments during the early 20th Century had a major influence on the decision to open the public forum four decades after the restrictive *Davis v. Massachusetts*38 ruling. One legal standard that predated the 20th Century First Amendment jurisprudence was the “bad tendency” test.39 Derived from the English common law of libel, the test measured the legality of various forms of speech by that speech’s tendency to cause an illegal action.40

Bad tendency

Between the Civil War and World War I, the bad tendency test was the most pervasive standard applied by the courts to free speech cases.41 The test was drawn from Sir William Blackstone’s Commentaries on the English common law in the 18th Century. Many decisions followed the conclusion of Blackstone that the legal right of free speech precludes prior restraints, but it allows the government to punish publications for their tendency to harm the public welfare.42 The longevity of the test very likely was due in no small part to the judges at that time

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38 167 U.S. 43 (1897).
40 *Id.*
who deferred to the “police power” of legislators and administrators to determine the tendency of speech.\textsuperscript{43}

Michael Kent Curtis summarized the general effect of the bad tendency test on speakers’ inability to freely express their thoughts even when the nation was not at war. Under the bad tendency approach, all it took was an assumed likelihood that the speech would lead to a bad result for government to criminalize the speech.\textsuperscript{44} It was not necessary that the consequences be immediate; the remote bad consequences were enough. Nor was the government required to show that the bad consequences had resulted or that they probably would result. Even true statements that had bad tendencies could get the speaker in trouble. Advocacy solely of legal political action also was off limits, if the tendency of the words was to cause something particularly bad to result.\textsuperscript{45}

In the decade before World War I, two Supreme Court decisions written by Oliver Wendell Holmes illustrate how the test worked. In \textit{Patterson v. Colorado},\textsuperscript{46} the Court upheld the contempt conviction of an editor who did not have an opportunity to prove truth as a defense. The editor was charged with publishing certain articles and a cartoon that reflected on the motives and conduct of the Colorado Supreme Court and that were allegedly intended to embarrass the court in its impartial administration of justice.\textsuperscript{47} He was criticizing the actions of his state’s highest court for acting as an accessory to a stolen election. The

\begin{itemize}
\item[\textsuperscript{43}] \textit{Id.}
\item[\textsuperscript{44}] Curtis, supra note 41 at 385-389.
\item[\textsuperscript{45}] \textit{Id.}
\item[\textsuperscript{46}] 205 U.S. 454 (1907).
\item[\textsuperscript{47}] \textit{Id.}
\end{itemize}
state’s Republicans had sought to protect the utility monopoly from plans for municipal electric power.

In 1904, the Democratic antimonopoly candidate defeated the Republican governor by a slim margin. After a constitutional change to allow more seats on the court, the lame-duck governor filled the seats before they came into existence. The reconstituted court proceeded to rule for the Republicans and defeat the Democrats’ claim to the governor’s seat, and it held parts of the home rule amendment unconstitutional, defeating plans by Denver to establish municipal electric power.48 Though the articles had a negative tone, the editor claimed that they were true and asserted a right to prove the truth based on free speech and free press grounds. Holmes indicated that the main purpose of those provisions was to protect against prior restraints by the government, not subsequent punishment. Punishment could extend to false or true statements. Holmes was concerned that criticism of a court in a pending case could affect the jury’s judgment.

When a case is finished, Holmes wrote, courts are subject to the same criticism as other people, but the need to prevent interferences with the administration of justice “by premature statement, argument or intimidation hardly can be denied.”49 The Supreme Court ruled, therefore, if a court regards a publication concerning a matter before it as an interference with the administration of justice, it may punish the publisher. Newspaper criticism of judicial

48 The political background of this case is recounted in Lucas A. Powe Jr., The Fourth Estate and the Constitution: Freedom of the Press in America 5-7 (1991) and Curtis, supra note 41 at 386-387.
49 Patterson, 205 U.S. 454, 458.
behavior in pending cases, even if accurate, would “tend to obstruct the administration of justice.”

In the second case, *Fox v. Washington*, a state statute incorporated the bad tendency test by defining as a misdemeanor the publication of written matter “having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence.” An editor was convicted under state law for editing materials that advocated disrespect for the law. The article at issue, entitled “The Nude and the Prudes,” which encouraged a boycott against anyone interfering with nude bathing, encouraged people to violate laws against indecent exposure. The editor was convicted for disrespecting the law by totally disregarding it. In upholding the conviction, Holmes stressed that speech could be punished for its bad tendency even without an explicit statutory prohibition.

The Supreme Court continued to apply the bad tendency test in a trilogy of cases that challenged the application of the Espionage Act, a law that punished attempts to cause insubordination in the military and obstruction of recruitment. In *Schenck v. United States*, *Frohwerk v. United States* and *Debs v. United States*, the Court upheld the convictions of antiwar protestors. A majority on the Supreme Court continued to use the bad tendency test to reject First Amendment claims through the 1920s. That

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50 Id.
51 236 U.S. 273 (1915).
52 Id. at 275.
53 Fox, 236 U.S. at 273.
54 249 U.S. 47 (1919).
55 249 U.S. 204 (1919).
56 249 U.S. 211 (1919).
standard remained viable even as more speech-protective tests began to emerge.

Clear and Present Danger

In late 1919, Justice Holmes began to retreat from the bad tendency test and apply the clear and present danger test. In a dissenting opinion in *Abrams v. United States*, Justices Holmes and Louis Brandeis relied on the words “clear and present danger” to construct a First Amendment test that would provide greater protection for speech by requiring a more immediate connection between the speech and the crime. Justices Holmes and Brandeis emphasized that speech could not be punished for “an indirect, remote, or possible tendency.” Although the new test was supposed to aid the cause of free speech, the result in the first major application in a majority opinion achieved the same results for speech as the bad tendency test. This was due to Justice Holmes’ continued reliance on the “bad tendency test” to uphold convictions, just as he had done in his prewar opinions involving free speech claims. Even his introduction of the “clear and present danger test” in *Schenck* was considered as an expression of bad tendency rather than the articulation of an alternative standard of First Amendment protection.

Geoffrey Stone noted his reasons for this lack of congruency. He said that Justice Holmes did not intend for the phrase “clear and present danger” to reflect a change in the “bad tendency” test. Stone noted that Justice Holmes was merely approving of the bad tendency under a different

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57 250 U.S. 616 (1919).
58 Rabban, *supra* note 39 at 55.
name. David M. Rabban agrees that Justice Holmes was not searching for a more protective alternative to the bad tendency test when he penned the clear and present danger test. After all, "both clear and present danger and bad tendency were roughly equivalent measures of proximity used by Justice Holmes to determine whether an act should be punished as a criminal attempt." Nevertheless, Justice Holmes' opinion in the Schenck case offers insight into the transformation that was taking place in a distinguished jurist.

In Schenck v. United States, Socialist Party leader Charles Schenk and another member of the party were arrested and charged with conspiring to violate the Espionage Act by printing and mailing draftees a leaflet opposing the draft and urging them to do the same. The circular intimated that conscription was "despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few." It encouraged the drafted men not to give in to intimidation, but it confined itself to peaceful measures in support of the repeal of the Conscription Act. Schenck and his comrade were convicted under the Act, which made it a crime to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the U.S. military forces. The crimes were

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60 Stone, supra note 36 at 195.  
61 Rabban, supra note 28 at 286.  
63 Id. at 51.  
64 Id.
punishable by a fine of up to $10,000 and imprisonment of up to 20 years, or both.\textsuperscript{65}

Justice Holmes noted “we admit that in many places and in ordinary times” the defendants would have been within their constitutional rights to publish the circular, but he added that “the character of every act depends on the circumstances in which it is done.”\textsuperscript{66} To illustrate his point, Holmes asserted that the greatest protection for free speech would not allow someone to falsely shout fire in a crowded theatre and cause a panic. To aid courts in evaluating the limitations on free speech, Holmes proceeded to announce his standard, which became a new legal test for subsequent jurists to apply. According to Holmes:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.\textsuperscript{67}

\textsuperscript{65} First World War.com: The War to End All Wars, available at \url{http://www.firstworldwar.com/source/espionageact.htm} (last visited April 1, 2006). Following the United States’ \textit{declaration of war with Germany} in April 1917, the U.S. Congress \textit{passed the Espionage Act} of June 15, 1917, which defined espionage during wartime. The Act was amended the following year on May 16, 1918 to include the \textit{Sedition Act of 1918}, which made it illegal even to speak out against the government. During World War I, the federal government prosecuted some 2,000 people under these laws for their opposition to the war and the draft. Stone, supra note 41 at 12.

\textsuperscript{66} Schenck, 249 U.S. at 52.

\textsuperscript{67} \textit{Id}. 

\textsuperscript{25}
Holmes justified the limitations on the speech at issue by noting that the type of anti-conscription utterances that would go uninhibited when the nation is at peace could become a hindrance to the nation’s war effort if they were allowed to continue. Ultimately the court upheld the constitutionality of the Espionage Act and the convictions of the socialists in Schenck that were based on the Act.68

Although Justice Holmes affirmed Schenck’s conviction, his enunciation of the clear and present danger test aided free speech by relaxing the grip the Court had placed on it through the restrictive bad tendency test. Adoption of the “clear and present danger test” in Schenck meant the beginning of the end of the “bad tendency test,” which had been used as a means of restricting expression for several decades.69 The decision supported the cause of free speech “in serving as an opening wedge that helped force courts to think out the content of the First Amendment.”70 Some scholars have criticized the Court for not giving enough immediate attention to First Amendment analysis. The Court instead considered narrow questions involving the violation of a specific statute—the Espionage Act of 1917 and the Sedition Amendment of 1918.71

68 See Id.
71 Jeremy Cohen, Congress Shall Make No Law: Oliver Wendell Holmes, the First Amendment, and Judicial Decision Making 107-108 (1989). Cohen cites three reasons for his conclusion that Justice Holmes gave insufficient weight to the First Amendment: 1) The Holmes opinion itself indicated that the justice focused on
The other two speech cases decided by the High Court during the same term were *Frohwerk v. United States*\(^{72}\) and *Debs v. United States*.\(^{73}\) In *Frohwerk v. United States*,\(^{74}\) Jacob Frohwerk, an editor for a Missouri German-language newspaper, was sentenced to 10 years imprisonment for helping to prepare and publish anti-draft articles. Specifically, he was charged with violating the Espionage Act and attempting to cause disloyalty, mutiny and refusal of duty in the military and naval forces in a time of war.\(^{75}\)

In upholding Frohwerk’s conviction, the Court held that the First Amendment did not protect every kind of speech. The Court looked at the circumstances surrounding the publication of the articles that were critical of the draft and found “... on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame. ...”\(^{76}\)

In addition, on the conspiracy charge, the Court noted that such a charge would not fail simply because it does not contain all of the specifics of how the conspiracy was to be carried out. Nevertheless, the court ruled that a conspiracy to obstruct recruiting would be criminal, even if there was no agreed upon means of accomplishing intent.

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addressing technical rules, evidentiary considerations, and statutory interpretations; 2) In Holmes’s letters, he indicated that issues of fact belonged in the category of evidentiary and statutory consideration, not constitutional adjudication; 3) Holmes’s writing off the bench and his judicial style in prior cases of holding to a limited judicial role when reviewing actions of the legislature.

\(^{72}\) 249 U.S. 204 (1919).

\(^{73}\) 249 U.S. 211 (1919).

\(^{74}\) 249 U.S. 204 (1919).

\(^{75}\) Id. at 205.

\(^{76}\) Id. at 209.
It is enough, Justice Holmes wrote, that there was an agreement by the parties to engage in speech with that common purpose in mind. Moreover, there were overt acts that were alleged to have been done to effect the conspiracy. In deciding the case as a criminal matter, the Court found there had been an agreement and an overt act, and that was sufficient to not interfere with the indictment.77 Apparently, the defendant’s words of persuasion alone, with no agreed-upon means to obstruct recruitment, constituted a conspiracy that violated the Espionage Act.

In Debs v. United States,78 the Court upheld a prison sentence for socialist leader Eugene Debs. The government charged Debs with violating the Espionage Act by interfering with recruiting when he gave a speech criticizing the United States’ role in World War I. He praised fellow socialists and war and draft resisters whom he had visited in jail.

Justice Holmes upheld the conviction, relying on the bad tendency of the speech. He said that the opposition to the war in this case was expressed in such a way that its intended effect would be to obstruct recruiting. He noted that the jury was carefully instructed that they could not find the defendant guilty of advocacy “unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service. . . .”79

Nevertheless, throughout the World War I era, Justice Holmes developed and applied his clear and present danger test in upholding a series of convictions of antiwar

77 Id.
78 249 U.S. 211 (1919).
79 Id. at 216.
dissents. By the 1920s, however, as the court majority seemed to revert to using a variation of the bad tendency test, Holmes found himself on the dissenting side of Court opinions.

**Incorporation Doctrine**

One of the greatest developments for civil liberties in the 1920s was the incorporation of freedom of speech into the Fourteenth Amendment, thereby sheltering such expression from infringement by the states.\(^{80}\) The incorporation doctrine grew out of substantive due process, a constitutional doctrine that provides protection through the Fourteenth Amendment for those rights and liberties that are fundamental.\(^{81}\) Specifically, the Fourteenth Amendment states that the state cannot deprive anyone of life, liberty or property without due process of law.\(^{82}\) At the same time, the First Amendment prohibitions on infringements of freedom of speech, press, religion and

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\(^{82}\) U.S. Const. amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
assembly, were applied only to the federal government.\textsuperscript{83} In order for the Bill of Rights to apply to the states, the Court had to affirmatively state it.\textsuperscript{84} Historically, the Court had only recognized economic regulation. The modern view of substantive due process was shaped by Justice Stephen J. Field’s dissenting opinion in the Slaughterhouse Cases in 1873.\textsuperscript{85} Field discerned that there were some inalienable individual liberties:

Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint that such as equally affects all persons…. The equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States.\textsuperscript{86}

Substantive Due Process was originally devised to strike down legislation that affected economic rights. In actuality, the theory operated to incorporate economic

\textsuperscript{83} U.S. Const. amend I:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.


\textsuperscript{85} Slaughterhouse Cases, 83 U.S. 36 (1873).

\textsuperscript{86} Id. at 97, 109-110 (Field, J. dissenting).
liberties into the Fourteenth Amendment.\textsuperscript{87} There was a widely held view that economic rights achieved their constitutional stature through judicial activism,\textsuperscript{88} however, there was not a precise connection apparent between economic due process and the doctrines that spawned the growth of civil liberties. To uncover the true origins of judicial recognition of civil liberties, scholars have looked to five primary interconnected sources:

1) the dissenting opinions of Justice Holmes;
2) the opinions of Justice Brandeis;
3) the Taft Court’s majority opinions;
4) the majority opinions of the Hughes court;
5) Justice Stone’s footnote four in Carolene Products.\textsuperscript{89}

The major case for incorporating the First Amendment into the Fourteenth Amendment to apply to the states was Gitlow v. New York.\textsuperscript{90} Benjamin Gitlow, a member of the left wing of the Socialist Party was convicted of violating the 1902 New York criminal anarchy law, which made it a crime to advocate violent overthrow of the government. He was arrested in 1920 for writing, publishing and distributing his \textit{Left-wing Manifesto}, a pamphlet that urged the establishment of socialism through strikes and other class actions. Although the Court upheld Gitlow’s conviction, Justice Edward T. Sanford, wrote on behalf of the majority, that “for present purposes, we may and do assume that freedom of speech and of the press... are among the fundamental personal rights and ‘liberties’ protected by

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\textsuperscript{87} See Cameron, supra note 80.
\textsuperscript{88} See \textit{id}.
\textsuperscript{89} \textit{Id. at} 9-11.
\textsuperscript{90} 268 U.S. 652 (1925).
the due process clause of the Fourteenth Amendment from impairment by the States."\(^9\) The case marked the beginning of the "incorporation" of the First Amendment as a limitation on the states. The incorporation process, which continued selectively over several decades, resulted in major changes in the law affecting civil liberties, affording citizens a federal remedy if the states deprived them of their fundamental rights. Before this decision, a person whose speech was suppressed by the state government could not bring an action against the state for a violation of constitutional rights based on the First Amendment.

Preferred Freedoms

Public speech under the First Amendment also benefited from a famous footnote in *Carolene Products v. United States*\(^{92}\) in 1938. The case involved a challenge to Congressional legislation that prohibited the interstate shipment of "filled" milk. Carolene Products contended that the law violated the Fifth Amendment’s due process provision. The Court found sufficient facts in *Carolene Products* to support the finding of a rational basis for the measure. The legislative findings that filled milk was injurious to the public health revealed the congressional rationale behind the law. But even in the absence of these legislative findings, the Court would have sustained the legislation because "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless ... it is of such a character as to preclude the assumption that it

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\(^9\) *Id.* at 666.

\(^{92}\) 304 U.S. 144 (1938).
rests on some rational basis..." Justice Stone then drew a distinction between general regulatory legislation and governmental restrictions on fundamental constitutional values.

While supporting minimal, rational basis, judicial scrutiny for the economic legislation at issue in the case, the Court issued the now-famous "Footnote 4" of the opinion in which it gave reasons for the continued independent judicial review of some government actions:

4. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation....

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national [origin], or racial minorities,

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93 Id. at 152.
whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. 94

From this footnote, the preferred-position doctrine was born. Using somewhat tentative and cautionary terms, the footnote addresses the appropriateness of applying varying degrees of scrutiny to different types of legislation. It appeared a year after the Court decided to take a more deferential posture toward economic legislation. Up until that time, the Court had scrutinized legislation affecting property rights to determine if they served a legitimate public purpose and was reasonable in their terms. After 1937, the Court embraced a more deferential posture to the policy judgments of Congress and state legislatures.

In each paragraph of the footnote, Justice Stone identified one possible justification for a less strict application of the presumption of unconstitutionality. The first paragraph suggested greater scrutiny when the legislation appeared to violate a specific constitutional prohibition. The second paragraph suggested that greater scrutiny may be appropriate in reviewing legislation restricting participation in the political process. The third paragraph suggested the presumption may be

94 Id. at 153.
appropriate for laws that affect “discrete and insular minorities”—powerless groups that are hated or feared by the majority in society. More intensive scrutiny may be called for when laws are targeted at religious, national or racial minorities due to prejudice, skewing the political process and distorting its functioning.

The footnote explained that people in our representative democracy have a right to govern themselves through their elected representatives. As such, the courts can presume that legislation enacted by the people through their representatives is constitutional. However, legislation may be subjected to more exacting scrutiny whenever it restricts basic rights and freedoms of political communication and open political processes or when legislation singles out disadvantaged minorities who lack political power. For the first time, the Court gave special constitutional protection to the rights of free speech and press. After 1936, the Court decided that some of the other constitutional amendments in the Bill of Rights were applicable to the states. The Court used the

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95 The true dimension of the Court’s deference to economic legislation was not known immediately after the Carolene Products case. This was revealed only through subsequent Court decisions in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), where the Court upheld the constitutionality of the state’s right-to-work law, and the decision in Williamson v. Lee Optical Co., 348 U.S. 483 (1955), rejecting the due process and equal protection arguments against the validity of an Oklahoma statute that restricted the ability of opticians to fit or duplicate eyeglasses. The Court was not only unable to find that the law had violated a specific constitutional violation, but the Court was willing to look at possible reasons for the enactment that would form a rational basis for the law. John E. Nowak et al., Constitutional Law (2d ed. 1983).
concept of “selective incorporation,” whereby a provision of the Bill of Rights was made applicable to the states if the justices thought it was meant to protect a “fundamental” aspect of liberty. Initially, the Court asked whether the amendment was so fundamental as to be “implicit in the concept of ordered liberty,” but the Court later altered the test to make incorporation dependent on whether the guarantee was “fundamental to the American scheme of justice.”

Consequently, fundamental rights, such as freedom of speech, are governed by the doctrine of “strict judicial scrutiny.” This means that when there is a challenge to regulation or legislation that directly infringes on free speech or free expression, for example, the Court must apply a strict two-part test to determine how important and necessary the law is and how restrictive are the means chosen by the government to deal with the activity targeted by the law. Specifically, the Court asked whether there is a compelling government interest in passing the regulation. Second, if the government’s interest is compelling, then the Court asks whether it is accomplished through the least restrictive means possible.

Consequently, in cases involving liberties contained in the Bill of Rights, especially those protections in the First Amendment, the Court would not presume the state’s actions to be constitutional and the Court would carefully review any claims brought to it. The doctrine gave an edge

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96 Nowak, supra note 94 at 455 (citing Palko v. Connecticut, 302 U.S. 319 (1937), which used the language “implicit in the concept of ordered liberty” and Duncan v. Louisiana, 391 U.S. 145 (1968), which used the language “fundamental to the American scheme of justice.”

97 Elizabeth Blanks Hindman, Rights vs. Responsibilities: The Supreme Court and the Media 65 (1997).
to people claiming the protections of the First Amendment. As a result, many of those coming before the Court in the late 1930s and early 1940s benefited from the application of the doctrine. Those “became some of the most fruitful years in the Court’s history for enlarging the ability of dissidents to be heard.”\textsuperscript{98}

**Maturation of the Public Forum Doctrine**

Forty-two years after *Davis v. Commonwealth*, the Court began a discussion of the tenets underlying the present-day public forum analysis in dicta in *Hague v. CIO* (1939).\textsuperscript{99} In *Hague*, the Court considered the constitutionality of a municipal ordinance forbidding all public meetings in the streets and other public places without a permit. The ordinance, created in 1908 in Jersey City, New Jersey, amounted to a peace-time sedition law. Jersey City’s mayor, Frank Hague, used the law and other administrative powers to create the closed city as a way of combating the closed shop and labor unions. He used the ordinance to exclude anyone, including organized labor and other groups whom he did not approve, from using public parks and streets.\textsuperscript{100}

William J. Carney, regional director of the C.I.O. in New Jersey, prepared to initiate a drive for C.I.O. membership in Jersey City. Under Hague’s leadership, police were waiting at C.I.O. headquarters when the organizers came into Jersey City. Police summarily searched the visitors and seized circulars and handbills related to the

\textsuperscript{98} MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 188 (1992).
\textsuperscript{100} Hague v. CIO, 101 F. 2d 774 (3\textsuperscript{rd} Cir. 1939).
C.I.O. union activities. Many of these people were deported from Jersey City by police who placed them on ferry boats bound for New York City or directed them in motor vehicles beyond the territorial limits of Jersey City.\textsuperscript{101}

The Jersey City ordinance at issue in the case provided that no public assembly could be held in the streets or parks of the city without a permit from the director of public safety. The ordinance provided that while the permit must be issued on request, it could be denied "for the purpose of preventing riots, disturbances of disorderly assemblage."\textsuperscript{102}

The C.I.O. applied for a permit for an outdoor meeting to petition the Board of City Commissioners to modify the ordinance prohibiting the distribution of circulars and to take action with respect to the alleged intimidation of hall owners by certain officers. The Director of Public Safety denied these permits on grounds that the meetings would lead to riots and disorder. They appealed to the mayor and the Director of Public Safety, but to no avail.\textsuperscript{103}

Abernathy points out that permits had generally been used in American cities to control street and park meetings.\textsuperscript{104} The requirement of a permit had been liberally administered. And where permits had been refused, state courts generally upheld such refusal against attacks on the validity of the ordinance. The \textit{Davis} rule was interpreted very literally by the state courts, and the result was

\begin{footnotes}
\item[101] Id. at 778.
\item[102] Id. at 782.
\item[103] Id. at 779.
\item[104] ABERNATHY, supra note 10 at 64.
\end{footnotes}
broad discretionary powers in the municipality to deny permits.\textsuperscript{105}

In a plurality opinion, the Court flatly rejected the city of Hague’s contention that the ordinance was constitutional. In this seminal opinion, Justice Roberts’ comments became the foundation for the modern public forum doctrine:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.\textsuperscript{106}

With Hague, the Supreme Court began to enunciate a public forum doctrine wherein expression on public property, which

\textsuperscript{105} Id at 64-65.
\textsuperscript{106} Hague, 307 U.S. 496, 515.
“time out of mind” had played a historic role in communication, should be critically defended against censorial regulation.

In that case, the court ruled that the government may not prohibit speech-related activities such as demonstrations, leafletting, and speaking in public areas traditionally provided for speech. Those places have historically served as vehicles of communication, especially for groups that lack power or access to alternative channels of communication.\textsuperscript{107}

Abernathy noted that while the holding in \textit{Hague} appeared to be diametrically opposed to the holding in the \textit{Davis} case, the latter was not overruled but distinguished. Regardless, there is no doubt that public speech and communication was left on better footing after the \textit{Hague} decision.

Although the public forum doctrine can be traced to a 1939 case, it did not get a lot of use in Supreme Court opinions until the early 1970s.\textsuperscript{108} In 1972, the U.S. Supreme Court introduced for the first time the concept of the “public forum” into First Amendment jurisprudence. Within 12 years, the concept had achieved the status of “a fundamental principle of First Amendment doctrine.”\textsuperscript{109} Harry Kalven, who is credited with providing the public forum

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concept with a separate identity and title, noted that during the Warren Court, the public forum doctrine enjoyed broad application.\textsuperscript{110}

**Protections for the Public Forum**

Judges applying public forum doctrine ask under what circumstances, if any, does the First Amendment guarantee an individual the right to utilize publicly owned real property for the purpose of exercising the freedoms of speech, press, assembly, and petition.\textsuperscript{111} For purposes of free speech, government property falls into one of four forum categories: 1) the traditional public forum; 2) the designated public forum; 3) the limited public forum; and 4) the nonpublic forum. In forum analysis, the government’s power to impose speech restrictions depends to a large extent on how the property under its jurisdiction is categorized. In essence, the level of judicial scrutiny hinges on whether the forum property is classified as traditional, designated, limited or nonpublic.\textsuperscript{112}

The first category, traditional public forum, was defined by the objective characteristics of the property, such as whether it is a public area that traditionally provided for speech. Examples of these public areas include historical places of assembly and debate such as streets, parks and sidewalks. Over time, such places have served as essential vehicles of communication, especially for groups

who lack power or access to alternative channels of communication. As a result of tradition, the property had been devoted to public assembly, debate, demonstrations and leafletting. The doctrine keeps the government from prohibiting speech-related activities in these settings.\footnote{See Downs, supra note 107.}

Nevertheless, the desire for free expression must be balanced with society’s need for order and tranquility. Hence, even if there is a public forum present, the government can still regulate access to it to control the harmful side-effects of expression—noise, congestion, litter and disorder. But the government has to be careful that its regulation does not discriminate on the grounds of viewpoint and does not restrict the exchange of communication.\footnote{Id.} This regulation, which is called a content-neutral time, place and manner restriction, is the only type of law allowed in the traditional forum. This means that in order to survive a challenge in the courts, the regulation: 1) must be justified without reference to the content of the regulated speech; 2) must be narrowly drafted and tailored to serve a significant government interest; and 3) must leave open sufficient alternative channels of communication of the information. Any governmental regulation based on the content of public forum speech is presumed to be unconstitutional, and when challenged in court, it will be struck down unless the governmental entity can show that the regulation is
necessary, narrowly drawn and serving a compelling state interest.\footnote{115}{See O’Neill, supra note 112. In addition, the court has to determine which areas are subject to the public forum standards.}

The second category of the forum doctrine is termed a designated public forum because it is created by governmental designation. Public property that is not considered part of the traditional category, but is treated by the government as a site suitable for communication, is considered a public forum by designation. Examples would include university meeting rooms and municipal theaters. Similarly a “limited public forum” is one that the government has designated for the purpose of free expression.\footnote{116}{The First Amendment Center at http://www.firstamendmentcenter.org/about.aspx?item=glossary.}

When the government does open property for expressive purposes, the property is subject to the same First Amendment obligations regarding regulation as the traditional public forum, with certain limitations. The forum may be opened for only certain types of groups or for certain types of expression, depending on the character of the property.\footnote{117}{Harvey L. Zuckman, Robert L. Corn-Revere, Robert M. Frieden and Charles H. Kennedy, Modern Communication Law 128 (1999).}

The same standards that govern a traditional public forum also apply to the designated public forum. While the government may limit access to certain speakers or certain subjects, the restrictions must be applied evenhandedly to all similarly situated parties.\footnote{118}{See O’Neill, supra note 112.}

The third category, called the nonpublic forum, is known as “off limits” public property. The nonpublic forum
is an area that is not historically left open for public discourse, and regulation of it is approved as long as there was a rational basis. It is the standard for any government property that does not fit into the other two categories.\textsuperscript{119} It involves property that serves a specific government purpose and is not a public forum by tradition or designation. As a consequence, it is significantly less protected by the First Amendment. Government may even engage in viewpoint discrimination in these domains by showing that the disparate treatment is reasonably related to the property’s function.\textsuperscript{120}

Downs suggests that the public forum doctrine may be less important to the disposition of the case than the court’s evaluation of the merits of the speech claim and the competing government interests. His suggestion indicates how complicated this area of law can be because, even in speech cases that could be decided based on the nature of the forum, a court’s evaluation of the substantive content of the speech may take precedent. Moreover, the expansion of government power in declaring more of its property “off limits” has coincided with the government’s refusal to bestow public figure status on such publicly oriented private property as shopping centers. As a consequence, it has been contended the public forum doctrine has become less formidable as government asserts its property rights, and demographic trends favor the use of malls over traditional downtown streets, sidewalks and parks for commerce and association.\textsuperscript{121} Examples of nonpublic

\begin{itemize}
  \item \textsuperscript{119} Downs, supra note 107 at 693.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id.
\end{itemize}
forums would include military bases, airport terminals and Post Office sidewalks.\footnote{122} O’Neill noted that judicial scrutiny is substantially relaxed when the question turns to a nonpublic forum. The government gets maximum control over the communicative behavior because its role is analogized to that of a private owner. The regulations need only be reasonable as long as the effort to suppress expression is not because of opposition to the speaker’s views. Control over access to a nonpublic forum can be based on the subject matter or the speaker’s identity as long as the distinctions are reasonable in light of the purpose served and they are viewpoint neutral.\footnote{123}

While the traditional public forum and the non-public forum have received some attention by commentators and scholars, there has been much more attention focused on the intermediate categories. These areas of public forum, which are fixed between the traditional public forum and the nonpublic forum, are called the designated public forum and the limited public forum.

Fischer has identified six relational descriptions for the designated public forum and the limited public forum that speak to the ambiguity of the designations: (1) the designated public forum and the limited public forum are interchangeable terms describing the same thing and both receive strict scrutiny review; (2) a limited forum is a type of designated public forum and both receive strict scrutiny review; (3) a limited forum is a type of nonpublic forum that receives only rational basis review; (4) a limited public forum can be either a type of designated public forum and the limited public forum.

\footnote{122}{Zuckman, supra note 116 at 128.} \footnote{123}{O’Neill, supra note 112 at 245-246.}
public forum or a type of nonpublic forum, the former receiving strict scrutiny and the latter receiving only rational basis review; (5) a limited public forum is a type of designated public forum but the limited public forum receives only rational basis review; (6) a limited public forum is a type of designated public forum in which the standard of review depends on whether the speaker falls inside or outside of the limiting class set by the government.\footnote{Fischer, Ronnie J., Comment: “What’s in a Name?”: An Attempt to Resolve the Analytic Ambiguity of the Designated and Limited Public Fora,” 107 DICK. L. REV. 639 (2003).}

Public Forum and the Benefits of Citizen Access

In her law review article, Lillian R. BeVier offers a supportive view of public forum doctrine.\footnote{Lillian R. BeVier, Rehabilitating Public Forum Doctrine: In Defense of Categories, 1992 SUP. CT. REV. 79 (1992).} She pens a response to the “prevailing scholarly consensus” that the Supreme Court’s primary responsibility in public forum cases is to maximize the opportunities of citizens to engage in expressive activity. Much of that scholarship has supported the view that the Court has not sufficiently sustained the kind of free speech envisioned in \textit{New York Times v. Sullivan},\footnote{376 U.S. 254 (1964).} when the Court sought to protect “uninhibited, robust, wide-open” debate on public issues. Her vision of the goal of judicial review in public forum cases suggests that the Court’s goal in developing the law of the public forum has not been to promote “uninhibited, robust, wide-open” debate, but to craft a doctrine that would reduce the chance that public forum regulators would
abuse their governmental power. Under this perspective, the question about public forum doctrine is not whether it provides enough opportunities for citizens to speak, but whether it is sufficiently correlated with differing degrees of First Amendment risk such that it plays an effective role in translating First Amendment theory into practice.\footnote{See BeVier, supra note 125.}

Under the general tolerance perspective, articulated by Lee C. Bollinger in \textit{The Tolerant Society: Freedom of Speech and Extremist Speech in America}, the main concern in the application of government time, place and manner restrictions on expression is that those wishing to confront people with unpopular speech activity get a serious and meaningful opportunity to do so.\footnote{LEE C. BOLLINGER, \textit{THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA} 201 (1986).} Sunstein fills in the gaps by articulating three important functions promoted by the public forum doctrine: 1) Speakers are ensured access to a wide variety of people; 2) Speakers are allowed to not only have general access to heterogeneous people, but to specific people and specific institutions with whom they have a complaint; 3) It is likely that people generally will be exposed to a wide variety of views.\footnote{Cass R. Sunstein, \textit{The Future of Free Speech}, in \textit{ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA} 289-290 (Lee C. Bollinger & Geoffrey Stone eds., 2002).}

Haiman sees the public forum as affirmative action by the government to bolster citizen expression on a basic level, by opening public sidewalks, streets and parks for speeches or demonstrations, and providing police protection for traffic control. Maintaining this kind of public forum
outdoors, despite some disruptions in traffic, has long been recognized as the state’s minimal contribution to the marketplace of ideas.\(^{130}\)

**Detraction from the Public Forum**

Some scholars have criticized the public forum doctrine, offering their own changes to the doctrine as alternatives. For example, Robert C. Post argued that the doctrine has developed quickly without the necessary constitutional foundations.\(^{131}\) He argued that the Court has yet to articulate a defensible constitutional justification for its division of government property into distinct categories. He proposed a reformulation of the doctrine that would distinguish the fora based on the nature of the government authority rather than on the character of the government property at issue. His proposal provided for two kinds of government authority: managerial authority and governance. The state is vested with managerial authority when it acts “to administer organizational domains dedicated to instrumental conduct.”\(^{132}\) This is an area in which the government could constitutionally regulate speech as much as needed to achieve instrumental objectives. Under governance, which is characteristic of the authority exercised by the state over the “public realm,” the government’s ability to restrict speech is limited by ordinary and generally applicable principles of First Amendment adjudication. If a resource is subject to

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\(^{131}\) Post, *supra* note 108 at 1715.

\(^{132}\) *Id.*
managerial authority, it is a nonpublic forum and its use can be subordinated to the discretion of state officials. If the government exercises authority over a resource that a member of the general public uses for communication, the resource is considered a public forum.\textsuperscript{133}

Daniel E. Farber and John E. Nowak argued that the doctrine distracted attention from the First Amendment values at stake in a given case.\textsuperscript{134} They claimed there were not three types of public forums but three basic types of First Amendment problems. They argued that the method of analysis in using the public forum doctrine has led to confused opinions and a disregard for First Amendment values. Therefore, they proposed a “focused balancing” test that would allow judges to address public forum issues in a manner that openly evaluates the particular nature of the threat to First Amendment values.

At least one commentator has suggested abolishing the distinction between public forums and non-forums. Barbara S. Gaal called the distinction “too blunt a judicial tool to effectively protect the values underlying the constitutional guarantee of free speech.”\textsuperscript{135} She urged the court to abandon the distinction between content-based and content-neutral restrictions. She urged that the court should replace these distinctions with a singular approach that requires direct examination and evaluation of the competing interests in each particular case. This would be

\begin{footnotes}
\item[133] Id.
\item[134] Farber & Nowak, supra note 108 at 1224.
\end{footnotes}
accomplished by applying a single test to all laws restricting expression in publicly owned places.\textsuperscript{136}

Sheila M. Cahill assessed the difficulties of viewing the public forum doctrine as a minimum access provision and as an equal access provision.\textsuperscript{137} This principle was grounded in the two rationales of the Hague decision. The first was that the government cannot prevent speech in some forums, although the state can channel it into certain forms and times. But it must allow some speech. The second is that the state cannot draw distinctions between prohibited and permitted speech on the basis of content.

Ronald A. Cass suggested several factors to guide courts in assessing claims to First Amendment speech rights on government property.\textsuperscript{138} Courts should consider the value of the property for nonspeech functions, the value of the property for the speech interest, and the extent to which these two uses conflict. Factors to consider in determining the value of the property for nonspeech use include: 1) the use for which the property was designed; 2) the availability of other facilities that could accommodate this use; and 3) the extent to which the physical presence of putative speakers, or any speech, or particular sorts of speech, would interfere with this use. Similarly, factors relevant in determining the value of the property for speech use include: 1) the availability, number, and similarity of alternative outlets for this speech; 2) the relative accessibility of this property and alternative

\textsuperscript{136} Id. at 143.
forums; 3) the suitability of other forums to the speech involved; 4) the size and composition of the audience that can be reached in this and alternative forums; 5) the particular symbolic value of the speech on this property and the extent to which that symbolic speech can be duplicated elsewhere.

Frederick Schauer and Bruce C. Hafen expressed some difficulty in applying public forum doctrine neatly to educational institutions. Schauer saw public forum as a juridical category that goes down the least satisfactory path.\textsuperscript{139} It would be better to use doctrines that honor institutional autonomy and the cultural differences that these fields bring with them. Courts may have to consider the special setting of higher education. He said that public forum doctrine was fine as it was originally conceived—for the purpose of mandating a speaker’s easement on certain forms of government property. However, the doctrine became more troublesome as it was applied to “the constructive equivalent of the classic public forums of streets, parks, and sidewalks.”\textsuperscript{140} Examples he cited were any place at a public school or state university where students congregated because those are locations where people might find themselves talking about the issues of the day.\textsuperscript{141}

He says it’s difficult to see the point of public forum analysis beyond the designated public forums. In the

\textsuperscript{139} Frederick Schauer, Comment, Principles, Institutions, and the First Amendment, 112 Harv. L. Rev. 84 (1998).
\textsuperscript{140} Id. at 98.
typical case, the complaint is about discriminatory treatment, not access. He also noted that the doctrine was essential in staking out an important area of mandatory access, especially for speakers who would not otherwise be able to secure some forum for their speech. The analysis reminds us of the special power of the government’s voice in the marketplace of ideas and the implausibility of expecting First Amendment doctrine and judicial action to check that power.\footnote{Id.} He cited Ronald Dworkin with identifying and defending the idea that matters of policy are for the legislatures and matters of principle are for the courts. The basic idea that courts should look for principle-based solutions to the problems they confront is ingrained in the legal and judicial mindset.\footnote{Id. (citing Ronald Dworkin, Law's Empire 178-84 (1986); Ronald Dworkin, A Matter of Principle 72-103 (1985); Ronald Dworkin, Taking Rights Seriously 22-28, 71-80, 90-100 (1977))).}

Hafen argued that the public forum doctrine should not be applied to a K-12 public school context.\footnote{Bruce C. Hafen, Comment, Hazelwood School District and the Role of First Amendment Institutions, 1988 Duke L.J. 685(1988).} Particularly, when it comes to the content of campus media, he indicated that courts should defer to a school’s educational policy choices. He said that decisions about how the newspaper, yearbook, or campus radio station filled their editorial space and air time are matters that are best left to educational judgment.

He argued that the “marketplace of ideas” concept was inapplicable to elementary and secondary public schools because it overlooks the extent to which deference to the educational institutions promotes educational and other
First Amendment interests of students. This is because the judgments about the content are being made by educators who are trained and focused on the educational interests of their students.  

These judgment calls are matters of educational policy that are made within the framework of the school’s First Amendment interests in institutional academic freedom. He finds it strange to have a First Amendment theory that gives so much discretion to the students who are still minors. These student reporters have more discretion than their real world counterparts enjoy, because in the real world, editorial discretion regarding publication is a protected First Amendment right that belongs to the editor of the newspaper. In public school settings, it is the institution, as publisher, that is ultimately responsible in terms of the risk of tort liability and the risk of the school’s reputation among parents and members of the public.

Fiore contended that an extension of public forum analysis to student publications at public higher education institutions would be detrimental to those institutions. To do so, Fiore contended, courts would have to address the differences between higher education students and secondary school students, whose publications are subject to the public forum doctrine. He argued that extending public forum analysis to publications in higher education would

\[145 Id.\]
\[146 See id.\]
\[147 Mark J. Fiore, Comment: Trampling the “Marketplace of Ideas:” The case against extending Hazelwood to college campuses. 150 U. PA. L. REV. 1915 (2002). He pointed out most courts take for granted that college publications are open to the public for free expression.\]
have a chilling effect on the “marketplace of ideas philosophy” that is embedded in the nation’s higher education institutions. Fiore concluded that the U.S. Supreme Court would need to step in for higher education student publications to be definitively excluded from public forum analysis. “Only then would colleges and universities maintain their status as the country’s ‘marketplace of ideas.’”¹⁴⁸

Higher Education and Forum Analysis

On college and university campuses, free speech protections for students are greatest when the speech takes place in a public forum—an area that is traditionally or by official policy available to students or the entire campus community for expressive activities. Expressive activities that are undertaken in a public forum receive far more protection than activities undertaken outside of the forum.¹⁴⁹

The U.S. Supreme Court has acknowledged that academic communities are special environments.

[a] university differs in significant respects from public forums such as streets or parks or even municipal theatres. A university’s mission is education, and the decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon

¹⁴⁸ Id. at 1968.
None of the studies took a comprehensive look at how the public forum doctrine has been applied by the courts to students at higher education institutions. However, Patricia Todd Bausch conducted a legal-historical analysis of the reported cases and identified three eras of development in which courts approached allegations of free speech and association infringements. Judges applied content-related evaluations such as, 'fighting words' and 'clear and present danger tests during the first era. In the second era, courts embraced the public forum concept as the most often used method for evaluating First Amendment challenges. In the current era, courts have shown less reliance on the public forum doctrine and more judicial evaluation of governmental intent to create a forum for the exercise of First Amendment rights. Freedoms of speech and association clearly are to be respected by public colleges and universities. However, those freedoms may be regulated reasonably by public institutions by using permissible time, place and manner restrictions. The analysis of reported cases through the three eras provided guidelines for institutions to identify controls that may be reasonable.

Joe David Walters analyzed the federal litigation since the Perry Education Association v. Perry Local

Educators Association\textsuperscript{152} decision in which public forum doctrine was applied by the courts in deciding First Amendment free speech cases and how those decisions impact public schools.\textsuperscript{153} Walters wanted to provide public school administrators with practical guidelines upon which prudent decisions can be made in situations impacting the free speech and free expression rights of individuals. The federal court cases included in this research were found using computerized searches of the "WESTLAW" and "ALLFEDS" database. Those cases in which public forum doctrine played a part in the court's decision were analyzed using case brief analysis. Thirty-six principles for school administrators were generated from the courts' decisions. Selected principles provided the clearest interpretation of public forum doctrine and the universal applicability to free speech and free expression issues in the public school setting.\textsuperscript{154}

Gail Paulus Sorenson examined the application of the doctrine in school and college cases. She concluded that there was a need for a more speech-protective restatement of the public forum doctrine.\textsuperscript{155} Such a statement would clarify the doctrine itself, better define its place in First Amendment jurisprudence and restore vitality to the limited public forum concept. She suggested that education needed something like a quasi-public forum, which would be

\textsuperscript{152} 460 U.S. 37 (1983).
\textsuperscript{154} See id.
akin to a quintessential public forum where students may freely exchange their views.

She noted that the Supreme Court had moved away from the type of speech-protective sentiments it expressed in *Tinker v. Des Moines Independent Community School District.*\(^{156}\) If the current post-*Tinker* analysis were applied to higher education under its broadest and widest interpretation, the “anti-apartheid shanties, and attendant communicative activities (if permitted at all), would have to be moved to the back lawn.”\(^{157}\)

Although First Amendment principles do apply to the campus, the way they are applied in that context could be affected by the unique interests of academic communities. In addition, some other court precedents allow colleges and universities to protect their interests in ways that might place limitations on student free expression. Those precedents make clear that the freedom of students to protest on campus does not include a freedom to disrupt classes and other planned activities.\(^{158}\) One of the critical issues in quelling disruptive protest activity is determining when the activity has become so disruptive that the participants lose their protection.

\(^{156}\) 393 U.S. 503 (1969).
\(^{157}\) Sorenson, *supra* note 153 at 469.
CHAPTER 3

METHODOLOGY AND PROCEDURES

Courts have played a major role in determining the extent of student rights and freedoms on college and university campuses. The purpose of this study was to identify and analyze those judicial precedents with the intent of delineating the balance between student rights to freedom of speech and the authority of public higher education institutions to restrict the use of campus property. The study was guided by the following research questions:

1. How has the public forum doctrine evolved and developed in decisions of the U.S. Supreme Court from 1897 to 2003?
2. How has the public forum doctrine been applied in reported state and federal cases involving the First Amendment free speech and association rights of students at public higher education institutions in the United States?

Methodology

Research for this dissertation began with a literature review that examined the creation of the public forum doctrine and its introduction into United States jurisprudence as a mode of analysis for resolving disputes involving freedom of speech on government property. Following the literature review in this area, the

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159 These sources were obtained through a variety of online and research efforts, including LEXIS.
researcher used computer-based legal research methods associated with the LEXIS electronic research database to locate the primary sources—all federal and state cases in which courts have made decisions applying public forum analysis in general.\textsuperscript{160} This research was followed by a search for cases in which the courts have applied the public forum doctrine in resolving legal challenges to restrictions on student free speech in public higher education.

LEXIS is a highly organized commercial database with a full complement of directories that includes highly developed search methods with good documentation. With a track record dating to the 1970s, the company offers quality controls and training support. It provides a wide variety of primary and secondary legal authority.\textsuperscript{161} Use of the database helped to ensure a thorough search for relevant cases. Using specific sets of search terms, the database could be relied on to provide an accurate and thorough collection of all of the relevant case law.\textsuperscript{162}

The database searches lead to citations in the official and unofficial reporters that publish the court rulings. The court decisions are public documents issued by the federal government and state governments. Terms to be used for searching the database for higher education cases included: “public forum,” “higher education,” “university,” “college,” “student,” “free speech,” and “student expression.” All of the cases identified as relevant through this search process were collected, labeled, and

\textsuperscript{160} Christina L. Kunz, Deborah A. Schmedemann, Matthew P. Downs, Ann L. Bateson, \textit{The Process of Legal Research} 22 (2000).
\textsuperscript{161} \textit{Id.} at 22.
\textsuperscript{162} See Larry L. Teply, \textit{Legal Research and Citation} 71-74 (1999).
stored for use in the study. The search yielded 40 written court rulings that contain judicial opinions delineating speech issues raised through lawsuits on public college and university campuses in the United States.

The study was limited to reported judicial opinions from the federal and state appellate courts and the federal district courts. Judges in these courts render their decisions in the form of opinions, which are based on the judges’ analyses of legally relevant facts and their application of the law to those facts. The cases that arrive at the respective courts’ doorsteps usually originate when an aggrieved party files a civil complaint alleging a violation of First Amendment rights to freedom of speech or expression. These opinions become the statement of law for the jurisdiction or geographic area covered by that court’s rulings.

Initially, cases were read thoroughly for content and separated into four categories, corresponding to the four areas of public forum doctrine established by the courts. First, the cases were categorized according to whether the courts determined the forum for the communication was traditionally open, designated as open by the government, limited, or nonpublic. Second, a more in-depth analysis of the cases was undertaken to make finer distinctions within and across established categories. This analysis paid particular attention to the language used by courts to classify various forms of speech in relation to the use of government-owned property.

One of the major sources of law in this country is the common law. Traditionally, courts have made law in at least three ways. 1) A court may declare that a general legal doctrine or principle is enforceable within that court’s
geographical reach. A court creates a binding law when it articulates and applies a legal doctrine. 2) A court can make law by deciding cases that interpret existing legal doctrines. Each case decided by the court creates new law; 3) A court can create new laws by interpreting legislative enactments. The court’s interpretation of the law determines how courts should apply that law to similar cases in the future.\textsuperscript{163}

The cases identified in this study were based on the public forum doctrine, which was created by the courts to analyze First Amendment disputes that arise on government property. The choice of which courts and cases to study is based on the development of the common law through precedent and the related doctrine of stare decisis, which is short for \textit{stare decisis et non quieta movere}, a phrase which is translated in several ways as “those things which have been so often adjudged ought to rest in peace,”\textsuperscript{164} “to stand by precedents and not to disturb settled points,”\textsuperscript{165} and “to stand on what has been decided.”\textsuperscript{166} It means that courts should follow the common law precedents. Courts must follow precedents that are considered to be binding or controlling authority. A precedent becomes binding authority for a court if the precedent case was decided by that court or a higher court in the same jurisdiction.

Judges are given a great deal of leeway in interpreting cases that are put forth as binding precedent.

\textsuperscript{164} Id. at 8.
\textsuperscript{165} Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, Shapo, \textit{Writing and Analysis in the Law} 10 (2003).
In general a case is considered binding if it shares the same significant facts with the case at issue and does not differ in any significant way from the instant case. In addition, the issues in the two cases must be the same and must have been necessary to the decision in the previous case. Courts can reject cases that are put forth as binding authority by distinguishing the cases on their facts or issues, finding that the previous cases are different from the instant case in some significant way. A court also could avoid being bound by precedent if it finds that the rule of the previous case is no longer valid and overrules it. 167

Even decisions that are not binding are given consideration under the rules of precedent. For that reason, researchers will look at decisions from other states and jurisdictions that are not directly on point, but that may contain principles on which to build legal arguments. Such decisions can be persuasive because of their depth of analysis and quality of reasoning in the opinion. Other factors that bear on the persuasiveness of a non-binding opinion include: the location and position of the court issuing the opinion; whether the opinion was issued by a unanimous or a split court; whether it was written by a well-respected jurist; and whether there was subsequent judicial and academic approval of the opinion. 168

In making determinations about the use of previous authority, it is important for researchers to determine the weight of authority when using precedent by determining which cases are most important to the resolution of the problem.

167 Id. at 6.
168 Id. at 7.
General guidelines include beginning the analysis with the cases on the same issue from the jurisdiction where the problem arose, starting with the cases from the highest court. The decisions of the courts within the jurisdiction, even if they are not binding, will be the most persuasive authority to a court. Regarding the weight of authority of cases from all jurisdictions, the similarity of the facts between the precedent and the instant case is important. Some other factors that can determine the weight of an authority include: the level of the court that decided the previous case; an opinion by a judge with an excellent reputation; a case decided by a unanimous or nearly unanimous court; the year of the decision; whether the state is geographically close or has similar social and economic conditions; the depth and quality of the prior treatment of the relevant issue.\textsuperscript{169}

Once the researcher collected the relevant cases, they were read and outlined, giving special attention to the legally relevant facts, issues, holdings, rulings and rationales. The holding in particular, which is the authoritative decision of the court, is important because it is binding. Everything else in the opinion, which may be classified as dicta, is not binding.\textsuperscript{170} Next, the researcher synthesized the cases according to the applicable area of law and then used the synthesis to analyze the public forum

\textsuperscript{169} SHAPO, supra note 164 at 22-23.

\textsuperscript{170} ROBERT C. BERRING, FINDING THE LAW 16-17 (1995). The author also notes that dictum cannot be relied on as precedent and cannot be cited as authority for a proposition unless it is explained how that case is being used as authority. "A well-reasoned dictum may more persuasive—and therefore more significant that an outworn holding." \textit{Id.} at 17.
cases.\textsuperscript{171} Specifically, the cases that use the public forum analysis were categorized and grouped with cases that have similar facts and similar analyses. The results of this study were reported by identifying the relevant cases, categorizing them with similar cases and explaining the effects of those similarities on the development of the law in this area. After this was done, the court decisions were compared and analyzed with the literature and theory on the public forum doctrine to gain a greater perspective on the development of the public forum doctrine, its application to public higher education institutions in the United States, and the relationship between the judicial interpretations of the public forum doctrine and institutional authority at public higher education institutions. Further, judicial results in the cases were contrasted and analyzed with the courts’ application of the doctrine to non-student speakers and communicators outside of an education setting. Analyzing these cases shed additional light on the direction of the law that affects student speech on campus, and provided some useful guidance for administrators who make policies that affect student expression.

\textbf{Method of Analysis}

All cases were read, categorized and analyzed around the issue of the public forum doctrine. In many cases, it was necessary to discuss the relevant facts of the case and how the courts applied the law to the facts. At the same time, it was necessary to scrutinize how the court applied public forum doctrine. In so doing, the researcher

\textsuperscript{171} Shafo, supra note 164 at 57-58.
considered whether the author of the court opinions applied any or all of the four types of public-forum analysis.

In analyzing legal cases, researchers are often guided by the process of legal reasoning, which is taught in American law schools, practiced in courts, and used by judges in writing opinions which form the basis of judicial decision making. Edward H. Levi said that the basic pattern of legal reasoning is reasoning by example.\textsuperscript{172} He called it reasoning from case to case and offered a three-step process, which is described by the doctrine of precedent in which a proposition that is descriptive of the first case is made into a rule of law and then applied to another similar situation. The steps are these: First, there is the similarity that is found between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.

The finding of similarity or difference is the key step in the legal process. The judge makes that determination in each individual case. When the judge looks to case law in the absence of a statute, he is not bound by the statement of the rule of law handed down by a judge in a prior case, even if it is a controlling case. Because the judge in a particular case is using different facts and circumstances than the prior case, he may ignore what the prior judge thought was important. The kind of legal reasoning process here, therefore, is one in which the classification changes as the classification is made.

Levi cited a number of reasons that reasoning by example was beneficial.\textsuperscript{173} First, it allows the litigants to participate in the law-making process. Second, reasoning by

\textsuperscript{172} Edward H. Levi, An Introduction to Legal Reasoning (1949).
\textsuperscript{173} Id. at 5-7.
example shows the role that the common ideas of society and the distinctions made by the experts can have in shaping the law. Third, it brings into focus important similarities and differences in the interpretation of the case law, statutes and a constitution of a nation.

In an exploratory research study that seeks to discover the status of the law across the nation, it is necessary to find the controlling and the persuasive authority in both the federal and state courts. The researcher, moreover, will need to delineate the issues that have controlling or persuasive authority and the level in which they have that authority. In combining the law of the entire nation, it will be necessary for the researcher to use all available authority to form an amalgamation of legal precedents that would be useful in understanding the breadth and depth of the law.

The deductive reasoning process was used in presenting the results of extensive searches and analyzing the results. This process involves reasoning from the general to the specific, or from a rule to the impact of the rule on a particular fact pattern. The first step in the deductive reasoning process is to identify the rules that may apply to a particular fact pattern. Such a rule is known as the major premise. The second step is to state the facts in terms of the rule. Such a statement is called the minor premise. The final step is to arrive at a conclusion after analyzing the relationship between the major premise and the minor premise.  

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Analogical analysis is grounded in the principles of precedent and stare decisis. Analogies are appropriate when the facts of the precedent are comparable to the case at hand. Such a determination can only be made on a case-by-case basis. Successful analogies depend on accurate identification of the critical facts of the controlling authority and the case at bar, and on accurately synthesizing cases.\textsuperscript{175}

If, however, the cases are different, then the decision in the precedent case should not control the outcome of the problem. The cases should be “distinguished.” Case synthesis is used when a research problem turns up many relevant cases and it becomes necessary to relate the cases to each other by synthesizing them.\textsuperscript{176} Precedents are typically analogous and yet distinguishable.

There are four categories of authority arguments that are based on legal precedent: Under the category of broad and narrow interpretation, if a precedent is favorable, it may have to be interpreted broadly or analogized to the instant case. On the other hand, if the precedent is unfavorable, it may be distinguished or overruled. Under the category of extending precedents to cover a gap, when the facts are different from those of the precedent but the underlying rationale seems applicable, it can be argued that the precedent is sufficiently analogous to be extended to the new situation. Under the category of conflicting lines of authority, if there are two alternative lines of

\textsuperscript{175} Romantz, \textit{supra} note 162 at 34-36.
\textsuperscript{176} Shafo, \textit{supra} note 164 at 57-58.
authority that go in opposite directions, it may be necessary to show why one line of authority is preferable to another. Finally, under the category of overruling precedent, precedent sometimes need to be overruled because it is out of date or no longer reflects good policy.¹⁷⁷

There are also policy arguments that are found in the reasons courts use to justify the outcome of the case. In doing so, the court may explain how the decision serves society’s interests. If a court opinion does not state the policy, a review of prior cases may reveal policy concerns.¹⁷⁸ Policy arguments can be put into four basic groups: 1) Normative arguments that are based on whether a rule advances or offends moral principals, whether a rule or harm advances a social goal, and whether the application of a rule is just in a particular case; 2) Economic arguments based on the efficient allocation of resources; 3) Institutional competency arguments in which courts will defer to the legislature or inquire into the interference with administrative agencies; 4) Judicial administration arguments about the practicality or impracticality of applying a particular rule.¹⁷⁹

Conceptual Approach

Toma classified legal scholars and their methods of inquiry into four discrete paradigms: legal formalists, legal realists, critical scholars, and interpretive

¹⁷⁷ Id. at 226-230.
¹⁷⁸ ROMANTZ, supra note 162 at 72.
¹⁷⁹ SHAFO, supra note 164 at 240-244.
The approaches of legal formalists have primary relevance in the current literature employing legal-historical research, but legal realism often informs analysis of the larger trends and themes derived from the body of case law. The legal-historical scholar will recognize the indeterminacy and subjectivity inherent in the product of courts and legislatures and understand law to be socially constructed, but he or she may also embrace the legal formalist position that we can study trends in judicial opinions over time and ascertain generalized legal principles. Legal formalists analyze judicial opinions and extrapolate specific legal principles in order to determine patterns of judicial thought. These patterns are further refined as generalized legal principles.

Legal realists propose to gain an understanding of the social factors influencing the development of legal principles, and acknowledge that the approach remains a process of subjective analysis rather than objective inquiry. A legal realist quoted in Toma’s study emphasized the dynamic and illusive nature of this inquiry, “Truth changes as society moves and evolves; and principles, including legal principles, change.”

American jurisprudence is shaped by a judge’s perspective on the law and his or her willingness to be influenced by the need to adapt the law to society’s changing needs. This continual process takes place through an interpretation of the facts, the elaboration of

181 Id. at 30.
182 See Levi, supra note 171.
the controversy, and a re-examination of the applicable law. Through focusing on this process as it is elaborated in a range of decisions over time, legal-historical analysis provides a method for understanding the legal principle’s evolution and the present shape of the law. As Cardozo wrote, “Cases do not unfold their principles for the asking... The instance cannot lead to a generalization till (sic) we know it as it is.”

Our understanding of the law is perpetually transformed through the adjudication of new cases. Levi emphasized that as case law evolves, legal concepts can be created out of particular instances, initiating a continuous realignment of cases and reshaping of selected constructs.

**Legal-Historical Processes**

Legal-historical scholars adopt the legal realist’s position that analysis remains subjective, but insist that the study of judicial opinions is analogous to the historian’s concentration on and analysis of text. The legal-historical scholar must first isolate a topic of relevance, and then, through the use of primary and secondary sources, identify the judicial decisions that contribute to the definition of the construct from which the topic evolved. Secondary sources are those works falling outside of primary authority, which discuss or analyze legal doctrine. These sources may include, but are not limited to, treatises, restatements of law, and

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articles in scholarly journals and law reviews. Primary sources are the judicial opinions drawn from the historical period under study, which define, delimit and apply the construct to a range of factual controversies. The compilation of case law must be organized in relation to its relevance to the construct’s development and to the precedential weight to be attributed to each judicial decision.

Once the researcher has begun the process of isolating a particular legal concept or principle, numerous resource materials, or finding tools, may be used to identify pertinent sources, including American Law Reports, American Jurisprudence, Shepard’s Citations, American Digest System, Corpus Juris Secundum, as well as computerized resources such as Lexis-Nexis, Westlaw, and other automated research tools.\(^{185}\) The finding tools provide additional resource materials that include citation to primary sources such as constitutions, statutes and judicial opinions. After primary sources are explored, legal standards regarding the concept’s applicability to a particular educational context may be extrapolated. Ultimately, the research encompasses all pertinent primary authority and relevant secondary authority, and utilizes the information located to explore the historic evolution of the legal concept as it relates to education.

\(^{185}\) Barbara J. Busharis and Suzanne E. Rowe, Florida Legal Research: Sources, Process, and Analysis (2002).
Definition of Terms

Unless otherwise indicated within the text, definitions of legal terms as used in this research are from Black’s Law Dictionary.

**Academic**--Pertaining to college, university, or preparatory school.

**Accountability**--State of being responsible or answerable.

**Aggregate**--Entire number, sum, mass, or quantity of something; total amount; complete whole.

**Autonomy**--The political independence of a nation; the right (and condition) of power of self government.

**Breach of the peace**--A violation or disturbance of the public tranquility and order. The offense of breaking or disturbing the public peace by any riotous, forcible, or unlawful proceeding.

**Chilling effect doctrine**--In constitutional law, any law or practice which has the effect of seriously discouraging the exercise of a constitutional right. The deterrent effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights.

**Constitutional**--Consistent with the constitution; authorized by the constitution; not conflicting with any provision of the constitution or fundamental law of the state.

**Constitutional freedom**--Generic term to describe the basic freedoms guaranteed by the Constitution such as the First Amendment freedoms of religion, speech, press and assembly together with protection under due process clause of the 14th Amendment.
**Constitutional right**—A right guaranteed to the citizens by the United States Constitution and state constitutions and so guaranteed as to prevent legislative interference with.

**Conviction**—The result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged. It is the final judgment on a verdict or finding of guilty; a plea of guilty, or a plea of nolo contendere, but does not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

**Espionage Act**—A federal law which punishes espionage, spying and related crimes.

**Grievance**—An injury, injustice or wrong which gives ground for complaint because it is unjust, discriminatory, and oppressive.

**Handbill**—A written or printed notice displayed, handed out, or posted, to inform those concerned of something to be done or some event. Posting and distribution of handbills is regulated by ordinance or statute in most localities.

**Judicial and Legal Discretion**—These terms are applied to the discretionary action of a judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained.

**Licensing**—Licensing involves the many procedures administrative agencies perform in conjunction with issuance of various types of licenses.

**Licensing power**—The authority in a governmental property to grant a license to pursue a particular activity.
Malicious--Characterized by, or involving, malice; having, or done with, wicked, evil, or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.

Ordinance--A rule established by authority; a permanent rule of action; a law or statute. In its most common meaning, the term is used to designate the enactments of the legislative body of a municipal organization.

Prior restraint--A system of “prior restraint” is any scheme which gives public officials the power to deny use of a forum in advance of its actual expression.

Privilege--A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption.

Public institution--One which is created and exists by law or public authority, for benefit of public in general; e.g., a public hospital, charity, college, university, etc.

Redress--Satisfaction for an injury or damages sustained. Damages or equitable relief.

Secular--Not spiritual; not ecclesiastical; relating to affairs of the present (temporal) world.

Segregation--The act or process of separation. The unconstitutional policy and practice of separating people on the basis of color, nationality, religion, etc. in housing and schooling.

Strict scrutiny test--Under this test for determining if there has been a denial of equal protection, burden is on government to establish necessity of the statutory classification. Measure which is found to affect adversely a fundamental right will be subject to “strict scrutiny” test which requires state to establish that it has
compelling interest justifying the law and that
distinctions created by law are necessary to further some
governmental purpose.

**Substantive law**—The part of the law which creates,
defines, and regulates rights and duties of parties, as opposed to “adjective, procedural or remedial law,” which prescribes method of enforcing the rights or obtaining redress for their invasion.

**Unconstitutional**—That which is contrary to or in conflict with a constitution. The opposite of “constitutional.”
CHAPTER 4
PUBLIC FORUM DOCTRINE IN THE UNITED STATES SUPREME COURT

Throughout the early 20th Century, governments were free to decide who could have access to public streets, parks and sidewalks for purposes of communication. In essence, local governments ruled over open spaces on public property like landowners, dictating the circumstances under which people could express themselves publicly. In 1939, the U.S. Supreme Court opened public spaces to speakers in the first of many First Amendment clashes between the fundamental rights of individuals to speak freely and the authority of the government to control activities on land that it owned and managed. In deciding Hague v. CIO, the U.S. Supreme Court recognized rights for people to speak freely on publicly owned property. In that case, the Committee for Industrial Organization had been denied permits to hold public meetings in streets and public buildings in Jersey City, New Jersey, and it was prohibited from distributing the group’s literature because of the nature of the speech involved. The Court held the city’s ordinance void because it allowed city officials to arbitrarily suppress speech.

Levi notes that the development process of a legal concept is often evolutionary. The first stage is the creation of the legal concept, and this concept is built up

186 307 U.S. 496 (1939).
187 The decision by the Court rested in part on the decision in the previous tem by the High Court that an ordinance that absolutely prohibits distribution of circulars, handbills and placards is void. Lovell v. Griffin, 303 U.S. 444 (1938).
as legal cases are compared. During this period, he noted, the court fumbles for a phrase. The court may try out several phrases, but the misuse or misunderstanding of words may come into play. At the second stage, the concept becomes more or less fixed, but further reasoning by example will continue to classify items as inside or outside of the concept. The third stage is the breakdown of the concept. Reasoning by using case examples in this stage “has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desirable.”

He acknowledges that this process will likely make judges and lawyers uncomfortable. As the process moves along and entirely new meanings turn up, they will attempt to “escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive.” At that point, according to Levi, the rule will lose its utility, the concept will have broken down, and the “reasoning by example” process must build another concept that can be applied to the facts as a means of resolving controversies.

This chapter explores the creation of the concept for protecting free expression in open, public spaces, the naming of that concept, the interpretation of it through analysis of Supreme Court cases, and its classification. Apparently, the concept has passed through Levi’s second stage of development, but it has not gotten very far through the third stage because the concept remains viable and has not yet broken down. To assess whether fractures have begun to occur, the application of forum analysis in

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189 Id. at 9.
190 Id.
public higher education settings will be evaluated in Chapter 5.

**Recognition of First Amendment Protection for Speech in Open, Public Spaces: 1939-1972**

In *Hague v. CIO*, the Supreme Court ruled in favor of establishing the rights of people to speak in open public spaces. In so doing, the Court reversed 42 years of judicial precedent that hinged on the 1897 case of *Davis v. Massachusetts*, which gave the state the complete authority to regulate speech on government-owned property. As such, the *Hague* case initiated a line of cases that recognized the free speech rights of citizens in the context of public areas.

As Levi suggested, there is an initial stage of a legal concept in which the concept is created, and the concept gets built up as legal cases are compared. At this early point in the development, the court searches for a phrase to attach to the concept. While the court tries out phrases, there could be misuses or misunderstandings of words that come into play.

The comparison of legal cases that contributed to the development of the public forum doctrine started early in the 20th century. Many of the first cases in that period involved government prohibition of speech-related activities in open spaces. *Schneider v. State* was a consolidation of four cases in which the defendants were convicted under municipal ordinances forbidding or regulating the distribution of literature in the streets or

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192 167 U.S. 43 (1897).
193 308 U.S. 147 (1939).
other public places. Three of the cases involved activities that took place in public streets and the fourth involved distribution of circulars by house-to-house visitations without a permit. The defendants challenged their convictions and the U.S. Supreme Court granted review, ruling that keeping the streets neat and clean was not a sufficient reason to justify prohibiting the defendants from handing out literature to other persons willing to receive it. The ordinance prohibiting house-to-house distribution without a permit was void because it banned unlicensed communication of any views or the advocacy of any cause from door to door, and it subjected canvassing to a police officer’s discretionary authority to determine what literature could be distributed and who could distribute it.

Subsequent solicitation regulations that were challenged in the U.S. Supreme Court met with a similar fate. The Court ruled that religious literature distributed by Jehovah’s Witnesses cannot be subjected to flat taxes on the privilege of door-to-door solicitation by the religious group’s members. In another case involving door-to-door handbilling by the Jehovah’s Witnesses, the Court invalidated a city ordinance that forbade knocking on the door or ringing the doorbell of a residence in order to deliver a handbill and invite occupants to religious, political or other kinds of public meetings. The Court refused to accept preventing crime and assuring privacy as sufficient reasons for justifying the ordinances. Several years later, however, the Court upheld an ordinance that

prohibited door-to-door solicitation of subscriptions to the Saturday Evening Post, Newsweek and other magazines. This subscription solicitation was distinguished from the previous case by virtue of the commercial character of the speech involved.\textsuperscript{196} The purpose of the ordinance was to guard citizens against the “annoyances of life"\textsuperscript{197} that result from door-to-door solicitation that was prohibited by the statute. In its opinion, the Court noted that the ordinance left open other methods of soliciting business.\textsuperscript{198}

Increasingly, the Supreme Court emphasized that city licensing officials cannot be given power arbitrarily to suppress free expression in the public streets and parks.\textsuperscript{199} In these opinions, the Court frequently cited Hague v. CIO because it emphasized that local authorities must appropriately circumscribe the exercise of discretion by the licensing officials. Hague prohibited officials from denying a license to speakers in the streets and parks because the officials disagree with the content of the speech, although the government could regulate noise that would constitute a breach of the peace. For example, in Terminiello v. Chicago,\textsuperscript{200} the Court overturned convictions for disturbing the peace in a case in which the defendant spoke to a large audience in an auditorium outside of which an angry crowd protested against the meeting. During his speech, one defendant, Terminiello, condemned the conduct of the crowd outside and vigorously criticized various

\textsuperscript{197} Id. at 632.
\textsuperscript{198} Breard, 341 U.S. 622 (1951).
\textsuperscript{200} 337 U.S. 1 (1949).
political and racial groups. There were several disturbances in the crowd. Terminiello was charged with violation of an ordinance forbidding any breach of the peace, which was described at trial as misconduct that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”

The Court overturned the verdict because it was a general one and it did not state the grounds on which the verdict rested. Moreover, the Court reasoned,

The vitality of civil and political institutions in our society depends on free discussion … [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to support diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.\[^{202}\]

In the Court’s view, free speech serves its purpose when it “induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”\[^{203}\] The Court suggested that speech that is provocative and challenging may have a profound effect on prejudices and preconceptions. The Court concluded that a

\[^{201}\] \textit{Id.} at 3.
\[^{202}\] \textit{Id.} at 4.
\[^{203}\] \textit{Id.}
more restrictive interpretation of the Constitution “would lead to standardization of ideas. . . .” 204

In this era, the U.S. Supreme Court also invalidated local laws and policies that restricted handbilling, public speaking, and related expressive activities. In addition, the Court removed restrictions on the freedom to speak and associate on public streets and in public parks.

In Jamison v. Texas, 205 a member of the Jehovah’s Witness organization was arrested and convicted for violating a Dallas ordinance that prohibited distribution of handbills to pedestrians on the street. The handbills contained an invitation to attend a gathering and described two books for sale that explained the religious views of the sect.

The U.S. Supreme Court reversed the conviction, holding that states were prohibited from interfering with a person’s constitutional right to express her views in an orderly manner using handbills, literature, or the spoken word. The Court indicated that a person who is legally on a public street has the right to express her views in an orderly manner. In addition, the Court held that while states could prohibit distribution of purely commercial leaflets on the streets, 206 they could not prohibit distribution of handbills concerning a religious activity merely because the handbills invited the purchase of

204 Id.
205 318 U.S. 413 (1943).
206 Note that the U.S. Supreme Court at that time had refused to give any First Amendment protection to commercial speech. See, Valentine v. Chrestensen, 316 U.S. 52 (1942). It was not until more than three decades later that the Court agreed to protect purely commercial speech. See, Virginia Board of Pharmacy v. Citizens Consumer Council, 425 U.S. 748 (1976).
religious books or because the handbills sought to promote religious fundraising.\textsuperscript{207}

In \textit{Niemotko v. Maryland},\textsuperscript{208} the U.S. Supreme Court dealt with restrictions on speech in a public park in which officials issued permits for gatherings without promulgating any guidelines for issuance. The case involved two members of the Jehovah’s Witnesses who scheduled Bible talks in a public city park. Though no rule existed requiring a permit, it was customary for organizations to get one from the Park Commissioner for meetings and celebrations of various kinds. When the group sought permission to use the park on four consecutive Sundays, permission was refused. The group appealed to the City Council, which also denied the request. When the group proceeded with two park meetings on consecutive Sundays, the leaders were arrested and convicted.

The U.S. Supreme Court, however, reversed the convictions and found the actions of city officials to be an unconstitutional prior restraint on free speech and religion in violation of the First Amendment because the city had no standards for issuing the permits.\textsuperscript{209}

\begin{quote}
In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous “practice,” whereby all authority to grant permits
\end{quote}

\textsuperscript{207} Jamison, 318 U.S. at 417.
\textsuperscript{208} 340 U.S. 268 (1951).
\textsuperscript{209} Id. at 273. But see id. at 273-289. In a concurring opinion, Justice Felix Frankfurter provided an elaborate summary of all of the public-place cases up to that time and offered a persuasive antithesis to the previous doctrine that granted unbridled authority to the state and municipal government restricting speech in public places.
for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served.\textsuperscript{210}

In the case of \textit{Talley v. California},\textsuperscript{211} the Court voided an ordinance that prohibited speakers from distributing anonymous literature. In that case, a Los Angeles ordinance barred distribution of "any hand-bill in any place under any circumstances" that did not have the names and addresses printed on them in the place the ordinance required. A handbill distributor was convicted of violating the ordinance, but the Supreme Court reversed his conviction. The Court recalled historical events to emphasize that states may not compel members of groups engaged in the dissemination of ideas to be publicly identified. The reason was that "identification and fear of reprisal might have deterred perfectly peaceful discussions of public matters of importance."\textsuperscript{212}

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. ... Before the Revolutionary War colonial Patriots

\begin{footnotes}
\item[210] Id. at 271-272.
\item[211] 362 U.S. 60 (1960).  
\item[212] Id. at 65.
\end{footnotes}
frequently had to conceal their authorship of distribution of literature that easily could have brought down on them prosecutions by English-controlled Courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.\footnote{213}{Id. at 64-65.}

The Court concluded that the ordinance was void on its face.\footnote{214}{Id. at 65. See also, Lovell v. Griffin, 303 U.S. 444 (1938) where the Court voided an ordinance in Griffin, Georgia, that forbade any distribution of literature at any time or place in that city without a license.} The Court reasoned that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.\footnote{215}{Id. at 64.}

Throughout the 1960s and 1970s, several cases reached the U.S. Supreme Court that would help define when access to public grounds for speech purposes would be appropriate. Many of the speech cases of this era involved protests by individuals asserting civil rights and protesting racial discrimination.

In \textit{Edwards v. South Carolina},\footnote{216}{372 U.S. 229 (1963).} a group of black high school and college students met one morning at a church in Columbia, then left about noon and walked in separate

\begin{footnotes}
\item[213] Id. at 64-65.
\item[214] Id. at 65. See also, Lovell v. Griffin, 303 U.S. 444 (1938) where the Court voided an ordinance in Griffin, Georgia, that forbade any distribution of literature at any time or place in that city without a license.
\item[215] Id. at 64.
\item[216] 372 U.S. 229 (1963).
\end{footnotes}
groups of about 15 to the South Carolina state house grounds, an area of two city blocks open to the general public. They sought to submit grievances to the citizens of South Carolina and the state legislative bodies and to peacefully protest discrimination against black citizens and the denial of legal privileges to those citizens. An orderly crowd gathered to watch. During the demonstration, police ordered the students to disperse or risk arrest. When the students failed to disperse, they were arrested and convicted of breach of the peace.217

The U.S. Supreme Court found that the students were convicted of an offense that was too generalized because “breach of the peace,” in the words of the state Supreme Court, “is not susceptible of exact definition.” In general terms, it is defined as “a violation of public order” and “a disturbance of the public tranquility.”218 Moreover, the court concluded that the students were convicted using evidence that merely showed they were peaceably voicing opinions that were opposed to the views of the majority of the people in the community to the degree that it attracted a crowd and required police protection. Thus the Court reversed the convictions after finding that the state infringed the students' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.219

In Cox v. Louisiana,220 the defendant was convicted of interfering with, obstructing, or impeding the administration of justice after he led a crowd of 2,000

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217 Id. at 233.
218 Id. at 234.
219 Id. at 238.
people in a demonstration in front of a courthouse largely to protest what the demonstrators considered to be an "illegal" arrest of 23 students on the previous day. The judges responsible for trying them and deciding on the legality of their arrests were in the building at that time. The officials present gave permission for the demonstration to take place across the street from the courthouse. At no time did the police recommend that the demonstration be held any further from the courthouse.  

The U.S. Supreme Court found that the police had prior notice that the demonstration was planned for the vicinity of the courthouse. Because the record clearly showed that the officials gave permission for the demonstration to take place across the street from the courthouse, the Court reversed Cox's conviction.  

Over the next several years, the justices had to decide how far to extend protection for speech in streets and parks to speech on other public sites. In one case, the answer from the Court centered on the lawfulness of the speakers' underlying conduct. In Brown v. Louisiana, the Court reversed breach-of-the-peace convictions stemming from a sit-in at a segregated public library by a small group of black residents. The Court held that the protestors could not be convicted merely because they did not comply with an order to leave the library. Their presence in the library was unquestionably lawful; it was a public facility, open to the public. The Court found no evidence that they disturbed the peace. Instead, the Court found that they had staged a peaceful and orderly protest.

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221 Id. at 570.
222 Id. at 572-573.
demonstration, with no intent to provoke a breach of the peace. Neither were the circumstances such that a breach of the peace might be "occasioned" by their actions, as the statute alternatively provided. The sole statutory provision invoked by the state stated nothing about occupying the reading room of a public library for more than 15 minutes, any more than it purported to punish the refusal to follow an unexplained command to withdraw from a public place. In the Court’s view, the statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. The Court concluded that any interference with this right would not be tolerated under the Constitution.224

In this same period, the High Court was compelled to decide the extent of protection of speech on public properties. In Adderley v. Florida,225 the Court held that speech access rights do not attach to all outdoor property. In Adderley, the Court upheld the trespass convictions of students who had gathered on the driveway and grounds of a county jail to protest arrests they deemed unlawful.

Harriett Louise Adderley and 31 other persons—all students of Florida A&M University—were convicted by a Leon County, Florida, jury on a charge of "trespass with a malicious and mischievous intent" upon the premises of the county jail. The students had gone from the school to the jail to "demonstrate" at the jail their objection to arrests of other protesting students the day before, and perhaps to protest more generally against state and local policies and practices of racial segregation, including

224 Id.
segregation of the jail. The county sheriff tried to persuade the students to leave the jail grounds and threatened the students with arrest. Some of the students left but those who remained were arrested for trespass.

The Court held that a trespass could be prosecuted regardless of the fact that it was the means of protesting segregation. The Court then ruled that the evidence supported the jury's verdict of guilty. The Court reasoned that the students' First Amendment rights were not violated because the state was authorized to preserve the property under its control for the use to which it is lawfully dedicated. 226

The Court distinguished Adderley from Edwards by noting that a jail is distinguishable from other public property. 227 The Edwards case arose when a number of people demonstrated on public property against their state's segregation policies. In Edwards, the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, the grounds around the state capitol are open to the public. Because of the need for security, jails are not so open. In Edwards, protestors peacefully went in through a public driveway, but in Adderley demonstrators entered the grounds through a driveway used only for jail purposes. South Carolina prosecuted the demonstrators on a breach-of-the-peace charge, which was non-specific and loosely defined. In this case, there was a more clearly defined state statute that the Adderley Court ruled was "aimed at conduct of one

226 Id. at 47-48.
227 The Court also contrasted this case with the decision in Cox, noting the Louisiana breach-of-the-peace law used to prosecute Cox was invalidated on the same grounds of vagueness.
limited kind, that is, for one person or persons to trespass upon the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary.‖

In Grayned v. Rockford, Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Black students at the school presented their grievances to school administrators at the high school. When the principal took no action on crucial complaints, a more public protest was planned. On April 25, 1969, approximately 200 people -- students, their family members, and friends -- gathered next to the school grounds. The demonstrators marched around on a sidewalk about 100 feet from the school building. Many carried signs that summarized the grievances: "Black cheerleaders to cheer too;" "Black history with black teachers;" "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists. After warning the demonstrators, police arrested 40 of them using an anti-picketing and an anti-noise ordinance as justification.

The Supreme Court found the antipicketing ordinance unconstitutional, but it sustained the antinoise ordinance. The Court held that the antinoise ordinance was not impermissibly vague because it was written specifically for the school context, where the prohibited disturbances were easily measured by their impact on the school. The antinoise ordinance was narrowly tailored to further the

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228 Adderley, 385 U.S. at 42.
229 408 U.S. 104 (1972).
230 Id. at 105.
city's compelling interest in having an undisrupted school session, and did not unnecessarily interfere with First Amendment rights. The Court recognized that the antinoise ordinance sought to prohibit noisy demonstrations that could disrupt normal school activities even though such expressive conduct may be constitutionally protected at other places or other times.

Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance’s reach. Such expressive conduct may be constitutionally protected at other places or other times, but next to a school, while classes are in session, it may be prohibited. The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty “audience” enters and leaves the school.\(^\text{231}\)

The Court noted that picketing may be prohibited when it occurs next to a school while classes are in session. Therefore, the Court ruled, the city of Rockford restriction on some peaceful picketing represents a legislative judgment that some kinds of expressive activity should be restricted at a particular time and place. In this case, that time and place was near a school during times when the school was in session.\(^\text{232}\)

In this evolutionary stage of development, there were several indications of how the public forum legal concept

\(^\text{231}\) Id. at 120.
\(^\text{232}\) Id.
was created and initially conceived. The concept was initially created in Hague v. C.I.O. and applied in subsequent cases. In Hague and its progeny, the Court appeared to be establishing the underpinnings of a legal rule regarding the open forum concept that allows speaking and literature distribution on public streets.

The Court did fumble for a phrase, but did not settle on one during this stage of development. Often the Court referred to the concept as one that involved protection for public streets and parks, without using the phrase “public forum” or even the term forum. In the cases that rose to the U.S. Supreme Court level during the civil rights era of the 1960s and 1970s, the areas for speech-related activities were broadened to become public grounds. One demonstration took place on the state house grounds, another on the street near a courthouse and a third inside of a public library—all areas that were open to public use.

**Emergence and Articulation of the “Public Forum” Doctrine: 1972-1980**

The phrase “public forum” was first used by the Court in 1972, as a phrase used to describe the concept of public access to government owned property for expression. In *Police Department of Chicago v. Mosley*, Earl Mosley, a federal postal employee, frequently picketed Jones Commercial High School in Chicago alone during school. He would walk the public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota."

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234 Id.
His lonely crusade was always peaceful, orderly, and quiet. About seven months after he began picketing, the city of Chicago enacted an ordinance making it a crime of disorderly conduct to picket on a sidewalk near a school during, or immediately before or after school unless the school was involved in a labor dispute. Mosley contacted the Chicago Police Department to find out how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested. He ended his picketing on the day before the ordinance became effective and sued the city, alleging a violation of his constitutional rights.235

The U.S. Supreme Court, in a majority opinion written by Justice Marshall, held the ordinance was unconstitutional because it made an invalid distinction between labor picketing and other peaceful picketing.

[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on

235  Id. at 93-94.
content alone, and may not be justified by reference to content alone.”

Clearly, the Court was concerned about fairness when it comes to accessing a public forum, but the Court indicated that the nondiscrimination requirement does not mean that picketing must always be allowed. The Court acknowledged that there could be time, place and manner regulations of picketing that may be necessary to further significant governmental interests. Likewise, under Equal Protection analysis, there may be sufficient regulatory interests justifying exclusions or distinctions among pickets. Justifications for selective exclusions from a public forum must be carefully scrutinized, however.

Another forum principle enunciated by the Court blocked the city’s attempt to prohibit all non-labor picketing at the school forum as a means of reaching the more disruptive types of non-labor picketing. The Court reasoned that because the city tolerated some disruption from labor picketing, some non-labor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Since the discrimination among pickets was based on the content of their expression, the Court held the ordinance unconstitutional.

After the “public forum” was identified and discussed in the Mosley case, subsequent decisions began to use it as part of the standard for determining whether a free speech right extended to speakers on government-owned property. In

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236 Id. at 96
237 Id. at 96.
238 Id. at 102.
Lehman v. Shaker Heights,²³⁹ for example, the Court applied the standard in rejecting a complaint that a city restriction on “car card” use in a political campaign violated the First Amendment. The Court rejected the notion that the form of advertising used in that case constituted a public forum.

In that case, Harry J. Lehman was a candidate for State Representative to the Ohio General Assembly for a district that included the city of Shaker Heights. In July 1970, Lehman sought to promote his candidacy by purchasing car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. The general election was scheduled for November 3rd. Lehman’s proposed copy contained his picture and read:

HARRY J. LEHMAN IS OLD-FASHIONED!
ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT

The city's transit system, by policy, did not permit any political advertising on its buses, although it had accepted advertisements from commercial establishments and public interest groups. Therefore, Lehman was not allowed to place a campaign advertisement on the commercial "car cards" located on city transit vehicles. He filed suit challenging the constitutionality of the municipal policy.²⁴⁰

In a plurality opinion penned by Justice Blackmun, the Court found that there was no First Amendment forum to be found in the case. The Court distinguished the advertising

²⁴⁰ Id. at 301.
space in Lehman from traditional settings in which open and public spaces where First Amendment values prevail. In a traditional setting, the Court posited, one would have to know the history of those spaces before one could say whether something could be said or done in a certain place.

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.\(^{241}\)

In describing the type of forum involved in this case, the Court was careful to delineate the notion of a closed forum by defining the absence of a public forum. Thus the nonpublic forum includes “no open spaces, no meeting hall,

\(^{241}\) Id. at 303.
park, street corner or other public thoroughfare.”242 In likewise fashion the Court implicated the presence of a nonpublic forum by limiting the car card space to commercial and service-oriented advertising, which are not at the top tier of First Amendment-protected speech. To rule otherwise, the Court analogized, would require opening display cases in various government facilities, such as public hospitals, libraries, office buildings, military compounds, and other public buildings, immediately converting them into “Hyde Parks open to every would-be pamphleteer and politician.”243 As a result, display cases in public facilities remain nonpublic fora, which are closed to random communicators.

In a concurring opinion, Justice Douglas takes the newspaper analogy a step further to illustrate that the car card is not a public forum, analogizing it to a newspaper and holding that standard applicable.244

The Court concluded that there was no First Amendment forum because the city had made a conscious decision to limit access to its transit system advertising space in order to minimize the chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. The Court found these legislative objectives advanced by the city to be reasonable, and therefore, no First Amendment violation had resulted from the restriction.245

In the term following the Lehman case, the Court reviewed a case in which a request to use a municipal

242 Id.
243 Id. at 304.
244 Id. at 305 (Douglas, J., concurring).
245 Id. at 304.
theatre was rejected. In *Southeastern Promotions, Ltd. v. Conrad*,246 Southeastern Promotions, a corporation that promoted theatrical productions, applied to members of a municipal board charged with managing a city-leased theater to present the musical "Hair." While none of the board members had seen the play or read the script, they had received reports that the musical involved nudity and obscenity. Based on those reports, the board concluded that the production would not be "in the best interest of the community," therefore, the board met and voted to reject the application. Southeastern Promotions filed suit, contending that the auditorium board members' rejection of its application to use the public forum amounted to an unconstitutional prior restraint on speech.

The U.S. Supreme Court agreed with the promoter that the denial of the use of the facilities for the production constituted a prior restraint on speech. Writing for a majority of the Court, Justice Blackmun stated that for prior restraints to be constitutional, the government must apply procedural safeguards reducing the danger of suppressing constitutionally protected speech. The prior restraint applied by the board members was not implemented under a system with appropriate and necessary procedural safeguards, as Southeastern Promotions was not assured prompt judicial review with a minimal restriction of First Amendment rights.247

In this early case involving an alleged "public forum," a municipal theatre, Justice Rehnquist wrote one of three dissenting opinions in which he criticized the Court for "treating a community-owned theatre as if it were the

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247 *Id.* 561-562.
same as a city park or city street, which it is not." He noted that the Court had failed to recognize that the promoter in this case sought to show the musical at a city-owned theatre, not at its own theatre. He felt that the Court had ignored the impact of cases like Adderley, which strongly endorsed the power of the state to control its property for its lawfully dedicated purpose. In Rehnquist’s view, the Court’s decision told managers of municipal auditoriums that they may not have a selective role in determining which performances may be booked. Instead, he suggested that the Court had relied too heavily on applying procedural safeguards to a dispute involving the content of a theatrical performance. While acknowledging in passing the municipal theatre as a public forum, the court did not analyze the case on that basis, focusing instead on whether procedural safeguards were in place as protection against an illegal prior restraint on free speech. In Rehnquist’s view had the Court applied public forum analysis, it would have recognized the city’s power to control the theatre for its dedicated purpose.

Thus, Rehnquist argued, that the auditorium historically only accepted productions that were suitable for family viewing.

[I]f it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think the policy can be described

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248 Id. at 570.
as arbitrary or unreasonable.\textsuperscript{249}

He argued that the only remaining question to decide in such a public forum case would be a judgment on the reasonableness of the regulation. Rehnquist’s views are significant here because they provide an analysis of the restriction based on the public forum doctrine instead of limiting the discussion to prior restraint law. His opinion sets up the city-owned theater as a kind of a limited public forum or nonpublic forum, where the community and its leaders can decide on the appropriateness of the attractions. Couched in those terms, the theatre would be less open to public speech than a public park or street.\textsuperscript{250}

The next case in the post-Mosley sequence of cases in which the Court continued to define types of fora was Greer v. Spock.\textsuperscript{251} In that case, the People’s Party and Socialist Workers Party candidates for president and vice-president informed the commanding officer of Fort Dix of their intention to enter the military base for the purpose of distributing campaign literature and holding a political meeting. The commander rejected their request, relying on the base's regulations governing political campaigning and the distribution of literature. The candidates filed an action seeking to enjoin the enforcement of the regulations, arguing that they violated the First and Fifth Amendments of the Constitution.\textsuperscript{252}

The U.S. Supreme Court held that the candidates had no generalized constitutional right to make political speeches

\textsuperscript{249} Id. at 572.
\textsuperscript{250} Id. at 563.
\textsuperscript{251} 424 U.S. 828 (1976).
\textsuperscript{252} Id. at 833-834.
or distribute leaflets at the military base. In the majority opinion written by Justice Stewart, the Court noted that the basic function of a military installation like Fort Dix is to train soldiers, not to provide a public forum.

A necessary concomitant of the basic function of a military installation has been “the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command.” The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.²⁵³

Therefore military bases, which are specifically designed for soldier training, are nonpublic fora, meaning they are generally off limits for speech by the general public. In the Court’s view, the fact that civilians had been invited to the base on occasion to speak did not convert the base into a public forum neither did it take away the authority of base officials to prevent others from entering the base to speak. The Court added that the regulation did not authorize the base authorities to prohibit the distribution of political campaign literature. Base officials can prohibit only publications that the commander finds to be a danger to military loyalty,

²⁵³ Id. at 838.
discipline and morale, but they cannot prohibit them on the basis of content. In a public forum, military officials presumably would not be able to stop speakers who they deem to be a danger in these areas. The base’s classification as a nonpublic forum, however, allows the military leaders to have such a rule in place to aid them in keeping order.

In addition, the Court held that the regulations were not constitutionally invalid on their face. Further, the regulations were not unconstitutionally applied because the commander had not discriminated among candidates based upon their political views and the regulations had been evenhandedly applied to all persons interested in speaking or distributing literature on the base.\(^{254}\)

According to Levi, after a legal concept is created and built up though a comparison of legal cases, the Court goes through an initial stage trying to find a phrase to call the concept.\(^{255}\) At the second stage, the Court settles on a phrase for the concept, and that becomes more or less fixed, but further reasoning is required to classify items as inside or outside of the concept.

As Levi’s “concept” development suggests, the Court continued to reach for a word or a phrase to identify the new concept. In 1972, the Court settled on the phrase “public forum,” beginning with Police Department of Chicago v. Mosley.\(^{256}\) With that decision, and the documented use of the phrase in subsequent cases, the concept reached Levi’s second stage. As a result, the concept became more or less fixed. Therefore, it is necessary to look to subsequent

\(^{254}\) Id.
\(^{255}\) Levi supra note 171 at 8-9.
\(^{256}\) 408 U.S. 92 (1972).
cases for help in classifying items as inside or outside of the concept.

**Delineation and Limitation of Forum Analysis: 1981-Present**

The public forum doctrine matured in the 1980s. With that process, the policy of the Court seemed to be to give a more relaxed scrutiny to restrictions in a public forum that provide content-neutral time, place and manner restrictions instead of allowing a total ban on expression. Considering all major U.S. Supreme Court decisions from that time until the present, the balance of the chapter will review Court cases that used public forum analysis.

Since the 1980s, the Court has altered the concept of traditional public forum, allowing several restrictions in spaces that historically had been free of government rules. In addition, the Court introduced the concept of a limited public forum, which exists as a space or venue that falls between the openness of the traditional public forum and the limitations of the nonpublic forum.

**Traditional Public Forum**

Streets, parks and sidewalks are venues where speakers have traditionally gained access for communicative purposes. In the early days of public forum analysis, the Court routinely struck down laws and reversed convictions of people who were exercising their freedom of speech and association in these areas. These are still protected areas, but the Court has sustained some regulations on speech and activities in those spaces when they are content neutral and narrowly tailored to achieve a substantial governmental interest. Several post-1981 cases illustrate
how the Court applied the traditional public forum concept to regulations of speech on government-owned property.

In 1983, in United States v. Grace,\textsuperscript{257} Thaddeus Zywicki was distributing leaflets on the sidewalk to passersby in front of the Supreme Court building when he was told by Court police officers on three occasions that he was in violation of a federal law that prohibited distribution of leaflets on Supreme Court grounds. Within months of Zywicki’s last warning, Mary Grace displayed a four foot by two and a half foot sign that had the text of the First Amendment inscribed on it. A Court police officer warned Grace that she would be arrested if she did not stop displaying the sign. Zywicki and Grace sought an injunction against continued enforcement of the statute that prohibited such activities anywhere on the grounds of the Supreme Court.\textsuperscript{258}

The U.S. Supreme Court held that the statute could not be applied to public sidewalks because they are among the areas of public property that may be considered to be public forum property. As such, sidewalks occupy a special position in terms of First Amendment protection. In an opinion written by Justice White, the Court also decided that sidewalks that border Supreme Court grounds do not lose their historically recognized character because they abut Supreme Court property, an area considered a nonpublic forum. Neither can the government change the character and status of the sidewalks simply by including them in the statutory definition of the Supreme Court grounds. Thus, the Grace Court stated:

Those sidewalks are used by the public

\textsuperscript{257} 461 U.S. 171 (1983).
\textsuperscript{258} Id. at 174.
like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city. We seriously doubt that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street.\footnote{259}

The Court held that the sidewalks were public fora and should be treated as such. They were indistinguishable from any other sidewalks in Washington, D. C., and the Court said it could discern no reason for treating them any differently. Moreover, they are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered to be public forum property. In addition, there was no separation, no fence, nor any other indication to people stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some “special type of enclave.”\footnote{260} Given the status of the sidewalk as a public forum, the federal prohibition on displays or other speech activity was unconstitutional insofar as it applied to the public sidewalks.\footnote{261}

\footnote{259} Id. at 183. \footnote{260} Id. at 180. \footnote{261} Id. at 183-184.
In 1988, in *Frisby v. Schultz*, the Court recognized the freedom to speak and picket in the street because it is a traditional public forum, but the Court also weighed in the balance the state's interest in protecting unwilling listeners while in their homes. In *Frisby*, two people who were strongly opposed to abortion sought to express their views on the subject by picketing on a public street outside the Brookfield, Wisconsin, residence of a doctor who performed abortions at clinics in neighboring towns. The protesters assembled outside the doctor's home at least six times in a one-month period. The picketing, though orderly and peaceful, generated substantial controversy and numerous complaints. In response, the town passed an ordinance banning all residential picketing.

The U.S. Supreme Court found that the streets of Brookfield were considered to be traditional public fora, and the anti-picketing ordinance must therefore be subjected to the stringent standards for restrictions on speech in traditional public fora. The state, however, had a legitimate interest in protecting the unwilling listeners while in their house. Justice O'Connor, writing for the Court majority, distinguished the type of picketing prohibited by the Brookfield ordinance from the more general means of communication that cannot be completely banned in residential areas, such as handbilling, solicitation and marching.

Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield

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263 *Id.* at 476-477.
ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.\textsuperscript{264}

The Court noted the “devastating effect of targeted picketing on the quiet enjoyment of the home. . . .”\textsuperscript{265} Because the picketing was considered to be intrusive and the Court found the ordinance was narrowly tailored to achieve its restrictive end, it was held constitutional.\textsuperscript{266}

Historically, courts have held that streets are traditional public fora, where expression is generally protected. These speech rights can be curtailed, however, when there is a significant government interest such as the one in this case—the protection of residential privacy. One key aspect of this privacy is protection of the unwilling listener. Although individuals are expected to simply avoid speech they do not want to hear, the Court acknowledged that the home is different. Also, a special benefit of the privacy that all citizens have in their residences is an ability to avoid intrusions. Thus, the Court noted it had previously held that residents are not required to welcome

\textsuperscript{264} Id. at 486.  
\textsuperscript{265} Id.  
\textsuperscript{266} Id. at 488.
unwanted speech into their own homes and that the
government may protect this freedom.\textsuperscript{267}

The Court said the anti-picketing ordinance must be
judged against the stringent standards established for
restrictions on speech in traditional public fora. This
means that in places such as streets the government may not
prohibit all communicative activity. In order for the state
to enforce a content-based restriction it must show that
its regulation is necessary to serve a compelling state
interest and that it is narrowly drawn to achieve that end.
In addition, the state may enforce regulations of the time,
place, and manner of expression which are content-neutral,
are narrowly tailored to serve a significant government
interest, and leave open ample alternative channels of
communication. Therefore, in future cases involving
expressive activity in the streets, courts likely will
apply the appropriate legal standard, depending on whether
the restriction on speech is directed at the content of
the expression or not.

A county fee that was charged for a permit to
demonstrate presented the Court with a serious
Nationalist Movement},\textsuperscript{268} the movement proposed to
demonstrate in opposition to the federal holiday
commemorating the birthday of the Rev. Martin Luther King
Jr. In Forsyth County, Georgia, the movement wanted to
conduct a rally with speeches for 90 minutes to two hours
on the courthouse steps on a Saturday afternoon in January
1989. The county imposed a $100 fee. In response to two
January 1987 demonstrations in Forsyth County that drew

\textsuperscript{267} \textit{Id.} at 485.
\textsuperscript{268} 505 U.S. 123 (1992).
numerous counter-demonstrators shouting racial slurs and throwing rocks and beer bottles, the county enacted an ordinance requiring the applicant to defray the cost of the event by paying a fee. About six months later, the county amended the ordinance to set the permit fee for demonstrations or parades at not more than $1,000 per day, and it empowered the county administrator to adjust the amount to be paid to meet the expenses related to the administration of the ordinance. The fee imposed on the Nationalist Movement was based on the county administrator’s time in issuing the permit. It did not include any calculation for law enforcement expenses. The movement did not pay the fee or hold the rally. The movement refused to pay the fee and initiated a suit to win the right to hold the rally.\footnote{\textit{Id.} at 127.}

In a 5-4 majority decision, written by Justice Blackmun, the U.S. Supreme Court declared the ordinance invalid because it tied the amount of the fee to the content of the speech without providing adequate procedural safeguards. The Court reviewed the public forum standards to be applied to the ordinance:

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades or assemblies in “the archetype of a traditional public forum,” is a prior restraint on speech. Although there is a “heavy presumption” against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums,
may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.\textsuperscript{270}

In examining the county’s construction and implementation of the ordinance, the Court found an absence of narrowly drawn, reasonable and definite standards. The decision of how much to charge was left to the unbridled discretion of the administrator, who was not required to rely on objective standards. The ordinance was unconstitutionally content-based because the administrator must examine the content of the message conveyed, estimate the public response to that content, and judge the number of police necessary to meet that response. Therefore, the Court ruled that the ordinance unconstitutionally tied the amount of the fee to the content of the speech without providing adequate procedural safeguards.\textsuperscript{271}

In the 1960s, the U.S. Supreme Court responded to challenges to the restrictions on demonstrations for people who were protesting and marching for civil rights and equality. Three decades later, challenges to restrictions

\textsuperscript{270} Id. at 130.
\textsuperscript{271} Id. at 137.
on protestors opposed to abortion occupied the attention of the court.

In 1994, in *Madsen v. Women’s Health Center Inc.*, antiabortion protesters threatened to picket and demonstrate around an abortion clinic in Melbourne, Florida. In September 1992, a Florida state court permanently enjoined the protesters from blocking public access to the clinic, and from physically abusing people entering or leaving the clinic. Six months later, the state trial court broadened the injunction after hearing complaints that access to the clinic was still impeded by the protesters’ activities and that those activities had discouraged some potential patients from entering the clinic, and had deleterious physical effects on others, and that doctors and clinic workers were being subjected to protests at their homes. The court broadened the injunction to keep protesters outside of a 36-foot buffer zone around the clinic entrances and driveway; it restricted excessive noisemaking within earshot of, and the use of images observable by patients inside the clinics and it prohibits protesters within a 300-foot zone around the clinic from approaching patients and potential patients who do not consent to talk, and it created a 300-foot buffer zone around the residences of the clinic staff.

The High Court ruled that the injunction was not subject to heightened scrutiny as content or viewpoint based. None of the restrictions at issue were directed at the content of the antiabortion message. The injunction imposed incidental restrictions on the protesters’ message.

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because they repeatedly violated the original injunction. The Court upheld the noise restrictions and the buffer zone around the clinic entrances and driveway because they burdened no more speech than necessary to eliminate the unlawful conduct targeted by the state court’s injunction. The Court, however, struck down as unconstitutional the buffer zone as applied to private property to the north and west of the clinic, the images observable provision, the no-approach zone around the clinic, and the larger buffer zone around the residences because the provisions swept more broadly than necessary to accomplish the goals of the injunction.274

The Court noted that injunctions have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred. The Court believed that those differences required a somewhat more stringent application of First Amendment principles in this context. In past cases evaluating injunctions restricting speech, the Court has relied on such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals. The Court’s close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. Accordingly, when evaluating a content-neutral injunction, the Court felt that the standard time, place, and manner analysis was not

274 Madsen, 512 U.S. at 776.
sufficiently rigorous; instead, it should ask whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.\textsuperscript{275}

Like streets and sidewalks, other open areas such as public plazas and squares have stood for many years as outdoor arenas for public expression. In general, courts have kept those areas free of regulation when there was no strong, compelling state interest for legislation.

\textit{Capitol Square Review v. Vincent J. Pinette,}\textsuperscript{276} was a 1995 case that involved Capitol Square, a 10-acre state-owned plaza surrounding the statehouse in Columbus, Ohio. For more than a century, the square had been used for public speeches, gatherings and festivals. Ohio law made the square available for public use for free discussion of public questions or for activities with a broad public purpose. Access to the square was regulated by the Capitol Square Review and Advisory Board. To use the square, one was required to complete an application and meet several criteria, which concerned safety, sanitation, and noninterference with other uses of the square; but which was neutral as to the speech content of the proposed event. After the board denied the Ku Klux Klan’s application to place an unattended cross on the square during the 1993 Christmas season, the KKK filed this suit.

In writing the opinion of the Court, Justice Scalia began to articulate a rule in applying the public forum doctrine. The Court indicated that it needed to be careful not to give sectarian religious speech preferential access

\textsuperscript{275} \textit{Id.} at 765.
\textsuperscript{276} 515 U.S. 753 (1995).
to a forum close to a seat of government because it would violate the Establishment Clause. Scalia continued:

[O]ne can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate. But those situations, which involve governmental favoritism, do not exist here. Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years. Private religious speech cannot be subject to veto by those who see favoritism where there is none.277

Because the square is a traditional public forum, a divided Court concluded the board may regulate the content of the Klan’s expression only if such a restriction is necessary, and narrowly drawn to serve a compelling state interest. Ultimately, the Court determined that religious expression could not violate the Establishment Clause where it was “purely private” and occurred in a public forum that was publicly announced and open to everyone on equal terms.278

277 Id. at 766.
278 Id. at 770.
In a case reminiscent of the early 20th Century efforts by local government to limit door-to-door solicitation by Jehovah's Witnesses, the Court considered the constitutionality of an ordinance that would require the mayor's permission before going door-to-door.

In *Watchtower Bible and Tract Society v. Village of Stratton*, two religious organizations sued the village of Stratton and the mayor, alleging that the village's ordinance requiring a permit for door-to-door solicitation violated constitutional rights, including the free exercise of religion, free speech, and the freedom of the press. The village had promulgated an ordinance that prohibited "canvassers" from "going in and upon" private residential property to promote any "cause" without first obtaining a permit from the mayor's office by completing and signing a registration form. The petitioning parties in this case, a society and a congregation of Jehovah's Witnesses that publish and distribute religious materials, brought an action for injunctive relief, alleging that the ordinance violated their First Amendment rights to the free exercise of religion, free speech, and freedom of the press.

The U.S. Supreme Court held that the ordinance's provisions making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violated the First Amendment as it applied to religious proselytizing, anonymous political speech, and the distribution of handbills.

In this case, the government could impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions were content-neutral and

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279 536 U.S. 150 (2002)
narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. The Court found that the ordinance was content neutral and did not bar anyone from going door-to-door in Stratton. It merely regulated the manner in which one must canvass. It required a canvasser to obtain a permit. Underlying the Stratton regulation are three distinct governmental interests: the prevention of fraud, the prevention of crime, and the protection of privacy.\textsuperscript{280}

The Court, however, ruled that the ordinance was not tailored to the Village's stated interests in protecting residents' privacy and the prevention of crime. With respect to the former, the Court indicated that the residents could post "No Solicitation" signs and exercise their right to refuse to engage in conversation with unwelcome visitors, thus providing ample protection for unwilling listeners. As to the latter, the Court noted it seemed unlikely that the lack of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance, and, in any event, there is nothing in the record that pointed to a crime problem related to door-to-door solicitation.

Nevertheless, a public forum such as the bandshell at New York's Central Park could be subject to reasonable regulations to lower the volume for concerts. In 1989, in \textit{Ward v. Rock Against Racism},\textsuperscript{281} Rock Against Racism, an unincorporated association dedicated to the "promotion of antiracist views," had sponsored annual concerts at the Naumberg Acoustic Bandshell in New York City's Central Park.

\textsuperscript{280} \textit{Id.} at 176.

\textsuperscript{281} 491 U.S. 781 (1989).
Park. The city had received numerous complaints of excessive sound amplification at RAR concerts from users of the nearby Sheep Meadow area of the park, other users of the park and from nearby residents adjacent to the park. RAR ignored repeated requests to lower the volume. When the city shut off the power, the audience became abusive and disruptive. Unable to resolve the noise-level problem with RAR or others performing at concerts in the bandshell area, the city adopted a Use Guideline for the bandshell that specified that the city would furnish high-quality sound equipment and retain an experienced sound technician for all performances. RAR challenged the city’s guideline in federal district court, which upheld the sound-amplification guideline. The U.S. Court of Appeals for the Second Circuit determined that the city’s guideline was valid only to the extent necessary to achieve the city’s legitimate interest in controlling excessive volume, however the appeals court found that there were various alternative means of controlling volume without also intruding on RAR’s ability to control the sound. 282 On appeal, the U.S. Supreme Court noted that it would decide the case as one in which the bandshell is a public forum for performances in which the government’s right to regulate expression is subject to the protections of the First Amendment. The court reasoned, however, that even in a public forum the government may impose reasonable restrictions on speech. In an opinion written by Justice Kennedy, the Court held that the law was valid as a reasonable regulation of the place and manner of expression because it was content neutral and narrowly tailored to

282 Rock Against Racism v. Ward, 848 F.2d 367 (2nd Cir. 1988).
accommodate the city’s interest in protecting citizens from loud and excessive “unwelcome noise.”283

It is undeniable that the city’s substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city’s sound technician control the mixing board during performances. Absent this requirement, the city’s interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondents past concerts.284

Just as the Court sought to provide clear access to the abortion clinic in Madsen v. Women’s Health Center Inc., the Court has upheld local laws that restrict political campaigning at the doorway to polling places. Of course, candidates for public office have the freedom to communicate at will with the voting public. At the same time, however, states have acted to protect voters from intrusive campaign communication as they approach the polls to cast their votes.

283 Ward, 491 U.S. at 796. In the same year as the Ward case, the U.S. Supreme Court heard Board of Trustees v. Fox, 492 U.S. 469 (1989), a case involving solicitation in institutional dorm rooms, but the Court refused to apply public forum analysis. The lower courts held that they were not a public forum for the purpose of commercial activity. Because the Court of Appeals did not decide the forum issue, the High Court refused to pursue the forum analysis. “Pursuing such an analysis would require us to resolve both legal and factual issues that the Court of Appeals did not address.”

284 Id. at 800.
In *Burson v. Freeman,* a treasurer for a candidate for a political campaign in Tennessee sued seeking declaratory and injunctive relief, claiming that state law limited her ability to communicate with voters. The law in question was a provision of the Tennessee Code that prohibited the solicitation of votes and the display or distribution of campaign materials within 100-feet of the entrance to a polling place on election day.

In his opinion announcing the judgment of the Court, Justice Blackmun noted that the Court applied strict scrutiny to the provision, but it acknowledged that this is one of those rare cases in which the law survived strict scrutiny, the Court’s most exacting standard of review of regulation.

The Court found the boundary restriction was constitutional in that the statutory provision constituted a constitutional compromise between the competing fundamental interests of free speech and the right to cast a ballot in an election free from the taint of intimidation and fraud. In the words of the Court:

A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.286

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286 Id. at 211.
Given the conflict between these two rights, the Court held that requiring solicitors to stand 100 feet from the entrances to polling places did not constitute an unconstitutional compromise. Accordingly, the Court had concluded that the state has a compelling interest in protecting voters from confusion and undue influence. The Court also has recognized a state’s compelling interest in protecting the election process from fraud.\textsuperscript{287}

The Court indicated that it did not expect that the minor geographic limitation prescribed by the statute constituted such a significant impingement. Thus, the Court did not view the question whether the 100-foot boundary line could be somewhat tighter as one of "constitutional dimension." Reducing the boundary to 25 feet is a difference only in degree, not a less restrictive alternative in kind. The Court accepted the suggestion that it takes approximately 15 seconds to walk 75 feet. The state has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. The Court did not find that this was an unconstitutional choice. At some measurable distance from the polls, the Court acknowledged, governmental regulation of vote solicitation could effectively become an impermissible burden. In reviewing challenges to specific provisions of a state's election laws, however, the Court elected not to employ any litmus tests to separate valid from invalid restrictions. “Accordingly, it is sufficient to say that in establishing

\textsuperscript{287} \textit{Id.} at 199.
a 100-foot boundary, Tennessee is on the constitutional side of the line.”\textsuperscript{288}

**Limited Public Forum**

The landmark public forum case of *Hague v. CIO* provided for free speech in areas that were traditionally open to the public. Subsequent cases, however, have discussed some limitations on the reach of the doctrine. In addition, the Court has established a “limited” public forum subject to the same legal standard as the traditional forum, which provides for the application of strict scrutiny and for narrow tailoring of limits on free speech. In the limited public forum, however, the government can restrict access to certain speakers and topics.

In *Heffron v. International Society for Krishna Consciousness*,\textsuperscript{289} the Minnesota Agricultural Society operated a state fair and enacted Rule 6.05 that restricted the sale or distribution of any merchandise or printed material without a license from the society. The rule, however, did allow persons and groups with a license to sell or distribute materials only from fixed locations. International Society for Krishna Consciousness (ISKCON) sued, claiming that the rule suppressed a ritual that requires its members to go into public places to sell religious literature and to solicit donations. The state argued that the rule was a permissible restriction on the place and manner of the religious organization's distribution, sale, and solicitation activities.

The U.S. Supreme Court held that the rule was constitutional. Justice White, writing for a majority of

\textsuperscript{288} Id. at 211.
\textsuperscript{289} 452 U.S. 640 (1981).
the Court, concluded that the rule was not applied in an arbitrary way and was applied equally to all organizations. The state's interest in confining distribution, selling, and fund solicitation activities to fixed locations was sufficient to satisfy the requirement that a place or manner restriction must be reasonable and serve a substantial state interest.

The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion. Considering the limited functions of the Fair and the combined area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fair grounds. The First Amendment protects the right of every citizen to "reach the minds of willing listeners and to do so there must be opportunity to win their attention. Rule 6.05 does not unnecessarily limit that right within the fair grounds.\textsuperscript{290}

\textsuperscript{290} \textit{Id.} at 655.

The Court concluded that the rule did not exclude the religious organization from the fairgrounds nor did it deny
the organization the right to conduct any desired activity at some point within the forum.\textsuperscript{291} Rule 6.05 was a valid place and manner restriction, because it was clear that alternative fora for expression by the Krishnas' protected speech exist despite the effects of the rule. The rule does not prevent ISKCON from practicing its Sankirtan ritual anywhere outside the fairgrounds. More importantly, the rule has not been shown to deny access within the forum in question. Here, the rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. Therefore the group has maintained a limited right of expression in the fairgrounds' limited public forum.

Around the same time as \textit{Heffron}, the U.S. Supreme Court started to face several "limited" public forum challenges regarding extracurricular activities and the use of spaces in public educational institutions by groups and individuals that wanted to sponsor nonacademic programs and activities.

In a 1981 decision in \textit{Widmar v. Vincent},\textsuperscript{292} the Court invalidated a state university regulation that prohibited student use of school facilities for religious purposes. A religious group, Cornerstone, which was registered at the University of Missouri at Kansas City as a student organization, regularly sought and received permission to hold meetings in university facilities from 1973 to 1977.

\textsuperscript{291} \textit{Id. at 654-655.}
\textsuperscript{292} 454 U.S. 263 (1981).
In 1977, the university informed the group that it could no longer meet in university buildings because a Board of Curators regulation prohibited the use of university space “for purposes of religious worship or religious teaching.” Eleven students sued to challenge the regulation. The rule adopted by the Board of Curators was intended to avoid a perception that the state university was endorsing or advancing religion, which might be construed as a violation of the First Amendment’s Establishment Clause.

Justice Powell, writing for the U.S. Supreme Court, noted that the university had created a forum generally open for use by student groups. In so doing, the university had assumed an obligation to justify its exclusions from the forum under applicable constitutional norms. In the Court majority’s view, the campus of a public university possesses many of the characteristics of a public forum. Because the college classroom and the surrounding environment is a “marketplace of ideas” and students have enjoyed free speech and association rights, the Court reasoned, any denial of the use of facilities must be scrutinized as if it were a prior restraint. After closely scrutinizing the restriction in this case, the court ruled that the university had discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.

In order to justify such a discriminatory exclusion from a public forum, the university must satisfy the test for content-based exclusions—that its regulation is

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293 Id. at 265.
necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest. In *Widmar*, the Court ruled that once a public university makes its meeting facilities generally available for use by student groups, it cannot deny to student religious groups the right to meet based on the content of the group’s proposed speech. The Court acknowledged that, as to students, the public university campus was analogous to a public forum, but since the university’s mission is educational, the university did have the authority to impose reasonable regulations that would be consistent with that mission. There was no obligation to make campus facilities available as meeting space for nonstudents. Thus, the *Widmar* decision suggests the concept of a limited forum in which the government’s interest in achieving a valued societal objective permits reasonable restrictions on access to the forum.

The university claimed that it had a compelling interest in maintaining strict church-and-state separation, which is derived from the Establishment Clause. The Court agreed that the university’s interest was compelling, however, that did not necessarily mean that a policy of providing equal access to the facilities for religious student groups and speakers would be incompatible with the Establishment Clause. The Court observed that the student activity would not necessarily be attributable to the university. As a consequence, the activity would be unlikely to be considered an advancement of religion by the state institutions. Therefore, the state’s interest in achieving greater church-and-state separation that is already ensured under the Establishment Clause is not sufficiently compelling to justify content-based
discrimination against religious speech of the student group.

Following the decision in Widmar, the Court faced requests to invalidate school board restrictions on the use of public school facilities after school hours. In 1993, in Lamb’s Chapel v. Center Moriches Union Free School District, the Court faced requests to invalidate school board restrictions on the use of public school facilities after school hours. In 1993, in Lamb’s Chapel v. Center Moriches Union Free School District,\(^{294}\) Lamb’s Chapel, an evangelical church in the community of Center Moriches, applied twice to the school district for permission to use school facilities to show a six-part film series containing lectures by author and radio commentator Dr. James Dobson. The series was to discuss Dobson’s views on the need to instill traditional family Christian values at an early age to counterbalance the undermining influences of the media. The requests were refused because the district saw the film as being church related and having a Christian perspective. New York had authorized local school boards to adopt reasonable regulations for the use of school property for specific purposes when the property was not being used for school purposes. Such uses included social, civic and recreational meetings and entertainment, and other uses pertaining to the welfare of the community, but the meetings needed to be non-exclusive and open to the general public. Pursuant to the state’s statutory empowerment of the local boards, the Center Moriches school board issued rules and regulations for use of the school property when it was not being used for school purposes. These regulations allowed for social, civic and recreational uses, but following judicial interpretation in the state, excluded use by any group for religious purposes. The church brought suit against the

\(^{294}\) 508 U.S. 384 (1993).
school district alleging the school district policy violated First Amendment rights.\textsuperscript{295}

In a majority opinion by Justice White, the U.S. Supreme Court held that denying the church access to school premises to exhibit the film series violated freedom of speech under the First Amendment. In part, the Court following the rationale of \textit{Widmar v. Vincent}, which held that permitting use of university property for religious purposes under the open access policy involved there would not be incompatible with the Establishment Clause. The Court stated that fears about such a violation were unfounded in this case:

The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in \textit{Widmar}, there would have been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.\textsuperscript{296}

Without determining the type of forum, the court noted that even a nonpublic forum needed to have distinctions that were reasonable and viewpoint neutral.

\textsuperscript{295} \textit{Id.} at 389.
\textsuperscript{296} \textit{Id.} at 395.
The Court noted there was discrimination based on viewpoint because the district permitted school property to be used for presenting all views about family issues and child rearing except those that deal with the subject from a religious viewpoint.

In 2001, *Good News Club v. Milford Central School* \(^{297}\) dealt with the same New York empowerment law that was at work in *Lamb’s Chapel*. The law authorized local school boards to make reasonable regulations for using school property when school was not in session. The sponsors of the Good News Club, a private Christian organization for children ages 6 to 12, submitted a request to hold weekly after-school meetings. The school board denied the request, finding that the proposed use was the equivalent of religious worship. The organization sued the school board alleging free speech violations.\(^ {298}\)

In an opinion written by Justice Thomas, the U.S. Supreme Court determined that the board engaged in impermissible viewpoint discrimination when it excluded the Good News Club from the after school forum. Such a violation was not justified by the board’s concern that permitting the children’s club activities would violate the Establishment Clause. Just as the Court found in *Lamb’s Chapel*, “the Club’s meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members.” \(^ {299}\)

Similarly, the Court noted that, Milford, like the institution in *Widmar*, “made its forum available to other organizations. The Club’s activities are materially

\(^{297}\) 533 U.S. 98 (2001).
\(^{298}\) *Id.* at 104.
\(^{299}\) *Id.* at 113.
indistinguishable from those in *Lamb’s Chapel* and *Widmar.* Therefore Milford’s reliance on the Establishment Clause as a defense was misplaced.

In *Rosenberger v. Rector and Visitors of the University of Virginia,* the limited public forum issue arose in a different context. The issue emerged over the university’s refusal to pay the contracted costs for a student publication. Students sued the UVA alleging First Amendment violations for the university’s refusal to authorize payment to a third-party contractor for the printing costs of a student publication. It was the policy at UVA for the university to authorize payments from its student activities fund to outside contractors for the cost of printing a variety of publications issued by student groups. The student activities fund received its money from mandatory student fees; it then used those fees to support a broad range of extracurricular student activities related to the university’s educational purpose. The student groups were required to include in all written materials a disclaimer notice that they are independent of the university and that the university is not responsible for them. The university withheld authorization for payments to a printer on behalf of a student group, Wide Awake Productions, solely because its student newspaper, *Wide Awake: A Christian Perspective at the University of Virginia,* promoted religious beliefs as prohibited by the university's student activities fund guidelines.

The U.S. Supreme Court held that the University of Virginia discriminated on the basis of religious editorial viewpoints, not religion itself. The Court found that the

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300 *Id.*  
students sought funding as a student journal, an enterprise supported by the student activities fund. Additionally, the Court held that Wide Awake’s disbursement request was for payment to a private contractor for the printing costs of materials that are protected under the First Amendment.

Having arranged to pay third-party contractors for the costs of a variety of publications, the university was prohibited from relying on funding guidelines that restricted financial support for programs or activities that promoted, among other things, “a particular belief in or about a deity or an ultimate reality.”302 The Court majority ruled that once the university created a limited public forum, it could not engage in viewpoint discrimination based on the views of the student groups it had elected to subsidize. To maintain a position of neutrality with regard to religion, the institution could take steps to dissociate itself from the student speech involved, but it could not deny funding based on the specific ideology or opinion espoused by the student religious group.

In Rosenberger, therefore, the Supreme Court concluded that a public university could not allocate the limited financial resources available to student organizations on the basis of discriminating between the viewpoints expressed by those organizations. Specifically, the Court rejected the institution's claim that the religious viewpoint espoused by the student organization justified the denial of funding. Under this reasoning, the demand for funding must be met by the university through a method that would "allocate the scarce resources on some

302 Id. at 827.
acceptable neutral principle.”\textsuperscript{303} Thus a public university’s adherence to a standard of viewpoint neutrality would impose a duty to grant recognized student groups use of funds and facilities made available by the institution as part of an extracurricular limited open forum.\textsuperscript{304}

In 2000, the Court decided \textit{Board of Regents v. Southworth},\textsuperscript{305} a case that also brought the limited public forum doctrine to bear on the use of student fees to sponsor expression. In that case, the Board of Regents of the University of Wisconsin System required students at the university's Madison campus to pay a segregated activity fee, which supported various campus services and extracurricular student activities. In the university's view, these fees enhanced students' educational experience by promoting extracurricular activities, stimulating advocacy and debate on diverse points of view, enabling participation in campus administrative activity, and providing opportunities to develop social skills--all of which were consistent with the university's broad educational mission. Registered student organizations that engaged in a number of diverse expressive activities were eligible to receive a portion of the fees, which were administered by the student government subject to the university's approval. Both parties agreed that the process for reviewing and approving applications for funding was administered in a viewpoint-neutral fashion. Registered organizations may also obtain funding through a student referendum. A group of present and former Madison campus

\textsuperscript{303} Id at 835.
\textsuperscript{304} Rosenberger, 533 U.S. at 98.
\textsuperscript{305} 529 U.S. 217 (2000)
students filed suit against the university, alleging that the fee violated their First Amendment rights, and contending that the university must grant them the choice not to fund the registered student organizations that engaged in political and ideological expression offensive to their personal beliefs.

In an opinion by Justice Kennedy, the U.S. Supreme Court upheld the university’s right to collect student activity fees it charged students to fund a program to facilitate extracurricular student speech if the program was viewpoint neutral in the allocation of funding support. It allowed the university the freedom to impose a mandatory fee if the institution determined that its mission was well served by introducing its students to dynamic discussion on a broad range of issues. In order to protect the rights of the objecting student, the Court noted that the university could allow an optional or refund system, but that would not be a constitutional requirement. Furthermore, the Court determined that the viewpoint neutrality requirement of the university’s program was sufficient to protect the rights of the objecting students. However, the court did not sustain the student referendum mechanism of the university's program, which appeared to permit the exaction of fees in violation of the viewpoint neutrality principle. As to that aspect of the program, the court remanded for further proceedings.\footnote{\textsuperscript{306} See, Southworth v. Board of Regents, 2000 U.S. App. LEXIS 15470 (2000).}

Note that the Rosenberger case was concerned with the rights a student has to use an extracurricular speech program already in place. Southworth considered whether a public university may require its students to pay a fee
which creates the mechanism for the extracurricular speech in the first instance. When the institution requires its students to pay fees to support the extracurricular speech of other students, it may not prefer some viewpoints to others.

Recognizing that facilitation of student speech is central to the mission of a public university, the High Court emphasized that these institutions must be free to adopt policies designed to provide a limited open forum in which students may engage in speech on the campus but outside the lecture hall. The Court distinguished higher education institutions that foster extracurricular student speech from labor unions and professional associations by noting that the university seeks principally to foster the widest possible range of student speech. While safeguards are justified to protect students who object to financing certain expressive activities, the majority concluded that it was not appropriate for the courts to determine “what is or is not germane to the ideas to be pursued in an institution of higher learning.”

Returning to the reasoning in *Rosenberger*, the majority imposed a standard of viewpoint neutrality on institutions that require and allocate mandatory student fees in support of extracurricular student fora. In such fora, it is certainly probable that some students will find the views of some student organizations objectionable or offensive. However, imposing a refund system or check-off in which students designate those organizations to receive funding might so disrupt the system as to render the extracurricular forum ineffective. Since the creation of

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307 Southworth, 529 U.S. at 232.
such a forum is justified by the institution’s objectives in facilitating the open exchange of ideas, the integrity of the institution’s practice must be judged by the extent to which it adheres to the principle of neutrality in providing access and allocating funds to recognized student groups.  

Nonpublic Forum

The nonpublic forum seems like an oxymoron because the discussion to this point has dealt with fora that are open for public communication. This forum, however, is considered off-limits or closed to the general public. There is communication that takes place in the nonpublic fora, but it is of an internal or personal nature and not for public consumption.

Airports are not generally considered to be traditional public fora like parks, streets and sidewalks. They are nonpublic fora that use government property to serve a specific government purpose and are not public fora by tradition. As nonpublic fora, airports are subject to regulations on the exercise of speech. However, despite such allowable limitations on airport speech, the Court decided that a ban on all speech in one major airport was too broad.

In 1987, the High Court decided Board of Airport Commissioners v. Jews for Jesus, a case involving a resolution adopted by the Los Angeles Board of Airport Commissioners banning “all First Amendment activities” within the Central Terminal Area at the Los Angeles International Airport. The next year, Howard Snyder, a

\[308\] Id. at 232-234.
minister for Jews for Jesus, a nonprofit religious corporation, was stopped by an airport officer while distributing free religious literature on a pedestrian walkway in the Central Terminal Area at the airport. The officer notified Snyder that he was in violation of the resolution and asked Snyder to leave, warning him that the city would take legal action against him if he refused. Snyder left the terminal, and he and his corporation subsequently filed suit against the airport board.

The U.S. Supreme Court held that the resolution was substantially overbroad as it expressly applied to “all First Amendment activities.” The resolution, by “prohibiting all protected expression, purports to create a virtual ‘First Amendment Free Zone.’” 310 Because the resolution was found to be facially unconstitutional, the Court saw no need to decide whether the Los Angeles airport was a public forum. The law would not stand even if LAX were a nonpublic forum.

The resolution therefore does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some “First Amendment activit[y].” We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum

310 Id. at 574.
because no conceivable governmental interest would justify such an absolute prohibition of speech.\textsuperscript{311}

Finally, the text of the resolution was regarded as so broad that it left no room for a narrowing construction that might render it constitutional.

Subsequent to \textit{Jews for Jesus}, the Court decided another airport regulation case that helped shape the nonpublic category of the doctrine. In 1992, in \textit{International Society for Krishna Consciousness, Inc. v. Lee},\textsuperscript{312} a not-for-profit religious corporation that raises funds by distributing religious literature and soliciting funds to support the religion, challenged a limitation on the distribution and solicitation at three major airports in the New York area. The regulation adopted by the Port Authority of New York and New Jersey limited distribution and solicitation to the sidewalks outside the terminals. The corporation sought an injunction prohibiting the police superintendent from enforcing the regulation.\textsuperscript{313}

The U.S. Supreme Court held that airports were not traditional public fora because their traditional purpose was to serve air travelers efficiently and not to promote the free exchange of ideas. Because the airport was a nonpublic forum, the regulation by the Port Authority needed only to be reasonable. In the majority opinion written by Justice Rehnquist, the Court found that the regulation was reasonable because it promoted the Port Authority’s interest in crowd control and efficient air

\textsuperscript{311} \textit{Id.} at 574-575.
\textsuperscript{312} 505 U.S. 672 (1992).
\textsuperscript{313} \textit{Id.} at 676.
travel by limiting solicitation to the areas outside of the airport terminals. Solicitation could have a disruptive effect on business by slowing down pedestrian traffic and targeting the most vulnerable persons. After noting the specific problems with slowing down travelers, the Court detailed other risks and concerns:

In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.\(^{314}\)

\(^{314}\) *Id.* at 684.
Despite the restrictions on solicitation inside of the terminal, the corporation would still be able to solicit on the sidewalk areas, which are frequented by a large percentage of airport users. In a concurring opinion, Justice O’Connor disagreed with the Court’s prohibition on leafletting, stressing that she could not accept a total ban on that activity without an explanation of how the restriction preserves the airport for its intended purpose. Justice Kennedy concurred to assert his belief that the airport corridors and shopping areas outside of the passenger security zones were public fora, and speech in those areas was entitled to protection consistent with public forum principles.

In two noteworthy cases, the U.S. Supreme Court made clear that mailboxes were nonpublic fora, making them off-limits to expression from the general public.

In United States Postal Service v. Council of Greenburg Civic Associations, the civic associations had a practice of communicating with their constituents by placing notices in their mailboxes. A federal statute, however, prohibited the deposit of unstamped “mailable matter” in a letterbox approved by the U.S. Postal Service. The Postal Service informed the associations that the practice was illegal and that it planned to begin enforcing the law. The civic associations claimed that the statute unconstitutionally abridged their rights under the First Amendment.

315 Id.
316 Id. at 692 (O’Connor, J., concurring).
317 Id. at 693 (Kennedy, J, concurring).
Justice Rehnquist, writing for a majority on the U.S. Supreme Court, held that the statute did not violate the First Amendment. The Court ruled that (1) a letterbox accepted by the Postal Service as an authorized depository for mail was not a public forum, (2) the statute advanced a significant governmental interest—maintenance of a nationwide system for safe and efficient delivery of mail; and (3) the statute was reasonable and content-neutral.\textsuperscript{319}

[A] letterbox, once designated an “authorized depository,” does not at the same time undergo a transformation into a “public forum” of some limited nature to which the First Amendment guarantees access to all comers. There is neither historical nor constitutional support for the characterization of a letterbox as a public forum. Letterboxes are an essential part of the nationwide system for the delivery and receipt of mail, and since 1934 access to them has been unlawful except under the terms and conditions specified by Congress and the Postal Service. As such, it is difficult to accept appellees’ assertion that because it may be somewhat more efficient to place their messages in letterboxes there is a First Amendment right to do so.\textsuperscript{320}

\textsuperscript{319} See id.
\textsuperscript{320} Id. at 128.
The Court saw no reason to treat a letterbox differently for First Amendment access than it had treated the military base,\(^{321}\) the jail,\(^{322}\) or the advertising space made available in city rapid transit cars.\(^{323}\) The Court had previously recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.

While *Greenburg* denied general access by the public to mailboxes, two years later the Supreme Court faced the issue of access to an inter-school mail system. The context of the case brought to the forefront issues of equal access to a forum of communication rather than a bid for initial access.

In 1983, in *Perry Education Association v. Perry Local Educators’ Association*,\(^ {324}\) both the union and the association previously represented teachers in the Perry Township Schools and had equal access to the inter-school mail system and teacher mailboxes. The union was later elected exclusive bargaining representative for the teachers in the school district. The agreement provided in pertinent part that access rights to the inter-school mail system would not be available to any rival union, such as Perry Local Educators' Association (PLEA). Two members of PLEA filed suit. The association argued that the inter-school mail system was a limited public forum, which had been used periodically by private non-school-connected groups and which had been accessed in the past by the association without restriction.

The U.S. Supreme Court ruled, in part,
If by policy or by practice the
Perry School District has opened its
mail system for indiscriminate use by
the general public, then PLEA could
justifiably argue a public forum had
been created. This, however, is not
the case. As the case comes before us,
there is no indication in the record
that the school mailboxes and inter-
school delivery system are open for
use by the general public. Permission
to use the system to communicate with
teachers must be secured from the in-
dividual building principal. There is
no court finding or evidence in the
record which demonstrates that this
permission has been granted as a
matter of course to all who seek to
distribute material. We can only con-
clude that the schools do allow some
outside organizations such as the
YMCA, Cub Scouts, and other civic and
curch organizations to use the facil-
ities. This type of access does not
transform government property into a
public forum.\(^{325}\)

Moreover, the Court explained that past access by PLEA
also did not change the status of the forum from a

\(^{325}\) Id at 47.
nonpublic one to a limited one. Thus the removal of rival union PLEA’s access was a result of the organization’s status change from the time when PLEA and another union both represented district teachers. At that time, the Court continued, the policy for granting both organization’s use of the mail facilities was based on the fact that both unions represented teachers and had legitimate reasons for use of the system. Therefore, “PLEA’s previous access was consistent with the School District’s preservation of the facilities for school-related business, and did not constitute creation of a public forum in any broader sense.”326 The Court held that the system was not a forum for public communication and the differential access provided the union and the association enabled the union to fulfill its obligations as exclusive representative of the teachers.

The rival union did have a legitimate reason to use the system, they wanted to be able to provide information to their members and to the current members of the currently recognized union. However, that interest was subordinated to the interest of the school district in limiting access to mailboxes to insure efficiency of operations.

A number of other Court decisions interpreting regulations restricting access to a variety of venues provide additional guidance on the meaning of the nonpublic category of the public forum doctrine. The circumstances of the cases are very broad based, including a workplace solicitation fund, utility poles, a post office sidewalk, a military base, and electronic communication outlets.

326 Id. at 48.
In 1985, in *Cornelius v. NAACP Legal Defense and Educational Fund*,\(^{327}\) some advocacy organizations sought to participate in the Combined Federal Campaign, an annual charity drive created by the federal government and aimed at federal employees. Organizations that received donations through the CFC included organizational statements in literature distributed to federal employees. Advocacy organizations that were excluded from participation in the CFC sued, claiming a violation of their First Amendment right to solicit charitable contributions.

Justice O’Connor, writing for a plurality on the U.S. Supreme Court, held that solicitation in the context of the CFC was protected by the First Amendment. Brief statements in the CFC literature directly advanced the speaker’s interest in informing readers about participating organizations’ existence and goals. In O’Connor’s view, the focus in defining the forum should be on the access sought by the speaker. Here, the advocacy organizations sought access to a particular means of communication, the CFC, a nonpublic forum. The Court emphasized that the government’s decision to restrict access to a nonpublic forum need only be reasonable, and the reasonableness must be assessed in light of the purpose of the forum and all surrounding circumstances. Here, the President could reasonably conclude that money spent on food and shelter for the needy is more beneficial than funds allocated to litigation that might result in aid to the needy. Moreover, the effort to

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avoid the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum.\textsuperscript{328}

There was evidence that the continued participation of the advocacy groups in the campaign would be detrimental to the campaign and disruptive of the federal workplace.

Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.\textsuperscript{329}

The Court ruled that the government’s justifications for denying the groups’ access to the campaign were reasonable in light of the purpose of the CFC. The Court therefore concluded that the federal government did not violate the First Amendment when it limited participation in the CFC.

In 1984, in Members of City Council v. Taxpayers for Vincent,\textsuperscript{330} Roland Vincent had been a candidate in 1979 for election to the Los Angeles City Council. A group of his supporters, Taxpayers for Vincent, contracted with a political sign company, Candidates’ Outdoor Graphics Service, to post signs with Vincent’s name on them. The graphics service created large cardboard signs with the

\textsuperscript{328} Id. at 808-809. The case was remanded for a decision on whether the government impermissibly excluded respondents from the CFC because it disagreed with their viewpoints.

\textsuperscript{329} Id. at 810-811.

message “Roland Vincent – City Council” and draped them over the crosswires that connect to utility poles at various locations.

Employees of the city’s Bureau of Street Maintenance, routinely removed all posters attached to utility poles and similar objects, including the COGS signs. In one week, 48 “Roland Vincent” signs were removed. The city employees were acting under the authority of the municipal code, which prohibited the posting of signs on public property.

Writing for a majority of the U.S. Supreme Court, Justice Stevens dismissed the suggestion that the poles were a public forum. The Court did not find any evidence of a traditional right of access to communicate through utility pole postings that would be comparable to that recognized for public streets and parks.

The Court noted that the First Amendment does not guarantee access to public property simply because it is controlled by the government. Just because lampposts can be used as signposts does not mean that the Constitution requires that lampposts be used as vehicles of communication.

Public property which is not by tradition or designation a forum for public communication may be reserved by the State “for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”\textsuperscript{331}

\textsuperscript{331} \textit{Id.} at 814-815.
The framework used by the Court for reviewing a viewpoint-neutral regulation was taken from *United States v. O'Brien.* That Court stated that the regulation had to be within the constitutional power of the government; further an important or substantial governmental interest; be unrelated to the suppression of free expression; and have an incidental restriction on First Amendment freedoms that is no greater than is essential to the furtherance of that interest.

In *Vincent,* the groups that filed the action, taxpayers and COGS, did not dispute that it was within the city’s constitutional power to attempt to improve its appearance or that the interest of the city is basically unrelated to the suppression of ideas. Consequently, the Court concluded that the city’s interest in avoiding visual clutter was sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the posting of signs on public property. Moreover, the Court decided that the scope of the restriction on the group’s expressive activity was not substantially broader than necessary to protect the city’s interest in eliminating visual clutter. The ordinance banning the signs did not curtail any more speech than was necessary to accomplish its purpose.

In 1990, in *United States v. Kokinda,* volunteers for the National Democratic Policy Committee set up a table on a sidewalk near the entrance of the Bowie, Maryland, post

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333 Id. at 377.
334 Taxpayers for Vincent, 466 U.S. at 817.
office to solicit contributions, sell books and subscriptions to the organization’s newspaper, and distribute literature on a variety of political issues. The Bowie postmaster asked the group to leave, but the members refused to budge. Postal inspectors arrested them, seizing their table, literature and other belongings. They were convicted by a federal magistrate of violating a law that prohibited solicitation on postal premises.

In the judgment of the U.S. Supreme Court, the postal sidewalk was not a traditional public forum; therefore, the law was not subjected to strict scrutiny but examined only for reasonableness. Justice O’Conner, who was joined by only three other justices in the opinion, found that the regulation of the sidewalk did not violate the First Amendment because the law was validly applied, and it was not unreasonable for the Postal Service to prohibit solicitation speech on grounds that such speech was disruptive of the postal business by impeding the usual traffic flow.\textsuperscript{336}

The Postal Service’s judgment is based on its long experience with solicitation. It has learned from this experience that because of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. ... In short, the postal service has prohibited the use of

\textsuperscript{336} Id. at 732-733.
its property and resources where the intrusion creates significant interference with Congress’ mandate to ensure the most effective and efficient distribution of the mails. This is hardly unreasonable.\textsuperscript{337}

Even if the forum had been dedicated to some First Amendment uses, O’Connor wrote that regulation of the reserved nonpublic uses would still require application of the reasonableness test. In a concurring opinion, Justice Kennedy agreed that the regulation did not violate the First Amendment, but he concluded that it was unnecessary to determine whether the sidewalk was a nonpublic forum, since the regulation met the traditional standards applied to time, place, and manner restrictions on protected expression. Kennedy seemed to be reminding his colleagues that government can limit speech in a traditional forum. The speech can be subjected to reasonable limitations and an application of standards for content neutrality and narrow tailoring. Though Kokinda was a postal sidewalk case its kinship is more closely aligned with events that take place on postal grounds instead of communication that occurs on sidewalks.

Earlier, the Court made clear in Greer v. Spock its impressions that the basic function of a military base was to train soldiers, not to provide a public forum. Because of the military’s need to fulfill the purpose of soldier training for the national defense, the base facilities tend to be nonpublic fora.

\textsuperscript{337} Id. at 735.
In 1985, in *United States v. Albertini*, the Court held that a military base did not become a public forum for First Amendment purposes merely because the base was used to communicate ideas or information during an open house. Back in 1972, Albertini and a companion had ostensibly obtained entry to the Hickman Air Force Base in Hawaii. While on the base they gained access to secret Air Force documents and destroyed them by pouring animal blood on them. Albertini was convicted of conspiracy to damage government property and was barred from reentering the base without written permission of the commander.

Albertini reentered the base in March 1981 and defaced government property but he was not prosecuted for it. Two months later, Albertini reentered the base during open house on Armed Forces Day. He and four companions appeared at the open house to engage in a peaceful demonstration criticizing the nuclear arms race. They displayed a banner, reading “Carnival of Death” and passed out leaflets. The commander recognized one of the demonstrators as someone who had been barred from Hickman. Subsequently, Albertini and his companions were apprehended and escorted from the base. The Court majority did not adopt the view that the base should be analyzed as a public forum simply because an open house was in progress. The Court held that the base did not become a public forum for the purposes of the First Amendment merely because the base was used to communicate ideas or information during the open house.

The fact that Albertini had received a letter barring him from the base distinguished him from the general public and provided reasonable grounds to exclude him from the

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The need to maintain base security justified exclusion from the open house and those who received letters barring them from the base were on notice of this exclusion. Therefore, when the military has issued a bar letter, the recipient cannot claim immunity from its prohibition on entry merely because the military has temporarily opened the base to the public.\textsuperscript{339}

Changes in communications technology have presented new contexts for the application of forum doctrine. Broadcasting, cable and the Internet have brought with them unique challenges for policy makers who, in one case, sought to restrict the content of speech that is appropriate for children. In another instance, judges used principles associated with the nonpublic forum to authorize a public television station to limit its debate to the two frontrunners from major political parties in a presidential election.

In 1998, in
\textit{Arkansas Educational Television Commission (AETC) v. Forbes},\textsuperscript{340} an Arkansas-owned public television broadcaster sponsored a debate between the major party candidates for the 1992 election in the state’s Third Congressional District. AETC invited the Republican and Democratic candidates to participate in the debate. Two months later, Ralph Forbes was certified as an independent candidate qualified to appear on the ballot. He sought permission to participate in the debate, but his request was denied.

Forbes sued AETC and requested a preliminary injunction mandating his inclusion in the debate. Justice Kennedy, in delivering the opinion of the Court, wrote that

\begin{itemize}
  \item \textsuperscript{339} Id. at 689.
  \item \textsuperscript{340} 523 U.S. 666 (1998).
\end{itemize}
Forbes' exclusion from the debate was consistent with the First Amendment. The Court found the debate to be neither a traditional public forum nor a designated public forum; instead it found that the debate was a nonpublic forum.

The debate's status as a nonpublic forum, however, did not give AETC unfettered power to exclude any candidate it wished. As JUSTICE O'CONNOR has observed, nonpublic forum status "does not mean that the government can restrict speech in whatever way it likes." To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.

The Court gave no consideration to the suggestion that Forbes' may have been excluded because his views were unpopular or outside of the mainstream. The Court accepted the AETC's contention that lack of popular support for Forbes was the main criterion for excluding him.

AETC limited eligibility for participation to candidates for that seat, and then it made a candidate-by-candidate determination as to which of the eligible candidates would participate in the debate. This kind of selective access indicates that the debate was a nonpublic forum. Moreover, the Court concluded, the broadcaster's

\[^{341}\] Id. at 682.
decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion that was consistent with the First Amendment.\textsuperscript{342}

In 2003, in \textit{United States v. American Library Association},\textsuperscript{343} federal restrictions on grants and discounted rates to aid public libraries in providing their patrons with Internet access were challenged. Congress found that library patrons, some of them minors, would use the facilities' computers to search the Internet for pornography and expose others to pornographic images by leaving them displayed on library computer terminals or printed at library printers. In an attempt to control such activities, Congress enacted the Children's Internet Protection Act, which prohibited public libraries from receiving the financial aid for Internet services unless they install software to block pornographic images and to prevent minors from accessing material considered harmful to them. A group of libraries and other interested parties

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\item \textsuperscript{342} \textit{Id.} at 683. But see, Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996), which involved First Amendment challenges to the Cable Television Consumer Protection and Competition Act of 1992 that sought to regulate the broadcasting of "patently offensive" sex-related material on cable television through the "leased access channels" and "public, educational, or governmental channels." A plurality of the Court concluded that it was unnecessary and unwise to decide whether or how to apply the public forum doctrine to leased access channels because it is not clear whether that doctrine should be imported wholesale into common carriage regulation of such a new and changing area, and although limited public forums are permissible, the Court has not yet determined whether the decision to limit a forum is necessarily subject to the highest level of scrutiny, and these cases do not require that it do so now.
\item \textsuperscript{343} 539 U.S. 194 (2003).
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sued the federal government, challenging the constitutionality of CIPA’s filtering provisions.

In an opinion written by Chief Justice Rehnquist, the Court held that public forum analysis was “incompatible with the discretion that public libraries must have to fulfill their traditional missions.” He reasoned that library staffs must consider the content of the books and other materials in making collection decisions, and therefore, they must have broad discretion in making those decisions. Further, the Court found that public forum principles were “out of place” for the circumstances of this case because Internet access in public libraries is neither a traditional nor a designated public forum.

In addition, the Court distinguished this case from Rosenberger, which held that the Student Activity Fund that was established by the University of Virginia had created a limited public forum by giving public money to student groups who wished to publish, and therefore could not discriminate on the basis of viewpoint. In contrast to Rosenberger, the Court in American Library Association found that the Internet terminals were not acquired by the library in order to create a public forum for Web publishers to express themselves. Similarly, the Court noted, a library does not collect books to provide a public forum for the authors of the books to speak. Instead, the library provides that access for the same reasons it offers other library resources: to facilitate research, learning and recreational pursuits. The Court ruled that the CIPA did not induce libraries to violate the Constitution because use of the software does not violate the patrons’ First Amendment rights. The law was a valid exercise of Congress’ spending power, therefore, Congress could insist
that these public funds be spent for the purposes for which they were authorized.\textsuperscript{344}

**Summary**

Levi’s theory on how legal concepts are created and evolve provides a useful means for analyzing public forum doctrine. He describes it as an evolutionary process that moves in three stages. In Levi’s first stage of development, the legal concept is created and the court searches for a name for the concept. As additional cases are decided, they serve as a basis for comparison in delineating the concept. As a legal concept, the public forum doctrine was created by the landmark ruling of the U.S. Supreme Court in *Hague v. CIO*\textsuperscript{345} in 1939. The *Hague* Court opened government-owned property to people who sought to use that space for public speaking, and it removed city officials’ discretion to arbitrarily suppress speech when they were approached for a permit to hold a public meeting. In the years immediately following *Hague*, the Court began reversing convictions of people who had been prosecuted for speaking, preaching, handbilling, or soliciting on the public streets, sidewalks and thoroughfares.\textsuperscript{346}

In the 1960s, several cases that became part of the civil rights movement involved the use of public forum analysis because the protests occurred on state-owned property. In nearly every instance, the Court reversed the demonstrators’ convictions for protesting discrimination

\textsuperscript{344} Id. at 237-238.
\textsuperscript{345} *Hague v. CIO*, 307 U.S. 496 (1939).
against African Americans on the grounds of the state house in South Carolina,\textsuperscript{347} in front of a Louisiana courthouse\textsuperscript{348} and at a segregated public library in that state,\textsuperscript{349} and in front of a high school in Illinois.\textsuperscript{350} The Court, however, drew the line at the premises of the county jail when it refused to interfere with the trespass convictions of college students who gathered on those grounds to protest arrests they felt were unlawful. The Court reasoned that the other areas were traditionally left open to the public, but the grounds of a jail are not.\textsuperscript{351} By designating the jail as public property that is off-limits to demonstrations and protests, the Court was beginning to draw lines that would aid in classifying some public properties as nonpublic fora.

At the second stage of Levi’s development of a legal concept, the concept acquires a name. The doctrine that was created in \textit{Hague v. CIO} got its name years later. In 1972, the U.S. Supreme Court settled on a name for state-owned property that was made available for human expression. In \textit{Police Department of Chicago v. Mosley},\textsuperscript{352} the Court named the public property that was available for human expression a “public forum.” “Once a forum is opened up to assembly or speaking by some groups,” the Court declared, “government may not prohibit others from assembling or speaking on the basis of what they intend to say.”\textsuperscript{353}

\begin{itemize}
\item \textsuperscript{347} Edwards v. South Carolina, 372 U.S. 229 (1963).
\item \textsuperscript{348} Cox v. Louisiana, 379 U.S. 559 (1965).
\item \textsuperscript{349} Brown v. Louisiana, 383 U.S. 131 (1966).
\item \textsuperscript{350} Grayned v. Rockford, 408 U.S. 104 (1972).
\item \textsuperscript{351} Adderley v. Florida 385 U.S. 39 (1966).
\item \textsuperscript{352} 408 U.S. 92 (1972).
\item \textsuperscript{353} \textit{Id.} at 96.
\end{itemize}
Also during the second stage, Levi observed that the legal concept becomes more or less fixed, and further reasoning by the courts is needed to help classify items as inside or outside of the concept. As such, the Court has examined the reasonableness of the regulations of speech while classifying the spaces for that speech according to the type of fora. Just after the Mosley case, the Court upheld reasonable restrictions on campaign ads on city transit vehicles\(^{354}\) and campaign distribution of literature on a military base.\(^{355}\) During the same time frame, the Court limited a city’s refusal to allow a performance of the musical “Hair” as an unconstitutional prior restraint on speech.\(^{356}\)

In the 1980s, there was a definite trend in the Court’s view of the public forum doctrine toward giving more relaxed scrutiny to restrictions in a public forum. This also was the period in which the Court delineated various types of fora, depending on the location of the speech in question. Those areas classified as traditional public fora were areas where speakers could deliver their messages free from content-based restrictions or insignificant governmental interests. They include sidewalks, streets, parks and plazas. United States v. Grace,\(^{357}\) which involved the sidewalk outside of the Supreme Court grounds, is representative of these cases. In Grace, the Court acknowledged that the very sidewalk adjacent to the Supreme Court Building was no less than the traditional public forum on which the exercise of controversial speech

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must be permitted and protected. As new cases emerged, however, even this traditional area of protection was regarded as subject to free speech limitations.

In one such case, the ordinance dealt with picketing in a residential neighborhood that was intrusive in that it interfered with the residents’ quiet enjoyment of their home.\textsuperscript{358} In another instance, the Court applied strict scrutiny and upheld a law that removed campaign solicitation 100 feet from the entrance to polling places as a compromise between the interests of free speech and the right to vote that is free of intimidation and fraud.\textsuperscript{359} In these cases, the Court applied a standard of strict judicial scrutiny, emphasizing that the state must demonstrate that restrictions on the traditional public forum are justified by a compelling interest and narrowly tailored to achieve that interest. Strict scrutiny, therefore, in a traditional public forum has room to accommodate legislation that would limit free speech provided that legislation is accompanied by a compelling state interest.

In a limited public forum, the government designates a certain area or space for expressive purposes. Like the traditional public forum, restrictions on speech are subject to the highest form of judicial review, known as strict scrutiny. However, the Supreme Court has indicated that in creating a limited public forum, the government can restrict access to certain speakers and topics. In \textit{Widmar v. Vincent},\textsuperscript{360} for example, the Court noted that the university had created a forum that was open for use by

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\item[\textsuperscript{358}] Frisby v. Schultz, 487 U.S. 474 (1988).
\item[\textsuperscript{359}] Burson v. Freeman, 504 U.S. 191 (1992).
\item[\textsuperscript{360}] 454 U.S. 263 (1981).
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student groups. The Court found that the university had discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. In order to justify such an exclusion from a public forum, the university must satisfy a compelling state interest test. While the Court agreed that the university’s interest was compelling, that did not necessarily mean that a policy of providing equal access to the facilities for religious student groups and speakers would be incompatible with the Establishment Clause. The Court observed that the student activity would not necessarily be attributable to the university because it was unlikely to be seen as an advancement of religion by the state. Moreover the rule in Widmar was followed in a couple of Supreme Court cases that challenged school boards’ restrictions on the use of public school facilities after school hours in Lamb’s Chapel v. Center Moriches Union Free School District\textsuperscript{361} and Good News Club v. Milford Central School.\textsuperscript{362}

In Lamb’s Chapel, an evangelical church was denied access to public school classrooms to show a six-part film series containing lectures by author and radio commentator Dr. James Dobson, discussing his views on instilling traditional family Christian values at an early age. The Supreme Court held that denying the church access to school premises to exhibit the film series violated the freedom of speech under the First Amendment. The Court following the rationale of Widmar v. Vincent in part, holding that the use of university property for religious purposes under the

\textsuperscript{361} 508 U.S. 384 (1993).
\textsuperscript{362} 533 U.S. 98 (2001).
open access policy involved there would not be incompatible with the Establishment Clause.

In *Good News Club v. Milford Central School*, the sponsors of the Good News Club, a private Christian organization for children ages 6 to 12, were denied a request to hold weekly after-school meetings because of concerns that the proposed use was the equivalent of religious worship, but the Court called such a denial viewpoint discrimination. Moreover, *Board of Regents v. Southworth*, which was a battle over the use of student fees to sponsor certain speakers, extended the goal of viewpoint neutrality far beyond religion and into all types of messages to prevent discrimination.

The so-called nonpublic forum could restrict speech as long as the regulation could be determined to be reasonable. Nonpublic areas are off limits to public forum speech. The Court rationales provide strong justifications for keeping the forum exclusive. Places such as military bases, mailboxes, airports, and in some cases, utility poles, are areas that the Court considered nonpublic fora, although they have some public characteristics.

**Conclusion**

The landmark U.S. Supreme Court case of *Hague v. CIO* and its progeny represent the first stage of Levi’s concept development theory--its creation. In this period the public forum concept came into being. While the Court tried to find an official name for it, the legal cases of that period helped to shape the doctrine. In *Police Department of Chicago v. Mosley*, the Court in 1972 arrived at a name,

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public forum, which moved the concept to Levi’s second stage of development. After Mosley, the development of the public forum doctrine continued through the second stage of Levi’s concept development. Because the public forum concept is still viable, it has not entered the third stage at which it would start to break down. The viability of the doctrine is evident in cases decided by the U.S. Supreme Court. The case analysis and examples have led to a classification of the doctrine into various parts, including traditional public forum, designated public forum, limited public forum, and nonpublic forum.

While the traditional public forum continues to be defined as it was at its inception in Hague v. CIO, the limited public forum provides a more restrictive application of forum concepts when all of the requirements of a traditional forum cannot be met. The nonpublic forum in particular has been useful in classifying which items are outside of the concept because that forum is off-limits to public discourse.

Chapter 5 will discuss whether there are any signs of a breakdown of the public forum concept through a review of federal and state public higher education cases.

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CHAPTER 5

CASES INVOLVING THE PUBLIC FORUM DOCTRINE
IN PUBLIC HIGHER EDUCATION

Students at U.S. colleges and universities have grown accustomed to exercising their freedom to speak, assemble and associate without any interference by the institutions. They meet in plazas, malls and quadrangles to recruit organization members, solicit signatures for petitions, debate the issues of the day, or just hold friendly chats. Institutions have struggled with the notion of maintaining freedom of expression in the campus community while keeping the peace and maintaining an environment that is conducive to learning. Occasionally, administrators must decide when they should regulate speech on behalf of the institution and how far those regulations can restrict speech before violating the First Amendment to the Constitution.

Decisions involving public higher education institutions that address forum analysis are reviewed in this chapter. The cases are grouped according to the type of campus venue and the type of activities students are engaged in on campus. They begin with speech in open outdoor spaces and proceed to indoor settings, which include displays. Thereafter, publication cases are discussed, and they are followed by cases involving associational rights and speech-related activities. The cases are synthesized and discussed using the facts, rulings and rationales of the courts.

In Chapter 4, the author analyzed the evolution of the public forum doctrine using Levi’s three-stage process for development of a legal concept. The initial development of
the doctrine began in the 1939 case of Hague v. CIO\textsuperscript{366} with the creation of a concept for the protection of free expression in open public spaces. Following this initial phase, the Court settled on the phrase “public forum” in Police Department of Chicago v. Mosley in 1972. Since then, the concept has passed through the second stage of development as the Court identified several classifications of public forum, including “traditional public forum,” “designated public forum,” “limited public forum,” and “nonpublic forum.” Although the concept may be said to have been developed extensively, it does not appear to have reached the third stage, at which the concept breaks down and loses its viability. In reviewing the application of forum analysis to cases involving the discrete area of public higher education, it is possible to assess whether the concept continues to maintain salience or has begun to erode.

**Traditional Public Forum**

Open areas in the outdoors, such as streets, sidewalks, parks and plazas, are considered traditional public fora. Beginning with Hague v. CIO and continuing until the present day, courts have recognized these open government properties as spaces where expression and associational activities could go on without interference by the government. Very few cases involving public higher education institutions have endorsed the concept of a traditional public forum in application to higher education. As the analysis below will show, judges have been reluctant to describe the grounds of a public higher

\textsuperscript{366} 307 U.S. 496 (1939).
education institution as coming within the sphere of a traditional public forum, although they appear willing to apply the compelling interest test to instances in which an institution sought to regulate a “designated public forum.” Judicial reluctance to apply traditional public forum doctrine to public higher education stems from the recognition that a campus can be distinguished from a public street, sidewalk, park or plaza because of the unique environment and mission of the educational institution.

An illustrative case of the application of forum doctrine to a public higher education institution demonstrates the judicial reluctance to adopt the notion of a traditional public forum while sustaining the importance of designated forums on a college or university campus. In *Spartacus Youth League v. Board of Trustees of the Illinois Industrial University*, the University of Illinois, Circle Campus, was a publicly owned and operated commuter school, which had promulgated several regulations on how goods and literature were to be distributed on campus. Under the terms of the regulations, only students, faculty or staff could distribute free printed material; the material was required to bear the name of the issuer; the distributor was required to furnish identification upon request; and that distribution was confined to a small area. A non-student member of the Spartacus Youth League (SYL), Sandor John, was arrested for criminal trespass after he refused to stop selling his newspapers on campus. SYL was a student organization with less than 10 members, held classes on Marxism and distributed the “Worker Vanguard,”

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publication the organization described as a working-class newspaper. The complaint against John was dismissed, but he joined with an association of students and non-students and filed suit against the institution, seeking to enjoin their enforcement of the regulations. The U.S. District Court for the Northern District of Illinois reasoned that Circle Center, which served as a hub of campus activities, and the campus walkways were "public forums." The Center was used by various political and social organizations to espouse their ideas through reserved booths. Circle Center was customarily used by students to meet, host speakers, discuss issues, and distribute literature.

After finding that the open areas in question were "public forums," the district court applied a standard of strict scrutiny to institutional regulations and held there was a substantial likelihood that the university regulations prohibited speech in a manner that was not justified by any compelling state interest.368

In discussing the legal standard applied in Spartacus Youth League, the court did not adopt a presumption that the campus areas in question were "traditional public forums," but did consider the history of institutional custom and practice with regard to these areas in concluding that the areas enjoyed public forum status. The court reiterated some of the previous U.S. Supreme Court conclusions that citizens have a constitutional right to use certain governmental property as public fora. Those rulings prohibited the state from regulating speech-related conduct in such places except by reasonable, nondiscriminatory regulations governing time, place and

368 Id. at 801.
manner. Once those regulations are shown to impinge upon First Amendment interests, the High Court shifted the burden to the state to demonstrate that the regulations were necessary to serve compelling governmental interests.

In determining whether an area is a public forum, courts have looked at the location’s character, usual activities and historical dedication to see if there has been a focus on exercising First Amendment rights. The court in *Spartacus Youth League* acknowledged that a public university, although not created mainly for public interchange, is a peculiarly fertile environment for the exchange and dissemination of ideas. For example, finding that the student center was a public forum, the court noted the important role of the center in campus activities, including its role in offering and advertising a wide variety of services in the building. In evaluating the history and use of the facility as reflected in the custom and practice at the institution, the court reasoned that a public forum had effectively been created by institutional fiat, permitting a judicial inference of a designated public forum. In addition, the court expressed concern about the breadth of the regulation. "By broadly prohibiting all literature sale and distribution by outsiders without University affiliations, defendants have failed to draft their regulations with the ‘small caliber precision’ required for rules impinging on First Amendment rights." Clearly, the district court was concerned that the institution’s restrictions were not narrowly tailored to provide adequate protection for free speech in the areas over which the regulations were intended to apply.

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369 Id. at 800.
One of the few higher education cases that reached the concept of a traditional public forum is *Brister v. Faulkner*. In that case, the public sidewalk adjacent to the university events center at UT-Austin was at issue. Students and campus visitors, who were members of the Austin Greens political party, began handing out leaflets outside the university’s Erwin Center during an Austin Chamber of Commerce reception for delegates to the National Issues Convention. The campus police, who had received complaints about the leafleting, informed one of the participants of the school's policy against the distribution of literature by non-students on university property. The officer explained that the paved recessed area belonged to the university, whereas the sidewalk belonged to the city. Students handing out leaflets were asked to leave the property because they were interfering with the arrival and departure of the facility's patrons. The property between the building and the street was indistinguishable from the city sidewalks. A person handing out leaflets, who identified himself to police as a UT student, also was prohibited from distributing leaflets because his leaflets did not contain his name or the name of a student organization, as required by university rules.

Both the student and non-student distributors filed an action claiming free speech violations. The U.S. Court of Appeals for the Fifth Circuit held that the specific property was a public forum and that the university had the option of implementing reasonable time, place, and manner restrictions.

\[370\] 214 F. 3d 675 (5th Cir. 2000).
Citing the *United States v. Grace*\(^{371}\) precedent, the court voiced its concern about not adequately notifying those who reasonably thought they were in a public forum on public grounds. Like the plaintiffs in the Grace case, members of the public in this case could not be certain when they have “entered the university's enclave.”\(^{372}\) This raised serious concerns about whether constitutionally protected speech was being chilled.\(^{373}\)

If individuals are left to guess whether they have crossed some invisible line between a public and non-public forum, and if that line divides two worlds—one in which they are free to engage in free speech, and another in which they can be held criminally liable for that speech—then there can be no doubt that some will be less likely to pursue their constitutional rights, even in the world where their speech would be protected.\(^{374}\)

The Fifth Circuit held that the paved sidewalk area between the public entrance to the University of Texas at Austin's Erwin Center and Red River Street was a traditional public forum.\(^{375}\) The Court's holding in *Brister*
was based on the particular fact that this area was "indistinguishable from the Austin city sidewalk."\textsuperscript{376}

The court, however, went on to reason that despite the nature of the forum, the constitutional rights of the leaflet distributors were not violated because the activities of the distributors were interfering with patrons. The appeals court affirmed the ruling of the district court, which held on one hand that the center's grounds between the base of the building and the curb of the street were a public forum. On the other hand, the district court rejected as unconstitutional a total ban on leaflet distribution, leaving the university the option of using reasonable time, place and manner restrictions. Using a more limited restriction on speech would still enable the university to remove anyone who interfered with the flow of traffic to and from the center. Despite the presence of a public forum, the university could protect its interests in the free flow of traffic by restricting people from handing out leaflets in the area of the sidewalk where patrons were arriving. The appeals court found that the lower court reached a correct result based on the area being "a unique piece of university property that is, for all constitutional purposes, indistinguishable from the Austin city sidewalk."\textsuperscript{377}

In \textit{Ohio v. Spingola},\textsuperscript{378} the plaintiff was arrested after he began preaching at the Monument at Ohio University in Athens where assemblies and public speaking are prohibited. The Monument area, which is located on a green space near a sidewalk, is a place where students gather to

\begin{footnotesize}
\begin{thebibliography}{9}

\bibitem{1} Id. at 683.
\bibitem{2} Brister v. Faulkner, 214 F. 3d 675, 683 (5th Cir. 2000).
\bibitem{3} 736 N.E. 2d 48 (Ohio App. 1999).
\end{thebibliography}
\end{footnotesize}
study, read, sit, talk and eat. While preaching, he engaged in a heated dialogue with students. After asking the preacher to leave, campus police arrested him for criminal trespassing. He was convicted of the charge in Athens County Municipal Court. On appeal, he argued that he had a First Amendment right to preach on OU property. The state appeals court found that the green was not a traditional public forum; rather it was a “non-traditional” public forum, which was opened by the government for the public to use for expressive activity. The court noted that the government could open up portions of the non-public forum and choose not to open the remaining portions. Thus the university could open portions of the green as a non-traditional public forum, but keep other such areas as non-public fora.

The court emphasized that such a forum could be reserved for its intended purpose as long as the regulation on speech is reasonable and is not an effort to suppress expression. The Monument is reserved for communication targeted at specific individuals rather than all individuals present in the Monument area. When students’ conversations on the green get too loud, they are asked to move their discussions to the city sidewalk. The state appeals court found this policy to be reasonable given the special characteristics of the educational environment and the institution’s desire to maintain a quiet atmosphere in order to fulfill its educational mission.  

\[\text{Id. at 144.}\]
Designated Public Forum

Judges have been reluctant to recognize a traditional public forum on a university campus. Instead, they have carefully considered the nature of the forum based on the institution’s custom and practice and its campus policies. For many campuses, the primary forum is one that is created through designation by the government. Officials at higher education institutions have established certain areas of their campuses as fora for speech consistent with the institutional mission. As long as such areas are open for speech, they must be viewpoint neutral. In the leading U.S. Supreme Court case on this subject, Widmar v. Vincent, the Court ruled that once a state university opens its facilities to student groups, it may not exclude religious groups without a compelling reason.

Moreover the Widmar Court acknowledged that a public university campus, at least for its students, "possesses many of the characteristics of a public forum." The Widmar Court went on to observe, however, that "[a] university differs in significant respects from public forums" and acknowledged that the Court has "never denied a university's authority to impose reasonable regulations compatible with [its mission of education] upon the use of its campus and facilities." The Court continued, "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."

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381 Id. at 263.
382 Id.
383 Id.
An example of the designated public forum can be found in a 2005 case, *Justice for All v. Faulkner*. During a photographic exhibit on the main plaza at the University of Texas at Austin, Justice For All, a student anti-abortion group, attempted to hand out leaflets that read, simply, "Life is Beautiful -- Choose Life." University officials attempted to stop the distribution.

JFA filed suit to challenge the university's "Literature Policy," which required that all printed materials distributed on campus bear the name of a university-affiliated person or organization responsible for their distribution. JFA contended that the policy was an unconstitutional restriction on anonymous speech in a designated public forum. The university argued that the policy was a reasonable, viewpoint-neutral regulation of speech within a limited public forum. The Fifth Circuit found the Literature Policy invalid under the First Amendment. The court held that:

> [W]here the government designates a forum for use by a given class of speaker, it is nearly inevitable that those who wish to make use of the forum will be required to sacrifice some measure of anonymity. The Literature Policy’s requirement that speakers identify themselves to every person who receives their message, however, sacrifices far more anonymity that is necessary to effectively preserve the campus

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384 410 F.3d 760 (5th Cir. 2005).
As a consequence, the court concluded that the Literature Policy was not narrowly tailored to realize a significant government interest and, therefore, was not valid under the First Amendment. The court struck down the restrictions on distribution of literature in those areas in part because the area was considered a designated public forum.

In other cases, courts have ruled on the constitutionality of university policies that regulate the location of publication distribution. In *Hays County Guardian v. Supple*, a Southwest Texas State University regulation prohibiting solicitation on campus was not applied to newspapers that were distributed free of charge before August 31, 1989, even if those newspapers contained advertisements. The policy was revised on that day so that free newspapers containing advertisements would be treated as prohibited solicitation. A local newspaper publisher and students sued. The federal district court found that the outdoor grounds of the university campus, including sidewalks and plazas, are designated public fora for the speech of university students. Because the speech occurred in traditionally open areas of campus, however, any content-based restrictions on speech must serve a compelling state interest and be narrowly drawn to serve that end. The university failed to meet this rigorous test in defending its restriction. The court concluded that the regulations against on-campus solicitation unconstitutionally restricted the distribution of the *Hays*

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385 *Id.* at 771-772.
386 969 F. 2d 111 (5th Cir. 1992).
County Guardian on campus. The court found that the regulation impermissibly restrained free expression.

In a case with a similar fact pattern to Hays, Texas Review Society v. Cunningham, a group of students from the Texas Review Society, a student organization that published a newspaper at the University of Texas (UTA), sued the president and Board of Regents, seeking an order preventing the university from enforcing a rule that prohibited students from personally distributing their newspaper on campus. UTA had such a prohibition if the newspapers contained paid advertisements. The university required that such ad-laden newspapers be distributed from designated racks established for a wide range of student publications.

The federal district court upheld the constitutionality of the university regulation requiring free student publications containing outside, paid ads to be distributed from unmanned stands as content neutral and tailored to the narrow governmental interest of preserving campus atmosphere from commercial hawking.

The case of Texas Review Society presented a good example of how the law is applied in a designated public forum. Like other such cases, the defendants in this case needed to show that the rule at issue was a valid time, place and manner provision and that it is a content-neutral rule, narrowly tailored to serve a significant governmental interest, and that it leaves open ample alternative channels for communication. As evidence of content neutrality, the court pointed to the evenhandedness of application by the Daily Texan, a student newspaper of

387 Id. at 121.
opposing political views, which had been required to distribute its papers from an unmanned receptacle at a similar location on the campus. Moreover, the rule was intended to serve a significant governmental interest: to protect this marketplace of ideas from becoming polluted by commercial hawking and solicitation. Third, the rule was found to be "narrowly tailored" to serve the legitimate government interest of protecting the educational atmosphere on a college campus. Finally, the rule in the case provided for ample alternative channels of communication because the plaintiffs were allowed to

(1) Remove the advertising and continue the hand-to-hand distribution. The plaintiffs could legitimately request a fee for the paper, or a donation.

(2) Maintain the ads and distribute the paper from an unmanned receptacle, while keeping a copy of the paper at the organizational table on the West Mall, and referring interested parties to the designated rack. 389

Therefore Hays County Guardian and Texas Review Society illustrate that the characterization of the forum will influence the degree to which the distribution of publications can be regulated or suppressed by higher education officials. The manner in which a student publication is circulated could depend on the type of forum and the types of content students choose to publish.

389 Id. at 1246.
The case of *Burbridge v. Sampson*\(^{390}\) deals with student free speech in a similar vein as the previously described cases—by specifying certain areas where free speech would be allowed. The case arose after South Orange County Community College District Board of Trustees enacted a policy (BP 5406) regulating the time, manner and place of speech and advocacy on campus by students and members of the public. It set forth a reservation system for "preferred areas," defined as "specific areas and properties available for public meetings with expected gatherings of 20 or more persons, and where amplification is permitted." Students at Irvine Valley College, one of the community colleges within the South Orange County Community College District, filed an action for injunctive relief against the defendant college and district officials, claiming the policy was unconstitutional.

The U.S. District Court for the Central District of California found that the areas on campus made available by the college were public fora. The court added that once the state elects to open a forum to the public for expressive activities, the state may establish and enforce reasonable time, place and manner regulations as long as they (1) are content-neutral, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels of communication. But because the institution established a reservation system for the preferred areas, the court analogized it to a licensing scheme in which the state could issue permits based on the content of the speech. The court concluded that the policy

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\(^{390}\) 74 F. Supp. 2d 940 (C.D. Cal. 1999).
was a content-based restriction on speech.\textsuperscript{391} Further, the court continued:

BP 5406 is also content-based because, for example, the designated school official must read the contents of the message of the literature proposed for distribution in order to determine whether non-exempt commercial literature ... is at issue. Similarly, the District’s regulation of “non-commercial” speech is content-based, as BP 5406 requires that school officials review proposed “noncommercial” materials to see if it falls within the allowable types of noncommercial material—“printed material or announcement of any kind ... that is not conducted for private business or personal gain.”\textsuperscript{392}

\textsuperscript{391} Under the public forum doctrine, few regulations are found to be content based. One possible reason for this is the doctrine’s emphasis on the location or situs of the expression, which means that institutional regulations may be more concerned with the time, place and manner of the speech rather than the content. In some non-public forum cases, regulations have been found to be content based. See Khaadem v. South Orange County Community College, 194 F. Supp. 2d 1011 (C.D.Ca. 2002) (The court found that while the regulation was content based to the degree that it distinguished between protected and unprotected expression within the text of the regulation. It regulated the time place and manner of speech and advocacy on campuses of the community college district.). In accord, Gay and Lesbian Students Ass’n v. Gohn, 850 F. 2d 361 (8th Cir. 1988); Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974); Gay Lesbian/Bisexual Alliance v. Pryor, 110 F. 3d 1543 (11th Cir. 1997).

\textsuperscript{392} Burbridge, 74 F. Supp. 2d at 950.
Thus, the court granted injunctive relief because the policy implicated a content-based restriction and the college failed to demonstrate that its provisions were necessary and narrowly drawn to further a compelling interest.\(^{393}\)

The foregoing cases illustrate the circumstances under which courts have interpreted the law affecting the institution’s speech policies and regulations as a public forum. Although the courts are reluctant to use the term “traditional” to identify the type of forum involved, they do note the open nature and character of selected areas on the college and university campuses. These are areas that the institution has established either through custom and practice at the institution or through the promulgation of institutional policies that advance student speech and other expressive activities. In many ways, these are much like the designated public fora, but the courts stopped short of using the term “designated.” Despite the reluctance of judges to apply the notion of a traditional public forum to higher education institutions, reliance on the reasoning associated with a designated public forum enables the judge to invoke the same test for constitutionality that would apply to free speech in the traditional public forum while preserving sensitivity to the unique mission of higher education institutions.

An updated application of the designated public forum can be found in the case of Roberts v. Haragan\(^{394}\) in which a student at Texas Tech was prohibited from delivering a speech or passing out literature to express religious or

\(^{393}\) Id.

political views in areas of campus other than those designated as a “free speech area.” One designated area was in a gazebo near the student union building. Jason Roberts wanted to pass out literature expressing religious and political views outside of the designated area but was denied permission. He filed a complaint claiming that the university’s policy regulating speech on campus restricted his freedom of speech.

The court found that the university’s policy was superseded by an interim policy, which contained a prior permission section that left no discretion to anyone to deny permission based on content or viewpoint, and therefore it was not a prior restraint. The Court was concerned, however, about the heavy burden the regulation placed on speech in a public forum. The court was not convinced that burdening all expressive activities in public fora with the prior permission requirement necessarily served the university’s significant interests.

In a designated public forum case, Bowman v. White, [395] a federal court of appeals backed the various time, place and manner restrictions placed on a campus preacher. Gary Bowman, who engaged in street preaching, said he felt a moral obligation to share his beliefs and convictions with college students and others found at public universities. At the University of Arkansas at Fayetteville, the institution’s comprehensive policy that regulated the use of campus space and facilities classified Bowman as a non-university entity, placed a five-day cap per semester per entity on the use of facilities and outdoor space; required such persons to make reservations in advance of their use.

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[395] 444 F. 3d 967 (8th Cir. 2006).
of a space, regardless of whether they intended to use the space for speaking, carrying signs, handing out literature, or sitting silently. The policy also imposed a three-business-day advance notice requirement for the use of space, and it prohibited anyone from using space in a way that interfered with the educational mission of the university. The policy further prohibited the use of space by non-university entities during so-called "dead days," which consisted of one quiet study day per semester, all final exam periods, and dates of commencement activities.

The appeals court ruled that it was reasonable for the university to limit designated fora to certain classes of speakers during dead periods in the academic year, and it was well established that the government was not required "to indefinitely retain the unlimited open character of" a designated public forum.\(^{396}\) The court concluded that the university's permit requirement, notice requirement, and dead day ban were constitutional, but the five-day cap was insufficiently narrowly tailored to survive.\(^{397}\)

The institution justified the five-day cap on the number of days per semester as a way to foster a diversity of viewpoints. While the federal appeals court agreed that the institutional policy of capping the number of days prevented speakers from monopolizing the space, it found that the five-day cap was not sufficiently narrowly drawn to achieve those interests because the policy merely limited Bowman's speech, but it did not offer more viewpoints. The court added that the space would go unused if Bowman had reached his five-day limit and no one else wanted to use the space.

\(^{396}\) Id. at 983.
\(^{397}\) Id. at 980-983.
The court suggested that a more narrowly tailored policy might grant Bowman more than five days per semester to speak if that space is not being used, and it would give preference to other speakers who have not already obtained five permits. Another type of policy suggested by the court that would further the institution’s interest in preventing a monopoly on a specific space for an entire semester would allow speakers to obtain permits for a limited number of events at any one time, rather than granting one permit for the school term.\footnote{398}

Another designated public forum case that did not involve students as plaintiffs significantly affected the students’ speech rights in such a campus forum. In\textit{ Mason v. Wolf},\footnote{399} there was a school policy at Auraria Higher Education Center, in Denver, Colorado, to limit access to a flagpole area for student groups only. Two non-students sought to demonstrate on campus to promote their pro-life, anti-abortion message. In the lawsuit by the pair, the court ruled that the flagpole area was a designated public forum. As such the regulation was not narrowly tailored to serve a significant public interest.\footnote{400}

The regulation used by school officials to prevent a group from demonstrating at the flagpole area was one that differentiated between student groups or student-sponsored groups and off-campus groups. The federal district court in Colorado found that the Plaza Building location did provide "an ample alternative channel of communication" to non-student or off-campus groups assigned there.\footnote{401}

\footnote{398}{\textit{Id.}} at \textit{982}.  
\footnote{399}{356 F. Supp. 2d 1147 (D. Colo. 2005)}.  
\footnote{400}{\textit{Id.}} at \textit{1161}.  
\footnote{401}{\textit{Id.}}.
One of the defendants testified that he was involved in formulating the policy in fall 2001, with the intent of creating a "free expression" zone in front of the Plaza Building for off-campus groups. In his opinion, this was an appropriate location where there was ample pedestrian traffic to give groups a fair audience. If the group was a student group, or was sponsored by a student group, the group could use the flagpole area.

In its analysis the court took an unusual path toward analyzing the legal standard. For the regulation to pass constitutional muster as a designed public forum, the court first found that such a regulation "must leave open ample alternative channels of communication." The court found that assigning non-student groups to the steps of the Plaza Building did provide an ample alternative channel of communication.\(^{402}\)

The second prong of the test inquired into whether the restriction or regulation was "narrowly tailored to serve a significant government interest." One reason for the regulation was a concern for disruption around the flagpole area, based on an event in 2000 involving an off-campus group and the need to have the flagpole area available for students because they are the primary constituency of the campus. Neither of these reasons was a significant government interest to support a regulation that discriminated between groups.\(^{403}\)

There were no significant reasons articulated by the administrators to justify a regulation differentiating between student and non-student groups being assigned to different locations on the campus only 130 feet apart.

\(^{402}\) Id. at 1160-1161.  
\(^{403}\) Id. at 1161.
Thus, the court found that the unwritten regulation limiting unsponsored non-student groups to the Plaza Building steps and prohibiting them from the flagpole area without a student sponsor, lacked a sufficient justification to pass the applicable constitutional test. Consequently, the enforcement of such a regulation violated the First Amendment rights of the plaintiffs.\textsuperscript{404}

**Limited Public Forum**

In higher education settings, courts have allowed institutions to place speech limitations on people who are not affiliated with the campus community. In *Bourgault v. Yudof*,\textsuperscript{405} a U.S. District Court in the Northern District of Texas, delineated the type of freedoms enjoyed on campus when there is speech an outsider that is directed toward students. As part of his ministry, Matt Bourgault, described as "a professing Christian," traveled to public universities throughout the United States to preach and hand out pamphlets to college students. He visited the University of Texas at Arlington and began preaching from an area near the campus university center. As Bourgault was preaching, a university police officer approached him and informed him that he needed permission from the student government office to speak on campus. Bourgault went to the student government office and completed an application, requesting the use of a "free speech forum near Library or University Center; to preach from Bible to students."\textsuperscript{406} He identified himself as an off-campus speaker and identified his Consuming Fire Campus Ministries as the organization

\textsuperscript{404} Id. at 1161-1162.  
\textsuperscript{405} 316 F. Supp. 2d 411 (N.D. Tex. 2004).  
\textsuperscript{406} Id. at 414.
seeking to hold a campus event. He also, however, indicated that there was no student organization cosponsoring the event. Consequently, Jeff Sorensen, the Director of Student Governance and Organization for UTA, denied Bourgault's request and wrote "Not approved per Univ. Policy" on the application.

Given the Supreme Court's reasoning in *Widmar v. Vincent*,\(^4\) the Fifth Circuit's limited holding in *Brister v. Faulkner*,\(^5\) and the fact that no court has found a university's campus to be a traditional public forum, the court concluded that Bourgault had not demonstrated a likelihood of success on his argument that the UTA campus is a traditional public forum. The court, therefore, looked to see if there was a designated or limited public forum on campus. The tribunal held that the UT System Rules did not open up any of its property to the general public; UTA has only opened up its property for the use of members of the UTA community. The judges determined that the property where Bourgault sought space to preach was classified as a limited public forum. As these classifications were made, courts have ensured that there was no discrimination in the application of the system's rules. The court concluded that limiting university property access to members of the

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\(^4\) 454 U.S. 263 (1981). In *Widmar v. Vincent*, the U.S. Supreme Court invalidated a state university regulation that prohibited student use of school facilities for religious purposes. The Court ruled that the university had discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.

\(^5\) *Brister*, 214 F. 3d 675 (5\(^{th}\) Cir. 2000).
campus community was not viewpoint discrimination nor was it unreasonable.\textsuperscript{409}

As a distinct category, the limited public forum joins the traditional, the designated and the non-public fora. The court in Bourgault also discussed some of the confusion and lack of consistency and uniformity surrounding this type of forum.\textsuperscript{410}

The Supreme Court and the Fifth Circuit have not clearly or consistently established or applied a standard of review to restrictions on speech in a limited public forum. The case law regarding limited public fora utilizes both the strict scrutiny standard applicable to traditional and designated public fora and the reasonableness standard applicable to nonpublic fora.\textsuperscript{411}

The court acknowledged that some tribunals have classified the limited public forum as a sub-category of the designated public forum. At least one appellate court, however, is of the opinion that the limited forum “is not coextensive” with the designated public forum and that the two terms cannot be used interchangeably. The court noted that both were established by government designation of an area, which is not a traditional public forum, but is an area that the public can access for expressive purposes. The main difference between the two fora is that the

\textsuperscript{411} Id. at *25.
limited public forum is created by opening up an area or facility on government property by government policy or practice to be used by a limited population, such as a student organization, or for a limited purpose. A designated forum is created when the government opens a forum up to “indiscriminate use by the general public.”\textsuperscript{412} Moreover, if there are restrictions on the speakers and topics that would remove the area from public forum status, the area may be deemed a nonpublic forum rather than a limited public forum.\textsuperscript{413} The court was of the opinion that when the government creates a limited public forum by opening up an area to speech on a particular subject or by a particular class of speakers, it must use the strict scrutiny standard to protect all speech that falls within the expressive purposes for which the limited public forum was opened. In this case, however, where speech does not fall within the expressive purpose for which the limited public forum was opened, that speech may be reasonably restricted.\textsuperscript{414}

The case also attempted to clarify the confusion between the nonpublic forum and the limited public forum. The difficulty in determining whether the standards of a nonpublic forum or limited public forum apply increased where permission is required to use the forum, because permission implies a nonpublic forum. The court indicated that under either test, a reasonableness standard would apply to Bourgault’s speech since he does not fall within the class of speakers for whose benefit the limited public forum was created. In concluding that UTA created a limited

\textsuperscript{412} Id. at *25 (citing Perry, 460 U.S. at 47)
\textsuperscript{413} Id. at note 7.
\textsuperscript{414} Id. at *27-28.
public forum, the court considered the fact that the UT system and UTA had not allowed an indiscriminate range of expressive activities in areas in question, and the fact that the institution’s rules require permission and sponsorship by those affiliated with the university before an off-campus speaker uses any campus area or facility.\footnote{415}

\[\text{T}wo \text{ standards are applicable to regulations affecting speech on limited public fora, depending upon the class of speaker: (1) as to those persons or topics for whom "the government has made the property available, a limited public forum is to be treated as a [designated] public forum . . . [and] is bound by the same constitutional standards that apply in a traditional public forum contest" subject to a strict scrutiny standard; (2) as to "all other [speakers or topics] . . . it is treated as a nonpublic forum" subject to a reasonableness standard.}\footnote{416}

The court held that the evangelist failed to create a fact issue demonstrating that either the library mall or the university center was a traditional public fora. Moreover, the court concluded that the university’s intent was to make those areas of campus a limited public forum in which they would be available for limited discussion for

\footnote{415}{Id. at *31.}
\footnote{416}{Id. at 28-29.}
faculty, staff, and students, or their registered organizations or affiliates.\textsuperscript{417}

In a similar case, \textit{American Civil Liberties Union v. C.D. Mote Jr.},\textsuperscript{418} the U.S. Court of Appeals for the Fourth Circuit called the University of Maryland College Park campus a limited public forum. Michael Reeves, who was not affiliated with the university, sought to distribute leaflets on behalf of Lyndon LaRouche. His request was denied because all available spaces that were designated for speech-related activity had been reserved. When he attempted to distribute leaflets at a nearby location without approval, he was cited by the university police and ordered to leave the campus or be arrested for trespassing. The university’s policy required that outsiders who wanted to engage in public speaking or literature distribution on campus reserve space at the appropriate location by registering with the campus reservations office up to five days in advance. Reservations were to be approved on a space-available basis with priority given to university departments, registered student organizations, students, faculty and staff. Lack of available space was the only acceptable reason to deny a permit. Un-sponsored speaking and distribution by outsiders was prohibited away from the Stamp Student Union and the adjacent Nyumburu Amphitheater.

The federal appeals court was of the opinion that the campus had become a limited public forum with the implementation of the policy. Prior to the issuance of the policy, the court indicated that the campus was a non-public forum for members of the public not associated with the university. In reaching these conclusions, the court

\textsuperscript{417} \textit{Id.} at *32.
\textsuperscript{418} 423 F. 3d 438 (4\textsuperscript{th} Cir. 2005).
found that the campus was not akin to a public street, park or theatre—areas that have traditionally been considered public fora. Instead, the appeals court emphasized that the public education institution’s mission was focused on students and other members of the university community. The campus had not traditionally been open to the public at large, and had functioned as a “special type of enclave”\textsuperscript{419} that was devoted to higher education.

Another example of the courts’ application of the limited public forum at a public higher education institution is found in the federal court case of \textit{University and Community College System of Nevada v. Nevadans for Sound Government}.\textsuperscript{420} In that case, the court considered the question of whether the area outside of a public university building was considered a public forum. In Nevada, petition circulators have a limited amount of time within which to collect signatures on proposed ballot measures. Circulators for Nevadans for Sound Government gathered signatures on two petitions containing measures to be placed on the November 2004 ballot: a referendum petition and an initiative petition. NSG filed a complaint, alleging that actions taken by various agencies including the University and Community College System of Nevada had unlawfully restricted access to properties for signature collecting purposes.

On May 18, 2004, the Bush Campaign held a political rally for ticketed invited guests at UNLV’s Artemis W. Ham Concert Hall. An NSG petition circulator testified that he was prohibited by the university police from collecting signatures, and he was arrested after he refused to adhere

\textsuperscript{419} United States v. Grace, 461 U.S. 171, 180.
\textsuperscript{420} 100 P. 3d 179 (Nev. 2004).
to police orders to leave the area. He testified that the only other signature-gathering location offered to him was away from the exits and off the premises.

For purposes of resolving the case, the federal appeals court ignored the notion of a traditional public forum and focused its analysis on distinctions between a limited public forum and a nonpublic forum.

Within the nonpublic forum description, at least for standard of review purposes, falls a subset, the "'limited public forum.'" A limited public forum is created when a state designates an area for speech activities by certain groups or for certain subjects. In limited public forums, the state "must respect the lawful boundaries it has itself set." When either nonpublic or limited public forums are involved, government restrictions on time, place, and manner will be upheld if they are viewpoint neutral and related to a legitimate government "purpose served by the forum." Moreover, "the government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."\(^{421}\)

The court concluded that the university properties were limited public fora and that the university was

\(^{421}\) *Id.* at 188-189.
required by statute to provide areas for signature gathering. The court held that under the First Amendment there was nothing inherently unreasonable in requiring a petition circulator to provide advance notice of his or her intended signature-gathering activities. The court pointed to several reasons for the notice, including enabling building operators to better accommodate the special needs of multiple signature gatherers and individual circulators and having a chance to notify other employees of the intended signature-gathering activities so that they will be able to adjust their duties accordingly. The court reversed an injunction that had been placed on the university system, prohibiting its leaders from interfering with the group's petition-circulating activity.\footnote{University and Community College System of Nevada, 100 P. 3d 179 (Nev. 2004).}

An unusual forum issue arose when University of Utah students were allowed to erect structures resembling “shanties” on campus as a protest of apartheid in South Africa. In University of Utah Students Against Apartheid v. Peterson,\footnote{649 F. Supp. 1200 (D. Utah 1986).} the University of Utah Students Against Apartheid, a student organization, erected several protest displays resembling "shanties" on a grass area near the student union building. They built the shanties to represent the oppressive conditions suffered by black people in South Africa and to compel the university to eliminate its investments in firms doing business with South Africa. In a meeting with a university administrator, the student group obtained university approval to build the structures. The university did not claim that the displays obstructed pedestrian traffic or otherwise disrupted the...
regular educational function of the university. Rather, the university contended that the existence of the shanties caused the university considerable expense due to the need to protect the shanty occupants and avoid exposure to potential liability.\textsuperscript{424}

The administration allowed the shanties to remain for approximately six months before informing the students that it was considering requiring their removal. After the university's Institutional Council voted against divestiture, the president met with the protesting students and informed them that the shanties had to come down. After some unsuccessful attempts to negotiate, the students initiated a lawsuit, alleging that the university's removal of the shanties would violate their right to freedom of speech under the First Amendment.\textsuperscript{425}

The federal district court in Utah noted that the campus was a limited public forum, but that the university had the authority to regulate student expression. In this case, the university had a student code that allowed the institution to regulate student free speech only through "clearly stated reasonable and nondiscriminatory rules and regulations regarding time, place, and manner."\textsuperscript{426}

The court found that the university's determination that the shanties would have to be removed was not based on the application of any specific university regulations. Rather, the university administration concluded that it would be in the best interests of the university to require their removal. The court, however, asserted that this approach was not an appropriate means of limiting or

\textsuperscript{424} Id. at 1202.
\textsuperscript{425} Id.
\textsuperscript{426} Id. at 1209.
prohibiting the exercise of free speech rights. Although the university can regulate free speech interests through clearly stated, narrowly tailored regulations enacted to further substantial government interests, in this case the university had not enacted such regulations. The court also noted that formally drawn regulations were necessary to ensure that restrictions on free speech were content-neutral, and they also serve as guidelines that enable students and student groups to plan and develop their free speech activities in a way that will be effective for the students and yet acceptable to the administration. The court, therefore, ruled in favor of the students, constructing a unique remedy by ordering that the shanties be made portable and be removed at night. 427

The unusual result and remedy in this case should be contrasted with the result in Students Against Apartheid Coalition v. O’Neil, 428 a nonpublic forum case with nearly identical facts. In O’Neil, the court invalidated a University of Virginia lawn use regulation that prohibited “structures” or an “extended presence” on the historic institution’s central lawn within 700 feet of the Rotunda on grounds that the regulation was unconstitutionally vague and not narrowly tailored to achieve the university’s interest in aesthetics. According to the federal district court, the university officials did not substantiate the institution’s ban on shanties and they understated “the

427 Id. at 1211. See also, Students Against Apartheid Coalition v. O’Neil, 660 F. Supp. 333 (W.D.Va. 1987), connected case, 838 F. 2d 735 (4th Cir. 1988), where the court held that lawn use regulations precluding brief, undamaging erection of shanties in a specified part of campus to protest apartheid violated the First Amendment, but it upheld the constitutionality of revised regulations. 428 660 F. Supp. 333 (W.D. Va. 1987).
significance of a university campus as a forum for robust open expression."\(^{429}\)

In response, the university revised the regulation, defining the term “structure” and deleting the ambiguous phrase “extended presence.” Thus on appeal in \(O’Neil\), \(^{430}\) student groups conceded that the revised regulation was content neutral, and the appeals court found that the revised regulation was narrowly drawn “to ensure maintenance of the architectural integrity of the upper Lawn, which is part of a National Historic Landmark.” \(^{431}\) It only prohibited the display of shanties on the university’s property that was a national historic landmark. The court concluded that the regulation was a reasonable time, place and manner restriction because the aesthetic concerns constituted a permissible government interest. \(^{432}\)

Despite all of the similarities between these two cases, there were major differences between them that had

\(^{429}\) Id. at 338.
\(^{430}\) 838 F. 2d 735 (4th Cir. 1988)
\(^{431}\) Id. at 737.
\(^{432}\) In accord with the result in \(O’Neil\), the court in Auburn Alliance for Peace and Justice v. Martin, 684 F. Supp. 1072 (M.D. Ala. 1988), aff’d mem. 853 F. 2d 931 (11th Cir. 1988) upheld the constitutionality of the institution’s prohibition of overnight, week-long camp-out to protest foreign policy while offering extended hours and an alternate site. Also, an institution that wanted to prohibit protest marches by unrecognized student organizations ran into serious problems, such that the university entered a consent agreement to delete the recognition requirement and affirm the First Amendment right to peaceful protest. See, Iranian Students Ass’n v. Edwards, 604 F. 2d 352 (5th Cir. 1979). The court also invalidated on overbreadth grounds an institution’s regulation requiring students to receive authorization for any demonstration three days beforehand and only allowing those of a wholesome nature. See, Shamloo v. Mississippi State Board of Trustees, 620 F. 2d 516 (5th Cir. 1980).
some bearing on the respective court rulings. First, the students at the University of Utah received permission from the administration to build the shanties, while the students at UVA did not. This fact alone made the erection of the structures on the Utah campus appear to be less of a public forum and more of a nonpublic forum because the grant of permission by the administration implies a nonpublic forum. At UVA, there was a lawn use regulation in place prohibiting structures with an “extended presence” from being erected, but the regulation was vague and lacked narrow tailoring. Second, there were differing underlying concerns for the administrators. Utah leaders were concerned about safety and liability, while Virginia officials wanted to ensure the architectural integrity of the lawn, which was a national historic landmark. Third, the restriction in O’Neil was found to be a reasonable time, place and manner restriction because it only prohibited the shanties from standing on the campus historical landmarks. At the University of Utah, there was no regulation in place that the institution could use to prohibit construction of the shanties or have them removed. Thus when the university concluded it would be in the best interests of the institution to have them removed, the court ruled that the method of removal would be an inappropriate means of limiting free speech rights. The court indicated that the university could regulate speech on campus through narrowly tailored regulations, but the university had not enacted any.

The difficulty of crafting restrictions applicable to protest on a public university campus is further illustrated by a decision which reviewed a community college district’s regulations on speech and association in
outdoor areas of a campus. In *Orin v. Barclay*,\(^{433}\) Benjamin Orin, a member of Positively Pro-Life, an anti-abortion group that demonstrated at high schools, colleges, and medical clinics around the Northwest, was told by a community college official that he could protest abortion on campus only if he could satisfy certain conditions. He was prohibited from creating a disturbance, interfering with students' access to school buildings, or couching his protest in overtly religious terms. After four hours of demonstration, confrontations between bystanders, protestors became potentially violent and campus security asked Orin to leave because he was violating these conditions. When he refused, campus security called City of Bremerton police officers who, after asking Orin to leave twice more, arrested him for criminal trespass and failure to disperse.\(^{434}\)

In a suit brought by Orin for violation of his civil rights, the U.S. Court of Appeals for the Ninth Circuit determined that local police were justified in ending the demonstration and arresting some of the protestors for trespass when they failed to respond to directives, but the college’s policy prohibiting overt religious activities violated content-neutral standards for free speech. Citing *Widmar v. Vincent*,\(^ {435}\) a ruling protecting religious worship or instruction in campus meeting rooms, the court held that once the school official created a forum for the

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\(^{433}\) 272 F.3d 1207 (9th Cir. 2001).
\(^{434}\) Id. at 1211.
demonstrators' expression, he could not limit their expression to secular content.\(^{436}\)

The first two conditions placed on Barclay’s speech -- not to create a public disturbance and not to interfere with campus activities or access to school buildings -- were content-neutral regulations. Consistent with the constitutional standards articulated in *Tinker v. Des Moines Independent School District*,\(^{437}\) these two conditions survived constitutional scrutiny because they did not distinguish among speakers based on the content of their message and they were narrowly tailored to achieve OCC's pedagogical purpose. The third condition -- to refrain from religious worship or instruction -- was regarded by the district court as more problematic. Having created a forum for the demonstrators' expression, Barclay could not, consistent with the dictates of the First Amendment, limit their expression to secular content. The third condition imposed by Barclay constituted a content-based regulation that may be upheld only if it "is necessary to serve a compelling state interest and ... is narrowly drawn to achieve that end."\(^{438}\)

\(^{436}\) *Orin*, 272 F. 3d at 1215. In *Widmar*, a public university defended its regulation excluding religious student organizations from campus facilities on the grounds that it was required by the Establishment Clause to observe a strict separation of church and state. Rejecting the university's argument, the Court held that allowing religious organizations the same access to school facilities enjoyed by secular organizations did not violate the Establishment Clause. The Court struck down the limitation as a content-based regulation of First Amendment rights of assembly, free exercise, and free speech that was not narrowly tailored to serve a compelling government interest.

\(^{437}\) 393 U.S. 503 (1969).

\(^{438}\) *Orin*, 272 F. 3d at 1215.
Unique Applications

Although judges have been reluctant to apply the concept of a traditional public forum to institutions of higher education, there is ample evidence that the forum doctrine, whether described as designated or limited, has had unique applications in the higher education setting. The doctrine’s application has gone beyond the setting of streets, sidewalks and other public areas in a higher education context. Using the judicial characterization of higher education as a “marketplace of ideas,” judges have reviewed cases involving free speech and associational rights in settings that are unique to the higher education enterprise. This analysis begins with an examination of institutional facilities’ use and continues with a review of the doctrine’s application to a wide range of contexts involving institutions of higher education.

University Facilities

As previously noted, *Widmar v. Vincent*[^439] was a decision in which the U.S. Supreme Court permitted the use of a state institution’s facilities for religious worship and teaching. After closely scrutinizing the restrictions in this case, the court ruled that the university officials had “discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.”[^440]

In *Widmar*, a religious student organization was not allowed to hold meetings in campus buildings because the institution governing board’s rule prohibited the use of

[^440]: *Id.* at 269.
university space for religious worship and teaching. The U.S. Supreme Court invalidated the regulation, ruling that any denial of the use of facilities must be scrutinized as if it were a prior restraint. After closely scrutinizing the restriction in this case, the court ruled that the university had discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.

In order to justify such a discriminatory exclusion from a public forum, the university must satisfy the test for content-based exclusions—that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest. In *Widmar*, the Court ruled that once a public university makes its meeting facilities generally available for use by student groups, it cannot deny to student religious groups the right to meet based on the content of the group’s proposed speech. The Court acknowledged that, as to students, the public university campus was analogous to a public forum, but since the university’s mission is educational, the university did have the authority to impose reasonable regulations that would be consistent with that mission.441 There was no obligation to make campus facilities available as meeting space for nonstudents. Thus, the *Widmar* decision suggested the concept of a limited forum in which the government’s interest in achieving a valued societal objective permits reasonable restrictions on access to the forum.

441 *Id.* at 268.
In *Schuloff v. Murphy*[^442] a federal district court considered the speech rights of students addressing a public board meeting on the university campus. Anita Schuloff, a graduate student in mathematics at Hunter College and a prospective law student at City University of New York, attended a public meeting of the CUNY Board of Trustees to express concerns about a particular professor at the law school, and she indicated she had student evaluations regarding this particular professor. These evaluations were from students at New York Law School, where the professor also taught, and not from CUNY; Schuloff, however, did not disclose this at the time. James P. Murphy, chairman of the CUNY board told Schuloff he would not allow her to read from the evaluations or mention specific names because of concerns about student privacy, but he would permit Schuloff to speak generally about the issues raised in the evaluations. Schuloff acceded and then spoke about specific criticism of the professor contained in the evaluations. She later sued Murphy for violation of her First Amendment rights for his refusal to allow her to identify or reveal any students by name.

After considering the various types of fora, the district court determined that the board created a limited public forum by opening the CUNY facilities for a public meeting. The court noted that any restrictions on such speech must be narrowly drawn to achieve a compelling governmental interest. The court found that there was no indication of the board trying to restrain her from

discussing the shortcomings of the law school professor; the only concern was to protect the privacy interests of the students. Schuloff was allowed to discuss the subject matter of the evaluations without disclosing the students' names, but she voiced no objection to this determination. She proceeded to discuss the content of the evaluations, observing that some of the students were unhappy about the professor's delivery and preparedness and that he allegedly taught his ethics class how to lie. The fact that she was not permitted to disclose the names of the student evaluators, however, did not in any way affect her ability to offer an opinion on the subject of the professor's abilities. In short, the court concluded that the restriction upon Schuloff's speech was narrowly drawn and it effectuated a compelling governmental interest, namely, the protection of student privacy as mandated by federal statute. The court concluded from the existence of this statute that protection of student privacy has been recognized as a compelling governmental interest, and that the institution acted to advance this interest when they prevented Schuloff from disclosing the names of the student evaluators.\footnote{443}

Courts have evaluated institutional custom and practice in the college and university setting in order to determine the existence of a designated, limited open forum or closed forum. When a closed forum is judicially acknowledged, a standard of reasonableness, rather than a compelling interest test, applies. For example, in \textit{Chapman v. Thomas},\footnote{444} a federal appeals court placed campus dormitories in the category of nonpublic fora, thereby

\footnotetext{443}{Id. at *10.}  
\footnotetext{444}{743 F.2d 1056 (4th Cir. 1984).}
holding the restrictions on door-to-door solicitation to be reasonable.

Prior to June 1980, North Carolina State University policy prohibited door-to-door solicitation in dormitories. The policy, however, was revised at that time to grant an exception for door-to-door campaigning for some candidates for student government office, including president, president of the senate, and treasurer. The exception was removed from the policy in December 1980 when a total ban on solicitation was reinstated.

While a student at NCSU, Chapman sponsored a series of Bible discussions on campus. In order to encourage attendance, he went from door to door in various dormitories informing fellow students of the planned Bible discussions. After receiving complaints from several students, NCSU officials informed Chapman that his activities violated the policy prohibiting door-to-door solicitation by anyone except certain student candidates for campus offices. When Chapman refused to cease solicitation, he was threatened with expulsion and subjected to an action initiated by the institution’s judicial system. After the charges were dismissed, Chapman sued, claiming that the policy violated his First Amendment rights of freedom of speech and religion on the grounds that it granted candidates for student government offices the right to campaign door-to-door in student dormitories while prohibiting door-to-door solicitation for religious purposes.

The federal appeals court noted that the university had a legitimate interest in protecting students in its residential dormitories from “unwanted, indiscriminate door-to-door solicitation by whoever might choose to
descend uninvited upon them at whatever time and for whatever purpose.” The court also found that the policy was reasonable and that the exception for students engaged in political activity was narrowly drawn to encourage responsible and effective participation in student government political activity.

The court also found that the students who filed the action were not totally left out of dorm solicitation by the policy. The university's solicitation policy did not prohibit all solicitation by the students within the residence halls. Solicitation in the lobbies and waiting areas of the dormitories and fraternity houses was permitted by the policy. Chapman also could solicit in other student rooms if the resident expressly invited him. The court, therefore, concluded that the selective solicitation policy was reasonable and not aimed at suppressing the student’s speech merely because of opposition to his views. The court’s decision strongly implied that the applied standard was reasonable if it left open alternative channels of communication and did not operate as a total ban on speech.

445 Id. at 1059.
446 Id.
447 In other non-public forum cases, courts have upheld bans on solicitation in the dorms. See, Fox v. Board of Trustees, 492 U.S. 469 (1989), on remand, 42 F. 3d 135 (2d Cir. 1994), cert. denied, 515 U.S. 1169 (1995) (before finding the case moot on remand, the court upheld a university resolution that prohibited students from sponsoring a “Tupperware party” in a campus residence hall); In accord, Brush v. Pennsylvania State Univ., 414 A. 2d 48 (Pa. 1980) (court upheld the prohibition on door-to-door canvassing except by invitation or majority vote as permissible TPM regulations and where there were alternatives of telephone, mail and main lobby canvassing); National Movement for Student Vote v. Regents of the Univ.
Classroom and Curriculum

While courts have at various times viewed the campus as the marketplace of ideas, they have not extended the marketplace to the classroom. For example, an acting class at an institution was found to be a nonpublic forum when a Mormon student sued for a violation of her First Amendment rights after she refused to use an expletive during classroom acting exercises. In Axson-Flynn v. Johnson, Christina Axson-Flynn, a Mormon student at the University of Utah, refused to say the word "fuck" or "take God's name in vain" during acting class. During her first semester in the Actor Training Program, ATP faculty members told her to "get over" her refusal to use those words, saying that not using the words would stunt her growth as an actor. Axson-Flynn rejected this advice and eventually left the ATP (and the University of Utah) before the end of her second semester; although never ordered to leave, she assumed that she would eventually be forced out. She then brought an action claiming that the university had violated

of California, 123 Cal. Rptr. 141 (Ct. App. 1975) (court upheld institution’s policy that prohibited solicitation of voter registration on dorm floors where students resided, but that allowed it in the main lobby).

See, Salehpour v. University of Tennessee, 159 F. 3d 199 (6th Cir. 1998), cert. denied, 526 U.S. 1115 (1999) (court upheld the discipline of a dental student who sat in one of the last two rows of class in violation of professors’ rules); Furumoto v. Lyman 362 F. Supp. 1267 (N.D. Cal. 1973) (court upheld discipline of students who disrupted Engineering class to demand that allegedly racist professor publicly debate his views on racial genetics); Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S.D. Tex. 1978) (arrest of student who refused to disperse from gym classroom did not violate free speech).

356 F. 3d 1277 (10th Cir. 2004),
her free speech and free exercise rights under the First Amendment.\textsuperscript{450}

The federal appeals court found that the classroom constituted a nonpublic forum and that the student's speech constituted "school-sponsored speech" and was thus governed by \textit{Hazelwood v. Kuhlmeier}.\textsuperscript{451} While the court acknowledged that \textit{Kincaid v. Gibson}\textsuperscript{452} had cast some doubt on the application of \textit{Hazelwood} in the context of university extracurricular activities, the Tenth Circuit noted that because Axson-Flynn's speech occurred as part of a curricular assignment during class time and in the classroom there was no need to analyze students' extracurricular speech. The court emphasized that it was appropriate to defer to the wisdom of the educators' pedagogy in curriculum matters, unless their methods were a pretext for discrimination. Viewing the evidence in a light most favorable to Axson-Flynn, however, the court found a genuine issue of material fact concerning whether the faculty's justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination. Therefore, summary judgment was improper and the case was remanded to the district court for further findings of fact on whether the course instructors had engaged in religious discrimination.

As Axson-Flynn illustrates, judges have consistently held that higher education classrooms and curricula constitute nonpublic fora, meaning that school officials could regulate the speech that takes place there in a

\begin{footnotes}
\item[450] \textit{Id.} at 1280.
\item[452] 236 F. 3d 342 (6\textsuperscript{th} Cir. 2001) (en banc).
\end{footnotes}
reasonable manner. In Brown v. Li,\textsuperscript{453} a federal appeals court found that an academic thesis co-signed by a committee of professors was not a public forum, limited or otherwise. In that case, Christopher Brown, a master's degree candidate in the Department of Material Sciences at the University of California at Santa Barbara, was required to write a thesis under the guidance of his thesis committee. He submitted his thesis, and received the committee’s approval. After he obtained the signature page from his committee approving his thesis, Brown inserted a “disacknowledgements” section into his thesis and attempted to file the thesis in the university library.\textsuperscript{454} The “disacknowledgements” section was a profane and irreverent acknowledgement that was critical of the university and government officials.

The thesis committee was alerted and did not approve the thesis with the new section. Brown was granted his degree, but the thesis was not placed in the library. He filed an action to have the thesis placed in the library. Concluding that no violation of the student’s First Amendment rights had occurred, the appeals court reasoned that the student was given an assignment that was fairly characterized as part of the curriculum. The court emphasized that the university could enforce reasonable standards to prohibit lewd and objectionable content in a student’s academic work. Moreover, the court concluded, the committee's decision was reasonably related to a legitimate pedagogical objective: teaching the student the proper format for a scientific paper.\textsuperscript{455}

\textsuperscript{453} 308 F.3d 939 (9\textsuperscript{th} Cir. 2002).
\textsuperscript{454} Id. at 943.
\textsuperscript{455} Id. at 952.
Campus Theatre

In Brown v. Board of Regents of the University of Nebraska, a senator objected to the film “Hail Mary” being shown at the Sheldon Film Theatre, a state-operated art theatre on the university campus and the institution announced the showing of the film would be cancelled. Students sued the university claiming a violation of their First Amendment rights. The federal district court in Nebraska found that the theatre was not a public forum because it had not consented to the general public having unrestricted access to its auditorium and facilities. Having the friends of the theater choose annually from a list of films and allowing organizations to occasionally rent the theatre did not constitute a relinquishment of editorial control over the selection of the films presented. Because the court could not classify the theatre as a public forum, the government could impose reasonable regulations. The restrictions on the film, however, were improper because they suppressed expression. Therefore, the court dismissed the action against the university.

The judicial reasoning in Brown illustrates the application of free speech principles to non-public fora. The institution could invoke reasonable limitations on presentations and performances, but the restrictions must not suppress expression. The expression in the film “Hail Mary” was unconstitutionally suppressed because it was at odds with the religious views of a state legislator who intervened to have it canceled. Consequently, the film was

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457 Id. at 681.
ordered reinstated in the theatre, and the court dismissed the action against the university.

Similarly, in *Linnemeir v. Board of Trustees of Purdue University*,\(^{458}\) three residents of Indiana filed an action to forbid the Fort Wayne campus of IU-PU from putting on a performance of Terrence McNally’s notorious play “Corpus Christi,” which they regarded as blasphemous. They argued that by presenting the play, the university would be violating the First Amendment by publicly endorsing anti-Christian beliefs. The court said the theatre, like classrooms, were not public fora.

The parties and the district judge have spent a lot of time debating whether the university's theater is really a public forum. The plaintiffs seem to think that if it is not, the university has no right to allow a blasphemous play to be performed in it. (If it is, that would weaken any inference that by permitting *Corpus Christi* to be performed the university was endorsing its message.) That is incorrect. Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers. It is the same with a university theater.\(^{459}\)

The court noted that school authorities and teachers, not the courts, should decide the elements of curriculum

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\(^{458}\) 260 F. 3d 757 (7th Cir. 2001).

\(^{459}\) *Id.* at 759-760.
and content of instruction.\textsuperscript{460} As in other cases in which a non-public forum has been judicially recognized, the authority of campus officials, when exercised in a reasonable and not arbitrary fashion, will prevail over demands for conformity and avoiding controversy.

Opponents insisted the university’s authorization to produce the play violated the Establishment Clause of the First Amendment because it would represent endorsement and advancement of a position antithetical to religious belief. Noting the play was produced by a theatre major as part of completing course requirements, the federal appeals court affirmed denial of the requested injunction on the basis that the First Amendment does not forbid a state university from providing a venue for the expression of viewpoints antagonistic to conventional religious beliefs. The court emphasized that while classrooms are not regarded as a public fora, institutions must decide which works are acceptable for classroom instruction. The university provided ample public disclaimers about the presentation of the play such that no presumption of endorsement could be read into the staging of the production.\textsuperscript{461}

\textbf{Displays and Postings}

Information that is displayed for the public to see has given rise to legal disputes. In the halls of academia,

\textsuperscript{460} \textit{Id.} at 760. Graduation ceremonies were found not to be a public forum. The case arose after a commercial photographer was prohibited from taking pictures alongside a photographer who contracted with the university to provide pictures of graduates as they walked across the stage to receive their diplomas. \textit{Foto USA Inc. v. Board of Regents of the University System of Florida, 141 F.3d 1032 (11\textsuperscript{th} Cir. 1998)}.

\textsuperscript{461} \textit{Id.}
some displays are made for aesthetic purposes; others are
done to communicate events and issues. Regardless of the
reason for the display, the level of protection displays
receive from the courts will depend largely on how the
forum is classified. Of course, communication in a
traditional public forum will get the most protection, and
communication in a nonpublic forum will receive the least
amount of protection.

In *Burnham v. Ianni*,462 two student members of the
history club at the University of Minnesota-Duluth
conceived an idea to publicize some of the areas of
expertise of the history department’s faculty by having
history professors pose for pictures with a prop related to
their areas of interest. One professor, whose interest was
American military history, wore a coonskin cap and posed
with a .45 caliber military pistol. Another professor,
whose interest was ancient Greece and Rome, held an ancient
Roman short sword while wearing a cardboard laurel wreath.
Eleven professors in all posed for or supplied pictures.
The chancellor ordered the pictures removed, and a suit was
filed by two professors and two history club members. In
defending his removal of the pictures, the chancellor
explained that the campus affirmative action officer had
reported receiving anonymous complaints about the display
that involved objections to the depiction of faculty with
weapons. The chancellor expressed his belief that the
“campus was enshrouded in an atmosphere of anxiety” as a
result of threats that had been made. His removal also was
part of his attempt to bring to an end the disruption

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462 119 F. 3d 668 (8th Cir. 1997).
caused by the display and to prevent a worsening of the atmosphere.\footnote{Id. at 672-673.}

The court indicated that the display case could be a limited public forum, but the court ruled that the nature of the forum made little difference in this case because the suppression of speech by the university fails even the most lenient forum test. The court reasoned that the display case was created for the type of activity for which it was being used—to inform the university and community of events and interests in the history department. The institution was not obligated to create such a forum, but once it did open the case, it was prevented from distinguishing the types of speech it would allow inside. Therefore, since the purpose of the forum was to spread information about the history department, it was unreasonable for the chancellor to suppress that type of information.

The court found that the photographs were removed because a handful of individuals objected to the exhibition of military-type weapons on campus. It concluded that the objections of a few people on campus to the display was not a constitutionally valid reason to regulate the freedom of expression.\footnote{Id. at 676.}

The Eighth Circuit observed that the display case outside of the history department could be regarded as a limited public forum. It said the university designated it as a forum for use by the history department. The court, citing \textit{International Society for Krishna Consciousness v. Lee},\footnote{505 U.S. 672 (1992).} for using the terms “limited” and “designated”
interchangeably. The court concluded that the display case was designated for the dissemination of information about the history department and suppression of exactly that type of information was not reasonable.466

Bulletin boards inside and outside of college and university campus structures also have raised an interesting public forum dilemma for the courts. In Pryor v. Coats,467 the U.S. Court of Appeals for the Tenth Circuit found that a law school bulletin board was a limited public forum. Jack Pryor, a first-year law student at the University of Oklahoma College of Law, sued the institution claiming discrimination for its policy that required student groups be registered if they were to have a bulletin board in the law school for their exclusive use and under their exclusive control. To qualify for bulletin board status, a group was required to file an application bearing the names, signatures, and student identification numbers of at least ten students who were members of the group. The application also required the name of a faculty advisor and a copy of the group's constitution. Each registered student group was then assigned a bulletin board identified by the name of the group. The assigned group was given exclusive control over the information posted on its bulletin board. Because the Christian Legal Society was a registered student group at the law school with access to a bulletin board, Pryor complained that the policy of restricting bulletin board availability to registered student groups was discriminatory in favor of Christianity and was an improper entanglement of the university in the advancement of religion. He made the same complaint to the

466  Id.
467  203 F. 3d 836 (10th Cir. 2000).
university, demanding his right to post writings on a bulletin board, but his demand was refused.

It was clear to the court that the law school did not intend to create a designated public forum when it made the bulletin boards available only to registered student groups. The court found that there was no evidence that Pryor was denied access to the bulletin board because the law school sought to suppress his viewpoint. Instead, the court found that the law school's restrictions requiring that student group registration precede access to the boards created a limited public forum subject to the more deferential reasonableness standard.\textsuperscript{468}

In \textit{Desyllas v. Bernstine},\textsuperscript{469} fliers were posted in an unauthorized area that was considered a nonpublic forum. Dimitris Desyllas, a student newspaper editor at Portland State University, sued university officials for violation of his First Amendment rights after the officials secured the newspaper office door with a lock. This action was taken because Desyllas informed the university president he had found a box of confidential student records outside of the newspaper office. Another PSU student posted fliers announcing a press conference that Desyllas had called to discuss his lawsuit against university officials. After posting the fliers, students observed a university officer removing postings from columns near the student center regarding the press conference while leaving other fliers alone.

The U.S. Court of Appeals for the Ninth Circuit ruled that certain areas of a university campus, such as the

\textsuperscript{468} Summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997).

\textsuperscript{469} 351 F.3d 934 (9th Cir. 2003).
building columns where Desyllas's fliers were posted, were not approved under university policy for handbill posting. Unlike the approved bulletin boards, the unapproved areas were not considered a public forum. Thus, the campus areas not approved for handbill posting are nonpublic fora, and the institution could limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint.

The court concluded that the university was not discriminatory in its attempts to enforce a viewpoint-neutral -- and content-neutral -- speech regulation. In addition, it was reasonable for the institution to remove the press conference fliers, along with other fliers posted on the columns near the student center, because it was consistent with the university's purpose to preserve the appearance of campus structures.\textsuperscript{470} Therefore the regulation was reasonable in light of the purposes served.\textsuperscript{471}

\textbf{Student Publications}

Perhaps the most diverse body of law to emerge from the public forum doctrine in public higher education is in the area of student publications. Some of the differences in viewpoints may be a result of the deference courts have given to higher education institutions coupled with the almost universal deference afforded the press as an

\textsuperscript{470} \textit{Id.} at 944.
\textsuperscript{471} \textit{Id.} Another example of a display that was a nonpublic forum involved a stained glass windows with representational depictions of naked women. The display was found not to be a public forum, even though they were exhibited in a gallery adjacent to a mall in the college’s principal building and despite the occasional inclusion of works by outsiders. Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985).
institution in this nation. Nevertheless, the status of the publications’ freedom from control will depend mostly on its forum classification.

The regulation of the news content of student publications has raised a number of questions regarding the application of the public forum doctrine. After the Hazelwood v. Kuhlmeier case substantially restricted the authority of high school student editors in favor of school administrators, courts have struggled with the application of the forum classifications for student publications in higher education settings.

For example, in Kincaid v. Gibson, the editor of the Thorobred student yearbook at Kentucky State University put together a smaller-than-expected production without the supervision of university officials. When the yearbook returned from the printer, Betty Gibson, KSU’s vice-president for student affairs, objected that the publication was of poor quality and “inappropriate.” She objected to the yearbook’s purple cover, its “destinations

472 Courts have tried to keep administrators at arms length to avoid their interference with student publications. In instances, therefore, where the public forum doctrine was not used to decide publication cases, the courts have on several occasions struck down the regulation. Leuth v. St. Clair Community College, 732 F. Supp. 1410 (E.D. Mich. 1990) (court rejected the college’s prohibition of advertisement for nude dancing club because the regulation was not narrowly tailored with specific guidelines); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971) (court rejected institution’s suspension of student editor for failing to submit controversial material to the faculty advisor); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970) (court rejected faculty advisory board’s prior review of material to be published in the institution’s campus newspaper).

474 236 F.3d 342 (6th Cir. 2001).
unknown” theme, the lack of captions under many photos, and the inclusion of current events unrelated to KSU. Gibson and KSU President Mary Smith decided to confiscate the yearbooks and withhold them to prevent distribution to the KSU community. The editor and another student sued, claiming a violation of their First Amendment rights.

In determining the type of forum involved, the court evaluated the policy and practice of the yearbook at Kentucky State, the nature and compatibility of the yearbook with expressive activity, and the context in which the yearbook was published. At that point, the federal appeals court concluded that there was clear evidence that KSU intended to make the yearbook a limited public forum. Specifically, the reasons for the court’s conclusion were: 1) The policy placed editorial control of the yearbook in the hands of a student editors, and it did not state any minimum standards of quality control; 2) The Student Publications Board followed its stated “hands off” policy in actual practice; 3) The nature of the yearbook was that it was a student publication that existed for the purpose of expressive activity, and it served as a forum in which students could present pictures, captions and other written materials, and these materials constituted expression for purposes of the First Amendment; 4) The context of the yearbook was that the editors and the readers were likely to be young adults, thus there could be no reason to suppress the yearbook on the grounds that it might not be suitable for the intended audience. After a thorough examination of the institution’s relationship to the Thorobred yearbook, the U.S. Court of Appeals for the Sixth Circuit concluded that there was “strong evidence of the university’s intent to designate the yearbook as a limited
The court found that the yearbook could be characterized as a limited open forum for expressive purposes even though it was financed and sponsored by the institution. In examining the constitutionality of the university officials’ actions, the court found that the confiscation of the yearbook was arbitrary and unreasonable. Therefore, the court held that university officials had violated the First Amendment rights of students by blocking the yearbook’s distribution. The assertion that the yearbook “lacked quality” did not justify confiscation and the actions of university officials reflected disagreement with the philosophic position taken by the editors of the yearbook in violation of rights to free speech and press under the First Amendment. Although the court utilized the public forum doctrine to determine whether the university violated the students’ First Amendment rights, it did add that “we note that a college yearbook with features akin to a university newspaper might be analyzed under a framework other than the forum framework.”

In Husain v. Springer, a U.S. District Court in New York found a partisan issue of the student newspaper that contained student speech to be a limited public forum. The College of Staten Island’s student newspaper, which was funded primarily by student activity fees, published a special issue endorsing a slate of candidates for student government. As a consequence of the newspaper’s endorsement, the college’s president, Marlene Springer, nullified the election results and scheduled a new

\[475\] Id. at 354.
\[476\] Id. at 348.
election, basing her decision on college election rules that: 1) prohibited the use of college newspapers for distributing campaign flyers and that 2) allowed candidates to receive 30 free copies of their flyers from the student government.

The federal district court, however, found that those rules did not preclude campus newspapers from endorsing candidates and concluded that President Springer's decision was a viewpoint-based restriction that violated the First Amendment. The fact that the president's action was directed toward the election rather than the newspaper did not remove the matter from First Amendment scrutiny. The court reasoned that the president's decision violated the students' right to be free from reprisals based on the content of the newspaper's articles. The court stated that the defendants, who have hinged their defense of this action on the claim that President Springer was merely preserving the scope of the limited public forum, made no effort to show that her actions were supported by a compelling state interest, or that there were less intrusive alternatives to her decision to nullify the election results. Obviously, assuring the fairness of a student election is an important interest, but there was no evidence to show that her actions were "necessary" to serve that interest or "narrowly drawn to achieve that end."\(^478\)

In a more recent student press case, the public forum doctrine once again became the legal standard for determining the level of student freedom. In *Hosty v. Carter.*\(^479\) three students at Governor's State University sued after the Dean of Student Affairs and Services at the

\(^{478}\) *Id.* at p. 214.

\(^{479}\) 325 F. 3d 945 (7th Cir 2003).
institution changed the policy for prior review of the student newspaper after the newspaper started printing articles about university employees. Although the newspaper's policy was to have a faculty adviser read stories intended for publication at the request of the student editors, the advisor customarily gave advice but did not make content decisions. The dean changed this policy when she informed the newspaper's printing company that a school official was required to review the newspaper's content before printing. The newspaper employees sued the dean, the university, and others.

When the case went before a district court, the judge ruled that the collegiate press was not held to the same restrictive standard as a high school press.\textsuperscript{480} The court decided that the Supreme Court rationale restricting the press freedom of the high school students in \textit{Hazelwood v. Kuhlmeier}\textsuperscript{481} was inconsistent with the maturity and responsibility typically attributed to traditional college students. While \textit{Hazelwood} stated that younger students in a high school setting did not enjoy a First Amendment right to editorial control of a school-sponsored newspaper, the federal district court was reluctant to apply a similar standard to the First Amendment rights of university students.

\textsuperscript{480} Hosty v. Governors State University, No. 01 C 500, 2001 U.S. Dist. LEXIS 18873 (N.D. Ill. Nov. 13, 2001).

\textsuperscript{481} 484 U.S. 260 (1988). The U.S. Supreme Court deferred to school administrators in determining appropriate content of school sponsored expressive activities like the newspapers as long as administrators have a reasonable pedagogical basis for their decision. The court, however, left open the question of whether the same deference would go to college and university administrators under similar facts and circumstances.
Ultimately, there was no liability for the administrator or the institution in Hosty. In 2005, the U.S. Court of Appeals for the Sixth Circuit ruled that the school dean was immune from liability. The federal appeals court affirmed that the newspaper in question operated in a designated or limited-purpose public forum and was beyond the control of the university's administration. Participants in such a forum were not subject to censorship when the sponsor decided that the particular speech was unwelcome. However, even though the censorship was a constitutional violation, qualified immunity still protected the dean unless it was clear to a reasonable public official that the conduct in question was unlawful. The court determined that the law on the issue was unsettled and hard to apply; therefore, the dean had no reason to know that her actions, predicated on the reasoning in Hazelwood, were unconstitutional.

The Hosty v. Carter case provides some direction on what is a designated public forum because the university created one by establishing a subsidized student newspaper. Participants in such a forum may not be censored when the sponsor decides that particular speech is unwelcome. As an example, the court cited the classrooms used for meetings in Good News Club that were designated public fora, and because the school allowed any student group to use the space, it could not forbid religious speech. Another example cited by the court involved the results of a school declaring the pages of the student newspaper open for expression, and thus restricting its officials from engaging in viewpoint or content discrimination while the

482 412 F. 3d 731 (7th Cir. 2005).
483 Id. at 739.
terms on which the forum operates remain open to a variety of viewpoints. Dean Carter did not purport to alter the terms on which the Innovator operated; that authority belonged to the Student Communications Media Board. And the rules laid down by the Board, though ambiguous, could be thought (when considered as favorably to plaintiffs as the record allows) to create a designated public forum.

Many student publications receive little or no operating funds from their institutions. In order to produce the requisite number of issues or volumes to maintain viability, these publications must seek revenues from alternative sources. As a result, many of them follow the lead of commercial publications by selling a significant portion of advertising space. Because the advertisement content is determined by the advertiser, the First Amendment rights of the speaker are implicated. Generally, the publication is distributed on campus, which can often pique the interest of administrators in the content of the advertisement.

In *Portland Women’s Health Center v. Portland Community College*, a women’s health center operated a clinic in Portland that provided a variety of services, including abortions. A center staff member placed an order to insert an advertisement in *The Bridge*, a local community college student newspaper produced as part of college’s advertising and journalism courses and distributed weekly to the 30,000 students. The order for the ad was accepted over the telephone, but when the camera-ready copy arrived at the newspaper, a faculty member in charge of the

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journalism program at the college rejected the ad because the ad referred to abortion, and he felt that an ad for such services would lower the tone of the newspaper.

While acknowledging the college sought to use *The Bridge* as a teaching tool, the court found that the record established the newspaper as a public forum. According to the court, *The Bridge* generally had acted as a public forum by serving all of the purposes of a newspaper and by opening itself to anyone who wanted to buy space. In its written policy, *The Bridge* listed one of its purposes as providing “a forum for communication within the college community.” As a result, the court held that *The Bridge* was a public forum for First Amendment purposes.

The court reasoned that the newspaper was not justified in rejecting the ad solely because of its content. As a result the court prohibited publishers from making selective exclusions from a public forum based solely on the content of the ad. Moreover, the court suggested that the exclusion was not justified because its publication did not create a disruption or an interference at the college. Specifically, the court concluded that the ad was truthful and did not advocate illegal or disruptive activity. Neither was there a suggestion that publication of the ad would have interfered with classwork. The court concluded that the First Amendment did not grant the college the right to suppress the center’s speech.

In another dispute over an advertisement, an alumni publication at Rutgers University was found to be a limited public forum that also rejected an advertisement because it conflicted with the publication’s policy. In *Rutgers 1000*

485 *Id.* at *8.*
Alumni Council v. Rutgers, The State University of New Jersey, \(^{486}\) Rutgers 1000 Alumni Council, the alumni branch of the "Rutgers 1000," a group of students, alumni and faculty opposed to Rutgers University's focus on Division I athletics and membership in the Big East Conference, submitted an advertisement to the Rutgers Magazine, inviting inquiries and providing a contact address. The magazine rejected the ad citing its policy against accepting "issue-oriented" or "advocacy" ads.

The reason the Alumni Council submitted an advertisement to the magazine was to appeal to alumni and to obtain more support for its cause. The advertisement urged Rutgers to "withdraw from 'professionalized' college athletics, resume competition at a genuinely collegiate level, and return to its values as an old and distinguished university." It solicited alumni to join Rutgers 1000's campaign and provided a mailing address and an Internet web site. The advertisement was rejected because it was determined to be a forbidden issue-oriented ad, despite previous instances of the publication having accepted issue-oriented or advocacy ads. The court explicated the importance of the determination of public forum status for a publication:

As a general rule, courts have tended to find public fora when the government has permitted advertising on a wide variety of issues. Conversely, where the government entity consistently has restricted the type of advertisement, courts have found that

the advertising space was nonpublic or a limited public forum. Consistency is critical to sustaining a finding that a forum is nonpublic. Consistency in application is the hallmark of any policy designed to preserve the non-public status of a forum. A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted. 487

The state appeals court determined that the magazine's advertising section was a limited public forum in which the defendant, through the magazine, enunciated a policy of limited access, only accepting advertisements that were not issue-oriented. In a limited public forum, the government may exclude speech based on content and speaker identity as long as the distinctions drawn are reasonable in light of the purpose served by the forum. The magazine's policy against issue-oriented advertisements was adopted to avoid exposing the university to controversy and criticism for certain positions, and the policy was found to be reasonable and fair. The court concluded that the magazine's advertising section was a limited public forum, and the magazine's policy against issue-oriented advertisements was reasonable and, as such, valid.

487 Id. at 571-572 (citing Hopper, supra, 241 F.3d at 1076).
Despite this finding of reasonableness and validity, the court also found that the magazine had violated its own policy by publishing an advertisement from the Big East promoting its conference activities and seeking ticket sales to conference championships. The ad appeared on the heels of an issue of the magazine that aired the controversy regarding Big East affiliation. In the context of the controversy, the ad reasonably could have been read as an endorsement of Rutgers’ Big East membership. The Big East ad took the opposite position from that advocated by the dissident group. The magazine apparently did not adhere to its own policy when it accepted an ad from the Big East in the context of the controversy. Therefore, after concluding that the magazine’s advertising section was a limited public forum and the magazine’s policy against issue-oriented ads was reasonable, the court ruled that once the magazine had violated its own policy by accepting the Big East ad, it engaged in forbidden viewpoint discrimination and ceded the right to deny the alumni council the opportunity to address the same issue in an ad.

Unlike the two foregoing cases in which the publications were found to be limited public fora, a federal district court took a different view of the advertising space of the student newspaper at the University of Nebraska, Lincoln. It was found not to be a public forum because the publication staff maintained control over the advertising content.

In *Sinn v. The Daily Nebraskan*, the court ascribes significant authority to the student newspaper’s exercise of editorial control of advertising. Two students who wanted
to run advertisements in the newspaper that included self-descriptions, “lesbian woman needs roommate” and “gay male seeks roommate,” sued when their ads were refused by the staff. The newspaper was operating under a policy established by the institution’s publication committee that prohibited discrimination based on “sexual orientation.” The policy was interpreted by the committee to prohibit all ads that indicated the sexual preference of the advertiser. Their reasons for prohibiting ads that indicated sexual preference included the following considerations: 1) the newspaper had not given its consent to unrestricted public access to its pages; and 2) the newspaper did not relinquish its editorial control over ads by accepting the proffered material as a matter of course. This type of editorial discretion precludes a right of access to the newspaper. The court concluded “neither newspapers in general nor the Daily Nebraskan in particular may be characterized as a public forum.”

In this case, the newspaper was able to prevail because the court recognized the editorial discretion of the newspaper. The court concluded that the plaintiffs had no constitutional right that would compel the newspaper to open its columns to all who are willing to pay to publish their sexual orientation in a roommate ad.

**Student Associations**

First Amendment freedom of speech not only extends to freedom of the press, it also includes freedom of association. Just as judges are protective of a student’s

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489 Id. at 664 (citing Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986)).
490 Id. at 152.
right to exercise free speech, they recognize that the opportunity for free association in personal and intellectual exchanges on the college campus must be protected. Following the Supreme Court’s guidance in *Widmar*, courts have applied public forum doctrine to a range of cases involving the free speech and associational rights of college students. In some cases this has meant ensuring the institutional regulations that affect student association are not applied to students and student groups in a discriminatory manner. In other instances, free speech and associational rights are implicated when student activity fees are improperly distributed.

Institutions encourage students to exercise their rights to free association while seeking to ensure that they do not engage in invidious discrimination in exercising those rights. In some instances, institutional rules and policies that prohibit discrimination against students based on race, sex, and sexual orientation come into conflict with the fora that institutions establish to ensure freedom of association on the campus.

For example, in *Christian Legal Society v. Walker,* a national association of Christian legal professionals and law students was accused of violating Southern Illinois University’s (SIU) nondiscrimination policies by precluding from its membership those who engaged in homosexual conduct. The membership of the group, known as the Christian Legal Society (CLS), were required to subscribe to a statement of faith and agree to live by certain moral principles including one that forbade sexual activity outside of a traditional marriage. Following complaints to

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491 453 F.3d 853 (7th Cir. 2006).
SIU about the student group’s policy, the law school dean revoked the group’s registered student organization status. In response, the association sued SIU, seeking an injunction and claiming SIU violated CLS’s First Amendment rights to free speech, expressive association, and the free exercise of religion.\textsuperscript{492}

The U.S. Court of Appeal for the Seventh Circuit concluded that it was unlikely that the organization had actually violated any university policy, which was the justification for revoking its recognition. In addition the court found that the organization showed a likelihood that the university infringed on its right of expressive association.

After pointing out that the level of scrutiny that applies to the institution’s actions in this kind of case differs depending on the nature of the forum from which the speaker has been excluded, the court engaged in a discussion of the types of fora. The court acknowledged that the forum nomenclature is not without confusion. It discussed court decisions that speak of a "limited public" forum, sometimes using the phrase interchangeably with the "nonpublic" fora, which means that both would be subject to a lower level of scrutiny.\textsuperscript{493} But "limited public forum" has also been used to describe a subcategory of "designated public forum," meaning that it would be subject to the more rigorous strict scrutiny test.

The court asserted that once the government has set the boundaries of its forum, it may not renege; it must respect its own self-imposed boundaries. Though recognized student organization status is a forum of the theoretical

\textsuperscript{492} Id. at 858.
\textsuperscript{493} Id. at 866.
rather than the physical kind—a street corner or public square is the physical kind—the same rules apply. The court concluded that the question of whether SIU's student organization forum is a public, designated public, or nonpublic forum is an inquiry that will require further factual development, and that is a task properly left for the district court. Nevertheless the CLS had provided sufficient information in its pleadings to satisfy the court that it could succeed on its claim that SIU is applying its policy in a viewpoint discriminatory fashion.\textsuperscript{494} Such discrimination would violate any of the tests associated with forum analysis.

Another associational rights case in which viewpoint or content discrimination became a factor was \textit{Lark v. Lacy}.\textsuperscript{495} In that case, Andrea Lark, a student at Purchase College of the State University of New York and a member of the New York City Church of Christ, was suspended from classes for two semesters because she violated college policies by intimidating and harassing a fellow student into attending Bible talk meetings. Thereafter, SUNY denied the Church of Christ a license to conduct religious services on campus. After renting the Performing Arts Center several times to the church and a wide array of other non-student users, SUNY Purchase revoked the church's permit because of the group's religious activities.\textsuperscript{496}

The federal district court held that the institution violated the registered student organization's First Amendment rights when it revoked use of facilities based on the individual expressive activity of some group members.

\textsuperscript{494} \textit{Id.} at 867.
\textsuperscript{495} 43 F. Supp. 2d 449 (S.D.N.Y. 1999).
\textsuperscript{496} \textit{Id.} at 459-460.
The institution’s limited open forum for student groups prevented it from denying the use of the facilities to the organization with which the students were associated. The court reasoned that this constituted an exercise in content-based discrimination with respect to a designated public forum, which is unconstitutional unless narrowly drawn to further a compelling governmental interest. The court found that SUNY Purchase had exercised the “most blatant form” of viewpoint discrimination because it used its concerns about the practices of individual members, such as Andrea Clark, as justification to take action against the church by denying access to campus facilities.  

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Defendants have not demonstrated why the revocation of the COC’s license was necessary to advance the state interest of ensuring the psychological safety of SUNY Purchase students and protecting the learning environment on campus—or, for that matter, how the solution was narrowly tailored to achieve those ends. If individual members of the COC behave in inappropriate ways, as Lark did, they can be disciplined if they are students, or barred from campus if they are not.

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The court concluded that banning the entire student organization’s congregation went beyond what was needed to protect students from intimidation and harassment.

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497 Id. at 476.
498 Id. at 476.
Student Activity Fees

Student First Amendment rights in expression that result from the use of student activity fees have been discussed previously in the two U.S. Supreme Court decisions, *Rosenberger v. Rector and Visitors of the University of Virginia* 500 and in *Board of Regents v. Southworth*, 501 In *Rosenberger*, students sued the institution alleging First Amendment violations for its refusal to approve payment for the cost of a student publication. Ultimately, the U.S. Supreme Court held that the institution had discriminated on the basis of religious editorial viewpoints by refusing to authorize the payments. *Southworth* considered whether a public university could require its students to pay a fee that created the mechanism for the extracurricular speech in the first instance. The Court permitted the university to use student fees to sponsor speech on campus, but it added some strong limiting language to keep institutional authorities from imposing only institution-supported viewpoints on students. 502

Lower federal courts have applied the same forum analysis in deciding other issues related to the use of student fees. For example, in *Rounds v. Oregon State Board of Higher Education*, 503 when the Ninth Circuit U.S. Court of Appeals examined the issue of student fees being used to

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500 Id.
503 Id. at 844-845.
504 166 F. 3d 1032 (9th Cir. 1999).
support a public interest group, the court found that the university had created a limited public forum.

Students at the University of Oregon were required to pay incidental fees in order to attend. The fees were used to support Oregon Student Public Interest Research Group Education Fund, a nonpartisan organization funded by student fees and aimed at developing students’ potential to become educated and responsible citizens who are informed about the legislative process and political system. The fees were challenged in court by a group of plaintiffs, including former or current students at the University of Oregon and an association called Students for Legal Government. The group sued the state Board of Higher Education, alleging a violation of state and federal constitutional rights.

The Ninth Circuit Court of Appeals found that the university’s imposition of a mandatory fee to support a nonpartisan organization was not an infringement of the plaintiffs’ freedoms. The students’ rights were not violated because they were not compelled to associate with OSPIRG. The court found that the fees supported a broad range of activity generally related to the purpose of the university, and the university had an elaborate system in place to ensure that the fees would be used to finance programs that would aid the cultural and physical development of students. The court noted that the university had developed a method for securing the fees that included in the criteria a requirement that the organization engage in activities of common interest to students. Thus, by requiring that student groups follow the university’s process of qualifying for funds, the university has created a limited open public forum that
encouraged a diversity of viewpoints. Citing Rosenberger, the court stated that this process encouraged "a diversity of views from private speakers." The diverse nature of this limited public forum was evident from the budgets for the years at issue. More than eighty organizations representing a wide range of political and ideological views received funding.

In a federal district court decision involving a challenge to a mandatory student fee, the court followed the lead of the High Court in Southworth in applying forum doctrine. The court allowed the fee but required that the rules and policies on use of the fees be content neutral so that they would not be allocated in a discriminatory manner.

In Amidon v. Student Association of SUNY Albany, State University of New York (SUNY) at Albany collected a mandatory student activity fee, which was later turned over to the student association for allocation among student organizations. The mandatory nature of the activity fee was regularly approved by student referendum. Collection of the fee generated about $1.69 million annually. If the fee was not paid, the student's transcript would be withheld or the student would not be allowed to register for classes.

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504 Id. at 1039 (citing Rosenberger, 525 U.S. at 834).
505 Id.
507 Id. at 138. The legal context for understanding the events of the instant case was articulated in the Supreme Court's decision in Board of Regents v. Southworth, 529 U.S. 217, 229 (2000). The Southworth plaintiffs brought suit concerning the constitutionality of mandatory student activity fees. Plaintiffs complained that the combination of the mandatory fee and its use to fund extracurricular, political, and ideological speech, with which plaintiffs disagree, violated their First Amendment rights.
The students and one student organization, Collegians for a Constructive Tomorrow (CFACT), sought to prohibit the association from using advisory referenda in allocating the funds. They also challenged the association's procedures for gaining access to a referendum and the funding of the public interest group.508

Eric Amidon, a self-proclaimed conservative, and a fellow student, Winston Brownlow, formed CFACT on campus to counter what they perceived as a liberal voice of the group, New York Public Interest Research Group, Inc. (NYPIRG) on campus. Amidon, Brownlow and their organization brought an action against the university’s Student Association and its President, alleging these entities distributed mandatory student fee money to student organizations in a way that violated the First and Fourteenth Amendments. They sought an injunction prohibiting the use of referenda in the allocation process and the return of their student activity fee money.509

The federal district court noted that SUNY Albany had created a public forum in the form of a fund to support students’ free speech. The forum, however, is “more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."510 In such a forum, the U.S. Supreme Court has recognized that a denial of funding amounts to a denial of access. The court found that the use of advisory referenda in the allocation of the fee was unconstitutional as it was an “unjustified content-based

508 Id. at 138-144.
509 Id. at 137-144.
510 Id. (citing Rosenberger, 515 U.S. at 830).
criterion” that was used in a decision making process that needed to be viewpoint neutral.\textsuperscript{511}

The High Court in Board of Regents of the University of Wisconsin System v. Southworth,\textsuperscript{512} a case that was factually similar to Amidon, upheld the university’s right to collect student activity fees it charged students to fund a program to facilitate extracurricular student speech if the program was viewpoint neutral in the allocation of funding support. It allowed the university the freedom to impose a mandatory fee if the institution determined that its mission was well served by introducing its students to dynamic discussion on a broad range of issues.

“In Southworth, the Supreme Court explained that a public university student activities fund is not a ‘public forum’ in the traditional sense of the term, but public forum cases are instructive with respect to safeguards as to the expressive activities which objecting students are required to support.”\textsuperscript{513} Universities, therefore, should attempt to avoid restrictions that are not viewpoint neutral because they interfere with the use of such fees in a way that would be content based. The court in Amidon, like the Court in Southworth, expressed concern about the use of referenda to determine the allocation of the fee. The Amidon court prohibited the use of referenda in funding allocations as it was an unjustified content-based criterion at a time when the government was required to be viewpoint neutral. The student funds that were paid to the public interest group were refunded.

\textsuperscript{512} 529 U.S. 217 (2000).
\textsuperscript{513} Amidon, 399 F. Supp. 2d 136, 147.
One case involving the application of university fees in order to fund a student legal services office predates the leading constitutional decisions, *Rosenberger* and *Southworth*. Nevertheless, the decision of the federal appeals court is instructive, particularly since it rejected the notion that the institution’s governing board had created a forum through its initial funding for a student legal services office. In *Student Government Association v. Board of Trustees of the University of Massachusetts*, the court ruled that forum analysis was inappropriate because the Legal Services Office was not a forum for purposes of the First Amendment. In this case, the governing board of the University of Massachusetts established the Legal Services Office (LSO) in 1974 to provide legal advice, representation, referral services and educational services to the students. The board authorized the LSO to represent students in criminal matters and to engage in litigation against the university on their behalf. More than a decade later, the board rescinded the representation for criminal cases and for actions against the institution. Three students and three student organizations sued claiming First Amendment violations.

Although fora have traditionally had a physical location, the court took note that the Supreme Court had recently extended the concept of a forum to include intangible channels of communication. Even considering such an expanded view, the court could not see how the LSO would be a forum. The court noted that forum doctrine was developed to monitor government regulation of access to

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514 *Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473 (1st Cir. 1989).
publicly-owned real property for speech purposes. Therefore forum analysis was ruled inapplicable. The court found that the university had not tried to restrict the First Amendment rights of the students.

**Electronic Communication**

The decision involving the legal services office has an interesting parallel in a case in which a federal district court ruled that a university’s electronic communication system was not a public forum. In *White Buffalo Ventures v. The University of Texas at Austin*, the university blocked e-mails pursuant to its anti-solicitation and anti-spam policies. White Buffalo, which operates several online dating services, had obtained a list of e-mail addresses from the university pursuant to a request under the state Public Information Act. The company sent 55,000 unsolicited e-mails promoting its dating service to members of the University of Texas (UT) community. UT officials received a number of complaints regarding the spam, so UT notified White Buffalo and asked the company to stop spamming UT addresses. White Buffalo declined to do so, and therefore UT added a filter for all incoming traffic from a single address, thereby blocking any more email from the dating service. UT presented evidence that it did not block the emails because they were from a dating service but because they were spam. White Buffalo sued UT, seeking to enjoin it from blocking its mass commercial emails to UT students, faculty and staff. It claimed that

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515 Id. at 476.
the blocking violated its free speech rights under the First Amendment.

The federal district court analogized email in this case to the internal mail system in Perry Education Association v. Perry Local Educators’ Association in ruling that the information technology network at UT was a nonpublic forum.

UT contends Perry controls in this case because its information technology network is primarily designed to further interests of the university and to facilitate communication between university community members. According to UT, the fact its network users can send and receive email to those outside the system does not render the network public, just as the teacher’s use of the mail system for some private correspondence did not render the internal mail system in Perry private.517

Moreover the court upheld the validity of the UT’s non-solicitation rules and anti-spam policy under the High Court’s test for constitutionality of commercial speech regulation. In so doing, the court found that the university asserted a substantial government interest in managing and blocking unsolicited commercial email. UT’s spam-blocking system was sufficiently narrowly tailored in light of the current technology. Therefore, UT’s policies did not violate the First Amendment. Because of this

517 Id. at 22.
holding, the court found it unnecessary to decide whether UT's network constituted a nonpublic forum.\textsuperscript{518}

**Summary**

Levi’s theory of how a legal concept is developed established a multi-stage process that can be used to assess how the law has progressed. Chapter 4 of this dissertation illustrated how the birth and development of the public forum tracked the stages of Levi’s development of a legal concept. In the first stage, Levi discusses the creation of the legal concept, and afterwards, the concept is built up as legal cases are compared. This research found that the first stage culminated in the 1939 landmark U.S. Supreme Court decision in *Hague v. CIO*, which created the protection for freedom of speech in an open space.

At the second stage of development, Levi’s concept more or less became fixed, and the Court settled on a name for the concept. During this second stage, courts continued making decisions that helped to shape the concept during its formative years. In 1972, the concept acquired the name of the “public forum doctrine.” Consistent with Levi’s theory, further reasoning by example continued to allow the classification of items as inside or outside of the public forum.

Courts have facilitated the second stage of development of the public forum doctrine through

\textsuperscript{518} In *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997), the court held the University of Oklahoma computer and Internet services do not constitute a public forum because they are lawfully dedicated to academic and research uses. In addition, the court said that the state has as much of a right as a private owner of property to preserve its property for the use for which it was dedicated.
identifying a variety of forum types. Each forum classification by the U.S. Supreme Court was analyzed in Chapter 4. In Chapter 5, this research analyzed how the public forum classifications were applied in higher education settings involving free speech and association rights in conflict with institutional policies and practices.

The forum classifications included a traditional public forum, a designated public forum, a limited public forum, and a nonpublic forum. At Levi’s third stage of concept evolution, he suggested that the concept begins to break down, leading to a loss of viability. In the context of public higher education, the forum doctrine has remained viable. There are, however, some fractures that have begun to occur in the application of forum analysis to public higher education and these fractures, together with emerging applications, will be treated as exploratory themes in the final chapter of this study.

Although four categories have been used by courts to apply the public forum doctrine—traditional, designated, limited and nonpublic for a—when courts applied the doctrine to public institutions, no cases were found in which judges identified any portion of the campus as a traditional public forum. Traditional fora, which includes sidewalks, streets, parks and plazas that have historically been open for expressive activities, have received the greatest amount of constitutional protection.

Closely related to the traditional public forum is the designated public forum, which includes spaces that the institutions have set aside for free speech on their campuses, either through custom and practice or by express institutional policy. Although there were several cases in
which the courts did not use the language of the designated public forum, judges nevertheless invoked the designated forum because they used such terms as “created” and “promulgated” to describe how the forum came into being. When judges recognize a designated public forum, they insist that institutions provide free speech venues to groups and individuals equally, without regulations on the content of their views and messages. In other words, institutional regulations on the designated public forum must be viewpoint or content neutral.

In such settings, courts also require that the regulation on speech be narrowly tailored to serve a substantial government interest, and leave open alternatives channels of communication. In relying on the reasoning of the designated public forum, judges have invoked the same free expression standards that would apply to the traditional public forum while remaining sensitive to the unique mission of higher education institutions.

The outdoor areas of campus, especially those outside of the student centers and on public walkways, are often regarded as public fora because these areas play a key role in promoting student activities and in offering a wide variety of student services. If speech-related activities in these areas must be restricted, the institution should have some compelling reasons for doing so.

Outdoor protests that have erupted in designated public fora on campus are protected, even though institutions may place reasonable time, place and manner restrictions on such activities. Although open greenspace is often regarded by judges as within the concept of a designated public forum, outside speakers may be prohibited under a uniform campus policy and certain areas may be
restricted because to do otherwise would turn the entire campus into a place of disputation.

The limited public forum is the third category of the forum doctrine applied to higher education settings. Though it bears some resemblance to the designated public forum, there are some distinct differences. This category allows institutions to limit the groups who use the forum through granting priority to those who are affiliated with the institution—faculty, staff, students, administrators and alumni. In addition to limiting the participants, the institution also can limit the subjects that are discussed, but the restrictions must be applied evenhandedly to all who are similarly situated.

Some courts have used the terms limited public forum and designated public forum interchangeably. While both were established by government designation of an area that the public can access for expressive purposes, there is a difference that should be noted. The main difference between the two fora is that the limited public forum is created by opening up an area or facility on government property by government policy or practice to be used by a limited population, such as a student organization or for a limited purpose. A designated forum is created when the government opens a forum up to general use by the general campus community.

The final category of the public forum doctrine is the nonpublic forum, which are areas of government-owned property that are not traditionally left open for public communication. Usually any government property that does not fit into the other three categories gets placed into this category. The legal standard applied to government regulations of speech is one of reasonableness. The
regulation also must not be an effort to suppress expression, nor should it be based on the viewpoint of the speaker. For all of these reasons, expression in the nonpublic forum receives significantly less judicial protection. Some of the nonpublic areas recognized by the courts in higher education include residence halls, classrooms, and office buildings, all of which have been set aside for an express purpose that is congruent with the institution’s primary mission and which the institution can restrict in order to realize that mission.

**Conclusion**

The application of the forum doctrine to public higher education includes many unique applications that require judges to balance the individual’s right to free speech against the institution’s educational mission. Forum analysis offers judges an opportunity to consider the context in which the speech or association interest occurs before deciding on whether the content of the speech is protected under the First Amendment. Because free speech may arise in a range of venues in a higher education setting, judges confront a variety of contexts for the application of forum analysis. These unique contexts have been addressed in this chapter through an analysis and synthesis of the pertinent case law.
CHAPTER 6

SUMMARY AND CONCLUSIONS

Colleges and universities are regarded as pillars of free speech and free inquiry. Administrators who make rules and policies for the institutions, however, have occasionally placed restrictions on the location or variety of expression by their students. As a consequence, students at many public higher education institutions have taken their claims of constitutional infringement to court. When this happens, judges deciding these cases have balanced the students’ constitutional freedoms against the institutional prerogatives to make rules and policies that are in the best interests of the institution. When students have claimed an infringement of their freedoms and liberties under the First Amendment, the judges often have employed the public forum doctrine as a lens through which they could gain a fair perspective of the needs of both students and administrators.

A primary purpose of this study was to identify and analyze the judicial precedents that have applied public forum analyses to public higher education in order to delineate the balance between student rights to freedom of speech and the authority of institutions to restrict the use of campus venues and facilities for expressive purposes. The importance of free expression to this nation was captured in the U.S. Constitution in 1791 with the addition of the First Amendment, which explicitly guaranteed the freedoms of speech, press, religion and assembly.

Protection of an individual’s freedom of expression in society was recognized in a series of early 20th Century
cases interpreting the First Amendment. Since then, courts have recognized that these liberties are central to a democracy. As a result, free speech is a fundamental part of student life and the institutional culture in public colleges and universities. Notwithstanding these free speech rights, administrators at public higher education institutions have been granted rulemaking authority from the state to make decisions that are in the best interests of the institution and that are consistent with the institution’s mission. In providing leadership for their institutions, administrators have used their authority to help eliminate disruptions and maintain order while fostering student development.

This dissertation used legal-historical research methods to examine the public forum doctrine as interpreted by state and federal courts within the United States. This research traced the evolution of the public forum doctrine from the beginning, with its roots in the 19th Century when courts did not grant protection to such spaces. It also covered the development of the doctrine in the U.S. Supreme Court and its application to public higher education in particular.

To accomplish these objectives, the research for the study applied computer-based legal research methods using the LEXIS electronic research database to locate the primary sources—U.S. Supreme Court cases applying public forum analysis. This was followed by a search for all cases in which the courts applied the public forum doctrine in resolving legal challenges to restrictions on student free speech in public higher education institutions.

All cases were analyzed based on the application of the public forum doctrine. Cases that applied to higher
education institutions were categorized according to the type of venue or the type of activity involved. The author analyzed the development of the public forum doctrine using Levi’s three-stage theory of legal concept development. In the first stage, the concept is created and courts seek to name it; in the second stage, courts settle on a name and refine the concept through application in other cases; and in the third stage, the concept breaks down.

**Public Forum Analysis**

Two research questions were addressed in this study.

**Research Question No. 1:**

**How has the public forum doctrine evolved and developed in decisions of the U.S. Supreme Court from 1897 to 2003?**

Public forum doctrine evolved out of First Amendment jurisprudence. The early seeds of the doctrine were sown in the 19th Century when state property rights trumped individuals’ First Amendment freedoms. In 1897, the most significant case of that era, *Davis v. Massachusetts*, encapsulated the position of the courts of that period. In that case, the U.S. Supreme Court viewed the public square as property owned by the state that gave the state the authority over the types of activities that could be conducted on those grounds. In the latter part of the 19th Century, gathering on municipal streets was restricted by the law of unlawful assembly, and groups like the Salvation Army that sought permits to parade on streets were often prohibited from engaging in these assemblies.

Protection for speech in the open public forum, however, was recognized under the First Amendment early in the 20th Century, after the U.S. Supreme Court refined its
First Amendment analysis to make it more communicator-friendly. Several Court interpretations of First Amendment tests combined to contribute to the notion of an open public forum. The clear-and-present-danger test allowed suppression of speech only if it would lead to dangerous societal consequences that are imminent. By limiting suppression to these instances, it eliminated convictions of people for speech that was not imminently dangerous, thereby removing a chilling effect on others who sought to express themselves. The incorporation doctrine allowed the First Amendment to apply to the states, delimiting the state’s power over individual constitutional rights. This action opened the door to free speech in the states by making the evolving protections of the First Amendment applicable to state laws and state action. The preferred-position doctrine recognized freedom of speech as a fundamental right, extending protections to people who appeared in court in the 1930s claiming the protections of the First Amendment.

As a result of the application of these doctrines, the First Amendment rights of speakers rose in prominence and consequently received greater protection from state and federal courts. A key decision reflecting the expansion of free speech rights was the 1939 case of Hague v. CIO, in which the U.S. Supreme Court recognized the First Amendment rights of speakers to express themselves on government property such as streets, sidewalks and public parks. In this landmark case, the Court ruled that government could not prohibit speech-related activities such as demonstrations, leafleting, and speaking in areas traditionally provided for public speech.
Levi’s theory on the evolution and development of a legal concept is illustrated in the Hague decision. The first stage encompasses the birth of a legal concept, which is specifically what occurred in the Hague case, although the case does not use the “forum” terminology. The rationale for the concept’s creation can be found in the text of the decision and in the use of the case as a precedent for protecting First Amendment rights of individuals speaking on government property.

In the period immediately following Hague, the Court decided several cases involving outdoor venues that included government prohibitions on speech. The Court voided all of the public communication restrictions, which included prohibitions on the distribution of literature in streets and through door-to-door visitations. In the next decade, the Court similarly rejected door-to-door solicitation by non-commercial entities such as the Jehovah’s Witnesses.

The Court also refused to allow licensing and permitting authorities arbitrary control over expression in public streets and parks. Those decisions reinforced the Hague notion that government officials cannot refuse to license public speakers because they disagree with the speech, but they could regulate noise levels to maintain peace. During this period, the Court invalidated local laws that restricted anonymous handbilling, public speaking, and related expressive activities. By the 1960s and 1970s, the Court had begun interpreting civil rights cases in a manner that was increasingly protective of the speakers’ right to protest racial discrimination.

During this early period in the life-cycle of a legal concept, Levi pointed out that courts will apply the
concept while fumbling for a phrase that characterizes it. When the public forum doctrine was initially formulated in the Hague case, it was not immediately called by that name. The phrase “public forum” was first used by the Court in 1972.

Since the birth of the public forum doctrine, judges have had to determine whether the government property where the speakers’ activities took place was a public forum that was open for people to speak or gather. In Levi’s second stage, the concept becomes more or less fixed, but further reasoning by example continues to classify items as inside or outside of the concept. True to Levi’s theory, in subsequent cases, the U.S. Supreme Court divided the forum doctrine into four classifications: (1) traditional public forum; (2) designated public forum; (3) limited public forum; and (4) nonpublic forum. Once elaborated into these categories, the doctrine has been used in numerous cases when courts were called on to determine the extent of government power to limit speech on public property.

Although in the 1980s the Court applied forum analysis in a way that tended to grant deference toward governmental authority in controlling open, public spaces, its position in the 1990s appeared to moderate this trend. In the latter period, the Court appeared to tip the balance between individual rights and governmental interest back toward greater consideration for the fundamental rights of the speaker when delineating the government’s role in managing its property.

There is no indication of a breakdown of the concept, as predicted for the third stage of Levi’s concept development theory. Fractures may be occurring, however, in various areas of the doctrine’s application. If there are
any fractures, they are likely to be hidden in the details of the judicially-articulated legal standards for determining the type of forum at issue—traditional, designated, limited and nonpublic.

The traditional public forum was defined by the objective characteristics of the property—whether it is a public area that traditionally provided for speech. Examples of these public areas include historical places of assembly and debate such as streets, parks and sidewalks. Through tradition, the property was devoted to public assembly, debate, demonstration and leafleting. Designation of an area as a traditional public forum places significant limitations on the government when it attempts to prohibit speech or speech related activities in that setting.

The regulation of a traditional public forum is subject to heightened judicial scrutiny, which places a substantial burden on the governmental entity to justify the imposition of any free-speech limitation. This means that in order to survive a challenge in the courts, the regulation: 1) must be justified without reference to the content of the regulated speech; 2) must be narrowly drafted and tailored to serve a significant government interest; and 3) must leave open sufficient alternative channels of communication for the information.

The second category of the forum doctrine was termed a designated public forum because it is created by governmental designation through express policy, custom or practice. Public property that is not considered part of the traditional category, but is treated by the government as a site suitable for communication, is considered a public forum by designation. When a governmental entity can be said to have created a designated public forum, the same
standard of judicial scrutiny as that applied to a traditional public forum is applicable to government restrictions on free speech. The major difference between a traditional and a designated public forum is that the latter must be created by the governmental entity either through an express policy providing for an open forum or through a pattern of governmental policy and practice that supports an inference of a governmental intent to establish such a forum.

Although the Supreme Court has defined a “designated public forum,” it has been more inclined to recognize instances involving a third category, a “limited public forum,” which is one that the government has designated for the purpose of free expression on a more limited basis. When the government does open property for expressive purposes, the property is subject to the same First Amendment obligations regarding regulation as the traditional public forum, with certain limitations. This “limited” open forum may be opened for only certain types of groups or for certain types of expression, depending on the character of the property. In a limited public forum, the government may limit access to certain speakers or certain subjects, and the restrictions must be applied evenhandedly to all similarly situated parties. Although courts have not uniformly applied the difference, it appears that while restrictions on speech in a designated forum are subject to heightened judicial scrutiny, restrictions in a limited public forum are reviewed for viewpoint neutrality and to determine whether the restriction was reasonable in light of the purpose served by the forum.
The fourth category, called the nonpublic forum, is judicially recognized as an area that is not historically left open for public discourse, and regulation of it is approved as long as there is a rational basis for that regulation. As a consequence, a nonpublic forum is significantly less protected by the First Amendment. Government may even engage in viewpoint discrimination in these domains by showing that the disparate treatment is reasonably related to the property’s function.

To summarize, the public forum doctrine evolved out of a variety of constitutional law principles in the early 20th Century, developing along the lines of Levi’s theory on the genesis and evolution of a legal concept. In the first stage of development, analysis of the context of speech and assembly activities was introduced in Hague v. CIO in 1939. Using a line of cases immediately following Hague, the Court began to elaborate on the doctrine, although there was no official name for it. The Court continued to grapple with a word or phrase to name the new concept. In the second stage of development, “public forum” doctrine was the phrase that the High Court settled on to identify the new legal concept, and subsequent cases helped to delineate it, classifying the cases according to the judicially-defined categories of traditional public forum, designated public forum, limited public forum and nonpublic forum.

Research Question 2
How has the public forum doctrine been applied in reported state and federal cases involving the First Amendment free speech and association rights of students at public higher education institutions in the United States?
Using Levi’s theory of legal concept development, the public forum doctrine has passed through his second stage, but it does not appear to have reached the third stage because the concept remains viable and has not yet broken down. However, as state and federal courts below the level of the U.S. Supreme Court apply the doctrine to cases involving public higher education institutions, there is evidence of some confusion in the application of the legal standards associated with the categories of public fora.

The U.S. Supreme Court has recognized the importance of traditional public fora by applying the most exacting scrutiny to keep the government from prohibiting expressive activities in these settings. However, although a few cases involving higher education institutions implicate a traditional public forum, judges have shown a reluctance to designate a “traditional public forum” in the context of higher education institutions.

The designated public forum has received much more judicial attention than the traditional public forum in terms of application to public college and university campuses. The reason for the increased emphasis on designated fora in higher education cases appears related to the unique mission of higher education, which, while characterized as a “marketplace of ideas,” remains principally dedicated to an educational function that may outweigh the individual’s First Amendment rights in the eyes of the judiciary.

Nevertheless, some areas of a public institution’s campus cannot escape a judicial characterization as designated public fora. Even when the institution has formulated no express policy for the campus use, judges have found some of the areas of campus to be designated
fora by virtue of the institution’s acquiescence in allowing a range of student free speech within the particular venue. In these “designated” settings, the institution must be sure that its policies regulating free speech meet rigorous constitutional tests.

Many of the outdoor areas of campus, especially outside of the student centers and on public walkways, are regarded as public fora because they help to fulfill the institutional mission by promoting student activities and are characterized by diverse student uses. If speech-related activities in these areas must be restricted, the institution must have a compelling reason for doing so. When outdoor protests have erupted, this speech also has been protected in designated public fora, although institutions may place reasonable time, place and manner restrictions on such activities.

Courts that once used the terms limited public forum and designated public forum interchangeably in application to selected areas of the public institution’s campus now distinguish the categories. Categorization of a “limited public forum” allows an institution to limit the groups who use the forum through granting priority to those who are affiliated with the institution—faculty, staff, students, administrators and alumni. In addition to limiting the participants, the institution also can limit the subjects that are discussed, but the restrictions must be applied evenhandedly to all who are similarly situated.

The final category of the public forum doctrine, the nonpublic forum, areas of government-owned property that are not traditionally left open for public communication, applies a standard of reasonableness rather than compelling interest. The regulation also must not be an effort to
suppress expression, nor should it be based on the viewpoint of the speaker. Some of the nonpublic areas recognized by the courts in higher education include residence halls, classrooms, and office buildings, all of which have been set aside for an express purpose that is congruent with the institution’s primary mission and which the institution can restrict in order to realize that mission.

**Key Conclusions**

1. **Administrators of public colleges and universities have broad authority to make rules and regulations that are consistent with institutional mission and in the best interest of the campus community.**

   In *Widmar v. Vincent*, the U.S. Supreme Court acknowledged that academic communities are special environments where the educational mission is paramount. [a] university differs in significant respects from public forums such as streets or parks or even municipal theatres. A university’s mission is education, and the 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.

   In the cases that were reviewed in this study, broad authority to implement policies that may have an impact on student free speech was consistently rationalized on the

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520 *Id.* at 268 n. 5 (1981).
administrator’s responsibility for campus safety and security and on the administrator’s accountability for attaining institutional objectives. Specifically with respect to student speech, there was substantial judicial support for the view that institutions may act to protect students or the institution from the potentially harmful consequences of speech that may reasonably be forecast to create substantial disruption or material interference in the institution’s operation.

2. Despite broad authority, administrators at these institutions are constrained in their policy-making and rule implementing functions by fundamental principles of the First Amendment.

The First Amendment guarantees of freedom of speech, press, association and religious liberty are extended through the application of the Fourteenth Amendment to state agencies such as public colleges and universities and constitute limits on administrative authority. State and federal courts regularly hear student challenges to policies that may directly implicate free speech rights or that indirectly “chill” the exercise of First Amendment freedoms.

3. Forum analysis ensures that administrators may exercise broad authority in a variety of campus settings that are set-aside for purposes essential to realizing the institution’s primary mission, but not without designating some areas of the campus that grant essential free speech and association rights to students and faculty.
This research confirms that judges have invoked forum analysis in order to distinguish the level of free speech protections applicable to various venues on a public institution’s campus. At the most fundamental level, judges have insisted that some areas of the campus must be set aside in order to ensure the maximum level of free speech protection is available to students in those venues.

Schauer emphasized that courts need to consider the special setting of higher education when assessing the best interests of students. However, he found public forum doctrine to be troublesome due to a lack of a “constructive equivalent” of the traditional public fora on the campus of the public higher education institutions, and contended that the institution should have the same type of freedom for students wherever students congregate on campus.

Higher education cases reviewed in this study confirm that judges are not prepared to describe areas of a higher education institution’s campus as a traditional public forum, however, the constructive equivalent to a traditional public forum, the designated public forum, has been recognized in selected higher education decisions. From the student rights perspective, the concept of designated public forum is essential to insure that some areas of the campus are available for the range of student free speech activities that create the marketplace of ideas so essential to the larger mission of an institution. From the perspective of the institution’s interest, designated areas for student free speech necessarily communicates that there are other areas of the campus in which limited open fora or closed fora are present.

See Schauer, supra note 139.
4. The protection of student speech on campus is influenced by the context in which the speech occurs.

This study confirms that judges often begin their inquiry concerning alleged violations of student speech rights by analyzing the context and the application of an institutional rule or policy. Using forum analysis, courts may look primarily and exclusively at the location where the speech occurred to determine the level of protection it will be afforded because the categorization of the type of space or venue will determine the type of forum and the degree of free speech protection.

Gaal argued that courts should abandon the effort to use categorization to resolve the problems associated with expressive activity on publicly owned property.\textsuperscript{522} She proposed to replace categories of fora with an approach that would apply a single test to all laws restricting expression on government-owned property.

This research established that Gaal’s approach is not the direction judges have adopted in analyzing free speech cases involving higher education institutions. In cases involving public higher education institutions, the judicial determination of the type of forum will make a difference in the legal standard that will be applied. For example, areas categorized as a designated public forum will be subject to strict judicial scrutiny, which requires the institution to demonstrate a compelling interest for the rule and a requirement that the rule be narrowly tailored. In nonpublic forum cases, on the other hand, courts base their decisions on the reasonableness of the

\textsuperscript{522} See Gaal, \textit{supra} note 135.
regulation. The judicial approach ensures that some areas of the public institution’s campus will receive substantial protection for the exercise of free speech, while granting broad discretion to administrators in regulating those areas that are set-aside for other uses congruent with the institutional mission.

5. **Institutional administrators may exercise the greatest control over areas of the campus that are characterized as closed forums.**

   This study affirmed that when a judge finds that student speech occurred in a nonpublic forum, the institution need have only articulate reasonable grounds for the restriction of that speech. O’Neill noted that judicial scrutiny is substantially relaxed when the setting for the speech is a nonpublic forum.\(^5\) In a closed forum, institutional administrators obtain maximum control over student communicative behavior because the student’s free speech is subordinated to the institution’s interest in realizing its mission. For example, a classroom is a closed forum, because it is intended for other purposes than the exercise of student free speech rights.

   Regulations governing closed forums need only be reasonable. As long as the institution’s effort to suppress expression is not based on opposition to the speaker’s views, institutional administrators will have substantial discretion to limit student speech. The cases cited in this study repeatedly affirmed that institutional control over access to a nonpublic forum is paramount as long as

\(^5\) See O’Neill, supra note 112.
the regulations are reasonable in light of the purpose served and they are viewpoint neutral.

6. The distinction between designated and limited open forums remains ambiguous, but lower federal courts have begun to suggest differences that have policy consequences for public higher education institutions.

Fischer pointed out the ambiguity in the judicial characterizations of designated and limited open forums. This study found differences in the way judges apply the concepts of designated open forum and limited open forum. Though some courts have used the terms interchangeably, the two have been distinguished in selected decisions. Both were established by government designation of an area that an individual can access for expressive purposes.

Based on this research, the most pervasive distinction between a designated open forum and a limited open forum is that the limited open forum involves a standard of review that is less stringent than that applied under the compelling interest test applicable to a designated open forum. The limited public forum was created by opening up an area or facility on government property by government policy, custom or practice to be used by a limited population, such as students, or for a limited purpose, such as ensuring diverse viewpoints among student groups.

It is clear that limitations on free speech in a designated open forum would prohibit content based restrictions on speech, because such a forum requires a content-neutral policy and allows only for reasonable time, place and manner of speech restrictions by institutional

524 See Fischer, supra note 124.
administrators. However, judges addressing higher education cases appear to be making a subtle distinction between content and viewpoint in cases involving the category of a limited open forum. In the limited open forum, some broad based, content restrictions may apply, but viewpoint distinctions would be impermissible. In order to clarify this difference between the two forum categories, further judicial guidance will be needed.

7. At public higher education institutions, content-based and viewpoint-based regulations on public forum speech are disfavored in the law.

Restrictions on content and viewpoint in open forums raise judicial concerns about restraining freedom of speech and are akin to prohibited prior restraint and censorship policies. Consequently, judges prefer regulations that are neutral as to the content of the speech and avoid singling out a particular viewpoint for exclusion from a forum.

When a designated public forum is created, content-based restrictions on that forum are unlikely to be tolerated by courts. However, if the forum is characterized as a limited forum, some content based restrictions may be permissible in the interest of furthering the institutional aims for which the forum was created. What is prohibited in the limited open forum, however, is a regulation that would prohibit a particular viewpoint relevant to the specified content of the limited open forum. This distinction, first articulated in Rosenberger, remains difficult to delineate as a matter of policy, and even harder to effectuate in practice.

Schauer viewed this as an issue of fairness that implicates access to the forum. He contended that the
complaint in the typical case is about discriminatory treatment. In *Rosenberger*, only recognized student organizations had access to the institutional forum created to fund student activities. When one student group was denied funding on the basis of espousing a religious viewpoint, that group could point to other student groups with a religious orientation in order to demonstrate the discriminatory impact of the policy.

8. **Courts have required that regulations on public forum speech be narrowly tailored to achieve a compelling state interest.**

BeVier contended that the goal of judicial review in public forum cases was not to promote freedom of expression, but to reduce the chance the public forum regulators would abuse their governmental power. She defended the judicial approach as a way to reduce the chance of government abuse. In relating this notion to higher education institutions, it is clear that the administrators and others who make rules and policies for the institutions must be careful rule makers and implementers. Regulations applicable to what may be characterized as a designated or open forum should not be broader than necessary to achieve a governmental objective. If the regulation is regarded as imposing limitations on speech in a public forum, then courts will look to see if the regulation is addressing a compelling interest of the institution and whether the regulation infringing on speech

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525 See Schauer, *supra* note 139.
526 See BeVier, *supra* note 125.
is constructed narrowly to achieve an important institutional goal without unduly restricting free speech.

9. The judicial characterization of student publications as limited open forums is currently undergoing legal challenge.

This study confirmed that while student publications have been historically characterized as within the limited public forum category, recent decisions applying the Supreme Court majority’s reasoning in Hazelwood to higher education create uncertainty about the continued application of this standard to these publications. The particular issue centers on whether the U.S. Supreme Court will extend to public college and university administrators the same deference it granted to public school administrators in applying the public forum analysis to newspapers sponsored by public schools.

Fiore contended that an extension of the Hazelwood rationale to student publications at public higher education institutions would be detrimental to speech and press freedom and inconsistent with the broader aims of public higher education. He argued that broad administrative discretion to censor or restrict the content of a college or university newspaper would have a chilling effect on the “marketplace of ideas philosophy” that is embedded in the nation’s higher education institutions.

No one can be certain of the outcome of this scenario, but Fiore makes a significant point. Granting discretion to control the content of student newspapers through an administrative review and approval process could have the

527 See Fiore, supra note 147.
effect of discouraging student free expression.
Administrative oversight may chill student press freedom to
the extent that it diminishes the notion of the higher
education institution as a marketplace of ideas.

10. The conflict between the rights of the students to free
expression and the rights of the public institution to
govern is dynamic and ongoing.

    Forum analysis remains a primary test for resolving
the conflict between a student’s right to free speech and
association and the public higher education institution’s
authority. Students at public higher education institutions
are the beneficiaries of significant freedom of expression
on campus as a result of judicial intervention and
application of the public forum doctrine. In place of the
traditional forum, courts have recognized designated public
forums and limited open forums on campuses. Consistent with
their institutional missions of free inquiry and open
accessibility, many public institutions allocate spaces on
campus primarily for students to gather and exchange ideas.
In other instances, courts have found a campus area to be a
designated open forum based on custom and practice rather
than express institutional designation.

    Once a court acknowledges a designated open forum, it
applies a rigorous speech-protective standard similar to
the U.S. Supreme Court-endorsed standard for a traditional
public forum. Even the limited forum, which may place
broader restrictions on use of the forum, provides student
protection for speech by prohibiting viewpoint-based
discrimination. The public forum doctrine restricts
government regulation of student speech. If there is a
need for regulation, courts have repeatedly expressed a
preference for rules and policies that are content neutral and that are narrowly tailored to achieving the specific objectives of the institution while ensuring ample alternative venues for student expression.

Nevertheless, forum analysis may also be interpreted to favor the higher education institution’s authority. Downs expressed concern that government would use forum doctrine to place limits on the uses of its property in a way that would restrict free speech rights. By declaring property “off limits” public colleges and universities might limit open forums for student use, making campuses more like the restrictive environments of military bases or airport terminals. This concern reflects the possibility that institutions will implement a limited number of “free speech zones” on the campus and restrict free speech in other settings.

Farber and Nowak argued that the method of analysis using the doctrine has led to confused opinions and a disregard for First Amendment values. They contended that the Supreme Court’s focus on the doctrine has distracted attention from the First Amendment values at stake in a given case. The research conducted in this study confirms that the application of forum analysis to public higher education institutions results in inconsistencies in the individual case and involves an on-going and dynamic balance between institutional interests and individual rights.

This study has chronicled the judicial emphases on analyzing the particulars of the institutional policies and rules, which may result in a de-emphasis on a student

\[528\] See Downs, supra note 107.
\[529\] See Farber & Nowak, supra note 108.
rights-institutional balance that is First Amendment-focused. The judicial tests examine the degree to which the rule or policy proscribes content and whether the regulation is sufficiently narrowly written to achieve the significant interests identified by the institution. By focusing the analyses on the appropriateness of the regulation of free expression, it may be that less judicial effort is expended on assessing the value of free expression and the importance of its role in public higher education institutions.

This does not mean that there is no balancing of interests in the application of the public forum doctrine to higher education institutions. The current method of choosing a category and applying a legal test inherently includes some form of balancing. However, the categorization process has left courts and commentators wondering at times whether public forum analysis is the best legal tool for settling virtually all disputes involving student expression rights at campuses that are exalted as marketplaces of ideas. The courts have intended forum analysis as a way to grant both sides an appropriate balance of power depending on the character of the venue. It should be anticipated that as new venues are created and new controversies arise forum analysis will result in new and unanticipated applications with implications for institutional authority, individual freedom, and the viability of the doctrine itself.

**Recommendations to Institutional Policy Makers**

Based on the principles and rulings gleaned from the public forum case law, several recommendations for administrators have emerged.
1. Make as few regulations of student speech as necessary. Ideally, the institutional setting would be free of student speech regulations, and students would be free to explore any idea or topic without regard to its injurious effects on the campus. It is not possible, however, to be free of all speech regulations and maintain an environment that is safe, secure and conducive to the institution’s mission.

2. If administrators must make policies that affect speech, their best legal footing would be with those policies that do not restrict the content of speech. The policies must not discriminate against speakers or their views. Legitimate regulations on speech would include those that are clearly tied to a significant interest of the institution. An example would be a regulation made to enhance campus security, prohibiting activities that may result in substantial disruption or material interference on the campus. Policymakers are on better footing when their regulation on speech does not turn out to be a total ban on any particular venue or type of activity.

3. Policymakers must make certain that students have alternative outlets for their communications outside of the areas restricted by the rules. Designate certain areas of the campus for free speech use by members of the campus community.

4. Speech that occurs on sidewalks, plazas and streets on the periphery of the campus.

5. Regulations regarding speech must not favor one campus group over another.
6. Administrators at public institutions should not make rules that prohibit religious worship and teaching in campus rooms that are open for student groups. Neither should they restrict the content of speech to eliminate religious terms.

7. Administrators can limit the locations, areas, days and times that preachers can preach in the open spaces on campus, but they cannot remove all areas. Neither can they be too restrictive regarding public areas, such as plazas and quadrangles, where preachers and others have traditionally been free to speak, display material, and hand out literature.

8. On campuses and areas of campuses that are considered limited public fora, some of the limits that administrators can use include limiting the amount of space (or the number of spaces in some instances) provided for free expression and giving space priority to people affiliated with the institution, including students, student organizations, faculty and staff, so that they get first choice of access to communication fora over those outside of the campus community.

9. When regulations are needed in any form on campus, administrators need to draft restrictions with specificity and notify people in various ways of the regulations. Further, the regulations should not extend beyond the time, place or manner of the speech.

Recommendations for Future Research
Future research on the role of the public forum doctrine in higher education should examine the case law that affects individuals other than students to gain a more thorough and comprehensive understanding of the impact the doctrine. One area of interest that would shed additional light on the problem involves the faculty. Future studies could analyze the extent of the faculty free expression rights at public institutions. Because faculty members enjoy academic freedom, an infringement on their freedom within the academy would pose a separate set of issues that are more complicated than the analysis of student speech rights on government property. The application of present-day public forum principles would create quite a dilemma for the courts. Judges may have to choose between the conflicting aims of academic freedom and important governmental interests, such as institutional governance or autonomy. Nevertheless, the results of such an investigation could provide a more complete picture of public forum application in a higher education context.
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