Assessing Constitutional Challenges to University Free Speech Zones Under Puhlic Forum Doctrine

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TABLE OF CONTENTS

INTRODUCTION

In September 2000, a student at New Mexico State University was arrested after disobeying a police officer's request to stop leafleting outside the student union because it was not an "open forum area."[1] At the University of Mississippi in the same year, a student was arrested for protesting the student newspaper outside the school's only designated speech area.[2] In November 2001, police ejected a West Virginia University student from a Disney on-campus recruiting seminar because the student had previously handed out anti-Disney flyers outside of the designated zone.[3] And in 2002, twelve Florida State University students were

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1. *See* Randal C. Archibold, *Boxing in Free Speech*, N.Y. TIMES, Apr. 8, 2001, § 4A (Education Life Supplement), at 23. The student, an opponent of the university's policy of maintaining "free speech zones," was passing out leaflets to promote his free underground newspaper. *Id.* The charges were later dropped, but the American Civil Liberties Union ("ACLU") sued on behalf of the student. *Id.* The suit was settled later that year, resulting in the abolishment of the "free speech zones" as well as a new policy clarifying free speech rights. *Id.*

2. *See* Mary M. Kershaw, *Free Speech Has Its Place—or Several—on USA's Campuses*, USA TODAY, May 13, 2002, at 6D.

3. *See* Michael A. Fuoco, *Students Protest WVU Free Speech Zones*, PITT. POST-GAZETTE, Feb. 13, 2002, at A-2.

arrested for trespassing after refusing to move their protest from in front of the administration building to a less visible "demonstration zone."[4] Incidents such as these, involving university policies that limit student expression to defined areas of campus,[5] have caused an outcry among students,[6] university officials,[7] and civil liberties groups,[8] who have derided such zones as incompatible with the constitutional guarantee of free speech.[9] This popular opposition has pressured some universities to change their speech zone policies.[10] Universities have also abolished their free speech zones due to the threat of lawsuit, or as a condition of settlement of lawsuits.[11] These factors may explain why there have been few court decisions on the constitutionality of these restrictions.

Every university is unique, as is every regulation creating a free speech zone. However, these zones do raise common questions. The First Amendment is clearly implicated when a public university regulates student speech, but since the legality of speech zones has not seriously been tested it is uncertain what legal framework would be used to analyze restrictions on that speech.[12] This Note analyzes the

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4. *See* Alisa Ulferts, *Keeping Protesters in One Area Isn't Free Speech, Critics Say*, ST. PETERSBURG TIMES, Apr. 29, 2002, at 1B [hereinafter Ulferts, *Keeping*]. The students were protesting the administration's purchasing of university apparel produced in foreign sweatshops. *Id.* In September 2002, a jury acquitted the students of the misdemeanor trespassing charges. *See* Alisa Ulferts, *Protesters Who Put up Tents in FSU Walkway Acquitted of Trespassing*, ST. PETERSBURG TIMES, Sept. 26, 2002, at 5B.

5. There are several names for these place regulations. Unless referring to a specific policy, this Note will refer to them as "free speech zones" or "speech zones."

6. *See, e.g.*, Fuoco, *supra* note 3 (describing a student demonstration against the West Virginia University speech zones); Nahal Toosi, *Political Activity Ban Suspended; UW-Whitewater Students, Faculty Criticized Rule*, MILWAUKEE J. SENTINEL, Feb. 16, 2002, at 03B (describing the suspension of a policy involving free speech zones due to student and faculty protest).

7. *See, e.g.*, Mary M. Kershaw, *WVU Students Are at Greater Liberty to Protest*, USA TODAY, May 13, 2002, at 6D (quoting a West Virginia University spokesperson that the school was reviewing its policy due to "unfortunate incidents"); Ulferts, *Keeping*, *supra* note 4 (quoting a spokesperson from the University of South Florida that its faculty opposed instituting free speech zones).

8. *See, e.g.*, Harvey A. Silverglate & Joshua Gewolb, *Muzzling Free Speech*, NAT'L L.J., Sept. 30, 2002, at A20. Silverglate is the co-founder of the Foundation for Individual Rights in Education ("FIRE"). An archive of media stories concerning free speech issues affecting colleges and universities may be found on the FIRE's website at http://www.thefire.org (last visited Jan. 27, 2004).

9. *See* U.S. CONST. amend. I.

10. *See, e.g.*, Archibold, *supra* note 1 (describing the modification of speech codes at Pennsylvania State University following complaints of "stifled" expression and describing the failure of speech codes to be instituted at the University of South Florida due to faculty opposition).

11. *See id.* (noting that New Mexico State University dropped its free speech zones following the settlement of the ACLU lawsuit).

12. *See* Erik Forde Ugland, *Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace*, 22 J.C. & U.L. 935, 946-47 (1996). Ugland notes that some courts have held that public forum analysis is inapplicable as applied to student speech on school grounds and instead have maintained that restrictions on student speech can be upheld only if they meet the test from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512-13 (1969). *Tinker* declared that free speech by students is "an important part of the educational process" and that while in school or on

question of free speech zones under the assumption that the courts will use public forum doctrine.[13]

Speech zone regulations are ostensibly content-neutral since all speakers, regardless of the content of their speech, are affected. Courts are more deferential to content-neutral regulations of the time, place, and manner of speech.[14] However, that deference has limits. Questions about the nature of the university campus define some of those limits. What is the relationship between a university's campus and the compatibility of that campus with free expression? Are all areas of the university similarly compatible? For what reason does the university seek to impose the place restrictions? Do the place restrictions go too far by restricting too much space, and thereby too much speech? Do the size and location of the zones leave sufficient alternatives for would-be speakers to express themselves? All of these issues are relevant. The ultimate question, then, is this: are these zones unlawful restrictions on speech, or are they merely reasonable restrictions on the time, place, and manner of speech? This Note explores that question. Because the uniqueness of each university precludes a definitive answer, this Note seeks to identify potential avenues for challenging these restrictions, and the particular factors that would make such challenges more persuasive. Further, to avoid discussing these universities and regulations in the abstract, this Note will hypothesize about the constitutionality of free speech zones with a concrete example from an era preceding much of the Supreme Court's public forum jurisprudence.

Part I will discuss how campus speech zones can be conceptualized using public forum doctrine[15] and will examine the 1970 Fifth Circuit case of *Bayless v. Martine*,[16] the facts of which will serve as the basis for a hypothetical speech zone challenge under public forum doctrine. Part II will analyze potential challenges to free speech zones if the grounds of universities are considered public fora, focusing on the time, place, or manner test for the validity of content-neutral speech restrictions.[17] Part III will discuss the implications for speech zone regulations if a campus were considered a nonpublic forum. Part IV considers the utility of non-legal options for eliminating speech zones. The Note will conclude by arguing that static place restrictions, which banish student expression to limited areas of

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campus a student may exercise those rights unless they "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." *Id.* at 512-13.

13. This has been the approach used by courts that have analyzed free speech zone restrictions at public universities. *See infra* Part II.A.

14. *See infra* Part II.B.

15. The Supreme Court has identified three types of public property for First Amendment purposes. The traditional public forum, open to speech and assembly by historical tradition; the designated public forum, opened to expression in whole or part by government fiat; and the nonpublic forum, an area not opened to public expression. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-47 (1983); *see also infra* Part I.

16. 430 F.2d 873 (5th Cir. 1970).

17. The time, place, or manner test is as follows:

> [I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quotations omitted).

universities, are unwise and potentially unconstitutional, and that universities can properly balance free expression with the need to fulfill their educational missions by maintaining reasonable time and manner restrictions on disruptive activities, while allowing peaceful, non-disruptive students the right to exercise their First Amendment rights wherever they feel their message can best he expressed.

I. DEFINING THE FRAMEWORK

A. Public Forum Doctrine

Under the "public forum" doctrine, government property can be categorized in three different ways: as a traditional public forum, a designated public forum, or a nonpublic forum.[18] Because the public's right of access to government property for speech purposes differs depending on that property's forum status, it is necessary to determine how any particular area on university property is to be classified. A brief description of the doctrine follows.[19]

The traditional public forum consists solely of places such as "streets and parks which '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 thoughts between citizens, and discussing public questions.'" [20] The designated public forum is created by govcrnmental action. Such a forum can be opened to all expressive activity, or opened only on a limited basis to particular groups or for the discussion of particular subjects.[21] However, mere governmental toleration of speech on public property does not suffice; the government must take an affirmative step to create the designated forum.[22] Thus, to determine if a designated forum exists, a court "look[s] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[23] Restrictions on speech in these zones are subject to strict scrutiny, with one exception.[24] A time, place, or manner restriction in a designated public forum needs to be content-neutral and narrowly tailored to a significant government interest, while leaving open adequate alternative channels for speech.[25] All public property that is neither a traditional nor a designated forum is a nonpublic forum.[26] Speech restrictions in a nonpublic forum need to be "reasonable in light of the purpose which the forum at issue serves" and unmotivated by disagreement with a speaker's viewpoint.[27]

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18. 16A AM. JUR. 2D *Constitutional Law* § 519 (1998).

19. For an extensive discussion of public forum doctrine, including its history and development, see Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309 (1999).

20. *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

21. *See id.* at 45 & n.7.

22. See 16A AM. JUR. 2D, *supra* note 18, § 519.

23. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (citing *Perry Educ. Ass'n*, 460 U.S. at 47).

24. The one exception: if a designated public forum is opened on a limited basis (to classes of speakers or for certain topics), then restrictions on speech falling outside that class or subject matter are reviewed like restrictions in a nonpublic forum. *See id.* at 806.

25. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *infra* Part II.B.

26. *See Perry Educ. Ass'n*, 460 U.S. at 46.

27. *Id.* at 46, 49.

Analyzing a university speech restriction under public forum doctrine thus requires examination of the university campus's nature. Of course, the university is not a monolithic entity. As one judge put it, "[a] campus of a major state university is a microcosm of the community, and, as such, contains a variety of fora."[28] Even so, there are clearly campus areas where unbridled expression cannot be permitted, such as classrooms in session and professors' offices.[29] Conversely, some campus areas must be open to all student group speech if they are open to some.[30] This Note will focus on a forum question that is not so clear: What is the status of outdoor areas of universities accessible to students (and usually the public at large)? When analyzing the effects of a regulation creating a free speech zone, the focus must be not on the location created by the zone itself, but rather the surrounding areas where, presumably, free speech is curtailed. These are the areas where speech regulations will be analyzed.

There are two ways to analyze the university campus forum question. Publicly accessible campus grounds can be considered as a public forum[31] covered by a time, place, or manner restriction. Under this model, free speech zones are areas where those restrictions are lifted or loosened. Speech restrictions outside the zones would be subject to the time, place, or manner test described below.[32] Alternatively, the campus can be considered a nonpublic forum. Under this model, the free speech zones are designated public forums opened for student expression. Speech outside these zones would be subjected to the test for restrictions on speech

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28. Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1354 n.6 (11th Cir. 1989) (Tjoflat, J., dissenting). Judge Tjoflat elaborated:

> Some places on campus, such as the administration building or the president's office, are not opened as fora for use by the student body, and may be best described as nonpublic fora. Other places on campus, such as the residence halls and fraternity and sorority houses, have been created to allow student expression, but remain limited for use by certain groups or for the discussion of certain subjects; these places may be best described as limited public fora. Other places on campus, such as the campus student union, streets, sidewalks, and park-like areas, are freely used for student expression. These areas are best described as traditional public fora, in which a university's ability to regulate speech is most circumscribed. Whether a university regulation restricts student speech in a part of its campus that is a public forum depends on the facts of each case.

Id. *See also* Rodney A. Smolla, LAW & CONTEMP. PROBS., Summer 1990, at 195, 218 (1990) ("The soundest view is to treat the campus not as one unified forum, but as subdivided into multiple forums to which differing free speech standards apply.").

29. The private offices of professors or administrators, even though students can visit, clearly would be nonpublic fora. *Cf.* Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs., 111 F.3d 1408, 1420 (8th Cir. 1997) (holding that a welfare office open to the public was a non-public forum).

30. When a university opens up its facilities for use by student groups, it has created a limited designated public forum where all such groups must be allowed access. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

31. For the purposes of this discussion, the question of whether open areas of a university are a "traditional" public forum, a designated public forum open to everyone, or a designated public forum limited to persons affiliated with the university, is not important; the test for content-neutral speech restrictions in all three is the same. *See* Laura L. Goodman, Note, *Shacking Up with the First Amendment: Symbolic Expression and the Public University*, 64 IND. L.J. 711, 716-17 (1989).

32. *See infra* Part II.B

in a nonpublic forum; that is, they must be reasonable in light of the purpose for which the government maintains the forum and be nonviewpoint based.[33] This doctrine is applicable to the university setting as Supreme Court precedent "leave[s] no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[34]

B. The Archetype Case: Bayless v. Martine

Before analyzing public forum doctrine, it will be useful to have a concrete example of a speech regulation that can serve as the target of a hypothetical free speech challenge. I have chosen a speech regulation that was challenged before much of the current Supreme Court public forum jurisprudence. *Bayless v. Martine*[35] arose out of the backdrop of campus demonstrations against the Vietnam War. In October 1969, Southwest Texas State University students demonstrated on campus near the Huntington Statue, in an area located between two classroom buildings.[36] The protest lasted several hours during the school day, leading faculty and students to complain of classroom disruption.[37] No action was taken against the students [38] even though the protest was not held in the "Student Expression Area" during the time allowed by the student handbook.[39] In November, the students informed the administration that they planned to demonstrate at the Huntington Statue again, from 10:00 A.M. to 2:00 P.M.[40] As before, this protest would be held on a school day outside of the time and place specified by the handbook.[41] The

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33. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 688-89 (1992) (O'Connor, J., concurring); *infra* Part II.B.

34. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

35. 430 F.2d 873 (5th Cir. 1970).

36. *Id.* at 875. For a map and photograph of the statue and the area as it looks today, see http://www.maps.txstate.edu/derr.html (last visited Jan. 27, 2004). The school has recently changed its name to Texas State University—San Marcos. *See* http://www.txstate.edu/name_change (last visited Jan. 27, 2004).

37. *Bayless*, 430 F.2d at 875.

38. *Id.* at 877.

39. The provision in "Student's Rights" section of the handbook read as follows:

> STUDENT EXPRESSION AREA
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> Students and University personnel may use the Student Expression Area located on the grass terraces in front of Old Main between the hours of 12:00 noon to 1:00 p. m. [sic], and from 5:00 to 7:00 p. m. [sic]. Reservations for the Student Expression Area are made through the Dean of Students Office and must be made at least 48 hours in advance. Rules to be observed by users of the area include:
>
> 1. No interference with the free flow of traffic.
> 2. No interruption of the orderly conduct of University affairs.
> 3. No obscene materials.
> 4. Person making the reservation is responsible for seeing that the area is left clean and in a good state of repair.

Id. at 875. The student expression area was described by the court as "centrally located on the University campus and . . . surrounded by classroom buildings." *Id.*

40. *Id.* at 876.

41. *Id.*

university feared more classroom disruption but attempted to accommodate the students by permitting the demonstration at the Huntington Statue on the condition that it be limited from noon to 1:00 P.M.[42] The students were warned that a violation of this compromise would lead to disciplinary action.[43] Despite this warning, students began assembling at the statue starting at 9:45 A.M.[44] The students, numbering fifty, sat silently on the grass until Dean of Students Floyd Martine arrived and warned the students to leave.[45] Ten students refused to go and were threatened with suspension if they did not disperse.[46] The students did not leave and were suspended until the 1970 fall term.[47]

The suspended students brought suit against the university seeking an injunction preventing their suspension and a declaratory judgment that the Student Expression Area regulation was unconstitutional under the First Amendment.[48] The Fifth Circuit disagreed. It held that the regulation was "a valid exercise of the University's right to adopt and enforce reasonable, non-discriminatory regulations as to the time, place and manner of student expressions and demonstrations."[49] Supporting the constitutionality of the regulation, the court noted, was the regulation's permissiveness. By stating that students "may" use the Student Expression Area, the regulation did not expressly prohibit demonstrations elsewhere on campus.[50] The court also noted the reasonableness of the regulation was "underscore[d]" by the extraordinary lengths the university took to secure alternative accommodations for the students.[51] Judge Thornberry, in concurrence, went further in discussing the permissiveness of the regulation. Although he believed the suspension was justified,[52] he felt that the rationale for that punishment could not be the students' violation of the handbook regulation.[53] In order to read the regulation as prohibiting the conduct of the students, the rule would have to be interpreted as disallowing student expression in other areas and at different times, a construction that would have rendered the rule invalid "for several reasons."[54] Among these reasons was an understanding that reading the regulation to restrict student assembly outside the Student Expression Area "would

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. The students claimed that the statute was overbroad and constituted a prior restraint on speech. *Id.* at 875.
49. *Id.* at 878 (citations omitted).
50. *Id.*
51. *Id.* ("[The permissiveness of the regulation] is coupled with the administration's prior and present efforts to allow these very students maximum freedom of expression consistent with its duty to operate the college as an educational institution . . . .").
52. The concurrence stated that the students could be punished for violating the Dean's ad hoc regulation of the time and place of the demonstration, for that regulation was reasonable and lawful. *Id.* at 881 (Thornberry, J., concurring).
53. *Id.* at 880 (Thornberry, J., concurring).
54. "First, [the prohibitive construction of the regulation would] require[] a real stretch . . . to infer this meaning . . . . Second, the rule was not so construed when applied to other student assemblies, and . . . [t]hird, it would restrict student assemblies to so small an area and so brief a time as to be unreasonable if strictly enforced." *Id.* at 881 n.2 (Thornberry, J., concurring).

restrict student assemblies to so small an area and so brief a time as to be unreasonable if strictly enforced."[55]

The regulation in *Bayless* was thus construed so that it did not expressly restrict student speech to the area specified in the student handbook. However, it is easy to imagine that the regulation could have been written restrictively, stating that students "must use" instead of "may use" the grounds specified.[56] Such a regulation today would resemble a free speech zone. Would this place regulation withstand judicial scrutiny?[57] This modified version of the *Bayless* regulation will serve as our hypothetical speech zone regulation that can be tested against the requirements of the First Amendment. This Note will return to this hypothetical regulation as it analyzes various potential challenges to speech zone regulations.

II. THE UNIVERSITY AS A PUBLIC FORUM

A. Is the Public University a Public Forum?

In footnote five of *Widmar v. Vincent*[58] the Supreme Court stated, "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[59] At the same time, the Court noted that this did not mean that "a university must grant free access to all of its grounds or buildings."[60] But what about those grounds that the university *has* granted open access to? Seizing on the language of *Widmar*, various commentators have argued that open areas on university campuses should be considered public fora.[61] Courts have often agreed, finding public areas on campuses to be designated public fora despite the insistence of the universities to the contrary.[62] Courts often have found that a university has opened its campus to expressive activity (and thereby created a designated public forum) with surprising ease. Boilerplate language in university mission statements[63] or the opening of facilities to use by some student groups has been

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55. *Id.* (Thornberry, J., concurring).

56. *See supra* note 39 for the full text of the regulation.

57. While this may seem extreme, some regulations designating "free speech areas" are this restrictive. *See infra* notes 244-45, 252-56, and accompanying text.

58. 454 U.S. 263 (1981).

59. *Id.* at 267 n.5.

60. *Id.*

61. *See, e.g.*, Juliane N. McDonald, Brister v. Faulkner *and the Clash of Free Speech and Good Order on the College Campus*, 28 J.C. & U.L. 467, 491 (2002) (arguing that in light of Supreme Court statements about the importance of universities to the nation, and the dangers of restricting speech in them, that college campuses should be considered the "proto-typical" public fora); Smolla, *supra* note 28, at 217-19 (reasoning that most areas of public universities should be considered designated public fora).

62. *See, e.g.*, Pro-Life Cougars v. Lee, Civil Action No. H-02-219, Order for Prelim. Inj. (S.D. Tex. Jun. 24, 2002) (finding that Butler Plaza, a centrally located area on the campus of the University of Houston, is a designated public forum) (on file with author); Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 338 (W.D. Va. 1987) (finding central lawn of the University of Virginia to be a traditional public forum); Spartacus Youth League v. Bd. of Trs., 502 F. Supp. 789, 798-99 (N.D. Ill. 1980) (holding that the student union of the University of Illinois, Circle Center, was a public forum).

63. *See* Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011, 1024 (C.D. Cal. 2002) (finding that the language "[t]he [college] is committed to assuring that all persons may exercise their . . . rights protected under the First Amendment . . . throughout

enough.[64] The mere structure of the public university has been accepted as proof of a governmental design to create a designated public forum. For example, in *Hays County Guardian v. Supple*[65] the Fifth Circuit held that the grounds of Southwest Texas State University comprised the "site of a community of full-time residents . . . where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."[66] Such a place, the court held, is "more akin to a public street or park than a non-public forum."[67] Other courts go further in finding parallels between the open spaces of university grounds and open areas such as public parks in deciding that university grounds are in fact *traditional* public fora.[68] Notably, the United States Supreme Court, in an opinion authored by Justice Anthony Kennedy, has advanced the view that universities have historically been open to all speech.[69] Such a historical background would be a prerequisite to the recognition of a traditional public forum.[70]

These findings, that the campus of the public university is at the very least a designated public forum, represent the most rational approach. On a visceral level this seems self-evident. Universities are places of higher learning and intellectual pursuit—they are the quintessential "marketplace of ideas."[71] The notion that a university's campus has *not* been opened for the expressive activity of students seems antithetical.[72] The rhetorical argument that free speech zones are actually "censorship zones" that silence students, while not completely accurate,[73] is nonetheless effective.[74] Administrators, in defending their speech zone policies,

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the facilities under its jurisdiction" left "no doubt" that the areas open to the public were public fora).

64. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

65. 969 F.2d 111 (5th Cir. 1992).

66. *Id.* at 117 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 651 (1981).

67. *Id.*

68. Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 338 (W.D. Va. 1987) (finding that the central lawn on the campus of the University of Virginia was akin to a "municipal park").

69. [I]n the University setting . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn.

Rosenberger, 515 U.S. at 835-36 (1995) (citations omitted).

70. *See supra* note 20 and accompanying text.

71. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas,' . . . ." Healy v. James, 408 U.S. 169, 180 (1972).

72. Courts are quick to point this out as well. *See, e.g.*, Auburn Alliance for Peace & Justice v. Martin, 684 F. Supp. 1072, 1076 (M.D. Ala. 1988) ("[T]his court can think of no place that should be more hospitable to the free expression of ideas than the campus of a great university.").

73. They are not entirely accurate because these codes forbid only certain types of "speech," such as protests, leafleting, and amplified sound, but not all private, personal speech. *See, e.g.*, *infra* note 93.

74. For example, a University of Texas task force recommended that the very use of the term "free speech zone" be banned in official documents. *See* Narrative Report and Recommendations from the Task Force on Assembly and Expression at the University of Texas at Austin, to the Faculty Council of the Univ. of Tex. at Austin (Nov. 18, 2002), *at*

inevitably note that they are committed to the principles of free speech.[75] Assuming this is true, presumably speech zone regulations represent an attempt to structure the "marketplace of ideas" so that it functions most effectively. Such power is clearly granted to the public university.[76] However, on the college campus, like anywhere else in the community, the protections of the First Amendment apply.[77] If the college campus is a public forum then the speech zone regulations must comply with the requirements of the time, place, or manner test.

B. The Time, Place, or Manner Test

The "time, place, or manner" test for public forum speech restrictions, as enunciated by the Supreme Court, states that "'the government may impose reasonable restrictions on the time, place, or manner of protected speech'" subject to three restrictions.[78] First, the restrictions must be "'justified without reference to the content of the regulated speech.'"[79] Second, the restrictions must be "'narrowly tailored to serve a significant governmental interest.'"[80] Finally, the restrictions must "'leave open ample alternative channels for communication of the information.'"[81]

The first prong, content-neutrality, entails a determination of the speech regulation's purpose. Such a regulation cannot be enacted due to disagreement with a speaker's message.[82] For restrictions on speech activities such as protests or leafleting, content-neutrality requires that the restriction be "justified without reference to the content of the regulated speech."[83] Even a regulation that meets this criterion can be challenged on content-neutrality grounds if the regulation allows for speech only with the permission of a government official possessing "unbridled discretion" to grant or deny the request.[84] Because such discretion might allow a government official to surreptitiously use content-based or viewpoint-based factors in deciding to grant or deny a speaker access, such a regulation requires standards "governing the exercise of [that] discretion."[85] However, if a regulation does not contain sucb standards, it may still be upheld if there are implicit limits imposed by "textual incorporation, binding judicial or administrative construction, or well-established practice."[86]

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http://www.utexas.edu/faculty/council/2002-2003/reports/TFAE.pdf (last visited Jan. 27, 2004) (on file with author).

75. *See, e.g.*, Kershaw, *supra* note 2.

76. "'We . . . hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.'" Healy, 408 U.S. at 192 (alteration in original) (quoting Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1089 (8th Cir. 1969)).

77. *See id.* at 180 ("[W]e note that state colleges and universities are not enclaves immune from the sweep of the First Amendment.").

78. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

79. *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

80. *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

81. *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

82. *Id.*

83. *Clark*, 468 U.S. at 293.

84. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755 (1988).

85. *Id.* at 763.

86. *Id.* at 770.

If a regulation is content-neutral and does not give a government official unbridled discretion, the next step is to determine whether the regulation is narrowly tailored to a significant state interest. Courts almost always find significant state interests, making this prong turn on the requirement of narrow tailoring.[87] The Supreme Court has held that "narrow tailoring" in this context does not mean that the regulation must use the least speech-restrictive means available. Instead, the requirement of narrow tailoring is satisfied "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[88] Even so, the regulation cannot be "substantially broader than necessary to achieve the government's interest."[89]

Finally, a constitutional time, place, or manner regulation requires a court to determine whether an affected speaker has ample alternative methods to be heard. Determining whether a speaker has adequate alternatives "requires a nuanced analysis that may take account of (1) the audience to which the speaker seeks to communicate and (2) the contribution of the desired location to the meaning of the speech."[90] "An adequate alternative does not have to be the speaker's first choice" but "an alternative is not adequate if it forecloses a speaker's ability to reach one audience even if it allows the speaker to reach other groups."[91] Additionally, courts have found complete bans on certain types of inexpensive methods of speech such as leafleting to leave speakers with inadequate alternative methods of communication.[92] With these guidelines in mind, this Note will next examine several cases that have dealt with content-neutral First Amendment zones both on college campuses and in other public fora to serve as a guide in determining the potential constitutional weaknesses of campus speech zone regulations.

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87. *See* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 438 (1999).

88. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (alteration in original) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

89. *Id.* at 800. For an argument that the continuing efficacy of this prong of the test is debatable following the case of *Hill v. Colorado*, 530 U.S. 703 (2000), see *The Supreme Court: 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 299 (2000) ("The Hill decision portends . . . the narrow tailoring test . . . fad[ing] into irrelevance."). However, circuit court decisions since *Hill*, striking time, place, and manner restrictions based on insufficient tailoring, may indicate that the death of this prong has been greatly exaggerated. *See, e.g.*, Weinberg v. City of Chicago, 310 F.3d 1029, 1042 (7th Cir. 2002) (holding that a ban on peddlers within 1000 feet of the United Center in Chicago was not narrowly tailored); Lederman v. United States, 291 F.3d 36, 46 (D.C. Cir. 2002); *infra* notes 126-69 and accompanying text.

90. Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334, 347 (S.D.N.Y. 1998) (footnotes omitted).

91. *Weinberg*, 310 F.3d at 1041 (citations and quotations omitted).

92. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) (invalidating ban on placing signs on residential property); *see also* Schneider v. State, 308 U.S. 147, 163-65 (1939) (holding unconstitutional a complete ban on leafleting in public).

C. Cases

1. Content-Neutrality

Several cases involving speech zone regulation have found that those zones were unconstitutional because university officials had too much discretion in deciding what activities would be permitted. The issue of unfettered discretion was dispositive to the issuance of a preliminary injunction in one recent case involving some rather egregious free speech zones. In *Pro-Life Cougars v. Lee*,[93] an anti-abortion student group at the University of Houston wished to display several signs as part of an exhibit in Butler Plaza, a centrally located four-acre area on campus.[94] The district court, in its findings of facts, chose not to describe the images on the signs, but the media described the exhibit as "pictures of dead fetuses."[95] Per the university's speech regnlations,[96] the Pro-Life Cougars ("PLC") requested the use of Butler Plaza to display their exhibit.[97] Although another campus group had displayed the same exhibit a few months earlier without complaints of disruption, Dean of Students William Munson found that the exhibit would be "potentially disruptive" and refused to allow it in Butler Plaza. Dean Munson instead suggested that the exhibit be placed at one of the sites specially designated for disruptive

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93. Pro-Life Cougars v. Lee, Civil Action No. H-02-219, Order for Prelim. Inj. (S.D. Tex. June 24, 2002) (on file with author).

94. *Id.*, Findings of Fact and Conclusions of Law, at 5-6.

95. Ron Nissimov, *Anti-Abortion Display Takes Center Stage at UH; Protesters Keep Quiet over Butler Plaza Exhibit*, HOUSTON CHRON., Sept. 4, 2002, at A23.

96. The regulation read:

> The right of peaceful expression and/or assembly within the university community must be preserved; however, the University has the right to provide for the safety of individuals, the protection of property, and the continuity of the educational process. The University will not permit any individual or group of individuals to disrupt or attempt to disrupt the operation and functioning of the University by any device, including, but not limited to, the use of pagers, cell phones, and other communication devices.
>
> At least two weeks prior to an event which is potentially disruptive, in addition to making the appropriate facility reservations, the sponsor of the event shall meet with the Dean of Students' designate to determine the time, place and manner of the event. Potentially disruptive events, including events where amplified sound is used outdoors, will be limited to the hours of 11:30 a.m. to 1 p.m. and 4 p.m. to midnight on class days. On non-class days, potentially disruptive events must be over by midnight. Authorized sites for events of this nature include the University Center (UC) Arbor, UC Patio, UC Satellite, or Lynn Eusan Park. Generated output shall not exceed the established decibel levels. Information on established decibel levels is available in the UC Reservations Office and the Dean of Students Office. Any exception to this policy must be approved by the Dean of Students.
>
> In emergency situations, the president or designated representatives have the responsibility to determine when the conditions cited above prevail and shall have the authority to take such steps as are deemed necessary and reasonable to quell or prevent such disruption.

Pro-Life Cougars, Findings of Fact and Conclusions of Law, at 3-4.

97. *Id.* at 6.

activities.[98] The PLC declined, as they felt that the "disruptive" speech zones were too small, obscured by trees, and too far away from the areas where students normally gathered to display their exhibit effectively.[99]

The students brought suit against the university and sought an order declaring the policy unconstitutional.[100] At the hearing on the plaintiffs' motion for a preliminary injunction, the university admitted that expressive activities that were "potentially disruptive" to the educational mission were subject to different time, place, or manner restrictions than nondisruptive ones.[101] Dean Munson testified that, because he had heard some complaints about some speech activities in the Plaza, he considered all activity on the Plaza "potentially disruptive." Pursuant to that policy, Dean Munson testified that he had banned all expressive activity in the Plaza regardless of the size or noise level of the expression.[102]

In ruling on the motion for a preliminary injunction, the district court first found that the main campus of the university, including Butler Plaza, was a designated public forum, and that the registration system was a prior restraint.[103] The court found that the dean had "unfettered discretion" to determine whether or not an activity was "potentially disruptive" and that his decisions were not constrained by any standards.[104] As proof, the court noted that the school had allowed the same exhibit previously, but then rejected an encore presentation even though it had proven to be nondisruptive.[105] The policy did not require action within a specified time period, nor did it require explanation for the denial.[106] The court thus found that the plaintiffs would likely succeed on the merits and granted a preliminary injunction barring the use of prior restraints on any student activity within the Plaza, and specifically ordering them to allow the PLC to display their anti-abortion exhibit.[107]

Following their loss on the motion for preliminary injunction, the university changed their policy by removing the dean's discretion. The new policy required all "expressive activity"[108] to be held in the four areas that previously were reserved just for disruptive activity.[109] When the court heard the case on the merits, the

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98. *Id.* at 5-7.

99. *Id.* at 7.

100. *Id.* at 11.

101. *Id.* at 8.

102. This included the removal of a Christmas tree that students had decorated, and the banning of cheerleader practice on the Plaza. *Id.* The dean also testified that he would consider "the silent expression of a single student on the Plaza holding a small sign proclaiming 'The World is a Beautiful Place'" to be potentially disruptive. *Id.* at 8-9.

103. *Id.* at 13, 15.

104. *Id.* at 9-10.

105. *Id.* at 16.

106. *Id.*

107. *Id.* at 19.

108. Defined as "[e]xtracurricular public speaking, literature distribution, poster displays, sign displays, any other type of graphic exhibitions, expressive performances, petitioning, or similar non-commercial activities held on University grounds." UNIV. OF HOUSTON, STUDENT ORGANIZATIONS HANDBOOK 6 (2003), http://www.uh.edu/campus/cact/manual/Student%20Organizations%20Handbook%20final%20version.pdf (last visited Jan. 27, 2004) (on file with author).

109. The second regulation read:

> The use of outdoor free expression areas is limited to University of Houston faculty, staff, students, and members of registered student organizations. The *only* reservable outdoor areas available to University

harshness of the second policy affected the court's evaluation of the first.[110] Noting that the university never conceded that the first policy was unconstitutional, and in light of the university's draconian response to losing the preliminary injunction, the court found that the risk of the university reverting to the first policy precluded mooting the students' lawsuit.[111] The court, again noting that the campus of the university was a public forum,[112] applied the time, place, or manner test and found the first policy unconstitutional based on the unfettered discretion granted to the dean.[113] The court granted summary judgment to the plaintiffs.[114] Under pressure from continuing legal challenges to the new policy, which the district court deemed "hostile to free speech,"[115] the university settled with the plaintiffs and finally dropped the contested speech zone regulations in June 2003.[116]

Issues of prior restraint and unfettered discretion also proved to be fatal to speech zone regulations at a California community college. The regulations at issue in *Burbridge v. Sampson*[117] and *Khademi v. South Orange County Community College District*[118] required groups to schedule all expressive activity and to receive prior approval for all postings and distribution of literature.[119] The regulations also required that groups of twenty or more, and all groups wanting to use amplified sound, use "preferred areas" for their expressive activities.[120] The "preferred areas" did not include a popular site in front of the "Student Services Center" that historically had been the site of expressive activity.[121] After students successfully won a preliminary injunction against the regulations in *Burbridge* due to a lack of procedural safeguards,[122] the college changed its code.[123] The new code was struck down as well, in part because it granted the president "completely unfettered

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> of Houston faculty, staff, students, or registered student organizations wishing to engage in expressive activities are the following: 1. Lynn Eusan Park . . . 2. University Center North Patio . . . 3. University Center Arbor . . . University Center Satellite Patio/Hill.

Id. at 7 (emphasis added). The second policy created one zone for expressive activity that did not require prior approval, but even there, speech was limited to between 7:00 A.M. and 7:00 P.M. and did not allow "amplified sound . . . displays or exhibits . . . structures . . . signs with sticks, wires, or poles of any type." *Id.*

110. *See* Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 580-81 (S.D. Tex. 2003) (deciding that the constitutionality of the first policy was not rendered moot because the university revised it).

111. "Given the pervasive limitations upon outdoor free speech in the Second Policy, the First Policy may be recalled with fondness for its 'liberality,' and hence, an attractive alternative to which a University administration that is less hostile to free speech may well revert." *Id.* at 581.

112. *Id.* at 582.

113. *Id.* at 585.

114. *Id.*

115. *Id.* at 581.

116. Ron Nissimov, *UH Reaches Settlement in Suit, Agrees to Halt Curbs on Speech*, HOUSTON CHRON., June 12, 2003, at A42.

117. 74 F. Supp. 2d 940 (C.D. Cal. 1999).

118. 194 F. Supp. 2d 1011 (C.D. Cal. 2002).

119. *Khademi*, 1016 F. Supp. 2d at 1023, 1025-26; *Burbridge*, 74 F. Supp. 2d at 948-49. The same regulations were at issue in both cases.

120. *Burbridge*, 74 F. Supp. 2d at 948-49.

121. *Id.* at 943.

122. *Id.* at 953.

123. *Khademi*, 194 F. Supp. 2d at 1016.

discretion" to allow groups to use amplified sound, to demonstrate outside the preferred zones, and to utilize indoor facilities.[124]

How would the hypothetical regulation from the *Bayless* case fare under a challenge that it was not content-neutral? On the face of our hypothetical regulation,[125] no expressive activity would be allowed except within the zone. It would seem that if there is no discretion—if all requests to speak outside a zone will be denied—then the university cannot fairly be said to hold unfettered discretion; indeed, it has no discretion at all.[126] This appears to have been the tactic of the University of Houston in *Pro-Life Cougars* when it passed the second policy. In our *Bayless* hypothetical, the regulation facially has no requirement that students obtain a permit or receive permission to use the Student Expression Area, other than requiring a reservation forty-eight hours in advance.[127] Because the regulation appears to grant officials no discretion, and because a two-day notice requirement is a reasonable method of preventing conflicts over limited space, the *Bayless* regulation does not appear susceptible to challenge on content-neutrality grounds.[128]

2. Narrow Tailoring

Plaintiffs may also challenge university regulations on narrow tailoring grounds. Although the requirement is often considered not to have much weight after *Ward v. Rock Against Racism*,[129] federal courts nonetheless use this prong to strike down speech zone restrictions. One such case involving a free speech zone in a public forum comes from outside the university setting. *Service Employee International Union, Local 660 v. City of Los Angeles*[130] arose out of security concerns surrounding the 2000 Democratic National Convention. The United States Secret Service and the Los Angeles Police Department planned to wall off an eight million square foot "secured zone" around the Staples Center, where the convention was being held.[131] Two hundred and sixty yards from the entrance to the Staples Center, just outside the secured zone, a demonstration site was set up.[132] There was no requirement that people stay inside the boundaries of the demonstration site, but the regulation banned "expressive activity" inside the

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124. *Id.* at 1023.

125. *See supra* notes 56-57 and accompanying text.

126. *Cf.* Young v. City of Simi Valley, 216 F.3d 807, 819 (9th Cir. 2000) (stating that because "officials have almost no discretion to deny a permit . . . it is not an unconstitutional prior restraint").

127. *See supra* note 39 and text accompanying note 55.

128. *See, e.g.*, United States v. McFadden, 71 F. Supp. 2d 962, 966 (W.D. Mo. 1999) (finding a forty-eight-hour time limit for a permit was reasonable).

129. *See supra* notes 84-86 and accompanying text.

130. 114 F. Supp. 2d 966, 968 (C.D. Cal. 2000).

131. *Id.* at 968. The Staples Center, located in downtown Los Angeles, is the home to several professional sports teams, including the Los Angeles Lakers, Los Angeles Kings, and Los Angeles Clippers. *See* http://www.staplescenter.com (last visited Jan. 27, 2004).

132. *Serv. Employee Int'l Union*, 114 F. Supp. 2d at 968. The site was furnished with a platform, a sound system, and bathroom facilities, and had a "sight line" to the Staples Center. *Id.* at 969.

secured zone.[133] Several groups who wanted to leaflet, protest, make speeches, and perform other expressive activities brought suit for a preliminary injunction against enforcement of the zone.[134]

In ruling on the motion for a preliminary injunction, the district court first determined that the area covered by the security zone—encompassing public streets and sidewalks—was a traditional public forum.[135] Thus, the court subjected the speech regulation to the time, place, or manner test to determine whether it was content-neutral, narrowly tailored to a significant government interest, and whether it offered adequate alternatives.[136] The parties did not dispute the issue of content-neutrality.[137] The court found, however, that the zone was neither narrowly tailored, nor did the demonstration area provide an adequate alternative.[138] As to the tailoring requirement, though the asserted interest of the government—protecting the public and the delegates—was clearly significant, the restriction was "substantially broader than necessary."[139] The size of the secured zone—185 acres—was so large that it prevented anyone "with any message, positive or negative, from getting within several hundred feet" of the delegates as they went in and out of the convention center.[140] The secured zone covered much more space than was necessary to allow safe entrance and exit to the building.[141] In addition, the restriction banned expressive activities at all times of day and night and started three days before the convention, indicating to the court that the city made no attempt to balance the requirements of security with the constitutional speech rights of the protestors.[142] The court flatly stated that "banning speech is an unacceptable means of planning for potential misconduct."[143] The court, also finding that the

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133. The regulation also banned any person without a ticket from the Democratic National Convention Committee ("DNCC") or prior clearance from the Secret Service. *Id.* at 968-69.

134. *Id.* at 968.

135. *Id.* at 970.

136. *Id.*

137. *Id.* at n.1. Even though the issue was not raised, the court expressed doubt that the restrictions were in fact content-neutral because a ticket from the DNCC was required to enter, and although "*some* Democrats will be denied access to the zone[,] . . . *all* non-democrats will be denied access." *Id.* (emphasis in original).

138. *Id.* at 971-73.

139. *Id.* at 971.

140. *Id.*

141. *Id.* The court noted that a complete "no-speech" zone properly tailored around entrances and exits would be permissible to protect the delegates, and noted that the protestors did not even attempt to seek access to the sidewalk area that actually surrounded the convention site. *Id.* at n.3.

142. *Id.* at 971-72.

> [T]he "manner" of speech is not addressed by the plan because the intent is to preclude all speech activities by non-invitees within the secured zone. Thus, there is again no attempt made to accommodate or balance the speech interests of the protestors against the need for security at the Convention site.

Id. at 972.

143. *Id.* Interestingly enough, the state's worries about potential misconduct became reality. Though the protests were mostly peaceful, on the first night of the convention at a site that would have been within the security zone, a few hundred protestors assaulted police officers by throwing rocks and bottles. Mounted police dispersed the violent protestors with rubber bullets and pepper spray. *See* Todd S. Purdum, *The Democrats: The Protesters;*

demonstration zone was an inadequate alternative,[144] granted the motion for a preliminary injunction.[145]

Another speech zone case involving public forum speech restrictions arose in the nation's capital. In *Lederman v. United States*,[146] a demonstration ban around the U.S. Capitol building, instituted to reduce foot traffic and protect people on the ground, was challenged.[147] The regulation defined some Capitol areas as "no-demonstration zones,"[148] and other areas as zones where demonstrations were allowed only with permits.[149] Lederman was leafleting on the sidewalk in front of the Senate side of the Capitol, within one of the "no-demonstration zones," when police officers approached and told Lederman to leaflet in a designated lawn area location 250 feet away.[150] Lederman did not comply because he "believ[ed] that he could not reach his intended audience from the lawn."[151] The police told him to wait on the sidewalk in front of the House side of the Capitol (another "no-demonstration zone"), upon which Lederman went right back to leafleting and was arrested for violating the ban.[152]

Lederman was acquitted of the criminal charges by the local court because that court believed that the ban was unconstitutional.[153] He then sued in federal court to challenge the ban's constitutionality. The D.C. Circuit found that the sidewalk where Lederman was arrested was a traditional public forum,[154] as the entire Capitol Grounds met the classic requirements of the traditional public forum.[155] Analyzing the "no-demonstration zone" under a time, place, or manner test, the court focused on the narrow tailoring aspect[156] and evaluated the restrictions using several principles:

> First, we closely scrutinize challenged speech restrictions to determine if [they] indeed promote[] the Government's purposes in more than a

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Police and Demonstrators Clash Outside Convention Hall, N.Y. TIMES, Aug. 15, 2000, at A15.

144. The portion of the opinion discussing adequate alternatives is discussed *infra* Part II.C.3. *See infra* notes 169-97 and accompanying text.

145. *Serv. Employee Int'l Union*, 114 F. Supp. 2d at 974-75.

146. 291 F.3d 36 (D.C. Cir. 2002).

147. *Id.* at 44. The ban affected "demonstration activity" defined as such:

> Parading, picketing, leafleting, holding vigils, sit-ins, or other expressive conduct or speechmaking that conveys a message supporting or opposing a point of view and has the intent, effect or propensity to attract a crowd or onlookers, but does not include merely wearing Tee shirts, buttons, or other similar articles of apparel that convey a message.

Id. at 39.

148. *Id.*

149. *Id.*

150. *Id.* at 39-40.

151. *Id.* at 40.

152. *Id.*

153. *Id.*

154. *Id.* at 41. The court chose not to address the constitutionality of the other no-speech zones around the Capitol. *Id.*

155. *Id.* The Capitol Grounds "have traditionally been open to the public, and their intended use is consistent with public expression." *Id.* at 41.

156. *Id.* at 44. The court ruled on this issue and did not reach the adequate alternative prong also raised by the appellant. *Id.*

> speculative way. Second, per se bans on expressive conduct are inherently suspect. Third, while the Government must be afforded a reasonable measure of discretion in determining how best to promote its identified interests, the Constitution does not tolerate regulations that, while serving their purported aims, prohibit a wide range of activities that do not interfere with the Government's objectives. Fourth, [t]he fact that a substantially less restrictive regulation [would] be equally effective in promoting the same ends may be relevant to the constitutional analysis.[157]

The court found that the ban promoted the government's purposes, but noted that it "imposes precisely the sort of 'total' restriction on certain types of speech that the Supreme Court [has] 'questioned.'"[158] The speech zone regulation allowed some types of speech, but the court held that this was relevant only for "ample alternatives" analysis and not to the narrow tailoring requirement.[159] The court noted that not all of the types of expressive activity banned could advance the government's purposes,[160] and that the "ready availability of 'substantially less restrictive' alternatives" would be as effective in "promot[ing] safety and orderly traffic flow."[161] For instance, the Capitol Police could enforce existing laws barring "disruptive conduct" and "obstructing . . . passage" outside the Capitol.[162] The court also suggested that a permit system could be used to limit the number and length of demonstrations, restrict the size of demonstrations, and so forth.[163] The D.C. Circuit found that the ban "impose[d] a serious loss to speech . . . for a disproportionately small government gain" and thus failed the narrow tailoring prong of the time, place, or manner test.[164]

The applicability of these cases to free speech zones on university campuses is apparent. If the court considers the grounds of a university a public forum, a complete ban on certain types of expressive activity in large portions of those grounds could fail the narrow tailoring requirement. There is no question that the first part of the test is met—maintaining order on campus is a significant, if not compelling, state interest.[165] And a regulation that bans demonstrations and other kinds of expressive activity is more likely to prevent disorder than no regulation at all.[166] However, the plaintiffs may still challenge the policy as being substantially

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157. *Id.* (alterations in original) (citations and quotations omitted).

158. *Id.* at 45.

159. *Id.*

160. *Id.* ("For example, a single leafleteer standing on the East Front sidewalk will no more likely block traffic or threaten security than will photographers, star-struck tourists, and landscape painters complete with easels, but the Board has made no effort to keep any of these latter individuals away from the Capitol.").

161. *Id.* (quoting Cmty. for Creative Non-Violence v. Kerrigan, 865 F.2d 382, 390 (D.C. Cir. 1989)).

162. *Id.*

163. *Id.* at 46. The court noted that it was just giving examples, and that not all of its suggestions might be upheld as constitutional. *Id.*

164. *Id.* (alteration in original) (citations omitted).

165. *See* Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1352 (11th Cir. 1989) ("A university's interest in furthering its educational mission, if reasonable in scope, may be a 'compelling state interest.'") (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).

166. That is, the regulation would meet the post-*Ward* narrow tailoring requirement. *See supra* notes 84-86 and accompanying text.

overbroad. As the size of the free speech zones shrink or the amount of expressive activity regulated grows, so too grows the potential argument that a university is curtailing substantially more speech than necessary in the quest to maintain order on campus.

Applied to the hypothetical regulation in *Bayless*, it would seem that a narrow tailoring challenge might be successful. The regulation as modified would allow demonstrations for three hours a day in one area of the campus.[167] On a sprawling campus, a regulation limiting speech to an area this small might fail a narrow tailoring challenge because it covers substantially more ground[168] or covers more time[169] than is necessary to avoid likely disruptions that would interfere with the operation of the university. Such a place restriction also fails to make any distinction between the inherent disruptiveness of different forms of expressive activity. A silent handbiller, a single speechmaker, a small cadre of picketers, or demonstrators using amplifiers are all precluded from speaking outside the speech zone, even though the risk of disruption to the university's mission posed by each of these speakers is obviously different. The combination of excluding expressive activity from areas that are appropriate for speech, and a lack of differentiation between the risk of different modes of speech, might convince a court that a free speech zone has not been tailored and restricts far more speech than is needed to protect the university's mission. Additionally, a plaintiff could also point to the availability of other methods to control disruption, such as detailed manner regulations, that could just as effectively prevent disruption to the mission of the university while allowing as much speech as is possible. A regulation like the one in the hypothetical, which limits speech to only one area on campus, presents a very promising argument for constitutional invalidity. In fact, both the majority opinion and the concurrence in *Bayless* strongly imply that if the actual *Bayless* regulation were read as restrictive, it would have been unconstitutional for this very reason.[170]

Again, the particulars of any speech zone regulation will vary. However, it should be apparent that, if the grounds of the university are considered a public forum, the persuasiveness of the lack of narrow tailoring argument is directly proportional to the ratio of open space to the size of the zone. The larger the campus and the smaller the speech zone, the higher the ratio will be. The higher the ratio, the more likely the regulation is "substantially broader than necessary."

3. Adequate Alternatives

The third potential avenue available to challenge a public forum speech restriction is to argue that the restriction fails to leave adequate alternatives for speech. Courts have found free speech zones unconstitutional on this ground. In *Service Employee International Union, Local 660 v. City of Los Angeles*,[171] the district court found that the speech zone restrictions around the Staples Center in Los Angeles left inadequate alternatives for speech.[172] Noting that political speech

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167. *See* notes 56-57 and accompanying text.

168. Such as areas far away from classrooms or other campus buildings.

169. Such as weekends.

170. *See supra* notes 50-55 and accompanying text.

171. Serv. Employee Int'l Union, Local 660 v. City of Los Angeles, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000).

172. *See supra* notes 128-143 and accompanying text.

directed at delegates to the Democratic Party's presidential nominating convention "rest[ed] at the very core of the First Amendment," the court found that the zone effectively prevented that speech from being heard.[173] The demonstration zone was far from the convention center and was separated from the center by a "media village" filled with large equipment.[174] This made it unlikely that the intended audience—the delegates—would be able to see or hear the protestors.[175] This made the zone unconstitutional.[176] The court granted the plaintiffs a preliminary injunction, holding that "[a]ny scheme that precludes plaintiffs from effectively communicating with those delegates will not withstand constitutional scrutiny."[177]

A successful adequate alternatives challenge has also been brought against a public university speech zone. In *Students Against Apartheid Coalition v. O'Neil*,[178] anti-apartheid student protestors sought to convince the University of Virginia Board of Visitors to divest from companies doing business in South Africa.[179] They built symbolic wooden shanties on a centrally located area on campus known as "the Lawn"[180] within sight of the Rotunda building where the Board was meeting.[181] The university reacted to this protest by creating a "lawn use" policy that banned "structures" on the portion of the Lawn visible from the Rotunda while allowing all other forms of protest.[182] The stated purpose of the regulation was to protect the aesthetic beauty of the lawn.[183] The university

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 972-73. "In short, at this crucial political event, those who do not possess a ticket to the convention cannot get close enough to the facility to be seen or heard. The First Amendment does not permit such a result." *Id.* at 972. The court noted that the other boundaries of the zone were permissible. *Id.*

177. *Id.* at 973, 975. The Ninth Circuit seems to be especially generous to claims of inadequate alternatives involving protest zones and buffer zones. Also interesting is that there seems to be a lot of this activity occurring in San Francisco. For instance, in *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1225-26 (9th Cir. 1990), the "Peace Navy," consisting of people on small boats, wanted to advance their anti-military message to people watching a naval parade from a pier in San Francisco Bay. The Navy instituted a seventy-five yard buffer zone around the pier. *Id.* at 1226. Sound amplification was also restricted. *Id.* at 1229. Because the Peace Navy could not be seen or heard by its intended audience, the court affirmed a permanent injunction against enforcing the zone. *Id.* at 1225-26, 1229.

Similarly, in *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999), the court overturned the convictions of protestors who had demonstrated without a permit at the Presidio in San Francisco based on a lack of adequate alternatives. The court found that the "First Amendment area" ignored by the protestors was too far away from the protestors' intended audience, the Park Service Visitors Center. *Id.* The court found the protest zone inadequate even though, as suggested by the concurrence, "[t]he First Amendment area was not Siberia. It was located only 150 yards or so away, and in view of, the Visitors Center." *Id.* at 1045 (Silverman, J., concurring).

178. 660 F. Supp. 333 (W.D. Va. 1987).

179. *Id.* at 335.

180. "The Lawn" and surrounding areas consists of "colonnades, pavilions . . . and the open grassy area between them." *Id.* The area, considered an architectural masterpiece, was designed by Thomas Jefferson and is both a National Historic Landmark and on the World Heritage List. *Id.* For maps and photographs of the Lawn, see http://www.virginia.edu/art/Lawntour/Welcome.html (last visited Jan. 27, 2004).

181. *Students Against Apartheid Coalition*, 660 F. Supp. at 337.

182. *Id.*

183. *Id.* at 335.

suggested alternative sites where shanties could be built, but students challenged the policy on First Amendment grounds.[184]

The district court held that the regulation was unconstitutional. First, the court noted that the regulation was vague,[185] and found an "insufficient nexus" between the restriction and the interest asserted.[186] The court, likening the Lawn to "a traditional public forum like [a] municipal park[]," then applied the time, place, or manner test.[187] The court found that the regulation left protestors without adequate alternatives for expression.[188] The alternative building sites were inadequate as they were infrequently traveled and outside of "earshot or clear sight" of the delegates inside the Rotunda.[189] Use of the mails and mass media were also inadequate, as they were more expensive, less likely to reach the intended audience, and less effective in presenting the student's message than the image of shanties on a pristine lawn.[190] Without adequate alternatives to the lawn expression, the regulations could not satisfy the time, place, or manner test.[191] The university later revised the policy.[192] The vague language of the regulation was tightened and the policy was modified to prevent the building only of those structures that "interrupt[ed] the architectural lines of the historic area" on the south side of the Rotunda.[193] This policy was upheld as constitutional as it allowed shanties to be built in other high traffic areas surrounding the Rotunda, satisfying the adequate alternatives requirement.[194]

While a lack of adequate alternatives is a potential basis for a First Amendment speech zone challenge, it suffers from some practical complications. To illustrate, consider the free speech zone described in *Bayless*.[195] The speech zone is centrally located and surrounded by campus buildings. This area is presumably high traffic. For speech that is not directed towards any particular audience, this speech zone is adequate, if not optimal, for reaching the largest audience possible. To challenge this policy on adequate alternative grounds would

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184. *Id.* at 337.

185. *Id.* at 335. The policy used, but did not define, the terms "structure" or "extended presence." *Id.* at 339. The term "extended presence" was "particularly . . . vague." *Id.*

186. It is unlikely that the regulation could be found unconstitutional on this ground today. This case predated *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989), which modified the narrow tailoring requirement to require only that the interest be advanced more so than it would be without the regulation, so long as the regulation is not "substantially broader than necessary" to meet that goal. *See supra* notes 84-86 and accompanying text.

187. *Students Against Apartheid Coalition*, 660 F. Supp. at 338 (citations omitted). "This case involves the central lawn of a large university. Mindful of the traditional role of the university as an invaluable marketplace of ideas, and the similarity between an open campus lawn and a traditional public forum like municipal parks," the court held that it would use the time, place, or manner test for a public forum. *Id.* at 338 (citations omitted).

188. *Id.* at 339-40.

189. *Id.* at 340.

190. *Id.* ("[T]he Board of Visitors . . . may not deliberately be seeking information about apartheid, and [using other methods] might be less effective for delivering the message that is conveyed by the sight of a shanty in front of the Rotunda.").

191. *Id.*

192. Students Against Apartheid Coalition v. O'Neil ("SAAC II"), 671 F. Supp. 1105, 1106 (W.D. Va. 1987), *aff'd per curiam*, 838 F.2d 735 (4th Cir. 1988).

193. *Id.* at 1107.

194. *Id.*

195. *See supra* Part I.B; *supra* notes 39, 56-57 and accompanying text.

require arguing that the university is not providing ample alternatives for speech, because it only allows speech at the heart of the university. This is absurd. Conversely, if a university placed its speech zones in peripheral, low traffic areas of the campus, an adequate alternatives argument might prove successful. The likelihood of success will turn on a question of degree: how much has the audience been reduced? The mere fact that the expression can reach more people in an alternate location does not make a free speech zone inadequate, so the successful challenger would need to show that the audience accessible from the speech zone is so reduced as to be inadequate.[196]

Another practical difficulty with the adequate alternatives challenge arises where students wish to speak to a particular audience that cannot be reached from the speech zone. Imagine that student protesters in *Bayless* want to protest the firing of the school's basketball coach outside the athletics department, which is a mile from the central speech zone. Any challenge in this case would likely be an "as-applied" challenge;[197] that is, the zone is unconstitutional *as applied to the basketball protestors* because the zone is too far from the athletics department for the protestors to have their message heard. An as-applied challenge is problematic for purposes of eliminating a free speech zone because even if the plaintiffs win, the speech zone will remain intact for everyone else. In order to strike the speech zone for all student groups, the plaintiffs would have to argue that the statute was facially unconstitutional—unconstitutional in all its applications.[198] For the reasons stated in the previous paragraph, this argument is not likely to win. The central speech zone is most likely adequate for most speakers, particularly those wishing to reach the world in general, and is therefore constitutional to those speakers. For the same reasons, an "overbreadth" challenge to the regulation by speakers who do have adequate alternatives is unlikely to be successful.[199]

To completely strike a free speech restriction on adequate alternatives grounds, the regulation at issue will probably be more similar to the one in *Students Against Apartheid Coalition*. There, the campus was generally open to speech with one small area designated off limits to one particular form of protest. There, the only group affected by the regnlation challenged it, and if it could not be applied to the shanty protestors it would never be applied at all. The challenge there effectively destroyed the zone. This is not the situation with the typical speech zone regulation. There, the majority of the campus is designated as no-protest with only small areas permitting speech. In the free speech zone case, an adequate alternatives challenge

196. *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989) ("[The fact that] the city's limitations . . . may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.").

197. *See* 16 AM. JUR. 2D *Constitutional Law* § 140, 545 n.83 (1998) ("[A]n 'as applied challenge' . . . argues that a statute, even though generally constitutional, operates unconstitutionally as to the plaintiff because of his peculiar circumstances.") (citing Texas Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 518 n.16 (Tex. 1995)).

198. "[A] 'facial challenge' to a law is a challenge based on a contention that the law, by its own terms, always operates unconstitutionally." *Id.* at § 140.

199. When a speech restriction can be legally enforced against a speaker, the overbreadth doctrine allows that speaker to bring a challenge to the law anyway. That speaker can prevail and have the law found unconstitutional in full, if "the statute is 'substantially' overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." 16A AM. JUR. 2D *Constitutional Law* § 411 (1998).

would likely carve out a niche in the no-speech area while leaving the overall speech zone structure intact. Still, such challenges could be useful in making sure that any speech zone policy allowed protests in crucial campus areas. For instance, an as-applied challenge could lift a speech zone restriction outside administration buildings for students who wished to be heard on issues directly affecting them as students. This piecemeal approach may be useful if not completely satisfactory.

III. THE UNIVERSITY AS A NONPUBLIC FORUM

A. Can the University be Considered a Nonpublic Forum?

Until this point, this Note has assumed that university campus grounds would be considered a public forum as to its students. However, if a university were able to successfully argue that its campus was a nonpublic forum, the time, place, or manner test would be replaced by the even lesser standard of "reasonableness" as a gauge of its constitutionality.[200] Is it possible to consider the university a nonpublic forum? The one main obstacle to such an effort is that, as noted,[201] the geographical and physical realities of most campuses will include areas that can be considered traditional public fora.[202] Public streets and sidewalks cross through universities, and open areas at many universities resemble parks. All of these areas are usually considered traditional public forums.[203] However, in *United States v. Kokinda*[204] the Supreme Court ruled that not all sidewalks are traditional public forums. Essentially, if a classic traditional public forum has a "sufficiently 'specialized'" use, then it may not be a public forum after all.[205] The question of whether otherwise traditional public fora on university campuses are specialized enough to strip them of their public forum status is beyond the scope of this Note but has recently been the subject of other scholarly work.[206] Assuming that the campus grounds could be considered a nonpublic forum, what might such a challenge to the free speech zone regulation look like? The issue will be discussed below.

B. A Guidepost for the Speech Zone Challenge Under Nonpublic Forum Doctrine?: Auburn Alliance for Peace & Justice v. Martin

One possible guidepost for what a speech zone challenge in a non-public forum regime might look like comes from Auburn University in 1988. In *Auburn Alliance for Peace & Justice v. Martin*,[207] a group of students and faculty (the Alliance) at Auburn University wanted to hold a weeklong camp-out on university

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200. *See supra* note 28 and accompanying text.

201. *See* Smolla, *supra* note 28.

202. As some courts have already done. *See supra* notes 64-67 and accompanying text.

203. *See supra* Part I.A.

204. 497 U.S. 720 (1990).

205. *See* Lederman v. United States, 291 F.3d 36, 41-44 (D.C. Cir. 2002) (explaining *Kokinda* and other cases, but then finding that the sidewalk around the U.S. Capitol building was not sufficiently specialized to remove its traditional public forum status).

206. *See* McDonald, *supra* note 61. McDonald discusses this issue as it relates to public universities through analysis of a Fifth Circuit case from 2002, *Brister v. Faulkner*, 214 F.3d 675 (5th Cir. 2000), dealing with the question of whether the sidewalk in front of a university amphitheater was a public forum. *Id.* at 476-77. She also analyzes similar decisions in other circuits. *Id.* at 484-91.

207. 684 F. Supp. 1072 (M.D. Ala. 1988).

grounds to protest foreign policy in Central America.[208] The university had regulations for speeches and demonstrations that allowed such speech only in the "Open Air Forum" and only between 11:00 A.M. and 2:00 P.M. each day, absent prior approval of the university.[209] The Alliance sought such approval and, after an initial denial, was granted an exception allowing use of the Open Air Forum for several additional hours each day.[210] Additionally, the university offered the

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208. *Id.* at 1073.

209. The regulations read as follows:

> Auburn University recognizes and supports the rights of students, employees of all categories, and visitors to speak and demonstrate in a lawful manner in designated areas of the campus. In order to maintain campus safety, security, and order, and to insure the orderly scheduling of facilities and to preclude conflicts with academic and co-curricular activities, Auburn University reserves the right to reasonably limit such activities by the following regulations regarding the time, place, and manner of such activities. These regulations shall be known as the Auburn University Speech Regnlations.
>
> A. Administration
>
> These regulations shall be administered by the Office of Student Affairs.
>
> B. Definitions
>
> 1. Speech, as used in this document, is the oral presentation of ideas in an open forum.
>
> 2. A demonstration shall be any process of showing individual or group cause by reasoning, by use of example, by group action, or by other forms of public explanation.
>
> C. Time, Place and Manner Limitations for Speeches and Demonstrations
>
> 1. Interior
>
> Demonstrations, debates and speeches may be held inside University facilities only in compliance with established procedures for the use of the facility.
>
> 2. Exterior
>
> a. Auburn University reserves the right to require that speakers, scheduled and unscheduled, sponsored and unsponsored, University affiliated, and visitors to campus, move to the Open Air Forum or to another location to avoid unreasonable conflict with the missions of the University and to assure that the flow of vehicular and pedestrian traffic will not be impeded. The use of the Open Air Forum is scheduled by the Office of the Director of Foy Union, for use between the hours of 11:00 a.m. and 2:00 p.m.
>
> The use of the Open Air Forum is to be scheduled in blocks of time, so as to encourage the accommodation of all users and to discourage the monopolization of the Open Air Forum by any person, agency, or organization. Demonstrations, speeches, and debates will be held only in the Open Air Forum unless special authorization is secuted through the Office of Student Affairs not less than 48 hours in advance. This authorization will require identification of the organization and agreement to abide by reasonable Auburn University regulations, and will not be unreasonably withheld.

Id. at 1073-74.

210. The University gave permission to use the forum from 9:00 A.M. to 4:30 P.M. on weekdays and 11:00 A.M. to 4:30 P.M. on weekends. *Id.* at 1074.

protestors an alternative site, on the concrete outside Memorial Coliseum,[211] for all other hours of the day when the Open Air Forum was unavailable.[212] The protestors did not believe they could transmit their message as effectively from the coliseum, and started a camp-out outside of hours in the Open Air Forum despite the regulations.[213] The demonstration was not disrnptive, but during the first night of the protest, campus police told the demonstrators to leave, taking the identification of those who refused.[214] Later those students were reprimanded.[215]

The Alliance sued the university, claiming that the refusal to grant twenty-four hour-a-day access to the Open Air Forum specifically, and the regulations generally, were unconstitutional in violation of the First Amendment.[216] The district court disagreed. Applying the standard time, place, or manner test,[217] the court found that, as applied to the Alliance, the restriction on the use of the Open Air Forum was content-neutral and that there was no proof of intent to discriminate against the Alliance's viewpoint.[218] The court seemed to find narrow tailoring in the university's extending the hours for using the Open Air Forum and granting an alternative location.[219] The adequate alternatives prong was satisfied as well. The court intimated that the purposes of the camp-out were not "particularly expressive," and in any case, less expressive than the camp-out in *Clark v. Community for Creative Non-Violence*,[220] in which the Supreme Court held that restrictions on camping did not bar alternative methods of expression.[221]

The court next addressed whether the regulations were vague and overbroad.[222] The court stated at the outset that they were not vague: no speech or demonstrations anywhere on campus without prior authorization, except in the Open Air Forum at stated times.[223] The court then found that the regulations were aimed at speech activities that "a reasonable person might find disruptive, or might . . . interfere with normal activities on campus" under both a plain interpretation of, and the university's actual application of, the regulations.[224] The university's power to move student speech outside the Open Air Forum based on interference with "the missions of the University" was held to mean that the university could move

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211. Memorial Coliseum, now known as Beard-Eaves-Memorial Coliseum, is Auburn's basketball arena. *See* http://www.auburntigers.com/mensbasketball/page.cfm?doc_id=343 (last visited Jan. 27, 2004).

212. *Auburn Alliance*, 684 F. Supp. at 1074.

213. *Id.*

214. *Id.* at 1075.

215. *Id.*

216. *Id.* at 1072-73.

217. *Id.* at 1077 (citing the test as it appears in Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

218. The actions of the university in attempting to accommodate the weeklong camp-out served to disprove this point conclusively in the court's view. *Id.* at 1076.

219. The court noted in light of the nature of this demonstration, which did not include speeches and was not disruptive, the University "wisely" extended the hours for use of the public forum, while still balancing the rights of these students against the others on campus. *See id.* at 1077.

220. 468 U.S. 288 (1984). The camp-out in *Clark* was tied to the reality of homeless people being forced to sleep outdoors. *See id.* at 295-96.

221. *See Auburn Alliance*, 684 F. Supp. at 1077 & n.2.

222. *Id.* at 1077-78.

223. *Id.* at 1078.

224. *Id.* This is similar to how a regulation that seems to grant "unbridled discretion" may be read as containing limits on that discretion. *Cf. supra* notes 79-83.

students based on the listed criteria: maintaining "'campus safety, security, and order . . . ,'" "securing 'the orderly scheduling of facilities'" and "'preclud[ing] conflicts with academic and co-curricular activities.'"[225] In light of this reading, the court stated that "[t]he University can not prevent speeches and demonstrations unless the requested speech or demonstration would unduly interfere with the criteria listed in the regulation, and such authorization 'will not be unreasonably withheld.'"[226] The Auburn speech regulations were thus upheld.[227]

What is uncertain about *Auburn Alliance* is how the court classified the areas of the campus outside of the Open Air Forum. The only mention of public forum doctrine was the finding that the Open Air Forum was the school's "designated Public Forum."[228] This does not necessarily mean that the other areas of the campus are nonpublic fora, but the language of the opinion lends strong support to that notion. The opinion limits its analysis of the time, place, or manner test to the "[r]estrictions imposed on [P]laintiffs' use of the Forum."[229] The judicial construction of the regulations as a whole, including the areas outside the Open Air Forum, were assessed as whether they are reasonable in light of the "mission of the University"—just as the nonpublic forum doctrine requires speech restrictions to be "reasonable in light of the purpose which the forum at issue serves."[230] The district court's construction of the speech regulations as being limited to those reasonable in light of the university's mission, seems tied to that court's earlier reading of the now-familiar footnote five of *Widmar*.[231]

The court's reading of the Auburn regulation perhaps illustrates some outer limits of the university's ability to restrict speech on campus. Restrictions on speech in a nonpublic forum must be reasonable in relation to the purpose of the forum.[232] If a college campus is a non-public forum, then to some extent, the mission statement of the university should be used to set that purpose. This was exactly what the court did in *Auburn Alliance*.[233] However, the ability of the university to restrict speech by promulgating a narrow mission statement seems to be limited by the holding in *Tinker v. Des Moines Independent Community School District*,[234] which involved events occurring in what is clearly a nonpublic forum: a

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225. *Auburn Alliance*, 684 F. Supp. at 1078 (quoting the student regulations at issue).

226. Interference with "campus safety, security and order, . . . orderly scheduling of facilities and to preclude conflicts with academic and extracurricular activities." *Id.* at 1072.

227. *Id.* at 1078.

228. *Id.* at 1072.

229. *Id.* at 1076.

230. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

231. The court in *Auburn Alliance* parenthetically summed up the footnote as meaning that "a university may regulate the time, place and manner of expressive activity so that it does not materially disrupt classwork, involve substantial disorder on campus, or invade the rights of others." *Auburn Alliance*, 684 F. Supp. at 1077.

232. *Perry Educ. Ass'n*, 460 U.S. at 49.

233. *See Auburn Alliance*, 684 F. Supp. at 1078 ("'[T]he missions of the University' is a broad criterion, the evidence before the Court indicates that the University has interpreted this criterion to limit speeches and demonstrations which disrupt classes, dormitory life, campus security, and the other criteria listed in the Speech Regulations.").

234. 393 U.S. 503 (1969). For an example of how Tinker might limit the university's ability to curtail speech, see Widmar v. Vincent, 454 U.S. 263, 268-69 (1981) ("The University's institutional mission, which it describes as providing a '*secular* education' to its students . . . does not exempt its actions from constitutional scrutiny. . . . [T]he First Amendment rights of speech and association extend to the campuses of state universities.")

classroom in session.[235] In *Tinker*, the Supreme Court upheld the right of high school students to wear black armbands in class as a show of protest against the Vietnam War.[236] If minor high school students "on the campus during the authorized hours" have free speech rights inside their nonpublic forum so long as they do not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others"[237] then *a fortiori* those same rights must extend to adult college students on the university campus. But these rights might not go too far. The expression in *Tinker* was aimed at suppressing speech—a content-based restriction.[238] Restricting time, place, and manner of speech that was disruptive was expressly permitted.[239] However, the *Tinker* formulation can be seen as setting a minimum. For any speech zone, the question should be whether or not the speech zone is reasonable in light of the university's valid goal of preventing "material[] disrupt[ion of] classwork . . . [,] substantial disorder[,] or invasion of the rights of others."[240] This still will likely not result in many successful challenges. First, "[t]he Goverument'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."[241] Additionally, in the nonpublic forum there is no narrow tailoring requirement, and as-applied challenges under inadequate alternatives theory will be marginally useful at best.[242]

In practical terms for free speech zone challengers in the nonpublic forum arena, it means they will probably not win, absent a truly egregious policy. Even though a place restriction is overbroad[243] and targeting disruptive behavior directly would be less speech restrictive, the fact that targeting disruptive behavior is more

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(citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) and Healy v. James, 408 U.S. 169, 180 (1972)) (emphasis in original).

The viability of *Tinker* with regards to student speech at the high-school level and below is possibly threatened due to recent cases. For a more thorough discussion of *Tinker* and its progeny, see Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623 (2002).

235. *See, e.g.*, May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1114 (7th Cir. 1986) (elementary school classroom is a nonpublic forum); Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1539-40 (7th Cir. 1996) (elementary school is a nonpublic forum); Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838, 1112 (W.D. Pa. 1996) (high school classroom is a nonpublic forum).

236. *Tinker*, 393 U.S. at 514.

237. *Id.* at 512-13.

238. *Id.* at 504.

239. "[C]onduct by the student, in class or out of it, which for any reason—*whether it stems from time, place, or type of behavior*—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513 (emphasis added).

240. *Id.*

241. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 808 (1985) (emphasis in original).

242. "The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. Rarely will a nonpublic forum provide the only means of contact with a particular audience." *Id.* at 809 (citations omitted).

243. Because not all potential speakers in that space would be disruptive, but all would be banned.

reasonable does not make it mandatory.[244] Certainly it is administratively easier to deny access instead of making case-by-case determinations of disruptiveness or monitoring of all events for signs of disruption. Additionally, the creation of a free speech zone—here, opening a designated public forum—could very possibly save the nonpublic forum campus speech restrictions. As in *Auburn Alliance*, the university's creation of a designated speech zone may be considered an attempt to accommodate students who have demonstrated that their actions will be non-disruptive. The issue of reasonableness cannot, of course, be divorced from the facts of a case. However, it is hard to imagine a university creating and supporting a free speech zone policy so restrictive that it would lose if its campus were considered a nonpublic forum. For this reason, it is likely crucial that any challenge to free speech zones establish that the university grounds in question are public forums.

IV. Non-Legal Alternatives?

This Note has thus far explored various legal challenges to free speech zones. In light of their unpopularity, might there be a different approach to bringing down speech zones? It is possible that student outrage and public pressure could act more swiftly than the courts to change overly restrictive speech regulations. However, the author believes that universities will not ordinarily respond to mere student pressure. The existence of the free speech zones themselves may serve as a practical impediment to pressuring a university to change its policies; after all, how many students will protest in front of an administration building if they can be expelled for doing so? Sadly, anecdotal evidence shows that universities tend to change their policies only when sued.[245]

Legal challenges hold considerably more promise. Initially, it is important to remember that universities certainly have the ability to craft free speech policies that will withstand constitutional scrutiny under the public forum doctrine. However, it might not be worth the university's effort. Legal challenges to university speech zones have the potential to succeed even when a zone is argnably constitutional. The constitutionality of a speech zone is not ensured until it is successfully defended, and therein lays the trouble. The inherent risk to the university is that it will be forced to pay a student's attorneys fees after its carefully drafted speech zone regulation is declared unconstitutional in a § 1983 lawsuit.[246] In times of limited university budgets and massive state deficits, the risk of being wrong is even more pronounced.

The West Virginia University policy shift late in 2002 is a paradigmatic example of a university bowing to public pressure only when sued. The university's controversial speech zone policy expressly limited student expression

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244. In fact, there is support for the proposition that a preemptive place restriction is perfectly reasonable. *See id.* at 810 ("[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum.").

245. *See supra,* notes 1, 90-114. *See also Campuses Under Fire over its 'Free-speech Zones'*, CHI. TRIB., June 3, 2003, at 36 (noting examples of speech zones dropped due to pending litigation).

246. 42 U.S.C. § 1983 (2000) allows civil lawsuits against state agencies (e.g., public universities) that deprive persons of constitutional rights. 42 U.S.C. § 1988(b) (2000) allows prevailing parties under § 1983 to recover attorney's fees from the state.

to two areas on campus.[247] These zones were "described by members of the university as being 'roughly the size of a classroom'" and only "about 50 people could fit in one zone while a little more than 100 could fit in the other."[248] Student protests led the university to make some modifications, but the university defended the general policy and retained the zone restriction as the policy's central feature.[249] However, under legal pressure after being sued by the civil libertarian Rutherford Institute on behalf of students, the university dropped the speech zones altogether.[250] In an amazing turnabout, the university called their regulation "an admittedly outdated and flawed policy."[251] West Virginia University later instituted a new policy to curb disruptive speech that did *not* use speech zones of any kind. That policy allows speech activities on "any grounds on the campus outside of buildings"[252] subject to nine time, place, and manner restrictions targeting disruptive activities themselves.[253]

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247. The WVU Policy, archived at http://www.thefire.org/issues/policy_031802.php3 (last visited Jan. 7, 2004), read as follows:

> Free Speech Activities, Policy on:
>
> West Virginia University recognizes the right of individuals to pursue their constitutional right of free speech and assembly, and welcomes open dialogue as an opportunity to expand the educational opportunities of our campus community. Individuals or organizations may utilize designated free speech areas on a first-come, first-served basis without making reservations.
>
> The free expression of views or opinions, either by individuals or groups, may not violate any rights of others, disrupt the normal function of the university, or violate the provisions specified in the University Code of Student Conduct. Solicitation is not permitted.
>
> The University reserves the right to relocate or cancel the activity due to disruption from excessive noise levels, traffic entanglement, or if the safety of individuals is in question. Due to the limitations of space on the downtown campus, the two desiguated areas for free speech and assembly will be the amphitheater area of the Mountainlair plaza and the concrete stage area in front of the Mountainlair and adjacent to the WVU Bookstore.

248. Jonathan V. Last, *In the Zone: At West Virginia University You Can Say Anything You Want—As Long As You're Standing in the Free-Speech Zone*, THE WKLY. STANDARD, March 25, 2002.

249. *See* Josh Hafenbrack, *Protest Freedoms Reviewed; WVU President Calls Regulations 'Practical Necessity'*, CHARLESTON DAILY MAIL, June 14, 2002, at 1A, Kershaw, *supra* note 7.

250. *See* Ellen Sorokin, *WVU Eases Campus-Speech Rules; Public Protests No Longer Limited to Designated 'Zones'*, THE WASH. TIMES, Nov. 12, 2002, at A08; Press Release, The Rutherford Institute, The Rutherford Institute Claims First Amendment Victory in West Virginia University 'Free Speech Zone' Case (Nov. 8, 2002) (on file with author), *available at* http://rutherford.org/articles_db/press_release.asp?article_id=335 (last visited Jan. 27, 2004).

251. Press Release, West Virginia University, WVU to Follow New Interim Policy on Free Speech While Regional Campuses, Governing Board Ponder Further Improvements (Jan. 27, 2004) (on file with author), *available at* http://www.nis.wvu.edu/2002_Releases/RevisedFSP.htm.

252. West Virginia University, Policy Regarding Freedom of Expression and Use of Facilities at West Virginia University and Regional Campuses §§ 3.3–3.4, *available at* http:// www.wvu.edu/freespeechpolicy.html/#Policy (last visited Oct. 20, 2003).

253. The restrictions:

Since the original draft of this Note, another civil liberties organization, the Foundation for Individual Rights in Education ("FIRE"), has declared a policy of instituting lawsuits against university free speech zones.[254] In April 2003, the FIRE sued Shippenburg University in Pennsylvania after the university instituted "a policy limiting demonstrations and rallies to two specific 'speech zones' on campus."[255] 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.[256] The community college quickly capitulated: "[A] day before college officials were to appear in court, they rescinded the speech-related policies."[257] In June 2003, the FIRE sued Texas Tech over a policy that required permission for speech activities everywhere on campus save for a small[258] "Free Speech Gazebo."[259] It is clear that civil liberties groups such as the FIRE and

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5.2.1 Attempt or actually interfere with, impair or impede the institution's regularly scheduled classes, events, ceremonies or normal and essential operations.

5.2.2 Interfere with, impede or cause blockage of the flow of vehicular or pedestrian traffic.

5.2.3 Interfere with, impede or cause blockage of ingress or egress to or from any building.

5.2.4 Willfully, negligently or recklessly commit any act likely to create an imminent health or safety hazard.

5.2.5 Interfere with a University event by blocking audience view, make sufficient noise to hamper a speaker or performance from being heard or perform any other act disruptive to the event.

5.2.6 Leave an area littered.

5.2.7 Use voice or amplification systems resulting in noise levels that interfere with regularly scheduled classes, campus events or operations or interfere with sleep between 10 p.m. and 7:30 a.m. at the residence halls.

5.2.8 Willfully, negligently or recklessly engage in destruction of property or physical harm to others.

5.2.9 Within 75 feet of the entrance to any campus health care facility, knowingly approach within 8 feet of another person in order to pass a leaflet or handbill, display a sign, or engage in oral protest, education, symbolic speech or counseling with that person, without that person's consent.

Id. at §§ 5.2.1–5.2.9. The final restriction is a slightly modified version of the statute upheld as constitutional by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703, 707-08 (2000). *See supra* note 87.

254. Tamar Lewin, *Suit Challenges a University's Speech Code*, N.Y. TIMES, Apr. 24, 2003, at A25.

255. *Id.*

256. Mary Beth Marklein, *Campuses on Opposite End of Free-Speech Struggles*, USA TODAY, May 20, 2003 at 1A.

257. *Citrus College Dodges Court Date by Dropping Speech Code*, CHRON. OF HIGHER EDUC., June 27, 2003, at 30.

258. The free speech zone here is so small that it must be seen to be believed. An image is available at http://www.thefire.org/images/tt_gazebo1.jpg (last visited Jan. 27, 2004).

259. Tracie Dungan, *Campuses Put Limits on Speech; Balance of Order, Freedom Sought*, ARK. DEMOCRAT-GAZETTE, July 13, 2003, at 19.

the ACLU[260] understand that legal persuasion and not student persuasion will be most instrumental in challenging university speech zones.

CONCLUSION

Place restrictions on student speech are a terrible idea. Certainly there is a need to maintain order on college campuses, and certainly some speakers go too far and cause disruption. More often than not, however, the disruption is not caused by the location of the speech but rather by the actions of the speaker. Unless the harm to be prevented by a place restriction relates to physical properties of the ground (for example, it is already being used by another group, or is an entrance to a building) the best policy for a university should be to promulgate rules that expressly permit nondisruptive student speech everywhere where students have a right to be.

Such an approach permits responsible students to fully exercise their constitutional rights and partake of the university experience, while simultaneously allowing the university to protect those same students from harm. Alternatively, if universities are truly interested in "establishing a Hyde Park corner,"[261] then such an area can be designated as a place where time, place, and manner regulations are lessened, or where reservation of space need not be procured. Either way, such an approach should be clear that expressive activity is not limited to that area.

Place restrictions are at best a lazy attempt to deal with the potential side effects of vigorous First Amendment activity. Besides that, they can be confusing, they make university officials look like censors, and they cause unrest even among those students who do not currently have a need to protest, but feel that their school will not permit them to peaceably express themselves should the need arise.

When I originally drafted this Note, speech zones had rarely been challenged. This appears to be changing. I am delighted to see that the FIRE, a civil libertarian organization, has forcefully taken the fight against university speech zone restrictions to the courts. Hopefully, in the coming years, the appellate courts will be forced to deal head-on with the issue of campus speech zone restrictions.

While this Note has demonstrated that certain speech zones may be constitutional under public forum doctrine, universities may wish to take the route of West Virginia University by amending speech zone policies to combat only disruptive speakers while leaving peaceful students alone. Perhaps, as Harvey Silverglate, co-founder of the FIRE has said, universities will recognize "that our entire country is a free speech zone, and that our campuses of higher education, of all places, cannot be an exception."[262]

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260. The ACLU has recently brought suit against the "University of Maryland at College Park on behalf of students after it limited free speech to one campus amphitheater and restricted where students could distribute literature." *Id.*

261. *See* Archibold, *supra* note 1.

262. Silverglate & Gewolb, *supra* note 8.