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Zoned Out — The Peculiar Assault on Free Speech by California Community Colleges

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In September 2010, with an election looming for members of a California community college's board of trustees, a few faculty members assembled outside the college's administration building during a public meeting of the board. They set up a folding table and intended to distribute leaflets urging support for challengers to incumbent board members. Campus police ordered them to leave, directing them to one of the free speech "areas" that the administration had designated. That area encompassed a small portion of the college's 71-acre campus, which includes several open areas and walkways, and more than 30 buildings. The three speech areas were one plaza, one patio, and part of a campus walkway near the college library. None of these areas adjoined the administration building.

In justifying its action, the college relied on its recently issued "election guidelines" that referred to "free speech areas on the…campuses…." The union asserted these restrictions were unconstitutional because the entire open space of the campus is a "public forum," where free speech is protected. The college relented, and faculty were able to leaflet outside a candidate forum held soon afterward in the same location. But, many other California community college districts have gone much further in their efforts to limit employee, union, or student speech on their campuses.

American colleges have long been identified with protest and demonstrations. In fact, a decade before the Revolutionary War, in 1765, colonists and Harvard college students protested the British Stamp Act at Harvard Yard.[1] Yet until the free speech battles that swept the nation in the 1960s, most American colleges were particularly hostile to freedom of speech on their campuses. It is worthwhile recalling that until the UC Berkeley Free Speech Movement of 1964, the history of the University of California overflowed with speech restrictions. Through the 1960s, the

university forbid political speakers and meetings on campus, prohibited the distribution of political writings, banned organizations whose views it disapproved, disciplined students or fired faculty who had "leftist" views, and behaved as though state and federal constitutional rights stopped at the college perimeter.[2] Such actions, of course, are and were unconstitutional.

Once again, there is a trend toward college administrations placing unconstitutional restrictions on speech. During the last few years, numerous California community colleges have adopted policies and regulations designed to severely curtail freedom of expression, if not altogether prohibit it except in limited "free speech zones." More than half of California community college districts have now declared their entire campuses to be "non public forums," with speech and advocacy confined to restrictive "free speech zones" or "areas."[3] In a sense, these policies have replaced the "marketplace of ideas" with a "speech boutique" or, perhaps, a gazebo, shunted to the side, and that is only sometimes available (often if reserved well in advance).[4]

The problem with a free speech zone is, of course, that it restricts expression to those inside the zone, and prevents speech from reaching those outside. In the case of several colleges, these "zones" are not just an infinitesimally small percentage of the campus' total open space, but they are remote from where people tend to walk or congregate. In this way, the college effectively prevents freedom of speech on nearly the entire campus. In implementing these "zones," most of the policies assert that they are intended to "protect" or "enhance" free speech. For this they should get an "A" in Orwellian doublespeak.

In addition to restricting the physical space where speech may occur, most of these policies or implementing procedures erect other barriers to spontaneous protected expression. Many demand advance notice as to the speakers' identity.[5] Several require advance submission of proposed remarks.[6] Some declare that individuals "shall be allowed to distribute petitions, circulars, leaflets, newspapers, and other printed matter" only "within the areas generally available to students and the community."[7] Others forbid solicitation of political or ideological contributions.[8] And, some prohibit anonymous speakers or literature.[9]

The widespread adoption of these policies is no coincidence. Many districts have been stimulated to act by the Community College League of California, a non-profit organization consisting of the 72 local community college districts in California. The League offers "model" policies on freedom of speech that encourage districts to declare that "the colleges of the district are non-public forums." The February 2010 version includes this Pinocchioan incentive: "Note: This policy is legally required."[10]

One recent, glaring example of "free speech" policy run amok took place at Southwestern College, in San Diego County, where in 2009, the college declared its campus to be a "non-public forum" and decided it was thus empowered to ban from the campus and place on leave three professors who protested outside the College's limited "free speech patio." (The resulting storm of protest over this illegal action led to the reinstatement of all three faculty members and a revised policy on

free speech.[11])

Such restrictions are unconstitutional, however, as colleges are the quintessential "marketplace of ideas," where freedom of expression is to be fostered, not curtailed.[12] The U.S. Supreme Court emphasized that "the university is a traditional sphere of free expression…fundamental to the function of our society,"[13] and courts have repeatedly affirmed this same principle in deciding questions of speech in American colleges.[14] For instance, the Supreme Court declared:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation…Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[15]

The court emphasized that because the First Amendment "needs breathing space to survive, the government may regulate in the area only with narrow specificity."[16] Thus, the court declared, the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[17]

In this marketplace of ideas, the students, faculty, classified staff, and the public have the right to engage in a wide variety of protected speech, such as hand billing or leafleting, soliciting signatures or funds, distributing literature, proselytizing, protesting, satirizing, debating, urging support or opposition to candidates or policies, and expressing themselves artistically. Of course, they also enjoy the right to listen to the speech of others.[18]

Since the 1960s, several California court decisions have affirmed the rights of workers and others to distribute political literature on American's college campuses. In 1969, the California Supreme Court affirmed the right of unions in K-12 public schools to hold rallies and distribute literature on public school premises during duty-free time.[19] In 1975, another decision affirmed workers' rights to distribute leaflets on school premises,[20] the court agreeing that in order to restrict First Amendment speech rights, a district bears a "heavy burden" of establishing a compelling state interest. It also held that a district must prove that the conduct being curtailed was reasonably likely to result in actual impairment or disruption of public service.[21] The current leadership of California's community colleges seem largely unaware of these precedents.

While most recent appellate cases have focused on overbroad policies that unconstitutionally punish or muzzle students or faculty,[22] there have been cases addressing policies dealing with speech in more general terms. Thus, the Supreme Court acknowledged in *Widmar v. Vincent*, that "the campus of a public university, at least for its students, possesses many of the characteristics of a public

forum."[23] But until the recent "Occupy" demonstrations, American colleges have been relatively devoid of mass protest.[24]

As this article explains, these new policies and procedures that restrict the location of speech to specific "free speech zones" or "areas" and restrict or "chill" the exercise of free speech in other ways, are undoubtedly unconstitutional. In case after case, California courts, and those of other jurisdictions, have struck down these limitations. Surprisingly, the widespread adoption of these restrictive policies has failed to receive much public notice, and these new hurdles now lie in wait for unsuspecting speakers.

Speech Zone Policies and Procedures

The typical policy that establishes "speech zones" usually states, "The District is a non-public forum, except for those areas that are generally available for use by students or the community, which are limited public forums."[25] As an example, in Los Angeles County, the El Camino College policy incongruously declares:

El Camino College welcomes and supports the open and free exchange of ideas and philosophies in a civil and respectful manner consistent with constitutional principles rooted in the First Amendment. In order to maintain a reflective and productive academic and social environment, the Superintendent/President shall enact administrative procedures to regulate the time, place and manner of the exercise of free expression in the limited public forums. While El Camino College is a non-public forum, Free Speech Areas have been designated as limited forums. The administrative procedures shall allow the right of students and non-students to exercise free expression....The distribution of printed materials or petitions in those parts of the College designated as Free Speech Areas, ... shall be permitted on campus ... Prohibited speech on campus includes ... the violation of District policies and procedures....[26]

In Santa Clara County, Gavilan College's AP 5550, entitled, "Speech: Time, Place, and Manner," declares the college is a non-public forum, except for a "designated Free Speech Area, as follows: Gazebo, located North of Cafeteria." It adds that "the Free Speech Area is a limited public forum, and that the District reserves the right to revoke that designation and apply a non-public designation at its discretion."

Most of these policies and procedures offer as their "legal authority" Education Code sections 66301 and 76120, discussed below. These policies are implemented through written "administrative procedures," which contain the additional specific limitations that are unconstitutional. To understand the implications of these policies, one must recognize the analytical methodology that has come to dominate court review.

Forum Analysis

Federal forum analysis: The legal distinctions among public forums, non-public forums, and limited and designated public forums. The "public forum doctrine" is a means through which courts analyze restrictions on freedom of speech in public places.[27] Federal "forum analysis," which is barely 30 years old, divides public property into public forums, non-public forums, and limited and designated public forums.[28] In federal constitutional analysis, the scope of free expression, and the allowed level of governmental regulation, turns on which forum is involved.

Federal forum analysis treats public streets, sidewalks, squares and parks, public grounds, and other rights-of-way to be "quintessential" *public forums*.[29] In a *public forum*, federal law holds that the government may only limit free speech and impose content-based exclusions on a showing that its regulation is narrowly drawn to achieve a compelling governmental interest.[30] Limitations are subject to "strict" judicial scrutiny. A "traditional" public forum is a place that is devoted to debate or association by long tradition or historical practice.[31] As the Supreme Court explained three-quarters of a century ago:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[32]

As with any "time, place, or manner" restrictions, the government bears the burden of justifying a location restriction.[33] And whenever a restriction covers a public forum, the government bears this same burden.[34]

A *designated public forum* is one that the government has opened to expressive activity.[35] In a designated public forum, the government may enforce a content-neutral time, place, and manner restriction only if the restriction is necessary to serve a significant government interest and is narrowly drawn to achieve that interest, and for such restrictions "is bound by the same standards as apply in traditional public forum."[36]

In a *non-public forum*, the least free speech rights exist. Non-public forums, which most California community colleges aspire to be, are, in the eyes of the courts, "no forum at all" for First Amendment purposes.[37] A non-public forum is one in which the *content* of the speech, and the *speaker*, can be restricted by the government. The government may entirely exclude, at its discretion, speakers on the basis of subject matter, so long as distinctions are viewpoint neutral and reasonably drawn in

light of the purpose served.[38] Hence, at Southwestern College, in 2009, the college declared it was a non-public forum and decided it was thus empowered to arrest and ban from the campus three professors who wanted to protest outside the limited "free speech zones." (The resulting storm of protest over this seemingly led to a "reassessment" of this illegal action.)[39]

Finally, a *limited public forum* is a non-public forum that the government elects to open for certain groups or for certain topics.[40] A district may convert part or all of a non-public forum to create such a limited public forum, since it may always increase speech rights beyond what is constitutionally required. Thus, in a "limited public forum," the government is able to restrict the topics of allowed speech and the speakers, but only in a place that would otherwise be a non-public forum, where there is no historic or intrinsic right to free public speech. In no circumstances is the government free to limit the status of its already-existing *public* forums, and any attempt to do so for a historical public forum is startling and utterly unwarranted.[41]

When a federal constitutional analysis is involved, the type of forum is critical to determining what standards apply to analyze any restrictions on speech.

The public forum under California law. California law holds that the test of whether property constitutes a public forum is whether the use of the area as a public forum interferes with its primary use.[42] This test is broader than that applied by federal courts. In the case of *Pruneyard Shopping Center v. Robins*, the California Supreme Court explicitly recognized that the state Constitution "grants broader rights to free expression than does the First Amendment" to the federal Constitution.[43] The court underscored that it had first recognized a private shopping mall as a public forum in 1946!

The primary uses of a shopping mall's open spaces are fairly evident to most consumers — such malls have replaced our town squares. A college's open spaces are even more apparent. Nearly every college campus includes pathways, sidewalks, hallways, plazas, quadrangles, courtyards, lawns, patios and fountains, public streets, student unions, and open areas where students and others have always congregated and exercised their freedom of expression. Indeed, a public college is *supposed to be a bastion of freedom of expression*, the quintessential public forum for protest, debate, and other political or artistic expression.

The exercise of these expressive and associative rights on a college campus rarely interferes with the primary educational use of the premises, and spirited debate, dissent, and protest actually enhance this purpose by exposing the college population to the free exchange of ideas in the search for truth. The generous open spaces and other areas of a college campus were never intended for mere pedestrian traffic, but offer the opportunity for adults in a college setting to associate and engage each other in debate and protest.

Because a public forum historically exists within California's colleges and universities, freedom of expression and association are fully protected from arbitrary limitation or exclusion by the trustees of that public property. Simply put, colleges cannot eliminate the constitutionally protected, historic public forum aspects of its

campuses *by purporting to recharacterize them as non-public forums*.

Such an action squarely conflicts with California law and federal law, which recognizes that a college campus bears all the attributes of a public forum.[44] Unlike VA hospitals, fishing piers, or military bases, which are either limited or non-public forums, the *default standard for a California community college is that the campus is historically and by tradition a public forum*.[45]

As mentioned above, California's more expansive approach to public forums is not limited to traditional forums such as streets, sidewalks, and parks, or to sites dedicated for communicative activities.[46] And the California Constitution grants more expansive speech rights than federal courts have interpreted in the First Amendment.[47]

The "Conversion" of a Public Forum to a Non-Public Forum Is Not Allowed

Under a federal constitutional analysis, traditional public forums are defined by the objective characteristics of a property, and hence simply asserting that those public forums are now "non-public forums" or "limited public forums" is ineffective to deprive a traditional or historic public forum of its status, when the objective characteristics remain unchanged.[48]

A designated public forum is created by intentionally opening a nontraditional public forum for public discourse.[49] The law dictates that "determining the government's intent is an inherently *factual inquiry*."[50] Thus, it is necessary to determine whether a forum is public or not by examining "the forum's past uses, the government's consistent policy and practice, and the forum's compatibility with expressive activity."[51] A policy statement, by itself, is not determinative.

Despite calling newly created speech zones "limited public forums," or "free speech areas," districts are actually *closing* public forums and purporting to convert and "designate" a small fraction of campus space into "limited public forums," whose availability for speech it may "revoke" at any time by fiat.

Rather than preserving its public forums, as the law requires, these new policies propose to do away with them. Yet a traditional public forum must be preserved for assembly and communication.

These principles were illustrated in a recent case, where Salt Lake City and the Mormon Church ran squarely into the Constitution by attempting to convert a formerly public forum street into a non-public forum mall. The city had sold a public street, historically available for speech, to the Mormon Church. Under the terms of the sale, the street and the mall plaza continued in existence, and the city maintained a public easement. But the Church owned the property, and a term of sale was the easement should not be interpreted to "create or constitute a public forum, limited or otherwise." The terms provided that the easement was not intended to allow picketing, distribution of literature, soliciting, demonstrating, or a

host of other expressive activities. The Church then posted signs forbidding such activities, and groups now foreclosed from use of the forum, such as the First Unitarian Church, filed suit.

The federal court held that the contractual declaration of an easement could not insulate the property from being considered a public forum:

> The easement's history, as well as the other contemporary characteristics of the easement discussed above, support the conclusion that the easement is a public forum. The objective nature and purpose of the easement and its similarity to other public sidewalks indicate it is essentially indistinguishable from other traditional public fora. We reach this conclusion *in spite of the City's express intent not to create a public forum*, because *the City's declaration is at odds with the objective characteristics of the property* and the City's express purpose of providing a pedestrian throughway. Accordingly, we hold that the easement is a public forum.[52] [Emphasis added.]

A primary thesis of the city and the Mormon Church was that, because the mall was no longer governmental property, the forum could be closed. The court rejected this, recognizing that either governmental ownership or governmental regulation was sufficient to find a public forum.[53] As the court stressed, government ownership is not required for a public forum to exist.[54]

The ultimate argument of the city and Mormon Church, that the city's intention to not create a public forum controlled the outcome, was rejected. The court explained, "The government cannot simply declare the First Amendment status of property regardless of its nature and public use."[55] It continued:

> If the objective, physical characteristics of the property at issue, and the actual public access and uses that have been permitted by the government indicate that the expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with the more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. (*International Society for Krishna Consciousness v. Lee*) (1992) 505 U.S. 672, at 698-699, J. Kennedy concurring in judgment).

While not every part of a college campus is, at all times, a public forum, California law recognizes that areas normally reserved for education or administration may also serve, at least temporarily, as designated or limited public forums. Thus, California's Civic Center Act[56] allows public use of classrooms, meeting areas, auditoriums, and other common areas of school and college districts for political meetings and events.[57]

Court Decisions Generally Treat College Campus Areas as Traditional or Designated Public Forums

In recent years, in nearly every instance in which a college has attempted to transform its public forums into non-public or limited public forums, the action was either enjoined, declared unconstitutional, or withdrawn when the school was confronted with demands or litigation.

In California, there have been but a handful of published cases, but they are instructive. In 1999, the South Orange Community College District adopted a policy identifying three "preferred areas" for speech and instituting a "reservation system" for gatherings of 20 or more. The policy forbid distribution of written material without obtaining prior approval.[58] The "preferred" speaking areas excluded the "popular" and "strategically located" areas where students typically gathered. Students went to court, challenging the regulations. The court found that the college had opened up its premises to public speech, and that the policy appeared to prohibit "the distribution of flyers advocating the need to safeguard individuals' rights of speech and seeking donations in support of [the students'] pending lawsuit."[59] It also concluded that partitioning the campus into speech areas was likely unconstitutional, resulting from overbroad regulations, and enjoined the unconstitutional provisions.

Following the decision, the South Orange CCD revised its policies, and landed back in court.[60] This time, the offending policies specified that use of "any portion" of the college's grounds had to be reserved, the decision being solely within the college president's discretion. The court found this to be an unconstitutional prior restraint because approval was dependent on the complete, unfettered discretion of the president. The district argued that its policies were valid "time, place and manner rules," but the court disagreed, finding that most of the policy restricted speech based on its content. In particular, one section allowed the college to examine the content of posted material and remove writings that it felt were obscene, libelous, or slanderous.[61] Holding that the state lacked a "compelling interest in enforcing state civil laws," the court struck down this aspect of the policy as being overbroad.

In 2009, a dispute arose at City College of San Francisco, which had in place policies requiring "off-campus" individuals and organizations to apply to speak or distribute literature "at least five (5) working days in advance…of the requested activity." The regulations restricted speech to "designated areas," in this case a plaza on campus, and required all literature for distribution to be provided to the college in advance, along with a form requesting use of the free speech areas. The case arose after the college police force placed a visitor under arrest, handcuffed him, took him to the campus police department, confiscated his literature, and detained him for more than an hour. He was then transferred to the county jail and held for three hours. The next day, the charges were dropped. The student sued.[62] The court never reached the question of whether this restriction was permitted, because it found on other grounds that the regulations were unconstitutional. The district did not dispute, and the court agreed, that the college's Ocean Campus was a public forum.

The court considered the provisions governing prior review and approval of materials, noting that the facts were comparable to those in *Lovell v. Griffin*,[63] where the Supreme Court found such rules to strike "at the very foundation" of the First Amendment.[64] After recognizing that CCSF's regulations "might properly be challenged as a prior restraint, a content-based regulation, or an exercise of unfettered discretion," it issued an injunction.[65]

Other Court Decisions

Several court cases have reviewed speech restrictions in American colleges, and most have found the restrictions unconstitutional. Notably, it is beyond dispute that "college campuses traditionally and historically serve as places specifically designated for the free exchange of ideas."[66] In considering government-imposed burdens on speech, the law holds that rights of free speech are nowhere stronger than in public forums.[67] As with any "time, place, or manner" restrictions, the government bears the burden of justifying a location restriction.[68] When these policies include advance approval, they are especially suspect.[69] Similarly, attempts to apply such limitations on solitary speakers or small groups have fared badly.[70]

Recently, in *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*,[71] a court struck down a five-day prior notice and permit scheme that restricted all demonstrations, picketing, and rallies to a "free speech area" constituting less than .1% of the campus grounds. The situation bears some similarity to the actions of many California community colleges, for the university declared its intent to regulate all expressive activity on campus, and that its entire campus was a limited public forum, in an effort to "avoid strict scrutiny." The university's reasoning was that since its regulation did not depend on the content of speech, it could curtail most speech.

The court explained that in order to apply a federal forum analysis, it looked at the traditional use of the space, the objective use of the space and its purposes, the college's intent and policy regarding the property, and its physical characteristics and location. The court reviewed the history of use of the college's premises, finding that open campus areas had, from an objective standpoint, been made available to students as a designated public forum. Because the property had "traditionally been open for speech and debate," the areas in question were a designated public forum as to the college's students. The court distinguished cases dealing with outsiders, and then focused on the nature of the restrictions, finding that allowing the college to restrict the speech of students to limited topics was "anathema to the nature of a university," the "marketplace of ideas." The court emphasized that a desire for order or to avoid possible future disruption of educational activities was insufficient because "undifferentiated fear or apprehension of a disturbance is not enough to overcome the right of freedom of expression on a college campus."[72] Finally, the court rejected the action of declaring the entire campus to be a limited public forum, concluding that various open areas of the college were designated public forums,

and also holding that the lack of standards by which to judge various speech activities made the policy unconstitutionally vague.

In *Roberts v. Haragan (Texas Tech University)*,[73] the court struck down Texas Tech's "designated forum area" policy as unconstitutional. While the court agreed that the entire campus was not a public forum, it found that the campus included areas which were characteristic public forums, including sidewalks, park-like areas, streets and other common areas. The court wrote that these areas "comprise the irreducible public forums on the campus."[74] It rejected the proposition that the university's ownership of the campus property allowed it carte blanche power to limit the public forum:

> The mere fact that the University owns all the land within its boundaries does nothing to change the equation. First Amendment protections and the requisite forum analysis apply to all government-owned property; and nowhere is it more vital, nor should it be pursued with more vigilance, than on a public university campus where government ownership is all-pervasive. *The University's interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its students, for whom the University is a community, in having adequate opportunities and venues available for free expression.* Indeed, those who govern and administer the University, above all, should most clearly recognize the peculiar importance of the University as a "marketplace of ideas" and should insist that their policies and regulations make adequate provision to that end.[75] [Emphasis added]

In *Justice for All v. Faulkner*,[76] the court rejected the university's assertion that its open areas were a limited public forum. The court examined the content of the rules, finding that they "guaranteed students the right to 'assemble and engage in free speech' subject to 'reasonable nondiscriminatory regulations as to time, place and manner of such activities.'" Based on these terms, the court held that the outdoor areas of the university campus "generally accessible to students such as plazas and sidewalks" were "designated public forums for student speech." Having reached this conclusion, the court ruled that the policy was not "narrowly tailored" because it burdens more speech than necessary to accomplish the university's supposed goal of preserving outdoor areas of the campus for leafleting by students. The court concluded that simply asking leafleters if they were students was much less intrusive than requiring every leafleter to identify him or herself.

Besides these cases, numerous other decisions also conclude that college campuses contain public or designated public forums.[77] In general, courts agree that college spaces routinely include public areas that amount to designated public forums.

The New Speech Policies and Procedures Are Unlawful

While the small number of speech zone cases may not provide a definitive answer on the constitutionality of specific community college district policies, they nonetheless offer considerable guidance that confirms the unconstitutionality of the new policies and procedures.

First, as is evident from the discussion above, it is generally the case that open areas of community college campuses are traditional public forums. Second, at most colleges both predecessor policies and actual experience confirm the public forum status of open areas. Third, the justifications offered by districts for cabining free speech into "limited public forum zones" are inadequate under a strict scrutiny analysis. The unbelievable justification that the changes are necessary to make speech "effective" are hardly persuasive. The new policies actually severely restrict speech, while offering less protection for speech than under previous policies. Furthermore, California law has afforded the widest protection to the public forum areas of colleges and other locations. And, the two cited Education Code sections do not warrant limiting speech to special, less protective zones.

Section 66301's intent is clear: (1) colleges cannot make or enforce any rules subjecting students to sanction for speech conduct which, if engaged in outside the college, is protected by the California or U.S. Constitution; (2) a student can sue and recover attorney's fees for violations; and (3) prior restraints on speech are not authorized; and (4) employees shall not be adversely affected (dismissed, suspended, disciplined, reassigned, transferred, etc.) for protecting students from the loss of their speech rights. Nothing in section 66301 authorizes college actions to reduce the speech rights of faculty, staff, or visitors, yet the new policies are aimed directly at employees and college visitors, not just students. Moreover, the legislature's accompanying declaration of intent includes the broad admonition of the U.S. Supreme Court in the *Tinker* case, that students "and teachers do not shed their constitutional rights to freedom of speech…at the schoolhouse gate…."[78]

Section 76120 is similarly focused solely on students and, like 66301, is intended to protect, not cabin, speech. It declares that colleges may enact "reasonable" time, place, and manner rules, which shall "not prohibit" students' rights to distribute printed material, wear buttons, and engage in speech except where the speech "incites students so as to create a clear and present danger of…unlawful acts…or the substantial disruption of the orderly operation of the community college…." As is evident, the wholesale restrictions created by these new rules are inconsistent with this statute as well.

The lesson of the precedent setting *Los Angeles Teachers Union* case is that, "when the effective exercise of First Amendment rights relating to speech is impaired by governmental regulation, a court must weigh the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat that the forbidden speech or related activity poses to that interest."[79] And, "the more substantial the infringement of First Amendment rights is, the more compelling the governmental interest and the more ominous the threat to that interest must be."

Applying these principles, it is apparent that the impairment of a rule zoning speech

into confined areas is substantial, while there is no substantial threat posed by the newly zoned speech. The threat to speech from these zones is "ominous," and the governmental interest in restricting the speech is virtually non-existent. There is no "clear and present danger" from continuing free speech outside the "zones."[80] The undifferentiated "fear" of college officials from continuing to permit speech throughout a campus' traditional and designated public forums is not enough to authorize speech zones. As the California Supreme Court has underscored, "Tolerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required."[81] What motivated this tidal wave of "zoning" restrictions on speech was not any particular problem, merely an effort at cabining speech for the sake of "orderliness." Of course, the world has experienced far too often the chilling excesses of the politics of order.[82]

Therefore, there is no doubt that the new rules — which at the encouragement of the Community College League have swept through the state — are unlawful. As with San Francisco and other districts that have been forced to withdraw them, those rules await lawsuits or other action to restore the status quo.

Individual Trustee or Administrator Liability for Adopting Policies and Procedures and Speech Zones

If the case law were not enough, the probability that an administrator will be liable for violating free speech rights should dissuade officials from the wholesale adoption of overbroad policies restricting free speech. Federal civil rights laws, in particular the 1871 Civil Rights Act,[83] provide that officials who deprive individuals of their federal statutory or constitutional rights, and who act "under color of state law," may be sued individually for damages for violating constitutional rights. It is, by now, clearly established that efforts to paint an entire college as a non-public forum or limited public forum, or to ignore the existence of traditional or designated public forums, violate "clearly established' law.[84] It is settled that adopting or enforcing policies which violate the First Amendment subjects officials to lawsuits for damages and attorney's fees.[85] Given this, it is difficult to imagine what various college officials and school boards could have been thinking when they attempted to recharacterize their properties as non-public forums, and erect barriers to free expression.

College Districts, as Public, State-Supported Educational Institutions, Have a Mandatory Obligation to Protect Freedom of Speech.

College districts have an obligation to protect freedom of speech. The purpose of the Federal Bill of Rights was to protect First Amendment freedoms from limitation by local officials. As was explained in *West Virginia State Board of Education v. Barnette*,[86] the Founding Fathers determined to protect such freedoms from the "vicissitudes of political controversy, to place them beyond the reach of majorities and officials."

In *Hague v. CIO*, the court held that the government has an affirmative duty to preserve public forums, and that the government did not enjoy the same discretion as a private property owner in regulating speech on public property.[87] Instead, the court imposed on the government the requirement that it accord the widest possible latitude to speech within "public forums," which are places where the government must guarantee not just the right, but the meaningful opportunity, for citizens to express themselves. Under this doctrine, the government serves as the guarantor of individuals' free speech rights.

By adopting policies that illegally restrict free expression, scores of California colleges have disregarded their obligation to assure that freedom of speech for employees, students, and the public is protected on college campuses.

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[1] The 1765 protest by Harvard students and Boston residents protested a law that taxed the colonists to pay for the lodging of British troops to keep the colonists in line, and to pay for British troops at war.

[2] *An extensive description of UC's war against free speech appears in At Berkeley in the Sixties, Jo Freeman, Indiana University Press, 2004, pp. 12-28.*

[3] These include the following community college districts: Alan Hancock, Antelope, Barstow, Butte-Glenn, Cerritos, Chaffey, Citrus, Coast, Desert, El Camino, Feather River, Gavilan, Glendale, Grossmont, Imperial Valley, Los Angeles, Mendocino Lake, Merced, Mt. San Antonio, Mt. San Jacinto, North Orange, Ohlone, Palomar, Rancho Santiago, Rio Hondo, Riverside, Santa Clarita, San Bernardino, San Joaquin Delta, San Mateo, Santa Monica, Sequoia, Shasta-Tehama-Trinity, Sierra, Siskiyou Joint, Solano, South Orange County, Southwestern, State Center, Taft, Ventura, Victor Valley, West Hills, West Kern, West Valley-Mission, Yosemite, and Yuba.

[4] See *Rodriguez v. Maricopa County Community College Dist.* (9th Cir. 2010) 605 F.3d 703.

[5] At North Orange, a speaker must identify him- or herself and the group one is making a reservation for. The same is true of Rio Hondo and Mt. San Jacinto.

[6] For example, the Allan Hancock administrative procedure on speech, dated June

15, 2009, required all persons to present a "brief written statement" of the general content of the statements they will be making. It also provides that the "free speech area" must be "reserved" "two weeks in advance of the planned speech activity."

[7] See Citrus College's Administrative Procedure (AP) 5550, pp. 1-2. Also, see, e.g., Citrus' AP 5550, which states,"No persons…shall solicit donations of money… except where…she is using the areas generally available to students and the community on behalf of and collecting funds for an organization that is registered…."

[8] Districts that restrict solicitation of contributions to registered non-profit or approved associated students organizations or clubs include Barstow, Citrus, Feather River, North Orange, Glendale, Los Angeles, Mt. San Antonio, Santa Clarita, San Joaquin, Sierra, State Center, and West Hills. Barstow states, for instance, "No persons using the Free Speech Area shall solicit donations of money, through direct requests for funds, sales of tickets or otherwise, except where he…is using the Free Speech Area on behalf of and collecting funds of an organization that is registered with the Secretary of State as a nonprofit corporation or is an approved Associated Students Organization or clubs." (See AP 5550 revised 5-12-05.)

[9] Districts that prohibit anonymous speech include Riverside, Santa Clarita, San Joaquin, and Mt. San Jacinto. Districts that forbid anonymous posting or bulletin board information include Los Angeles, Mt. San Antonio, Rio Hondo, State Center, West Hills, Cerritos, and Barstow.

[10] February 2010 "model policy," entitled "BP 3900 Speech: Time, Place, and Manner," references as its source Education Code sections 78120 and 66301, and includes this line: "The college(s) of the District is/are non-public forums, except for those areas that are designated public forums available for the exercise of expression by students, employees or the public." However, policies and procedures adopted generally have been even more restrictive of speech, as discussed above.

[11] *http://thefire.org/case/806.html*.

[12] This market analogy was first used by Justice Holmes in his dissent in *Abrams v. United States* (1919) 250 U.S. 616, 630, referring to the "best test of truth" being the "competition of the market." This analogy is credited with inspiring Justice Brennan's specific reference to the rights of listeners: "I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General of the U.S.* (1965) 381 U.S. 301, 308, Brennan concurring.

[13] *Keyshian v. Board of Regents of the State of New York* (1967) 385 U.S. 589, 605-606.

[14] The phrase was first applied in *Keyshian, supra,* 385 U.S. at 603, which held unconstitutional laws requiring college professors and other school employees to

sign loyalty oaths, on penalty of losing their jobs. The laws in question also declared that the "utterance of any treasonable or seditious word" was grounds for dismissal. The court ruled, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues (rather) than through any kind of authoritative selection."

[15] *Keyshian, supra,* 385 U.S. at 603, citing *Sweezy v. State of N.H. by Wyman* (1957) 354 U.S. 234, 250.

[16] *Id.*

[17] *Id.*

[18] *Lamont v. Postmaster General* (1965) 381 U.S. 301; *Kleindienst v. Mandel* (1972) 408 U.S. 753, 762-763 [upholding the First Amendment right to "receive information and ideas...."]; *Searle v. Regents of the University of California* (1972) 23 Cal.App.3d 448, 453.

[19] *Los Angeles Teachers Union v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551.

[20] *California School Employees Assn. v. Foothill-De Anza Community College Dist.* (1975) 52 Cal.App.3d 150.

[21] In numerous cases, California courts have protected school or college employees from discharge or disciplinary action because of their protected free speech. *Adcock v. Board of Education* (1973) 10 Cal.3d 60 [teacher openly critical of school policies at a public forum was ordered reinstated because his dismissal resulted from his exercise of his rights of free speech.]; *Finot v. Pasadena City Board of Education* (1967) 250 Cal.App.2d 189 [dismissal for wearing a beard unlawful, appearance protected by freedom of speech]; *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575; *Ofsevit v. Trustees of Cal. State University* (1978) 21 Cal.3d 763 [college teacher discharged in violation of First Amendment rights entitled to reinstatement and for several years, though he had only a one-year contract]; *Bauer v. Sampson* (9th Cir. 2001) 261 F.3d 775 [faculty member at community college unlawfully penalized for criticizing college president in literature he distributed on campus, protected by freedom of expression]; *Bright v. Los Angeles Unified School Dist.* (1976) 18 Cal.3d 450 [declaring unconstitutional efforts of local school officials to prevent distribution of student newspapers by, *inter alia*, requiring prior approval of their content].

[22] See, e.g., *Silva v. University of New Hampshire* (D. N.H. 1994) 888 F.Supp. 293 [dismissal of faculty member for discussion protected by First Amendment]; *U.M.W. Post, Inc. v. Board of Regents of University of Wisconsin System* (E.D. Wis. 1991) 774 F.Supp. 1163 [rule restricting speech by students was overboad].

[23] (1981) 454 U.S. 263, 274.

[24] While demonstrations against wars in Iraq and elsewhere have occurred, they generally have not led to serious confrontations over free speech activities.

[25] See Butte-Glenn Community College District, Board Policy 3900.

[26] See El Camino College Board Policy 5550, "Speech: Time, Place and Manner," adopted 12-9-02.

[27] This construct originated with the decision in *Perry Education Assn. v. Perry Local Educators Assn.* (1983) 460 U.S. 37, 45-46.

[28] *Hopper v. City of Pasco* (9th Cir. 2001) 241 F.3d 1067, 1074.

[29] *Frisby v. Schultz* (1988) 487 U.S. 474, 481.

[30] See *United States v. Stevens* (3d Cir. 2008) 533 F.3d 218, 232. A "content-based" regulation, that is one which regulates the content of a message, is presumed unconstitutional in a public forum. *Id.*

[31] *Perry Education Assn. v. Perry Local Educators Assn., supra,* at 45. The court explained, "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks…. In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

[32] *Hague v. CIO* (1939) 307 U.S. 496, 515-516. "Time immemorial" would certainly include Socrates speeches at the grounds and walkways of the Lyceum (Aristotle's school) in ancient Greece, circa 339 B.C. (Socrates' speech also upset certain political powers, resulting in his trial and the subsequent squelching of his speech by hemlock.) See Plato's *Apology,* 21 d-e, 23a, 23e.

[33] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 816-817; *City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 50-52.

[34] *Perry, supra*, 460 U.S. at 45.

[35] *Perry, supra*, 460 U.S. at 46; *Arkansas Educational Television Comm. v. Forbes* (1998) 523 U.S. 666, 677.

[36] *Perry, supra.*, 460 U.S. at 46.

[37] See, *Arkansas Educational Television Comm. v. Forbes* (1998) 523 U.S. 666, 678.

[38] *Cornelius v. NAACP Legal Defense and Education Fund* (1985) 473 U.S. 788, 799-800.

[39] See, e.g., http://chronicle.com/article/Professors-Suspended-After-a/48942 and http://thefire.org/article/11237.html.

[40] The case law reveals some confusion between "limited" as opposed to "designated" public forums. In several cases, the court has somewhat clarified its analysis. See, e.g., *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 829. The standard applied by the Supreme Court to limited public forums is "identical to that which the court has applied to non-public forums." *Justice for All v. Faulkner* (2005) 410 F.3d 760, 766. The court explained in *Good News Club v. Milford Cent. School* (2011) 533 U.S. 98, that "[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech, and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint, [citation] and must be reasonable in light of the purpose served by the forum, [citation]." *Id.* at 106.

[41] *DiLoretto v. Downey Unified School Dist.* (9th Cir. 1999) 196 F.3d 958, 964, cert den. (2000) 529 U.S. 1067.

[42] *In re Hoffman* (1967) 67 Cal.2d 845, 851. In *Hoffman*, the issue was the right of protesters opposed to the Vietnam War to distribute literature to departing troops at Union Station in Los Angeles. The city attempted to restrict distribution on grounds that while "streets, sidewalks, and parks" have from "time immemorial" been held "in trust" for freedom of expression, a railway station was different, and that speech activities could be regulated as "unauthorized uses." *Id.* at 849. The court concluded that this distribution did not interfere in the use of the station as a transportation terminal. *Id.* at 851.

[43] (1979) 23 Cal.3d 899, 910.

[44] See *Barr v. Lafon* (6th Cir. 2008) 528 F.3d 554, 576, contrasting a public school — a limited public forum for K-12 age children — with a forum for adults.

[45] *Preminger v. Secretary of Veterans Affairs* (9th Cir. 2008) 517 F.2d 1299, 1313, holding that the VA Hospital is a non-public forum; and *Greer v. Spock* (1976) 424 U.S. 828, holding that a military base is a non-public forum; *New England Regional Council v. Kinton* (1st Cir. 2002) 284 F.3d 9, holding a fishing pier to be a non-public forum.

[46] See, *Pruneyard Shopping Center, supra.*

[47]

In states that do not have California's constitutionally based, special protection of free expression, some federal courts have concluded that universities or colleges were designated public forums. See, e.g., Bowman v. White (8th Cir. 2006) 444 F.2d 967, 977-978, holding that the University of Arkansas was an "unlimited designated public forum," despite having many characteristics of a traditional public forum. Id.

at 979. However, the court definitively rejected the university's assertion that it was a non-public forum. Id.

[48] *Perry*, *supra,* 460 U.S. 37, 45.

[49] *Perry*, *supra*, 460 U.S. at 45-46.

[50] *Air Line Pilots Assn. v. Department of Aviation* (7th Cir. 1995) 45 F.3d 1144, 1152; *Stewart v. District of Columbia* (CA DC 1988) 863 F.2d 1013, 1018.

[51] *Id.* at 1017.

[52] *First Unitarian Church of Salt Lake City v. Salt Lake City* (10th Cir. 2002) 308 F.3d 1114, 1131.

[53] 308 F.3d at 1122, relying on, *inter alia*, *United States v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 [applying forum analysis to privately owned mailboxes controlled by the government]; *Marsh v. Alabama* (1946) 326 U.S. 501, 505 [title to property in a "company town" is not determinative to public speech rights on property]; *Venetian Casino v. Local Joint Executive Board* (2001) 257 F.3d 937, 945, n. 6 [sidewalks need not be government owned to constitute public forums].

[54] *Cornelius v. NAACP Legal Defense Fund*, *supra*, 473 U.S. at 800-801.

[55] *First Unitarian Church, supra.*, 308 F.3d at 1125, emphasis added."

[56] Education Code sections 58130 et seq.

[57] The act was originally adopted in 1913. Besides that act, the Educational Employment Relations Act (EERA) assures labor organizations the same right in section 3541.5. See also, *Desert Community College Dist.* (2007) PERB Dec. No. 1921, 21 PERC 137 [union entitled to hold meeting on campus in classroom to determine endorsements for school board election].

[58] *Burbridge v. Sampson* (C.D. Cal. 1999) 74 F. Supp. 2d 940.

[59] *Id.* at 952.

[60] *Khademi v. South Orange County Community College Dist.* (C.D. Cal. 2002) 194 F. Supp. 2d 1001.

[61] California Education Code section 76120 allows colleges to prohibit student speech that is libelous or slanderous, or obscene.

[62] *Jews for Jesus, Inc., v. City College of San Francisco* (N.D. Cal. 2009) 2009 WL 86703.

[63] (1948) 303 U.S. 444.

[64] 303 U.S. at 451.

[65] Court documents indicate the district and an individual defendant, an officer presumably involved in the arrest, agreed to pay the plaintiffs $60,000 in attorney's fees to settle the dispute, according to the judgment issued April 15, 2009.

[66] *Healy v. James* (1972) 408 U.S. 169, 180.

[67] See *Perry, supra*, 460 U.S. at 45.

[68] *United States v. Playboy Entertainment Group, supra*, 529 U.S. at 816-817; *City of Renton v. Playtime Theatres, Inc., supra*, 475 U.S. at 50-52. To survive constitutional review, a "time, place, or manner" restriction must be "content-neutral," must "be narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

[69] To the extent any of the new policies insist on permits or applications as a condition of speech, such requirements are a "prior restraint" on speech and there is a "heavy presumption" that they are unconstitutional. *Forsyth County v. Nationalist Movement* (1992) 505 U.S. 123, 130. As the Supreme Court has cautioned, "It is offensive not only to the values protected by the First Amendment, but to the very notion of a free society that in the context of everyday public discourse a citizen must first inform the government of her desire to speak...and then obtain a permit to do so." *Wachtower Bible & Trace Society of New York, Inc., v. Village of Stratton* (2002) 536 U.S. 150, 165-166.

[70] The Supreme Court has "consistently struck down permitting systems that apply to individual speakers as opposed to large groups...." *Berger v. City of Seattle* (2009) 569 F.3d 1029, 1038, citing *Wachtower Bible, supra*, 536 U.S. at 166-167.

[71] (S.D. Ohio) 2012 W.L. 2160969.

[72] Quoting from *Healy v. James*, *supra*, 408 U.S. at 191.

[73] (N.D. Texas 2004) 346 F. Supp. 2d 853.

[74] *Id.* at 861.

[75] *Id.* at 862-863.

[76] (5th Cir. 2005) 410 F.3d 760, 769.

[77] These include *Riermers v. State ex rel University of North Dakota* (N.D. 2009) 767 N.W. 2d 832; *Bowman v. White* (8th Cir. 2006) 444 F.3d 967, 977-978; *Pro-Life Cougars v. University of Houston* (S.D. Texas 2003) 259 F.Supp.2d 575, 582; and *Hays City Guardian v. Supple* (5th Cir. 1992) 969 F.2d 111, 116.

[78] *Tinker v. Des Moines School District* (1969) 393 U.S. 503, 506-507.

[79] *Supra,* 71 Cal. 2d at 556.

[80] *Id.* at 558.

[81] Author Bezemek personally attended a meeting in Alameda County's Peralta District, two years ago, where it was obvious that graphic photos of abortions had motivated some in the college community to favor restrictive new speech rules, even though the unpopular anti-abortion protesters were well within their constitutional rights to protest as they had.

[82] See, e.g., *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terror*, Geoffrey R. Stone, W.W. Norton & Co., Inc., 2004.

[83] 42 U.S.C. section 1983.

[84] *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.

[85] See 42 U.S.C. section 1988.

[86] (1942) 319 U.S. 624, 638.

[87] *Supra,* 307 U.S. at 514-516.