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# Comments: Keep It Clean: How Public Universities May Constitutionally Enforce Policies Limiting Student Speech at College Basketball Games

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# KEEP IT CLEAN: HOW PUBLIC UNIVERSITIES MAY CONSTITUTIONALLY ENFORCE POLICIES LIMITING STUDENT SPEECH AT COLLEGE BASKETBALL GAMES.

## I. INTRODUCTION

The term “home-field advantage” at public university sporting events has taken on an entirely new meaning in recent years.<sup>1</sup> Traditional chants like “let’s go team” are commonly overshadowed by cheering speech<sup>2</sup> involving profanity,<sup>3</sup> attacks on sexuality,<sup>4</sup> derogatory comments aimed at families of opposing players,<sup>5</sup> and even violence.<sup>6</sup> Although meaningful displays of expression certainly exist at college sporting events, student cheering speech often reaches intolerable levels.<sup>7</sup> Consider the following experiences of teenage student athletes when they went on the road to represent their universities.

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1. Marissa DeCuir, *Schools Try Hard to Foil Fans’ Curses*, USA TODAY, Nov. 1, 2007, at 6C, available at [http://www.usatoday.com/sports/college/football/2007-10-31-fan-behavior\\_N.htm](http://www.usatoday.com/sports/college/football/2007-10-31-fan-behavior_N.htm) (“[C]olleges across the USA are cracking down on stadium behavior.”).
  2. Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 527–28 (2006) (defining cheering speech as the expression surrounding sports).
  3. Erik Brady, *How Free Should Speech Be at Campus Games*, USA TODAY, Feb. 6, 2004, at 1A, available at [http://www.usatoday.com/sports/college/mensbasketball/2004-02-05-fans-free-speech\\_x.htm](http://www.usatoday.com/sports/college/mensbasketball/2004-02-05-fans-free-speech_x.htm).
  4. Grant Wahl, *Over the Top*, SPORTS ILLUSTRATED, Mar. 3, 2008, at 40, 42, available at [http://sportsillustrated.cnn.com/2008/writers/grant\\_wahl/02/26/abusive.fans0303/index.html](http://sportsillustrated.cnn.com/2008/writers/grant_wahl/02/26/abusive.fans0303/index.html) (discussing a student’s sign which read “Kevin Loves John Amaechi,” a pun on the names “Kevin Love,” a player for the UCLA Bruins, and “John Amaechi,” an openly gay former player in the National Basketball Association).
  5. *Id.* at 40 (discussing “screams of ‘whores’ that made Kevin Love’s grandmother cry”).
  6. *Id.* (noting an incident where the mother of Eric Gordon, star player for Indiana University, was pelted with a cup of ice water while watching one of her son’s games).
  7. Myles Brand, *Getting a Grip on Fan Behavior in College Sports*, Nov. 11, 2008, [http://www.huffingtonpost.com/myles-brand/getting-a-grip-on-fan-beh\\_b\\_143034.html](http://www.huffingtonpost.com/myles-brand/getting-a-grip-on-fan-beh_b_143034.html). Mr. Brand is President of the National Collegiate Athletic Association (NCAA). *Id.*

A. *Kevin Love's Visit Home*

As an All-American and consensus national player of the year, Kevin Love was arguably the top high school basketball player in the history of Oregon.<sup>8</sup> Naturally, when he returned to Oregon as a UCLA Bruin on January 23, 2008, to play the Oregon Ducks, he expected the fans to express their dissatisfaction with his decision to leave the state.<sup>9</sup> However, not even Love anticipated the way in which Oregon's student body would express itself. Stan Love, Kevin's father and sixth-leading scorer in Oregon's history, said "his family was pelted with popcorn cartons and empty cups, as well as a barrage of profane insults . . . including screams of 'whores' that made Kevin's grandmother cry. . . . [and] 'six-year-old kids with signs saying KEVIN LOVE SUCKS.'"<sup>10</sup> The experience left Love's father appalled at the students' behavior and vowing never to return to his alma mater.<sup>11</sup>

B. *Eric Gordon's De-Commitment to The University of Illinois*

Just weeks after the incident at Oregon, another high school All-American standout, Eric Gordon of the Indiana Hoosiers, was confronted with similarly inexcusable fan behavior.<sup>12</sup> Gordon and his family, who decided to bring their own security detail following the Love incident, were subjected to comments like "I wish you would die," and "I hope you break your leg."<sup>13</sup> Another student felt the need to launch a cup of ice water at Gordon's mom, Denise, which hit her on the back of the head.<sup>14</sup>

C. *Maryland Terrapin Students' Treatment of Duke's J.J. Redick*

In recent years, the men's basketball programs at the University of Maryland and Duke University have become heated rivals.<sup>15</sup> J.J.

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8. See Wahl, *supra* note 4; see also Kevin Love Biography, <http://www.kevinlove.org/kevin-love-biography.php> (last visited Sept. 8, 2009).

9. Wahl, *supra* note 4.

10. *Id.*

11. *Id.* Stan Love commented: "[J]ust because my kid didn't pick Oregon he gets abused like that? I'll never go back there." *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. See Craig Saperstein, *Upon Further Review: Duke-Maryland: The Best Rivalry . . . For Now*, THE CHRON., Jan. 16, 2002, <http://media.www.dukechronicle.com/media/storage/paper884/news/2002/01/16/UndefinedSection/Upon-Further.Review.Duke.Maryland.The.Best.Rivalry.For.Now-1455889.shtml> (describing the beginning of the Maryland-Duke rivalry in 2002); see also *Comcast Sportsnet Showcases Maryland-*

Redick, second leading scorer in Atlantic Coast Conference (ACC) history,<sup>16</sup> was perhaps the most hated “Dukie” to visit Maryland. Throughout his career, Redick was the target of Maryland students’ hostility.

Students evidenced their hatred towards Redick in a variety of ways. During a nationally televised game in 2004, many students chanted, “[Fuck] you, J.J.!” each time he stepped to the foul line.<sup>17</sup> A year later, following intense public scrutiny stemming from the vulgar chant, one student held a sign containing a poem referencing sexual encounters with Redick’s sisters.<sup>18</sup>

#### D. *The Problem*

Students are certainly free to express their feelings towards the teams that they support and their opponents. The problem lies in the manner of expression. Public universities have been unwilling or unable to adequately address this behavior.<sup>19</sup> It is unclear whether this is a result of administrative policy implicitly encouraging unacceptable behavior through inaction,<sup>20</sup> or whether it is a result of an inability to confidently restrict student speech without fear of constitutional challenge.<sup>21</sup> Either way, public universities should

*Duke Rivalry*, Feb. 9, 2007, <http://umterps.cstv.com/sports/m-baskbl/spec-rel/020907aab.html> (promoting the rivalry prior to a 2007 contest).

16. Caulton Tudor, *Hansbrough Breaks ACC Scoring Record*, CHARLOTTE OBSERVER, Mar. 20, 2009, at 1C (noting that Redick is now second on the ACC career scoring list to Tyler Hansbrough, who surpassed him on March 19, 2009).
17. Brady, *supra* note 3. The article further suggests that college students are too immature to understand the significance of their actions. One student was quoted saying: “If you can’t curse at a basketball game, what’s next, a curfew? . . . We’re paying them for an education, not to tell us what we can say at a basketball game.” *Id.* at 5A. The student fails to realize that part of the education must clearly address acceptable social behavior.
18. Brian Freedman & Brendan Lowe, *Dukies, Redick Meet Reformed Terps Fans*, DIAMONDBACK (College Park, MD), Feb. 14, 2005, at 1, available at <http://media.www.diamondbackonline.com/media/storage/paper873/news/2005/02/14/NewsonCampus/Dukies.Redick.Meet.Reformed.Terps.Fans-2320686.shtml>. The poem read: “J.J., Here’s a Poem: Terps Are Red/ Devils Are Blue/ Jeanie Was Good/ Abby Will Be Too.” *Id.* at 8.
19. Brand, *supra* note 7 (“It’s time to address this rising problem. We had better get a grip on fan behavior.”).
20. *Id.* (“[T]here are administrators and coaches who judiciously look the other way for fear of dampening the enthusiasm that could give an edge to their teams.”).
21. First Amendment Center, <http://www.firstamendmentcenter.org/Speech/pubcollege/faqs.aspx?id=14022&#q14022> (last visited Sept. 15, 2009) (addressing why the

remember that their purpose is to educate, and that throughout the last forty years, the Supreme Court of the United States has afforded them wide latitude to restrict speech.<sup>22</sup> Dissenting in *Papish v. Board of Curators of the University of Missouri*,<sup>23</sup> Chief Justice Burger discussed the special role of the public university:

[I]t is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.<sup>24</sup>

It is this special role of public universities that may ultimately allow them to confront the inexcusable fan behavior displayed on campuses across the country.

Commentators who have argued in support of a university's ability to place restrictions on intolerable speech have focused primarily on *Cohen v. California*<sup>25</sup> and other similar cases, which deal with expression.<sup>26</sup> Further, they rely heavily on the "captive audience doctrine"<sup>27</sup> to argue in favor of university-implemented regulations.<sup>28</sup> However, each of these arguments has paid little attention to the unique characteristics of public universities.<sup>29</sup>

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organization believes a public college stadium cannot prohibit fan profanity simply because there are kids in the stands).

22. See *infra* Part III.B–C.

23. 410 U.S. 667, 671 (1973) (Burger, C.J., dissenting).

24. *Id.* at 672.

25. 403 U.S. 15 (1971).

26. See, e.g., Gregory Matthew Jacobs, Comment, *Curbing Their Enthusiasm: A Proposal to Regulate Offensive Speech at Public University Basketball Games*, 55 CATH. U. L. REV. 547, 564–65 (2006) (stating that a university's regulation of speech at a basketball game will receive the same analysis as did the California statute criminalizing disturbance of the peace by offensive conduct in *Cohen*); Kelley Tiffany, Comment, *Cheering Speech at State University Athletic Events: How Do You Regulate Bad Spectator Sportsmanship?*, 14 SPORTS LAW. J. 111, 119 (2007) (utilizing *Cohen* as support for the assertion that public universities must satisfy strict scrutiny for the Court to uphold regulations on expression).

27. This doctrine "centers on the inability of the audience to avoid hearing or seeing the objectionable speech or expression." Tiffany, *supra* note 26, at 132.

28. See Jacobs, *supra* note 26, at 565; Tiffany, *supra* note 26, at 132 (both authors analyze and justify university regulations on captive audience grounds).

29. See generally Jacobs, *supra* note 26; Tiffany, *supra* note 26 (both authors failed to consider school missions).

This Comment will approach the issue from a different angle. A consideration of the university's basic educational mission will be necessary to provide the appropriate context under which potential policies must be analyzed.<sup>30</sup> Student codes of conduct from the University of Oregon and the University of Maryland will be relied upon as examples of policies that inadequately tackle poor fan behavior.<sup>31</sup>

Then, rather than attempting to piece together Supreme Court rulings on general First Amendment issues, this Comment will rely almost exclusively on precedent established in a line of student speech decisions.<sup>32</sup> After detailing the evolution of the Supreme Court's unique approach to analyzing high school and university policies, while carefully noting the rationale that allows for certain regulations, this Comment will dispose of the argument that regulations within the basketball arena are impermissible under the public forum doctrine.<sup>33</sup> In particular, several key cases and factors will be used to support the argument that universities have developed the basketball arena for commercial purposes, have not designated it for public discourse, and therefore have not created a designated public forum. Accordingly, universities may place reasonable restrictions on speech within the basketball arena.

This Comment will then address the problematic expression that occurs within the basketball arena to determine the type of expression at which the restrictions should be aimed.<sup>34</sup> Next, the focus of this Comment will shift to the competing interests involved in creating a useful policy.<sup>35</sup> These interests include the students' dual concerns of freedom of expression<sup>36</sup> and administrative discretion,<sup>37</sup> as well as the universities' unique role as educators.<sup>38</sup> Finally, this Comment will discuss the important components of a constitutionally sound policy that serves the twin goals of promoting the students' right of expression and the universities' basic educational missions.<sup>39</sup>

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30. *See infra* Part II.A.

31. *See infra* Part II.B.

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See infra* Part V.

35. *See infra* Part VI.

36. *See infra* Part VI.A.1.

37. *See infra* Part VI.A.2.

38. *See infra* Part VI.B.1.

39. *See infra* Part VII.

## II. MISSION STATEMENTS AND STUDENT CODES OF CONDUCT

In addition to their individual mission statements, most universities, if not all, have a student code of conduct, which addresses student behavior and life in general on their campuses. Mission statements and codes of conduct often define a university's existence and address the values that it seeks to instill in its students.<sup>40</sup>

### A. *Mission Statements*

When considering any policies limiting student speech, it is paramount that the universities and the courts keep in mind the very reasons that universities exist. These reasons will later serve as justification for constitutionally implementable speech codes.

For example, consider the University of Maryland's four-page mission statement, last amended in November of 2000.<sup>41</sup> In the very first paragraph, under the heading "Institutional Identity,"<sup>42</sup> the university states that "[t]o realize its aspirations and fulfill its mandates, the University advances knowledge, provides outstanding and innovative instruction, and nourishes a climate of intellectual growth in a broad range of academic disciplines and interdisciplinary fields."<sup>43</sup> Consistently underlying each phrase of that sentence is the university's unique role as a mentor and teacher of its students.<sup>44</sup> Under the "Institutional Objectives and Outcomes" section, the university states that it will "[e]nsure a university environment that is inclusive as well as diverse and that fosters a spirit of community."<sup>45</sup> This part of the university's mission statement is indicative of the university's need to promote civility and community among its

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40. See JEFFREY ABRAHAMS, *THE MISSION STATEMENT BOOK: 301 CORPORATE MISSION STATEMENTS FROM AMERICA'S TOP COMPANIES 8* (Ten Speed Press 1999) (1995) (containing discussion of the importance and purpose of mission statements in various organizations, which is comparable and transferrable to educational mission statements).

41. Mission Statement, University of Maryland, College Park, [http://www.provost.umd.edu/Strategic\\_Planning/Mission2000.pdf](http://www.provost.umd.edu/Strategic_Planning/Mission2000.pdf) (last visited Mar. 20, 2009) [hereinafter UMD Mission Statement].

42. *Id.*

43. *Id.*

44. See *supra* text accompanying notes 22–24 (discussing the special role of the public university).

45. See UMD Mission Statement, *supra* note 41.

students, a lesson that is continually diminished by episodes of unruly fan behavior.<sup>46</sup>

The University of Oregon's mission statement sends a similar message to its readers. Stating that "[a]cademic quality is the cornerstone of the University of Oregon's identity,"<sup>47</sup> the university defines itself as a "unique institution that will challenge students to change the world by giving them the skills and knowledge to question critically, think logically, communicate clearly, act creatively, and live ethically."<sup>48</sup> As part of the college experience, the environment at basketball games necessarily serves to foster the academic quality to which the university's mission statement refers, as well as to supplement the educational process of teaching students critical, creative, and ethical thinking and communication skills.<sup>49</sup> However, the university's satisfaction of these objectives is impeded when its students are allowed to call Kevin Love's grandmother a "whore."<sup>50</sup>

### *B. Codes of Conduct*

While university mission statements are used as a means of communicating the role of universities, the codes of conduct are essentially the universities' means of assuring the successful completion of those missions.<sup>51</sup> The University of Maryland emphasizes the importance of its Code of Academic Integrity and its Code of Student Conduct:

'The biggest educational challenge we face revolves around developing character, conscience, citizenship, tolerance, civility, and individual and social responsibility in our students. We dare not ignore this obligation in a [sic]

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46. See *supra* Part I.A–C (providing examples and analyzing the impact of unruly student behavior).

47. Best Colleges, University of Oregon (2009), <http://colleges.usnews.rankingsandreviews.com/college/items/3223> (last visited Sept. 11, 2009) [hereinafter UO Mission Statement].

48. *Id.*

49. See generally UO Mission Statement, *supra* note 47.

50. Wahl, *supra* note 4, at 40.

51. See *University of Maryland Code of Student Conduct*, <http://www.president.umd.edu/policies/docs/v100b.pdf> (last visited Sept. 11, 2009) [hereinafter UMD Code of Conduct] (noting that the primary purpose of its code is to "protect the campus community" and that, "[c]onsistent with that purpose, reasonable efforts will . . . be made to foster the personal and social development of . . . students who are held accountable for violations of University regulations").



society that sometimes gives the impression that virtues such as these are discretionary. These should be a part of the standard equipment of our graduates, not options.<sup>52</sup>

Interestingly, character, tolerance, civility, citizenship, and responsibility are the very values that students seem to be lacking when they engage in unruly fan behavior. Although the university may state that its purpose is to instill such values in its student body, the university's unwillingness to sternly address these problems makes it difficult to believe the genuineness of that statement.<sup>53</sup>

The relevant sections of the codes of conduct at the University of Maryland and the University of Oregon are used to demonstrate that fan behavior at basketball games seems to be an afterthought when developing student codes of conduct.<sup>54</sup> For example, the only language in the University of Maryland's code that appears to address fan behavior states that a student's intentional and substantial interference "with the freedom of expression of others on University premises or at University-sponsored activities" is subject to disciplinary action.<sup>55</sup> Although this language could be applied to fan behavior, it serves no use when trying to curb poor fan behavior. Instead of sanctioning poor fan behavior, this language actually sanctions student conduct that would attempt to *deter* unruly fan behavior.

Shortly following section 9(j) of the University of Maryland's Code of Student Conduct, section 9(m) seeks to promote a contradictory principle.<sup>56</sup> This section makes punishable student conduct on university premises or at university-sponsored activities that is "disorderly or disruptive" and "which interferes with the activities of others, including studying, teaching, research, and University administration."<sup>57</sup> Section 9(m) is the only language in the university's code that could be applied to sanction poor fan behavior,

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52. See Office of Student Conduct: Division of Student Affairs, (discussing the purposes of the university's various codes for student conduct) (unpublished material, on file with author).

53. See *infra* text accompanying notes 55–58.

54. See *infra* text accompanying notes 55, 61.

55. UMD Code of Conduct, *supra* note 51, at § 9(j). This language echoes the Court's material and substantial disruption test as articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513–14 (1969). Under the material and substantial disruption test, the Court held that wearing black armbands to school during the Vietnam War would not "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509; see also Part III.A.1.

56. See UMD Code of Conduct, *supra* note 51, at § 9(m).

57. *Id.*

as the derogatory remarks regarding J.J. Redick's sisters could be seen as interfering with the University's ability to achieve its educational mission.<sup>58</sup>

The University of Oregon's Student Code of Conduct similarly neglects to directly address student conduct at sporting events.<sup>59</sup> The University of Oregon's code of conduct employs comparable language to the University of Maryland's code of conduct in the section most relevant to fan behavior.<sup>60</sup> For example, under the "Violations of Community Standards by Individual Students" section of its code, the university states that students may be sanctioned for "[e]ngaging in behavior that could reasonably be foreseen to cause disruption of, obstruction of, or interference with the process of instruction, research, administration, student discipline, or any other service or activity provided or sponsored by the University."<sup>61</sup> It seems that calling an opponent's family member a "whore," or holding a sign that negatively (and inaccurately) depicts his sexuality, could reasonably be seen as interfering with the process of instilling educational and societal values in students.<sup>62</sup>

At the end of the day, fan behavior around the country is often deplorable.<sup>63</sup> The codes of conduct discussed above, which barely address the issue, either inadequately deter such behavior or too often go unenforced at revenue-generating sports venues.<sup>64</sup> The University of Maryland and the University of Oregon are certainly not alone in

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58. See *supra* Part II.A.

59. See Student Conduct Code, <http://studentlife.uoregon.edu/studentconductandcommunitystandards/conductcode/tabid/69/Default.aspx> (last visited Mar. 20, 2009) [hereinafter UO Student Conduct Code].

60. See *id.*; see also UMD Code of Conduct, *supra* note 51.

61. UO Student Conduct Code, *supra* note 59. The language in this section, like its counterpart in section 9(m) of the UMD Code of Conduct, *supra* note 51, also seems to be drawn from the Court's substantial disruption test articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

62. See Wahl, *supra* note 4 (discussing the Kevin Love incident at Oregon University).

63. See Editorial, *Georgia Tech Fan Behavior Absurd*, HEIGHTS (Boston), Sept. 17, 2007, available at <http://media.www.bcheights.com/media/storage/paper144/news/2007/09/17/Editorial/Georgia.Tech.Fan.Behavior.Absurd-2972398.shtml>. Students threw water bottles at Boston College cheerleaders, forcing the referees to stop the game five times, and "fans chastised radio personality Jayme Parker, referring to her as a 'slut,' telling her to go home, and using other graphic, demeaning, and crass language." *Id.* See also Eric Hoover, *Crying Foul Over Fans' Boorish Behavior*, CHRON. HIGHER EDUC. (Washington, D.C.) Apr. 9, 2004, at A1, available at <http://chronicle.com/free/v50/i31/31a00101.htm> (discussing incidents at the University of Kentucky, Iowa State University, and the University of Maryland).

64. See Brand, *supra* note 7.

the fight. Thus, it is essential that universities join together to get a hold on this problem through well-crafted, constitutionally-sound policies banning unacceptable student conduct before it further infiltrates the college basketball environment.

### III. SUPREME COURT DECISIONS GOVERNING SPEECH IN PUBLIC SCHOOLS

Admittedly, the Supreme Court has treated primary and secondary schools somewhat differently than public universities. The Court has often repeated its view that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"<sup>65</sup> However, as Part III.B points out, the Court has not clearly spoken as to whether policies of primary and secondary schools are to be treated differently than those of universities; in fact, some of the Court's language indicates that they are to be treated the same.<sup>66</sup>

#### A. *High School Speech Cases*

##### 1. *Tinker v. Des Moines Independent Community School District*<sup>67</sup>

Several student speech cases have reached the Court in the last forty years, beginning with *Tinker*. During the height of the Vietnam War, several students in a Des Moines school district agreed to protest the war by wearing black armbands to school.<sup>68</sup> Aware of the students' plans, the principals adopted a policy that any student wearing a black armband would be asked to remove it, and that if that student refused, he or she would be suspended until he or she returned without it.<sup>69</sup> In accordance with the adopted policy, three students were suspended for their protest.<sup>70</sup>

The students brought suit challenging the constitutionality of the schools' policy, alleging a First Amendment violation.<sup>71</sup> The Court noted that the state, through school officials, may not justifiably prohibit student expression without showing "something more than a

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65. *Healy v. James*, 408 U.S. 169, 180-81 (1972) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). This has sometimes resulted in greater protection for students.

66. See discussion *infra* Part III.B.

67. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

68. *Id.* at 504. John Tinker, fifteen years old, and Christopher Eckhardt, sixteen years old, attended high schools in Des Moines. *Id.* Mary Beth Tinker, thirteen years old, attended junior high school in Des Moines. *Id.*

69. *Id.*

70. *Id.* The protest occurred in the middle of December. *Id.* The three students did not return to school until after New Year's Day. *Id.*

71. *Id.* at 505.

mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>72</sup> It was in this context that the Court first established its “material and substantial disruption” test used in student speech cases.<sup>73</sup> Applying the test to the facts in *Tinker*, the Court found no evidence indicating that the wearing of armbands would “substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>74</sup> Paramount to this conclusion was the determination that wearing armbands constituted a form of political speech through “silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”<sup>75</sup> As a result, the Court struck down the schools’ policy, sending the message that a student’s freedom of speech rights do not disappear upon entering school.<sup>76</sup>

## 2. Bethel School District No. 403 v. Fraser<sup>77</sup>

In July 1986, the Court faced another school speech case involving a school’s policy prohibiting certain student conduct.<sup>78</sup> The school policy at issue in *Fraser* stated that “[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”<sup>79</sup> The language of the policy clearly emanated from *Tinker* and encompassed the material and substantial disruption test,<sup>80</sup> but went no further than prohibiting conduct clearly violative of *Tinker*.<sup>81</sup>

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72. *Id.* at 509.

73. *See id.* The test states that a public school may not burden a student’s rights to freedom of expression so long as he expresses himself without “‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.” *Id.* at 513 (alteration in original) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

74. *Id.* at 509.

75. *Id.* at 508. Accordingly, the Court found there to be no evidence of petitioners’ interference with the other students’ rights or the schools’ work. *Id.*

76. *Id.* at 514. The policy was determined to be unconstitutional, and the Court articulated one of its more famous quotes, suggesting that schools may not be able to limit student speech: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.

77. 478 U.S. 675 (1986).

78. *See id.* at 677.

79. *Id.* at 678.

80. *See supra* note 73 and accompanying text.

81. *See Fraser*, 478 U.S. at 678. The policy only prohibited obscene language which materially and substantially interfered with the educational process. This suggests that the policy did not prohibit obscene language that did not interfere with the

The respondent in *Fraser*, a public high school student in petitioner's school district, was disciplined under this policy for delivering a nomination speech during a school-wide assembly in which he referred to his candidate using an "elaborate, graphic, and explicit sexual metaphor."<sup>82</sup> After admitting to his deliberate use of the sexual innuendo, the student was suspended for three days in accordance with the school's policy.<sup>83</sup> Fraser brought suit alleging that the policy violated his First Amendment right to freedom of speech.<sup>84</sup>

Although the *Fraser* Court certainly reflected upon *Tinker*, its ultimate approach deviated from *Tinker*'s material and substantial disruption test.<sup>85</sup> It seemed that the Court was primarily concerned with the general purpose of schools in evaluating the policy at issue.<sup>86</sup> The Court recognized the importance of tolerating different views, but it also recognized the need to balance this tolerance against the needs and sensibilities of fellow students.<sup>87</sup> Essentially, the Court's balancing test weighed the school's interest in teaching students the "boundaries of socially appropriate behavior" and the school board's authority to determine what manner of speech is appropriate in school assemblies against the students' "undoubted freedom to advocate unpopular and controversial views."<sup>88</sup> Ultimately, the Court concluded:

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educational process, even though it could have done so as obscene expression was not protected speech. See generally *Miller v. California*, 413 U.S. 15, 24, 36-37 (1973) (holding that expression which satisfies the three-prong test for obscenity is unprotected). The policy is a perfect example of the effect of *Tinker* and how schools believed the Court would closely scrutinize any policy limiting students' free expression. See *Fraser*, 478 U.S. at 678 (demonstrating that Bethel High School used the precise material and substantial interference language announced in *Tinker* in its prohibition against obscene language).

82. *Fraser*, 478 U.S. at 677-78.

83. *Id.*

84. *Id.* at 679.

85. See *id.* at 680-81.

86. Referring to the role and purpose of the public school system, the Court noted that "[public education] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Id.* at 681 (quoting CHARLES BEARD & MARY BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

87. *Id.* "[C]onstitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)).

88. *Fraser*, 478 U.S. at 681-83.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . .<sup>89</sup>

It became evident that a school's purpose would allow it to restrict student speech in ways that other governmental entities might not be able to restrict similar speech.<sup>90</sup> In *Fraser*, the Court recognized that the First Amendment does not prevent schools from restricting vulgar and lewd speech when it reasonably believes permitting such speech would undermine the school's basic educational mission.<sup>91</sup>

### 3. Hazelwood School District v. Kuhlmeier<sup>92</sup>

Just two years after *Fraser*, the Court reexamined school speech regulations in *Kuhlmeier*. Staff members of a high school newspaper filed suit claiming that the school's censorship of certain articles violated their First Amendment rights.<sup>93</sup> The students argued that the school paper constituted a public forum, and therefore, they were entitled to greater protection of the content that was published.<sup>94</sup>

The Court's analysis in this case is relevant on two levels. First, the Court found that public schools are not traditional public forums unless designated as such by the school.<sup>95</sup> In the case of the school paper in *Kuhlmeier*, the Court held that the school officials did not designate it as a public forum.<sup>96</sup> In so holding, the Court reiterated

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89. *Id.* at 683.

90. *See id.* at 682; *supra* text accompanying notes 87–88.

91. *Fraser*, 478 U.S. at 685. “A high school assembly or classroom is no place for a sexually explicit monologue . . . .” *Id.*

92. 484 U.S. 260 (1988).

93. *See id.*

94. *See id.* at 267.

95. *Id.* “The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that ‘time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” *Id.* (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

96. *Id.* at 270. The Court found that the school lacked the “‘clear intent to create a public forum,’” which it had found to exist in other cases. *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). *But see* *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (finding that the university's consistent

that a state actor may only create a non-traditional forum when clearly intending to do so.<sup>97</sup>

The second critical aspect of the Court's opinion is its reaffirmation of *Tinker* and *Fraser*, and its decision in favor of the school exercising editorial control of the student-published newspaper.<sup>98</sup> The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>99</sup> This relates back to the school's basic educational mission described in *Fraser*<sup>100</sup> and indicates the Court's unwillingness to handicap schools in their pursuit of that educational mission.<sup>101</sup>

#### 4. *Morse v. Frederick*<sup>102</sup>

The Court's most recent student speech case, decided in 2007, involved a school principal that suspended a student for displaying a controversial sign during an off-campus, school-sponsored event.<sup>103</sup> The principal believed that the sign violated a local school board policy specifically prohibiting expression that advocated "the use of substances that are illegal to minors."<sup>104</sup> Relying on *Tinker*, *Fraser*, and *Hazelwood*, the Court held that "schools may take steps to

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accommodation of student organizations by reserving meeting rooms indicated an intentional creation of a forum generally open for use by student groups); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 174–75 (1976) (finding that the state designated a public forum by holding school board meetings open to the general public).

97. See *Kuhlmeier*, 484 U.S. at 267. The import of the classification as a public forum will be addressed in Part IV.

98. See *id.* at 271–73.

99. *Id.* at 273.

100. See *supra* notes 85–91 and accompanying text.

101. See *Kuhlmeier*, 484 U.S. at 273. "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights." *Id.* (alteration in original) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). In a subsequent footnote, the Court expressly reserved the decision as to whether the same degree of deference is appropriate at the college and university level. *Id.* at 273 n.7.

102. 551 U.S. 393 (2007).

103. *Id.* at 396. During an approved class trip, student Joseph Frederick held a fourteen-foot banner which read "'BONG HITS 4 JESUS'" at the Olympic Torch Relay while fellow students looked on. *Id.* at 397.

104. *Id.* at 398.

safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”<sup>105</sup>

Perhaps more relevant than the holding in *Morse* is the Court’s discussion of *Tinker* and *Fraser*, and how the Court resolved those cases differently. The Court acknowledged the unclear mode of analysis used in *Fraser*, but recognized the clear difference between the “political “message” of the armbands in *Tinker* and the sexual content of [Fraser’s] speech.”<sup>106</sup> Further, the Court stated that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”<sup>107</sup> Since it was evident that *Tinker*’s material and substantial disruption test was not employed in *Fraser*, the *Morse* Court acknowledged that *Tinker*’s test is not absolute.<sup>108</sup> Accordingly, the school in *Fraser* was justified in restricting otherwise protected speech when considered “in light of the special characteristics of the school.”<sup>109</sup>

Likewise, the *Morse* Court considered the special nature of the school environment in determining that Frederick’s wielding of the controversial banner was justifiably sanctioned.<sup>110</sup> Although the Court recognized the important government interest in limiting speech reasonably viewed as promoting illegal drug use to students, the Court’s ultimate conclusion was that “[t]he First Amendment does not require *schools* to tolerate at school events student expression that contributes to [the dangers of illegal drug use].”<sup>111</sup> It is impossible to disregard the Court’s overwhelming sense of the school’s purpose in this decision.<sup>112</sup> At its core, *Morse* is in line with *Fraser* and *Kuhlmeier* in its relaxed approach toward student speech,

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105. *Id.* at 396–97.

106. *Id.* at 404 (alteration in original) (quoting *Fraser*, 478 U.S. at 680).

107. *Id.* at 405 (referencing *Cohen v. California*, 403 U.S. 15, 16–18 (1971) (holding that the conviction of a defendant for disturbing the peace by wearing a jacket bearing words “Fuck the Draft” at a local courthouse violated his freedom of speech rights)).

108. *Morse*, 551 U.S. at 393, 405. In addition, *Kuhlmeier* effectively confirmed that the material and substantial disruption test from *Tinker* is not absolute when it allowed the school to exercise control over the style and content of the school paper even though student control would not have substantially and materially disrupted the work of the school. *Kuhlmeier*, 484 U.S. at 272–73. Therefore, schools may limit student expression even when it does not substantially and materially disrupt the work of the school. *See id.*

109. *Morse*, 551 U.S. at 405.

110. *Id.* at 408–09.

111. *Id.* at 410 (emphasis added).

112. *See id.* at 408–09.



which often allows for schools to regulate otherwise protected speech based on their unique role and purpose in society.<sup>113</sup>

*B. Student Speech Cases at the University Level*

There is great debate regarding the scope of the decisions discussed above and whether they should be extended to public university campuses.<sup>114</sup> Advocates of unfettered speech, such as Foundation for Individual Rights in Education (FIRE),<sup>115</sup> have historically argued that the student speech precedents do not apply with equal force to institutions of higher learning.<sup>116</sup> Conversely, universities consistently argue that the high school speech standard applies to public universities as well.<sup>117</sup>

Supreme Court decisions have inadequately addressed the issue. On one side, cases like *Healy v. James*<sup>118</sup> and *Papish v. Board of Curators of the University of Missouri*<sup>119</sup> seem to imply that policies infringing upon student speech will be treated differently at the college level.<sup>120</sup> At the same time, the Court's discussion eight years

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113. *See id.* at 405–06, 409.

114. Sean Clark, *Bong Hits and Bright Lines*, July 5, 2007, <http://www.thefire.org/index.php/article/8201.html>.

115. FIRE's mission is to protect students' First and Fourteenth Amendment rights at America's colleges and universities. *See* About Fire, Sept. 2, 2004, <http://www.thefire.org/index.php/article/4851.html>.

116. Press Release, FIRE, Victory for Free Speech as Third Circuit Issues Ruling Against Temple University (Aug. 4, 2008), <http://www.thefire.org/index.php/article/9573.html>. William Creeley, FIRE's Director of Legal and Public Advocacy, noted that college students are entitled to full First Amendment protection and stated that "attempts to equate the rights of high school students with those of college students are without merit." *Id.*

117. *See* Clark, *supra* note 114. When discussing the potential impact of *Morse*, former FIRE President David French said, "the university's *first line of defense* is the high school speech standard. When high school student rights shrink, universities grow bolder."

118. 408 U.S. 169 (1972) (holding that the burden was on a college administration to justify the rejection of a college organization's application for recognition if the student organization complied with the campus filing requirements).

119. 410 U.S. 667 (1973) (holding that a state university's expulsion of a graduate student because of disapproved content of a newspaper, which the student distributed on campus, could not be justified as a nondiscriminatory application of reasonable rules governing conduct).

120. *See Healy*, 408 U.S. at 180–81 (involving members of a registered religious group at a state university who challenged a university policy that excluded religious groups from the university's open forum policy whereby university facilities were generally available for activities of registered student groups) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic

later in *Widmar v. Vincent*<sup>121</sup> indicates otherwise. While acknowledging *Healy*'s statement that the college classroom is a prime location for the marketplace of ideas, the Court stated that “[a] university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”<sup>122</sup> This seems to indicate that in fulfilling its educational mission, a public university is granted similar leeway in regulating student speech, as are secondary schools.<sup>123</sup>

### C. Key Factors

Although the Court has not readily distinguished between the level of First Amendment protection afforded to high school students and that afforded to college students, several important considerations remain constant in student speech cases at all levels. On the one hand, the Court always recognizes the powerful protections of the First Amendment.<sup>124</sup> In each of the decisions discussed above, the Court noted that while the rights of students are not always the same as those of adults in other settings, they still exist within the confines of the school. Quoting *Shelton v. Tucker*,<sup>125</sup> the *Healy* Court stated that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”<sup>126</sup>

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- freedom.”); see also *Papish*, 410 U.S. at 670 (“[*Healy*] makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus [sic] may not be shut off in the name alone of ‘conventions of decency.’”).
121. 454 U.S. 263, 268 (1981). The Court cited to *Tinker* to support the argument that “First Amendment rights of speech and association extend to the campuses of state universities.” *Id.* at 268–69. The fact that *Tinker* is used to protect college students’ free speech rights indicates that the Court sees the case as universally applicable to school speech cases, regardless of the setting.
122. *Id.* at 268 n.5.
123. See *id.* (explaining that while universities have many characteristics of a public forum, courts must consider the unique characteristics of a school environment when analyzing First Amendment rights); see also *Hosty v. Carter*, 412 F.3d 731, 735–36 (7th Cir. 2005) (applying *Hazelwood* to a public university speech case).
124. See *supra* Part III.A–B.
125. 364 U.S. 479, 487 (1960) (finding that a state statute requiring teachers in public schools to file affidavits giving names of all organizations to which they had belonged to or contributed to within the preceding five years as a prerequisite to employment was unconstitutional because it deprived the teachers of the right of associational freedom).
126. *Healy v. James*, 408 U.S. 169, 180 (1972) (alteration in original). A critical aspect of this quote is that it was made in the context of discussing college classrooms, the primary setting for academic discourse. It should hardly be argued that the “vigilant

However, most important in every student speech case is the Court's consideration of the school's basic educational mission.<sup>127</sup> Decisions involving student speech are always considered "in light of the special characteristics of the school."<sup>128</sup> It certainly appears that the Court is much more likely to uphold a public university policy when that policy furthers the university's educational mission by limiting speech which undermines that mission.<sup>129</sup> Similarly, the concern for civility and acceptable social behavior leans in favor of allowing a university to restrict certain speech.<sup>130</sup>

#### IV. PUBLIC FORUM ANALYSIS

After determining that public universities are unique government entities for the purposes of a constitutional analysis, it is imperative to address the nature of the forum of a college basketball game. Some would argue that even after conceding that universities are special and that they have a greater ability to restrict speech, they still cannot do so at basketball games because the universities' various stadiums and arenas constitute public forums.<sup>131</sup> However, a closer look at Supreme Court decisions reveals that basketball arenas on public campuses are not public forums, even though expressive activity does occur within their confines.

##### A. *Defining the Forum*

Although the Court is more deferential to public school policies than it is to those of other state actors, it would still have to classify university stadiums and arenas as a specific type of forum before analyzing the relevant university policies.<sup>132</sup> A long line of decisions indicates that a forum may be classified as (1) a traditional public

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protection of constitutional freedoms" is as vital at the university's basketball game as it is during a classroom debate. *Id.* Such an argument implies that it is equally important to protect a student's right to shout profanity and sexual slurs as it is to protect a student's right to disagree with a professor.

127. *See, e.g.,* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

128. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

129. *See* Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981).

130. *See* Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 672 (1973) (Burger, C.J., dissenting).

131. Wasserman, *supra* note 2, at 529-30. "At one end is a state university controlling student-fan speech in its arena, a state actor plainly bound by the limitations of the First Amendment." *Id.*

132. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("[T]he standard by which limitations upon [a right of access to public property for expressive purposes] must be evaluated differ [sic] depending on the character of the property at issue.").

forum, (2) a public forum created by government designation, or (3) a nonpublic forum.<sup>133</sup> As indicated in *Perry Education Association v. Perry Local Educuators' Association*,<sup>134</sup> the Court's classification of a particular forum will determine the degree to which citizens are shielded from state regulations within that forum.<sup>135</sup>

The first type of forum is a traditional public forum.<sup>136</sup> The Court considers places like streets, parks, and other "places which by long tradition or by government fiat have been devoted to assembly and debate," to be traditional public forums.<sup>137</sup> As such, regulations within these forums are subject to strict scrutiny review, which requires the state to demonstrate that any regulations on speech in these forums serve a compelling state interest and are narrowly drawn to achieve that interest.<sup>138</sup> Because of the unique nature of traditional public forums and the history that accompanies them,<sup>139</sup> one would be hard-pressed to argue that basketball arenas constitute traditional public forums.<sup>140</sup>

#### B. *Designated Public Forum v. Nonpublic Forum*

The more important debate is whether these arenas should be classified as designated public forums or nonpublic forums. This determination is critical because it would prove to be the difference between the Court enabling universities to limit certain forms of speech or prohibiting such limitations.<sup>141</sup> If classified as a designated public forum, universities would be bound by the same rules

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133. *See id.* at 45–46; *see also* *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

134. 460 U.S. 37.

135. *See Perry Educ. Ass'n*, 460 U.S. at 46 ("Public property which is not by tradition or designation a forum for public communication is governed by different standards.").

136. *See Cornelius*, 473 U.S. at 802.

137. *Perry Educ. Ass'n*, 460 U.S. at 45. Places like streets and parks "'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.'" *Id.* (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

138. *Perry Educ. Ass'n*, 460 U.S. at 45.

139. *See Hague*, 307 U.S. at 515–16 (discussing historical assembly at streets and parks).

140. Basketball arenas have not historically been used for discussing public questions and do not fall within the ambit of a traditional public forum under the *Perry* description. *See Perry Educ. Ass'n*, 460 U.S. at 45.

141. *See id.* at 45–46. Discussing designated public forums, the Court stated that "[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.*

regarding traditional public forums.<sup>142</sup> Conversely, if the arenas were determined to be nonpublic forums, the universities would be able to reasonably regulate speech, as long as the regulations are viewpoint neutral<sup>143</sup> and are “not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>144</sup>

There are several factors that the Court considers when determining whether a forum is a designated public forum.<sup>145</sup> The Court has looked to see whether the government has designated the place for “use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”<sup>146</sup>

The Court has also noted however:

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked 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.<sup>147</sup>

This suggests, and case law supports, the notion that state actors must “evidence[] a clear intent to create a public forum.”<sup>148</sup> For example, the Court found that a state university’s express policy of opening its meeting facilities to registered student groups created a public forum open for use by all student groups.<sup>149</sup> The Court found that the university evidenced a clear intent to create a public forum through its express policy of allowing student groups to convene and discuss their issues.<sup>150</sup>

The Court reached a similar outcome in *Southeastern Promotions, Ltd. v. Conrad*.<sup>151</sup> The Court found that members of the municipal

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142. See *id.* In designated public forums, state actors may only adopt reasonable time, place, and manner regulations. *Id.* As in traditional public forums, content-based restrictions will only be upheld upon a showing that the regulation is narrowly drawn to serve a compelling state interest. *Id.*

143. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

144. *Perry Educ. Ass’n*, 460 U.S. at 46 (citing *U.S. Postal Serv. v. Greenburgh Civic Ass’n*, 453 U.S. 114, 131 n.7 (1981)).

145. See *Cornelius*, 473 U.S. at 802.

146. *Id.* (citing *Perry Educ. Ass’n*, 460 U.S. at 45–46 n.7).

147. *Id.* (referencing in part *Perry Educ. Ass’n*, 460 U.S. at 47) (emphasis added).

148. *Id.*

149. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

150. *Id.*

151. 420 U.S. 546 (1975).

board responsible for managing a city auditorium violated a promoter's rights when they rejected the promoter's application to perform a controversial play in the theatre.<sup>152</sup> After determining that the board's unchecked power of reviewing all applications constituted a prior restraint,<sup>153</sup> the Court recognized the theatre as a public forum.<sup>154</sup> Certain language contained in the original dedication booklet stated:

'It will be [the board's] endeavor to make [the auditorium] the community center of Chattanooga; where civic, educational[,] religious, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory.

It will not be operated for profit, and no effort to obtain financial returns above the actual operating expenses will be permitted. Instead its purpose will be devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship.'<sup>155</sup>

Interpreting this language, the Court determined that the auditoriums under the board's control were "designed for and dedicated to expressive activities" and consequently functioned as public forums.<sup>156</sup>

It seems therefore that to consider a place to be a designated public forum merely because it is open to "expressive activity" is to discredit the importance of the term "discourse" and the nature of a public forum.<sup>157</sup> The auditoriums in *Southeastern Promotions* were certainly open to expressive activity, yet were considered public forums based on their expressed purpose in their dedication

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152. *See id.* at 552 ("[R]espondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards.").

153. *Id.*

154. *Id.* at 555.

155. *Id.* at 549 n.4 (alterations in original) (quoting SOUVENIER OF DEDICATION OF SOLDIERS AND SAILORS MEMORIAL AUDITORIUM 40 (1924)).

156. *Id.* at 555.

157. Merriam-Webster Dictionary defines "discourse" to be a "verbal interchange of ideas," and likens it to a "conversation." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 357 (11th ed. 2004). Another definition describes it as "formal and orderly and usually extended expression of thought on a subject." *Id.*

booklets.<sup>158</sup> Each of the above cases, along with the Court's language,<sup>159</sup> indicates that something more is required.<sup>160</sup> A plain reading of the Court's language leads to the conclusion that a state actor must intentionally open a nontraditional public forum for public conversation, if not debate, if it is to be considered a designated public forum.<sup>161</sup>

### C. *Public Places Considered Nonpublic Forums*

By itself, the fact that a place is suitable for expression is not enough. The Court has rejected the argument that "whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment."<sup>162</sup> Any belief that a public place owned by the government is automatically a public forum was discredited in *United States v. Kokinda*,<sup>163</sup> where the Court held that a sidewalk on postal property was not a traditional public forum.<sup>164</sup>

*Kokinda* presents an interesting wrinkle in constitutional law. As stated above, public streets have long been held to be traditional public forums, places that "time out of mind" have been used for public debate.<sup>165</sup> Yet the Court looked to the purpose of this particular sidewalk to determine whether it deserved traditional public forum protection.<sup>166</sup> The Court concluded that the postal

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158. 420 U.S. at 549 n.4. The auditorium was considered "a common meeting place to discuss" issues central to the community, not simply a place open to expressive activity. *Id.* (quoting *SOUVENIER*, *supra* note 155).

159. As stated above, the Court has found that mere inaction or permitting limited discourse does not evidence a clear intent to open a nontraditional public forum for public discourse. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

160. *See Widmar v. Vincent*, 454 U.S. 263, 264–65 (1981) (school adopted express policy of opening its facilities for use by student groups); *see also Se. Promotions*, 420 U.S. at 549 n.4 (expressed purpose of the auditorium was to allow for "civic, educational[,] religious, patriotic and charitable organizations and associations [to] have a common meeting place to discuss and further the upbuilding and general welfare of the city").

161. *See Cornelius*, 473 U.S. at 802 (interpreting the word "discourse" in accordance with its dictionary definition).

162. *Greer v. Spock*, 424 U.S. 828, 836 (1976).

163. 497 U.S. 720 (1990).

164. *See id.* at 730 (analyzing the Postal Service's sidewalks under nonpublic forum standards).

165. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

166. *Kokinda*, 497 U.S. at 727 (recognizing that the sidewalk lacked the characteristics associated with other sidewalks inviting expression including openness, congestion, and a relaxed environment where people could enjoy one another).

sidewalk, “constructed solely to provide for the passage of individuals engaged in postal business,” was not the type of sidewalk afforded strict review.<sup>167</sup>

Furthermore, the argument that individuals and groups had been permitted to leaflet, speak, and picket on those premises was to no avail.<sup>168</sup> The Court stated that *permitting* limited discourse does not create a public forum; instead, as stated throughout, the government must *intentionally open* that forum for public discourse.<sup>169</sup> In the end, the case represents an important concept in constitutional forum analysis: the purpose of a government-owned forum is more critical to the analysis than what may occur inside that forum.<sup>170</sup>

The Court relied on this purpose-oriented approach in determining the nature of the forum in *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*,<sup>171</sup> where it held that an airport terminal, though freely open to all members of the public, was a nonpublic forum under the First Amendment.<sup>172</sup> Petitioners (ISKCON) alleged that the Port Authority’s policy prohibiting solicitation in the terminal should be struck down under the Court’s strict scrutiny review of government regulations of public forums.<sup>173</sup> In response, the Court stated that “a traditional public forum is property that has as ‘a principal purpose . . . the free exchange of ideas.’”<sup>174</sup> Relying on *Kokinda*, the Court determined that because the airport functioned primarily as a commercial establishment, its principal purpose was not to promote the free exchange of ideas.<sup>175</sup> Absent such a purpose, the airport terminal had to be considered a nonpublic forum.<sup>176</sup>

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167. *See id.* at 727. “[T]he location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.” *Id.* at 728–29. *But cf.* *United States v. Grace*, 461 U.S. 171 (1983) (holding that the sidewalk surrounding the Supreme Court building was a traditional public forum).

168. *Kokinda*, 497 U.S. at 730.

169. *Id.* (relying on *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

170. *See supra* text accompanying notes 160–63.

171. 505 U.S. 672 (1992).

172. *See id.* at 679.

173. *See id.* at 677–78.

174. *Id.* at 679 (quoting *Cornelius*, 473 U.S. at 800).

175. *Id.* at 682 (noting that airports are designed to make a regulated profit); *see also* *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (“Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”).

176. *See ISKCON*, 505 U.S. at 682.



These cases emphasize that not all publicly owned properties capable of supporting expressive activity are considered public forums. Together, *Perry Education Association*, *Widmar*, *Southeastern Promotions*, *Kokinda*, and *ISKCON* indicate that the Court places great importance on the reason a particular forum exists when characterizing that forum.<sup>177</sup>

*D. The Basketball Arena on a Public Campus: A Nonpublic Forum*

Many assume that as part of a public university campus, a university's basketball arena is undoubtedly a designated public forum.<sup>178</sup> They assume that the university "intentionally invites fans to fill the stands for specifically expressive purposes."<sup>179</sup> Still, what is consistently overlooked in these examinations of collegiate sporting events is the true purpose underlying these invitations to the public: money.<sup>180</sup>

In October 2002, the University of Maryland and the Maryland Stadium Authority finished construction of the Comcast Center,

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177. See *supra* Part IV.B–C.

178. See, e.g., Wasserman, *supra* note 2, at 539 ("There is no question that a state university is bound by the First Amendment in attempting to regulate fan expression."). Although Professor Wasserman never expressly attributes this statement to classifying the arena as a public forum, such an inference can be made. See *id.*

179. See Howard M. Wasserman, *Cheers, Profanity, and Free Speech*, 31 J.C. & U.L. 377, 387 (2005) (referencing Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1570 (1998) and Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 321–22 (1999)). But cf. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (rejecting the principle that a government-operated place becomes a public forum whenever members of the public are permitted to visit).

180. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (recognizing that a sports arena, like a shopping center or an office building, serves the public for commercial purposes); see also Peter J. Schwartz, *The Most Valuable College Basketball Teams*, FORBES, Jan. 2, 2008, [http://www.forbes.com/2007/12/27/college-basketball-valuations-biz-sports\\_cz\\_js\\_0102basketball.html](http://www.forbes.com/2007/12/27/college-basketball-valuations-biz-sports_cz_js_0102basketball.html) (discussing the net value of several prominent men's college basketball programs); Bradley S. Pensyl, Note, *Whistling a Foul on the NCAA: How NCAA Recruiting Bylaws Violate the Sherman Anti-Trust Act*, 58 SYRACUSE L. REV. 397, 410 (2008) (citing CBS Renews NCAA B'ball, CNN MONEY, Nov. 18, 1999, <http://money.cnn.com/1999/11/18/news/ncaa/>) (discussing a 1999 contract that CBS and the NCAA entered into, totaling \$6 billion over eleven years); Douglas Bryant, Comment, *A Level Playing Field? The NCAA's Freshman Eligibility Standards Violate Title VI, But The Problems Can Be Solved*, 32 TEX. TECH L. REV. 305, 305–06 (2001) (discussing college sports as a lucrative business, and intercollegiate athletics as revolving around money).

successor to the long-revered Cole Field House.<sup>181</sup> The project to erect the new arena, with an estimated budget over \$125 million, resulted in a state-of-the-art facility capable of housing nearly 18,000 spectators.<sup>182</sup>

If it is difficult to understand why the University of Maryland would commit so much money to the development of a new basketball arena when the Cole Field House was recognized as one of the great college basketball environments in the country, look no further than Peter Schwartz's article in *Forbes* magazine.<sup>183</sup> In the article, Schwartz lists the estimated values of the twenty most valuable men's basketball programs, as well as the profits those teams posted in 2007.<sup>184</sup> The University of North Carolina ranked first in the country, estimated to be worth \$26 million after posting a \$16.9 million profit in 2007.<sup>185</sup> They were followed by fifth-ranked Duke, worth \$22.6 million after an \$11.2 million profit in 2007, and thirteenth-ranked North Carolina State, worth \$13.6 million after a \$7.9 million profit that same year.<sup>186</sup> Right behind those universities, ranking fourth in the ACC and seventeenth nationally, was the University of Maryland, with an estimated value of \$13.1 million after posting a \$7.3 million profit in 2007.<sup>187</sup>

This perspective is critical for an effective forum analysis of public university basketball arenas. As demonstrated in *ISKCON*, the fact that a place may be open to the public and capable of supporting expressive activity does not automatically render that place a public forum.<sup>188</sup> Like the airport in *ISKCON*, "designed to *make* a regulated

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181. University of Maryland Comcast Center, <http://www.mdstad.com> (Follow "Completed Projects" hyperlink, then follow "University of Maryland College Park-Comcast Center" hyperlink) (last visited Sept. 18, 2009).

182. *See id.*

183. *See* Schwartz, *supra* note 180.

184. *See id.*

185. *Id.*

186. *Id.*

187. *Id.* Team values were calculated based on what the basketball programs contributed to four different beneficiaries: (1) their university, including money that was used for academic purposes; (2) their athletic department (net profit generated by the program that was retained by the department); (3) their conference; and (4) their local communities, considering the spending by visitors to the county that was attributable to the program. *See id.*

188. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682–83 (1992) (noting that the purpose of airport terminals is to meet needs rather than support expressive activity).

profit,”<sup>189</sup> the Comcast Center at the University of Maryland operates to that same end.<sup>190</sup> In addition to seating 3,000 more people than its predecessor, Cole Field House, the Comcast Center has three times the number of concession stands and a team store that never existed at Cole.<sup>191</sup> On top of that, the University sold the naming rights to the arena for \$25 million.<sup>192</sup> When considering the incredible value and profitability of men’s basketball programs, in conjunction with massive stadium construction, it is nearly impossible to misconstrue the nature of a college basketball game; more than anything, it is an enormous revenue-generating event.<sup>193</sup>

The fact that fans have been permitted to engage in expressive activity does not render the purpose of the arena meaningless.<sup>194</sup> As the Court made clear in *Kokinda*, permitting limited discourse does not create a public forum.<sup>195</sup> Like the sidewalk in *Kokinda*,<sup>196</sup> and the airport terminal in *ISKCON*,<sup>197</sup> the basketball arena was created for a purpose other than supporting public debate, though limited discourse may occur within. After considering the amount of money involved

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189. *Id.* at 682 (emphasis added).

190. *See* Schwartz, *supra* note 180.

191. *See* Welcome to the Comcast Center! <http://umterps.cstv.com/school-bio/md-comcast-center.html> (last visited Sept. 18, 2009).

192. *See* Comcast Exercises Option to Include Floor Naming Rights in New Arena, July 12, 2000, <http://www.umterps.com/genrel/071200aaa.html> (“By exercising the option, Comcast’s naming rights gift has increased from \$20 million to \$25 million, making it the largest known corporate naming gift in the United States for a collegiate athletic facility.”).

193. *See, e.g.*, Comcast Center A-Z Information Guide, <http://www.umterps.com/sports/m-baskbl/spec-rel/101404aad.html> (last visited Sept. 20, 2009). Indicative of the revenue-generating purpose of the basketball arena, the Comcast Center guide contains information on concessions, corporate sponsorships, donations, group ticket sales, mascot appearances, merchandise, program sales, rental information, season tickets, suites, summer camps, tours of Comcast Center, and University of Maryland catering. *Id.*

194. *See* *United States v. Kokinda*, 497 U.S. 720, 728–30 (1990) (finding that although expression was permissive, “[t]he postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office,” and thus incidental expression did not create a public forum); *see also* *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (finding that a school paper did not constitute a public forum, though student expression was permitted therein).

195. *See* *Kokinda*, 497 U.S. at 730 (concluding that the postal sidewalk, unlike most sidewalks given traditional public forum protection, was constructed to provide for passage of individuals engaged in postal business, and therefore was not even a designated public forum).

196. *Id.*

197. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992).

in the support and promotion of college basketball, the unmistakable commercial purpose underlying the spectacle likens the analysis to the Court's approach in *ISKCON*, and leads to the similar conclusion that the college basketball arena is a nonpublic forum.

## V. PROBLEMATIC EXPRESSION

Even after recognizing that public universities can constitutionally limit expression in basketball arenas, it is important to note that most expression would be unaffected by a university's implementation of a fan behavior policy. For example, while some political speech<sup>198</sup> occasionally takes place within the arena,<sup>199</sup> it has not created the same level of controversy that other types of expression have created. And while there are other forms of expression that neither send a political message nor resort to profane or lewd language, the epicenter of the problem involves student expression laced with profanity, sexual innuendo, and derogatory slurs.<sup>200</sup>

Despite the long line of student speech and public forum cases, some commentators have argued that *Cohen* is controlling and thus allows students to profanely and lewdly insult opposing students and families.<sup>201</sup> However, the analogy is inapposite. Granting that *Cohen* stands for the principle that “government may not prohibit or punish

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198. As the Court said in *Virginia v. Black*, political speech is at the core of the First Amendment. 538 U.S. 343, 365 (2003). This Comment does not seek to propose restrictions on political speech primarily because the Court has made clear that such restrictions are generally impermissible. However, political speech has not presented the same problems as have offensive forms of student speech.

199. See, e.g., Theresa Vargas, *All the Hoos in Hooville Hit With a Sign of the Times*, WASH. POST, Aug. 21, 2008, at B08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/20/AR2008082001297.html> (discussing the University of Virginia's temporary ban on signs following intense public scrutiny of head coach Al Groh).

200. See *supra* Part I.

201. See Wasserman, *supra* note 2, at 571–72. Professor Wasserman reminds that *Cohen* represents the attitude that a speaker's choice of words are essential elements to the overall message and “government cannot prohibit certain words without also suppressing certain messages or ideas in the process.” *Id.* at 572. However, as discussed throughout this Comment, the rules are different for schools and public universities. The government, through the school, was allowed to punish the student in *Fraser* for delivering a speech laced with sexual-innuendo, despite the possibility that the words may have been necessary to deliver the intended message. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986); see also Tiffany, *supra* note 26, at 119 (stating that any state university has a tough battle to overcome the *Cohen* test of strict scrutiny when restricting speech at athletic events).

speech simply because others might find it offensive,<sup>202</sup> universities are still not precluded from prohibiting student profanity. By punishing students who scream "Fuck You, [player],"<sup>203</sup> or call a visiting player's grandmother a "whore,"<sup>204</sup> the university is doing much more than simply punishing objectionable speech; the university is fulfilling its mandates.<sup>205</sup>

Precedent established outside of the educational stratosphere should not trap universities. Although the Court has found profanity to be sometimes protected as valuable speech under the *Cohen* scenario,<sup>206</sup> should the same rules apply to effectively require a university to permit behavior that undermines its mission in assisting students to become educated, moral, and ethical society members? Suppose that in the classroom, where the vigilant protection of students' expression is most vital,<sup>207</sup> a student used profanity or a lewd remark to express disagreement with a classmate's opinion. If applying the *Cohen* ideology—that the language is essential to communicating the intended thought—the students' remarks would probably be protected under *Tinker*'s material and substantial disruption test.<sup>208</sup> If the profanity and lewdness are considered valuable speech under *Cohen*, it would be difficult to determine that protected expression to be a material and substantial disruption of the university's activities.

Yet there is little doubt that such behavior would result in the student's removal from class and potential disciplinary actions. Under *Fraser*, the Court would balance the student's interest in expression against the university's interest in teaching students the boundaries of socially appropriate behavior,<sup>209</sup> and would likely uphold the disciplinary sanctions as it did when such remarks occurred in a school assembly.<sup>210</sup> Although *Cohen* has professed that particular words should be protected because they are sometimes necessary to achieve the intended message, this rationale just simply

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202. See *Tiffany*, *supra* note 26, at 119 (citing Erwin Chemerinsky, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 999 (2d ed. 2002)).

203. See *Brady*, *supra* note 3.

204. See *Wahl*, *supra* note 4.

205. See UMD Mission Statement, *supra* note 41.

206. See *Cohen v. California*, 403 U.S. 15, 25 (1971). Referring to the language on *Cohen*'s jacket, Justice Harlan stated that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.*

207. See *Healy v. James*, 408 U.S. 169, 180–81 (1972).

208. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

209. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

210. See *id.* at 685–86

has not been and should not be applied in the school setting.<sup>211</sup> Why should a university be handcuffed because the expression occurs in a different campus building?<sup>212</sup>

The simple truth is that a student can effectively cheer for his or her team, or against an opposing team, without needing to resort to profane and lewd expression. The practical difference between the content of the messages “J.J. stinks”<sup>213</sup> and “Fuck J.J.” is trivial; a fan who shouts either succeeds in demonstrating his dislike for the player. While the minute difference between the two may be justifiable in the *Cohen* setting, it is a great hindrance on the university’s educational mission to require the university to support intolerable expression in the basketball arena that would be properly disciplinable elsewhere.<sup>214</sup>

## VI. COMPETING INTERESTS: STUDENTS VERSUS UNIVERSITIES

Having established that universities may place reasonable restrictions on profane and lewd speech within the basketball arena, it is important to address the competing interests involved in creating such restrictions. Developing adequate policies that simultaneously adhere to constitutional safeguards and sanction certain behavior has been a difficult undertaking for public universities. Universities have been unable to find the proper balance between allowing student expression and disallowing certain expression that contradicts their educational missions.<sup>215</sup> Along with freedom of expression, universities must also consider the students’ interest in the administration having limited discretion over the development and enforcement of potential policies. At the same time, a central

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211. *See id.* (finding that Fraser’s lewd remarks were not necessary to achieve the intended message).

212. *See id.* at 688 (Brennan, J., concurring). Justice Brennan noted that “[i]f [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because [school] officials considered his language to be inappropriate.” *Id.* But because Fraser’s speech occurred within the school environment, the Court ruled in the government’s favor. *See id.* This logically extends to the college basketball arena, one of the most prevalent and notable school environments on college campuses.

213. In the sporting context, saying someone “stinks” indicates he is extremely bad. Usage is in accordance with a definition listed under “stink” in the dictionary. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1226 (11th ed. 2004).

214. *See Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

215. *See id.* at 681. The Court recognized the difficult task of balancing student expression against educational purposes. *Id.*

purpose of any public university is to develop viable community members.<sup>216</sup> Any policy addressing fan behavior must give due consideration to each of these interests.

### A. *Student Interests*

#### 1. Freedom of Expression

This Comment has relied on the premise that a university's educational mission allows it to regulate speech in a way that other governmental entities cannot. For instance, the Court has made it clear that while students in public schools do not "shed their constitutional rights,"<sup>217</sup> those rights do not automatically allow for student expression that would undermine a school's basic educational mission.<sup>218</sup> Allowing fan behavior during a school-sponsored activity, like the behavior discussed in Part I of this Comment, can only serve to undermine the university's educational mission.<sup>219</sup> Although the Court has upheld the First Amendment rights of adults to utilize profanity as a form of expression in some settings,<sup>220</sup> it has often rejected the rights of students to do the same.<sup>221</sup>

Further, while there *may* be a case for allowing vulgar expression in a classroom debate, logic dictates that the same form of expression is not as valuable at a basketball arena when it is used to derogatorily address opposing players and their families.<sup>222</sup> As discussed throughout, universities have been afforded the right to reasonably restrict speech that undermines their missions, and a student calling a visiting player's grandmother a "whore" does just that.<sup>223</sup> Allowing such behavior sends the message to students that verbal abuse is acceptable. A university cannot stand by idly and send this message, and at the same time satisfactorily accomplish its mission to nourish

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216. *See supra* Part II.

217. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

218. *Fraser*, 478 U.S. at 685 (finding that the First Amendment does not prevent schools from restricting vulgar and lewd speech at a school assembly).

219. *See supra* Part I.

220. *See generally* *Cohen v. California*, 403 U.S. 15, 16–18 (noting that the defendant wore the jacket as a means of informing the public of his disapproval of the draft and the Vietnam War).

221. *See Fraser*, 478 U.S. at 681, 685–86 (recognizing that it was highly appropriate for a public school to prohibit vulgarity and other offensive terms in public discourse).

222. One could argue that expression similar to Cohen's jacket, 403 U.S. at 16, is important to the learning process in a college classroom, where the vigilant protection of the marketplace for ideas is required, and therefore furthers the university's educational mission. *See Healy v. James*, 408 U.S. 169, 180 (1972).

223. *See Wahl*, *supra* note 4.

student thought and help develop creative and ethical society members.<sup>224</sup> Unfortunately, university inaction implicitly condones this sort of behavior and contributes, to a degree, to the university's failure to fully satisfy its mandates.

Still, students are unequivocally entitled to a certain level of protection.<sup>225</sup> The purpose of this section is not to argue for the general censorship of distasteful language, but rather to appeal to the moral and ethical dilemma of allowing college students, half of whom are still teenagers, to engage in forms of expression not suitable to a civilized society. It is important for universities to be cautious against substantially impeding the students' First Amendment rights when creating school speech policies. The university must pay careful attention to students' interests and cannot limit speech in a way that is inconsistent with its educational mission. Being careful, however, does not require being handcuffed; while the university must be respectful of the First Amendment, the Court has allowed for schools to infringe on students' rights of expression to a certain degree.<sup>226</sup>

## 2. Limited Administrative Discretion

As with any policy implicating First Amendment rights, the university must also be cautious to avoid drafting a policy that grants administrators too much discretion in enforcement.<sup>227</sup> In various contexts, the Court has rejected broad grants of discretion to school administrators in educational policy-making.<sup>228</sup> And while school

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224. See UO Mission Statement, *supra* note 47.

225. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

226. See *supra* Part III; see also Traci B. Edwards, *First Amendment Rights in Public Schools: Bethel School Dist. v. Fraser*, 12 OKLA. CITY U. L. REV. 907, 931 (1987) (recognizing *Fraser* as an example of the Court's "willingness to stretch the Constitution past previous limits in order to achieve its goal of the proper inculcation of fundamental values, even at the expense of suppressing a student's first amendment right of freedom of speech").

227. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (noting that even content-neutral regulations can operate to stifle free expression, and thus violate the First Amendment, where a licensing official is afforded too much discretion in granting or denying a permit).

228. See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) ("[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or



administrators have certainly been granted the latitude necessary to effectively discharge schools' educational responsibilities, the Court has indicated that it will step in when basic constitutional values are directly and sharply implicated.<sup>229</sup>

With regard to the college basketball arena, this approach dictates that a potential policy curbing expression be precise and specific, and as much as possible, limit officials' discretion in enforcing that policy. Since the policy will necessarily be triggered only after students engage in the prohibited speech, it must be written in a manner that consistently results in viewpoint neutral enforcement.<sup>230</sup> So long as the policy is drafted to proscribe certain conduct and language, and is enforced fairly without regard to the speaker's views, the policy should withstand the reduced constitutional scrutiny applied in the education context.

## B. *University Interests*

### 1. *Educational Mission*

The educational mission of universities has been the bedrock of this Comment's argument that public universities may constitutionally enforce policies limiting student speech at college basketball games. In prior cases, the Court has repeatedly allowed schools to implement policies proven to be important in carrying out their educational missions.<sup>231</sup> If universities explicitly indicate that their educational missions are an integral part of their student speech policies and if their enforcement of those policies is consistent with their missions,

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other matters of opinion.”) (citation omitted); *see also* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (rejecting a Board of Education's attempt to compel a student to salute the flag, reasoning that while boards have highly discretionary functions, they must be performed within the limits of the Bill of Rights).

229. *See Pico*, 457 U.S. at 866 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

230. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 689 (1986) (Brennan, J., concurring) (“[S]chool officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express.”).

231. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (stating that a school's educational judgment that racial diversity is essential to its educational mission is one to which the Court will defer, and therefore will allow race to be a factor in admission decisions); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.”) (citation omitted).

then the Court is likely to approve of such policies.<sup>232</sup> Ultimately, if a policy prohibiting certain offensive speech in the basketball arena is going to withstand constitutional challenge, it would have to be justified by the university's interest in effectuating its educational mission.

## 2. Continued Financial Support from Alumni

Moreover, universities rely heavily upon alumni donations to provide the type of learning environments suitable to promoting their goals and objectives.<sup>233</sup> Poor fan behavior may cause concern for alumni, and in turn, lead to decreased donations.<sup>234</sup> Although this concern has no constitutional import with regard to the legality of a potential policy, it is certainly critical to universities as they consider implementing potential policies. It is paramount that universities have a procedure in place to avoid incidents such as those described in Part I in an effort to maintain a proud tradition to which alumni eagerly provide support.

## VII. NECESSARY COMPONENTS OF A CONSTITUTIONALLY SOUND POLICY THAT BALANCES STUDENTS' RIGHTS TO EXPRESSION WITH UNIVERSITIES' EDUCATIONAL MISSIONS

Navigation through a complex history of constitutional analysis concerning student speech<sup>235</sup> and the public forum doctrine<sup>236</sup> is futile absent a workable policy that simultaneously balances the interests involved and serves to eliminate intolerable student conduct. Developing such a policy to address the type of fan behavior presented in Part I of this Comment requires adherence to the rules

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232. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (upholding the constitutionality of a school's mandatory student activity fee and the speech which it supports so far as it is consistent with the school's educational mission and applied on a viewpoint-neutral basis).

233. *See, e.g.*, About the Campaign, <http://www.greatexpectations.umd.edu/about.html> (last visited Sept. 24, 2009) (stating that in 2008, donations from over 40,000 alumni totaled a record-setting \$130 million to support scholarships, faculty, facilities, and more); Great Expectations, The Campaign for Maryland, <http://www.Greatexpectations.umd.edu> (last visited Sept. 24, 2009) (noting that as of January 31, 2009, the donation campaign had raised \$587 million of its \$1 billion goal).

234. *See* Hoover, *supra* note 63 (discussing deplorable student fan behavior at various universities around the country).

235. *See supra* Part III.

236. *See supra* Part IV.

established in the school speech decisions discussed throughout this Comment.

The language of potential policies may vary, but should refer to several aspects to enhance their constitutional status. A constitutionally permissible policy should contain language referencing the university's educational mission and the university's desire to further that mission through teaching civility and acceptable social behavior to its students.<sup>237</sup> It should note the types of incidents that have occurred on college campuses as the reasons for its development. While explicitly recognizing the importance of protecting their students' First Amendment rights, the policy should impose reasonable restrictions that are viewpoint neutral. Moreover, enforcement of the policy should not result in suppressing expression merely because administrators oppose the speaker's view.<sup>238</sup>

The policy may contain different levels of sanctions for students who violate the restrictions. For example, first time offenders may be issued warnings; second time offenders may be ejected from the stadium; third time offenders may be banned from the stadium for an entire season. Each university's choice of sanctions is important to the extent that it provides students with an incentive to cooperate. Without sanctions, a potential policy would have no teeth and thus, would not help to alleviate the problem of inexcusable student behavior.

A university's implementation of a policy consistent with its educational mission that results in viewpoint neutral enforcement and provides specific sanctions for violators will help clean up student speech in the basketball arena. Once implemented, university policies can restore the college basketball environment to an enthusiastic gathering of students capable of supporting their teams and expressing dislike toward opponents in a manner consistent with the college environment. Following these guidelines should render future policies constitutionally sound.

## VIII. CONCLUSION

At the end of the day, the college environment is intended to be both educational and enjoyable. As indicated in their mission statements, the central purpose of public universities is to educate and develop young adults. Providing an energetic and exciting athletic program to supplement the classroom aspect of a student's

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237. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

238. See *supra* Part VI.A.2 (discussing the importance of limiting administrative discretion in enforcing school speech policies).

educational experience helps the universities further their missions. However, providing that environment does not require universities to allow students to verbally abuse opposing players and their families. A long line of constitutional decisions indicates that because of the special nature of the school, the Court should and will allow public universities to impose reasonable restrictions on intolerable student speech at college basketball games.

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