AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**ACLU-University of Maryland v. Mote, 423 F.3d 438** (4th Cir., 2005)

*In 2001, the University of Maryland at College Park decided to change its policy regarding outside speakers on campus. Prior to 2001, only members of the campus community and their guests were allowed to speak on campus. The new policy adopted in 2001 was designed to make the campus more open. Members of the campus community could demonstrate and leaflet on campus so long as they were not disruptive. Outsiders were allowed to do so only if sponsored by a community member. Unsponsored outsiders could make use of the Nyumburu Amphitheater stage on campus and designated sidewalk space outside the student union building. Outside groups could reserve space for their use on campus to the extent that the space is available and with five days advance notice.*

*The American Civil Liberties Union of the University of Maryland at College Park was a registered student group on campus. It sued the university president in federal district court seeking to have the new policy declared unconstitutional on the grounds that any restriction on outside speakers on campus infringed on their ability to hear the broadest possible set of viewpoints expressed on campus. They were joined by Michael Reeves, who had sought to gain greater access to campus to leaflet students on behalf of perennial political candidate Lyndon LaRouche. The district court ruled that the new university policies were reasonable regulations in a limited public forum. On appeal, the circuit court agreed.*

JUDGE WIDENER.

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The issue in this case is plaintiff's assertion that the University's policy violates the speech clause of the First Amendment. The First Amendment provides that “Congress shall make no law ․ abridging the freedom of speech.” Under our decision in *Goulart v. Meadows* (4th Cir.2003), when a First Amendment claim is asserted the court must begin the inquiry by determining whether the plaintiff had engaged in protected speech. If that is the case, the court next “must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.” After determining the type of forum, the court must determine whether the justifications for the exclusion satisfy the requisite standard for that forum. The first step in the analysis is easily answered here. Reeves attempted to engage in speech of a political nature, which the parties agree is protected speech.

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Plaintiff argues that the outdoor areas of the College Park campus should be considered public forums. To support this argument plaintiff points to the fact that access to the outdoor areas are not limited to students, faculty and staff, but instead are generally open to any member of the public, and that the University allows members of the public to engage in any lawful activity in these open areas except public speaking and handbilling. While this is true, it is not determinative because “[t]he 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.” Plaintiff's argument is also answered by looking to the Supreme Court decision in *Widmar v. Vincent* (1981), which recognized that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.” . . .

Examining the circumstances of this case, we are of opinion and agree with the district court that the College Park campus is a limited public forum. Contrary to plaintiff's arguments, the campus is not akin to a public street, park, or theater, but instead is an institute of higher learning that is devoted to its mission of public education. This mission necessarily focuses on the students and other members of the university community. Accordingly, it has not traditionally been open to the public at large, but instead has been a “special type of enclave” that is devoted to higher education. *United States v. Grace* (1983). There is nothing in the record to indicate that until the policy at issue here was implemented, the campus was anything but a non-public forum for members of the public not associated with the university. By implementing its policy the University made the campus a limited public forum.

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The court must next determine if those being excluded are of a similar character to those who are allowed access, that is the members of the University community who are permitted to speak freely on University grounds. Under our decision in *Goulart* whether a person is of a “similar character” to others permitted to speak in the forum depends on the purpose of the limited forum. The purpose of the University is clearly to provide a venue for its students to obtain an education, not to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community. While it is obviously true that there could be similarities in the content of speech by an outsider and a member of the campus community, that does not require them both to be treated the same. This case is clearly an example of where “the government may draw permissible status-based distinctions among different classes of speakers in order to preserve the purpose of the forum, even when the proposed uses by those inside the permitted class of speakers and those outside the permitted class of speakers are quite similar.”

Having decided that the University's campus is a limited public forum, and that the external standard applies in this case, the restriction by the University only has to be “viewpoint neutral and reasonable in light of the objective purposes served by the forum.” Plaintiff argues that the University's policy lacks both viewpoint neutrality and reasonableness, thus failing this standard. To support his assertion that the policy is not viewpoint neutral plaintiff points to one occasion where the University allowed a protest staged by the Westboro Baptist Church other than within the limits of the regulations. The record shows that the University, as an academic exercise, had raised the subject of community reaction to the killing of a homosexual college student by showing a play called “The Laramie Project” to foster more discussion among students involved in the University's First Year Book Program. Knowing the Baptists were opposed, the University permitted their protest away from Nyumburu and at the play's location. We think this lessened restriction was “reasonable in light of the purpose served by the forum.” . . .

Having determined that the University's policy is viewpoint neutral, the court must then determine if the policy is “reasonable in light of the purpose served by the forum.” To support this argument plaintiff relies upon our decision in *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist*. (4th Cir. 1993).  *Multimedia* is not applicable here however, because that case concerned a total ban on the placement of newspaper racks, which we held to be unreasonable under the circumstances. This case does not involve a total ban of speech by the general public, it merely involves a time, place, and manner restriction. We begin this analysis by noting that the University's policy “need only be reasonable; it need not be the most reasonable or the only reasonable limitation.” The University policy does not deny un-sponsored outsiders access to its campus, but instead merely requires them to reserve a spot which they may do as much as five days in advance, and then speak or distribute leaflets in that part. We especially note the places for speaking or handbilling are the most visited on the campus, a distinct advantage to the speaker or handbiller. If outsiders desire to leaflet or give a speech in another area of campus, they must simply find a sponsor, and they can perform these activities anywhere on the campus. We have previously recognized that universities have limited resources, which they have an interest in reserving for members of the university community. *Glover v. Cole* (4th Cir. 1985). If the University opened its entire campus to all members of the unaccompanied public, it would have to utilize a greater amount of those resources by, for instance, dispersing the limited staff throughout the campus to supervise the events. We are of opinion that this simple requirement of a sponsor is reasonable.

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*Affirm.*