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

**Pro-Life Cougars v. University of Houston, 259 F. Supp. 2d 575** (S.D. Tex., 2003)

*In October 2001, the registered student group Pro-Life Cougars applied to the University of Houston Dean of Students for a permit to display a “Justice for All Exhibit” on a centrally located Butler Plaza The exhibit would include a set of signs discussing a variety of abortion-related issues from a pro-life perspective. The dean determined that the exhibit would be “potentially disruptive” and thus could only be located in a remote site designated by campus policy for particularly loud public events. Another student group had been able to display the same exhibit at the central plaza in the spring of 2001.*

*The student group filed suit against the university on the grounds that the discretionary authority given to the dean of students to relegate some exhibits and events to remote locations was a violation of their First Amendment rights. The university responded that the “University First Policy” regarding potentially disruptive events was a content-neutral regulation of the time, place and manner of expressive activity on campus. The district court granted a preliminary injunction barring the university from enforcing its policy. The university responded by appealing that ruling while adopting a “Second Policy” that barred all student events from Butler Plaza except for university-sponsored events and small, “nondisruptive” student events. The circuit court upheld the preliminary injunction, and in further proceedings the district court struck down the university policy regarding Butler Plaza and disruptive events as an unconstitutional prior restraint on speech.*

JUDGE WERLEIN.

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. . . . Defendants' persistent defense of the constitutionality of the First Policy, and the power of the University to re-enact it, prevents the Court from finding that the constitutional question is moot. This is particularly true given the requirements of the Second Policy adopted by the University, which now require all faculty, staff, students, and student organizations who wish to engage in outdoor expressive activities, to make reservations ten days in advance to use one of four sites designated by the University where such expressive activities will be permitted, or, if reservations are not obtained, to confine their outdoor expressive activities to a single site east of the University power plant. Given the pervasive limitations upon outdoor free speech in the Second Policy, the First Policy may be recalled with fondness for its "liberality," and hence, an attractive alternative to which a University administration that is less hostile to free speech may well revert. Certainly, in the context of this case, the constitutionality of the First Policy is not a moot question.

"[A] speaker's right to access government property is determined by the nature of the property or `forum.'" Defendants assert that Butler Plaza is a limited public forum and that as such they are allowed to impose greater speech restrictions than otherwise allowed for public forums. Plaintiffs on the other hand, argue that the University and in particular Butler Plaza, are traditional public fora. The distinction is significant because "[t]he right of access to government-owned property for expressive activity is greatest when the property is a 'public forum.'" Thus, the constitutionality of speech restrictions in a limited public forum are judged under the reasonableness standard, while speech restrictions in a traditional or designated public forum are subject to strict scrutiny. *Chiu v. Plano Independent School District* (5th Cir., 2001).

To determine whether a forum is either a limited non-public forum or a designated public forum, a court should consider two factors: (1) the government's intent with respect to the forum; and (2) the nature of the forum and its compatibility with the speech at issue. Moreover, government owned property is considered a traditional public forum when the property has been traditionally used by the public for assembly and debate or when the government intentionally has opened up a non-public forum for public discourse.

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Defendants admit that they purposefully opened up Butler Plaza as a forum for student expression. . . .

This uncontroverted evidence compels the conclusion that both the University, and in particular Butler Plaza, are public fora designated for student speech. This conclusion is consistent with both the Supreme Court's holding in *Widmar v. Vincent* (1981), in which the Court noted that the "campus of a public university, at least for its students, possesses many characteristics of a public forum" and the Fifth Circuit's holding in *Hays County Guardian v. Supple* (5th Cir., 1992)*,* in which the Fifth Circuit explained that the function of a university campus suggests that the intended role of the same is more akin to a public street or park than a non-public forum. . . .

Any restriction imposed by the University on student expressive activity on Butler Plaza must therefore be analyzed under the strict scrutiny standard as opposed to the reasonableness standard suggested by Defendants. Under the strict scrutiny standard, a content-neutral regulation of speech on a public forum "must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication." . . .

. . . . Prior restraints, however, are not *per se* unconstitutional. A scheme tantamount to a prior restraint will be upheld so long as certain constitutional requirements are met. . . .

First, the scheme must not delegate overly broad discretion to a government official. Second, "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message. . . ." Finally, the scheme "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Forsyth Count v. National Movement* (1992).

. . . . Although prior restraints are not *per se* unconstitutional, the First Policy lacks the procedural safeguards necessary to survive a constitutional challenge.

First, the First Policy on its face is devoid of any objective guidelines or articulated standards that Dean Munson should consider when determining whether any given student expressive activity should be deemed "potentially disruptive." Under the First Policy, every time a student organization applies for a permit to use Butler Plaza, Dean Munson, *in his sole discretion and without the aid of objective guidelines,* is free to determine whether the proposed student expressive activity is or is not "potentially disruptive." . . . Therefore, under the First Policy, Dean Munson is empowered arbitrarily to deny access to Butler Plaza to students whose expressive activity *he* may deem offensive or undesirable. Such unbridled discretion renders the First Policy unconstitutional. . . .

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The First Policy also is not narrowly tailored to serve a significant governmental interest. To be narrowly tailored, a speech regulation must not burden substantially more speech than is necessary to further the stated legitimate governmental interest, which in this case is the preservation of the University's academic mission. But as the testimony of Dean Munson illustrates, the First Policy on its face and as applied can and has burdened more speech than necessary to carry out the University's academic mission. Dean Munson testified that after having considered for some time the eligibility of a particular event to be displayed on Butler Plaza on a case-by-case basis, and after allegedly receiving some complaints that *some* expressive activities could be overheard in some classrooms located near the plaza, he determined, as of April 2001, that *all* expressive activity on Butler Plaza, irrespective of how quiet, small, benign, or nondisruptive the expression may be, is "potentially disruptive" and thus banned from Butler Plaza.

Dean Munson testified that he would regard as "potentially disruptive" even the silent and nondisruptive expression of a single student on Butler Plaza holding a small sign proclaiming "The World is a Beautiful Place." Further, in keeping with his finding that *all* expressive activity on Butler Plaza is "potentially disruptive," Dean Munson testified that during the holiday season, he ordered removed from Butler Plaza a Christmas tree which carried with it some cheerful note of Season's Greetings for University students. The uncontroverted exercise of such sweeping power illustrates the unconstitutionality of the First Policy and Dean Munson's failure to adhere to the constitutional requirement that regulation of speech in a public forum be narrowly tailored and not burden more speech than is necessary to further the stated legitimate governmental interest.

. . . . The Supreme Court has explained that "[a] government regulation that allows arbitrary application is `inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" . . .

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