# COMMENT

# Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press

*The Supreme Court has upheld students' first amendment rights in many contexts, but has declined to speak on first amendment issues concerning official student publications at public universities. Although nearly every major public university has a student operated newspaper, lower federal courts have not provided adequate direction for resolving controversies between student editors and persons seeking access to the press. Focusing on the state action and public forum doctrines, this Comment examines the competing first amendment interests of these groups, and concludes that student editors who are free from administrative control may limit public access to campus newspapers.*

## INTRODUCTION

Inherent in the notion of academic freedom is the first amendment right of free expression.[1] Student managed newspapers published on public university campuses promote academic freedom by channeling student expression and providing editorial experience. The extent of

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[1] "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. In Gitlow v. New York, 268 U.S. 652, 666 (1925), the first amendment was held to apply to the states by virtue of the due process clause of the fourteenth amendment. U.S. CONST. amend. XIV, § 1.

Although academic freedom is not one of the enumerated rights of the first amendment, the right to teach, inquire, evaluate, and study is fundamental to a democratic society. *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982) (students' right to receive information and ideas from school library books); Widmar v. Vincent, 454 U.S. 263 (1981) (student religious group's right to use campus facilities); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (students' right to express opinion on controversial subjects not limited to classroom hours); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (teachers free to retain controversial beliefs and memberships in organizations); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (professor's right to engage in political expression and association).

student editorial autonomy, however, is not well defined. Judicial decisions have resolved conflicts between students and school administrators; a student editor's expression is, for the most part, constitutionally protected from administrative censorship.[2] However, conflicts between student editors and nonstudents[3] seeking access to state university[4] newspapers have not been resolved. Student editors have claimed a constitutional right of free press and editorial discretion in the selection of material.[5] Contributors have asserted that the Constitution mandates their right of access to newspapers published on state university campuses.[6] Resolving the conflict between these interests would clarify the extent of student editorial discretion and inform student editors of the constitutional implications of rejecting material from the newspaper.

Part I of this Comment discusses the function and structure of student newspapers on state university campuses. Part II introduces the first amendment rights of students on campus and compares the extent of student editorial discretion with the amount of faculty control. Part III outlines the requirements of state action and concludes that student editors are not state actors when their editorial decisions are made free

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[2] Papish v. Board of Curators, 410 U.S. 667, 671 (1973) (unofficial student publication may not be suppressed absent actual or imminent disruption of school's educational activities).

[3] This Comment is limited to problems arising from nonstudent contributors using the courts to gain access to campus newspapers. Controversies among student contributors and student editors are normally resolved through on-campus remedial procedures. Although individual student contributors have no input over the editing processes of the newspaper, the collective student body may by referendum remove an irresponsible student editor. *See* sources cited at note 11 *infra*.

[4] Throughout this Comment, use of the term "state university" applies to all publicly supported colleges and universities regardless of a particular school's designation as a state university or state college.

[5] *See, e.g.*, Bazaar v. Fortune, 476 F.2d 570 (university officials not entitled to censor student literary magazine), *aff'd as modified*, 489 F.2d 225 (5th Cir. 1973) (en banc), *cert. denied*, 416 U.S. 995 (1974); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980) (high school principal enjoined from censoring student newspaper); Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Va.) (high school editor's right to include birth control article in school newspaper), *aff'd*, 564 F.2d 157 (4th Cir. 1977); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970) (student free from state college administration's censorship); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967) (student editor could not be expelled for criticizing governor in college newspaper), *vacated as moot sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[6] *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1074 (5th Cir. 1976) (off-campus homosexual group claimed student's refusal to print paid advertisement deprived group of first amendment rights), *cert. denied*, 430 U.S. 982 (1977).

from administrative regulation. Therefore, a student's editorial decisions are not limited by the constitutional restrictions imposed on the state. Part IV discusses the imposition of a right of access to student newspapers. It concludes that in the absence of state action, a student editor's freedom-of-the-press right is more compelling than a contributor's interest in being heard. Furthermore, even if state action exists, the public forum doctrine of the first amendment should not allow contributors unlimited access to student newspapers.

## I. THE FUNCTION AND STRUCTURE OF STATE UNIVERSITY NEWSPAPERS

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.[7] It is an active voice which reflects a reporter's interpretation of facts and provides readers with the views and opinions of its publishers.[8] Newspapers have been labelled metaphorically the "Fourth Estate" — an institution outside the government that is an additional check on the three official branches.[9] In the academic arena, student newspapers not only provide the campus community with university related information, but also allow students the editorial freedom to operate and publish their own press.[10]

Unlike an individually written student thesis or seminar paper, a student newspaper is published by combined student effort. A single article passes through the hands of three or four staff members for editing.[11] Because of the extent of student involvement, a student newspa-

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[7] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[8] *See* 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947) ("A journal does not merely print observed facts the way a cow is photographed through a plateglass window.").

[9] Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 634 (1975). The metaphor of the "Fourth Estate" was coined by Thomas Carlyle when referring to the press as the fourth estate in British Parliament. *Id.*

[10] *See* Arrington v. Taylor, 380 F. Supp. 1348, 1357-58 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

[11] The editing procedure of most student newspapers consists of articles being submitted first to a page editor for primary editing, then to a copy editor for style editing and proofreading, a department editor for secondary editing, and finally to the editor-in-chief for approval. Telephone interviews with: Laura Barber, editor-in-chief of the Daily Barometer, Oregon State Univ. (April 5, 1983); Ron Crow, news editor of the Daily Collegian, Pennsylvania State Univ. (April 5, 1983); Ellen Granberg, editor-in-chief of the California Aggie, U.C. Davis (March 21, 1983); Mark Hayward, editor-in-chief of the Lantern, Ohio State Univ. (April 5, 1983); Milan Lazich, copy editor of the Daily Bruin, UCLA (March 21, 1983); Ellen Rossler, editor-in-chief of the Crimson White, Univ. of Alabama (April 5, 1983); Diana Sultenfuss, editor-in-chief of the

per reflects the collective views of its staff, and does not necessarily represent the views of the university as a whole.[12] In this respect, a student newspaper is comparable to a privately owned newspaper which is characterized by the philosophies of its publisher, and not by the views of the city which it serves.[13]

Student editors at most major state universities are free from direct administrative and faculty control over the content of the newspaper.[14] Most newspapers are funded by advertising revenue,[15] and at some universities, student body funds will support a paper when advertising revenue fails to meet publishing costs.[16] Media boards, comprised of students and faculty, select the editor-in-chief from a group of applicants.[17] Typically, editors receive a stipend from the newspaper's budget,[18] but in some cases their salaries are paid in part by student body activity fees.[19] Editorials reflect the views of the collective staff, and opinion columns represent the views of the signatories.[20] The student editor has the power to adjust the allocation of pages and to make and amend

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Battalion, Texas A & M (April 5, 1983); Barry Witt, editor-in-chief of the Michigan Daily, Univ. of Michigan (April 5, 1983). All further references to the practices and procedures of university newspapers are based on these interviews.

[12] In Arrington v. Taylor, 380 F. Supp. 1348, 1359 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), the court noted that when a student newspaper adopts a position on a given subject, it acts more as an independent newspaper than as a state agency, and its position is that of its editors and writers and not that of the university or state government.

[13] *Id.*; *see also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[14] For example, the editors at Oregon State, Penn. State, U.C. Davis, Ohio State, UCLA, Univ. of Alabama, Texas A & M, and Univ. of Michigan are free from direct university control.

[15] This is true of the student newspapers listed in note 14 *supra*.

[16] At the Univ. of Alabama, approximately 15% of student body activity fees goes toward supporting the newspaper. At Texas A & M, one dollar of every paying student's services fee is contributed to the newspaper's budget.

[17] The editor-in-chief of the Michigan Daily, however, is elected by the newspaper's staff. The editor of the Daily Tar Heel at the University of North Carolina is elected by the student body. Kania v. Fordham, 702 F.2d 475, 476 (4th Cir. 1983).

[18] Editors at U.C. Davis, UCLA, Univ. of Alabama and the Univ. of Michigan receive a stipend.

[19] Editors at Oregon State and Penn. State are paid in part by student body activity fees.

[20] This is the situation at Oregon State, Penn. State, U.C. Davis, Ohio State, UCLA, Univ. of Alabama, Texas A & M, and the Univ. of Michigan. *See* Arrington v. Taylor, 380 F. Supp. 1348, 1362 (M.D.N.C. 1974) ("*The Daily Tar Heel* . . . speaks only for those which [sic] control its content at any given time. It does not speak on behalf of . . . the student body."), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

advertising policy.[21] Major capital expenditures such as the purchase of new typesetting or printing equipment, however, may require university approval.[22] Most student newspapers are given rent free use of campus facilities.[23] In addition, some newspapers utilize a campus print shop for producing the paper,[24] instead of contracting with private offset printing companies.[25]

## II. STUDENTS' FIRST AMENDMENT RIGHTS: FREEDOM OF THE PRESS AND THE RIGHT TO EDIT

The first amendment guarantees editors a constitutional right to express themselves through editorials and to control the content of their press.[26] For the most part, the Supreme Court has strictly construed the amendment's language that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[27] The Supreme Court has yet to discuss the first amendment rights of student editors of official campus publications,[28] although it has upheld students' first

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[21] Editors with this power include those at Oregon State, Penn. State, U.C. Davis, and UCLA. At Ohio State, however, a separate student operated advertising department oversees all advertising placement and policy.

[22] Approval is required at the Univ. of Michigan, for example.

[23] Newspapers given rent free facilities include: the Daily Barometer, Oregon State; the California Aggie, U.C. Davis; the Daily Bruin, UCLA; the Crimson White, Univ. of Alabama; the Battalion, Texas A & M; and the Michigan Daily, Univ. of Michigan.

[24] For example, the Daily Barometer, Oregon State and the Battalion, Texas A & M utilize a campus shop.

[25] The California Aggie, U.C. Davis, for example, is printed in Rancho Cordova, Cal.

[26] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974):

> The choice of material to go into a newspaper . . . and [the] treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

*Id.* at 258.

[27] U.S. CONST. amend. I. But the Supreme Court has found certain speech not absolutely protected. *See, e.g.*, New York v. Ferber, 102 S. Ct. 3348 (1982) (child pornography); FCC v. Pacifica Found., 438 U.S. 726 (1978) (radio broadcasts of sexually explicit speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting" words).

[28] For official student publication cases in which the Supreme Court has denied certiorari, see Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); Bazaar v. Fortune, 476 F.2d 570, *aff'd as modified*, 489 F.2d 225 (5th Cir. 1973) (en banc), *cert. denied*, 416 U.S. 995 (1974); Avins v.

amendment rights in other contexts.[29] This part argues that because the student press is entitled to the same general protections from state censorship afforded privately owned newspapers, a student editor's right to select material should be equivalent to the rights of a private editor once students are granted autonomy.

### *A. Students' Constitutional Right of Free Expression*

Freedom of the press includes the right to express opinions in editorials and the right to control the content of the press through the use of editorial discretion.[30] The Supreme Court in *Tinker v. Des Moines Independent Community School District*[31] recognized that constitutional guarantees of free expression extend to students. In upholding a student's right to wear an arm band to protest the Vietnam War,[32] the Court firmly established that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[33] The Court was careful, however, to preserve the school administration's ability to enforce reasonable campus rules and regulations consistent with student rights.[34]

Subsequent Supreme Court cases have echoed the principles of *Tinker*.[35] In *Papish v. Board of Curators*[36] the Court ruled that the dissemination of ideas via a student publication can not be suppressed

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Rutgers, State Univ., 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

[29] *See* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982) (students' right to receive ideas protected from school board's removal of library books); Widmar v. Vincent, 454 U.S. 263 (1981) (student religious group's right to use campus facilities); Papish v. Board of Curators, 410 U.S. 667 (1973) (student publication may not be suppressed absent actual or imminent disruption of school's educational activities); Healy v. James, 408 U.S. 169 (1972) (student political group's right to use campus facilities); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (students' right to express opinion on controversial subjects not limited to classroom hours).

[30] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[31] 393 U.S. 503 (1969).

[32] *Id.* at 513-14.

[33] *Id.* at 506.

[34] *Id.* at 513.

[35] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (university's regulation prohibiting registered student religious group's use of campus facilities violated principle that state regulation of speech be content neutral); Healy v. James, 408 U.S. 169 (1972) (school administration's denial of access to campus facilities and official recognition to a political student group unconstitutional).

[36] 410 U.S. 667 (1973).

in the name of "conventions of decency" no matter how offensive the ideas may be to good taste.[37] Although *Papish* involved the attempted censorship of an unofficial newspaper, the holding has been applied by lower courts concerned with official student newspapers.[38]

Controversies involving official student newspapers are more difficult to resolve than cases concerning underground papers because the school administration claims to control that which it creates.[39] Lower courts have acknowledged that the Constitution does not compel the school to establish an official student newspaper.[40] However, the courts have held that the administration may not censor speech once a newspaper has been established as a forum for student expression.[41]

Some courts use "forum" language when limiting administrative regulation of student publications.[42] Other courts apply the specific "public forum" concept [43] to cases involving state supported student newspa-

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[37] *Id.* at 670. *Papish* involved the suppression of an unofficial student publication on a university campus. High school publications are often treated differently from their university counterparts in prior restraint cases because of the differences in age and maturity between high school and college students. For an analysis of the circuit courts' treatment of high school publication cases, see Huffman & Trauth, *High School Students' Publication Rights and Prior Restraint*, 10 J.L. & EDUC. 485 (1981).

[38] *See, e.g.*, Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975); *see also* Nichols, *Vulgarity and Obscenity in the Student Press*, 10 J.L. & EDUC. 207 (1981).

[39] *See, e.g.*, Nicholson v. Board of Educ., Torrance Unified School Dist. 682 F.2d 858, 863 (9th Cir. 1982); Trachtman v. Anker, 563 F.2d 512, 516 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); Zucker v. Panitz, 299 F. Supp. 102, 103 (S.D.N.Y. 1969). For a complete analysis of issues surrounding "alternative" newspapers in California high schools, see Letwin, *Regulation of Underground Newspapers on Public School Campuses in California*, 22 UCLA L. REV. 141 (1974).

[40] *See* Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618 (M.D. Ala. 1967), *vacated as moot sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968); Olson v. State Bd. for Community Colleges and Occupational Educ., 652 P.2d 1087, 1090 (Colo. App. 1982).

[41] *See* note 5 *supra.*

[42] *E.g.*, Bazaar v. Fortune, 476 F.2d 570, 575 (student publications cases similar to "open forum" cases), *aff'd as modified*, 489 F.2d 225 (5th Cir. 1973) (en banc), *cert. denied*, 416 U.S. 995 (1974); Lee v. Board of Regents, 306 F. Supp. 1097, 1100-01 (W.D. Wis. 1969) (as a campus newspaper, the Royal Purple constitutes an "important forum for the dissemination of news and expression of opinion"), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (student newspaper serves as "a forum for the dissemination of ideas").

[43] A public forum is either a public place that has traditionally been available for expressive activity, or a government owned facility the function of which would not be disturbed by both unlimited public access and expressive activity. For further discussion of the applicability of the public forum doctrine to student newspapers, see notes 155-84 and accompanying text *infra.*

pers.[44] Using public forum language to protect students, however, creates ambiguity for two reasons. First, use of the public forum doctrine implies a guaranteed public right of access to state facilities.[45] The applicability of the public forum doctrine to state media, as opposed to state facilities, is inappropriate, however, because of the editorial aspect inherent in communications media.[46] Second, by using the public forum doctrine, the courts imply that there is state action in the editorial decisions of the school newspaper. In public access cases, however, the student editor is often not a state actor.[47]

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[44] *E.g.*, Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 736 (E.D. Va.), *aff'd*, 564 F.2d 157, 158 (4th Cir. 1977) (student newspaper established as "public forum" for student expression).

[45] For detailed analyses of the development of the public forum doctrine, see Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Karst, *Public Enterprise and the Public Forum: A Comment on* Southeastern Promotions, Ltd. v. Conrad, 37 OHIO ST. L.J. 247 (1976); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975) [hereafter Note, *Minimum Access*].

[46] *See, e.g.*, Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1042 (5th Cir. 1982) (editorial discretion of public broadcaster is incompatible with labelling public television station a public forum), *cert. denied*, 103 S. Ct. 1274 (1983); Avins v. Rutgers, State Univ., 385 F.2d 151, 153 (3d Cir. 1967) (acceptance and rejection of articles submitted to state law review necessarily involves editorial judgment), *cert. denied*, 390 U.S. 920 (1968). For discussions of the effect of the first amendment on state actors who function as editors, see Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 CALIF. L. REV. 1221, 1250-51 (1982); Comment, *A Right of Access to Student Newspapers at Public Universities*, 4 J. COLL. & U.L. 209, 215-22 (1977) [hereafter Comment, *Right of Access*]; Note, *Editorial Discretion of State Public Broadcasting Licensees*, 82 COLUM. L. REV. 1161, 1175-78 (1982) [hereafter Note, *Editorial Discretion*]; Note, *Public Forum Theory in the Educational Setting: The First Amendment and the Student Press*, 1979 U. ILL. L.F. 879 [hereafter Note, *Public Forum Theory*]; Note, *The State College Press and the Public Forum Doctrine*, 32 U. MIAMI L. REV. 227 (1977) [hereafter Note, *State College Press*].

[47] Resolution of first amendment cases concerning student newspapers depends on the often difficult determination of the state's involvement in the editorial process. *See* Canby, note 46 *supra*, at 1138 ("[T]here has been no clear delineation of constitutionally permissible editorial roles between students, faculty, and administration."). State action theory is discussed at notes 56-133 and accompanying text *infra*.

### *B. Student Editorial Autonomy and Faculty Control*

Although courts have consistently upheld a student's constitutional right to express opinions in an official student newspaper,[48] they have not established rules concerning a student's constitutional right to control the content of the newspaper. Most state university administrations allow student managed newspapers editorial autonomy.[49] Viewed on a continuum, student editorial autonomy and freedom of the press is inversely related to the amount of faculty control. At one end of the scale lies student newspapers published through journalism courses.[50] Student editors enrolled in such courses have limited discretion because as part of the course, their selection of material is subject to faculty review; hence, their first amendment right to edit is only a privilege.[51] At the other end of the scale are newspapers managed by students outside the classroom in which the editor is selected by the students and no faculty input influences the editing process.[52] In these papers, a student

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[48] *See* cases cited in note 5 *supra*.

[49] *See* the state universities listed at note 14 *supra*.

[50] Most newspapers produced through journalism courses are high school papers. *See, e.g.*, Nicholson v. Board of Educ., Torrance Unified School Dist. 682 F.2d 858 (9th Cir. 1982); Reineke v. Cobb County School Dist., 484 F. Supp. 1252 (N.D. Ga. 1980); Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); *see also* Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971) (college newspaper).

[51] In Nicholson v. Board of Educ., Torrance Unified School Dist. 682 F.2d 858 (9th Cir. 1982), the court discussed the editorial discretion of high school newspaper writers enrolled in journalism classes:

> [T]he special characteristics of the high school environment, particularly one involving students in a journalism class that produces a school newspaper, call for supervision and review by school faculty and administrators. Under the precise circumstances of this case administrative review of a small number of sensitive articles for accuracy rather than for possible censorship or official imprimatur does not implicate first amendment rights.

*Id.* at 863 (footnote omitted); *see also* Canby, note 46 *supra*:

> The students' right to be free from content control in a sponsored publication does not arise from a first amendment absolute, but from the university's allocation to them of the entire editorial function. Other structures might have given the students less freedom, and some restrictions in scope could then have been imposed.

*Id.* at 1144 (footnote omitted).

[52] Most newspapers which are operated outside the classroom are university newspapers. *See, e.g.*, Kania v. Fordham, 702 F.2d 475, 476 (4th Cir. 1983); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1074 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); Arrington v. Taylor, 380 F. Supp. 1348, 1353 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Antonelli v. Ham-

editor has the first amendment freedom-of-the-press right to edit and control the newspaper's content.[53] The school administration can structure any type of newspaper so long as the structure does not prevent students from expressing their own opinions.[54] However, once students have been granted editorial autonomy, retroactively applied university regulations that restrict autonomy violate the editors' freedom of the press.[55]

The principles enunciated in *Tinker* and *Papish* have been applied to strike down every form of censorship of student publications at public universities. These principles should also extend to protect student editors' discretion in selecting the newspaper's content.

## III. STATE ACTION AND STATE UNIVERSITY NEWSPAPER EDITORS

Litigation has been triggered by student editors who have rejected material on the basis of its content.[56] Editors feel justified in excluding articles or advertisements that are repugnant to the newspaper's social

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mond, 308 F. Supp. 1329, 1331-33 (D. Mass. 1970); *see also* Bayer v. Kinzler, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974) (high school newspaper extracurricular activity), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

[53] *See* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976) (university authorities could not order student newspaper editor to publish or reject off-campus homosexual group's advertisement), *cert. denied*, 430 U.S. 982 (1977); Arrington v. Taylor, 380 F. Supp. 1348, 1365 (M.D.N.C. 1974) ("[a] campus newspaper is part of the 'press' for the purpose of the First Amendment to the Constitution of the United States"), *aff'd mem.* 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Antonelli v. Hammond, 308 F. Supp. 1329, 1337, 1337-38 (D. Mass. 1970) (state university officials had no right to control editorial policy of student newspaper).

[54] *See* Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) ("It may well be that a college need not establish a campus newspaper . . . . But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment."); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618-19 (M.D. Ala. 1967) (although no legal obligation on school authorities to operate a student newspaper, officials could not censor editor's political expression), *vacated as moot sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[55] *See* Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971) (new administrative policy placing previously independent student newspaper under supervision of mass communications department did not alter newspaper's function; therefore, restraint placed on editor's writing abridged editor's right of free expression).

[56] *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976) (advertisement announcing homosexual group's meeting), *cert. denied*, 430 U.S. 982 (1977); Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969) (advertisements describing purposes of university employees' union, proclaiming the immorality of discrimination on account of color or creed, and containing verses opposing Vietnam War), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

or political philosophies.[57] For example, campus newspaper editors have refused advertisements that portray ethnic minorities in a stereotypical fashion or that promote commerce in companies believed to engage in unfair labor practices.[58]

Persons denied access to a state university newspaper have brought suit against the student editor or university claiming that denying access to the student newspaper deprived potential contributors of free speech and equal protection.[59] The Constitution, however, safeguards private individuals only from state deprivations of protected rights.[60] Therefore, persons denied access to student newspapers must prove that the editor was a "state actor" who unconstitutionally denied plaintiffs access.

This part discusses the various Supreme Court approaches to state action issues and their applicability to student newspaper cases. Part IV focuses on the result of finding state action and discusses whether a student, as a state editor, must grant a contributor access to the newspaper under the public forum doctrine.

### *A. State Action Doctrine*

The fourteenth amendment provides in part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person . . . the equal protection of the laws."[61] Since the Supreme Court's decision in the *Civil Rights Cases*,[62] only action that is "fairly attributable" to the state is covered by the fourteenth amendment.[63]

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[57] The student newspaper editors at Oregon State, U.C. Davis, and UCLA stated that they have, in the past, excluded material from the paper that was either blatantly sexist or morally offensive, or material that would insult minority students on campus. *See* sources cited at note 11 *supra*.

[58] For example, some state university newspapers have rejected advertising by Gallo Winery because it was charged with unfair labor practices. Karst, note 45 *supra*, at 257 n.37.1.

[59] *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

[60] "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted).

[61] U.S. CONST. amend. XIV, § 1.

[62] 109 U.S. 3 (1883).

[63] Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2754 (1982).

Two distinct types of cases arise under the fourteenth amendment. The first are those involving some specific act of a branch of government, its agencies or officials.[64] Official student newspapers raise difficult state action issues because the paper's presence on campus may give the impression that the newspaper is a governmental agency and the student editor a governmental agent. To resolve state action issues concerning the governmental character of the newspaper, one must determine whether the editor is a state agent by virtue of an employment relationship with the university. The student body's role as publisher must also be considered. The second type of case that raises state action issues is that in which the plaintiff claims the denial of a right secured by the fourteenth amendment or federal law by the act of a nongovernmental party. A party may be subject to constitutional mandates, and the state liable for its unconstitutional acts, if nongovernmental actions are significantly imbued with state authority.[65] If a student editor is not a governmental party, one must consider the university's involvement with the editorial actions of the newspaper in order to resolve the state action issue.[66]

Because state university newspapers function differently from campus to campus, the state action issue must be decided on a case by case basis. If a student editor were held to be a state actor, she would be subject to the constitutional mandate of state content and viewpoint neutrality and equal protection in regulating contributors' speech: the state may not favor the views of one speaker over the views of

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[64] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures — Boards of Education not excepted."); *cf.* Polk County v. Dodson, 454 U.S. 312, 325 (1981) (public defender employed by state is not state actor when performing traditional functions as counsel to a defendant in a criminal proceeding); *see also* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 228.

[65] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (private club operating under discriminatory regulatory scheme enforced by state liquor board); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (restaurant employee may be a state actor by refusing to serve patron because of a state enforced custom of racial segregation in public restaurants).

[66] *See* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1074-75 (5th Cir. 1976) (editor's rejection of advertisement did not constitute state action since student body elected the editor, and university officials did not supervise or control newspaper), *cert. denied*, 430 U.S. 982 (1977); Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M.D.N.C. 1974) (classifying editors as state actors when practicing racial discrimination in hiring staff, and as independent newspaper editors when adopting a position on a given subject), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *see also* notes 107-33 and accompanying text *infra*.

another.[67]

### *B. A Student Editor as Government Agent and A Student Newspaper's Status as a Government Agency*

Generally, persons employed by the state act for the state in the performance of their official duties.[68] In some instances, however, a state employee is not a governmental actor if the employee's official duties require the employee to act as an adversary to the state.[69]

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[67] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972). The constitutional mandate of content neutrality requires that the state not determine what subjects and classes of speech may be discussed in a public forum. Viewpoint neutrality is required regardless of a facility's designation as a public forum since the state may never prohibit speech solely because it expresses a particular viewpoint. Equal protection guarantees that the state not distinguish among speakers based on their identity. *See* Stone, *Restrictions on Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). For an analysis of the Supreme Court's decisions on content neutrality, see Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

[68] Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2753 n.18 (1982). Suits against government officials and state employees for deprivation of constitutional and federal rights are often brought under 42 U.S.C. § 1983 (1976 & Supp. IV 1980):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

This section was derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, which was passed for the express purpose of enforcing the provisions of the fourteenth amendment. Lynch v. Household Finance Corp., 405 U.S. 538, 548 (1972). The Supreme Court has held that in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the state action requirement of the fourteenth amendment are identical. Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2750 (1982). For cases brought under the fourteenth amendment and § 1983 against state employees and officials, see Parratt v. Taylor, 451 U.S. 527 (1981) (prison officials); Estelle v. Gamble, 429 U.S. 97 (1976) (medical personnel in state prison); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state mental hospital superintendent); United States v. Price, 383 U.S. 787 (1966) (state law enforcement officials); Monroe v. Pape, 365 U.S. 167 (1961) (city police officers); United States v. Classic, 313 U.S. 299 (1941) (state election officials).

[69] *See* Polk County v. Dodson, 454 U.S. 312, 320-22 (1981) (public defender not a state actor when counsel for criminal defendant since public defenders necessarily act as adversaries to state prosecution and are constitutionally required to be free from administrative control). For a critical view of *Polk County*, arguing that both Supreme Court precedent and policy require the conclusion that public defenders act under color of

Student editors are not state employees because they are not salaried by the university or subject to university control. If a student editor receives a salary, payment is made from advertising revenue or from student government stipends.[70] A student editor functions as an independent contractor as opposed to an employee: a student-faculty media board or the student body selects the editor to perform editorial duties, but the specific manner in which those duties are performed is normally left entirely to the editor's discretion.[71] A student editor's duties often require her to be an adversary to the university administration in order to avoid the newspaper's use as an instrumentality for government opinion.[72] Because a student editor must often act contrary to the state's interest, a student editor should not be considered a governmental agent even if she is salaried by the university.

Some writers and courts imply that a student newspaper is a government agency because it is state created and state owned.[73] It is expressed indirectly that the university is the controlling publisher of the student newspaper.[74] It is true that an official student newspaper is dependent upon the support of the state for its continued existence. How-

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state law, see Note, Polk County v. Dodson: *Liability Under Section 1983 for a Public Defender's Failure to Provide Adequate Counsel*, 70 CALIF. L. REV. 1291 (1982).

[70] *See* notes 15-16 and accompanying text *supra*.

[71] *See* Kania v. Fordham, 702 F.2d 475, 476 (4th Cir. 1983) (chief responsibility for content and editorial policy of student newspaper lies in an editor elected by the student body and subject to recall).

Related to the question of the employment status of the editor is the issue of a university's liability for the tortious conduct of the newspaper. A university may or may not be vicariously liable for the newspaper depending upon the existence of an agency relationship. To establish an agency relationship between the newspaper and the state, there must exist a manifestation of consent, benefit, and right of control. RESTATEMENT (SECOND) OF AGENCY § 1 (1957). Although the first prong of the agency test is met because the university consents to the newspaper's representation as an official campus newspaper, the university benefits only indirectly from its relationship to the newspaper depending upon the journalistic reputation of the paper. The university receives no financial benefit from the paper. Additionally, there usually exists no right of control over the newspaper's editorial and advertising policies. *See* text accompanying notes 52-55 *supra*. For an analysis of theories which may be invoked to establish a university's liability for defamatory material in student publications, see Note, *Tort Liability of a University for Libelous Material in Student Publications*, 71 MICH. L. REV. 1061 (1973).

[72] *See* Yudof, note 46 *supra*, at 882-84 (university cannot make student editors unwilling conduits of government policy).

[73] *See, e.g.*, Karst, note 45 *supra*, at 255-58; Arrington v. Taylor, 380 F. Supp. 1348, 1353, 1365 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

[74] *See* M. YUDOF, WHEN GOVERNMENT SPEAKS, 218-20 (1983).

ever, it is unsound to assert that a student newspaper's relationship to the university is that of the traditional relationship between an editorial staff and a publisher. The privileges and responsibilities normally associated with a publisher are decentralized in the student newspaper context. The courts have held that university officials may not exercise a publisher's prerogative and fire an editor who prints articles contrary to the wishes of the administration.[75] At many universities the publisher's right to oversee the financial aspects of the publication has been delegated to a student-faculty media board or the student government association.[76] On some campuses only the student body in its entirety may recall an editor or adjust the allocation of activity fees to the newspaper's budget.[77] A student newspaper should not be considered a governmental agency because its editorial policies are not controlled by a government publisher.[78]

### *C. Private Conduct as State Action: A Tripartite Determination*

In deciding state action controversies which focus on the conduct of private parties,[79] the Supreme Court has used numerous tests and ap-

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[75] *See* Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[76] *See* universities cited at note 11 *supra.*

[77] *See* Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983). The students at U.C. Davis recently defeated a ballot proposition which would have curtailed funding for the minority students' newspaper, The People's Monitor. Interview with Ellen Granberg, note 11 *supra.*

[78] This is similar to public broadcast stations which cannot be considered "government" solely because they are "owned" and partially funded by state governments. *See* Muir v. Alabama Educ. Television Comm'n, 656 F.2d 1012, 1018 n.11 (5th Cir. 1981), *aff'd on rehearing*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983).

[79] Cases involving private parties acting as "joint participants" with state officials have raised state action problems but found state action nevertheless. *See, e.g.*, Lugar v. Edmondson Oil Co., 102 S. Ct. 2744 (1982) (corporate creditor acting with clerk of court and county sheriff acted under color of state law); Dennis v. Sparks, 449 U.S. 24 (1980) (private parties conspiring with judge acted under color of state law despite doctrine of judicial immunity); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (restaurant employee acting with police officer deprived plaintiff of right to equal protection in public accommodation); *cf.* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (private creditor not "joint participant" with state officials by merely invoking presumptively valid judicial process). Under current state action theory, a student editor acting with a state official in the deprivation of a contributor's rights would be a state actor under § 1983 only if the state official were acting pursuant to a state policy. For an

proaches.[80] The Court has held a state responsible for private decisions in three circumstances: when the private party performed a function exclusively reserved to the state;[81] when the state was financially dependent on the discriminatory conduct;[82] and when private actions were significantly encouraged or coerced by the state.[83] A contributor denied access to a state university newspaper must demonstrate that one of these three situations exists in order to maintain a suit against an editor or the university for the deprivation of a constitutional right.

1. Private Performance of Exclusive Governmental Functions

Private action is converted into state action when the private entity performs a traditionally exclusive governmental function, such as conducting a state election[84] or performing all necessary municipal services in a privately-owned town.[85] Operating a student newspaper is not tra-

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interpretation of the Supreme Court's recent decisions on the state action requirement of § 1983, see *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 241-46 (1982).

[80] *See, e.g.*, the "joint action" test, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (private party does not become a "joint participant" with state officials merely by invoking a presumptively valid judicial process in pursuit of legitimate private ends); the "nexus" test, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (inquiry must be whether there is a sufficiently close nexus between the state and the challenged activity of the regulated entity); the "state compulsion" test, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (private restaurant owner's racially segregated practices were compelled by state enforced customs); the "symbiotic relationship" test, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state had so far insinuated itself into a position of interdependence with a racially discriminatory restaurant that it was a joint participant in the enterprise); the "public function" test, Terry v. Adams, 345 U.S. 461 (1953) (because the electoral process is an exclusive government function, pre-primary straw vote which excluded blacks violated the fifteenth amendment, despite the absence of formal state involvement in their exclusion). These tests are actually catch phrases the Court uses to characterize the relationship between the state and a private actor in a particular situation. The names of these tests were coined by the Court in its decisions subsequent to those from which the phrases derive.

[81] *See* notes 84-90 and accompanying text *infra*.

[82] *See* notes 91-106 and accompanying text *infra*.

[83] *See* notes 107-32 and accompanying text *infra*.

[84] Terry v. Adams, 345 U.S. 461 (1953) (white voter association's pre-primary election unconstitutionally deprived certain citizens the right to vote because of their race and color); Nixon v. Condon, 286 U.S. 73 (1932) (political party committee invested by legislature with power to prescribe voting qualifications of its members violated fourteenth amendment by denying blacks the right to vote).

[85] Marsh v. Alabama, 326 U.S. 501 (1946) (exercise of constitutionally protected rights on the public streets of a company town could not be denied by the town owners); *see also* Evans v. Newton, 382 U.S. 296 (1966) (substitution of private trustees for city officials to manage a municipal park in order to keep park racially segregated

ditionally an exclusive governmental function; it is traditionally a private enterprise.[86] The government has never been obligated to provide the public with news and ideas; in fact, the first amendment may inhibit it from doing so.[87]

The public function theory of state action has been applied only in the context of elections, company towns, and municipal parks. The Supreme Court recently decided in *Rendell-Baker v. Kohn*[88] that providing education for maladjusted high school students was not an exclusive public function.[89] The Court held that a private party does not engage in state action merely by performing a function which benefits the public.[90] Under the public function test, a student editor is not a state actor because the services she performs are not within the exclusive province of the state.

2. State Dependence on Discriminatory Conduct

In only one case in the past two decades, *Burton v. Wilmington Parking Authority*,[91] has the Supreme Court found state action based on the state's dependence on a private entity's discriminatory conduct.[92] In *Burton* the Eagle Shoppe, Inc. was a private corporation that operated a restaurant as a lessee in a building owned by the state and located wholly within a parking lot owned by the state. The Court held that the state had "so far insinuated itself into a position of interdepen-

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violated equal protection).

[86] America's private newspaper industry began in 1690 with Benjamin Harris' *Publick Occurrences* which the British government censored because it was not licensed. British licensing of colonial newspapers declined in the early 1700s, and by 1790 approximately 450 newspapers were printed in America by private publishers. *See generally* D. BRENNER & W. RIVERS, FREE BUT REGULATED — CONFLICTING TRADITIONS IN MEDIA LAW (1982); M. FRANKLIN, THE FIRST AMENDMENT AND THE FOURTH ESTATE (2d ed. 1981).

[87] For an argument that the first amendment contains an implied prohibition against participation by the government in the dissemination of political ideas, see Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).

[88] 102 S. Ct. 2764 (1982).

[89] *Id.* at 2772.

[90] *Id.*

[91] 365 U.S. 715 (1961).

[92] McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 808 (1978). Professor Tribe recently referred to *Burton* as a "major spider" in the otherwise seamless web of state action law. L. Tribe, Comments at the Fourth Annual Supreme Court Review and Constitutional Law Symposium (Sept. 24-25, 1982) (available from National Practice Institute).

dence" with Eagle Shoppe that state action existed.[93]

Commentators have suggested that since student newspapers operate on state university campuses, the newspaper and the state are interdependent.[94] Considering the Supreme Court's repeated pronouncements of the limitations of *Burton*,[95] however, a potential student newspaper contributor would not be able to support a finding of state action under what the Court later termed the "symbiotic" standard.[96]

The Supreme Court's holding in *Burton* was based on a unique set of facts and circumstances. The state had granted the Wilmington Parking Authority, a state subdivision, the power to lease portions of the building as necessary to finance and maintain the parking facility.[97] Eagle Shoppe, a lessee of the state, refused to serve the black plaintiff

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[93] 365 U.S. at 725.

[94] Comment, *Right of Access*, note 46 *supra*, at 210-15; Note, *Public Forum Theory*, note 46 *supra*, at 883, 909-11; Note, *State College Press*, note 46 *supra*, at 232-37. These commentators addressed the state action isssue in response to the Fifth Circuit's decision in Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977), which held that a student editor's refusal to print an advertisement from an off-campus homosexual group did not constitute state action. Courts often resolve state action issues in a result-oriented manner and are more likely to find state action when the private party has discriminated on racial grounds or has acted in a particularly egregious manner. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 473-75 (1978). Perhaps under prevailing attitudes, a court today would be more willing to find state action in an editor's discrimination against a group for its sexual orientation than was the court which decided *Mississippi Gay Alliance* in 1976.

[95] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974) ("We cautioned, however, that while 'a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property.") (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961)). In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) the Court stated:

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose . . . .

*Id.* at 175. Even in *Burton* itself the Court was careful to narrow its holding: "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee . . . ." 365 U.S. at 726.

[96] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

[97] *Burton*, 365 U.S. at 717-18.

solely because of his race.[98] In finding state action, the Court noted that several factors were particularly relevant: the commercially leased area was located on public property;[99] the Authority's lease arrangement was an indispensable part of the state's plan to operate the project as a self-sustaining unit;[100] and profits earned by Eagle Shoppe's discrimination contributed to the success of the governmental venture.[101]

A student newspaper's relationship to the university is factually similar to the relationship in *Burton* only to the extent that a newspaper is operated on public property. The Court in *Burton* stated that not every leasing agreement with the state makes the lessee a state actor.[102] The Supreme Court applied the symbiotic relationship standard in an instance in which the state was financially dependent on a private actor's racially discriminatory conduct that occurred on government property. Hence, the *Burton* standard seems limited to racial conflicts.[103]

Therefore, in order for a contributor's state action claim to prevail under the symbiotic theory, the plaintiff would have to show at least that the state university was financially dependent on the editor's discriminatory conduct. Most state university newspapers do benefit from the rent-free use of facilities and may be partially subsidized by student activity fees.[104] However, to support a finding of state action under *Burton*, it is the *state* that must benefit from its relationship with the newspaper.[105] The university would have to be financially dependent on

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[98] *Id.* at 716, 724.

[99] *Id.* at 723.

[100] *Id.* at 723-24.

[101] *Id.* at 724 ("Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.").

[102] *Id.* at 725-26.

[103] *But see* Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1524 (1983). The court, relying on *Burton*, and distinguishing *Rendell-Baker*, found the actions of a private school for delinquent boys to be state action. Students were placed at the school involuntarily by juvenile courts and other state agencies. *Id.* at 940. The case did not involve racial discrimination; however, the conduct of the school was particularly egregious. The students were subjected to examinations by polygraph, mail censorship, isolation rooms, and excessive physical force. *Id.* at 940-42.

[104] For further discussion of state subsidy issues, see notes 121-29 and accompanying text *infra*.

[105] Rendell-Baker v. Kohn, 102 S. Ct. 2764, 2772 (1982). *But see* Blum v. Yaretsky, 102 S. Ct. 2777, 2788 n.19 (1982) (state not responsible for private nursing home's decisions to transfer Medicaid patients to lower levels of care even though state encourages such transfers and benefits financially from them). The holding in *Blum* suggests that financial benefit by the state, absent egregious conduct by the private entity —

an editor's decision to deny access to the student newspaper. Since state universities do not receive any revenue from a student newspaper,[106] no symbiotic relationship would exist to support a finding of state action under the *Burton* analysis.

3. State Encouragement or Coercion

Private action has been converted into state action when the state actively encouraged or coerced the discriminatory conduct. Many state action cases have questioned whether the requisite connection exists by virtue of the state's licensing, regulating, or subsidizing a private entity. Neither licensing, regulation, nor subsidy alone will convert private parties into state actors; the state must have significantly encouraged or coerced the challenged practice in order for there to be state action.

*a. Licensing and Regulation*

In *Moose Lodge No. 107 v. Irvis*,[107] the Supreme Court considered whether the Pennsylvania Liquor Control Board's licensing of a private club to serve liquor implicated the state in the club's racially discriminatory guest policies. The Court held that licensing was not enough to constitute state action.[108] However, the Board's regulations required liquor licensed clubs to adhere to their own constitutions and by-laws.[109] The Court held that state action existed since the Board's regulations encouraged segregation by requiring the Lodge to follow its discriminatory bylaws.[110]

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such as the racial discrimination in *Burton* — will never suffice to trigger state action.

[106] Most college newspapers are self-sufficient through advertising revenue or in some cases receive a small allotment of mandatory student fees, and therefore the university newspaper's financial situation has little bearing on the financial health of the university. A university would rarely be in an analogous situation to the parking authority in *Burton*, i.e., reliance on a discriminatory practice in order to finance a state program.

[107] 407 U.S. 163 (1972).

[108] *Id.* at 177.

[109] *Id.*

[110] *Id.* at 178-79; *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (restaurant employee may be a state actor by refusing to serve patron in accordance with state-enforced custom of racial segregation in public restaurants); *cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354-59 (1974). In *Jackson* a private utility regulated by the state terminated the plaintiff's electric service for nonpayment before affording her notice and an opportunity to pay. Although the state approved the utility's termination procedures, the Supreme Court held that the company's action could not be considered state action because the state did not specifically encourage the cir-

In the context of federally licensed communications media, the state action issue is difficult to resolve because of the competing first amendment interests of broadcasters and the public. In *CBS v. Democratic National Committee*,[111] the Supreme Court held that the first amendment did not require television and radio broadcast licensees to accept editorial advertisements.[112] There was no majority opinion on whether the broadcasters' policy of refusing editorial advertisements while accepting commercial ads constituted state action. Three Justices believed that the refusal to accept editorial advertisements was not government action since the federal regulation of stations did not encourage or approve the practice.[113] Three other Justices indicated that even if there were state action, allowing broadcasters this editorial freedom would not violate the public's first amendment interests.[114] Justice Douglas, concurring in the judgment, stated that the broadcasters' first amendment rights precluded a finding of state action,[115] but Justices Brennan and Marshall found government action because the broadcasters were federally licensed and heavily regulated.[116]

The rejection of editorial advertisements was also the subject of litigation in *Lee v. Board of Regents of State Colleges*,[117] decided two years before *Democratic National Committee*. In *Lee*, a federal district court was confronted with access demands made to a student newspaper governed by a faculty-student publications board. Because the student editor's refusal to accept editorial advertisements was made in accordance with board policy, the court held that the actions were attributable to the state.[118] In light of the Supreme Court's difficulty in resolving the state action issue in *Democratic National Committee*, the court's finding in *Lee* seems hastily drawn. The court's decision, however, might be justified on two grounds. First, the student newspaper was operated on government property. The broadcasting companies in

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cumstances in question. *But see* Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952) (private transit system's radio service remained subject to fifth amendment since federal regulatory commission investigating service approved the practice and found that public safety, comfort, and convenience were not impaired by the radio transmission).

[111] 412 U.S. 94 (1973).

[112] *Id.* at 94-132.

[113] *Id.* at 114-21 (Burger, C.J., joined by Stewart, J., and Rehnquist, J.).

[114] *Id.* at 146-47 (White, J., concurring); *id.* at 147-48 (Blackmun, J., joined by Powell, J., concurring).

[115] *Id.* at 162 (Douglas, J., concurring in the result).

[116] *Id.* at 172-81 (Brennan, J., joined by Marshall, J., dissenting).

[117] 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

[118] *Id.* at 1101-02.

*Democratic National Committee*, although federally regulated, were nevertheless privately owned entitities operated on private property. More importantly, the faculty-student publications board regulated editorial decisions and recommended and encouraged the newspaper's advertising policy.[119] The university president supported the practice.[120]

*b. Subsidy*

A state's financial support of a private entity through direct funding or free use of public facilities has raised state action issues in two contexts. First, the Supreme Court has held that a state itself violates the fourteenth amendment if grant aid would have a significant tendency to facilitate, reinforce, and support private discrimination.[121] For example, the state may not loan textbooks to racially discriminatory schools[122] or allocate exclusive control of public recreation facilities to segregated schools.[123] Second, state support of private entities has been challenged by persons asserting that the subsidy provided state aid to the alleged misconduct and that, therefore, the private entities should have complied with constitutional mandates.[124]

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[119] *Id.* at 1099.

[120] *Id.*

[121] Norwood v. Harrison, 413 U.S. 455, 466 (1973).

[122] *Id.* at 463-68.

[123] Gilmore v. City of Montgomery, 417 U.S. 556, 565-70 (1974).

[124] Students have challenged the constitutionality of a university's use of mandatory student fees to support a student newspaper on two grounds. First, students argue that their ability to express their views is limited because of the resources expended on the campus newspaper. Courts have held that the university's imposition of student fees does not violate the first amendment since the university is not using public funds to advance its own views or those of a favored class. *See, e.g.*, Kania v. Fordham, 702 F.2d 475, 480 (4th Cir. 1983) (use of fees not designed to further university's ideological biases); Arrington v. Taylor, 380 F. Supp. 1348, 1363-64 (M.D.N.C. 1974) ("When we speak of the 'state' in the context of abridging First Amendment rights, we certainly do not mean to include a campus newspaper which exists primarily for the benefit of, and controlled by, the students themselves"), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *see also* Kamenshine, note 87 *supra*, at 1124-32, 1140-42 (open forum requirement is inappropriate for student newspapers since normal tenure of controlling editor is not sufficiently long to establish a "political orthodoxy in violation of others' free speech interests"). Second, it has been argued that the practice violates the first amendment protection against compelled expression. *See, e.g.*, *Kania*, 702 F.2d at 480 (government may incidently abridge individual rights of free speech and association when engaged in furthering constitutional goal of 'uninhibited, robust, and wide-open' expression); *Arrington*, 380 F. Supp. at 1362 ("[The paper] speaks only for those which [sic] control its content at any given time. It does not speak on behalf of a group with which the plaintiffs are identified."). *But cf.* Galda v.

In two recent Supreme Court cases, *Rendell-Baker v. Kohn*[125] and *Blum v. Yaretsky*,[126] the Court determined that state funding did not convert private conduct into state action. In both cases the Court used the encouragement or coercion standard to resolve the state action issue. In *Rendell-Baker*, a private school, which received ninety percent of its funding from the state, discharged a vocational counselor. The Court held there was no state action because the state did not compel or encourage the decision to discharge.[127] Similarly, the Court held in *Blum* that a doctor's decision to transfer a patient from a Medicaid funded nursing home, although made in accordance with state guidelines, was not state action because the state's regulations did not dictate the doctor's decision.[128] Thus, *Blum* seems to limit the state action inquiry to the question of coercion. Under the *Burton* symbiotic relationship analysis, state action would have been present in *Blum* since the state financially benefitted from the nursing home's conduct.[129]

*Mississippi Gay Alliance v. Goudelock*[130] directly considered the state action issue in regard to a state university newspaper which operated free from administrative control. In that case a student editor declined to publish an off-campus homosexual group's advertisement. The district court found that the university did not compel the student editor's decision to accept or reject particular material; hence, there was no state action.[131] The Fifth Circuit, in a brief opinion, affirmed the lower court.[132]

Under the state encouragement or coercion analysis, student editorial

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Bloustein, 686 F.2d 159 (3d Cir. 1982) (unless college can demonstrate a compelling governmental interest justifying its assessment of student fees for an organization engaged in research, lobbying, and advocacy for social change, college cannot exact fees from those students who are unwilling to pay). *See generally* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995 (1982); Gibbs & Crisp, *The Question of First Amendment Rights vs. Mandatory Student Activity Fees*, 8 J.L. & EDUC. 185 (1979).

[125] 102 S. Ct. 2764 (1982).

[126] 102 S. Ct. 2777 (1982).

[127] 102 S. Ct. at 2770 n.6, 2772; *see also* Polk County v. Dodson, 454 U.S. 312, 321 (1981) (public defenders do not act under color of state law even though paid by the state).

[128] 102 S. Ct. at 2786-90; *see also* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (mere implementation by private creditor of statutory scheme for debt collecting held not state action).

[129] 102 S. Ct. at 2798 (Brennan, J., joined by Marshall, J., dissenting).

[130] 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977).

[131] Mississippi Gay Alliance v. Goudelock, No. EC-74-28-K, slip. op. at 6-7 (N.D. Miss. Oct. 25, 1974) (copy on file at the U.C. Davis Law Review office).

[132] 536 F.2d at 1076.

actions could amount to state action if a student editor were unable to make independent decisions because of the newspaper's structure. However, an editor's decisions are not attributable to the state when she is allowed to exercise her own journalistic judgment.

The Supreme Court has never attempted to formulate an infallible test for resolving state action controversies.[133] The resolution of state action issues in state university newspaper cases must be determined on a case by case basis. In determining whether a state university student editor acts on behalf of the state, a factual inquiry would usually reveal that a student editor is not a state employee. Further, under the tripartite state action analysis applicable to the conduct of private parties, a student editor rarely engages in state action when performing editorial duties.

## IV DISCERNING A RIGHT OF ACCESS TO STUDENT NEWSPAPERS

### *A. The "Fairness Doctrine" and the Right to Reply*

The university's inability to control student editorial discretion, once the school has taken a "hands off" approach toward the newspaper, has prompted discussion among legal scholars and commentators.[134] These writers discuss the desirability of imposing a limited right of access to state created student newspapers.[135] Some suggest that a fairness doctrine, similar to that imposed on broadcasters by the Federal Communications Commission (FCC),[136] could be constitutionally enforced

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[133] Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

[134] *See* Canby, note 46 *supra*, at 1131-34, 1138-48; Cass, note 45 *supra*, at 1304-07, 1350-54; Karst, note 45 *supra*, at 254-58; Shiffrin, note 46 *supra*, at 625; Yudof, note 46 *supra*, at 882-84; Comment, *Access to State-Owned Communications Media — The Public Forum Doctrine*, 26 UCLA L. REV. 1410, 1412-14 (1979); Note, *Public Forum Theory*, note 46 *supra*; Note, *State College Press*, note 46 *supra*.

[135] *E.g.*, Barron, *Access — The Only Choice for the Media?*, 48 TEX. L. REV. 766, 774-77 (1970); *see also* Comment, *Right of Access*, note 46 *supra*; Note, *Public Forum Theory*, note 46 *supra*; Note, *State College Press*, note 46 *supra*. This view has some support in the courts. Justice Goldberg, dissenting in Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977), said, "I would hold that there exists in some situations a right to nondiscriminatory access to the advertising and announcement sections of state-supported newspapers." *Id.* at 1089 (Goldberg, J., dissenting).

[136] 47 U.S.C. § 315(a) (1976). There has been recent discussion advocating the repeal of the fairness doctrine. *See* Comment, *The Future of Content Regulation in Broadcasting*, 69 CALIF. L. REV. 555 (1981).

against a student editor.[137]

1. Access to Broadcast Media: *Red Lion Broadcasting Co. v. FCC*

The fairness doctrine requires broadcasters to provide overall balance in covering controversial issues and to create access rights for specific persons whose professional integrity has been attacked on the air.[138] In *Red Lion Broadcasting Co. v. FCC*,[139] the Supreme Court faced the issue of whether the fairness doctrine and its component, the personal attack rule, unconstitutionally abridged broadcasters' first amendment rights. The Court acknowledged the plaintiff broadcaster's first amendment rights,[140] but because of the limited number of broadcasting frequencies available upheld the rules for two reasons: (i) broadcasters have a special privilege and responsibility to give suitable air time to matters of public interest;[141] and (ii) the paramount first amendment interest is the right of the public to receive information of public concern.[142] Applying a "fairness doctrine" to a student newspaper, however, could not be justified on the basis of *Red Lion* because the holding

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[137] Professor Canby suggests that it is possible to analogize the position of the state-supported university press to that of broadcast licensees because student editors are awarded control of the student newspaper, which has an inherent competitive advantage on its campus just as broadcasters are granted valuable licenses. He states, however, that the first amendment does not mandate a fairness requirement for the student newspaper even though the FCC mandates such a concession for broadcast licensees. Canby, note 46 *supra*, at 1146-47. Professor Karst has responded to Professor Canby with the argument that in the school newspaper context, it is precisely the paper's near-monopoly that makes crucial its recognition as a public forum in which the public should be given access. Karst, note 45 *supra*, at 255-57. "The point is not that the first amendment commands a school-imposed 'fairness doctrine' for school newspapers, but that it may command some rule of guaranteed access to the newspapers' pages for those opposing the editors' views." *Id.* at 257 (footnotes omitted).

[138] 47 U.S.C. § 315(a) (1976). For discussion of the fairness doctrine's constitutionality as it applies to media access, see generally Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964); Lively, *Media Access and a Free Press: Pursuing First Amendment Values Without Imperiling First Amendment Rights*, 58 DEN. L.J. 17 (1980); Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223.

[139] 395 U.S. 367 (1969).

[140] *Id.* at 386.

[141] *Id.* at 390.

[142] *Id.*

was limited to the unique characteristics of a broadcast medium.[143]

2. Access to Print Media: *Miami Herald Publishing Co. v. Tornillo*

Persons seeking access to the press argue that the first amendment's freedom-of-the-press clause was ratified to preserve newspapers as a marketplace for the dissemination of news and ideas.[144] It has been argued by commentators and proponents of access that in today's media-oriented society the government should compel a limited right of access to the press to ensure free public debate.[145]

In print media cases as well as broadcast cases, editorial discretion is an important consideration in determining whether the public should

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[143] *See* Lively, note 138 *supra*, at 32-33 & n.145.

[144] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248 (1974). John Milton, whom the English Government prohibited from publishing without a license in 1643, developed the theory that freedom of expression and unrestricted debate would lead to the discovery of truth. J. MILTON, AREOPAGITICA 35 (Everyman's Library ed. 1927). Thomas Jefferson, like Milton, also opposed government restrictions on freedom of expression because "[w]here the press is free, and every man able to read, all is safe." Letter from Thomas Jefferson to Col. Charles Yancey, 14 THE WRITINGS OF THOMAS JEFFERSON 384 (A. Lipscomb ed. 1904). The marketplace of ideas notion was recognized in American law by Justice Oliver Wendell Holmes in Abrams v. United States, 250 U.S. 616 (1919):

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

*Id.* at 630 (Holmes, J., dissenting). For access advocacy, see Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973).

The access approach to the press has been much criticized. Professor Chafee argues that "liberty of the press is in peril as soon as the government tries to compel what is to go into the newspaper." Z. CHAFEE, note 8 *supra*, at 633. Justice Stewart asserted that the press could be relegated to the status of a public utility. Such regulation of the press, however, would be contrary to the Constitution the Founders wrote. It would not be the Constitution "that has carried us through nearly two centuries of national life." Stewart, note 9 *supra*, at 637.

[145] *See* Barron, note 144 *supra*; Chatzky & Robinson, *A Constitutional Right of Access to Newspapers: Is There Life after* Tornillo*?*, 16 SANTA CLARA L. REV. 453 (1976); Lange, note 144 *supra*. For strong arguments against enforcement of a right of access to newspapers written before the decision in *Miami Herald*, see Traynor, *Speech Impediments and Hurricane Flo: The Implications of a Right-of-Reply to Newspapers*, 43 CIN. L. REV. 247 (1974); Comment, *Freedom of the Press vs. The Public's Right to Know: Newspaper Right of Reply Statutes*, 43 CIN. L. REV. 164 (1974).

be granted free access. From the editor-in-chief to the city desk, editors oversee every aspect of the publication from page one news items to back page obituaries. Editorial decisionmaking does not begin or end on the editorial page, but is reflected in such things as the selection and position of articles, the size of the typeface, and the placement of commercial and classified advertisements. Whether the press is a major metropolitan newspaper or a Hollywood scandal sheet, it develops a personality of its own because of its editorial slant. If these newspapers were freely open to the public, they would lose their identity and become the equivalent of a restroom wall, with the right of access to those who could scribble first.

In *Miami Herald Publishing Co. v. Tornillo*,[146] the Supreme Court found a publisher's right to a free press a weightier interest than that of a contributor's interest in being heard. The Court struck down a Florida right-of-reply statute imposed on private newspapers.[147] Despite arguments that newspapers had become big businesses which influenced and manipulated public opinion and were no longer the broadly representative newspapers that the first amendment's press clause sought to protect, the Court held that compelling editors "to publish that which " 'reason' tells them should not be published" " is an unconstitutional restriction on the freedom of the press.[148] Confronted with the compet-

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[146] 418 U.S. 241 (1974).

[147] *Id.* at 258.

[148] *Id.* at 256 (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1944)). Some courts and commentators have suggested that a student newspaper be freely accessible to advertisers. They assert that unlimited access to advertisements would not infringe a student's freedom of the press since arguably the placement and selection of advertisements requires little editorial discretion. *See, e.g.*, Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1076-90 (5th Cir. 1976) (Goldberg, J., dissenting), *cert. denied*, 430 U.S. 982 (1977); Note, *Public Forum Theory*, note 46 *supra*, at 908-13; Note, *State College Press*, note 46 *supra*. Nevertheless, the courts have recognized that the selection of advertisements requires editorial discretion. *See, e.g.*, CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (fairness doctrine does not require broadcaster to air editorial advertisements contrary to editorial judgment); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) (newspaper could not be compelled to accept and print advertising in exact form submitted); Cyntje v. Daily News Publishing Co., 551 F. Supp. 403 (D.V.I. 1982) (absent racially discriminatory purposes, newspaper cannot be compelled to print or disseminate a paid advertisement); *cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (newspaper prohibited from separating help-wanted classifications in advertising columns under "male" and "female" headings). The Court's decision in *Pittsburgh Press* was based primarily on the ground that the advertising at issue was purely commercial speech and as such was beyond the reach of the first amendment and, therefore, was not protected from regulation. *Id.* at 384-87. First amendment protection was ex-

ing first amendment interests of free press and free speech, the Court implicitly gave more protection to free press.[149]

The Court's rationale in *Miami Herald* should extend to student newspapers. If student newspapers operate independently of administrative control, then the constitutional guarantee of free press requires that student editors be free from contributors' demands. A student editor's right to control the content of her press deserves greater constitutional protection than a nonstudent contributor's right to speak through the newspaper. This is true even if the editor's rights must be exercised in accordance with reasonable campus rules and regulations.[150] In *Joyner v. Whiting*,[151] the president of a state university sought to compel a black editor to reverse the editor's ban on advertisements from white businesspersons. The Fourth Circuit held that the president was justified in prohibiting racial discrimination in staffing the newspaper and accepting advertisements,[152] but, as a remedy, could not curtail funding of the newspaper.[153] The court stated that to comply with the first amendment, the administrator's remedy must be narrowly drawn to rectify only the discrimination in staffing and advertising.[154]

### *B. Public Forum Doctrine and State Created Communications Media*

In those instances in which a student editor's decision to deny access constitutes state action, contributors claim a constitutional right of access to the student newspaper under the public forum doctrine.[155] A

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tended to include commercial speech three years later in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). For discussions of first amendment protection of commercial speech, see Barrett, *"The Uncharted Area" — Commercial Speech and the First Amendment*, 13 U.C. DAVIS L. REV. 175 (1980); DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975); Note, *A Newspaper Cannot Constitutionally Be Compelled to Publish a Paid Advertisement Designed to be an Editorial Response to Previous Newspaper Reports:* Wisconsin Association of Nursing Homes, Inc. v. Journal Co., 64 MARQ. L. REV. 361 (1980).

[149] *See* Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 647 (1975).

[150] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969).

[151] 477 F.2d 456 (4th Cir. 1973).

[152] *Id.* at 463.

[153] *Id.*

[154] *Id.* at 464.

[155] *See* Lee v. Board of Regents, 306 F. Supp. 1097, 1100-01 (W.D. Wis. 1969) (student newspaper is a forum that "should be open to anyone who is willing to pay to

public forum is either a public place that has traditionally been available for expressive activity[156] or a government owned facility whose function would not be disturbed by both unlimited public access and speech activity.[157] If a facility is labelled a public forum, the state may impose only reasonable time, place, and manner restrictions on the expressive activity.[158] It has been suggested that a state university student newspaper is a state created public forum because it is a state supported medium edited by state actors.[159] Although the Supreme Court has yet to decide whether a state created communications media is a public forum,

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have his views published therein"), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (school officials prohibited from denying access to high school newspaper that served as a forum); *cf.* Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 736 (E.D. Va.) (school board has no power to regulate newspaper which was established as a public forum and not as an official publication), *aff'd*, 564 F.2d 157, 158 (4th Cir. 1977).

[156] *E.g.*, United States v. Grace, 103 S. Ct. 1702 (1983) (sidewalks surrounding U.S. Supreme Court building); Hague v. CIO, 307 U.S. 496 (1939) (streets and parks). Justice Roberts' opinion in *Hague* has become the accepted statement of the right of free speech in public places: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515. For the classic discussion of the public forum doctrine, see Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1; *see also* Note, *Minimum Access*, note 45 *supra*, at 118-20 & n.14 (streets are the "poor man's printing press").

[157] *E.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (state fair grounds); City of Madison Joint School Dist. No. 8 v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167 (1976) (open meeting of board of education); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater and auditorium); Rosen v. Port of Portland, 642 F.2d 1243 (9th Cir. 1981) (airport terminal building); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.) (bus terminal), *cert. denied*, 393 U.S. 940 (1968); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railroad station).

For government facilities held not to be public forums, see Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 103 S. Ct. 948 (1983) (school district mail system); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (letterboxes); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (prison not public forum for inmates); Greer v. Spock, 424 U.S. 828 (1976) (military base); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space on city buses); Adderley v. Florida, 385 U.S. 39 (1966) (jail facility).

[158] *See* Police Dep't v. Mosley, 408 U.S. 92, 98 (1972); Adderley v. Florida, 385 U.S. 39, 46-48 (1966); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941).

[159] *See, e.g.*, Comment, *Right of Access*, note 46 *supra*, at 219-22; Note, *Public Forum Theory*, note 46 *supra*, at 910-13; *But see* Cass, note 45 *supra*, at 1354 (student newspaper cases cannot be resolved by defining the paper as a public or nonpublic forum).

several lower courts have addressed the issue with varying results.[160] Extending the public forum doctrine to such media requires consideration of the media's function and the scope of editorial responsibilities. Such consideration suggests that contributors should be denied unlimited access to a student newspaper.

1. Public Broadcasters

The Fifth Circuit in *Muir v. Alabama Educational Television Commission*,[161] and its companion case *Barnstone v. University of Houston, KUHT-TV*,[162] recognized the importance of editorial discretion.[163] Arguing that a public television station licensed by the FCC was a public forum, viewers of the Alabama Educational Television Commission (AETC) and the University of Houston's television stations claimed a first amendment right to compel the licensees to broadcast a previously scheduled program, "Death of a Princess," which the licensees had cancelled. The Northern District of Alabama granted summary judgment for AETC.[164] The Southern District of Texas held that the university operated station was a public forum and as such could not deny access to speakers, including the producers of "Death of a Princess."[165] The circuit court held that the viewers did not have the right to compel the broadcast.[166] The FCC does not mandate a general right of access to broadcast licensees because it recognizes that editorial discretion is a necessary element in providing quality programming.[167] Relying on the

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[160] For cases that have held communications media to be public forums, see Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Va.) (high school newspaper), *aff'd*, 564 F.2d 157 (4th Cir. 1977); Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969) (university student newspaper), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school newspaper).

For cases that have held communications media not to be public forums, see Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) (public television station), *cert. denied*, 103 S. Ct. 1274 (1983); Avins v. Rutgers, State Univ., 385 F.2d 151 (3d Cir. 1967) (state university law review), *cert. denied*, 390 U.S. 920 (1968).

[161] 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1274 (1983).

[162] *Id.*

[163] *See id.* at 1042-43. For a discussion of public policy reasons which may limit the scope of editorial discretion in public broadcasting, see Note, *Editorial Discretion*, note 46 *supra*.

[164] 656 F.2d 1012 (5th Cir. 1981) (discussing unpublished district court opinion).

[165] 514 F. Supp. 670 (S.D. Tex. 1980).

[166] 688 F.2d at 1048.

[167] The Communications Act of 1934, 47 U.S.C. § 151, 153(h) (1976) provides that broadcast licensees are not common carriers. The Supreme Court has held that forcing broadcasters to develop a nondiscriminatory system for controlling access was what Congress intended to avoid. FCC v. Midwest Video Corp., 440 U.S. 689, 705 (1979).

FCC's rationale, the court held the public television stations not to be public forums.[168]

2. State Publications and Student Newspapers

Some courts have restricted the right of access to a state publication on the basis that editorial autonomy was central to the publication's function.[169] In *Avins v. Rutgers, State University of New Jersey*,[170] the plaintiff alleged a violation of his first amendment rights when his article was rejected by a state university law review. The Third Circuit held that the editorial function was not lessened when the state was the publisher.[171] Therefore, the court declined to compel unlimited access to the state publication if such access would restrict the government editor's exercise of editorial discretion.

Persons have claimed a constitutional right of access to student newspapers on the theory that the newspaper is a public forum because it is published by the state and has been created for public expression.[172] Potential contributors would have unlimited access to a student news-

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For an argument that imposition of access requirements to cablecasters would be contrary to the first amendment, see Comment, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 CALIF. L. REV. 1393 (1982).

Public television licensees are generally subject to the same regulatory requirements as their commercial counterparts. *See* Community Television v. Gottfried, 103 S. Ct. 885, 893-94 (1983) (FCC need not evaluate public station's service to handicapped audience by a different standard than that applicable to commercial stations). The Supreme Court has recently granted an appeal to determine whether the Public Broadcasting Act's prohibition of editorializing by public television and radio station licensees violates the first amendment. League of Women Voters v. FCC, 547 F. Supp. 379 (C.D. Cal. 1982), *appeal granted*, 103 S. Ct. 1249 (1983).

[168] 688 F.2d at 1041-43 (1982).

[169] *See, e.g.*, Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) (judicial order could not require college newspaper to accept announcements from student groups, but could prevent administration from prohibiting newspaper's printing of such material); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976) (college newspaper may refuse to print advertisements), *cert. denied*, 430 U.S. 982 (1977); Avins v. Rutgers, State Univ., 385 F.2d 151 (3d Cir. 1967) (law review may refuse submitted articles on basis of editorial judgment), *cert. denied*, 390 U.S. 920 (1968).

[170] 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

[171] *Id.* at 153-54; *cf.* Radical Lawyers Caucus v. Pool, 324 F. Supp. 268 (W.D. Tex. 1970). In *Radical Lawyers* a state bar association, a state agency, refused to accept an advertisement from a radical lawyers group for publication in the bar journal. The court held that the editors' desire to avoid harm to the bar's image did not justify the advertisement's exclusion. *Id.* at 270.

[172] *See, e.g.*, Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

paper if the newspaper were labelled a public forum, and the state as editor would have no editorial discretion over the selection of materials.[173] If the newspaper were not a public forum, the student as state editor would retain editorial discretion limited only by the constitutional mandate against government censorship[174] and viewpoint discrimination.[175]

It should be noted that a student publication would not be a public forum merely by virtue of its existence on a campus which might be open to the public for some purposes. The public forum analysis should be applied to the vehicle used for expression — the newspaper.[176] Regardless of whether or not a state university is itself a public forum,[177] a

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[173] *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 149-50 (1973) (Douglas, J., concurring in the result) (if government managed a prestigious newspaper it would not be free to control content). Contrast the later statement of Justice Douglas in Lehman v. City of Shaker Heights, 418 U.S. 298, 306 (1974) (concurring opinion): "The First Amendment . . . draws no distinction between press privately owned, and press owned otherwise." *See also* Canby, note 46 *supra*, at 1124-25 ("[S]electivity is inherent in and essential to a number of governmental operations . . . .").

[174] *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552, 555 (1975) (city officials' rejection of theater company's application to perform play in public forum was an unconstitutional prior restraint).

[175] *See* Carey v. Brown, 447 U.S. 455 (1980) (statute distinguishing between peaceful labor picketing and other peaceful picketing unconstitutional); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

[176] In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983), the Supreme Court held that although the first amendment's guarantee of free speech applied to an interschool mail system as it did elsewhere within the school, the mail system was not a public forum. The Court stated, "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Id.* at 954.

[177] *See* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) ("We have not held . . . that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all its grounds or buildings."). It has been suggested that a school or universisty is a "semi-public forum." Yudof, note 46 *supra*, at 884-88; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-21, at 690 nn. 13 & 14 (1978). Because students' first amendment rights are protected within the school environment but the general public does not have complete access to school facilities for expressive activity, these commentators view schools as falling between traditional public forums and places where there is no right of access. The term "semi-public forum" has not been adopted by the Supreme Court although it has stated that a public forum may be created for a "limited purpose." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 955 n.7 (1983).

For a discussion of the ability to exclude nonaffiliated persons from schools while

student newspaper's status as a public forum is determined by an independent analysis of the newspaper's function. Even if some portions of the university are freely accessible to the public,[178] accessibility to the newspaper must be compatible with necessary editorial discretion.

In *Lee v. Board of Regents of State Colleges*,[179] however, a federal district court found that Whitewater State University's student newspaper was a public forum,[180] because the paper constituted an important forum for the dissemination of news and the expression of opinion,[181] and, moreover, the administration solicited commercial advertisements. The court held that the school administration could not constitutionally exclude political advertisements.[182] The court, however, need not have based its holding on a determination that the campus newspaper was a public forum. Rather, the *Lee* court should have held that the school administration unconstitutionally discriminated against the content of the proferred advertisements. The administration's policy permitted the publication of commercial advertisements which are not afforded full first amendment protection[183] but excluded advertisements that expressed political ideas deserving the highest level of protection.[184]

Student newspapers are unlike traditional public forums or those government facilities in which unlimited speech activity is consistent

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protecting student speech, see Cass, note 45 *supra*, at 1342-44.

[178] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981) (university facilities available for student religious groups); Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd., 578 F.2d 1122, 1124-25 (5th Cir. 1978) (school facilities available for use by private organizations); Spartacus Youth League v. Board of Trustees, 502 F. Supp. 789, 799 (N.D. Ill. 1980) (student union accessible to persons distributing literature); *cf.* American Future Systems v. Pennsylvania State Univ., 553 F. Supp. 1268 (M.D. Pa. 1982) (university may not regulate commercial speech in dormitory common rooms).

[179] 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

[180] *Id.* at 1100-01.

[181] *Id.*

[182] *Id.* at 1102.

[183] *See generally* Barrett, note 148 *supra*.

[184] 306 F. Supp. at 1101; *see also* Whitney v. California, 274 U.S. 357 (1927):

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

*Id.* at 375-76 (Brandeis, J., concurring) (footnote omitted); *see generally* Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1.

with the facility's use. Because unlimited access would interfere with the editorial function inherent in a newspaper, a student newspaper should not be deemed a public forum even in those instances in which the student editor is a state actor.

## CONCLUSION

Student newspapers published on state university campuses are structured with varying degrees of faculty supervision. When newspapers are designed to promote editorial autonomy, courts should recognize the first amendment press rights of student editors. The editor's autonomy from university officials in selecting material and expressing views should extend to freedom from contributors' demands. Students' editorial decisions have the same constitutional implications as private — and not state — editors. Therefore, contributors should not be allowed to compel student editors to accept material over students' editorial judgment. Given the importance of student editorial autonomy in the promotion of academic freedom, a fair burden is cast on nonstudent contributors when limiting access to the campus press.

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