

Winter 2020

## Forum Delegation: The Birth and Transposition of a New Approach to Public Forum Doctrine

Brett Johnson

Shane C. Epping

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_comm\\_ent\\_law\\_journal](https://repository.uchastings.edu/hastings_comm_ent_law_journal)



Part of the [Communications Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Brett Johnson and Shane C. Epping, *Forum Delegation: The Birth and Transposition of a New Approach to Public Forum Doctrine*, 42 HASTINGS COMM. & ENT. L.J. 77 (2020).

Available at: [https://repository.uchastings.edu/hastings\\_comm\\_ent\\_law\\_journal/vol42/iss1/5](https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol42/iss1/5)

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

---

---

# Forum Delegation: The Birth and Transposition of a New Approach to Public Forum Doctrine

by Brett G. Johnson<sup>1</sup>  
Shane C. Epping

## Abstract

This paper introduces and explores the concept of forum delegation: the power of government officials to suggest which forums to allow speakers to use. The concept is born out of a recent legal battle between the University of Minnesota and conservative speaker Ben Shapiro, in which the UMN required Shapiro to speak in a venue away from the heart of campus due to concerns over the school's ability to provide adequate security for the event. The paper first analyzes the UMN case to assess the constitutionality of forum delegation in the context of regulating speech and public universities. Next, it applies Robert Post's theory of constitutional domains to transpose forum delegation from the public university context to situations in which cities must deal with controversial speakers. The goal in explicating the concept of forum delegation within this latter context is to give cities a tool in which to constitutionally balance the interests of speakers, audience members, public safety concerns, and efficient resource management. Such a tool can be especially helpful at a time when provocateurs have sought to weaponize the First Amendment through politicizing and polarizing free speech principles.

---

1. Brett G. Johnson (MA, University of Iowa; PhD, University of Minnesota) is an assistant professor of journalism studies at the University of Missouri. His research focuses on the intersection of mass communication law and media sociology. Shane C. Epping (MA, University of Missouri) is a Ph.D. student at the University of Missouri. His research focuses on media sociology and journalism ethics.

## Introduction

In December 2017, officials at the University of Minnesota (UMN) approved the application of a politically conservative student organization to bring the well-known conservative speaker Ben Shapiro to campus to give a speech. However, UMN officials stipulated that Shapiro's speech must be held in an auditorium located on the school's smaller and more suburban St. Paul campus rather than in a larger venue on the school's larger and more urban Minneapolis campus.<sup>2</sup> Shapiro came and spoke on the St. Paul campus on February 26, 2018. In July 2018, the student group (Students for a Conservative Voice, or SCV) and the national organization that financed Shapiro's speech (Young America's Foundation, or YAF) brought a federal lawsuit against several UMN officials, alleging that the moving of Shapiro's speech to St. Paul amounted to unconstitutional viewpoint discrimination.<sup>3</sup> In February 2019, Judge Susan Richard Nelson of the U.S. District Court for the District of Minnesota held that several of SCV's and YAF's claims could go to trial.<sup>4</sup> Both parties failed to reach a settlement following a conference in August 2019.<sup>5</sup>

Over the last decade or so, the debate over controversial figures speaking at public colleges and universities has gravitated toward *whether* schools must allow these figures to speak on campus at all.<sup>6</sup> Less attention has focused on the debate over *how* public colleges and universities can allow controversial figures to speak on campus. Therefore, the UMN case offers scholars the opportunity to shift this peripheral part of the debate to the center of the discussion over controversial speakers on college campuses. The UMN's handling of the Shapiro speech is not completely unique: in early 2018, Michigan State University agreed to allow white nationalist Richard Spencer to speak in a large agricultural facility (essentially, a barn) a mile-and-a-half south of the southern edge of its main campus.<sup>7</sup> MSU

---

2. *Young America's Foundation v. Kaler*, 370 F. Supp. 3d 967, 977 (D. Minn. Feb. 26, 2019).

3. Complaint at 2, *Young America's Foundation v. Kaler*, No. 018-cv-01864 (SRN/HB), 2018 WL 3321944 (D. Minn. July 3, 2018) (Trial Pleading).

4. *Young America's Foundation*, 370 F. Supp. 3d 967 at 974; *see infra* Part I.A.

5. Second Amended Complaint, *Young America's Foundation v. Kaler*, No. 18-cv-1864 (SRN/HB), 2019 WL 936663 (D. Minn. Sep. 13, 2019).

6. *See, e.g.*, Mark G. Yudof and Kenneth Waltzer, *Free Speech, Campus Safety, or Both*, CHRON. OF HIGHER ED. (Sept. 15, 2017); Daniel Henninger, *The Free-Speech Wars*, WALL ST. J. (Oct. 12, 2017), at A17; Gary Pavela, *Only Speech Codes Should Be Censored*, CHRON. OF HIGHER ED. (Dec. 1, 2006).

7. Sarah Brown, *Richard Spencer Will Speak at Michigan State—Way Out on a Farm*, CHRON. OF HIGHER ED. (Feb. 28, 2018), <https://www.chronicle.com/article/Richard-Spencer-Will-Speak-at/242684> (around "three dozen" people attended the event, though it is not clear whether that was due to the venue's location); *see* R.J. Wolcott, *White Nationalist Richard Spencer Blames Violent Protesters for Small Crowd at MSU*, LANSING STATE J. (Mar. 5,

officials stated that scheduling Spencer in this venue was meant to “minimize[] the risk of violence or disruption to campus.”<sup>8</sup> However, as of this writing, Spencer has not taken any legal action against MSU regarding the school’s selection of a peripheral venue, unlike YAF in the UMN case.

The UMN case also offers something more for First Amendment scholars to debate about outside of the realm of free speech on public colleges and universities. It gives scholars the opportunity to reassess public forum doctrine in the context of how other government entities (namely cities and towns) that contain multiple public forums of various categories (traditional, designated, limited and nonpublic) can manage how they delegate the use of these forums to extreme speakers in a constitutionally sound manner. For instance, less than a week prior to the August 2017 Unite the Right rally in Charlottesville, VA that turned violent and led to the death of a counter-protester, the city of Charlottesville had sought to move the rally from the smaller Emancipation Park to a much larger public park out of a concern for its ability to manage public safety in a more confined space.<sup>9</sup> The U.S. District Court for the Western District of Virginia granted rally organizer Jason Kessler injunctive relief, finding the city’s attempt to move the event to be viewpoint discrimination.<sup>10</sup> The UMN case could offer the theoretical (if not doctrinal) groundwork upon which to construct a principle of “forum delegation” that broader categories of state actors could rely on when faced with the issue of managing extreme speakers who seek to use public forums.

This paper uses the UMN case as an analytical lens for highlighting the major issues involved with the notion of forum delegation, first as it applies to public colleges and universities and subsequently as it could apply to municipalities. Part one of the paper reviews the full set of facts from the UMN case and the legal arguments of both parties. Each of these issues will then be addressed in turn by focusing on relevant case law. These issues include: the categorization of the forum in the case and the resulting standard of review;<sup>11</sup> the nature of the university’s mission and how it applies to the standard of review;<sup>12</sup> the university’s interest in maintaining security surrounding the speech, and the constitutional boundaries of that interest;<sup>13</sup> whether UMN’s large-scale event policy gave unbridled discretion to

---

2018), <https://www.lansingstatejournal.com/story/news/local/2018/03/05/richard-spencer-michigan-state/397727002/>.

8. *Id.*

9. *Kessler v. City of Charlottesville*, No. 17-CV-00056, WL 3474071 (W.D. Vir. Aug. 11, 2017) at \*1.

10. *Id.*

11. *See infra* Part I.B.

12. *See infra* Part I.C.

13. *See infra* Part I.D.

administrators to discriminate on the basis of the content of Shapiro's speech;<sup>14</sup> and whether the St. Paul venue amounted to an ample alternative channel for Shapiro's speech.<sup>15</sup> Alongside relevant case law, examples from other public universities' speech policies will be introduced where appropriate to highlight common trends among policies and how they reflect current precedent. The aim of this section is to lay the doctrinal groundwork for explicating the concept of forum delegation as it may apply to broader categories of state actors. One could contend that it may appear backward logic to begin the analysis within a specific category of public forums and expanding it out to broader categories (not to mention forums that trigger higher levels of constitutional review), and an explication of this concept of forum delegation more appropriately come from a top-down analysis of public forum doctrine as a whole. However, it is argued here that the key issues at play in the UMN case are not endogenous to the university setting, and furthermore they touch upon an array of concerns related to public forum doctrine as a whole.

Part two of the paper assesses the notion of forum delegation using various strands of First Amendment theory. In particular, this section relies on Professor Robert Post's concept of constitutional domains as a useful theoretical framework propping up the notion of forum delegation as constitutionally sound doctrine. Part three of the paper offers a prototypical legal framework that could be used when state actors such as municipalities seek to delegate the use of public forums when confronted with extreme speakers. This section offers several hypothetical scenarios to frame the boundaries of this concept.

## I. The UMN Case

### A. *Facts of the Case*

The facts of the case begin with SCV requesting in the fall of 2017 to bring Ben Shapiro to UMN to give a speech on campus on February 26, 2018. Because the speech was expected to attract a large audience and require a substantial amount of security, the UMN Assistant Director of Student Unions and Activities, Eric Dussault, told SCV that the speech would be subject to the university's large-scale event policy (LSEP).<sup>16</sup> This policy required a student organization to fill out an application describing aspects of the event, including the anticipated number of attendees, how ticketing will be managed, how the event will be promoted, how the event will be financed, and (perhaps most importantly for the facts of this case)

---

14. *See infra* Part I.E.

15. *See infra* Part I.F.

16. *Young America's Foundation v. Kaler*, 370 F. Supp. 3d 967, 976 (D. Minn. Feb. 26, 2019).

anticipated security issues or concerns about the impact of the event on the campus community.<sup>17</sup> In completing this application, SCV requested several of the university's largest auditoriums on its main Minneapolis campus to hold the event, including a 455-seat auditorium in Mayo Hall and a 1,056-seat auditorium in Willey Hall.<sup>18</sup> The latter, the group's preferred location, had been a venue in the recent past for speeches by (more liberal) speakers such as Supreme Court Justices Ruth Bader Ginsburg and Sonia Sotomayor, U.S. Senators Bernie Sanders, Elizabeth Warren, Amy Klobuchar and Al Franken, and former U.S. Vice-President Walter Mondale.<sup>19</sup> SCV alleged that they urged in their application that UMN officials grant their application for one of these venues because officials had moved a prior SCV event featuring conservative commentator Lauren Southern to what SCV considered an undesirable venue.<sup>20</sup>

In late December 2017, UMN Chief of Police Matthew Clark sent an email to SCV saying that pursuant to the LSEP, "the admin has asked that we try to move this visit to the St. Paul campus. It's going to be a security issue with past lectures at other universities."<sup>21</sup> In later emails to SCV, Dussault and UMN Police Lieutenant Troy Buhta elaborated on the security concern, saying that it would difficult for security officials to secure a skyway that connected the Willey Hall auditorium to surrounding buildings.<sup>22</sup> UMN officials officially approved SCV to use the St. Paul campus' North Star Ballroom, which could seat 400-500 people, for the Shapiro speech.<sup>23</sup> In late January 2018, SCV sought to again reserve Willey Hall for the speech and requested more information on why officials had denied them use of the venue in the first place. SCV argued that the St. Paul campus was a less desirable location for the speech because very few students live on that campus, very few students living in the Minneapolis campus ever use the university's bus service to visit that campus, and it would be an inconvenience for students living in the main Minneapolis campus to travel the three-and-a-half miles to the St. Paul campus for the

---

17. *Student Group Policies: Large Event Process*, U. MINN. STUDENT UNIONS & ACTIVITIES, <https://sua.umn.edu/get-involved/student-groups/student-group-policies#large-event-process> (last visited Mar. 9, 2019).

18. *Young America's Foundation*, 370 F. Supp. 3d 967 at 976 (Note: Despite the spelling, Willey is pronounced like Wiley, not like Willy.).

19. *Id.* at 977.

20. *Id.* at 976.

21. *Id.* at 977.

22. *Id.* Many buildings on the UMN campus, as well as in both the cities of Minneapolis and St. Paul, are connected to neighboring buildings via skyways so that individuals can move from building to building without having to set foot outside during winter. See *Minneapolis Skyway Guide*, Meet Minneapolis, <https://www.minneapolis.org/map-transportation/minneapolis-skyway-guide/>.

23. *Young America's Foundation*, 370 F. Supp. 3d 967 at 977.

speech.<sup>24</sup> Furthermore, SCV alleged that they had received more than 700 requests for information about the speech, which would make the 1,056-seat auditorium in Willey Hall a more logical venue than the North Star Ballroom.<sup>25</sup> However, in early February 2018, SCV withdrew its application for reserving Willey Hall and agreed to have Shapiro speak in St. Paul.<sup>26</sup> Shapiro spoke on February 26, 2018, to an audience of about 450.<sup>27</sup> The university provided equipment for livestreaming the speech online.<sup>28</sup> A crowd of a few dozen people protested Shapiro's speech outside the St. Paul venue.<sup>29</sup> In other words, Shapiro spoke with hardly a fuss.

In July 2018, the Young America's Foundation (YAF) and SCV filed a lawsuit in the U.S. District Court for the District of Minnesota against Dussault, Clark and Buhta, as well as UMN President Eric Kaler and Vice President Michael Berthelsen, claiming, *inter alia*, that the school's LSEP was unconstitutional both facially and as applied to Shapiro's speech.<sup>30</sup> YAF and SCV alleged that the university's concerns for security were unfounded, and rather amounted to viewpoint discrimination and were used as a means to effectively "banish"<sup>31</sup> Shapiro's speech.

On February 26, 2019, Judge Susan Richard Nelson issued an opinion granting the university's motion to dismiss YAF's and SCV's claims of the LSEP being facially unconstitutional.<sup>32</sup> However, Judge Nelson did not grant the university's motion to dismiss the plaintiffs' challenge that the LSEP was unconstitutional as applied.<sup>33</sup> In so ruling, Judge Nelson laid the groundwork for the potential legal battle over the as-applied challenge. First, she held that the venues in question on the UMN campus should be considered limited public forums.<sup>34</sup> Such a categorization meant that the constitutionality of UMN's LSEP would be upheld so long as the restrictions it put in place were viewpoint neutral and reasonable based on the purpose of the forum.<sup>35</sup> Second, Judge Nelson held that "in the absence of any specific information about planned protests in response to Mr. Shapiro, or other potentially

---

24. *Id.* at 976-77.

25. *Id.* at 977.

26. *Id.*

27. *Id.*

28. Motion to Dismiss at 21, *Young America's Foundation v. Kaler*, No. 0:18-cv-01864-CV-1864 (SRN-HB), 2019 WL 936663 (D. Minn. Aug. 22, 2018).

29. *Id.* at 10.

30. Complaint at 13, *Young America's Foundation v. Kaler*, No. 0:18-cv-01864 (SRN/HB), 2018 WL 3321944 (D. Minn. July 3, 2018) (Trial Pleading).

31. *Young America's Foundation*, 370 F. Supp. 3d at 977.

32. *Id.* at 974.

33. *Id.* at 995 (Judge Nelson also dismissed the claims as they applied to President Kaler, but not as they applied to the other defendants.).

34. *Id.* at 986.

35. *Id.*

disruptive behavior, it is plausible that Defendants' decision to move the speech to the St. Paul campus may have been based merely on concerns that some persons on the [] campus objected to [Mr. Shapiro's] viewpoint," rather than objective criteria regarding security concerns as defined by the LSEP.<sup>36</sup> Thus, the question of whether the application of the LSEP was both reasonable and viewpoint neutral would hinge on whether university officials reasonably expected extraordinary security concerns due to the speech, as well as whether the policies afforded the officials unbridled discretion to move the speech regardless of whether the concerns were reasonable.

Each of these issues will be analyzed in turn, starting with the question of forum analysis. The goals of these analyses are to assess the constitutionality of UMN's policy, and, assuming the policy is constitutional, to develop the concept of forum delegation and how it might be applied on a broader scale.

### B. Forum Analysis

Courts have clearly articulated that an entire university campus cannot be categorized as one type of forum or another.<sup>37</sup> Rather, public universities are made up of a variety of potential categories of forums,<sup>38</sup> and therefore legal battles have centered on *how* the various parts of a public university should be categorized in the context of forum analysis. For example, is an open green space, a sidewalk or a street contained within a university campus a traditional public forum because it is analogous to a city park, sidewalk or street, which are generally considered traditional public forums? What about a large auditorium (like the one in Willey Hall in the UMN case), where universities and student groups invite speakers to give speeches? What about small classrooms? Answering these questions is important for shedding light on the UMN case, but also for defining the concept of forum delegation within the public university context.

To better understand public forum doctrine as it applies to public universities, it is important to give a very brief overview of public forum doctrine as it applies certain types of government property in general. The doctrine has its roots in Justice Owen Roberts' famous *dicta* in *Hague v. CIO*:

---

36. *Young America's Foundation*, 370 F. Supp. 3d at 990 (internal quotes omitted).

37. *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011) (holding that "the fact that a University may make a discrete location on a sprawling campus available for public discourse does not compel the conclusion that it must open the doors of all of its facilities for public discourse.").

38. *Bowman v. White*, 444 F.3d 967, 976-7 (8th Cir. 2006) ("A modern university contains a variety of fora. Its facilities may include private offices, classrooms, laboratories, academic medical centers, concert halls, large sports stadiums and arenas, and open spaces.").

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>39</sup>

It was not until the 1960s brought a series of Civil Rights Era First Amendment cases before the Court that the idea behind Roberts' *dicta* gained both doctrinal status and a name (public forum doctrine),<sup>40</sup> with Professor Harry Kalven given credit for coining the term in his famous 1965 law review article.<sup>41</sup> The first time the term appeared in a Supreme Court opinion was in 1972, and that in a citation to Kalven's article.<sup>42</sup> The speed at which the doctrine appeared and began to develop has led several scholars to criticize the foundations and purposes of the doctrine.<sup>43</sup>

Following the christening of the doctrine, the Court was tasked with defining its boundaries, namely surrounding the question of whether any government-owned property should be considered a public forum. In answering "no" to that question across cases involving government property in the form of prisons,<sup>44</sup> military bases,<sup>45</sup> an inter-office mail system for public employees,<sup>46</sup> public utility poles,<sup>47</sup> a charity function for a government

---

39. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 S. Ct. 954 (1939).

40. Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 86 (1992).

41. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965).

42. *Grayned v. City of Rockford*, 408 U.S. 104, 109 n. 5 (1972); see BeVier, *supra* note 40, at 87.

43. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) (arguing, "Although public forum doctrine has developed with extraordinary speed, it has done so in a manner heedless of its constitutional foundations."); BeVier, *supra* note 40, at 80 (arguing that "the cacophony of opinions" on public forum "reflect fundamentally different conceptions of the goals of the First Amendment."); Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 661 (2010) (arguing that decades of conflicting conceptions of public forum doctrine has led the doctrine to have "little predictive power . . . in inapt settings.").

44. *Adderley v. Florida*, 385 U.S. 39 (1969).

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

46. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

47. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

agency,<sup>48</sup> the sidewalk in front of a public building,<sup>49</sup> and—appropriately—public university buildings,<sup>50</sup> the Court was forced to consider the extent to which First Amendment activities *could* be protected in such venues. The result was a categorization system. Following Roberts’ dicta, the category of traditional public forums reflects public locations where First Amendment activities traditionally take place: public streets, sidewalks, parks and plazas.<sup>51</sup> The constitutionality of government restriction of speech in these forums is determined using the highest level of review: strict scrutiny. Thus, to withstand constitutional scrutiny, restrictions on speech in these forums must be content-neutral, further a significant government interest, be narrowly tailored to achieve that interest, and allow ample alternative channels for expression to speakers affected by these restrictions.<sup>52</sup> Generally, restrictions are seen as constitutional if they address only the time, place or manner in which the speech is expressed. For instance, the U.S. Supreme Court has held that restrictions on the volume of music played within a public forum,<sup>53</sup> or restrictions on the ability to erect tents for overnight sleeping on the National Mall,<sup>54</sup> were valid content-neutral regulations of speech despite the fact that they impinged upon the central message of the speakers in each case.

One small step below traditional public forums are designated public forums. These consist of government-controlled venues other than traditional public forums that the government has explicitly set aside (i.e., “designated”) for the same First Amendment activities that would occur in a traditional public forum, “even though it was not constitutionally required to do so.”<sup>55</sup> Unlike with traditional public forums, government can also choose to close these forums from communicative activity.<sup>56</sup> Venues that the government could designate as public forums include municipal theaters,<sup>57</sup>

---

48. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985).

49. *United States v. Kokinda*, 497 U.S. 720 (1990).

50. *Widmar v. Vincent*, 454 U.S. 263 (1981).

51. *Kalven*, *supra* note 41, at 11-12 (writing, “in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.”).

52. *Caplan*, *supra* note 43, at 650-1.

53. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

54. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

55. *BeVier*, *supra* note 40, at 92.

56. *Id.* See also *United States v. Grace*, 461 U.S. 171, 180 (1983) (“Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.”).

57. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

meeting rooms at public schools,<sup>58</sup> or even a public official's Twitter account.<sup>59</sup> As with traditional public forums, strict scrutiny would be applied to assess the constitutionality of restrictions on speech in designated public forums, given the fact that they serve the same function.<sup>60</sup> It is important to note that the government can only create a designated public forum (which, like traditional public forums, would trigger a strict scrutiny level of review) by explicit intent. As the U.S. Supreme Court held in 1985, "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."<sup>61</sup> Therefore, public universities do not create a designated public forum simply by opening up certain spaces (whether green space or lecture halls) to a speaker. Rather, they must specifically state that the venue they have opened up is intended to be a designated public forum. However, there have been recent efforts by state legislatures to statutorily define certain public spaces on public university campuses as traditional public forums, thereby stripping from universities the discretion to designate these spaces as public or nonpublic forums.<sup>62</sup> Such bills passed by statehouses have been in response to public universities creating so-called "free speech zones" on campus,<sup>63</sup> whereby schools specifically designate certain (often out-of-the-way) areas on campus as public forums for use by members of the university community and members of the general public alike.<sup>64</sup>

58. *Good News Club v. Milford Central Sch.*, 553 U.S. 98 (2001).

59. *Knight First Amendment Institute v. Trump*, 302 F.Supp.3d 541 (S.D. N.Y. 2018).

60. Caplan, *supra* note 43, at 652.

61. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

62. *See, e.g.*, Emily Wangen, *Campus Free-Speech Bill Passes Iowa Senate*, DAILY IOWAN (Mar. 11, 2019), <https://www.dailyiowan.com/2019/03/11/campus-free-speech-bill-passes-iowa-senate/>; S. B. 93, 98th Gen. Assemb., 1st. Reg. Sess. (Mo. 2015) at 2 ("The outdoor areas of campuses of public institutions of higher education in this state shall be deemed traditional public forums. Public institutions of higher education may maintain and enforce reasonable time, place, and manner restrictions in service of a significant institutional interest only when such restrictions employ clear, published, content, and viewpoint-neutral criteria, and provide for ample alternative means of expression. Any such restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble.").

63. *See, e.g.*, Mo. S. B. 93, *supra* note 62; Iowa Senate File 274, 88th Gen. Assemb. (Iowa (2019) § 4.2 ("Except as provided in this chapter, and subject to reasonable time, place, and manner restrictions, a public institution of higher education shall not designate any area of campus a free-speech zone or otherwise create policies restricting expressive activities to a particular outdoor area of campus.")).

64. *See, e.g.*, Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U. L. 481, 503-4 (2005); Neal H. Hutchins & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103 (2018). Note: although the topic of free

At the opposite end of the spectrum of forum categorization are nonpublic forums, which consist of government-owned property in which the government, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>65</sup> The level of constitutional review applied to these forums focuses on the reasonableness of government restrictions on speech, though restrictions are still required to be content neutral.<sup>66</sup> The U.S. Supreme Court has also used the term “limited public forum” to refer to virtually the same phenomenon as nonpublic forums.<sup>67</sup> Professor Caplan notes that the interchangeable nature of these two terms has led to confusion among both judges and scholars alike,<sup>68</sup> and Professor Post has suggested abandoning the term “limited public forum” altogether and moving ahead solely with the term “nonpublic forum.”<sup>69</sup> As with Judge Nelson’s ruling in the UMN case, many courts have held that public university venues at issue in First Amendment cases are “limited public forums,”<sup>70</sup> though other courts have called similar venues “nonpublic forums.”<sup>71</sup> Though not necessarily

speech zones appears to relate to explicating the concept of forum delegation, it is distinct in that the creation of free speech zones is an *a priori* means by public universities to manage First Amendment activities on their campuses rather than a doctrinal principle that could be used to manage venue use by controversial speakers on a case-by-case basis. Thus, the concept of free speech zones will not be further discussed herein.

65. *Adderley v. Florida*, 385 U.S. 39, 47 (1969). See also 1 Smolla & Nimmer on Freedom of Speech § 8:8 (2018) (defining nonpublic forums as consisting “of publicly owned facilities that have been dedicated to use for either communicative or noncommunicative purposes, but that never have been designated for indiscriminate expressive activity by the general public.”).

66. Caplan, *supra* note 43, at 652 n.28.

67. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-7 (2001).

68. Caplan, *supra* note 43, at 654.

69. Post, *supra* note 43, at 1754. See also Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140 (2009) (arguing that the terms “designated public forum” and “limited public forum” should be collapsed into a concept called a “middle forum” defined by an objective observer’s analysis of what the purposes of the forum are and whether the government is endorsing a particular message in allowing certain speakers to use the forum over others).

70. *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (holding that student organizations at the University of California, Hastings College of Law were limited public forums); *Rosenberger*, 515 U.S. at 819 (holding that a university’s student activity fee system was a limited public forum); *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985) (holding that open parts of campus where a group sought to distribute newspapers were limited public forums); *Bourgault v. Yudof*, 316 F. Supp. 2d 411 (N.D. Tex. 2004) (holding that a pedestrian area on a public university’s campus was a limited public forum).

71. *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) (holding that public areas on a university’s campus were nonpublic forums because they were open to “expressive activity for a limited purpose by certain groups,” such as students); *Roberts v. Haragan*, 346 F. Supp.

dispositive, universities also attempt to define their public spaces as either limited or nonpublic forums in their speech codes as a means to reinforce this precedent.<sup>72</sup> Regardless of which of the two labels is used, the spaces at issue are treated with the same level of constitutional scrutiny noted above.

Determining the difference between traditional public forums and nonpublic forums is not simply a matter of categorically labeling one type of property as one rather than the other. Rather, the function of the property—and the role the government plays in facilitating that function—becomes the determining factor in categorization.<sup>73</sup> For instance, using this logic, the U.S. Supreme Court has held that not all public streets and sidewalks may be considered traditional public forums, a holding that has helped shape lower court decisions regarding such property on public university campuses. Relying on the Court's holding in *United States v. Kokinda*,<sup>74</sup> the U.S. Court of Appeals for the Eleventh Circuit held that “it is of lesser significance that the [university's] sidewalks and Pedestrian Mall physically resemble municipal sidewalks and public parks. The physical characteristics of the property alone cannot dictate forum analysis.”<sup>75</sup> In *Kokinda*, the Court held that the sidewalk in front of a U.S. Post Office was not a public forum, applying the principle that “the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.”<sup>76</sup> That analysis allowed the Eleventh Circuit to deem constitutional a university's policy limiting the ability of a speaker not associated with the university to speak on the school's sidewalks and in other open areas.

---

2d 853 (N.D. Tex. 2004) (holding that parts, but not all, of a public university could be considered nonpublic forums).

72. See, e.g., *Chapter 13. Speech, Expression, and Assembly*, Univ. of Tex, <http://catalog.utexas.edu/general-information/appendices/appendix-c/speech-expression-and-assembly/> (“The grounds and buildings owned or controlled by The University of Texas at Austin are not open for assembly, speech, or other activities as are the public streets, sidewalks, and parks. In furtherance of the University's educational mission, the University campus is a limited forum open only to faculty, staff, and students. Unaffiliated groups and individuals may not engage in expressive activities at the University except in accordance with these rules.”); *Chapter 1720-01-12: Use of University Property by Non-Affiliated Persons for Free Expression Activities*, Rules of the Univ. of Tenn.: All Campuses, <https://publications.tnsofiles.com/rules/1720/1720-01/1720-01-12.20141015.pdf> (“A student organization using a University limited public forum may invite a non-affiliated person to participate in the student organization's free expression activities, subject to the terms of the invitation and subject to the time, place, and manner restrictions.”).

73. See Caplan, *supra* note 43, 653.

74. 497 U.S. 720 (1990).

75. *Bloedorn v. Grube*, 631 F.3d 1218, 1233 (11<sup>th</sup> Cir. 2011).

76. *Kokinda*, 497 U.S. 720 at 728-9. See also *id.* at 727 (holding that “[p]ublicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will”).

Professor Lillian BeVier has argued that the purpose of public forum doctrine has been to “reduce the systemic opportunities for public forum regulators to abuse their government power” to limit speech.<sup>77</sup> She further contends that the essential question at issue in public forum cases is whether the doctrine “is sufficiently correlated with differing degrees of First Amendment risk.”<sup>78</sup> Ultimately, in holding that public universities’ facilities are limited public forums or nonpublic forums, courts have only needed to apply a low level of scrutiny in cases involving restrictions on speakers’ ability to use these forums. As noted above, this level of scrutiny, which lies somewhere in between intermediate scrutiny and rational-basis review, merely requires that the universities prove that their restrictions on speech are reasonable in light of the use of the forum and not based on viewpoint discrimination.<sup>79</sup> In applying this level of scrutiny, courts routinely have focused on universities’ educational mission and the security concerns posed by a controversial speaker in addressing the reasonableness of universities’ speech policies. Framed in terms of BeVier’s argument above, the debate surrounding the role a university’s central mission should play in determining the reasonableness of their speech regulations is essentially a debate about the risk these policies pose to the First Amendment.

### C. A University’s Mission

Just as a public university has many types of public forums, a public university has many missions. As University of Virginia Professor Chad Wellmon wrote in an op-ed following the violence in his school’s home city of Charlottesville in August 2017, a university is “a health center, a federal contractor, a sports franchise, an event venue, and, almost incidentally, [an institution] devoted to education and knowledge.”<sup>80</sup> Therefore, it is difficult to cleanly assess what role First Amendment activities play in a university’s mission. Are they integral to its mission of educating students? Of being a civic institution that serves multiple communities? Of being merely an event venue? Two scholars of higher education recently argued that “allowing access to campus spaces for speech and expressive activities is only one aspect of the multiple functions carried out at public colleges and universities.”<sup>81</sup> But do these multiple functions (or missions) even justify allowing access at all, or perhaps justify reasonable restrictions on access?

---

77. BeVier, *supra* note 43, at 81.

78. *Id.*

79. *Supra* Caplan, note 43.

80. Chad Wellmon, *For Moral Clarity, Don’t Look to Universities*, CHRON. OF HIGHER ED. (Aug. 14, 2017), <https://www.chronicle.com/article/For-Moral-Clarity-Dont-Look/240921>.

81. Hutchins & Fernandez, *supra* note 64, at 109.

Generally, courts have held that universities' mission primarily involves the education of their students. For example, the U.S. Court of Appeals for the Fourth Circuit held that a public university's "mission necessarily focuses on the students and other members of the university community."<sup>82</sup> However, courts and scholars are divided over the extent to which (or even whether) this mission should be a determining factor in assessing the constitutionality of university restrictions on speech in their forums. In the very same case, the Fourth Circuit held that the purpose of a university "is clearly to provide a venue for its students to obtain an education, not to provide a venue for expression of public views that are not requested or sponsored by any member of the campus community."<sup>83</sup> Interestingly, the Fourth Circuit referred public universities a "special type of enclave" devoted to higher education,<sup>84</sup> relying on language from the U.S. Supreme Court's decision in *United States v. Grace*, which referred to the grounds around the U.S. Supreme Court building as such an "enclave" apart from traditional public forums.<sup>85</sup> It is somewhat ironic that the Fourth Circuit chose that particular word given the Supreme Court's rather clear statement in *Healy v. James* that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>86</sup> One commentator has noted that the Fourth Circuit's word choice "fl[ies] in the face of *Healy*," and risks "so narrow[ing] the range of expression and the variety of speakers who can engage in First Amendment activities on campus as to sterilize university campuses [ . . . ]."<sup>87</sup>

On the contrary, Professor Paul Horwitz questions whether public universities must necessarily be required to abide the same constitutional principles regarding the permissibility of their speech codes.<sup>88</sup> Professor Horwitz suggests that courts "should not assume that all [public universities] place the search for truth at the heart of their mission, nor that the search for truth can only be served by the same free-for-all discourse that the First Amendment guarantees for public speech at large."<sup>89</sup> Rather, Horwitz suggests that universities should be allowed to freely experiment with the level of restrictiveness of their speech codes. Doing so, he argues, would force universities to confront the meaning of their educational mission and

---

82. *American Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005).

83. *Id.*

84. *Id.*

85. 461 U.S. 171, 180 (1983).

86. 408 U.S. 169, 180 (1972).

87. Stephen Douglas Bonney, *The University Campus as Public Forum: The Legacy of Widmar v. Vincent*, 81 UMKC L. REV. 545, 564-5 (2013).

88. PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 127 (2013).

89. *Id.*

how freedom of expression factors into that mission.<sup>90</sup> This approach would create a true marketplace of ideas within the institution of higher education, allowing students and faculty members to choose to attend or work for a university that aligns with their values regarding freedom of expression or diversity and inclusion.<sup>91</sup> The validity of Horwitz's argument is beyond the scope of this paper. However, it does allow for a more expansive understanding of what a public university's mission is, which highlights how powerful this factor can be in deciding First Amendment cases in favor of universities.

At least one federal judge has argued that such a fuss over a university's central mission is misplaced and "irrelevant to a proper First Amendment forum analysis."<sup>92</sup> Rather, in his concurring opinion in *Bowman v. White*, Judge Kermit Bye contended that the streets, sidewalks and parks controlled by the university should be considered *traditional* public forums given their substantial similarity to forums controlled by cities or towns.<sup>93</sup> Moreover, Judge Bye argued that even assuming that the university's mission *could* be factored into the categorization of the forum, he contended that expressive conduct, whether by students or outside groups (though perhaps especially involving the latter) is in fact compatible with—if not central to—a mission of promoting higher education, and that the majority failed to give this particular mission due weight in its forum analysis.<sup>94</sup>

The issue of whether a public university's educational mission is dispositive when determining the constitutionality of its restrictions on speech is central to the question of the extent to which (or even whether) speakers not affiliated with the university ("outside speakers") have a right to speak on university campuses. Undergirding the doctrine related to this issue is dictum in a footnote from the 1981 case *Widmar v. Vincent*, in which the U.S. Supreme Court noted that a public university need not "make all of its facilities equally available to students and nonstudents alike," nor must it "grant free access to all of its grounds or buildings."<sup>95</sup> Relying on *Widmar*, the U.S. Court of Appeals for the Fourth Circuit held that Virginia Tech could require an itinerant preacher to use an outdoor location on campus that saw less student foot traffic rather than a central outdoor location on campus due to the fact that his presence on campus was not sponsored by a student organization.<sup>96</sup> Similarly, in *Bloedorn*, the Eleventh Circuit held that a public university's educational mission was a reasonable justification for limiting

---

90. *Id.* at 128.

91. *Id.*

92. *Bowman v. White*, 444 F.3d 967, 985 (8th Cir. 2006) (Bye, J., concurring).

93. *Id.* at 984.

94. *Id.* at 985.

95. 454 U.S. 263, 267 n.5 (1981).

96. *Gilles v. Torgersen*, 71 F.3d 497, 500 (4th Cir. 1995).

the ability of outside speakers to speak on its campus.<sup>97</sup> Some universities have incorporated language into their speech policies that mirror precedent from these cases.<sup>98</sup>

Some have argued that this deference to a university's mission goes too far. In his concurring opinion in the *Bowman* case, Judge Bye took particular issue with the notion that a university's mission should be narrowly framed as only applying to students:

[T]here is no reason students who may or may not pay tuition and who may or may not live on campus should have more expressive rights upon a campus street than should non-students who directly support the public university with tax dollars. The non-student public attends civic, sporting, theater, and other events on public university campuses. In this sense, a public university belongs just as much to a community as it does to the students. Nor is a public university's educational mission limited to its students—a university and its faculty publish books to benefit the public good and use public tax dollars to conduct important research.<sup>99</sup>

Many scholars, commentators and public officials, if not other judges, certainly share Judge Bye's outlook.<sup>100</sup> Some universities have adopted

---

97. *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011).

98. See, e.g., *Campus Free Speech*, Univ. of Alaska, available at <https://www.alaska.edu/freespeech> (“Universities openly test our assumptions and are home to controversial ideas, and we need to maintain this—but we also have to ensure the safety of our campuses and students.”)

99. *Bowman v. White*, 444 F.3d 967, 988 (8th Cir. 2006). See also Nathan W. Kellum, *If It Looks Like a Duck . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 40 (2005) (writing, “The primary purpose of a university or college is generally compatible with expressive speech activity. On its face, universities serve to educate those students who attend, and such higher education best flourishes in an environment of various ideas. There can be little doubt that many ideas and theories have once been relegated to minority or disfavored status, but through free and open debate on college campuses, gained greater acceptance.”).

100. See, e.g., Editorial, *Discourse and Distress: Sessions Frankly Addresses Campus Free Speech*, PITT. POST-GAZETTE (Sept. 28, 2017) (commenting on Attorney General Jeff Sessions' speech about threats to free speech on college campuses and contending that “campuses shouldn't promote senseless obstacles out of fear of robust discussion”); Editorial, *Hurt Feelings? Too Bad. Don't Coddle College Kids*, USA TODAY (Sept. 17, 2015), at A7 (commenting on University of Chicago's First-Amendment-friendly speech policy and arguing that “this war on free speech does students a disservice by shielding them from the real world, where they won't be able to silence co-workers and bosses whose speech they dislike”); Suzanne B. Goldberg, *Free Expression on Campus: Mitigating the Costs of Contentious Speakers*, 41 HARV. J.L. & PUB. POL'Y 163, 166-167 (2018) (arguing that “higher education institutions are the quintessential sit for contestation of ideas,” and that “[a]lthough college and university campuses are hardly the only forums where vigorous debate can take

speech policies that embrace First Amendment activities as part of their core mission.<sup>101</sup> A former legal director of the ACLU Foundation of Kansas and Western Missouri called the distinction between outsiders and students as potential speakers at public universities “a crabbed view of . . . free speech rights,” noting that outside speakers “are not hostile alien invaders but are an integral part of the university’s milieu and surrounding environs.”<sup>102</sup> Furthermore, contrary to cases cited here involving outside speakers, in the UMN case a student group *did* sponsor the controversial speaker in question, and thus precedent from these cases does not appear to apply to the UMN case. However, the discussion surrounding the power of deference to the university’s mission is important to two other issues in this case: the issue of ensuring security for the campus community, and the issue of unbridled discretion.

#### *D. Security Concerns*

Professor Kenneth Lasson called security “[p]erhaps the most important practical concern of universities faced with the question of *whether* to provide a forum for a controversial speaker.”<sup>103</sup> It is important to consider the role security plays not only in whether a university can prevent a speaker from speaking, but also in terms of how it can manage a speaker who is planning to speak on campus. In grappling with the latter issue, UMN essentially has two distinct, yet related, concerns about security for the Shapiro speech: first, the likelihood that the speech will lead to violent actions; and second, the amount of resources needed to provide adequate security for the speech, particularly as it relates to the first concern. Each concern will be analyzed in turn before being considered in tandem.

##### 1. Likelihood of Violence

Following violent reactions to controversial speakers over the past several years, it is understandable that universities would want to prevent similar violence from erupting on their campuses. It is relevant to note that

---

place, they remain among the few locations in American society today where those debates occur in person.”).

101. See, e.g., *Guiding Principles*, Univ. of Ill. System (Dec. 8, 2017), [https://www.uillinois.edu/about/guiding\\_principles](https://www.uillinois.edu/about/guiding_principles) (“An unyielding allegiance to freedom of speech—even controversial, contentious, and unpopular speech—is indispensable to developing the analytical and communication skills of our students and empowering all members of our university communities to be active and informed citizens. We are committed to the open exchange of competing ideas, perspectives, and values—a founding principle that built our nation—and to making the U of I System’s own distinctive institutional voice part of these productive dialogues.”).

102. Bonney, *supra* note 87, at 562.

103. Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS L. REV. 39, 88 (1999) (emphasis added).

UMN Police Chief Matthew Clark noted security issues with “past lectures at other universities” in his email to SCV as sufficient evidence to justify moving Shapiro’s speech to St. Paul.<sup>104</sup> This rationale is not new. Auburn University cited the violence in Charlottesville when it initially tried to prevent Richard Spencer from speaking on campus, though Chief Judge W. Keith Watkins of the U.S. District Court for the Middle District of Alabama held that the university could “not cut off the free speech of Mr. Spencer or other persons except as a last resort to ensure security or to prevent violence or property damage, and only after first making bona fide efforts to protect the speaker from . . . hostility by other, less restrictive means.”<sup>105</sup> Michigan State University tried to rely on this strategy as well before relenting and allowing Spencer to speak in a far-flung venue on its campus.<sup>106</sup> However, UMN’s use of this rationale is unique because of the action it spurred: moving the speech rather than banning it. Before discussing the constitutionality of this move and its underlying rationale, it is important to discuss the more serious infraction of denying someone the right to speak out of fear that the speech would incite violence.

The incitement standard in First Amendment jurisprudence comes from the U.S. Supreme Court’s 1969 decision in *Brandenburg v. Ohio*.<sup>107</sup> In reversing a Ku Klux Klan leader’s conviction under Ohio’s criminal syndicalism law, the Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>108</sup> Professor Clay Calvert has convincingly argued that the prophylactic use of the *Brandenburg* test to prevent incitement to violence would be an unconstitutional prior restraint.<sup>109</sup> Professor Calvert notes that the *Brandenburg* test can only be triggered “when an individual actually starts to speak,” because “[w]ithout words, there simply is no advocacy to proscribe. There is simply a person and a guess about what he might say.”<sup>110</sup>

---

104. *Young America’s Foundation v. Kaler*, 370 F. Supp. 3d 967, 977 (D. Minn. Feb. 26, 2019).

105. *Padgett v. Auburn University*, No. 3:17-CV-231-WKW, 2017 WL 10241386, at 2 (M.D. Ala. Apr. 18, 2017) (internal quotes omitted).

106. *Brown*, *supra* note 7.

107. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

108. *Id.* at 447.

109. Clay Calvert, *Reconsidering Incitement, Tinker and the Heckler’s Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. L. REV. 109 (2018).

110. *Id.* at 120. *See also Pickings v. Bruce*, 430 F.2d 595, 600 (8th Cir. 1970) (holding that an administrator’s attempt to ban speakers from campus because their “views would be apt to exacerbate the tensions between the College and the community; and . . . would be apt to provoke discussions between students and encourage them to action . . . cannot justify an

Furthermore, the violent reaction that university officials are presumably more concerned about stems from individuals who are *hostile* rather than *sympathetic* to the speaker's message. In other words, it is unlikely that a speech by Shapiro on the oppression of white males would inspire white male audience members to commit acts of violence against students of color immediately following Shapiro's speech, let alone that Shapiro himself would command audience members to commit such violence in a way that would run afoul of the *Brandenburg* test. Rather, a more likely scenario would involve individuals who vehemently believe that Shapiro's message is evil protesting *en masse* near the speech's venue, and tensions could escalate if this group and individuals sympathetic to Shapiro's message came in close proximity to each other. If violence did erupt, it would be inconsequential who threw the first punch. Rather, the sheer *presence* of a restive mob at the venue is key kindling that could be stoked into violence. The question becomes: does this potential for violence that is sparked by Shapiro's ability to attract a hostile audience justify moving him to a different part of campus? Answering this question requires an examination of the heckler's veto principle and its relation to a university's concerns that it would have sufficient resources to handle potential security issues.

When state officials silence a speaker to appease a hostile audience, it is an unconstitutional "heckler's veto."<sup>111</sup> In 1949, the U.S. Supreme Court struck down the disorderly conduct conviction of a racist priest after his speech caused hostile audience members to throw bricks and bottles at

---

infringement of First Amendment rights."). *But cf. Stacy v. Williams*, 306 F. Supp. 963, 970 (N.D. Miss. 1969) (holding that "in order to withstand constitutional attack, prior restraints must be narrowly drafted so as to suppress only that speech which presents a 'clear and present danger' of resulting in serious substantive evil which a university has the right to prevent."). The fact that this case was decided the same year as *Brandenburg* suggests that the *Brandenburg* test would supersede the "clear and present danger" test, though according to this court's logic it is not completely clear that a prior restraint of speech would be a necessarily unconstitutional measure available to universities. It is worthwhile to note that Calvert argues that the "substantial disruption" test from the case *Tinker v. Des Moines*, 393 U.S. 503 (1969), would be a more constitutionally sound approach to disinviting speakers compared to the *Brandenburg* test, though he counsels against the application of this test from the secondary school context to the milieu of public universities as it could "open[] the door for public universities . . . to censor the expression of their own students." This paper will not venture into the discussion of whether the substantial disruption test could or should be applied at public universities as it essentially focuses on *whether* speakers can be allowed on campus rather than the more nuanced discussion of how public universities can manage the controversial speakers who do come to campus.

111. See, e.g., Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions against Controversial Speech*, 21 COMM. L. & POL'Y 175 (2016) (discussing heckler's veto jurisprudence generally); Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007) (defining a heckler's veto as a situation when "the state [hides] behind the unpleasant reaction of some portions of the public in order to silence a speaker").

him.<sup>112</sup> Writing for the Court, Justice Douglas outlined the reasoning behind denying power to heckler's vetoes:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a . . . serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>113</sup>

However, the issue of whether speakers deliberately provoke an audience to become violent has divided judges. In 2015, a divided U.S. Court of Appeals for the Sixth Circuit, sitting *en banc*, held that law enforcement officials infringed upon the First Amendment right of a group of Christian preachers speaking at a local Arab-American festival when they arrested the preachers for causing Muslims festivalgoers to react violently to their anti-Islamic messages.<sup>114</sup> Writing for the majority in the 8-7 *en banc* decision, Judge Eric Clay held, "If the speaker, at his or her own risk, chooses to continue exercising the constitutional right to freedom of speech [before a hostile audience], he or she may do so without fear of retribution by the state, for the speaker is not the one threatening to breach the peace or break the law."<sup>115</sup> In dissent, Judge John Rogers argued that by protecting controversial speakers, police officers are *incentivizing* them to make their messages more hostile, writing, "Faced with the choice of allowing you to be an injured martyr . . . or serving as a protective guard as the disruption escalates, the officers will doubtless choose the latter and become your phalanx."<sup>116</sup> Therefore, an argument could be made that allowing state officials the power to reduce the opportunity for a speaker to goad a hostile audience into a violent reaction—say, by moving the venue of a controversial speech—could split this philosophical difference in heckler's veto situations.

So, does a heckler's veto principle apply to the UMN case? Lower-court decisions discussed above would suggest the answer is no, due mainly to

---

112. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

113. *Id.* at 4.

114. *Bible Believers v. Wayne Co.*, 805 F.3d 228 (6th Cir. 2015) (*en banc*).

115. *Id.* at 253.

116. *Id.* at 274 (Rogers, J., dissenting).

three factors. First, the venue is a limited/nonpublic forum, meaning the constitutionality of the university's policies for ensuring safety could be upheld on simple reasonableness grounds. Second, the university did not try to ban Shapiro's speech or stop him from speaking to quell a hostile audience, which would follow more classic examples of heckler's vetoes. Finally, the university's action could be considered reasonable in light of the fact that it had limited resources to devote to security in the event violent protests erupted on the more densely populated Minneapolis campus. This issue of sufficient security resources is an important one that deserves further examination.

## 2. Sufficient Resources

Recent events involving controversial speakers have led public universities to spend hundreds of thousands of dollars on security costs.<sup>117</sup> As University of Florida President Kent Fuchs put it in an op-ed following alt-right leader Richard Spencer's speech at UF in October 2017, the more than \$600,000 the university spent in security costs for the event was the "the equivalent of nearly 100 students' annual tuition."<sup>118</sup> Public universities, or any state actor, is constitutionally forbidden from billing these speakers for these exorbitant security costs. More specifically, the U.S. Supreme Court held in 1992 that state actors could not assess varying fees to different groups seeking to speak in a public forum based on the level of security that the government believed the speakers would need.<sup>119</sup> As Justice Blackmun put it in his opinion for the Court, "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."<sup>120</sup> However, charging a speaker more for his or her controversial speech and making judgments on how to *manage* that speech given the extent of a university's resources are likely two distinct concepts. Indeed, the Supreme Court has held that universities have the right "to make academic judgments as to how best to allocate scarce resources."<sup>121</sup> Thus, as universities inevitably must balance these competing concerns, courts have had to take that balancing act into account when deciding case involving university restrictions on speech.

In *Bloedorn*, the Eleventh Circuit held that the university's significant interest in ensuring safety and order on campus permitted its strict regulation

---

117. See, e.g., Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas? Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349 (2011).

118. Kent Fuchs and Glenn C. Altschuler, *How White Supremacists Exploit Public Higher Education*, WALL ST. J. (Oct. 23, 2017), at A17.

119. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

120. *Id.* at 135.

121. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

of the times and places in which outside speakers could speak, especially given the fact that the school employed a “limited security force.”<sup>122</sup> Similarly, in *Bowman*, the Eighth Circuit held that the university had a significant interest in its strict regulation of permits to outside speakers “because of the time and resources necessary to accommodate the crowds” attracted by a controversial speaker, thereby disrupting “the unique educational environment” of the university.<sup>123</sup> The court further noted that “a university is less able than a city or other entity with police powers to deal with a significant disruption on short notice,” which justified the university’s requirement of outside speakers giving officials at least three days of notice of their intention to speak on campus.<sup>124</sup> Even Judge Bye, who believed that the university’s sidewalks in *Bowman* should have been categorized as traditional public forums, ended up concurring with the court’s decision because he believed the university’s interest in security and crowd control while faced with limited resources was sufficiently significant to justify its policy of permitting and requiring advance notice.<sup>125</sup> The Fourth Circuit in *Mote* also held that a university that opened its entire campus to all members of the public would have to utilize a greater amount of its limited resources to supervise outside speakers.<sup>126</sup> In a case from 20 years earlier, the Fourth Circuit held that a university’s “limited resources are not well spent on politicking a regulation for the benefit of third parties [the distribution of newspapers] rather than on enhancing the principal objective, i.e., education.”<sup>127</sup>

Exactly how much a university can expect to spend on security for controversial speakers is difficult to calculate. On the one hand Professor Erica Goldberg suggests that such factors as the number of audience members attending a talk, the number of entrances and exits to a particular venue, and whether the event is open to the public or only to students could be relatively easily measures for calculating security costs.<sup>128</sup> On the other hand, Professor Kenneth Lasson has suggested that more nebulous and “multifarious exigencies occasioned by controversial speakers,” including “the tenor of the times, nature of the forum, current tensions on campus, and the size and makeup of the student body,” could factor into a university’s calculus over what resources it would need to summon for security.<sup>129</sup> The

---

122. *Bloedorn v. Grube*, 631 F.3d 1218, 1238 (11th Cir. 2011).

123. *Bowman v. White*, 444 F.3d 967, 981 (8th Cir. 2006).

124. *Id.* at 982.

125. *Id.* at 991 (Bye, J., concurring).

126. *American Civil Liberties Union v. Mote*, 423 F.3d 438, 445 (4th Cir. 2005).

127. *Glover v. Cole*, 762 F.2d 1197, 1203 (4th Cir. 1985).

128. Goldberg, *supra* note 117, at 399.

129. Lasson, *supra* note 103, at 59.

UMN plan in the Shapiro case appears to have considered both of these categories of factors.

If a university is not allowed to pass the security costs associated with hosting a controversial onto the speaker or the student group that invited him or her, and if the university cannot ban the speaker from speaking out of a concern for a violent reaction, then moving the venue for the speaker's speech seems to be the most appropriate means of balancing the university's goals of public safety, its education mission, reducing security costs, and upholding First Amendment principles. However, one more key issue (indeed, arguably the main triable issue in the UMN case) remains: the university's policy on delegating forums to controversial speakers out of a concern for security and resource management must still be content neutral, lack vagueness, and not place unbridled discretion in the hands of administrators.

#### *E. Content Neutrality, Vagueness and Unbridled Discretion*

Deference to a university's mission may lend a presumption of constitutionality to its restrictions on access to its forums. However, the school's regulations must still be content neutral. Several cases discussed above show a pretty clear-cut example of content neutral restrictions, such as policies involving bans on outside speakers, regardless of what those speakers wanted to say.<sup>130</sup> A pretty strong case can be made that UMN's decision to move Shapiro was content neutral on its face: the university's LSEP addressed security concerns regardless of the speaker's message. Although a controversial speaker like Shapiro might garner more security attention, it is conceivable that UMN could have made a similar decision regarding an equally controversial leftwing speaker with the potential to lead to protests by conservative students and community members. However, a more nuanced issue regarding content neutrality lurks in this case in particular and behind the notion of forum delegation more broadly: schools' policies can be held as discriminating on the basis of content if they deemed too vague or if they grant unbridled discretion to officials over how the policies should be wielded. These issues are central to YAF's and SCV's claims in the UMN case.

##### 1. Vagueness of Policy

Professor BeVier identifies the vagueness doctrine in the context of public forum cases as essentially being focused on the "effect [of potentially vague policies] on official decision making about speech uses of public

---

130. See, e.g., *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006); *Mote*, 423 F.3d 438; *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011).

property.”<sup>131</sup> For a university to avoid running afoul of the vagueness doctrine, its policies must specifically identify the security risks that the university seeks to either prevent or manage and how it considers speech to bring about those risks. For instance, the U.S. District Court for the Central District of California held that by vaguely defining impermissible expressive activities as those that could pose an “unreasonable risk of harm,” the policies of a consortium of community colleges gave campus presidents virtually unlimited discretion to identify and ban such speech.<sup>132</sup>

It is also imperative that universities’ policies be written down, as opposed to existing as vague guidelines that administrators follow and speakers and student groups merely guess at. In *Young America’s Foundation v. Napolitano*, Judge Maxine Chesney of the U.S. District Court for the Northern District of California signaled that unwritten policies involving regulating the speech of high-profile speakers could be subject to facial First Amendment challenges, while formal written policies would be more subject to as-applied challenges.<sup>133</sup> This case involved a similar though importantly distinct set of facts to the UMN case. At issue were two policies used by the University of California-Berkeley to regulate speeches by controversial conservative speakers including Ann Coulter, David Horowitz and Ben Shapiro: an unwritten one (the High-Profile Speaker Policy, or HPSP) and a formal written one (the Major Events Policy, or MEP).<sup>134</sup> The former was implemented in response to violent protests surrounding a planned speech by former Breitbart News editor Milo Yiannopoulos in February 2017.<sup>135</sup> Essentially, the policy was a stop-gap measure that the university could rely on to regulate impending speeches by Coulter and Horowitz before a more formal policy could be created. The HPSP required “all events involving high-profile speakers to conclude by 3:00 p.m. and be held in securable locations, and . . . enabled University officials to impose security fee[s] . . . as a matter of discretion.”<sup>136</sup> The university did not provide any criteria regarding which speakers might be considered “high-profile” or what a “securable” venue meant.<sup>137</sup> The university passed its most up-to-date version of the MEP in August 2017 and used it to set parameters

---

131. BeVier, *supra* note 40, at 85.

132. *Khademi v. South Orange County Communication College District*, 194 F. Supp. 2d 1011, 1030 (C.D. Cal. 2002). *See also Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003) (striking down a university’s speech policy because it was facially “devoid of any objective guidelines or articulated standards that [administrators] . . . should consider when determining whether any given student expressive activity should be deemed ‘potentially disruptive.’”).

133. 2018 WL 1947788 (N.D. Cal., Apr. 25, 2018).

134. *Id.*

135. *Id.*

136. *Id.* at 3 (internal quotes omitted).

137. *Id.*

---

---

on a speech by Shapiro.<sup>138</sup> The new policy (which is analogous to the LSEP policy in the UMN case) essentially defined and codified the key concepts involved in the HPSP, while also scrapping policies that the university had not followed consistently, such as the 3:00 p.m. cutoff time for large events.<sup>139</sup>

Judge Chesney dismissed YAF's claim that the MEP was vague and unconstitutional on its face.<sup>140</sup> However, Judge Chesney denied the university's motion to dismiss YAF's as-applied challenges to both policies, particularly given evidence that the university used the MEP to justify charging YAF more than three times the security costs for the Coulter speech compared to what it charged a student group who invited Justice Sonia Sotomayor to speak.<sup>141</sup> Furthermore, Judge Chesney denied the university's motion to dismiss YAF's Equal Protection claim given the same discrepancy in fees charged to student groups in the case of these two speakers.<sup>142</sup> This case can be distinguished in part from the UMN case as it relates to the issue of this discrepancy in fees, which almost certainly appears unconstitutional in light of *Forsyth*. However, this case and the UMN case share a root issue: whether the policy in question was so vague that it opened the door for unequal treatment of speakers. This question, along with the issue of whether the policy also placed unbridled discretion in the hands of administrators, are arguably the central issues in both of these cases, and represent key hurdles for developing the concept of forum delegation.

## 2. Unbridled Discretion

The U.S. Supreme Court articulated the standard for avoiding unbridled discretion in the 2002 case *Thomas v. Chicago Parks District*.<sup>143</sup> That case involved a Chicago ordinance requiring groups to apply for permits to use the city's parks for events involving more than 50 people, which was used to deny a group seeking to demonstrate for the legalization of marijuana access to certain parks at certain times. The Court unanimously upheld the constitutionality of the ordinance, noting that its criteria for denial were "reasonably specific and objective, and d[id] not leave the [ultimate] decision [on use of the parks] to the whim of the administrator," as well as the fact that the ordinance offered applicants two paths for appealing permit denials.<sup>144</sup>

In cases involving issues of unbridled discretion regarding university speech policies, courts have appeared to side with universities when

---

138. *Napolitano*, 2018 WL 1947788 at 1.

139. *Id.* at 6.

140. *Id.* at 10.

141. *Id.* at 8.

142. *Id.* at 9.

143. 534 U.S. 316 (2002).

144. *Id.* at 324 (internal quotes omitted).

reasonable attempts are made to follow policies in a consistent manner.<sup>145</sup> In contrast, the U.S. District Court for the Southern District of Texas struck down the University of Houston’s speech policy because it contained no procedural safeguards to prevent giving administrators overly broad discretion to determine whether speech could be potentially disruptive.<sup>146</sup> Therefore, some universities have attempted to have reviews of applications to invite controversial speakers to go through multiple channels. For example, the University of Iowa requires such applications to be communicated to the chairperson of the Faculty Senate which, in turn, must be reviewed by the Committee on University Safety and Security, and ultimately reported to the Faculty Council.<sup>147</sup> Multiple options are available to the chairperson, if deemed necessary, inclusive of a request for “the sponsoring college or department to change the location of the program or to restrict attendance to professional specialists only.”<sup>148</sup>

#### *F. Ample Alternative Channels*

Finally, the last part of constitutional review regarding public forums—whether the state allows speakers ample alternative channels following regulation of their speech—is important to outlining the parameters of forum delegation given that the very issue in the UMN case involved moving a speaker from one venue to another. The key question is the definition of “ample.” The former general counsel for the Maine Community College System has argued that an alternative forum “need not be the best or as good as the [originally] selected forum; it need only accord a meaningful opportunity for expression.”<sup>149</sup> Indeed, he continues, “[t]he availability of an alternative location for the speech enhances an institution’s argument that its denial in a different area is not a meaningful deprivation of the speaker’s true ability to be heard.”<sup>150</sup>

An ample alternative channel may not necessarily be on the campus of the university responsible for restricting speech. In *Bloedorn*, the Eleventh Circuit held that Georgia State University allowed outside speakers amply alternative channels to speak by virtue of the fact that it was located within a municipality. The court held, “Surrounding the campus on every side are public streets and sidewalks from which Bloedorn can preach his message to

---

145. *Bloedorn v. Grube*, 631 F.3d 1218, 1237 (11th Cir. 2011); *American Civil Liberties Union v. Mote*, 423 F.3d 438, 446 (4th Cir. 2005).

146. *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003).

147. *Chapter 28—Campus Speakers and Programs*, Univ. of Iowa Operations Manual, <https://opsmanual.uiowa.edu/administrative-financial-and-facilities-policies/campus-speakers-and-programs>.

148. *Id.* at 28.2c(3).

149. Langhauser, *supra* note 63, at 500.

150. *Id.*

---

---

GSU community members as they enter and exit the campus.”<sup>151</sup> Certainly, universities tend to have more unique speech-friendly forums than cities, like classrooms and lecture halls.<sup>152</sup> Therefore, following the logic of *Bloedorn*, it is an open question whether the qualitative difference between one of these venues and a city’s streets or parks is sufficient to defeat the ample alternative channels requirement if a university were to wholly deny a speaker the chance to speak in one of its auditoriums. However, extending that logic to the UMN case, moving a speaker from one auditorium to another appears to satisfy the ample alternative channels requirement more so than the *Bloedorn* logic of moving a speaker from university sidewalks to city sidewalks, so long as the venue is of similar size and quality to another venue that speakers would prefer for some other reason (such as central location, as in the UMN case).

*G. Assessment of UMN Case and Potential Future Similar Cases*

The foregoing discussion opens the door to speculation about a potential decision on the merits of the UMN case should it go to trial. The array of precedents from various levels of federal courts suggests that UMN’s decision to move the event was reasonable in light of the university’s mission to simultaneously give students the opportunity to hear speakers with challenging viewpoints, ensure security of the university community, and efficiently manage its resources. The North Star Ballroom appears to be an ample alternative channel for the event, given that its capacity was within the attendance range that SCV had suggested in its application.<sup>153</sup> Therefore, most likely, the case will hinge on the issues of whether UMN officials engaged in content discrimination when applying the LSEP to the Shapiro speech, and whether the policy gave the officials unbridled discretion to make their decision to move the event. Given the fact that officials discussed the change of venue with SCV, it is likely that UMN would prevail on the unbridled discretion issue. Thus, we are left with the issue of content discrimination. If the UMN cannot show that it implemented its policy in a fashion that it would have applied to other speakers (regardless of viewpoint) whose presence could have led to violence on campus, then the policy will fail.

---

151. *Bloedorn v. Grube*, 631 F.3d 1218, 1241 (11th Cir. 2011).

152. *See* Goldberg, *supra* 99.

153. *Young America’s Foundation v. Kaler*, 370 F. Supp. 3d 967, 977 (D. Minn. Feb. 26, 2019).

To guide universities, student groups and outside speakers in future cases involving forum delegation, **Error! Reference source not found.** below offers a flowchart made up of key questions that could determine whether a student group should be granted its first choice of venue for an invited speaker, or whether the university's choice should hold sway. The flowchart is framed in terms of two possible outcomes: a student group inviting a controversial speaker to campus can use its first choice of venue; and the university can allow the speech to go ahead in its choice of venue.

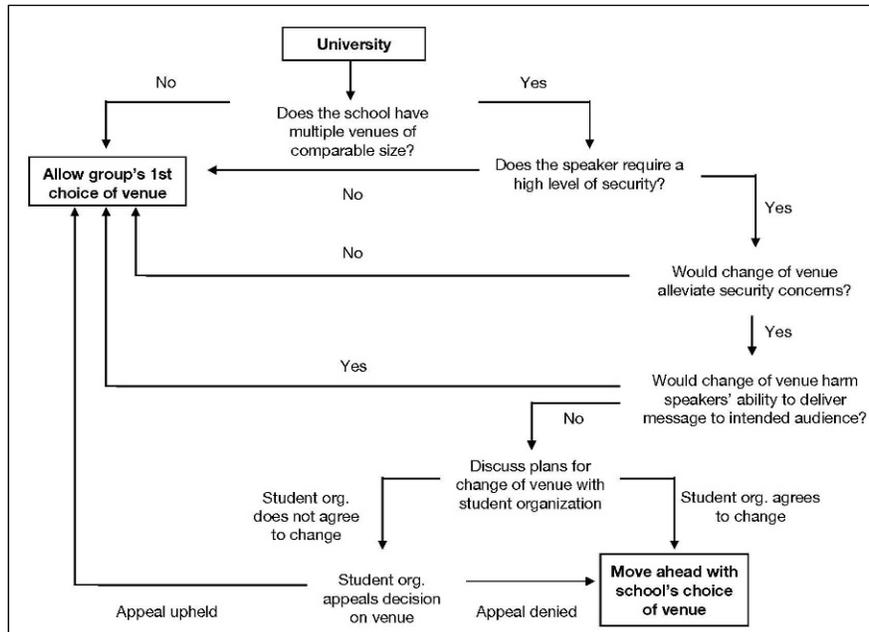


Figure 1: Decision Flowchart for Forum Delegation at Public Universities

The process begins with the university reviewing the application of a student group to invite the speaker. If the university has multiple venues of comparable size (and, certainly, not all public universities have this luxury), school officials can begin moving through a checklist of criteria to help them arrive at a final decision regarding which forum to delegate to the speech. These criteria are designed to reflect precedent from cases discussed above, and to provide university officials with clear and transparent guidelines for forum delegation, with safeguards in place to protect the interests of student groups and invited speakers. These criteria include: the level (and cost) of security required by the speaker; whether change of venue would actually alleviate those security concerns; and whether the change of venue would hinder the speaker's ability to deliver the message.

University officials would have to keep documentation of their decision-making process at each step of the flowchart so that speakers and

---

---

student groups could challenge university officials during an appeals process. For example, university officials should be prepared to file affidavits documenting their assessment of security risks and necessities involved with hosting a speaker. Such documentation should show that university officials' assessments were not arbitrary and not based on viewpoint discrimination toward the speaker. The onus would also be on the school officials to show that moving the speaker would not hinder the speaker's ability to deliver his or her message. For example, officials should be prepared to file affidavits documenting that the proposed alternative venue would not be unreasonably far away and unreasonably inaccessible via public transportation to allow students, or other members of the public, to adequately attend the event. When possible, consultation with neutral third parties could be advantageous for university officials to make their case for moving venues.

Once these criteria have been satisfied, the flowchart would demand that student groups receive due process through the ability to appeal the school officials' decisions. This provision would eliminate the risk that universities would be operating with unbridled discretion when following these policies. Exactly what type of appellate body would hear the student groups' appeals is open for discussion. Ideally, a dispute resolution channel outside of the federal court system would be most cost-effective for both parties. A dispute resolution office housed within the university that could nevertheless act independently of university policy, such as an office of the ombudsperson, could satisfy this role. If the students' appeal is upheld, then they could win the right to use their first choice for a venue. If the appeal is denied, the university's choice of venue would be used for the speech. At no point in this process would university officials be allowed to deny the speaker a forum; their only power would be to choose which of several roughly equivalent forums to allow the speaker.

## II. Transposing Forum Delegation

This paper has made two claims. First, the University of Minnesota's handling of the Richard Shapiro speech was arguably constitutionally sound in light of precedent from current case law surrounding controversial speakers on public university campuses.<sup>154</sup> Second, UMN's handling of the speech offers a novel approach for dealing with controversial speakers on public university campuses: forum delegation. This method, if conducted properly, could balance the interests of speakers, audience members, community members, and the university in a way that does not unreasonably burden any party. This paper now puts forth the following proposition: forum delegation likely could be transposed beyond the public university setting to

---

154. *See supra* Part. I.G.

government entities that manage multiple traditional public forums. This final section will elaborate on this transposition. In particular, this section will rely on Professor Robert Post's notion of constitutional domains as applied to public forum doctrine as the theoretical vehicle for this transposition. It will then use counterfactual analysis with the litigation surrounding the issuing of a permit for the 2017 Unite the Right rally in Charlottesville, Virginia, to assess the validity of the transposition of forum delegation.

#### A. Governance versus Management

In his 1995 book *Constitutional Domains*, First Amendment scholar Robert Post conceives of three forms of social order ("domains") through which to analyze the relationship between individuals and communication: community, management and public.<sup>155</sup> The main goal of a community is to maintain the integrity of its social fabric, and thus communication functions to honor the identity and dignity of individuals within that community.<sup>156</sup> The main goal of the domain of management is to logically arrange individuals for the sake of achieving organizational ends, with communication functioning to further this goal.<sup>157</sup> Lastly, the ultimate goal of the public is to subject the political and social order to public opinion, and communication facilitates this goal by allowing citizens to engage in self-governance.<sup>158</sup> Post poses these three domains as a means for developing constitutional theory and doctrine with clean boundary lines. These domains have the power to explain the exceptionally expansive nature of First Amendment protections,<sup>159</sup> and justify restrictions on First Amendment activities—such as with public forum doctrine.

In an earlier law review article, Professor Post applied the domains of management and the public to the communication goals at stake in public forum analysis.<sup>160</sup> Post's chief criticism with the development of public forum doctrine is that it has sought to categorize the forum status of government property based on the nature and purpose of that property.<sup>161</sup>

---

155. Robert C. Post, *Constitutional Domains* 2 (1995).

156. *Id.* at 3-4.

157. *Id.* at 4-6.

158. *Id.* at 6-10.

159. See, e.g., Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) (arguing generally that the goal of the First Amendment is to ensure that the domain of the public supersedes the domain of the community when it comes to freedom of expression, lest the subjective norms of the latter threaten the ability of the public to critically engage with challenging ideas of public concern, which is essential for self-governance).

160. Post, *supra* note 43, 1827.

161. *Id.* at 1717.

Thus, as noted above, public streets and parks (mainly due to the U.S. Supreme Court's *dicta* in its primordial public forum case *Hague v. CIO*<sup>162</sup>) have been considered traditional public forums, with other public property be labeled as either designated public forums or limited/nonpublic forums depending on how the government intended them to be used.<sup>163</sup> However, Post laments that the rapid construction of public forum doctrine has led "toward the conclusion that the government's actions within [a] public forum are simply subject to the same first amendment restraints as are government actions generally."<sup>164</sup> For Post, this conclusion offers little in the way of constitutional justification for the categorization of and application of concomitant levels of review to various types of government property.

Therefore, for the sake of doctrinal uniformity, Post offers an alternative theory. The heart of Post's argument is that public forum doctrine should be "concern[ed] with the nature of [government's] managerial authority" over a certain forum, "rather than with the character of the government property."<sup>165</sup> Post's theory appears to adequately explain forum delegation in the context of public colleges and universities. In particular, it is consistent with the reasonableness standard that courts have applied to public universities' policies regarding the use of limited or nonpublic forums. Expressed in terms consistent with Post's model, such policies of public universities essentially involve "government action within organizational domains [that] is at times designed for the specific purpose of facilitating symbolic interaction."<sup>166</sup> Indeed, Post singles out *Widmar v. Vincent*, the Court's first case involving public forum doctrine at public universities, as "plainly recogniz[ing] that the university was invested with managerial authority to regulate speech as necessary for the attainment of institutional ends": its educational mission.<sup>167</sup> This approach does not mean that government entities would enjoy unfettered discretion on who gets to use the forums under their control. Rather, constitutional scrutiny would be invoked, Post argues, "when members of the general public bring the scope of [the government's] managerial authority into question."<sup>168</sup> Therefore, a constitutional prohibition would be triggered "when an institution permits selective access to members of the public for reasons other than the achievement of legitimate institutional ends."<sup>169</sup> Such state action would

---

162. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 S. Ct. 954 (1939); see *supra* notes 39-54 and accompanying text.

163. Post, *supra* note 43, at 1756.

164. *Id.* at 1776.

165. *Id.* at 1781.

166. *Id.* at 1799.

167. *Id.* at 1779.

168. Post, *supra* note 43, at 1781.

169. *Id.* at 1827.

threaten the goals of the domain of the public—which Post calls the domain of “governance”<sup>170</sup> in the context of public forum doctrine to refer to the role of public forums in effectuating democratic self-governance.<sup>171</sup>

Post’s theory appears to run into hurdles when applied to traditional public forums, thereby jeopardizing the formation of the concept of forum delegation. Indeed, Post writes, “The line between governance and management corresponds to the distinction between the public and nonpublic forum.”<sup>172</sup> Furthermore, Post writes, “The accommodation of the conflicting objectives to which we subject our streets [and parks] is a matter of public governance, and hence must be evaluated according to the constitutional principles appropriate for such governance.”<sup>173</sup> However, these hurdles are not necessarily insurmountable when it comes to applying forum delegation. Indeed, Post’s theory is designed to give explanatory power to doctrinal boundaries regarding when the government can engage in content discrimination when managing the sheer *ability* of speakers to use its forums. Post offers the example of a public prison being required to allow all possible religious groups into its facilities to offer religious education to inmates, but the prison would have a penological (i.e., managerial) interest in preventing a group advocating for illegal drug use from entering the prison while allowing Alcoholics Anonymous to speak to inmates.<sup>174</sup> Meanwhile, the question of which of its traditional public forums a government can allow a speaker to use is more appropriately conceived as a function of management rather than governance. In other words, this function of management *precedes* the function of governance.

Using this premise as a starting point, we can rely on Post’s conception of the type of review that should be used to balance the goals of management and governance to assess the validity of forum delegation:

If an institutional objective is of sufficient importance, and if the appropriation of a public resource [such as a public forum] is sufficiently necessary to the attainment of the objective, first amendment principles may well permit rights of free expression respecting the resource to be subordinated in carefully limited kinds of ways . . . [so long as] this subordination will always be provisional, the result of hard-fought clarification of competing public values.<sup>175</sup>

---

170. *Id.* at 1784.

171. *Id.* at 1794.

172. *Id.* at 1833.

173. Post, *supra* note 43, at 1794.

174. *Id.* at 1826.

175. *Id.* at 1789-90 (internal citations omitted).

---

---

Thus, Post's theory offers a valid alternative for strict scrutiny to assess the validity of forum delegation. Strict scrutiny would apply in the event that a city would try to deny a speaker access to a forum. However, because forum delegation merely involves a city's *suggestion* of which of its many forums a speaker would be able to use, a review of the substantial government interests (similar to the standard of reasonable interests in the context of public universities), would be required to assess the constitutionality of such a suggestion.

The flowchart featured in **Error! Reference source not found.** below—modeled after the flowchart for public universities depicted in **Error! Reference source not found.**—shows how forum delegation could be applied to cities that manage multiple traditional public forums using Post's suggested standard of review. Like a public university, a city would first have to determine whether it has multiple forums of comparable size, which, as with universities, is a luxury that many cities may not have. If it does, then the city would systematically progress through the same criteria as a public university to justify forum delegation: whether the speaker requires a high level of security; whether the change of forum would alleviate the security concern; and whether moving the venue would harm speaker's ability to deliver his or her message to an intended audience. As with universities, cities should be prepared to document (for the purpose of filing affidavits during an appeals process) justification for each step made in their decision-making process. The last criterion—whether moving the venue would harm speaker's ability to deliver his or her message to an intended audience—adds a new wrinkle to the analysis compared to the application of this model to public universities: in cities, it may be more likely that the forum that the speaker seeks to use, itself, may be integral to his or her

message. As will be shown below, this issue was very much in play in the Charlottesville case.

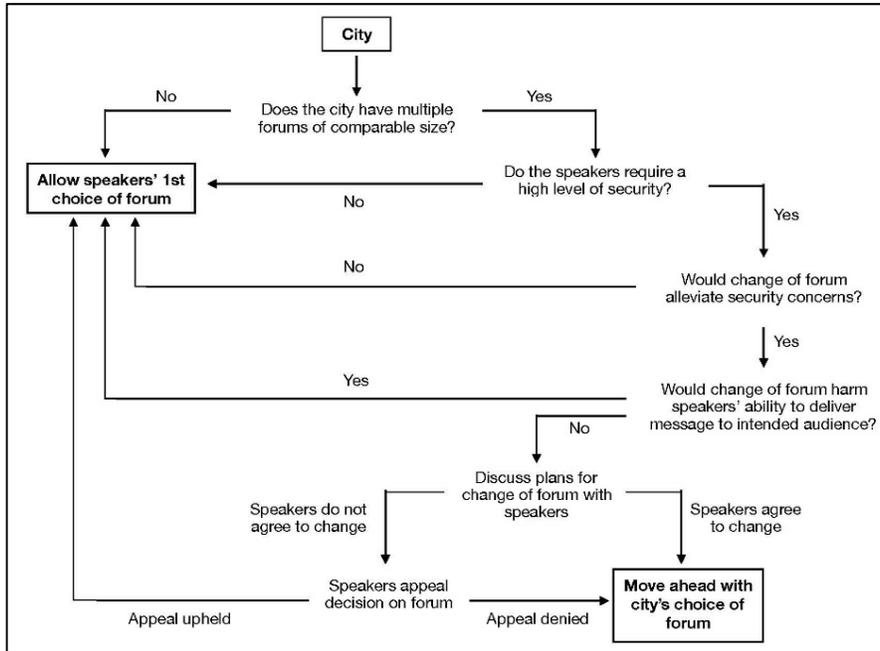


Figure 2: Decision Flowchart for Forum Delegation in Cities

As with the flowchart involving public universities, a city would be required to afford speakers due process to challenge the city's decision to move the forum. As with universities, a cost-effective solution would be to create an independent channel for dispute resolution outside of the state or federal court system. Such a channel could be modeled after the City of Chicago's two-step system for resolving disputes over the denial of permits to use the city's parks, which the Supreme Court saw as dispositive in upholding the constitutionality of the city's permit system from a challenge based on unbridled discretion.<sup>176</sup> If the speakers prevailed, they would be allowed to speak in their first choice of forum.

176. *Thomas v. Chicago Parks District*, 534 U.S. 316, 324 (2002) ("These grounds are reasonably specific and objective, and do not leave the decision to the whim of the administrator. . . . They provide narrowly drawn, reasonable and definite standards to guide the licensor's determination, . . . [a]nd they are enforceable on review—first by appeal to the General Superintendent of the Park District, . . . and then by writ of common-law certiorari in the Illinois courts, . . . which provides essentially the same type of review as that provided by the Illinois administrative procedure act.") (internal quotes and citations omitted).

### *B. Some Hurdles*

Before applying forum delegation to a counterfactual analysis of the Charlottesville case, a few doctrinal hurdles need to be overcome to successfully transpose forum delegation from the public university setting to the municipal setting. The first involves the distinction in the category of forums involved in each context: nonpublic versus traditional public forums, respectively. At first blush, it may appear that the U.S. Supreme Court has already precluded the use of forum delegation in traditional public forums. In *Schneider v. State*, Justice Owen Roberts noted that “the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>177</sup> However, it is important to put these words in the context of this particular case. *Schneider* involved a consolidation of four cases in which municipal ordinances against littering were cited to prevent individuals from distributing leaflets and handbills in traditional public forums such as streets and parks. Two of those cases involved ordinances that allowed individuals to distribute literature in parks, but not on public streets or in alleys. This distinction in where distribution of leaflets would be allowed is what prompted Justice Roberts’ words above. However, the notion of forum delegation adopted from the UMN case is distinguishable from the two unconstitutional ordinances in *Schneider*. The Court struck down these ordinances because the cities had not offered a significant interest that would be furthered if the handbill distributors were moved to a different venue.<sup>178</sup> In other words, the ordinance did not survive strict scrutiny. A policy of suggesting where a speaker should be allowed to speak, born out of a substantial government interest in minimizing violence and reducing security costs, would arguably not face the same problem.

Next, as noted above, the Eighth Circuit held in the *Bowman* case that public universities were less able than cities or other government entities from using police powers to summon a security presence for controversial speakers on short notice.<sup>179</sup> Although such a relative distinction may be true, cities do not have unlimited budgets upon which to draw to summon security for controversial speakers. Thus, resource management can still be considered an important interest that cities should be allowed to factor into their management of forums. However, the threshold of the amount of security costs that cities could cite to justify forum delegation could (and perhaps should) be higher than for public universities. For example, if a city has already exhausted its annual overtime budget for police officers by the

---

177. 308 U.S. 147, 163 (1939).

178. *Id.* at 160.

179. *See* note 124 and accompanying text.

time a controversial speaker seeks to use a city's forums, then the city's interest in resource management could be considered more significant.

Finally, there is the problem of being able to predict with certainty that a controversial speaker or event will lead to violence, especially months before an event is scheduled. Furthermore, the violence would need to be caused as much (if not more so) by sympathizers of a speaker or attendees of an event rather than by counter-protesters, lest a heckler's veto scenario appear to threaten the validity of attempts to move an event from one forum to another. The application of forum delegation to the Charlottesville case below will highlight that problem. However, as it was argued above in relation to the UMN case,<sup>180</sup> because forum delegation does not involve denying a speaker the right to speak, but rather involves the mere ability of a city to suggest where he or she speaks, the heckler's veto doctrine would not apply.

### C. Charlottesville Counterfactual

White nationalists gathered in Charlottesville, Virginia on August 11 and 12, 2017. One of their expressed goals was to protest the city's removal of a statue of William E. Lee at a public park, whose name would be changed from Lee Park to Emancipation Park.<sup>181</sup> The rally turned violent on August 12 when white nationalists clashed with counterprotesters. The clashes left at least 34 people wounded, and 32-year-old counterprotester Heather Heyer was killed when James Alex Fields, Jr., drove his car into a crowd of counterprotesters.<sup>182</sup> Two state troopers, H. Jay Cullen and Berke M. M. Bates, were also killed when their helicopter crashed as they were monitoring the demonstrations.<sup>183</sup> The events of Charlottesville spurred an intense national debate on racism, domestic terrorism and freedom of speech in America at a time when many believe that white nationalists feel more emboldened than ever.<sup>184</sup> The events even prompted Professor and First Amendment scholar Rod Smolla to existentially ask at a conference in August 2018, "My God, what has my life's work wrought?"<sup>185</sup>

---

180. See *supra* Part I.D.1.

181. Maggie Astor, Christina Caron and Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html>.

182. *Id.*

183. *Id.*

184. See, e.g., Liam Stack, *Over 1,000 Hate Groups Are Now Active in United States, Civil Rights Group Says*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/hate-groups-rise.html>.

185. PF&R Panel Session: "True Threats, Hate Speech and the Rise of Trump in America – Does the First Amendment Protect Too Much 'Offensive' Speech?", Ass'n for Ed. in Journalism and Mass Comm. Annual Conference, Washington, D.C. (Aug. 9, 2018, 1:45 PM).

Presciently, a few days before the demonstrations, officials in Charlottesville sought to prophylactically quell the violence they were expecting. On August 7, 2017, the city informed Kessler that it was modifying the permit that it had granted to Kessler on June 13, 2017, by requiring him to hold his demonstration in the much larger McIntire Park rather than in Emancipation Park.<sup>186</sup> Kessler filed for injunctive relief on August 10, 2017, in the U.S. District Court for the Western District of Virginia. On August 11, 2017, Judge Glen E. Conrad granted Kessler's motion and reinstated his permit to hold the rally in Emancipation Park.<sup>187</sup> The city had contended that its decision to move the rally was based on evidence (mainly gleaned from social media) that holding the event at Emancipation park would present major security concerns.<sup>188</sup> However, Judge Conrad called the city's evidence "circumstantial,"<sup>189</sup> and held that "merely moving Kessler's demonstration to another park will not avoid a clash of ideologies or prevent confrontation between" Kessler's supporters and his opponents.<sup>190</sup> Rather, Judge Conrad held that the city would face *worse* security concerns by moving the event given that supporters and opponents of Kessler would surely demonstrate in *both* McIntire Park and Emancipation Park.<sup>191</sup> In the end, the city won a pyrrhic victory by being right about the extent of the violence.

Most likely, the "eleventh-hour" nature of Charlottesville's attempt to move Kessler's rally was its critical flaw. If the city had tried to move the event immediately after receiving Kessler's application for use of Emancipation Park, could it have survived constitutional scrutiny? Let's walk through the flowchart in **Error! Reference source not found.** Charlottesville satisfied the first criterion: it had a venue of larger size to offer Kessler and his sympathizers. Assuming that the city would have had intelligence earlier on in the process to know with reasonable certainty that the event would lead to violence, it could have satisfied the second and third criteria as well.

However, a much more difficult problem arises regarding the criterion that moving the event from one forum to another would not harm the ability of the speakers to deliver their message. Professor Amanda Reid has argued that place is often central to a speaker's message, offering the phenomena of roadside memorials as examples of people using a place as an essential means to communicate their message of remembrance of the deceased, or

---

186. *Kessler v. City of Charlottesville, Va.*, No. 17-CV-00056, WL 3474071 (W.D. Vir. Aug. 11, 2017) at \*1.

187. *Id.*

188. *Id.*

189. *Id.* at \*3.

190. *Id.* at \*2.

191. *Kessler*, WL 3474071 at \*2.

even the more political message of criticism of road conditions or American driving culture.<sup>192</sup> Reid notes that arguments can be made that state and local officials have significant legal grounds for removing these memorials out of concern for safety (e.g., the memorials might distract drivers, causing more accidents),<sup>193</sup> or because of Establishment Clause concerns (e.g., the presence of a cross in a public place memorializing a traffic death could convey the notion that the state is endorsing a Christian message).<sup>194</sup> However, Reid also notes that a compelling argument can be made that forced removal of these memorials would dilute their message, given the significance of the place as the last location where a loved-one was alive, thereby making “other rituals and other avenues for expression [of memorializing the dead] inadequate.”<sup>195</sup>

The essential nexus between place and message that Reid highlights—and the concomitant constitutional concerns that arise out of trying to break that nexus—can be extended to the issue of controversial groups seeking to express a message in a specific location. In the Charlottesville case, Kessler’s group sought to protest the removal of the statue of Robert E. Lee from the public forum that they sought to use. In spite of the security concerns of holding the rally in Emancipation Park (even assuming city officials had identified the concerns far earlier than they did in the actual case), moving the rally could have diluted Kessler’s message. To compare this case to a hypothetical example, a controversial speaker opposed to a new city ordinance may wish to protest in front of City Hall, and thus moving the speaker to a more open park a few miles away from City Hall would dampen the speaker’s message. Or, to take another historical case, because the Village of Skokie, Illinois was heavily populated with Jews—and, in particular, Holocaust survivors—marching in the city’s main town square was central to the message of Frank Collin and the National Socialist Party of America.<sup>196</sup> As repugnant as the group’s message may have been, an argument could be made that moving the Nazis to the outskirts of the town could have dampened their message.

However, this hurdle is not necessarily insurmountable. The U.S. Supreme Court has upheld the constitutionality of content neutral time, place, and manner restrictions of speech in cases where the venue and means of expression were central to the speakers’ message. In *Clark v. Community*

---

192. Amanda Reid, *Place, Meaning, and the Visual Argument of the Roadside Cross*, 2 SAVANNAH L. REV. 265 (2015); Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 NEB. L. REV. 124 (2013).

193. Reid, *Place, Meaning, and the Visual Argument of the Roadside Cross*, at 278.

194. *Id.* at 298.

195. *Id.* at 283.

196. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

---

---

*for Creative Non-Violence*, the Court held that a prohibition on camping on National Park property (such as the National Mall) was a constitutional content-neutral restriction on speech, despite the fact that it impinged directly on a group's means of protesting the plight of the homeless: erecting a tent city on the National Mall.<sup>197</sup> The Court held that the federal government's interest in maintaining the beauty of the Mall was a sufficiently significant interest to allow the prohibition to survive constitutional review.<sup>198</sup> Therefore, if forum delegation can be considered a content-neutral time, place and manner restriction on speech, provided it is triggered by a substantial government interest in maintaining security at reasonable costs, then the incidental impingement upon the central message of the speaker could be deemed constitutional. However, this condition likely will not be categorically settled in any given situation involving forum delegation. Indeed, it likely will be the central focus of litigation, or, at the very least, an appeals process.

### Conclusion

The purpose of this paper has been to explicate and develop the concept of forum delegation—the process by which a government entity could constitutionally manage which forum, among the several public forums under its control, a speaker can use to deliver a message. The concept is born out of the University of Minnesota's (arguably) constitutional decision to move a speak by Ben Shapiro from one venue on its large campus to another. Its application is meant to be limited in nature. It would apply only to situations when the risk of violence sparked by a controversial speaker is reasonably certain, when multiple forums of comparable size are available for a government entity to choose from, and when moving the speaker would further a substantial interest in quelling violence. Forum delegation involves merely a suggestion by government officials on which of its forums it would allow a speaker to use. Therefore, the process of forum delegation falls within Professor Robert Post's domain of management—government's ability to control how it uses its property to achieve legitimate institutional ends—rather than the domain of governance, whereby traditional First Amendment principles of strict scrutiny would apply.

Forum delegation is not designed to be a panacea. Counterfactual analysis of the litigation surrounding the Unite the Right rally in Charlottesville suggests that forum delegation could have survived constitutional scrutiny had it been applied early in the process of reviewing organizers' application for use of the city's parks. However, the close nexus between the speakers' message and their preferred forum (*Emancipation*

---

197. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

198. *Id.* at 296.

Park) could have negated the city's efforts to move speakers to a larger park, where law enforcement would have faced fewer difficulties in containing violence between speakers and counter-protesters. If a government entity's efforts do survive constitutional scrutiny, the main benefit of forum delegation is that interests of all stakeholders involved can be balanced: speakers get to speak, audience members get to hear, counter-protesters get to counter-speak, violence is mitigated, and a university's/city's costs for security can be held to reasonable levels. If the attempts to delegate forum use do not survive constitutional scrutiny, government officials can at the very least claim a public relations victory by showing that, through following the criteria suggested above, they sought to balance the competing interests of promoting freedom of expression and protecting the safety of community members. Such a claim is not insignificant. Indeed, it can offer a powerful rhetorical tool to restore public confidence in freedom of expression at a time when extremist groups plow ahead with their strategy of "weaponizing" the First Amendment to sow social discord through the polarization of free-speech principles.<sup>199</sup>

Certainly, the development of the concept of forum delegation into a potential doctrine is far from finished. At the very least, the proposals put forth in this paper have opened up the discussion surrounding this concept. With this opening salvo, it is hoped that scholars will continue to vigorously debate the theoretical and doctrinal principles underlying the concept, as only through such debate can a novel idea such as forum delegation have the potential to expand and strengthen.

---

199. See, e.g., Adam Liptak, *Weaponizing the First Amendment: How Free Speech Became a Conservative Cudgel*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>.

