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SAN DIEGO COMMITTEE AGAINST REGISTRATION AND THE DRAFT v. GOVERNING BOARD OF THE GROSSMONT UNION HIGH SCHOOL DISTRICT: PUBLIC FORUM ANALYSIS IN THE HIGH SCHOOL CONTEXT

I. INTRODUCTION

In *San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of the Grossmont Union High School District*,[1] the Ninth Circuit held that an anti-draft organization's first amendment right to free speech was violated when it was denied the opportunity to place anti-draft advertisements in a school district's high school newspapers.[2] The court's holding was based on its determination that the high school newspapers constituted limited public forums.[3] The court held, in the alternative, that even if the school newspapers constituted non-public forums, the School Board of Grossmont violated CARD's first amendment rights because its exclusion of CARD's advertisement was unreasonable and constituted viewpoint-based discrimination.[4] The district court denied CARD's request for a preliminary injunction against the School Board.[5]

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1. 790 F.2d 1471 (9th Cir. 1986) (per Reinhardt, J.; the other panel members were Goodwin, J.; Wallace, J. dissenting) [hereinafter *San Diego CARD*].

2. *Id.* at 1478.

3. *Id.* at 1476.

4. *Id.* at 1478.

5. *Id.* at 1472 n.1. The advertisement depicted a ghost-like figure, stating "Don't Let The Draft Blow You Away!" The following statement appeared below the figure:

> Know Your Rights!
> Know Your Choices!
> If the draft starts tomorrow, you could be in boot camp 11

The Ninth Circuit reversed and remanded.[6]

II. FACTS

The plaintiff, San Diego Committee Against Registration and the Draft,[7] sought to purchase advertising spaces from five student newspapers published by high schools in the Grossmont School District.[8] The School Board denied the plaintiff access to the newspapers on the ground that the advertisements constituted advocacy of an illegal act.[9] CARD filed an administrative claim with the Board seeking a reversal of the School Board's decision.[10] This claim was denied.[11] CARD then brought a civil rights suit [12] in the district court seeking a preliminary injunction against the Board.[13] The plaintiff alleged that the Board violated CARD's rights under the first and fourteenth amendments by denying CARD access to the advertising spaces while granting access to military recruitment advertisers.[14] The district court denied CARD relief, determining that CARD had failed to show either probable success on the merits of its claim or that it had raised a question that was sufficiently serious to

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days later.
Call or Write: Committee Against Registration and the Draft.
735-7518, 238-6878
P.O. Box 15195
San Diego, CA 92115

Id.

6. *Id.* at 1481.

7. *Id.* at. 1472. CARD is a non-profit organization consisting of student and non-student members. The organization counsels young men on alternatives to compulsory military service. *Id.*

8. *Id.* CARD's request for access to the advertising spaces was ultimately given to the Superintendent of the School District to issue a policy guideline. *Id.*

9. *Id.*at 1473. *See infra* note 23.

10. *San Diego CARD*, 790 F.2d at 1473.

11. *Id.*

12. 42 U.S.C. § 1983 (1982) states in pertinent part:

> "Every person who, under color of any . . . regulation . . . of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Id.

13. *San Diego CARD*, 790 F.2d at 1473.

14. *Id.*

warrant issuance of a preliminary injunction.[15] The plaintiff appealed to the Ninth Circuit Court of Appeals.

III. BACKGROUND

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech . . . ."[16] The right to free speech and expression has been considered one of the primary rights of our democratic society - "the touchstone of individual liberty"[17] - upon which nearly all other forms of freedom are conditioned.[18] Freedom of speech is fundamental to our dynamic society, for the right "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[19] which is "one of the chief distinctions that sets us apart from totalitarian regimes."[20]

However, the first amendment's freedom of speech is not absolute.[21] Restrictions have been placed on speech, and the courts have determined that, in certain situations, an individ-

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15. *Id.* The District Court found that: 1) The student newspapers were limited public forums. 2) The military service advertisements that had appeared in the student newspapers were non-political and offered vocational opportunities to the students. 3) The School District policies permitting publication of political speech by students only and restricting newspaper access by non-students to commercial speech were reasonable in light of the purpose of school publications. *Id.*

16. U.S. Const. amend. I.

17. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 857-64 (2nd ed. 1983) [hereinafter J. NOWAK], for a historical background of freedom of speech.

18. Palko v. Connecticut, 302 U.S. 319, 327 (1937) (assertion that neither liberty nor justice would exist if the first amendment freedom of speech did not apply to the states), *rev'd* on other grounds, Benton v. Maryland, 395 U.S. 784 (1969).

19. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1956)). *See generally* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

20. Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (ordinance, as applied to petitioner, violated right of free speech).

21. Dennis v. United States, 341 U.S. 494, 503, 581 (1951) (discussing the history of free speech cases). *See* J. NOWAK, *supra* note 17 at 857-1027; M. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE FIRST AMENDMENT §§ 2.01-4.11 (1984); Whitney v. California, 274 U.S. 357 (1927) "[T]he freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language . . . ." *Whitney*, 274 U.S. at 371 (Criminal Syndicalism Act held not to be a restraint on the right of free speech). *See generally* J. Barron, C. Dienes, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979) [hereinafter HANDBOOK].

ual's right to free speech must be tempered by other interests of society.[22] Thus, the courts have developed restrictions on speech in areas such as advocacy of unlawful conduct,[23] speech deemed to be "fighting words,"[24] and obscene,[25] commercial,[26] and libelous speech.[27] Even when speech does not fit into one of these categories, it can be regulated, provided the regulation is content-neutral. These are the so-called time, place, and manner regulations.[28] Two opposing views of freedom of speech emerged during the development of the time, place, and manner regulations. The broad "liberal" view of freedom of speech was eloquently expressed by Justice Roberts in *Hague v. Committee for Industrial Organizations*:[29]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the

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22. *See Whitney*, 274 U.S. at 371. The Court stated in *Whitney*: "[A] state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means . . . ." *Id.* (citing Gitlow v. New York, 268 U.S. 652, 666-68 (1925)).

23. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). "[A state may] forbid or proscribe advocacy of the use of force or of law violation [when] such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

24. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (developed the "fighting words" doctrine and upheld a statute construed to ban "face-to-face words plainly likely to cause a breach of peace by the addressee"). *Id.* at 573-74. For refinements of the doctrine see Lewis v. City of New Orleans, 415 U.S. 130 (1974) (words conveying or intending to convey disgrace are not fighting words); Cohen v. California, 403 U.S. 15 (1971) (fighting words doctrine can only be applied to face-to-face encounters); *Terminiello*, 337 U.S. 1 (1949) (fighting words must present a clear and present danger before government can intervene). *See generally* HANDBOOK, *supra* note 21 at 63-76; Rutzick, *Offensive Language and The Evolution of First Amendment Protection*, 9 HARV. C.R. - C. L. L. REV. 1 (1974).

25. *See* Roth v. United States, 354 U.S. 476 (1957) (obscenity is not protected by the Constitution). *See generally* J. NOWAK, *supra* note 17 at 1011 (Material will be considered obscene if it "(a) appeals to a purient interest in sex, (b) has no serious literary, artistic, political, or scientific merit, and (c) is on the whole offensive to the average person under contemporary community standards"). J. NOWAK, *supra* note 17 at 1011. *See generally* HANDBOOK, *supra* note 21 at 607-69.

26. See Valentine v. Chrestensen, 316 U.S. 52 (1942) for the origin of commercial speech analysis. *See generally* HANDBOOK, *supra* note 21 at 155-80.

27. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (states may determine what standard should be imposed in defamation actions involving private plaintiffs, but negligence is minimum requirement); New York Times v. Sullivan, 376 U.S. 254 (1964) (recognizing a conditional privilege for libelous statements made by the press media with respect to an elected public official).

28. *See generally* HANDBOOK, *supra* note 21 at 93-114.

29. 307 U.S. 496 (1939).

> 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. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[30]

The more narrow restrictive view was set forth by Justice Holmes in *Davis v. Massachusetts*:[31]

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.[32]

To strike a balance between the two opposing views, the courts have developed the public forum analysis.[33] This analysis centers on the fact that speakers may possess certain rights enabling them access to a particular forum to exercise their right to free speech. With the public forum analysis, the courts have attempted to define those rights and provide guidance in determining when time, place, and manner restrictions may be imposed.

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30. *Id.* at 515-16.

31. 167 U.S. 43 (1897).

32. *Id.* at 47.

33. See Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979) for a history of public forum analysis; *See also* Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

Two recent Supreme Court cases[34] attempted to extensively catalogue the analysis of earlier decisions.[35] In *Perry Education Association v. Perry Local Educators' Association*,[36] the Court observed that the existence of a right of access to public property and the standard by which limitations upon such a right are evaluated will differ, depending on the character of the property at issue.[37] In its analysis, the Court differentiated between three types of forums to which the public's right of access varies, as well as the restrictions the state may impose.

A. Public Forums

Public forums encompass property which has historically been held open for public use and devoted to assembly and debate.[38] The *Perry* Court noted that streets and parks are traditional public forums.[39] However, the courts have not enumerated any specific principles to determine what other forms of public property could be established as public forums.[40] As a result, ac-

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34. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (the use of public forum analysis to determine that teachers' mailboxes were non-public forums); Cornelius v. NAACP, 105 S.Ct. 3439 (1985) (the use of public forum analysis to determine charity drive aimed at federal employees to be a non-public forum).

35. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating an ordinance which prohibited picketing on a public way adjacent to a school while the school was in session; the ordinance was found to regulate speech based on its content); Adderley v. Florida, 385 U.S. 39 (1966) (student demonstration at a county jail; conviction of statutory crime of trespass upheld); Cox v. Louisiana, 379 U.S. 536 (1965) (student demonstration in opposition to racial segregation conducted near courthouse; convictions for breach of peace, obstruction of public passages and picketing all reversed).

36. 460 U.S. 37 (1983).

37. *Id.* at 44. The issue before the Court was whether the first amendment was violated when a teachers' exclusive bargaining representative was granted access to the District's interschool mail system, while such access was denied to a rival union. *Id.* at 39. The Court held that the mail system was a non-public forum because it found that the mail system was not open for use by the general public although the school had granted civic and church organizations periodic access. *Id.* at 46-47. The Court further held that the School Board's regulation denying the rival union access was reasonable. *Id.* at 50-54. The Court determined that the regulation was consistent with the School Board's legitimate interest in preserving the mail system's primary function of transmitting school-related messages among teachers. *Id.* at 50-51. By enabling the union to effectively perform its obligations and prevent interunion conflicts in the schools, the mail system was preserved for its intended purpose. *Id.*

38. *Id.* at 45.

39. *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)) (recognizing the right of access to a public forum predicated upon established common law notions of adverse possession and public trust).

40. *See* Note, *Public Forum Analysis After Perry Education Associationv. Perry*

cess to a wide variety of public places has been the subject of litigation.[41]

United States v. Grace[42] explained that whether the property in question is generally open to the public is a factor to be considered in forum analysis.[43] However, public property does not become a public forum simply because the members of the public are permitted to come and go at will.[44]

Justice Brennan's dissent in *Lehman v. City of Shaker Heights*[45] recapitulates the standards relevant in determining when public places will be considered public forums. According to Justice Brennan, the Court must balance the interests of the government with the interests of the speaker and his audience. Accordingly, the Court must examine the primary use of the public property and the extent to which that use will be disrupted if access for free expression is granted.[46]

Once a public place is deemed a public forum, the general public does not possess an unfettered constitutional right to use the facility as it pleases.[47] The restrictions the state may impose upon communicative activity include time, place, and manner

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Local Educators' Association - A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property, LIV FORDHAM L. REV. 545 (1986).

41. *See* United States Postal Serv. v. Council of Greenburg, 453 U.S. 114 (1981) (letterbox a non-public forum); Fernandez v. Limmer, 663 F.2d 619 (5th Cir. 1981) (airport a public forum), *cert. dismissed*, 458 U.S. 1124 (1982); Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319 (2d Cir. 1974) (welfare office waiting room a public forum), *cert. denied*, 419 U.S. 838 (1974); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space on city rapid transit cars a non-public forum); Adderley v. Florida, 385 U.S. 39 (1966) (jail a non-public forum).

42. 461 U.S. 171 (1983) (public sidewalks forming the perimeter of the Supreme Court grounds are public forums).

43. *Id.* at 177.

44. *Id.*

45. 418 U.S. 298 (1974) (advertising space on city rapid transit cars not a public forum).

46. *Id.* at 312.

47. Cornelius v. NAACP, 105 S.Ct. 3439, 3448 (1985). Justice O'Connor stated:

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speakers activities.

Id. at 3448.

regulations which are content-neutral.[48] However, such regulations must serve a significant government interest.[49] In addition, if the state imposes a restriction on the communicative activity, the state must allow the speaker access to other methods of communication.[50] Finally, if the state seeks to exclude speech in a public forum, based on its content, the state must show that a compelling government interest requires such exclusion.[51]

B. Limited Public Forums

Limited public forums, also known as forums by designation, include public property which the government has opened for the purpose of limited or certain expressive activity.[52] A limited public forum may be established for use by certain groups for discussion of any topic,[53] or open to the entire public for the discussion of particular topics.[54] Once a limited public forum is created, the right of access encompasses only those groups or topics of similar character.[55]

Cornelius v. NAACP[56] developed what is known as the "government intent test" to determine whether the government has intended to open a non-traditional forum for communicative activity.[57] According to *Cornelius*, the courts must look to the policy and practice of the government along with the nature of

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48. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See generally* Handbook, *supra* note 21 at 93-114.

49. *Perry*, 460 U.S. at 45.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 46 n.7 (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

54. *Perry*, 460 U.S. at 46 n.7 (citing City of Madison v. Wisconsin, 429 U.S. 167 (1976)).

55. *Perry*, 460 U.S. at 48. In *Perry*, the Court noted:

> [w]hile the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as [the rival union], which is concerned with the terms and conditions of teachers employment."

Id. See also Greer v. Spock, 424 U.S. 828, 838 n.10 (1976) (military reservation could exclude political speeches while permitting lectures concerning drug abuse).

56. 105 S.Ct. 3439 (1985).

57. *Id.* at 3449.

the property and its compatibility with expresssive activity.[58] Thus, a limited public forum will not be found if there is a clear showing of a contrary intent.[59] In addition, when the nature of the property is not compatible with expressive activity, courts will not designate a public forum.[60]

In *Widmar v. Vincent*,[61] a state university's express policy generally afforded registered students access to its facilities.[62] Therefore, the Court concluded that the university's facilites were limited public forums generally open for use by student groups only.[63]

As with public forums, reasonable time, place, and manner limitations may be imposed in limited public forums, and a content based exclusion can be imposed if it serves a compelling state interest.[64] As Justice Marshall stated in *Police Department of Chicago v. Mosley*:[65]

> [G]overnment may not grant the use of a forum

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58. *Id.* The issue in *Cornelius*, was whether the first amendment was violated when the federal government excluded legal defense and political advocacy organizations from participating in the Combined Federal Campaign, a charity drive directed towards federal employees at their place of business. *Id.* at 3443. The Court held that the organizations' first amendment rights had not been violated by the exclusion. *Id.* at 3455. The Court had to determine whether the forum to address was the federal workplace or the charity drive. The Court stated that the correct forum was to be defined in terms of the access sought by the speaker and thereby rendered the charity drive as the forum at issue. *Id.* at 3449. However, the Court further explained that it was necessary to examine the special nature and function of the workplace when assessing its compatibilty with expressive activity. *Id.*

The Court found the charity drive to be a non-public forum after applying the two prong intent test. *Id.* at 3451. First, the Court found that neither the government's practice nor policy evinced an intent to open the charity drive as a public forum, for the government consistently limited participation to voluntary agencies which it deemed appropriate. *Id.* at 3450-51. In addition, the government developed extensive admission criteria to limit access to the forum. *Id.* at 3451. Second, the Court examined the nature of the federal workplace and found that it existed to accomplish the employers' business. *Id.* The Court concluded that the government had the right to exercise control over access to the federal workplace to avoid constant interruptions of the employees' performances. *Id.*

59. *Id.* at 3450.

60. *Id.*

61. 454 U.S. 263 (1981).

62. *Id.* at 265.

63. *Id.* at 267.

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

65. 408 U.S. 92 (1972) (anti-picketing ordinance held unconstitutional on the grounds that it discriminated among pickets based on the content of their expression).

> to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . [G]overnment must afford all points of view an equal opportunity to be heard. Once a forum is opened up to . . . speaking by some groups, government may not prohibit others from . . . speaking on the basis of what they intend to say.[66]

C. Non Public Forums

Non-public forums constitute public properties which are not traditional public forums or forums designated for communication.[67] In *International Society for Krishna Consciousness v. New Jersey Sports and Exposition*,[68] the court held that a race track and stadium did not constitute a public forum.[69] The court noted that it would not be appropriate to declare a certain location a public forum when the full exercise of first amendment rights would be inconsistent with the primary use of the property.[70] After examining numerous Supreme Court decisions,[71] the court stated that the race track did not fit into any of the accepted descriptions of a public forum.[72]

In *Greer v. Spock*,[73] the Supreme Court found a military reservation could constitutionally exclude political speeches and

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66. *Id.* at 96.

67. *Perry*, 460 U.S. at 46.

68. 691 F.2d 155 (3d. Cir. 1982).

69. *Id.* at 158.

70. *Id.* at 160 (quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980)).

71. *Int'l Society*, 691 F.2d at 160 (to determine whether property owned or controlled by the state is a public forum, the courts must first examine how the forum is used); Heffron v. Iskon, Inc., 452 U.S. 640 (1981) (state fair a limited public forum because it exists to provide means of exhibition to large numbers of people); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (prison is not a public forum for its inmates because the exercise of such free speech rights would conflict with the operations of the prison); Southeastern Promotions v. Conrad, 420 U.S. 546, (1975) (municipal theatres and auditoriums are designed for and dedicated to expressive activities).

72. *Int'l Society*, 691 F.2d at 161. The court reasoned that the stadium complex was not analogous to traditional public forums such as street and parks, nor was the comple designed and created for expressive activity. Moreover, the court stated that the stadium complex was a commercial venture created by the state designed to generate revenue. *Id.*

73. 424 U.S. 828 (1976).

distribution of leaflets in two areas open to the general public.[74] The Court stated that the basic function of a military reservation is to train soldiers, not to provide a public forum.[75] As stated by Justice Stewart, "[t]he notion that federal military reservations, like municipal streets or parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false."[76] Accordingly, the nature and purpose of the military reservation was not found to be compatible with the expressive activity sought to be communicated.[77]

In non-public forums, states may impose the same reasonable time, place, and manner restrictions that are permitted in the traditional and limited public forums.[78] Moreover, access to a non-public forum may be restricted to preserve the forum for its intended purpose if the regulation is reasonable and not based on opposition to the speaker's view.[79] The reasonableness of a regulation must be assessed in light of the purpose of the forum and all the surrounding circumstances,[80] thereby reserving the forum for its intended purpose.[81] To preserve the non-public forum for activities compatible with its intended purpose, the state may make distinctions regarding access on the basis of

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74. *Id.* at 838.

75. *Id.* at 834.

76. *Id.* at 838.

77. *Id.* at 838 n.10. The court noted that even though civilian lectures on drug abuse and religious services had taken place on the base, this fact did not of itself convert the base into a public forum to allow political candidates the right to campaign on the base. *Id.*

78. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing United States Postal Serv. v. Council of Greenburg, 453 U.S. 114, 131 n.7 (1981)).

79. *Perry*, 460 U.S. at 46.

80. Cornelius v. NAACP, 105 S.Ct. 3439, 3453 (1985).

81. *Perry* 460 U.S. at 46. "[T]he State, 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." *Id.* (quoting *United States Postal Serv.*, 453 U.S. at 129-30, quoting Greer v. Spock, 424 U.S. 828, 836 (1976), quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)). *See also* Cornelius v. NAACP, 105 S.Ct. 3439 (1985). Legal defense fund organizations brought suit alleging the federal government violated their first amendment rights when it excluded them from participating in the Combined Federal Campaign, a charity drive aimed at federal employees. *Cornelius*, 105 S.Ct. at 3443. The Supreme Court held the federal government had not violated the legal defense funds first amendment rights. *Cornelius*, 105 S.Ct. at 3455. The Court held that the charity drive was a non-public forum, therefore, the government's desire to avoid political favortism was a valid justification to exclude the group, as was the desire to minimize disruption of the work place. *Cornelius*, 105 S. Ct. at 3451.

subject matter and speaker identity.[82] However, when making such distinctions, reasonable grounds for denial of access will not sanctify a regulation that is in reality a facade for viewpoint-based discrimination.[83]

D. The Development of the Right to Free Speech in the Context of High Schools

When dealing with first amendment rights and their limitations in schools, courts have developed the principle that first amendment rights must be considered in light of the special circumstances of the school environment.[84] In *Tinker v. Des Moines School District*,[85] three high school students had been suspended from school for wearing black arm bands in protest of the Vietnam war.[86] In holding that the students' conduct was protected by the free speech clause of the first amendment,[87] and the due process clause of the fourteenth amendment,[88] the United States Supreme Court found that first amendment rights are available to students.[89] As stated by the Court, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[90] The Court noted that the judiciary has consistently affirmed the position that school officials must be given full authority to prescribe and control conduct in the school,[91] yet this authority must not abridge fundamental constitutional safeguards afforded to the students.[92] *Tinker* set forth a test to determine whether a restriction on an expressive activity is justified.[93] A restriction is justified when the activity "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[94] Thus, the Court found that because the students' protest was not dis-

82. *Perry*, 460 U.S. at 49.
83. *Cornelius*, 105 S.Ct. at 3454.
84. Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).
85. 393 U.S. 503 (1969).
86. *Id.* at 504.
87. *Id.* at 505-06.
88. *Id.*
89. *Id.* at 506.
90. *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967), quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
91. *Tinker*, 393 U.S. at 507.
92. *Id.*
93. *Id.* at 513.
94. *Id.*

ruptive of the school environment or of other students' rights,[95] the School Board violated the students' right to free speech.[96]

When embarking on a forum analysis of access claims to schools and their environs, the court must identify and examine the nature of the property at issue[97] and its compatibility with expressive activity.[98] Additionally, the court must examine the school board's policies and practices to determine the type of forum the board intended to create.[99] Therefore, it is important to note that it may not be possible to apply a single rule across the board as to the type of forum a school and its environs will be classified. Access claims vary according to the particular forum sought to be utilized, and the policies and practices of the school boards differ depending on the forum.[100]

In *Grayned v. City of Rockford*,[101] the Court held that members of the general public may be afforded access to the public sidewalks surrounding a high school campus for expressive activity, provided that activity falls within the guidelines set by *Tinker*.[102] Justice Marshall, speaking for the Court, espoused

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95. *Id.* at 514. "The record does not demonstrate any facts which might have reasonably led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the schoolpremises in fact occurred." *Id.*

96. *Id.*

97. Cornelius v. NAACP, 105 S.Ct. 3439, 3446 (1985).

98. *Id.* at 3449.

99. *Id.* As stated by the Court in *Cornelius*:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.

Id.

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

101. 408 U.S. 104 (1972).

102. *Grayned*, 408 U.S. at 121. In *Grayned*, students, family members and friends, totaling approximately two hundred people, took part in a demonstration which was planned after school administrators did not respond to students' complaints. *Id.* at 105. Grayned had been arrested and convicted for participating in the demonstration in violation of an anti-picketing ordinance and an anti-noise ordinance. *Id.* at 106. Grayned challenged the constitutionality of the ordinances but did not insist that the ordinances had violated constitutionally protected activity. *Id.*

The anti-picketing ordinance, which the Court held to violate the Equal Protection Clause of the fourteenth amendment, provided that: "A person commits disorderly con-

the broad, liberal view of Justice Roberts in *Hague*,[103] stating that free expression "must not, in the guise of regulation, be abridged or denied."[104] Justice Marshall relied on *Tinker* in recognizing the need to apply first amendment rights in accordance with the special characteristics of the school environment.[105] He re-emphasized that "wide exposure to [the] robust exchange of ideas is an 'important part of the educational process and should be nurtured' ".[106] Thus, as with *Tinker*, the *Grayned* Court stated that free expression by students should not be barred from the school campus.[107] Noting that the general public does not have an absolute right of access to schools or their environs,[108] the Court applied *Tinker* and declared that curtailing the general public's free speech may be permitted only if such expressive activity "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[109] Justice Marshall explained that a determination must be made as to whether the manner of expression is basically incompatible with the normal activity of the particular place at a particular time to warrant curtailing the public's free speech.[110] The narrow restrictive view of Justice Holmes is evidenced in *Student Coalition for Peace v. Lower Merion School District*.[111] In *Student Coalition*, a non-school sponsored student organization[112] sought

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duct when he knowingly: (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit peaceful picketing of any school involved in a labor dispute . . . . " *Id.* at 107.

The anti-noise ordinance which the Court upheld as constitutional, provided in part: "No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . . . " *Id.* at 107-08.

103. 307 U.S. 496 (1939).

104. *Grayned*, 408 U.S. at 117 (quoting Hague v. CIO, 307 U.S. 496, 516 (1939)).

105. *Grayned*, 408 U.S. at 117.

106. *Id.* at 117 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 512 (1969)).

107. *Grayned*, 408 U.S. at 117.

108. *Id.* at 117-18.

109. *Id.* at 118 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969)).

110. *Grayned*, 408 U.S. at 116. *See* Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil will not interfere with a public library).

111. 776 F.2d 431 (3d Cir. 1985).

112. *Id.* at 433. The organization was dedicated to the cause of world peace through nuclear disarmament. *Id.*

access to the high school's athletic field to stage a Peace Fair.[113] Though the field had been regularly used for non-school community events,[114] the court determined that the field had not been designated as a forum for community events.[115] In finding a non-public forum,[116] the court concluded that the School Board's decision to deny the organization access to the field was reasonable.[117] The court based its conclusion on the School Board's desire "to keep the 'podium of politics off school grounds' "[118] and to maintain an appearance of neutrality.[119] The court noted that the Board's decision would be upheld as reasonable even if its fears of potentially disruptive political controversy proved to be unfounded.[120]

IV. THE COURT'S ANALYSIS

A. THE MAJORITY

1. *Newspapers as Limited Public Forums*

The Ninth Circuit began its analysis by discussing whether the school newspapers were public, limited, or non-public forums.[121] To make this determination, the court focused on the intent of the School Board as evidenced by the Board's publication policies and practices as well as the nature of the newspapers and their compatibility with expressive activity.[122] The court found that by their very nature, school newspapers are devoted entirely to expressive activity, since everything that appears in the newspaper is speech.[123] The court concluded that newspapers were the type of property most compatible with ex-

113. *Id.*

114. *Id.* at 433-34.

115. *Id.* at 437.

116. *Id.* The court in *Student Coalition* based its decision upon two factors: 1) The School Board's policy required that non-school sponsored organizations obtain permission to use the field. 2) The athletic field was not created for expressive activity. *Id.*

117. *Id.*

118. *Id.*

119. *Id. Cf* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (justifiable restriction on expressive activity when it "materially disrupts class work or involves substantial order or invasion of rights of others") *Tinker*, 393 U.S. at 513.

120. *Student Coalition*, 776 F.2d at 437.

121. *San Diego CARD*, 790 F.2d at 1476.

122. *See* Cornelius v. NAACP, 105 S.Ct. 3439, 3449 (1985).

123. *San Diego CARD*, 790 F.2d at 1476.

pressive activity.[124]

The court ultimately found that the Board created a limited public forum in the newspapers in two respects, as evidenced by the Board's policies and practices.[125] First, the Board allowed a certain group, the students, access to the newspapers to discuss any topic,[126] thereby creating a limited public forum similar to that in *Widmar*.[127] Second, the Board's policy governing the newspapers also entitled the general public access to the newspapers with the only content limits being that the advertisements had to offer goods, services, or vocational opportunities to the students.[128] Therefore, the court reasoned, the Board's intent to create a limited public forum was established.[129]

Having determined that the school newspapers constituted a limited public forum to which the right of access encompassed only those topics of similar character, the court found that the issue narrowed itself to a debate over the particular limitations the Board could impose on the topics the nonstudents wished to discuss in the newspaper.[130]

The court first examined the military ads the Board allowed to be published.[131] Agreeing with the district court, the Ninth Circuit found that the military ads published in the newspapers were vocational or career ads.[132] But the Ninth Circuit further held that the district court erred when it found that the military recruitment ads were nonpolitical.[133] In reaching this conclusion, the court reasoned that the government's interest in promoting

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124. *Id.*

125. *Id.*

126. *Id.* Students were subject to certain conditions which were not relevant to the issue before the court. *Id.*

127. *See supra* text accompanying notes 61-63.

128. *San Diego CARD*, 790 F.2d at 1476.

129. *Id. See also* City of Madison School Dist. v. Wisconsin, 429 U.S. 167 (1976) (limited public forum open to the entire public for the discussion of certain topics).

130. *San Diego CARD*, 790 F.2d at 1476. The Board contended that its policies permitted nor-students to engage only in non-political commercial speech. *Id.* at 1476-77. The Board also claimed that the military service advertisements were non-political, but CARD's advertisements were not. *Id.* at 1477. The District Court found that the military service advertisements (1) offered vocational or career opportunities to students and (2) were non-political. *Id.*

131. *Id.* at 1477.

132. *Id.*

133. *Id.*

military service is not based on economics, rather, it is essentially political or governmental.[134] The court reviewed the history of military service and found it to be both controversial and political in nature,[135] thereby negating the totally commercial aspect of the military ads.[136] Thus, the military ads printed in the school newspapers presented one side of a political dispute.[137] Through this analysis, the court found that the Board's *actual* policy permitted nonstudents to engage in speech which is both political and commercial, at least in respect to the military service topic itself.[138] "Having established a limited public forum, the Board [could] not, absent a compelling government interest, exclude speech otherwise within the boundaries of the forum."[139] No such interest was found to exist here.[140] Therefore, since CARD's advertisements were composed of the same political and commercial speech as the permitted military advertisements, the Board's exclusion of CARD's advertisements violated CARD's first amendment rights.[141]

2. *Newspapers as Non-Public Forums*

In the alternative, the Ninth Circuit held that even if the school newspapers were non-public forums, the Board nevertheless violated CARD's first amendment right to free speech.[142] The court held that the Board's conduct denying CARD access to publish its ads was unreasonable and constituted viewpoint-based discrimination.[143]

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134. *Id.*

135. *Id.* The court noted that opposition to military service has been present throughout the nation's history. *See, e.g.* United States v. Seeger, 380 U.S. 163 (1965) (discussing the history of conscientious objection). The student protests over military service in the late 1960's and 1970's also reflected the controversy. *See also* In re Summers, 325 U.S. 561 (1945) (attorney could be denied admission to state bar because of his opposition to military service).

136. *San Diego CARD*, 790 F.2d at 1478.

137. *Id.* at 1477.

138. *Id.* at 1478 (emphasis in original).

139. *Id.*

140. *Id.*

141. *Id. See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (once a limited public forum is established, the constitutional right of access extends only to other entities of similar character).

142. *San Diego CARD*, 790 F.2d at 1478.

143. *Id.*

In a non-public forum, restrictions on speech are upheld if they are reasonable and are not an attempt to engage in viewpoint discrimination.[144] The court, nevertheless, rejected all three of the Board's arguments that its exclusion of CARD's advertisements was reasonable.[145]

First, the court rejected the Board's contention that the advertisements' political character was a reasonable basis for exclusion.[146] The court stressed that because the published military advertisements were not solely non-political, but were in fact, of a mixed political and commercial nature,[147] the Board could not reasonably exclude CARD's advertisements when they pertained to the same politically controversial subject matter.[148]

Concerning the Board's second contention, that publication of the advertisements would promote non-registration for the draft, amounting to an illegal act, the court held that the Board could not imply that CARD sought to promote illegal activity based on its name alone.[149] The court noted that a state could prevent an individual's activities which are geared toward inciting or producing imminent lawless action where it is likely that illegal conduct will result.[150] However, since the Board did not produce any evidence to substantiate this claim, the court concluded that denying CARD access to the newspapers on the basis of speculation[151] was unreasonable.[152]

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144. *See supra* text accompanying notes 73-83.

145. *San Diego CARD*, 790 F.2d at 1480.

146. *Id.* at 1479.

147. *Id.*

148. *Id.* The Board's asserted policy allowed for restricting the publication of ads proffered by non-students, to non-political advertisements offering goods, services or vocational opportunities to students. *Id.* at 1476-77.

149. *Id.* at 1479.

150. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). The Court in *Brandenburg* reversed the conviction of a Ku Klux Klan leader for violating Ohio's Criminal Syndicalism Statute which prohibited the advocation of political reform through violence and the formation of groups formed to teach criminal syndicalism. *Brandenburg*, 395 U.S. at 444-45. The Court held that "[The state may not] 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." *Brandenburg*, 395 U.S. at 447.

151. *San Diego CARD*, 790 F.2d at 1479. The record disclosed the Board derived their allegation solely on the basis of CARD's name. *Id. See* Gay Students v. Bonner, 509 F.2d 652, 662 (1st Cir. 1974) (speculation that an individual may at sometime engage in illegal conduct is insufficient to justify a regulation).

152. *San Diego CARD*, 790 F.2d at 1479. "To the contrary, the record indicated that

The court also rejected the Board's argument that the advertisement exclusion was predicated out of desire to allow the students to utilize the newspapers as a forum for their own free expression, rather than as a forum for a host of nonstudent groups.[153] The court acknowledged that, practically speaking, the Board may impose access limits on the amount of nonstudent materials, but such restrictions may not be imposed arbitrarily or unreasonably.[154] The court found that the Board's treatment of CARD's advertisement was arbitrary because the Board was unable to distinguish how publication of CARD's advertisements would diminish the students' right of access, while the military advertisements would not do so.[155] Moreover, the Board did not present any objective system for limiting or choosing ads concerning the same subject matter.[156] Thus, the court found that the Board was unable to offer any reasonable basis upon which to justify the exclusion.[157]

Finally, the court held that the Board had exercised viewpoint-based discrimination because it had not provided a valid basis for denying CARD access to the same forum as that utilized by the military advertisements.[158] The Ninth Circuit reasoned that the only inference that could be drawn from the Board's publication of only pro-military recruitment advertisements was that the Board was barring CARD's anti-draft ads because of their content or message.[159] Since the Supreme Court

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CARD, through its advertisement, sought to apprise eligible students of legitimate and lawful alternatives to the draft, such as the availability of student deferments." *Id.*

153. *Id.* at 1480.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1481.

159. *Id. See* City of Madison v. Wisconsin, 429 U.S. 167 (1976) (School Board meeting open to the public; held, non-union teacher had the right to speak even though the subject pertained to pending collective bargaining negotiations). The Court stated: "To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees." *City of Madison*, 429 U.S. at 175-76. *See also* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (city ordinance prohibiting all picketing within one hundred and fifty feet of school except peaceful picketing of any school involved in a labor dispute held to be discriminatory). The Court in *Mosley* stated that "the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95.

had previously held in *Cornelius*[160] that such viewpoint-based discrimination is impermissible, even in a non-public forum,[161] this provided the majority with a second ground for finding the Board's actions violated the first amendment.[162]

B. DISSENT

Judge Wallace challenged the majority's conclusion that the Board's acceptance of the military ads created a limited public forum from which CARD's advertisements could not be excluded.[163] The dissent argued that the majority ignored the "teachings" of *Cornelius*.[164] It concluded that the school papers constituted a non-public forum and that the restrictions the Board sought to impose on CARD's advertisements were reasonable.[165] However, Judge Wallace believed that a remand was necessary in order to determine specifically whether the Board's rejection constituted viewpoint-based discrimination.[166]

Judge Wallace began his analysis by focusing on the issue of the identification of the forum itself.[167] He asserted that the correct forum at issue was not the newspapers in general, but rather, the newspaper advertising spaces, since CARD sought access only to the particular advertising spaces.[168]

Applying the *Cornelius* intent test,[169] the dissent argued that the Board's policies and practices did not represent an intention to grant general access to the newspapers' advertising spaces.[170] Judge Wallace relied on the Board's policy which gave the publication staff and advisor discretion to publish paid advertisements by nonstudents, if they determined that the advertisements would advance the newspapers' "primary purposes

160. 105 S.Ct 3439 (1985).
161. *Id.* at 3554.
162. *San Diego CARD*, 790 F.2d at 1481.
163. *Id.* at 1483.
164. *Id.*
165. *Id.* at 1485.
166. *Id.*
167. *See* Cornelius v. NAACP, 105 S.Ct. 3439, 3449 (1985) (defining forum according to access sought by the speaker).
168. *San Diego CARD*, 790 F.2d at 1483.
169. *See supra* text accompanying notes 56-60.
170. *San Diego CARD*, 790 F.2d at 1483-84.

sufficiently to warrant publication."[171] Judge Wallace reasoned that this policy, coupled with the practice of limiting advertisements to those offering goods, services, or vocational opportunities to students, indicated the Board did not intend to create a limited public forum.[172]

Applying the second prong of the *Cornelius* intent test, the dissent argued that the purposes of the advertising spaces were to teach students journalistic management and to help finance the publication of the newspapers, not to create a forum for expressive activity for nonstudents.[173] Therefore, the Board's policy enabling it to exclude CARD's advertisements should be upheld, in order to avoid disrupting the educational process.[174]

Finally, the dissent rejected the majority's contention that "if speech admitted in a forum relates to a 'controversial and political issue', the government has created a limited public forum that encompasses the issue."[175] Judge Wallace argued that such a test is in conflict with the government intent test set out in *Cornelius*.[176] The dissent asserted that if the majority's test were applied to *Cornelius*, health and welfare services would be considered "controversial and political", thereby opening up the campaign into a limited public forum from which legal defense and political advocacy organizations could not be excluded.[177] This result was expressly rejected by the Supreme Court in *Cornelius*.[178]

Having concluded that the school newspapers constituted a

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171. *Id.* at 1484.

172. *Id.* at 1483-84. *See also Cornelius*, 105 S.Ct. 3439. "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius*, 105 S. Ct. at 3451.

173. *San Diego CARD*, 790 F.2d at 1484. (There is no evidence in the record that the Board advanced this argument).

174. *Id.* Justice Wallace stated: "[O]ur obligation to apply First Amendment rights 'in light of the special characteristics of the school environment' ", (citing Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969)), "requires that we accept 'school policies that are reasonably designed to adjust those rights to the needs of the school environment.' " (citing Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982)). *San Diego CARD*, 790 F.2d at 1484.

175. *San Diego CARD*, 790 F.2d at 1484.

176. *Id.*

177. *Id.*

178. 105 S.Ct. 3439 (1985).

non-public forum,[179] Judge Wallace applied the *Cornelius* test to determine when restrictions on access to such a forum will be upheld.[180] Judge Wallace argued that the Board's denial of access to the newspapers was reasonable, for it was designed to avoid disruption in the school.[181] Though the School Board did not argue that publication of CARD's advertisement would cause disruption in the school, Judge Wallace stated that the Board was acting pursuant to a policy which was developed to limit disruption.[182]

While Judge Wallace agreed that military recruitment ads may tender political implications, he chose to follow the standard of review applicable to restrictions in non-public forums as set out in *Student Coalition for Peace v. Lower Merion School District*.[183] Under that test, a School Board need only draw a reasonable line between political and non-political speech.[184] The dissent concluded that the military ads were non-political and CARD's ads could reasonably be excluded as political.[185]

The dissent objected to the majority's inference that the Board's refusal of CARD's advertisements constituted viewpoint-based discrimination,[186] since it found the military ads to be non-political.[187] However, Judge Wallace stated that because none of the district court's findings explicitly addressed this issue, a specific finding on viewpoint-based discrimination should be determined on remand.[188]

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179. *San Diego CARD*, 790 F.2d at 1484.

180. *Id.* at 1483-84.

181. *Id* at 1485.

182. *Id.* at 1485 n.2.

183. 776 F.2d 431 (3d Cir. 1985). In *Student Coalition* the court maintained that the School Board was not required to delineate with absolute clarity the distinction between activities imposing political messages and those imposing non-political messages. *Id.* at 437. The line drawn need only be reasonable and not a facade for viewpoint discrimination. *Id.* Thus, an activity which may have an implicit political message, may be deemed non-political when such message is subsidiary to other aspects of the activity. *Id.*

184. *Id.*

185. *San Diego CARD*, 790 F.2d at 1485.

186. *Id.*

187. *Id.*

188. *Id.*

V. CRITIQUE

A. Limited Public Forum

The Ninth Circuit correctly followed precedent in holding that the School Board violated CARD's first amendment rights. The court properly concluded both that the school newspapers were limited public forums, and based on this, that the Board violated CARD's constitutional rights by refusing it access to the forum. By focusing on access to the school newspapers in general, rather than to the advertising spaces in particular, the majority ignored the dicta of *Cornelius v. NAACP*[189] that the courts must "take a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property."[190] Nevertheless, the majority correctly applied the *Cornelius* intent test and properly held that the school newspapers were a limited public forum.

The first prong of the *Cornelius* intent test involves an analysis of the government's policy and practice towards the forum at issue.[191] Here the Board's admitted policy was to allow the general public access to publish advertisements provided they offered goods, services, or vocational opportunities to the students.[192] However, since the Board allowed, on a number of occasions, mixed commercial and political advertisements pertaining to military service to be published in the newspapers,[193] its actual policy evinced an intent to open the forum for such speech. It must be noted that the court in *San Diego CARD* explicitly narrowed its holding to mixed commercial and political advertisements dealing only with military services.[194]

Perry Education Association v. Perry Local Educators' Association[195] can be distinguished from *San Diego CARD*. In *Perry*, the Court determined that a school mail system was a non-public forum for the School Board's policy and practice did

189. 105 S.Ct. 3439 (1985).
190. *Id.* at 3449.
191. *See supra* notes 56-58 and accompanying text.
192. *San Diego CARD*, 790 F.2d at 1476.
193. *Id.* at 1478.
194. *Id.*
195. 460 U.S. 37 (1983).

not render the mail system open to the general public.[196] Rather, the school had restricted its use to official business with very few exceptions.[197] Consequently, use of the system by an organization affiliated with the school, such as the teachers' exclusive bargaining union, did not convert the mail system into a limited public forum.[198] In *San Diego CARD*, however, the Board's admitted policy was to allow outside entities regular access to the newspaper advertising spaces.[199]

San Diego CARD can also be distinguished from the nonpublic forum found in *Cornelius*. In *Cornelius*, the government had developed extensive admission criteria and had consistently limited participation of groups soliciting funds in a charity drive conducted at a federal workplace.[200] In addition, the Court found that the federal workplace was not consistent with expressive activity.[201] In *San Diego CARD*, the School Board had not developed an extensive or objective system for limiting the number of advertisements to be published.[202] Furthermore, a school newspaper is a conduit for the dissemination of ideas[203] and serves as a communication channel for "wide exposure to [the] robust exchange of ideas."[204] Thus, student newspapers are an important aspect of the educational process and are intimately compatible with expressive activity.

The dissent in *San Diego CARD* lost sight of *Cornelius* when applying the second prong of the intent test. Judge Wallace did not focus on the nature of the school newspapers in which the advertisements were contained, as *Cornelius* requires.[205] Rather, Judge Wallace focused on the nature of the

196. *Id.* at 47.
197. *Id.*
198. *Id.* at 46-48.
199. *San Diego CARD*, 790 F.2d at 1476.
200. Cornelius v. NAACP, 105 S.Ct 3439, 3451 (1985).
201. *Id.*
202. *San Diego CARD*, 790 F.2d at 1480.
203. *See* Gambino v. Fairfax City School Bd., 429 F. Supp. 731 (E.D. Va 1977) (high school newspaper a public forum publication of article concerning birth control could not be suppressed solely because the School Board did not deem it appropriate course content), *aff'd*, 564 F.2d 157 (4th Cir. 1977). *See also* Zucker v. Panitz, 299 F. Supp. 102 (1969) (high school students were entitled to place advertisements in opposition to Vietnam war in the school newspaper).
204. Tinker v. Des Moines School Dist., 393 U.S. 503, 512 (1969).
205. *See supra* notes 56-60 and accompanying text.

advertising spaces specifically, thereby limiting his analysis on the compatibility issue.

The dissent erroneously stated that the majority purported to introduce a test in direct conflict with the *Cornelius* intent test.[206] In summarizing the majority's conclusion that the school newspapers constituted a limited public forum, Judge Wallace stated "[t]he majority's . . . conclusion rests on its mistaken belief that if speech admitted in a forum relates to a 'controversial and political' issue, the government has created a limited public forum that encompasses the issue."[207] However, the majority did not rest its conclusion on such a test. As explained, the court properly applied the two prong test of *Cornelius*.[208] In keeping with the analysis in *Perry*,[209] when the government has created a limited public forum open to the general public for a discussion of certain topics, the constitutional right of access encompasses only those topics of *similar* character.[210] Military service, the topic of CARD's advertisement, clearly fell within the perimeters of the limited public forum since military service advertisements had previously been published.

Having found a limited public forum encompassing political military advertisements, the court correctly held that the Board violated CARD's first amendment rights when it denied CARD access, since the Board failed to advance a compelling government interest for its actions.[211]

B. Non-Public Forums

Even if the student newspapers were non-public forums, the court correctly held that the Board's restrictions on access were unreasonable and constituted viewpoint-based discrimination.[212] The *Perry* Court explained that regulations must be assessed in light of the purpose of the forum and all the surrounding circumstances in order to preserve the forum for its intended pur-

206. *San Diego CARD*, 790 F.2d at 1484.
207. *Id.*
208. *See supra* text accompanying notes 121-129.
209. 460 U.S. 37 (1983).
210. *Id.* at 48.
211. *San Diego CARD*, 790 F.2d at 1478. *See supra* text accompanying notes 64-66.
212. *San Diego CARD*, 790 F.2d at 1478.

pose.[213] Applying the test set out in *Tinker v. Des Moines School District*,[214] the School Board did not produce any evidence to prove that granting publication of CARD's advertisements would materially disrupt classwork or involve substantial disorder or invade the rights of others.[215] In addition, since the purpose of the advertising spaces was to offer goods, services, or educational opportunities to the students, CARD's advertisements would not have interfered with the purpose of the newspapers as communicative channels.

Purporting to rely on *Cornelius*, the dissent maintained that CARD's advertisements could reasonably be excluded to avoid disruption in the schools.[216] In *Cornelius*, the Court stated that "[g]overnment need not wait until havoc is wreaked to restrict access in a non-public forum."[217] However, broad assertions of possible disruptions must be substantiated with evidence, though that evidence need not be conclusive.[218] The Court in *Cornelius* found that enough evidence was presented to show that the continued participation of the advocacy groups in the charity drive would be detrimental to the Campaign and disruptive of the federal workplace.[219] However, in *San Diego CARD*, no evidence was offered to substantiate the claim that CARD's advertisement would cause disruption in the schools.[220]

San Diego CARD can also can be distinguished from the other key case relied upon by the dissent, *Student Coalition for Peace v. Lower Merion School District*.[221] In that case, the Board sought to deny a political student group access to the school's athletic field in order to maintain the appearance of neutrality.[222] The court in *Student Coalition* reasoned that since the Board had not allowed *any* other political groups access, the Board could then reasonably exclude the politically oriented

213. *Perry* 460 U.S. at 46. *See supra* notes 79-83 and accompanying text.
214. 393 U.S. 503 (1969).
215. *San Diego CARD*, 790 F.2d. at 1480 n.10.
216. *Id.* at 1485.
217. 105 S.Ct. at 3453.
218. *Id.* at 3453-54.
219. *Id.* Evidence presented included letters from employees, managers and members of Congress expressing concern over admittance of the organizations, over one thousand telephone complaints, and a decline in the number of contributions. *Id.*
220. *San Diego CARD*, 790 F.2d at 1480 n.10.
221. 776 F.2d 431 (3d Cir. 1985).
222. *Id.* at 437.

Peace Fair.[223] In *San Diego CARD*, the School Board did not exclude *all* politically controversial advertisements from publication. Therefore, since one side of the politically controversial question of military service was espoused, neutrality was lost. There could then be no justification for the exclusion of CARD's viewpoint.[224]

VI. CONCLUSION

In *San Diego CARD*, the Ninth Circuit found that an anti-draft organization's first amendment rights were violated when it was denied access to publish advertisements in several high school newspapers. The conflict presented by the majority and dissenting opinions reflects the long standing battle between those holding a liberal view of first amendment freedoms and those adhering to a more restrictive approach. The majority's liberal approach, upholding the right of free speech, is essential in the school context, for it is in the schools where our nation's young are first introduced to our democratic system. Students must be allowed the freedom to assimilate unpopular and controversial views to fully develop their own political beliefs and values. An understanding of this principal seems to underlie the majority opinion in *San Diego CARD*.

*Maureen Mullane**

223. *Id.*

224. *See also* Greer v. Spock, 424 U.S. 828 (1976). In *Greer*, the Court found a regulation banning political speeches and demonstrations on a military base to be reasonable and not view-point-based discrimination. *Id.* at 838-40. The purpose of the base was to train soldiers, and like the school policy in *Student Coalition*, Fort Dix's policy did not allow for *any* partisan political campaigns on the base. *Id.* at 839. Therefore, it could not be said that the base was discriminating against one particular viewpoint since *no* political viewpoints were granted access. *Id.* at 838-839. (emphasis added).

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