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The First Amendment in Conflict: Advertising Access to State University Student Newspapers

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THE FIRST AMENDMENT IN CONFLICT: ADVERTISING ACCESS TO STATE UNIVERSITY STUDENT NEWSPAPERS

I. INTRODUCTION

The first amendment guarantees citizens the right to freedom of speech. Additionally, the freedom of the press clause prohibits governmental intervention with the media. No mention is made, however, of a citizen’s right to speak freely through use of the press. Consequently, a question arises concerning the scope of a person’s right to publish a message in the press. This comment will address the issue of publication access to the newspapers of state-affiliated universities, colleges and junior colleges. In particular, it will determine a citizen’s right to publish both commercial and editorial advertisements in student newspapers. The comment proposes that the constitutional conflict between speaker and student press be resolved in favor of the press. This conclusion is based on a balancing of constitutional rights and a finding that freedom of the press does not differentiate between private and student publications. Resolution of this conflict will give both student editors and those seeking to disseminate their ideas a clearer picture of their rights. Additionally, a solution of this conflict will present a more cognizable standard for granting or denying a right of publication to student newspapers.

Freedom of the press is a right made explicit by this country’s founders nearly two centuries ago. Yet, it is only in recent decades that courts have been called upon to articulate the meaning and scope of this important guarantee. A little over ten years have passed since the United States Supreme Court held in Miami Her-
ald Publishing Co. v. Tornillo that a private newspaper has a constitutional right to determine if it will or will not publish a given article, editorial or advertisement. Much confusion, still remains, however, regarding the right of a newspaper affiliated with a state-supported institution to refuse to publish a proffered advertisement. The connection of the newspaper to the state, as in the case of a state university or college, allows those seeking access to the newspaper to employ the state action doctrine. Thus, a person seeking to publish material may use the newspaper's connection with the state to argue that refusal to print the material violates the speaker's right of freedom of speech. On the other hand, compelling publication will impair a student editor's power of discretion under the free press clause.

The problem presented is which of two first amendment rights, freedom of the press and freedom of speech, has supremacy. As stated in Mississippi Gay Alliance v. Goudelock: "The search must be for a reconciliation between the interests, on the one hand, of student autonomy in control over the contents of the newspaper, and, on the other, of nondiscriminatory public access to a communication forum sponsored by the state." Reconciling the conflict between these issues will help alleviate the uncertainty student editors face in deciding whether to grant or refuse access and will allow them to make such decisions with knowledge of the legal implications.

Resolution of this issue involves consideration of a number of constitutional doctrines. This comment first discusses the rights of student editors and the student press under the first amendment. It reviews claims that student newspapers are public forums and thus should be compelled to grant access on a content-neutral basis. The discussion will then shift to the distinction between commercial and

7. In Tornillo, appellee, a candidate for the Florida House of Representatives, sought an injunction forcing the Miami Herald to print verbatim his response to editorials critical of his candidacy. His suit was based on a Florida statute giving candidates a right of reply to newspaper comments assailing the candidate's personal or official record. 418 U.S. at 243-44. The Court ruled for the Miami Herald, holding the right of reply statute violated the first amendment guarantee of freedom of the press. Id. at 258.
8. See infra notes 85-91 and accompanying text.
10. 536 F.2d at 1087 (Goldberg, J., dissenting).
11. Throughout this comment, the term "student newspaper" will be used to refer to the newspapers of state university, state college and state junior college campuses. For a discussion of the rights of student newspapers of private colleges, see Comment, Freedom of the Press on the College Campus, 9 New Eng. L. Rev. 153 (1973).
noncommercial advertisements and the possibility of granting greater access to one type of advertising versus another. Next, the comment addresses the state action doctrine and the role it has played in prior court decisions. It then discusses the conflicting constitutional rights of the student press and prospective speakers and the need for a more concrete policy of advertising access to student newspapers. Finally, the comment concludes that a student editorial decision to refuse to print an advertisement should be granted the same constitutional protection as a similar decision at a private newspaper.

II. STUDENT FIRST AMENDMENT RIGHTS

The United States Supreme Court has held that the first amendment applies to persons attending state universities and colleges,\(^\text{12}\) as well as to students in secondary and grammar schools.\(^\text{13}\) In addition, the Court has concluded that university administrators are prohibited from interfering with student expression through regulation of student groups\(^\text{14}\) or censorship of the student press.\(^\text{15}\)

In *Healy v. James*,\(^\text{16}\) the Supreme Court held that the president of Central Connecticut State College could not prohibit the formation of a campus chapter of the Students for a Democratic Society (SDS).\(^\text{17}\) Although dealing with a student group, *Healy* has been interpreted to prohibit any prior restraints on the publication of a student newspaper or any attempts to censor a student paper's

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12. *Healy v. James*, 408 U.S. 169 (1972). "At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment." Id. at 180.
13. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), which held that high school and junior high school students were free to express their opinions, even on controversial subjects, during school hours as long as this expression did not "materially and substantially" interfere with the operation of the school. Id. at 513.
16. 408 U.S. 169.
17. 408 U.S. at 187. Justice Powell's majority opinion stated that refusal to recognize the group operated as a prior restraint because the president's decision denied the students their right to associate, and was made prior to any S.D.S. action that could warrant such a sanction. Justice Powell stated that: "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as those views may have been . . . the mere expression of them would not justify denial of First Amendment rights." Id. at 187. The opinion also stated that such a prior restraint placed a "heavy burden" on the college to demonstrate the appropriateness of its action. Id.

A prior restraint is an act to suppress expression before it occurs. The effect of a restraint is to also stop any activity which might result from the expression. The Supreme Court has opposed prior restraints in all but the most exceptional situations. *Near v. Minnesota*, 283 U.S. 697 (1931).
The Court granted similar protection to off-campus student newspapers in *Papish v. University of Missouri Curators*.

In *Papish*, the Court held that the expulsion of a graduate student for distributing a non-affiliated newspaper that offended "conventions of decency" violated the first amendment. The decision stated that the university could not suppress non-obscene ideas no matter how offensive they were to good taste.

Consequently, offensive or controversial expression may not be suppressed in an affiliated student publication.

Lower courts have applied these decisions to hold that a college or university may not act to censor the contents of an affiliated student newspaper.

According to one such case, a university can only act to regulate the content of a student newspaper when the regulation is shown to be "necessarily related to the maintenance of order and discipline within the educational process." Arguably then, a state university can only force publication of material in a student newspaper if failure to publish the message would interfere with the educational process. Such a conclusion is logical in light of *Tornillo*, which granted private newspapers a similar protection from government interference.

Although a university or college is not compelled to establish a student newspaper, once it has recognized such an activity, the courts have decreed that administrators may not dictate what a stu-

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20. Id. at 670.


22. Antonelli v. Hammond, 308 F. Supp. 1329. In *Antonelli*, the student editor of the Fitchburg State College newspaper challenged a university requirement that all material submitted for publication first be approved by a faculty advisory board. University funding of the paper was contingent on the advisory board's approval of each issue. *Id.* at 1332.

The Massachusetts District Court held that the school's position as a financial backer of the newspaper did not give it a right of editorial control. *Id.* at 1337. Furthermore, it ruled that allowing the administration to use the campus newspaper as a vehicle for ideas that only the state deems appropriate is inconsistent with the first amendment.

23. 308 F. Supp. at 1337.

dent publication will or will not print. It is still uncertain, however, to what extent the Constitution affords a student editor the right to control the contents of his newspaper. Lower courts have suggested that the prohibition of a right of access granted to private newspapers in the *Tornillo* case may extend to the editors of student newspapers. In *Kania v. Fordham*, the court went so far as to note that the "student press is entitled to the same general protections afforded privately owned newspapers." The Ninth Circuit Court of Appeals has also suggested that a state-supported university newspaper is free to exercise "subjective editorial discretion" in rejecting a proffered article.

One court, however, has refused to extend the private publisher holding of *Tornillo* to the college newspaper setting, particularly in regard to the advertising portion of a paper. Instead, the court held that those persons willing to pay to have their message published in a state college paper should be granted a right of access under the public forum doctrine. This doctrine provides for public access to state-owned forums, such as college newspapers, which can be used as a means of expression.

### III. The Public Forum Doctrine

Traditionally, the public forum doctrine has provided that certain publicly owned facilities—such as parks, streets, and common areas—are available to citizens for assemblies, discussions and other

26. See, e.g., Kania v. Fordham, which held that a university could not compel its student newspaper to provide access to those disagreeing with its editorial position. The court stated that granting such access would violate freedom of the press under *Tornillo*. 702 F.2d at 477 n.5.

The court in Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, cited the *Tornillo* case in holding that the choice of material for a newspaper is an exercise of editorial discretion. Such freedom of choice cannot be subject to governmental regulation and still be consistent with first amendment guarantees.

27. 702 F.2d 475 (1983).
28. *Id.* at 477 n.5.
31. See Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), in which the Court described the public forum doctrine as the notion that: "streets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Id.* at 315.
expressive activity. More recently the doctrine has been expanded to include municipal theaters, university buildings, and, in some instances, student newspapers.

In a recent case dealing with the public forum doctrine, the Supreme Court attempted to bring some uniformity to the public forum area. In Perry Education Association v. Perry Local Educators Association, the Court stated that public property may be categorized three ways for public forum purposes. The three categories are: those areas that are traditional public forums, those that are limited public forums, and those that are not public forums. Each category provides for varying degrees of protection for free speech ranging from stringent protection for traditional public forums to no protection for property which is not a public forum. In addition to the Perry factors, it is also necessary to examine the compatibility of


33. In Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975), the promoter of the rock musical "Hair" filed suit after city officials in Chattanooga, Tennessee rejected an application to use the municipal theater. The Supreme Court ruled for the promoter, stating the city's rejection was an invalid prior restraint. Id. at 556-57.

34. Widmar v. Vincent, 454 U.S. 263 (1981), held that a state university could not exclude a religious group from using university building on the basis of the religious content of the group's speech. The buildings previously had been open for use by all student groups. Id. at 277.

35. Lee v. Board of Regents, 306 F. Supp. 1097, in which the court ruled for advertising access to a student newspaper under both state action and public forum doctrines.

36. 103 S. Ct. 948 (1983). The Perry Court held that a teachers union could enter into an agreement with a public school district prohibiting a rival teachers union from using teacher mailboxes at the public schools. Justice White's majority opinion stated that public property that is not traditionally a public forum, the mailboxes in this case, may be reserved for its intended use so long as the regulation on speech is reasonable and is not designed to suppress expression merely because public officials oppose the speaker's views. Id. at 955.

37. Id. at 954-55. Such forums have "immemorially been held in trust for use of the public." Id. in such instances, the state may enforce content-based restrictions only if there is a compelling interest that is narrowly drawn to achieve the desired end.

38. Id. at 955. A limited public forum is an area where the state has opened up public property as a place where the public may carry out expressive activity. Once this property is opened up for such activity, it is subject to the same standards as those governing a traditional public forum. Id.

Although opening up public property to expressive activity may create a public forum, Justice White qualified this by stating that the property must be opened to "indiscriminate use by the general public." Id. at 956. Thus, it is arguable that public property that is not open for such indiscriminate use is not a public forum.

39. Id. Public property that is not a forum for public communication allows for greater restrictions on expressive activity. Under this category, the government may limit or prohibit expressive activity as long as the regulation on speech is not designed to merely suppress expression of the speaker's view. Id.
Because *Perry* is a recent case, no court has applied its public forum test to a student newspaper. However, two student publication cases decided prior to *Perry* produced differing results on the public forum question.

In *Lee v. Board of Regents*, plaintiffs successfully used the public forum doctrine to gain advertising access to a student newspaper, the Royal Purple. The *Lee* court held that as a campus newspaper "the Royal Purple constitutes an important forum for the dissemination of news and expression of opinion. As such a forum, it should be open to anyone who is willing to pay to have his views published therein—not just commercial advertisers." Consequently, under *Lee*, the courts may use the doctrine to force a student newspaper to print an advertisement if the paper is found to be a public forum.

However, the court in *Avins v. Rutgers* reached a contrary result in deciding an access claim to the state university's student law review. The *Avins* court based its ruling on the incompatibility of

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40. Brown v. Louisiana, 383 U.S. 131, 142 (1966). In *Brown*, the Court reversed the conviction of a group of blacks who had refused to leave a segregated public library. The Court held that a silent protest was compatible with the primary function of the library.

41. It is the author's contention that a student newspaper is not a public forum under *Perry* because access to such newspapers is controlled and is not indiscriminate. See *supra* note 38.


43. *Id.* at 1100-01. In *Lee*, the plaintiffs sought relief under 42 U.S.C. § 1983 after the Royal Purple, the student newspaper of Wisconsin State University at Whitewater, refused to publish three editorial advertisements.

42 U.S.C. § 1983 states:

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


Those persons seeking access to student newspapers under this section allege the university or college, and its affiliated paper, is a state actor. Consequently, the newspaper is violating plaintiff's rights under § 1983 in denying publication of an advertisement.

The three advertisements in *Lee* dealt with a university employees union, alleged discrimination, and race relations and the Vietnam War. 306 F. Supp. at 1099. The proffered advertisements were rejected under a policy that prohibited the publication of "editorial advertisements" in the Royal Purple. The university's Student Publications Board, a faculty-student committee that reviewed the general policies of student publications, had adopted the advertising guidelines. The court stated that "editorial advertisements" were those advertisements that express a view on political issues in the broad sense of the word. 306 F. Supp. at 1099.

44. 306 F. Supp. at 1100-01.

the desired expression with the forum. In *Avins*, the Third Circuit ruled that the plaintiff, author of an article rejected by the law review editors, failed to demonstrate that he had a right of access to the law review despite the journal's affiliation with a state university. Furthermore, recognizing that not all forums are compatible with public expression, the court found public access incompatible with the editorial judgment exercised by the law review editors. Although the law review was connected with the state due to its affiliation with the university, the court held that this connection did not lessen the law review editors' exercise of editorial discretion.

The *Avins* court's recognition of the importance of editorial judgment in a public forum raises the possibility of state forums granting or denying access to newspapers on the basis of content. Although content discrimination has been explicitly prohibited by the Supreme Court in the context of other public forums, the Court has yet to consider the access question in light of a conflicting first amendment right—that of the student press to operate free from governmental interference.

In addition to the compatibility of the desired expression to the forum, the existence of alternative means of access to the target audience will influence a court's decision to grant or deny access. If an alternative forum is not available, exclusion of the speech from the university newspaper will prevent the speaker from communicating with the target audience altogether. Such a possibility has led one commentator to argue for limiting a student editor's right to exclude material in favor of assured access to the target audience:

> [I]t is precisely the paper's near monopoly that makes crucial its recognition as a public forum. The school paper case is quite unlike the case of the state university law review in this respect; normally a school newspaper is the only significant print medium focusing on the school community. Thus there is a sound reason for limiting the editor's discretion to present a one-sided view of the issues. The point is not that the first amendment commands a school-imposed "fairness doctrine" for school newspapers, but that it may command some rule of guaranteed access to the newspapers' pages for those opposing the

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46. In this finding, the court stated that "each particular avenue for expression presents its own peculiar problems." *Id.* at 153.
47. *Id.* at 153-54.
This argument to limit editorial discretion may only be relevant if the student newspaper is determined to be a public forum under the Perry test. If the newspaper is not a public forum, the student newspaper with a campus audience is analogous to a private newspaper enjoying a monopoly in its publishing area. In particular, small towns with only one newspaper create a situation similar to that of a college campus. No right of advertising access is granted in these situations—indeed, compelled access in the private newspaper/small town situation would be unconstitutional under Tornillo because that decision prohibits any interference with the contents of a private newspaper. Consequently, a lack of alternative forum should not compel access to student newspapers if the newspaper is not otherwise a public forum.

Alternative access includes the question of the effectiveness of the alternative forums at disseminating an advertisement. To warrant access, can a speaker claim that a student newspaper is the only effective means of reaching the "relevant audience" when other less effective forums are available? Additionally, the "quality and credibility" of the forum employed will potentially influence the recipient's perception of the message. Thus, the impact of a message "will vary depending on whether it is found in a leaflet handed out by the speaker, read in a major newspaper or viewed on television."

The advantage of a student newspaper over alternative campus forums, however, is questionable. Although the paper may reach a larger audience at less cost than alternative forums, the message may attract less attention depending on its location in the paper, the sur-

50. Id. at 257.
51. The court in Associates & Aldrich, 440 F.2d 133, held the Los Angeles Times was not "subject to control for the public good" despite its control of 80% of the morning circulation in the Los Angeles area. Id. at 134.
52. In 1980, there were 1,260 cities in the United States with populations between 10,000 and 25,000. At that same time there were 931 daily newspaper serving cities with populations of 25,000 or less. Similarly, in 1980 300 daily newspapers served 526 cities with populations between 25,000 and 50,000. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1982-83) at 21,562.
53. 418 U.S. at 258.
55. Id. at 1436.
56. Id.
rounding material and the size of the newspaper.\textsuperscript{57} Thus, an argument for access under the public forum doctrine should concentrate on whether the newspaper is a public forum, whether the speech is compatible with the forum, and whether there are alternative vehicles for the speech. A decision on whether to grant advertising access to a forum may also depend on the nature of the message as commercial or editorial. This distinction is relevant in determining the message’s compatibility with the forum and also raises the question of differing levels of constitutional protection.

IV. COMMERCIAL AND EDITORIAL SPEECH

The courts have long made a distinction between the rights of a speaker with a commercial message versus those of a speaker seeking to express a noncommercial message.\textsuperscript{58} The Supreme Court greatly narrowed this gap, however, in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.}\textsuperscript{59} In \textit{Virginia Pharmacy}, the Court extended first amendment protection to commercial speech—\textit{that which does “no more than propose a commercial transaction.”}\textsuperscript{60} The result of this decision is that student newspapers may now be forced to grant access to commercial speech. Previously, papers have denied such access because commercial speech was not afforded first amendment protection.

Despite the elevation of commercial speech to a level of first amendment protection, the Court indicated that some types of com-

\begin{footnotesize}
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\item \textsuperscript{58} In \textit{Valentine v. Chrestensen}, 316 U.S. 52 (1942), the Court held that the first amendment protected persons communicating information or disseminating opinions. However, it ruled the constitution imposed “no such restraint on government as respects purely commercial advertising.”
\item \textsuperscript{59} \textit{Virginia Pharmacy}, the Court struck down a state regulation prohibiting a pharmacist from publishing or advertising prices for prescription drugs. The Court stated that while the advertiser’s interest may be purely economic, this profit motive does not make the speech deserving of less protection. \textit{Id.} at 761.
\item \textit{Id.} at 762.
\item \textit{Id.} at 763. The Court also stated that all commercial advertising is of value: Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in a large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable. \textit{Id.} at 765.
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commercial speech are deserving of less protection. For example, false or misleading commercial speech may be excluded from constitutional safeguards. Additionally, the Court's overall treatment of commercial speech still appears to be less protective than that of noncommercial speech.

A. Commercial Speech and the Press

A private newspaper's ability to refuse to publish a commercial advertisement has never been an issue. Prior to the Virginia Pharmacy decision, private publishers could reject a commercial advertisement, as such speech was not constitutionally protected. Following the Court's ruling in the Tornillo case, the constitutional status of commercial speech had no bearing on a right to publish. Under Tornillo, private newspapers were free to limit access to all types of speech in any way they chose. The issue of commercial access to state-affiliated student newspapers, however, has not been resolved. Indeed, no case has arisen in the student press arena dealing solely with the issue of commercial speech.

The Virginia Pharmacy ruling may have served to create an issue of commercial speech access where none existed before. Under prior decisions, such as Associates & Aldrich v. Times Mirror, Co., a state university newspaper could argue that it had a right to exclude commercial speech as deserving of less constitutional protec-


See also Barrett, The Uncharted Area: Commercial Speech and the First Amendment, 13 U.C.D. L. REV. 175 (1980).

63. Virginia State Bd. of Pharmacy, 425 U.S. at 771; Friedman v. Rogers, 440 U.S. at 9; Central Hudson Gas & Elec., 447 U.S. at 563-64.

64. See Orahlik v. State Bar Ass'n., 436 U.S. 447, reh'g denied, 439 U.S. 883 (1978), in which the Court stated: "We instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." Id. at 456.

See also Friedman v. Rogers, 440 U.S. at 10 n.9; Central Hudson Gas & Elec., 447 U.S. at 563.

65. In Associates & Aldrich Co., 440 F.2d at 136, the Ninth Circuit held that the Los Angeles Times was free to exercise editorial control over commercial advertisements.


67. Although the Lee and Goudelock cases dealt with advertising access to the student press, the advertisements in those cases dealt with noncommercial speech. See infra notes 85-98 and accompanying text.

68. 440 F.2d 133.
tion than other types of speech. This argument has been weakened by the newly recognized constitutional protection of commercial speech.

A student newspaper editor now finds himself faced with the prospect of being forced to publish all commercial advertisements. Should he be forced to publish solicitations to patronize objectionable businesses, such as those committing unfair labor practices or advancing unpopular views? Likewise, should the newspaper be forced to publish advertisements for guns, cigarettes or other potentially harmful products? The answer should be "no."

Despite the Virginia Pharmacy ruling, commercial speech is deserving of less constitutional protection than noncommercial speech. Therefore, student newspapers arguably have the latitude to exclude commercial advertisements. Additionally, student newspapers should be allowed to reject commercial advertisements on a class basis. A class ban would prohibit ads for a particular product, such as guns or cigarettes, regardless of the advertiser. A similar ban on television and radio advertising of cigarettes has been in effect since 1971.

Although this government ban operates in a very limited context, a similar non-governmental class ban should not offend the constitutional protection of commercial speech. The constitutionality of a class ban is contingent upon equal application of the ban to all advertisers of a product.

As already mentioned, the commercial advertising access problem is unique to state-affiliated publications. The relation of a student newspaper to a state university implicates the doctrine of state action—perhaps the major obstacle to editorial discretion denying

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69. Id. at 136.
70. See supra notes 58-61 and accompanying text.
71. See Karst, supra note 49, at 257, n.37.1. In Karst, the author questions the constitutionality of state university newspapers' refusal to grant advertising access to Gallo Wineries on the ground that it had been charged with unfair labor practices.
72. Metromedia v. City of San Diego, 453 U.S. 490 (1981). In Metromedia, the Court reviewed a number of its recent commercial speech decisions and determined that such speech is granted less constitutional protection than noncommercial speech. Id. at 505-12. The decision held the portion of a municipal ban on billboards containing commercial speech was valid. However, the Court invalidated the ordinance on its application to noncommercial speech. Id. at 513-17.

See also Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983), in which the court upheld a ban on municipal liquor advertisements. In this instance the sale of beer was legal in the county where the campus was situated and where the campus newspaper was distributed. Under the Mississippi statute, however, liquor sales were illegal in other areas of the state.
advertising access. Under this doctrine, speakers allege that a student newspaper's public university affiliation classifies the paper as a state actor. Consequently, a paper's refusal to print an advertisement constitutes a state act in violation of the speaker's constitutional rights.

V. STATE ACTION

Those persons suing to gain access to a student newspaper under the state action doctrine have alleged that the publication's refusal to print the desired material violates their rights of freedom of speech and equal protection of the laws. However, the Supreme Court has recognized that purely private action is not subject to the requirements of the first or fourteenth amendments. Therefore, plaintiffs must demonstrate a state interference with their constitutional rights in order to compel publication of their material.

A. Application of State Action Doctrine

The principle of state action was first articulated in the Civil Rights Cases, a group of suits brought by black citizens who had experienced discrimination in obtaining hotel rooms, theater tickets and seating in railroad cars. The plaintiffs alleged various violations of the Civil Rights Act of 1875. In ruling against the plaintiffs, the Supreme Court held that the violations alleged were the result of purely private activity and thus, were not within the pur-


75. 306 F. Supp. 1097, 536 F.2d 1073.

76. The Court stated in Hudgens v. NLRB that:
   It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state . . . [citation omitted]. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

424 U.S. at 513.

77. "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

"[P]rivate conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

78. 109 U.S. 3 (1883).

79. Id. at 4-5.

80. Id. at 4.

81. Justice Bradley stated:
view of the fourteenth amendment.82

The state action doctrine has continued intact since the ruling in the Civil Rights Cases. However, no concrete test for determining the presence or absence of state action has been formulated. The result is a certain amount of confusion in determining when an act can be attributed to the state,83 thus triggering the protections of the first and fourteenth amendments.84

The problems involved in determining the presence of state action are readily apparent in the cases dealing with access to state college and university publications. In Lee,86 plaintiffs sought relief on state action grounds, in addition to the public forum doctrine, in order to force the Royal Purple to publish three advertisements.86 The proffered advertisements were rejected under an advertising policy that prohibited the publication of "editorial advertisements" in

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.

Id. at 13.
82. Id. at 24-25.
83. Justice Rehnquist stated in Jackson v. Metropolitan Edison Co. that: "While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." 419 U.S. 345, 349-50 (1974).

See, e.g., Comment, Beyond Weighing and Sifting: Narrowing Judicial Focus as an Alternative to Burton v. Wilmington Parking Authority, 5 PEPPERDINE L. REV. 95 (1977) [hereinafter cited as Narrowing Judicial Focus].

84. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948). In this case, the Supreme Court stated that judicial enforcement of a racially restrictive covenant constituted state action because no discrimination could occur without the court's action. Consequently, the state was prohibited from becoming involved in the enforcement of the covenant; Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). In Burton, the Court held that a private restaurant's refusal to serve a black man constituted state action because the restaurant was located in a publicly owned parking garage. Among the factors contributing to a finding of state action were that the garage and land were publicly owned, that the profits from the restaurant aided in the financial success of a public agency and that the restaurant was an integral part of the facility. Id. at 723-24; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1971). The Court held the state's regulation of a private club's liquor license did not constitute a sufficient relationship with the government to find state action; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In this case, the Court ruled the actions of a state-regulated public utility, which enjoyed a partial monopoly, did not constitute state action. As in Moose Lodge, the Jackson majority did not find the "symbiotic relationship" present in Burton to link the utility with the state. Id. at 357.

85. 306 F. Supp. 1097.
86. Id. at 1099. See supra note 43.
the Royal Purple.

The district court held that the university president's support of the policy and the possibility that the regents could enforce the policy constituted state action. The court stated: "There can be no doubt that defendants' restrictive advertising policy—a policy enforced under color of state law—is a denial of free speech and expression in violation of the First and Fourteenth Amendments."

The Lee court determined that state action was present because the regents had a potential right to enforce the advertising policy. This finding is tenuous when other factors, not discussed in the opinion, are examined. In reviewing the newspaper's connection with state authority, the opinion makes no mention of the management structure of the Royal Purple, the editorial discretion allowed the student editor, or the method of financing the newspaper. Despite this dearth of factual support, the court determined that the regents' connection was sufficient to place this case on "the Burton side of the [state action] line drawn in the Civil Rights Cases" and to find state involvement present. The Fifth Circuit made a contrary finding, however, in Mississippi Gay Alliance v. Goudelock—a case with facts similar to those of Lee.

In Goudelock, the Mississippi Gay Alliance sought a court order under 42 U.S.C. section 1983 compelling publication of an advertisement in The Reflector, the student newspaper of Mississippi State University. The student editor, Bill Goudelock, had refused

87. The court's words were: "[T]he fact that the Board of Regents may have the power to enforce the policies in question." 306 F. Supp. at 1100.

88. Id. at 1100. The court further found that in accepting commercial and public service advertisements, yet rejecting editorial advertisements, the Royal Purple and the university were creating an "impermissible form of censorship." Id. at 1101. The court cited Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967) as controlling. Lee v. Board of Regents, 306 F. Supp. at 1101. Wirta held that a county transit district's policy of refusing advertisements of a political or controversial nature, while allowing purely commercial advertisements, violated the first amendment. Contra, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

89. 306 F. Supp. at 1102.

On appeal the Seventh Circuit affirmed the lower court's ruling. However, defendants' conceded the state action issue at this hearing and only argued that the newspaper was a facility of the university and the advertising policy was a "reasonable means of protecting the university from embarrassment and the staff from the difficulty of exercising judgment as to material which may be obscene, libelous or subversive." The court rejected this argument based on Tinker v. Des Moines School District, 393 U.S. 503 (1969), because a desire to avoid embarrassment or difficulty did not warrant restricting expression. 536 F.2d 1073, 1073-74.

90. 419 U.S. 345, 351.

91. 536 F.2d 1073.

92. Id. at 1074.
to publish an ad promoting the services of a "Gay Center." The court's opinion stated no reason for Goudelock's rejection of the advertisement.

Although activity fees collected by the state university contributed to the financial support of The Reflector, the court did not find this nexus sufficient to support a finding of state action and, thus, to force publication of the ad. Instead, the court cited the absence of university involvement in selecting material for publication. The court also found the fact that the student body elected the editor significant in negating the claim of state involvement. Once it decided the state action issue, the court justified the rejection of the ads as an exercise of editorial discretion protected under Tornillo.

As with Lee, the Goudelock court failed to thoroughly discuss The Reflector's daily operations. For example, the majority did not mention the presence of a faculty advisor, much less his role in determining the content of the editorial and advertising sections of the newspaper. These daily operations, along with the paper's management structure, should be important factors in a court's determination regarding the presence of state action. The majority also neglected to make any mention of the Lee case despite its "striking similarities."

The above cases indicate that a court's resolution of the state action question will rest in large part upon the relative weight it assigns to the individual factors tying a publication to a university.

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93. Id. The "Gay Center" offered counseling, literature, and legal aid to homosexuals.
94. 536 F.2d at 1075.
95. Id.
96. Id. The court held that the protection Tornillo affords to private newspapers should be extended to The Reflector since state action was not present. Thus, in this case the first amendment precludes interference with the exercise of editorial discretion.

In addition to the lack of state action needed to adjudicate the case, the court also said it had "special reasons" in ruling for defendants. Because homosexual activity was a criminal offense in Mississippi, the court said Goudelock had a right to avoid involving The Reflector with this illegal activity. 536 F.2d at 1075-76.

See Miss. CODE ANN. § 97-29-59 (1972), which states:

"Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."

97. Id. at 1077 (Goldberg, J., dissenting).
98. Id. at 1082 (Goldberg, J., dissenting). Judge Goldberg argued the court should have looked closer at Goudelock for evidence of state action. He said that direct involvement by state officials is not the only indication of state action: "A number of factors must be examined to determine if the action challenged as detrimental to individual rights should be considered to be state action for fourteenth amendment purposes." 536 F.2d at 1084.

Consequently, these factors can influence a court's decision to grant or deny access. For example, the *Goudelock* court saw little significance in the fact that student fees funded the newspaper. Instead, it placed great importance on student selection of the editor as evidence negating the presence of state action.

That a finding of state action relies substantially on individual facts was also demonstrated in *Radical Lawyers Caucus v. Pool.* This decision concerned another section 1983 action which sought relief from a Texas Bar Journal's refusal to print a Caucus advertisement. The proffered ad publicized an upcoming Radical Lawyers Caucus meeting. The court ordered publication of the ad, holding that the state bar was a state agency. Thus, the Texas bar could not exercise content discrimination in accepting advertisements. The state action nexus in this case was more apparent than in *Lee* and *Goudelock* because the Journal was clearly tied to a state agency. An employee of a state agency exercised editorial discretion in *Radical Lawyers Caucus,* while university students exercised such discretion in *Lee* and *Goudelock.* Additionally, a state agency remained responsible for complete funding and administration of the Journal.

**B. Unpredictability of State Action**

From the above discussion, it is apparent that the determination of the presence or absence of state action rests on the individual circumstances of each case. This standard lends little guidance to the student editor faced with a decision of rejecting an advertisement. The editor must gamble that state action will not be found in his particular situation should a suit be filed. If a suit is filed, the decision of advertising access will be left to a court using a confusing and uncertain method of review—the state action doctrine.

Additionally, while resolution of the state action question will turn on the specific facts of a case, the emphasis a judge places on certain facts can lead to a skewed result. Such a result will likely occur when constitutional rights conflict: "When a constitutional
prohibition appears likely to collide with well established practices, the almost irresistible temptation is to escape the dilemma by manipulating the state action concept.” Despite the numerous managerial and editorial structures of campus newspapers, each structure must be evaluated to determine whether state action is present. In making this evaluation, courts will be subject to an “irresistible temptation” to manipulate.

The state action doctrine leaves to the courts the duty to sift facts and weigh circumstances to determine if state action is present. Whether the balancing of free speech and free press rights that occurs in these cases should be left to such an uncertain process is questionable.

Consideration should also be given in the state action analysis to the student editor's role in determining whether to grant or refuse advertising access to the newspaper. Arguably, if the student editor is free to make a decision on access, no finding of state action should occur as the university or college is not involved in the editorial process. Consequently, a student editor's decision to deny advertising access without any university input should be respected as one devoid of state action.

If an editor's decision to reject an advertisement is free of state action, then the question of allowing access becomes one of prevailing constitutional rights. The provisions for freedom of the press and freedom of speech are linked in the text of the first amendment. Yet, one of the two must give way in determining the existence of a right to compel publication of an advertisement. The competing rights must be balanced against each other to resolve this problem.

VI. THE CONSTITUTIONAL CONFLICT

Essentially, the problem of advertising access to student newspapers is one of balancing two first amendment rights, freedom of speech and freedom of the press. Such constitutional comparison is, however, not an easy task. As Archibald Cox stated: “Some balancing is inescapable. The ultimate question is always, where has—and

104. Id. at 1125.
105. Student Editorial Discretion, supra note 3, at 1091-93. The cited comment discusses only the structures of state-supported universities and colleges in relation to access to the editorial columns of their student newspaper. However, the present comment also involves consideration of the structure of junior college newspapers.
106. See supra notes 103-04 and accompanying text.
107. 365 U.S. at 722.
should—the balance be struck?”

Previously, the balance has weighed in favor of the advertiser's right to speak in cases involving state-affiliated student newspapers. The only way to avoid a forced decree of access was to demonstrate enough editorial autonomy to prevent a finding of state action or public forum. Such compelled access, albeit under a finding of state action, itself offends the Constitution. As Judge Wright stated in *Associates & Aldrich v. Times Mirror*: “There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material.”

The established rule is that a student newspaper may not be prohibited from publishing an item it wishes to print. No such protection exists to protect a student paper from being forced to publish an advertisement it does not wish to print. However, proposals have been made to limit a right of access to the editorial columns of the student press.

A. Editorial Access

The concept of limiting editorial access to the state-affiliated press surfaced as early as the *Avins* case in 1967. In that case, the court refused to force publication of a proffered article in the Rutgers Law Review because such action would intrude upon the editorial board's discretion. Based on the *Avins* case, forced access to the editorial columns of a student publication should be denied when it would interfere with an editor's exercise of discretion.

Student newspaper editors clearly must exercise some amount of

110. See Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073.
111. See Avins v. Rutgers, 385 F.2d 151.
112. 440 F.2d 133.
113. Id. at 135.
114. See supra notes 19-23 and accompanying text.
115. See Avins v. Rutgers, 385 F.2d 151; Canby, supra note 103, at 1133-34; Karst, supra note 49, at 255-58; Access to State-Owned Media, supra note 54, at 1455-57.
116. 385 F.2d 151.
117. “[T]he acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment.” 385 F.2d at 153.
118. “As long as alternative methods of expression are available, a right of access should be denied where the government enterprise cannot truly exist without the exercise of editorial discretion.” Canby, supra note 103, at 1134.

See also Karst, supra note 49, at 255-57.
editorial discretion in granting access to a paper's editorial space. Additionally, it is necessary for an editor to use discretion to maintain the character of the newspaper and meet the space restraints of each issue. A grant of open access to the editorial columns would irrevocably harm the nature of the student newspaper and make it more of a "printed bulletin board." Thus, a limitation on editorial access is necessary to preserve editorial discretion, as well as the character of the publication.

Arguments have been made, however, to restrict an editor's right to refuse publication in order to prevent unwarranted denials of access. It is important that access be allowed for viewpoints opposing those of the editors. Thus, commentators contend publication of these views should be compelled when a student editor refuses to print them voluntarily. Additionally, the question of alternative forums remains an important consideration, as a lack of such media may create a stronger case for granting access. If the courts were to follow these arguments, discretion would be allowed so long as the editor exercises it in a "professional," rather than a personal manner. Consequently, a court hearing an access suit would be free to deny publication of the material when the editor has made a justifiable decision. This concept, that courts should balance access and editorial interests, has gained limited support from commentators.

While providing some defense for the free press interest, the balancing test does not go far enough to protect a student newspaper's right to deny access. In determining an access question, the

119. 418 U.S. at 258.
120. The Tornillo Court stated: "It is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or state commands the readers should have available." 418 U.S. at 257.
121. See Karst, supra note 49 at 256.
122. See id. at 256-57; Canby, supra note 103, at 1133-34.
123. See Karst, supra note 49, at 257.
124. Id.
125. Id.
126. Professor Karst suggests a sufficient justification would be based on poor writing quality or bad taste, as perceived by the editor. An unjustifiable exercise would be printing guest editorials favoring one side of an issue while refusing access to opposing views. Karst, supra note 49, at 258.
127. See Access to State Owned Media, supra note 54, at 1455-57, in which the author proposes that a two-step balancing test be applied.

"The initial question is whether the medium should even be considered a public forum. . . . The second step of the analysis, then, will require a reformulation of the scope of permissible content regulation to accommodate a combination of access and editorial interests in the use of the forum." Id. at 1455-56.
court is in effect usurping the discretion of the student editor and using its own discretion regarding the appropriate contents for the paper.\textsuperscript{128}

If the newspaper were privately owned, such action would violate the \textit{Tornillo} holding that the governmental regulation of the press is inconsistent with first amendment guarantees of a free press.\textsuperscript{129} If student editors exercise complete editorial discretion such that university involvement is minimal or non-existent,\textsuperscript{130} the student newspaper is arguably as independent from state influence as a private newspaper. In that case, the protections afforded by \textit{Tornillo} should extend to student editorial discretion, and should prevent a court from interfering with a student editor's decision to deny access. Under \textit{Tornillo}, editorial discretion always outweighs the speaker's right to be heard.\textsuperscript{131} Thus, the balance always tips in favor of denying access.

\section*{VII. The Case for Denying Advertising Access}

Just as the balance weighs against \textit{editorial} access, an attempt to compel access to the \textit{advertising} columns of a private newspaper would be struck down under \textit{Tornillo}. Although subject to minor exceptions,\textsuperscript{132} a private publisher is free to accept, reject or modify\textsuperscript{133} a proffered advertisement.

\begin{footnotes}
\footnotetext[128]{Professor Karst disagrees; he states that the court is simply ruling on the propriety of a student editor's action. Karst, supra not 49 at 258.}
\footnotetext[129]{The \textit{Tornillo} Court stated: The Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantee of a free press as they have evolved to this time. 418 U.S. at 258.}
\footnotetext[130]{See supra notes 117-24 and accompanying text.}
\footnotetext[131]{See \textit{Lorain} Journal Co. v. United States, 342 U.S. 143 (1951). In \textit{Lorain}, the Court held that it was a violation of anti-trust laws for a newspaper to refuse advertising in order to destroy competition and reestablish a monopoly. In this case, an Ohio newspaper rejected advertising of a customer who also broadcast commercials on a competing radio station. \textit{Id.} at 148-49. Additionally, a newspaper cannot refuse the advertising of a customer because of pressure from competing customers. B. SCHMIDT, \textit{Freedom of the Press v. Public Access} 48 (1976).}
\footnotetext[132]{See Associates \& Aldrich, 440 F.2d at 136.}
\end{footnotes}
No such explicit right, however, has been extended to student newspapers. Indeed, commentators have generally opposed any student editorial discretion to reject advertising.\(^\text{134}\) Despite the lack of scholarly support for such student discretion, there appears to be no difference between private and student newspapers sufficient to warrant lesser constitutional protection for the latter.

Proposals have been made that would, at the least, limit access to the editorial columns of a student newspaper.\(^\text{135}\) Yet, no similar suggestion has been proposed with regard to the advertising columns. Such a dichotomy remains true even though advertising columns are placed side-by-side with editorial material on the newspaper page. Additionally, many of the advertisements that student editors wish to reject contain editorial materials.\(^\text{136}\)

As a result, a speaker who is denied a right to have his article printed need only purchase advertising space to display the message. The article, in its advertisement form, may share the newspaper page with the same stories it would have accompanied had it been printed as a news item. The only significant indication of its commercial character would be a border or label proclaiming it an advertisement. An advertisement extolling the virtues of Naziism or germ warfare would probably be as objectionable to the editors as an article containing the same content. Furthermore, with an advertisement, the newspaper benefits financially by printing a view which it opposes. While a paper's editors may not agree with the views of the advertisement, this fact does not always appear to the readers. Although a disclaimer may remedy this situation, management should not be compelled to disassociate itself from an advertisement it opposes and still be forced to publish it.

A similar situation arises with strictly commercial advertising. A purely commercial ad seeking mercenaries to fight in El Salvador or engineers to develop a new type of nuclear weapon may be as incongruent with the nature and purpose of the student newspaper, as determined by the student editors, as an article promoting the same ends. Yet, the editors may be able to deny access to the article

\(^{134}\) See Canby, supra note 103, at 1133-34. "The advertising section of a school newspaper or state university law review is also more effective when open and unrestricted."

\(^{135}\) See also Karst, supra note 49, at 257 n.37.1. The general argument in this area is that there is no editorial necessity to deny access to the advertising sections of a student paper. In addition, an open advertising forum will promote speech and will be compatible with the forum.

\(^{136}\) See supra notes 116-27 and accompanying text.

but not to the advertisement. Consequently, a student newspaper may not completely prohibit the publication of an editorial or commercial message. It may, at best, only require that the message be shifted from the editorial columns to the advertising columns on the other side of the page. Thus, a right to limit editorial, but not commercial, access only serves to change a message's location. However, student newspapers should be granted the editorial right to exclude the message completely.

In comparison, the editors of a private newspaper are able to reject both objectionable advertisements and articles. The extension of this constitutional right is denied to student newspapers because of their ties to the state. In many cases, however, these ties are tenuous at best. Furthermore, even if the ties are present, an editor's decision to deny access, free of state influence, should be respected.

Despite perceptions to the contrary, an editor's function stretches beyond a paper's news columns. Important and difficult first amendment decisions must be made regarding advertisements as well as news articles. As with a private newspaper, a student publication depends, at least in part, on advertising revenue to help meet its budget. Therefore, it is unlikely that a student editor could indiscriminately refuse advertising because this action would harm the paper financially. An editor who irresponsibly exercises his power to deny advertising access might also be subject to discipline or removal by the student body or student media board if provisions for such action exist. The editor would also be subject to public pressure to curb this practice. Furthermore, there is no reason to assume that the editor of a student newspaper would be more likely to act irresponsibly in denying a right of access than the editor of a private newspaper. Consequently, where the student editors exercise their discretion free from university strictures, the student newspaper should not be subject to greater restrictions in denying advertising access than a private paper.

At a minimum, student newspapers should be given more leeway in limiting access to commercial advertisers. As previously stated, the lower level of first amendment protection afforded commercial speech should grant student newspapers discretion to exclude

138. See Student Editorial Discretion, supra note 3, at 1092 nn.15-16.
139. Id.
140. See supra notes 58-73 and accompanying text.
these advertisements on an individual basis.\textsuperscript{141}

A more powerful argument may be made for the exclusion of commercial speech on a class basis. Such a doctrine would grant student newspapers the ability to reject advertising for an entire product class, such as weapons, alcohol, or drugs.

The Supreme Court allowed advertising discrimination on a class basis in \textit{Lehman v. City of Shaker Heights}.\textsuperscript{142} In \textit{Lehman}, the Court held that a public transit agency has the right to deny access to all political advertisements in its buses: "[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."\textsuperscript{143} The Court added that because state action existed in \textit{Lehman},\textsuperscript{144} the practices governing advertising must not be "arbitrary, capricious, or invidious."\textsuperscript{145} As the advertisement rejected in \textit{Lehman} was editorial and clearly state action was present, a student newspaper should be granted a similar right to exclude classes of advertising. This right would depend, of course, on the condition that access not be denied on an "arbitrary, capricious, or invidious" basis.\textsuperscript{146}

When a student newspaper is free from university control it is, constitutionally, similar to a private newspaper.\textsuperscript{147} The student newspaper's connection with the state via its university affiliation is superficial\textsuperscript{148} and should be insufficient to reduce the student editors' ability to exercise their constitutional power of discretion. Furthermore, forcing access to student newspapers raises a danger of further governmental intervention, including:

\begin{quote}
The danger of deterring those items of coverage that will trigger duties of affording access at the media's expense; the danger of inviting manipulation of the media by whichever bureaucrats are entrusted to assure access; and the danger of escalating from access regulation to much more dubious exercises of governmental control.\textsuperscript{149}
\end{quote}

This danger is particularly relevant to student newspapers, as a number of efforts have already been made to influence and even reg-
ulate their content.150

Thus, a potential for constitutional trespass exists on both sides. Required access may legitimize governmental trespass on a student newspaper’s constitutional interest in freedom of the press. At the same time, an unscrupulous student editor may unjustifiably deny access, thereby abridging the speaker’s right to free expression. A balancing test may reduce the occurrence of such abuses. Such a test, however, is not guaranteed to be effective in all cases.151 A similar potential for trespass formerly existed in the private sector; the Supreme Court eliminated any such threat in Tornillo.152 There is no apparent reason why a similar policy should not be applied to the student press.153 The issues are virtually the same in determining access to the public and private press. Provided the student editor’s access decision is free of university influence, the constitutional protections for student newspapers should be the same as those for private newspapers.154

VIII. CONCLUSION

This comment has attempted to resolve the question of limiting advertising access to the student newspapers of state-affiliated colleges and universities based upon a number of constitutional doctrines.

The state action doctrine is not well suited for determining whether access should be granted because the management and financial structure of student newspapers varies greatly.155 The courts will often examine these structures to measure the level of a student

150. See supra notes 12-23 and accompanying text.
151. See supra notes 122-27 and accompanying text. While it is hoped a court will take great care in balancing these rights, this may not always be the case. See, e.g., Access to State-Owned Media, supra note 54 at 1413 n.11.
152. See Tornillo, in which the Court stated: “Compelling editors or publishers to publish that which ‘reason’ tells them should not be published is what is at issue in this case.” 418 U.S. at 256.
153. “A newspaper or magazine is not a public utility subject to ‘reasonable’ governmental regulation in matters affecting the exercise of journalistic judgement as to what shall be printed.” Id. at 259. (White, J., concurring).
155. For example, the amount of funding a student newspaper receives from the administration, from the students or from its own advertising revenues, is different at each school. Likewise, the method of selecting student editors and their ties to the college administration will also vary.
paper's autonomy. This level is used to determine whether or not state action is present.\textsuperscript{156} This framework, however, is not always an accurate indication of whether an editor's decision constitutes state action. Thus, structural differences, which have little or no impact on state involvement in editorial decisions, should not be used to distinguish between granting and denying access. So long as a student editor remains free of any university or college influence in making an access decision, the doctrine should not be used to compel access.

Likewise, a student newspaper should not be forced to grant access under a public forum theory. A student newspaper's affiliation with a public college or university should not lead to the automatic conclusion that the paper is a public forum. Also, this affiliation does not warrant the infringement of the paper's free press interests which would result from a public forum finding. This argument is especially applicable if the speaker has access to alternative forums.

At the very least, the courts should adopt a balancing test for determining on a case-by-case basis if advertising access is proper. Additionally, a more lenient policy should be exercised in denying access to commercial speech, especially on a class basis. The courts have previously upheld the constitutionality of such class bans.\textsuperscript{157}

Finally, in balancing the rights of freedom of speech and freedom of the press, a right to limit advertising access, similar to that protected by the first amendment under the \textit{Tornillo} decision should be favored. A student newspaper in which the editors exercise independent judgment in granting or refusing access proves akin to a private newspaper and should be granted similar rights. Therefore, a policy of compelled advertising access violates the free press clause by infringing upon the editorial discretion exercised in such a publication.

\textit{Daniel J. Coyle}

\textsuperscript{156} 306 F. Supp. 1097, 536 F.2d 1073.

\textsuperscript{157} \textit{See supra} note 73 and accompanying text.