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The State College Press and the Public Forum Doctrine

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> executive compliance according to the legislative mandate. Softening that mandate by construction serves to provide a gloss that the agency is properly performing the duties assigned by the statute, and operates, in effect, to gloss over and screen out any shortfalls in agency performance from the committees and bodies of the legislature. They might otherwise be compelled—by explicit judicial avowal that its decree enforcing the legislative will cannot be enforced by sanctions—to confront the gulf between their expressed will and the practical realities of agency compliance.[61]

In contrast, the author offers the observation that the relief afforded by the exceptional circumstances clause may so dilute the disclosure amendments that Congress, if still in favor of expedition, will be compelled to enunciate its ultimate policies regarding resource allocations and/or increase the funding of the agencies for request screening. For proponents of disclosure, such a result would best serve the public interest.

LOUISE H. MCMURRAY

The State College Press and the Public Forum Doctrine

In a recent case the Fifth Circuit decided that a student editor of a state university campus newspaper could not be compelled to print paid advertisements submitted for publication. The author of this note disputes the court's analysis in determining that the campus newspaper was not a public forum. Upon concluding that a public forum was involved, the author argues that the plaintiffs had a constitutionally protected right of access arising from the first and fourteenth amendments.

The Mississippi Gay Alliance submitted a paid advertisement and an announcement[1] to *The Reflector,* a Mississippi State University campus newspaper.[2] The advertisement informed the public of

61. *Id.* at 618 (Leventhal, J., concurring).

1. *The Reflector* regularly ran a "Briefs" section in which announcements of campus and local organizations were printed gratuitously. Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1076 (5th Cir. 1976).

2. There was a dispute as to whether or not *The Reflector* was the "official" newspaper of Mississippi State University. Plaintiffs claimed that it was (Complaint for Plaintiff at paragraph 9), and that the paper itself bore the designation "Official Newspaper of Mississippi State University" on the front page. The answer of the University stated that there was no "official" university newspaper. Answer for Defendant at paragraph 9. The answer of

the Alliance's meetings and of the counseling and legal services offered.[3] The student editor, Bill Goudelock, refused to print either the advertisement or the announcement. Alleging infringement of its first and fourteenth amendment rights, the Alliance and its chairperson, Anne DeBary, filed suit in the United States District Court for the Northern District of Mississippi against Goudelock and three University officials.[4] Plaintiffs' prayer for relief included one hundred dollars actual damages,[5] one hundred dollars punitive damages, and an order commanding publication of the advertisement and announcement in question as well as any future advertisement or announcement submitted. Upon motion of the University officials, the district court dismissed the complaint against them, and the court, "of its own motion,"[6] dismissed the complaint against defendant Goudelock. On appeal, the United States Court of Appeals for the Fifth Circuit *held,* affirmed: Where the state exercises no editorial control over a college newspaper, the first and fourteenth amendments do not proscribe refusal of a student editor to accept a paid advertisement for publication. *Mississippi Gay Alliance v. Goudelock,* 536 F.2d 1073 (5th Cir. 1976).

The constitutional issues arising from this case involve the Alliance's alleged right of access to express its views through the media and the bounds of the campus newspaper editor's right to edit. This direct clash between two protected first amendment rights—freedom of speech and freedom of the press—presented the Fifth Circuit with a dilemma.

Freedom of the press is guaranteed against infringement by the first amendment.[7] It is made applicable to the states by the fourteenth amendment.[8] Seemingly then, neither Congress nor a state legislature may exercise any editorial control over a private publisher. Thus, in *Miami Herald Publishing Co. v. Tornillo,*[9] the Su-

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defendant Goudelock also denied the allegations in paragraph 9 of the complaint; and further stated the truth to be that *The Reflector* was the "official" newspaper of the Mississippi State Student Association and the student body of Mississippi State University. Answer for Defendant at paragraph 9.

3. The content of the announcement does not appear in the record. 536 F.2d at 1074.

4. The University officials joined as defendants were: William L. Giles, President of M.S.U.; Henry F. Myers, faculty advisor to *The Reflector;* and Sam Dudley, Chairman of the Communications Department.

5. Under 42 U.S.C. § 1983 (1970), any person who is deprived of his constitutional rights by one acting under color of state law has an action at law for damages and may maintain a suit in equity to enjoin the illegal acts.

6. Mississippi Gay Alliance v. Goudelock, No. EC-74-28-K, slip op. at 12 (N.D. Miss. Oct. 25, 1974).

7. U.S. CONST. amend. I.

8. Gitlow v. New York, 268 U.S. 652 (1925).

9. 418 U.S. 241 (1974).

preme Court invalidated a Florida "right of reply" statute[10] which required a newspaper to print the reply of any candidate for nomination or election who is criticized by that paper. The Court said:

> 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 guarantees of a free press as they have evolved to this time.[11]

Similarly, in *Associates & Aldrich Co. v. Times Mirror Co.*,[12] the Ninth Circuit affirmed the district court's dismissal of an action seeking to enjoin an editor from censoring advertising copy proffered by the plaintiff.[13]

Despite judicial reluctance to interpret the first amendment to protect the public against discriminatory editing practices of private publishers, several commentators[14] have advocated the so-called "access theory." The theory and its underlying policy are best set forth by its originator and chief proponent Professor Jerome A. Barron:

> There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. . . .
>
> The conventional constitutional issue is whether expression already uttered should be given first amendment shelter or whether it may be subjected to sanction as speech beyond the constitutionally protected pale. To those who can obtain access

10. FLA. STAT. § 104.38 (1973) (repealed 1975).

11. 418 U.S. at 258.

12. 440 F.2d 133 (9th Cir. 1971).

13. The advertisement was for a movie which, although not legally obscene, was deemed offensive by the defendant newspaper. *Id.* at 134.

14. *See generally* Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Note, *The Duty of Newspapers to Accept Political Advertising—An Attack on Tradition*, 44 IND. L. J. 222 (1969); Comment, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120 (1971); Note, *Monopoly Newspapers: Troubles in Paradise*, 7 SAN DIEGO L. REV. 268 (1970); Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. FLA. L. REV. 293 (1969); Note, *Free Speech and the Mass Media*, 57 VA. L. REV. 636 (1971).

> to the media of mass communications first amendment case law furnishes considerable help. But what of those whose ideas are too unacceptable to secure access to the media? To them the mass communications industry replies: the first amendment guarantees our freedom to do as we choose with our media. Thus the constitutional imperative of free expression becomes a rationale for repressing competing ideas.[15]

Proponents of the access theory analogize the case of newspapers to that of broadcasts. It has been held that broadcasters may be compelled to provide access to those criticized by their broadcasts.[16] The argument is that since the broadcast rule is a by-product of the limited number of air waves,[17] then the fact that there are a limited number of newspapers[18] should, by analogy, require an extension of the access rule to newspapers.[19]

The counterargument to the access theory, espoused by advocates of the "autonomy theory,"[20] is that the first amendment stands as a bar to any government-enforced access to privately owned publications. That is, under our constitutional scheme, private publishers enjoy an autonomous position free from governmental interference in editorial decisions. Supporters of the autonomy theory argue against the broadcast analogy for three reasons. First, the analogy fails because broadcasters must have a license from the government while newspapers may be published by anyone, at any time, without any governmental license or approval.[21] Second, the first amendment, as applied by the fourteenth, offers protection only from acts of the state so that the acts of a private publisher cannot be reached.[22] Third, employment of an access-oriented policy would entail the practical problem of deciding how far the government could go to equalize methods of access to the media.[23]

The arguments on both sides are formidable and the equities are by no means clear-cut. Kenneth L. Karst points out: "The

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15. Barron, *supra* note 14, at 1641-42.

16. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

17. *Id.* at 928.

18. At least one writer suggests attacking the problem through strict enforcement of antitrust laws. Note, *Reaffirming the Freedom of the Press: Another Look at Miami Herald Publishing Co. v. Tornillo*, 73 MICH. L. REV. 186, 199-200 (1974). This analysis is rejected by another writer. Note, *Monopoly Newspapers*, *supra* note 14.

19. *See* Note, *Resolving the Free Speech—Free Press Dichotomy*, *supra* note 14, at 314-15; Note, *Monopoly Newspapers*, *supra*, note 14.

20. Note, *Reaffirming the Freedom of the Press*, *supra*, note 18.

21. *Id.* at 198-99.

22. Loper, Book Review, 26 MAINE L. REV. 415, 422-23 (1974).

23. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43-45 (1975).

media-access cases are problematical not because they require a choice between equality and freedom, but because both equality and freedom are to be found on either side of the argument."[24]

The Supreme Court, however, has firmly decided the issue. In *Miami Herald Publishing Co. v. Tornillo,*[25] the Court, after an extensive examination of the access theory, rejected any such right of access to a privately published newspaper. Thus, the autonomy theory is now the weight of authority and there is only a very limited area in which government may exercise any censorship over a private publisher.[26] The situation is different, however, where the publication is an arm of the state; once state action is invoked, the fourteenth amendment demands equality.[27] It is this equality principle which has led to the development of the "public forum doctrine."[28]

If any right of access to *The Reflector* were to have been afforded the Alliance, it would have had to stem from an application of the public forum doctrine. Essentially, this doctrine holds that once a state creates a forum for the expression of views, it cannot discriminate on the basis of the content of any viewpoint sought to be aired. *Police Department v. Mosley*[29] is the case usually cited on this point:[30]

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government

24. *Id.* at 43.

25. 418 U.S. 241 (1974).

26. Even a private publisher has no first amendment protection when it comes to "unprotected speech." Unprotected speech has been held to include libelous remarks. Beauharnais v. Illinois, 343 U.S. 254 (1952). *But see* New York Times v. Sullivan, 376 U.S. 255 (1964) (newspaper held not liable for libel). Also unprotected are obscenity, Roth v. United States, 354 U.S. 476 (1957), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

27. "No state shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

28. The term "public forum" was first used by Harry Kalven, Jr. Karst *supra* note 23, at 35-36.

29. 408 U.S. 92 (1972). In *Mosley,* a citizen who had frequently picketed a local school to protest racial discrimination challenged a local ordinance which prohibited all picketing at schools except that which related to a labor dispute involving the school. The Court invalidated the ordinance on first amendment grounds.

30. "The citation and quotation of *Mosley* is becoming commonplace as a shorthand for

> may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[31]

The concept of the public forum has been repeatedly acknowledged and affirmed.[32] Thus, the issue in the noted case becomes: does *The Reflector* qualify as a public forum so that the Alliance may claim a constitutionally protected right of access to its columns? The answer is to be found in the public forum cases and in the contours of the state action doctrine.

There is little doubt that *The Reflector*, a Mississippi State University campus newspaper,[33] may fall within the public forum doctrine. The doctrine has been applied to state school newspapers in both *Lee v. Board of Regents of State College*[34] and *Zucker v. Panitz*.[35] The fact that access was sought to advertising columns rather than to news or editorial columns of the newspaper does not detract from the public forum argument of the Alliance. In both *Lee* and *Zucker* as well as in *Radical Lawyers Caucus v. Pool*[36] and *Kissinger v. New York City Transit Authority*,[37] courts commanded

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the first amendment's principle of equal liberty of expression." Karst, *supra* note 23, at 66.

31. 408 U.S. at 96 (footnote omitted).

32. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (public theatre); Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974) (campus meetings); Southeastern Promotions, Ltd. v. City of W. Palm Beach, 457 F.2d 1016 (5th Cir. 1972) (public theatre); Lee v. Board of Regents of State Colleges, 441 F.2d 1257 (7th Cir. 1971) (campus newspaper); Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found., 417 F. Supp. 632 (D.R.I. 1976) (bicentennial ceremonies); Radical Lawyers Caucus v. Pool, 324 F. Supp. 268 (W.D. Tex. 1970) (state bar association journal); Zucker v. Panitz, 299 F. Supp. 102 (S.D. N.Y. 1969) (high school newspaper); Kissinger v. New York City Transit Auth., 274 F. Supp. 438 (S.D.N.Y. 1967) (subway trains). *But see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), where plaintiff was denied access to advertising space in buses on the ground that only commercial, and not political, advertising was accepted. The Court distinguished this case from other public forum cases on the ground that there is no right to subject people to advertising, and people on buses comprise a "captive" audience who cannot avoid the message of the advertiser. *Id.* at 302. This decision has been criticized on the ground that the audience is "captive" whether the advertisements are political or commercial and there is no sound reason for distinguishing the two. Karst, *supra* note 23, at 35.

33. *See* note 2, *supra*.

34. 441 F.2d 1257 (7th Cir. 1971) (campus newspaper).

35. 299 F. Supp. 102 (S.D.N.Y. 1969) (high school newspaper).

36. 324 F. Supp. 268 (W.D. Tex. 1970) (state bar association journal).

37. 274 F. Supp. 438 (S.D.N.Y. 1967) (New York subway advertising). In this case, a private advertising company was joined as a defendant. One writer suggests that this fact may be significant in that the first amendment is being applied to a private party in contradistinction to *Miami Herald*. Barron, *supra* note 14, at 489. It is suggested that this analysis is a misreading of the *Kissinger* case. The New York City Transit Authority had a contract with the advertising company which allowed the company to place advertisements in the subway cars and on subway walls. This contractual relationship constituted state action;

publication of advertisements under the public forum doctrine. Since the doctrine is typically invoked upon a finding of state action, an analysis of the Fifth Circuit's finding that no state action existed[38] is crucial to an examination of the noted case.

Neither the district court[39] nor the Fifth Circuit[40] cited any state action cases. None of the student newspaper cases cited found any real difficulty with the state action question. From the context of their opinions, however, both the trial[41] and appellate courts[42] found state action wanting because the University officials exercised no direct control over the newspaper or the editor's decision not to print the advertisement.

An absence of direct control need not be determinitive of the state action issue, however. In *Coke v. City of Atlanta,*[43] where a private airport restaurant refused to serve a black except in separate dining facilities,[44] the court found state action to exist notwithstanding the fact that the city, which leased the restaurant, exercised no control over the decision of the restaurant to discriminate.[45] Other courts have found state action in the absence of direct control by the state.[46] These courts have analyzed the state action problem by several alternative methods which include: 1) a "significant involvement" test;[47] 2) a "public function" test;[48] 3) a "but for" test;[49] and

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consequently, the court was not applying the first amendment to a private party. 274 F. Supp. at 641.

38. 536 F.2d at 1074-75.

39. Mississippi Gay Alliance v. Goudelock, No. EC-74-28-K (N.D. Miss. Oct. 25, 1974).

40. 536 F.2d 1073 (5th Cir. 1976).

41. Mississippi Gay Alliance v. Goudelock, No. EC-74-28-K, slip op. at 6-7 (N.D. Miss. Oct. 25, 1974).

42. 536 F.2d at 1074-75.

43. 184 F. Supp. 579 (N.D. Ga. 1960).

44. Although *Coke* involved racial discrimination and *Mississippi Gay Alliance* does not, the difference is not necessarily significant. In Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 19 (5th Cir. 1976), Judge Coleman, who also wrote the opinion in *Mississippi Gay Alliance,* clearly stated that the same standard is to be applied in determining state action in racial discrimination cases as in all other cases. *See* 31 U. MIAMI L. REV. 198, 202-03 (1976).

45. Not only was there no actual control exercised by the state in the discriminatory acts, but it appeared that there was little that the city could have done to prevent the restaurant from discriminating. Perhaps the city could have made the lease conditional on an agreement by the lessee not to discriminate or it could have passed legislation prohibiting any private concern operating on publicly owned property from depriving any citizen of constitutional rights. Having failed to do either, the city was left with no means by which it could have reached the discriminatory policy of the restaurant.

46. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert denied,* 353 U.S. 924 (1957); Department of Conservation & Dev. v. Tate, 231 F.2d 615 (4th Cir. 1956).

47. The significant involvement test looks to the nature and extent of the involvement of the state in the challenged action. If such involvement is found to be "significant," then a

4) a lease-license analysis.[50]

An examination of the facts of the noted case reveals that a finding of state action would not have been unwarranted under these alternative state action theories. The facts show that the paper was funded by a non-waivable tuition fee collected by the University,[51] that the editor was paid out of the funds so collected,[52] that the paper used facilities of the University rent-free,[53] and that the paper was a campus newspaper at Mississippi State University.[54]

In the case of *Bazaar v. Fortune,* the mere fact that the newspaper was funded by a non-waivable fee assessed to all the students was held sufficient to clothe the actions of the paper as state action.[55] Nor did it matter that the paper in question was not the official newspaper of the university as long as it was funded by the non-waivable fee.[56]

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finding of state action is made. Moose Lodge v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 386 (1967); *cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

48. Whenever the challenged action occurs in the sphere of what is traditionally thought of as a "public function," state action exists. Marsh v. Alabama, 326 U.S. 501 (1946) (action of company-owned town is state action since governing a town is traditionally a public function); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973) (action of a college is state action as providing an education is traditionally a public function).

49. State action exists wherever the discrimination could not have occurred "but for" the involvement of the state. Shelley v. Kraemer, 334 U.S. 1, 19 (1948); Ingram v. Dunn, 383 F. Supp. 1043, 1046-47 (N.D. Ga. 1974). This analogy to tort law, though not widely accepted, is interesting. It is contended that if the analogy were more fully developed, its usefulness would be more widely accepted. The *Ingram* court, for example, analyzes the problem in terms of the "but for" test, but procedes no further with the analogy. This ignores the proximate cause issue which usually follows the cause-in-fact ("but for") issue in a negligence case. Thus, the "but for" test does not fully solve the problem. Many times a negligent act will be the cause-in-fact but not the proximate cause of an injury. Proximate cause, which is essentially a policy issue, can be used to limit the set of cases reachable through state action in much the same manner it has been used to limit the number of cases in which liability is imposed despite the fact that cause-in-fact has been determined.

50. The general rule which seems to have evolved is that where the alleged violation is made by a lessee of the state, state action is found; but where the alleged violation is made by a licensee of the state, no state action is held to exist. *See* Columbia Broadcasting Sys., Inc. v. National Democratic Comm. 412 U.S. 94 (1973) (broadcast license); Moose Lodge v. Irvis, 407 U.S. 163 (1972) (liquor license); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (lease); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965) (gratuitous lease); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1957) (lease); Ingram v. Dunn, 383 F. Supp. 1043 (N.D. Ga. 1974) (business license); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960) (lease). *But see* Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976) (gratuitous lease).

51. 536 F.2d at 1074.

52. Complaint contained in Joint Appendix at 3, Mississippi Gay Alliance v. Goudelock, No. EC-74-28-K (N.D. Miss. Oct. 25, 1974).

53. 536 F.2d at 1085 (dissenting opinion).

54. *See* note 2 *supra.*

55. 476 F.2d 570, 575 (5th Cir. 1973).

56. *Id.*

The mere fact that *The Reflector* used office space in the state-owned university could have been sufficient to rest a finding of state action. In *Hammond v. University of Tampa,*[57] the Fifth Circuit decided that actionable racial discrimination[58] existed in a private university solely on the grounds that the university's "establishment was largely made possible by the use of a surplus city building and the use of other city land leased for the university purposes."[59]

In other school newspaper-public forum cases, there seemed to be no real doubt about state action. In *Lee v. Board of Regents of State College*[60] state action was conceded; in *Zucker v. Panitz*[61] and *Joyner v. Whiting,*[62] it must have been assumed, for it was not discussed.

Even assuming that the facts in the noted case, taken individually, do not require a finding of state action, it is difficult to argue that, taken together, they do not show the significant involvement requisite to such a finding. The Fifth Circuit held no state action to exist due to the fact that there was no *direct* action by a state official. Yet no case is cited which would indicate that direct involvement is a prerequisite of such a finding.[63] Even *Golden v. Biscayne Bay Yacht Club,*[64] an opinion of the Fifth Circuit written by the author of the *Mississippi Gay Alliance* opinion, does not support this proposition. In *Golden* the court had a perfect opportunity to rest its refusal to find state action on the direct action theory, but chose instead to rely on the significant involvement test. Thus, *Golden* can be interpreted as an implicit rejection of the direct action theory by the Fifth Circuit.

Two significant problems remain with the court's opinion. First, the court failed to note the duality of the role of the newspaper and its editor. Not only do they have rights and obligations in relation to the university, but they also have rights and obligations versus the public. Second, the court misread *Bazaar v. Fortune,*[65] an earlier Fifth Circuit case.

The court's approach as to the first problem seems to take

57. 344 F.2d 951 (5th Cir. 1965).

58. The fact that *Hammond* involves racial discrimination does not necessarily impair the analogy. *See* note 44 *supra.*

59. 344 F.2d at 951.

60. 441 F.2d 1257 (7th Cir. 1971).

61. 299 F. Supp. 102 (S.D.N.Y. 1969).

62. 477 F.2d 456 (4th Cir. 1973).

63. 536 F.2d at 1084 (dissenting opinion).

64. 530 F.2d 16 (5th Cir. 1976).

65. 476 F.2d 570 (5th Cir. 1973).

cognizance only of the rights of the editor and not of the rights of the Alliance. The court reasoned that since the university officials could not, under *Bazaar,* censor the paper, it had the rights of a private publisher and according to *Miami Herald Publishing Co. v. Tornillo,*[66] it could not be compelled to publish the advertisement. While it is true that the university may not abridge the first amendment rights of the newspaper, it does not follow that the newspaper occupies the role of a private entity beyond the reach of the fourteenth amendment. There are strong indications that "this court would review a decision by the students to exclude blacks from participation on the newspaper staff as a decision imbued with state action."[67] It is this duality which the court ignored, thereby overlooking a crucial point in the course of its analysis of the case. The *Bazaar* case addressed the rights of the paper with respect to its position with the university; but it did not address the rights of a citizen with respect to the newspaper, which is the issue in *Mississippi Gay Alliance.*[68]

As to the second problem, the Fifth Circuit stated in reference to *Bazaar:* "As a matter of fact, in the context of the matter before us, this Court has held that the University authorities could not have ordered the newspaper not to publish the Gay Alliance advertisement, had it chosen to do so . . . ."[69] Such a reading of *Bazaar* is improper in at least two ways. First, the "context" of *Bazaar* was quite different from that of *Mississippi Gay Alliance.* In *Bazaar,* the court acted to prevent censorship by the university, while in *Mississippi Gay Alliance,* the court was asked to prevent discrimination in advertising where the university chose to remain idle. Second, despite the implication that the university is, according to *Bazaar,* powerless to restrict the newspaper in any way, this is not necessarily true. Undoubtedly, publication of obscene materials could be proscribed by the university.[70] Similarly, discriminatory policies of the newspaper are subject to university review. In *Joyner v. Whiting,*[71] the Fourth Circuit indicated its agreement with the university president who defended his right to prohibit a discrimi-

66. 418 U.S. 241 (1974).

67. 536 F.2d at 1085 (dissenting opinion). *Cf.* Joyner v. Whiting, 477 F.2d 456, 463-64 (4th Cir. 1973), in which the court addressed this issue and indicated its support of the view that such action may be reached.

68. The Court consistently frames the issue from the position of the newspaper and its right to refuse the advertisement; it is never viewed from the perspective of the Alliance and its right to be heard.

69. 536 F.2d at 1075.

70. *See* note 26 *supra.*

71. 477 F.2d 456 (4th Cir. 1973).

natory policy in accepting staff members and advertisements.[72] Clearly, *Joyner* indicates that the university officials could have commanded publication of the advertisement which was arbitrarily rejected. In fact, it is at least arguable that they *should* have commanded publication due to their obligation as state officers to protect constitutional rights.[73]

In concluding that a right of access to *The Reflector* exists, there are two remaining issues which must be resolved to determine whether or not the right of access extends to the advertisement in question. First, does the editor have a right which countervails the Alliance's right of access? Second, does the advertisement fall within the category of "unprotected speech"?

Judge Goldberg, in his dissent, addresses the first question,[74] and there seems to be little reason to dispute his analysis. He balances the competing interests involved in this manner:

> I think that the two interests [freedom of speech and freedom of the press] can be accommodated through a doctrine which permits student editors of state newspapers unfettered discretion over what might be termed the "editorial product" of the newspaper, yet requires that when the newspaper devotes space to unedited advertisements or announcements from individuals outside the newspaper staff, access to such space must be made available to other similarly situated individuals on a nondiscriminatory basis.[75]

This right of access, which is akin to the "fairness doctrine,"[76] is not a novel idea. Writing for the majority in *Joyner,* Judge Butzner indicated that:

> A college newspaper's freedom from censorship does not necessarily imply that its facilities are the editor's private domain. When a college paper receives a subsidy from the state, there are strong arguments for insisting that its columns be open to the

72. *Id.* at 462-63 (decided on other grounds); *cf.* United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) (provision of Civil Rights Act prohibiting a newspaper from printing discriminatory housing advertisements held to be constitutional).

73. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961), in which the Court stated that:

> [T]he Authority [an agency of the state] could have affirmatively required Eagle [the discriminating party] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.

74. 536 F.2d at 1087-89.

75. *Id.* at 1087.

76. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

> expression of contrary views and that its publication enhance, not inhibit, free speech.[77]

It does not appear that the editor's first amendment rights outweigh the first and fourteenth amendment rights of the Alliance. Nor does it appear—in response to the second remaining issue—that there is any reason for the advertisement to be without protection.

The only arguments that can be made to deny first amendment protection to the advertisement are that commercial speech is not protected and that the advertisement is so closely related to illegal acts[78] that it is stripped of protection.[79] It is quite clear, however, that commercial speech is protected,[80] and that a mere gathering of a gay group is not so closely related to illegal activity that it is without first amendment protection.[81]

Based on the foregoing analysis, it is submitted that the Fifth Circuit incorrectly decided the noted case. Unfortunately, the Alliance's petition for certiorari to the United States Supreme Court was denied.[82] The result is that the Supreme Court leaves intact two significant changes which the Fifth Circuit has made in constitutional doctrines. First, without expressly stating so, the Fifth Circuit has imposed a requirement of direct action by the state before invoking the protections afforded by the fourteenth amendment and, in so doing, has ignored the Supreme Court's previous decision in *Burton v. Wilmington Parking Authority.*[83] Second, in circumventing the public forum doctrine by finding an absence of state action, the court has severely limited the utility of that doctrine in an area in which it had previously been recognized.[84] Thus, the

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77. Joyner v. Whiting, 477 F.2d 456, 462 (4th Cir. 1973).

78. The argument is that as a result of printing the Alliance's advertisement, acts of unnatural intercourse will occur and such acts are proscribed by state law. MISS. CODE ANN. § 97-29-59 (1972).

79. Where speech is closely related to illegal activity it is not within the scope of the first amendment's protection. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388-89 (1973) (sexually discriminatory employment advertisements); Gay Lib v. University of Missouri, 416 F. Supp. 1350 (W.D. Mo. 1976) (unnatural intercourse).

80. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

81. Gay Students Org. v. Bonner, 509 F.2d 652, 662 (1st Cir. 1974); Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found., 417 F. Supp. 632, 637 n.6 (D.R.I. 1976); *cf.* Healy v. James, 408 U.S. 169 (1972) (S.D.S.). *Contra,* Gay Lib v. University of Missouri, 416 F. Supp. 1350 (W.D. Mo. 1976), where the court upheld the university's decision to withhold official campus recognition of a gay group on the grounds that illegal activity—unnatural intercourse—would likely result from allowing campus meetings of the gay group.

82. 45 U.S.L.W. 3704 (U.S. April 26, 1977) (No. 76-956).

83. 365 U.S. 715 (1961).

84. Lee v. Board of Regents of State Colleges, 441 F.2d 1257 (S.D.N.Y. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

opinion of the Fifth Circuit has a limiting effect on the protections afforded by the first and fourteenth amendments. Because of this limiting effect, it is suggested that the Court should have granted certiorari and reversed the case.

RONALD D. POLTORACK

Fisher v. First National Bank of Chicago: 12 U.S.C. Section 85 Is Granted Automatic Extraterritorial Effect

This note discusses the operation of the Seventh Circuit's holding that pursuant to 12 U.S.C. section 85 a national bank located in Illinois may apply that state's interest rates in any other state. Through an economic analysis, the author argues that this operation is essentially sound but should be modified to permit the consideration of conflicts of law principles. The operation of the exception to this general rule is also considered. Specific attention is given to the application and effects of the words "located" and "existing" as used in section 85.

Fisher, an Iowa resident,[1] brought an action against the First National Bank of Chicago, chartered in Illinois, alleging that the interest charged in connection with its bank credit cards was usurious under Iowa law. In *Fisher v. First National Bank of Chicago*[2] the Seventh Circuit Court of Appeals affirmed the decision of the District Court for the Northern District of Illinois[3] to dismiss the

1. In June, 1969, plaintiff Fred Fisher ("Fisher"), a resident of Iowa, received a credit card from The First National Bank of Chicago ("Bank"), a national banking association located in Chicago, Illinois. Fisher accepted the card and used it numerous times to obtain credit from the Bank pursuant to the terms of the agreement that was enclosed with the card when he received it.

Brief for appellee at 2. (References to appendix omitted.)

2. 538 F.2d 1284 (7th Cir. 1976), *cert. denied*, 97 S. Ct. 786 (1977).

3. This action . . . was originally filed in the United States District Court for the Southern District of Iowa on September 3, 1971. . . .

On May 9, 1972, on the Bank's motion, the district court dismissed the complaint for lack of subject matter jurisdiction. Fisher requested reconsideration of that ruling and also sought leave to file an amended complaint. . . .

On June 14, 1972, the district court denied Fisher's motion for reconsideration, and, on July 5, 1972, denied his motion for leave to amend the complaint. On appeal, the district court's jurisdictional ruling was reversed (6-2) by the Court of Appeals for the Eighth Circuit sitting en banc, and the case was remanded with instructions that Fisher be allowed to file his amended complaint. 479 F.2d 26 (8th Cir. 1973).

On remand, the district court took up the Bank's motion for a change of venue pursuant to Section 94 of the National Bank Act, 12 U.S.C. § 94, and on February 14,