

HANDBOOK OF FREE SPEECH ISSUES



**OFFICE OF GENERAL COUNSEL
THE CALIFORNIA STATE UNIVERSITY**

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I. INTRODUCTION

The right to free speech, when applied in a university context, can be complicated and confusing. This manual provides basic information and is intended to be a campus resource when particular questions arise. University Counsel are always available to help respond to questions about specific situations.

II. FREEDOM OF SPEECH

The First Amendment to the United States Constitution provides that Congress shall “make no law...abridging the freedom of speech...” The First Amendment is made applicable to the States through the Fourteenth Amendment.

The California Constitution provides that “[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”¹ Courts have held that the California free speech clause is “more definitive and inclusive than the First Amendment....”²

It is widely understood that freedom of speech prohibits the government from interfering with one’s own speech. It is less well known that this same prohibition extends to interfering with the right to hear what someone else has to say, or compelling someone to express certain views, adhere to a particular ideological viewpoint or subsidize speech to which s/he objects.³

III. WHAT IS PROTECTED “SPEECH?”

“Speech” that is protected by law includes a broad array of expressive conduct -- oral, written, pictorial and other expressive means that convey an idea. “Symbolic speech,” such as burning the flag at a protest rally, is also protected, so long as it is not intertwined with additional factors such as disruptive conduct, which is not protected.

There are four generally recognized categories of protected speech: political, religious, corporate and commercial. Political and religious speech, which is at the core of our historical and

¹ Cal. Const., Art. I, § 2, sub. (a).

² Wilson v. Superior Court, 13 Cal.3d 652, 658 (1975). *See also* Griset v. Fair Political Practices Com., 8 Cal.4th 851, 866, fn. 5 (1994) (“As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart”); People v. Glaze, 27 Cal.3d 841, 844, fn. 2 (1980); Dailey v. Superior Court, 112 Cal. 94, 97-98 (1896) (the liberty of speech clause “is the broader, and gives ... greater liberty” than the First Amendment).

³ *See generally* Langhauser, “Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity,” 31 Journal of College & University Law 481, 486-487 (2005).

constitutional ideas of liberty, receives the greatest protection. Corporate and commercial speech, which generally relate to products, and not ideas, receive a lesser degree of protection.⁴

Speech that is “de minimis”-- *e.g.*, a student’s complaint about a seating assignment, or the fact that a theater student is compelled to recite certain lines for a play – is excluded from constitutional protection.⁵ Also excluded is speech that promotes an unlawful end, such as:

- Promoting actual violence or harm;⁶
- “Fighting words;”⁷
- True threats;⁸
- Expression that constitutes criminal or severe harassment;
- Defamation;
- Obscenity;
- False advertising; or
- The use of public resources for partisan political activities.⁹

Speech that is otherwise protected may not be disallowed solely because the audience finds the message offensive, even where members of the audience react to the speech in a disruptive manner. To disallow speech on such grounds would violate a First Amendment ban otherwise known as the “heckler’s veto.” In such circumstances, while there may be a legitimate need to take action against the disruptive members of the audience, the speech itself must be allowed to continue.¹⁰

⁴ Langhauser, *supra*, at 490-491.

⁵ *Id.*, citing Salchpour v. Univ. of Texas, 159 F.3d 199, 208 (6th Cir. 1998); Axson-Flynn v. Johnson, 356 F.3d 1277, 1292 (10th Cir. 2004).

⁶ The fact that the speech of a particular individual or group may in the past have resulted in some violence or harm is not a sufficient rationale to prohibit that person or group from engaging in future speech activities on campus. Courts have held that the proper response to potential and actual violence is to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate free speech activity as a prophylactic measure. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 551 (1965); Kunz v. New York, 340 U.S. 290, 294-295 (1951).

⁷ “Fighting words” are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942).

⁸ *See, e.g.*, Murakowski v. University of Delaware, 575 F.Supp. 571,589 (D. Del. 2008) (A statement is a “true threat” – thus, not protected by the First Amendment – if “a reasonable person would foresee that the statement[] would be a serious expression of intent to harm or assault...[in the context of] the surrounding events and reactions of listeners and whether the threat was unconditional and unequivocal and communicated a gravity of purpose and the prospect of immediate execution.”)

⁹ *See* “Handbook of Election Issues” at http://www.calstate.edu/gc/OGC_Manuals_on_Legal_Issues.shtml.

¹⁰ *See, e.g.*, Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept., 533 F.3d 780 (9th Cir. 2008), citing Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (“[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.”)

While some types of employee speech in the workplace are protected, others are not. Public employees may not typically be disciplined for certain types of speech, (*e.g.*, labor-related or religious speech) but can be held accountable for most other types of work-related speech unless the content is a matter of public concern.¹¹

Other content-based restrictions that threaten the “censorship of ideas” are prohibited. As summarized by the Supreme Court:

“...above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas....”¹²

IV. FREE SPEECH ON CSU CAMPUSES

The First Amendment does not guarantee access to property that is owned by the government.¹³ No one, including “students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for unlimited expressive purposes.”¹⁴

However, because CSU campuses are public institutions – and public universities are considered to be the quintessential “marketplaces of ideas” – the rights of both the campus community and the general public to engage in free speech activities on CSU campuses are quite broad.

A. “Forum Analysis”

The right to use particular locations at CSU campuses for speech activities is largely a function of the character and/or location of the property where the speech occurs – *e.g.*, if a speaker speaks on a campus walkway, the walkway is the relevant forum; if the speaker posts a flyer on a bulletin board on the same walkway, the bulletin board becomes the relevant forum.¹⁵ There are three kinds of “forums” on campus: the public or “traditional” forum, which receives the greatest protection; the limited or “designated” forum, which receives less protection; and the non-public forum, which receives very limited protection.

A public forum is defined as public property that has traditionally been available to assembly or debate -- *e.g.*, streets, parks and lawn areas. CSU may not prohibit all speech activity in such locations, and a very high standard is required to enforce any content-based prohibitions -- *i.e.*,

¹¹ Public employee speech is discussed in more detail in section V., below.

¹² Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

¹³ United States Postal Service v. Council of Greenburgh Civic Ass’n, 453 U.S. 114, 129 (1981).

¹⁴ Grayned v. City of Rockford, 408 U.S. 104, 117-118 (1972).

¹⁵ See Downs v. L.A. Unified School District, 228 F.3d 1003, 1013 (9th Cir. 2000); Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 688 (N.J. Super. Ct. App. Div. 2002) (pertinent forum in dispute over right to compel publication of advertisement in college magazine was not the magazine itself, but more limited advertising section of magazine).

prohibitions that reference the particular message to be delivered. Any regulation must be necessary to serve a compelling interest and narrowly drawn to achieve that end.¹⁶ CSU may regulate the time, place, and manner of speech in public forums if the regulations are content-neutral, narrowly tailored to serve a significant interest and leave open ample alternative channels of communication. Time, place and manner regulations are discussed in section IV.C below.

A limited or designated forum is an area that has not been traditionally public, but which has been specifically identified as such by a CSU campus -- *e.g.*, an auditorium or a lobby. In other words, unlike traditional public forums, a designated forum results from a purposeful action to open the location for public discourse,¹⁷ and not from the characteristics of the location itself. Once designated, CSU may not restrict speech at a designated public forum, even though it was not required to create the forum in the first place.¹⁸ CSU is not required to indefinitely designate a forum as open, but as long as it does, it is bound by the same standards that apply in a traditional public forum. Hence, reasonable time, place and manner regulations are permissible, but any content-based prohibitions must be narrowly drawn to effectuate a compelling interest – a very demanding standard.¹⁹

Non-public forums which are not open for public speech by tradition or design receive very little protection. CSU may adopt reasonable time, place, and manner regulations that apply to these areas, or may reserve them for their intended purposes only. If their intended purposes include speech-related activity, any regulation must be reasonable and not an effort to suppress expression merely because of the speaker's viewpoint.²⁰

A good example of the distinction between a public or designated forum and a non-public forum is a campus bulletin board. A board on which anyone is allowed to post notices is a public or designated forum, and removal of material based on content is prohibited. A bulletin board that is specifically made available only for management postings is not a public or a designated forum (even though it is visible to the public) and can be cleared of material that does not meet the criteria set by management, based on its content.

¹⁶ Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 38 (1983), *citing* Carey v. Brown, 447 U.S. 455, 461 (1980).

¹⁷ A public forum may be created for a limited purpose such as use by certain groups [*e.g.*, Widmar v. Vincent, 454 U.S. 263, 267-268 (1981) (student groups)], or for the discussion of certain subjects [*e.g.*, City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976) (school board business)].

¹⁸ Widmar, *supra*, 454 U.S. at 268 (university meeting facilities); City of Madison, *supra*, 429 U.S. at 176 (school board meeting); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (municipal theater).

¹⁹ Id., 454 U.S. at 270.

²⁰ United States Postal Service, *supra*, 453 U.S. at 131, fn. 7.

B. The California Compatibility Test

Under the California Constitution, courts consider whether use of a particular facility for speech activity would interfere with its primary use.²¹ If not, then it is available for public use. In other words, the test is whether speech activity is fundamentally incompatible with normal activity. Courts have made clear that mere “annoyance” or “inconvenience” are not enough to meet this incompatibility threshold: “Annoyance and inconvenience...are a small price to pay for preservation of our most cherished right.”²² As a state institution, the CSU is subject to both the First Amendment and the California Constitution; therefore, must meet not only the federal “forum analysis” standards, but the broader California compatibility test as well.

C. Time, Place and Manner Restrictions

Universities do need to be able to ensure safety, security and order, prevent unlawful conduct, preserve architectural aesthetics, and limit the volume of commercial solicitations even in public forums.²³ Reasonable time, place and manner restrictions on the use of public forums are permissible, provided that they are carefully designed to (1) coordinate the appropriate use of a particular location for speech activities, and not to prohibit particular forms of expression; (2) “serve a significant government interest” and are not more extensive than necessary to serve that interest; and (3) “leave open ample alternative channels for communication of the information.”²⁴ They must be clear and specific enough to place the public on notice as to exactly what is authorized and what is forbidden

To be legally sustainable, time, place, and manner policies must consider all of the following:

- Is the campus interest sufficiently significant? Interests that have qualified include: prevention of crime; maintenance of safety to persons or property; avoidance of disruption of University functions; maintenance of an educational rather than a commercial atmosphere; preservation of residential tranquility; maintenance of personal privacy; and preventing commercial exploitation of students.²⁵

²¹ See, e.g., Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985)(abrogated in part by Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352 (2000)); In re Hoffman, 67 Cal. 2d 845, 851 (1967).

²² Carreras, *supra*, 768 F.2d at 1046, *citing* Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51 (1967).

²³ See, e.g., Khademi v. S. Orange County Comm. Coll. Dist., 194 F.Supp. 2d 1011, 1026-1027 (C.D.Cal. 2002); Students Against Apartheid Coalition v. O’Neil, 838 F.2d 735 (4th Cir. 1988); American Future Systems v. Pennsylvania State University, 618 F.2d 252, 255 (3d Cir. 1980) and 688 F.2d 907, 912 (3d Cir. 1982).

²⁴ Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 648 (1981).

²⁵ Caution is advised in meeting these standards -- e.g., a court struck down Penn State’s policy limiting commercial solicitation in its dormitories, concluding that the content restrictions on the sale of cookware had nothing to do with maintaining a proper study atmosphere in the dormitories or protecting the privacy of the students. [American Future Systems, *supra*.] Similarly, the Ninth Circuit struck down an attempt by Santa Clara County to prohibit gun shows at its fair grounds, finding that the prohibition failed to directly advance the goal of reducing the possession of guns in the county. [Nordyke v. Santa Clara County, 110 F.3d 707, 713 (9th Cir. 1997).]

- Does the restriction directly and materially advance the significant campus interests which have been identified?
- Is the restriction sufficiently narrow and tailored to accomplish the goal without adversely affecting other forms of protected free speech?

Such restrictions must also be routinely and even-handedly enforced. A policy that is only enforced against “objectionable” speech will be struck down.

Trustee policy addresses which types of speech activity must be allowed to occur on CSU campuses, and which can be prohibited under what circumstances.²⁶ Campus policies must harmonize with Trustee policy, and must be posted:

“Notice shall be posted at or near the principal entrances of each campus calling attention to the existence of regulations relating to use of CSU buildings and grounds and designating the places where copies thereof and directives issued by the campus president pursuant thereto may be examined.”²⁷

California Education Code section 89031 provides that any violation of these regulations is a misdemeanor.

1. Advance Notice, Registration and Permitting Requirements

Requirements that call for advance notice, registration or permits before speech activity can occur are presumed to be unreasonable, as they can “drastically burden free speech,”²⁸ particularly on college campuses, which are recognized as “center[s] for free intellectual debate.”²⁹ The presumption can be overcome where the requirement is content neutral and is a reasonable restriction under all of the circumstances, but it is a tough standard to meet.

“Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers. Moreover, because of the delay caused by complying with the permitting procedures, “[i]mmediate speech can no longer respond to immediate issues.”³⁰

²⁶ See Title 5, Cal. Code of Regs. § 42350 *et seq.*

²⁷ Title 5, Cal. Code of Regs., § 42354.

²⁸ Rosen v. Port of Portland, 641 F.2d 1243, 1249 (9th Cir. 1981); O’Toole v. Superior Court (San Diego Community College District), 140 Cal. App. 4th 488, 503 (Cal. App. 4th Dist. 2006), *citing* Grossman v. City of Portland, 33 F.3d 1200, 1204 (9th Cir. 1994).

²⁹ O’Toole, supra, 140 Cal. App. 4th at 503, *citing* Braxton v. Municipal Court, 10 Cal.3d 138, 149 (1973).

³⁰ Grossman, supra, 33 F.3d at 1206. See also Carreras, supra, 768 F.2d at 1049 (Anaheim’s solicitation permit ordinance for the Anaheim Stadium (now Edison Field) was found to violate the California Constitution because it lacked adequate procedural safeguards and permitted city officials to deny or revoke permits on the basis of unguided discretion).

a. Members of the Campus Community vs. “Outsiders”

Courts are more willing to uphold restrictions on speakers who are external to the campus community – e.g., vendors, activists and external interest groups.³¹ Certain permitting requirements applicable to “outsiders” have been upheld.³²

b. Discretion to Grant/Deny Permits

A written permitting process limited by its terms to considerations of public safety or other similar considerations can be sustained. Campus policies should make clear when and under what circumstances permits will be denied, and should also specify that permits will not be denied based on the content of the proposed speech. It is also a good idea to provide for a review of any permit denial.

c. Length of Advance Notice Requirements

The length of any advance notice requirement is critical to its reasonableness. The longer the period of advance notice, the more unlikely it will be sustained.³³ Although there is no hard and fast rule, several ordinances requiring two or less days advance notice have survived challenge.³⁴ Conversely, courts have routinely struck down restrictions with a longer advance notice period.³⁵

d. “Spontaneous” Expression

Any advance notice or permitting requirement should also contain an exception for “spontaneous events.”

³¹ See, e.g., A.C.L.U. Student Chapter-Univ. of Md. Coll. Park v. Mote, 321 F.Supp. 2d 670, 681 (S.D. Md. 2004) (forum limited to speakers associated with university legitimately furthers institution’s primary purpose); Bourgault v. Yudof, 316 F. Supp. 2d 411, 421 (N.D. Tex. 2004) (outside preacher was legitimately denied access to campus forums).

³² See Glover v. Cole, 762 F.2d 1197, 1201 (4th Cir. 1985) (state has a recognized interest in regulating the way third parties utilize its educational facilities).

³³ See, e.g., Douglas v. Brownell, 88 F.3d 1511, 1523-1524 (8th Cir. 1996) (striking down a 5-day advance notice requirement for processions of 10 or more persons on streets and sidewalks as unjustifiably long and because applied to groups as small as 10); N.A.A.C.P., West. Reg. v. City of Richmond, 743 F.2d 1346, 1356-1357 (9th Cir. 1984) (striking down a 20-day advance notice period for parades).

³⁴ See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1045 (9th Cir. 2006) (upholding two-day advance notice requirement for marches and assemblies, etc.); A Quaker Action Group v. Morton, 516 F.2d 717, 735 (D.C. Cir. 1975) (approving two-day advance notice requirement for planned public gatherings on a designated area on the grounds of the White House); Powe v. Miles, 407 F.2d 73, 84 (2^d Cir. 1968) (upholding two-day advance notice requirement).

³⁵ See, e.g., cases noted in fn. 31 above and O’Toole, supra, 140 Cal. App. 4th at 503 (District policy requiring a special permit before anti-abortion posters could be displayed and literature handed out on campus was struck down where “District produced no reasonable basis for requiring a speaker to wait up to 10 days for approval, [and the policy had no] adequate safeguards to guide the Dean of Student Affairs’ discretion or show the permit requirement was narrowly tailored to achieved its legitimate objectives”).

“Restricting spontaneous political expression places a severe burden on political speech because...timing is of the essence in politics ... and when an event occurs, it is often necessary to have one’s voice heard promptly, if it is to be considered at all. To suggest that [a twenty-four hour] waiting period is minimal ignores the reality of breakneck political campaigning and the importance of getting the message out in a timely, or, in some cases, even instantaneous fashion.”³⁶

In a Santa Monica case, the court found reasonable a general permitting scheme that provided an exception for “[s]pontaneous events which are occasioned by news or affairs coming into public knowledge less than forty-eight hours prior to such event,” and which provided that the events could be conducted on the lawn of City Hall without the organizers first having to obtain a permit.³⁷

2. Free Speech Zones

It used to be common to designate a “free speech zone” on college campuses, where all free speech activities were to take place. While it is still possible to label certain areas as “free speech zones,” meaning that most free speech activities will occur there, courts have recognized that the ability to communicate some messages in a particular location can be significant to the message.³⁸ Thus, having exclusive “free speech zones” where all free speech activity must occur will not be sustained. A location may be symbolic to the protest, one where people habitually gather, “one at which the particular audience the speaker seeks to reach is present” or significant in some other way.³⁹

It can be effective to designate an entire campus open to free speech, and except out only those locations where such activity would significantly interfere with and/or disrupt university business -- e.g., immediately adjacent to classrooms, where teaching and learning would be disrupted, or narrow walkways or corridors, where the free flow of foot-traffic would be impeded.

³⁶ Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1008 (9th Cir. 2003) (citations omitted) (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (Harlan, J., concurring)). See also N.A.A.C.P., *supra*, 743 F.2d at 1356 (“A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the ‘same’ parade 20 days later”).

³⁷ Santa Monica, *supra*, 450 F.3d at 1028. See also N.A.A.C.P., *supra*, 743 F.2d at 1355; Elrod v. Burns, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”).

³⁸ See Galvin v. Hay, 374 F.3d 739, 750 (9th Cir. 2004) (“The Court has recognized that location of speech, like other aspects of presentation, can affect the meaning of communication and merit First Amendment protection for that reason”); N.A.A.C.P., *supra*, 743 F.2d at 1350 (noting that “[certain] protests frequently occur in response to topical events, and their effectiveness may depend on both their immediacy and the forum where they take place”).

³⁹ Santa Monica, *supra*, 450 F.3d at 1048, citing Galvin v. Hay, *supra*, 374 F.3d at 751 (“As speakers may generally control the presentation of their message by choosing a location for its importance to the meaning of their speech, they may ordinarily -- absent a valid time, place, and manner restriction -- do so in a public forum”).

3. Equal Access to Facilities

Campuses must allow equal access to public forums as a venue for speech. For example, if a campus rents an events hall to the public for weddings, conferences and other gatherings, it must also allow the same access to anyone else who is willing to agree to standard rental terms, notwithstanding their membership in a controversial group or intent to discuss controversial issues. A widely-accepted standard adopted by the American Association of University Professors (AAUP) provides as follows:

“Students should be allowed to invite and to hear any person of their own choosing. Those routine procedures required by an institution before a guest speaker is invited to appear on campus should be designed only to ensure that there is orderly scheduling of facilities and adequate preparation for the event, and that the occasion is conducted in a manner appropriate to an academic community. The institutional control of campus facilities should not be used as a device of censorship. It should be made clear to the academic and larger community that sponsorship of guest speakers does not necessarily imply approval or endorsement of the views expressed, either by the sponsoring group or by the institution.”⁴⁰

Courts have held that public universities may legitimately require all speaker requests to come from recognized student or faculty groups to ensure that the speaker will address matters that are of interest to the campus community.⁴¹ Such a requirement may be seen as furthering a university’s educational mission by limiting speech to matters in which at least one campus group has an interest.

Speakers can only be restricted based on content where it reasonably appears that they will advocate (1) violent overthrow of the government; (2) willful destruction or seizure of campus buildings or other property; (3) disruption or impairment, by force, of the campus’s regularly scheduled classes or other educational functions; (4) physical harm, coercion or intimidation or other invasion of lawful rights of campus officials, faculty or students; or (5) other campus disorder of a violent nature.⁴² Before a campus speaker is barred there must be “a reasonable apprehension of imminent danger to the essential functions and purposes of the institution, including the safety of its property and the protection of its officials, faculty members and students.”⁴³

⁴⁰ “Joint Statement on Rights and Freedoms of Students,” approved by the AAUP, United States Student Association, Association of American Colleges and Universities, National Association of Student Personnel Administrators, and the National Association for Women in Education. The statement is reprinted in AAUP, *Policy Documents and Reports*, (9th ed. 2001), and is available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm>.

⁴¹ Stacy v. Williams, 306 F. Supp. 963, 973 (N.D. Mass. 1969); Gilles v. Blanchard, 477 F.3d 466 (7th Cir. 2007); Gilles v. Miller, 501 F.Supp.2d 939 (W.D.Ky. 2007).

⁴² Stacy v. Williams, *supra*, at 973.

⁴³ Id., at 973-74.

4. Sales and Distribution of Non-Commercial Materials

Trustee policy provides that written materials may be distributed on campus grounds subject only to reasonable time, place and manner restrictions, and that sales of published materials is also permitted, provided that:

- (i) such published materials are not available for sale at the campus bookstore, and
- (ii) the selling or display of such published materials is conducted in compliance with any time, place and manner directives adopted by the president, and
- (iii) the published materials displayed or offered for sale are not in violation of the . . . the Penal Code (relating to the sale and distribution of obscene matter), or . . . the Education Code (relating to the preparation, sale and distribution of term papers, theses and other materials to be submitted for academic credit).⁴⁴

Non-commercial published materials includes any written materials distributed or offered for sale by an individual or group -- *e.g.*, booklets distributed or offered for sale to raise funds for a charitable organization.

D. Commercial Speech

CSU has much greater latitude to restrict commercial speech. The U.S. Supreme Court has held that for commercial speech to be protected (1) it must concern lawful activity and not be misleading; (2) the asserted governmental interest seeking to prohibit or limit the commercial speech must be substantial; (3) the regulation must directly advance the government interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.⁴⁵

Trustee policy prohibits commercial transactions on CSU campuses without the written permission of the President, which must be granted where:

- (i) the proposed activity aids achievement of the educational objectives of the campus, does not unreasonably interfere with the operation of the campus and is not prohibited by law, or
- (ii) the prospective buyer has agreed in writing in advance to an appointment, and the prospective seller makes no more than one appointment for any day, and such appointment does not interfere with the operation of the campus.⁴⁶

⁴⁴ Title 5, Cal. Code of Regs., § 42351.

⁴⁵ Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557, 566 (1980).

⁴⁶ Title 5, Cal. Code of Regs., § 42350.1. Note that this section does not apply to private sales (defined in § 42350).

Credit card purveyors are specifically limited, and are prohibited from offering gifts to student for filling out credit card applications.⁴⁷

Restricting campus vendors to daylight hours or the times when campus buildings are generally open is reasonable. Restriction of campus vendors to certain locations on campus that will not interfere with teaching and studying or create campus congestion is reasonable. Restriction on sound amplification within specified limits is reasonable. Restricting particular vendors is not reasonable. Limiting pure speech activity, such as advertising, is not reasonable.

V. PUBLIC EMPLOYEE SPEECH

When the CSU is acting in its capacity as an employer it has more reason and authority to regulate employee speech than it does when acting as a sovereign (*e.g.*, regulating student speech). Because CSU employees are “public employees” they have greater rights than private sector employees to voice themselves in the work place. There are four relevant types of protected speech: labor-related speech, political speech, religious speech and matters that are of concern to the public at large.

Imposing discipline or taking an adverse work-related action against an employee for engaging in any protected form of speech is clearly prohibited, as is threatening or intimidating an employee in order to prevent them from engaging in protected speech. Prior restraint, such as a policy or rule forbidding certain types of speech would also be improper unless it serves a legitimate business necessity carefully balanced against the rights of employee speech.

A. Political Speech

Becoming a public servant (*i.e.*, state employee) does not require that an employee refrain from engaging in politic activity. The “right of political association” is a form of protected speech and the California Labor Code specifically prohibits employers from controlling or preventing their employees from engaging in political activities or affiliations.⁴⁸ Campuses may not prohibit or take any adverse action based on an employee’s personal political affiliation, activity or beliefs.⁴⁹ For example, CSU cannot typically make job related decisions based on a person’s political association -- a republican manager cannot refuse to hire the most qualified person simply because he/she is a democrat.

Where the particular job duties require the public employee to support certain political positions, however, the employee may be required to conform to the chosen “message” while acting in his/her role as an employee. The political views we hold as citizens are distinct from what views we may legitimately express while “on the job.”

⁴⁷ *Id.*, § 42350.6.

⁴⁸ Cal. Labor Code § 1101.

⁴⁹ *Smedley v. Capps, Staples, Etc.*, 820 F. Supp. 1227 (N.D. Cal. 1993).

The law prohibits the use of public funds for political campaign activity.⁵⁰ This means state resources cannot be used to promote a partisan position. For example, an employee cannot use the office photocopier to duplicate campaign flyers for his/her chosen political candidate. Likewise, a campus cannot choose to allow only one candidate to speak on campus while denying others because of their political message and/or affiliation -- CSU must also remain “entirely independent of all political and sectarian influence.”⁵¹ While expressing one’s political views as a public citizen is appropriate – and protected, creating the perception that one’s viewpoint is the official view of the CSU is not. So while it may be acceptable to wear a political button to work on Election Day, it would generally not be appropriate for a CSU employee to use his/her title and CSU letterhead to endorse a particular political candidate or link from a CSU website to that candidate’s website.⁵²

B. Religious Speech

Numerous laws protect an employee’s right to be free from religious discrimination, including the free exercise of religion at work.⁵³ At the same time, public institutions such as the CSU are required by the Establishment Clause of the U.S. Constitution to maintain the separation of church and state and to avoid the appearance of endorsing religious views.⁵⁴ Government employers are also obligated to run efficient business operations. As such, courts apply a “balancing test” which takes into account the public employee’s interest in the free exercise of religion and the public employer’s interests in the efficiency of public service and its limitations under the Establishment Clause.⁵⁵

Each situation involving religious speech in the workplace must be carefully analyzed on its particular facts, as a different outcome may be called for depending on the combination of the

⁵⁰ See, e.g., Cal. Government Code § 8314; Stanson v. Mott, 17 Cal.3d 206, 210 (1976) (“[A] public agency may not expend public funds to promote a partisan position in an election campaign”).

⁵¹ Cal. Education Code § 66607.

⁵² For additional information see the CSU Office of General Counsel’s “Handbook of Election Issues” at http://www.calstate.edu/gc/OGC_Manuals_on_Legal_Issues.shtml.

⁵³ For example, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.) requires that employers accommodate expression that is based on a sincerely held religious practice or belief, unless it threatens to constitute harassment of others or otherwise poses an undue hardship on the employer. See the CSU Office of General Counsel’s “Religious Discrimination Issues in Employment Handbook,” at http://www.calstate.edu/gc/OGC_Manuals_on_Legal_Issues.shtml for further guidance.

⁵⁴ The U.S. Supreme Court has made clear that avoiding an Establishment Clause violation may be a compelling state interest. See, e.g., Lamb’s Chapel v. Ctr. Moriches Union Free School District, 508 U.S. 384, 394 (1993) (“the interest of the State in avoiding an Establishment Clause violation ‘may be compelling,’ ...justifying an abridgment of free speech otherwise protected by the First Amendment”); Good News Club v. Milford Cent. School, 533 U.S. 98, 112 (2001) (“We have said that a state interest in avoiding an Establishment Clause violation ‘may be characterized as compelling,’ and therefore may justify content-based discrimination”).

⁵⁵ Berry v. Dept. of Social Services, 447 F.3d 642, 650-651 (9th Cir. 2006) (religious speech by employees in public workplaces can be limited in order to avoid violations of the Establishment Clause).

circumstances. Employer policies restricting the exercise of religion in the work place are most likely to withstand scrutiny where the employee's religious conduct and/or message could be interpreted as representing the (public) employer's views. For example, a display of religious items within the individual offices of a campus counseling center utilized for counseling sessions would generally be inappropriate, while such a display may be acceptable in the individual offices of a payroll or data entry department not utilized for meeting with others or open to the general public.⁵⁶ Similarly, employers may not prohibit prayer in the workplace, but may enforce reasonable restrictions. It would be permissible, for example, to prohibit the use of conference rooms for prayer meetings (assuming a similar prohibition against use of conference rooms for other non-work related activities), while allowing employees to pray in break rooms or outside during lunch.⁵⁷ Depending on the context and the subject matter being discussed, a faculty member's expression of his/her own personal religious viewpoints in the classroom may also be problematic.⁵⁸

The appropriateness of religious messages in e-mail signature blocks is another common query. This may be permissible depending on where the employee is in the office hierarchy and who receives the message (*e.g.*, colleagues versus clients). The appropriateness will vary depending on the actual content, who is receiving the message and whether or not it might be confused as coming from or having been endorsed by the employer rather than the individual employee.

The employer's need to run an efficient operation is also relevant. If religious proselytizing is interfering with work operations or is upsetting other employees, the employer may legitimately restrict the activity.⁵⁹ Conversely, if religious discussions are taking place during break periods, and no one is offended by the activity, no restriction is necessary or appropriate.

C. Labor-Related Speech

Campuses are prohibited under both state laws and CSU collective bargaining agreements from imposing discipline or threatening, intimidating or retaliating against an employee for engaging in protected labor-related speech and activities.⁶⁰ However, even otherwise protected speech

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ *See, e.g., Pelozo v. Capistrano Unified School District*, 37 F.2d 517, 522 (9th Cir. 1994) (rejecting a high school teacher's challenge to a restriction barring him from discussing religion with students, the court held that the school district's interest in avoiding an Establishment Clause violation trumped the teacher's right to talk to students); *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006) (public community college had the right to require that cosmetology instructor refrain from engaging in speech related to her religious beliefs concerning the sinfulness of homosexuality while serving as an instructor).

⁵⁹ *But see Tucker v. State of California Dept. of Education*, 97 F.3d 1204 (9th Cir. 1996), where the Ninth Circuit found the employer's rule prohibiting employees from posting or discussing religious messages in the workplace was overbroad and therefore violated the First Amendment.

⁶⁰ *See, e.g.,* the Higher Education Employer-Employee Relations Act, Cal. Government Code § 3560 et seq.; Cal. Code of Civil Procedure § 527.3.

loses its protection where it is so “opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice” as to cause “substantial disruption of or material interference with school activities.”⁶¹

For example, in a case decided by the Public Employee Relations Board (PERB), a teacher was reprimanded after she tried to engage the superintendent in an impromptu conversation about contract negotiations.⁶² The District contended that the reprimand was justified because the teacher used profanity when the superintendent refused to answer her questions. While PERB ruled in favor of the union because the profanity in question was relatively innocuous, it explained that “an employee’s speech may lose its protected status, thus leaving the employer free to impose discipline, if the speech is so disrespectful of the employer as seriously to impair the maintenance of discipline.”⁶³

“Maintenance of discipline” means that campuses can take action where necessary to control workplace functionality. If the conduct in question takes place during work hours, at the work place, employer action (*e.g.*, discipline) will likely be sustained. For example, where an employee helped prepare and signed a letter to a vice president in which she repeatedly called him a liar and charged him with having “an obvious contempt for the truth,” her discharge was upheld.⁶⁴ The letter was distributed just prior to an election regarding the future union representation of the employees. The court stated:

“An employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer ... It is difficult to perceive of a situation that is further beyond the protected concerted activities of the [Labor] Act than this denunciation of the employer.”⁶⁵

A letter of warning issued to an employee was also upheld where a co-worker complained that the employee repeatedly approached her about filling out a union authorization card during her work hours.⁶⁶ Because management had received a complaint, the NLRB determined that the warning not to subject coworkers to “harassment of any kind” was appropriate and did not impinge on the employee’s union rights.

⁶¹ Santa Ana College Organizing Comm. v. CFT/AFT/AFL-CIO, 11 PERC 18021, 104 (1986) (citation omitted).

⁶² Rio Hondo Faculty Assoc. v. Rio Hondo Community College Dist., 7 PERC 14010, 27 (1982).

⁶³ Id., at 28.

⁶⁴ NLRB v. Blue Bell, 219 F.2d 796 (5th Cir. 1955).

⁶⁵ Id., at 798.

⁶⁶ BJ’s Wholesale Club, 318 NLRB No. 83, 6 (1995).

D. Matters of Public vs. Private Concern

If the speech in question does not fall into any of the three categories discussed above, to be protected the employee's speech must involve a 'matter of public concern' and the employee's interest in expressing him- or herself as a private citizen must outweigh the campus's interests in promoting workplace efficiency and avoiding workplace disruption.⁶⁷

Whether a particular matter is of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record."⁶⁸ To qualify, the speech must "relate to matters of overwhelming public concern – race, gender and power conflicts in our society,"⁶⁹ or be that which is "fairly considered as relating to any matter of political, social, or other concern to the community."⁷⁰ Speech is usually considered to be of public concern if it helps citizens "to make informed decisions about the operation of their government."⁷¹ Speech is not of public concern when it "deals with individual personnel disputes and grievances [that] would be of no relevance to the public's evaluation of the performance of governmental agencies"⁷² or "the employee [speaks] in order to bring wrongdoing to light or merely to further some purely private interest."⁷³ A personal complaint or grievance that does not affect the public good in any way or deals purely with workplace minutia is not protected speech.

The U.S. Supreme Court recently made clear that when public employees make statements as part of their official duties, they are not protected as private citizens, even if the subject is of public concern. In Garcetti v. Ceballos, 126 S. Ct.1951 (2006), a deputy district attorney was disciplined because he wrote in a disposition memorandum and testified in court that he believed an affidavit from the police used to obtain a critical search warrant contained serious misrepresentations. The Court held that the attorney's speech was not protected by the First Amendment because where a public employee makes statements pursuant to his official duties, he is speaking not as a citizen but for his employer, even if his speech relates to a matter of public concern. The "controlling factor" in the Court's decision was that the deputy's "expressions were made pursuant to his duties as a calendar deputy."

"Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official

⁶⁷ Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977), quoting Pickering, *supra*, 391 U.S. at 568.

⁶⁸ Connick v. Myers, 461 U.S. 138, 147-148 (1983).

⁶⁹ Hardy v. Jefferson Comm. Coll., 260 F.3d 671, 679 (6th Cir. 2001).

⁷⁰ Connick, *supra*, 461 U.S. at 146.

⁷¹ Roe v. City and County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997).

⁷² Id.

⁷³ Havekost v. United States Dept. of the Navy, 925 F.2d 316, 318 (9th Cir. 1991).

communications are accurate, demonstrate sound judgment, and promote the employer's mission."⁷⁴

The scope of an employee's official duties is a practical one: "[f]ormal job descriptions often bear little resemblance to the duties an employee is actually expected to perform."⁷⁵ At least one court has held that a claimant's speech might be considered part of his/her official duties if it relates to "special knowledge" or "experience" acquired on the job.⁷⁶

In Garcetti, the Supreme Court declined to answer whether the "official duty" analysis would apply in the same manner to a case involving a faculty member's speech related to scholarship or teaching. What might legitimately constitute speech "related to scholarship or teaching" has not yet been made clear; lower courts have differed over whether (and if so, when) to apply the "official duty" test to academic instructors.⁷⁷

Finally, an employee's right to speak must be balanced against the CSU's right to effectively provide its services.⁷⁸ "In conducting this balancing, courts give government employers "wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to

⁷⁴ Id., 126 S.Ct. at 1960. See also Battle v. Board of Regents for Georgia, 468 F.3d 755 (11th Cir. 2006). Battle worked in the university's office of financial aid and was responsible for verifying financial aid submissions and checking for and reporting inaccuracies and signs of fraud. When she discovered fraud that she thought was the doing of her superiors, she reported it and complained repeatedly to have it corrected. Nothing was done until after an audit revealed problems. Although she received good reviews, after two years in the position her contract was not renewed and she sued. The court denied her claim, stating "[w]hen an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." Citing Garcetti, *supra*, at 1961, the court rejected the idea that the nature of public employment transforms a public employee's statements into a matter of public concern protected by the First Amendment:

"Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen . . . In this case, Plaintiff admitted that she had a clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered in the student financial aid files . . . We conclude that because the First Amendment protects speech on matters of public concern made by a government employee speaking as a citizen, not as an employee fulfilling official responsibilities, Plaintiff's retaliation claim must fail." Id., at 760.

⁷⁵ Garcetti, *supra*, 547 U.S. at 424.

⁷⁶ Gorum v. Sessoms, 561 F.3d 179 (3d Cir. 2009).

⁷⁷ *E.g.*, Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008) (dismissing a professor's lawsuit against a public university on the grounds that the professor's complaints regarding "the proper administration of an educational grant fell within the scope of [his] teaching duties"); Lee v. York County School Div., 484 F.3d 687 (4th Cir. 2007) (declining to apply Garcetti in determining whether a high school teacher's bulletin board postings constituted protected speech under the First Amendment); Gorum, *supra* (applying the "official duty" test to dismiss a professor's lawsuit against a public university on the grounds that the speech in question did not fall within the professor's scholarship or teaching).

⁷⁸ Pickering, *supra*, 391 U.S. at 568; Connick, *supra*, 461 U.S. at 140.

do so with dispatch.” Moreover, public employers need not allege that an employee’s expression actually disrupted the workplace: “reasonable predictions of disruption” are sufficient.⁷⁹

Legitimate campus interests include maintaining discipline, promoting harmony among coworkers, securing confidentiality, performing the public function in an efficient manner and maintaining relationships between supervisors and employees that call for personal loyalty and confidence. Conversely, there is no legitimate interest in stifling public comment about poor management or illegal activity.

As in the labor-related speech cases discussed above, where otherwise protected speech crosses the line into disruptive behavior it loses its protected status. If an employee’s speech (regardless of the content/message) upsets the ability of the work environment to function, disciplinary action may be taken pursuant to the provisions of Education Code § 89535. Insubordination, false statements and profanity need not be tolerated in the workplace.⁸⁰

VI. STUDENT SPEECH

A. Student “Academic Freedom”

Whether students have a right to “academic freedom” is a subject of national debate. In 1967, representatives of five higher education associations drafted and approved a “Joint Statement on Rights and Freedoms of Students,” which was then reprinted by the AAUP and widely accepted.⁸¹ The statement addresses student academic freedom in the classroom and off campus, in student records and student affairs, and in disciplinary proceedings and access to higher education. Specifically, the statement asserts that students have the right to be evaluated solely on an academic basis and not on their personal opinions or conduct that is separate from the course curriculum. It also provides that “students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.”⁸²

B. Rules and Policies that Regulate Speech and Conduct

CSU students’ rights to free expression are set forth in the Education Code. Section 66301 prohibits CSU from making rules or taking disciplinary action:

⁷⁹ Brewster v. Bd of Education of Lynwood Unified Sch. Dist., 149 F.3d 971, 979 (9th Cir. 1998) (citations omitted).

⁸⁰ Rankin v. McPherson, 483 U.S. 378, 388 (1987).

⁸¹ The statement is reprinted in AAUP, *Policy Documents and Reports* (9th ed. 2001) and is available on-line at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm>.

⁸² Id.

“ . . .solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.”

Trustee regulations also preclude the taking of disciplinary action based on speech alone.⁸³ This is consistent with a long line of cases that similarly prohibit discipline against students based on speech alone. For example, the fact that students wore black armbands to school in protest of the Vietnam War constituted “symbolic speech” that was deemed protected.⁸⁴ Other examples include “sit-ins” (where students occupy an area on campus), rallies, boycotts of classes or events, wearing a common item (ribbons, jeans, berets, etc.) or color, etc. Action may only be taken under the student conduct procedures where the symbolic speech in question materially and substantially disrupts the educational process.⁸⁵

C. Student Classroom Speech

Students’ right of free expression is not without limits in the classroom. The classroom is not an open forum and is therefore subject to reasonable speech regulation.⁸⁶ Students do not have a right to insist that a class be viewpoint neutral,⁸⁷ e.g., students may be required to write papers expressing a particular point of view with which they may not agree as long as the assignment promotes legitimate pedagogical interests.⁸⁸

Student behavior that “materially disrupts class work or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.”⁸⁹ Faculty are in charge of their classrooms and can expect students to comport themselves in a manner that is consistent with a healthy learning environment. If a student

⁸³ Title 5, Cal. Code of Regs., § 41301.

⁸⁴ Tinker v. Des Moines Comm. School Dist., 393 U.S. 503, 516 (1969).

⁸⁵ Title 5, Cal. Code of Regs., § 41301. *See also* Pinard v. Clatskanie School Dist. 6J, 467 F.3d 755 (9th Cir. 2006), where the Ninth Circuit held that while student-athlete complaints about a basketball coach were protected, refusing to play basketball was not.

⁸⁶ Bishop v. Aronov, 926 F.2d 1066, 1071 (11th Cir. 1991).

⁸⁷ Edwards v. Aguillard, 482 U.S. 578, 586 n. 6 (1987).

⁸⁸ Brown v. Li, 308 F.3d 939, 953 (9th Cir. 2002).

⁸⁹ Tinker, *supra*, 393 U.S. at 513.

continues after fair warning to engage in disruptive behavior, it may be necessary to involve the Student Conduct Officer and pursue possible discipline.⁹⁰

D. Student Newspapers

Freedom of the press is one of the most staunchly guarded of all First Amendment rights, and applies equally to student publications. Education Code Section 66301 provides that “[n]othing in this section shall be construed to authorize any prior restraint of student speech [or the] student press.”

Section 66301 was recently amended to add that an employee may not be disciplined, reassigned or otherwise retaliated against solely for acting to protect a student engaged in protected speech. The amendment was specifically intended to protect faculty advisors to student newspapers and other media outlets who act to protect a student’s free speech rights.

E. Student Government

At least one court has held that imposing a limit on the amount candidates may spend in connection with student government elections does not violate the candidates’ First Amendment rights.⁹¹ As limited public forums, such elections may be regulated by a university as long as the regulations are reasonable and viewpoint neutral. Putting a cap on student government campaign expenditures can be seen as a reasonable and necessary means of ensuring and preserving the character of the elections as an educational function, rather than simply a political exercise.

⁹⁰ Repeated or severe instances of classroom disruption are actionable under the CSU Student Conduct Code. It is important to remember that a person’s status as a student cannot be altered without following the proper procedures. While a faculty member may understandably wish to ban a student from attending the class in the future or ever again, that can only be done by way of the discipline process set out in Title 5 and Executive Order 970. With certain very limited exceptions, campuses do not have the ability to permanently remove a student from a class, program or department without following this process. Professors still have wide latitude in how they run their classrooms and grade students in their individual courses.

⁹¹ Flint v. Dennison, 488 F.3d 816 (9th Cir. 2007).