

Reopening the Public Forum—From Sidewalks to Cyberspace

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The public forum doctrine has been a fixture of free speech law since the beginning of the modern era of First Amendment jurisprudence. The doctrine serves several functions. It is a metaphorical reference point for the strong protection of free speech everywhere, and it provides specific rules protecting free speech in public places. In this Article, Professor Gey reviews the development of the public forum doctrine. Professor Gey argues that serious problems have developed within the doctrine in recent times due to the Supreme Court's refusal to extend the full protection of the doctrine to new forums that do not resemble the parks and sidewalks of the traditional public forum cases. Professor Gey then reviews Justice Kennedy's recent contributions to the debate over the public forum doctrine, in which Justice Kennedy advocates expanding the protective scope of the doctrine. Professor Gey draws on Kennedy's suggestions to propose a reinterpretation of public forum doctrine. Under this reinterpretation, the First Amendment would protect speech in a public space unless the speech would significantly interfere with the government's noncommunicative activities in that space. Professor Gey also argues that the reinterpreted doctrine should extend beyond physical spaces to cover "metaphysical" forums, including any government property that provides an instrumentality of communication. In the final sections of the Article, Professor Gey considers the application of his theory to two new, "metaphysical" forums: government subsidy programs and government access to the Internet.

In many respects, the story of the First Amendment is the story of the public forum doctrine. The Supreme Court's classic statement of the public forum doctrine in *Hague v. C.I.O.*¹ also captures the spirit of the First Amendment generally: from "time out of mind" the Amendment has protected "assembly, communicating thoughts between citizens, and discussing public questions."² Likewise, free speech—in public forums and elsewhere—has "from ancient times, been a part of the privileges, immunities, rights, and

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¹ 307 U.S. 496 (1939).

² *Id.* at 515.

liberties of citizens.”³ In a perfect world, the First Amendment would reflect the same ideals as the hypothetically pure public forum described in *Hague*: a strong presumption in favor of unfettered speech, an equally strong presumption against government manipulation or control of debate and discussion, and a built-in tolerance for boisterous and even offensive expression.

Unfortunately, in recent years the strong protections offered by the public forum doctrine have been limited to the most traditional of forums, such as public parks and sidewalks. Outside these very traditional contexts, the Court has been extremely reluctant to apply the same rigorous standards to protect the quintessential First Amendment objectives of expressive openness and freedom from government control. Thus, the Court has permitted the government to limit or even exclude private speech from many publicly-owned venues that do not fit precisely the traditional model of a park or a sidewalk, even if those nontraditional venues are theoretically devoted to the dissemination of ideas. Thus, the Court has permitted the government to restrict speech by limiting access to residential mail boxes,⁴ public school inter-office mail systems,⁵ public areas in municipal airports,⁶ advertising space in public transit systems,⁷ and publicly-owned billboards.⁸

In these and hundreds of similar cases the Supreme Court and the lower courts have employed the oxymoronic concept of a “limited” public forum to describe forums that simultaneously are and are not public. The inconsistency inherent in the limited public forum concept is compounded by the method used by the Court to determine whether, and to what extent, the government has opened a non-traditional forum. In assessing whether a public space is a limited public forum, the courts typically attempt to ascertain the government’s intent in creating the forum. In other words, in a limited public forum case, which inevitably involves a government attempt to bar some speaker from a government-owned venue, the courts ask whether the government intended to open the forum for this particular kind of discussion. Not surprisingly, the answer is usually “no.”

This approach is deeply inhospitable to speech in new or nontraditional forums. Moreover, the courts’ restrictive attitude in the limited public forum

³ *Id.*

⁴ See *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981).

⁵ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

⁶ See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

⁷ See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

⁸ See *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, *amended on denial of rehearing*, 74 F.3d 371 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

cases has even begun to infect their treatment of traditional public forum cases. In recent years, the Supreme Court has applied the logic of the limited public forum doctrine to permit the government to restrict speech on public sidewalks outside post offices,⁹ public schools,¹⁰ and polling places.¹¹ In these cases the Court holds that speech on public sidewalks may be prohibited if it is "incompatible" with the government's chosen activity in the forum.¹²

The speech-restrictive thrust of the Court's public forum decisions is especially striking in light of the fact that the Supreme Court has otherwise been relatively hospitable to First Amendment free speech claims in recent years. During the same period in which the Court expanded the government's power to control speech in public forums, the Court strongly reaffirmed the First Amendment requirement of content-neutrality,¹³ vigorously reiterated the need to protect offensive or politically unpopular speech,¹⁴ and even expanded First Amendment protections in areas such as commercial speech.¹⁵ Some of the discussions in these speech-friendly cases suggest the possibility of heavily revising the Court's recent public forum analysis in a way that would make that analysis more compatible with the strong support for speech that is evident among a majority of the Court's members.

This Article reviews the Court's current public forum doctrine and suggests various ways in which that doctrine could be revised to make it more speech-protective. These modifications will bring the doctrine into line with the generally protective spirit of the Court's modern First Amendment analysis, and will also provide an analytical framework for dealing with two of the more vexing "new forum" problems confronting the courts recently: the problem posed by content restrictions on government subsidies of expression and problems arising from the regulation of new communication technologies such as the Internet.

The first section of this Article reviews the evolution of the current public forum doctrine, especially with regard to its application in the limited public forum cases. The second section addresses several recent opinions casting doubt

⁹ See *United States v. Kokinda*, 497 U.S. 720 (1990).

¹⁰ See *Grayned v. Rockford*, 408 U.S. 104 (1972).

¹¹ See *Burson v. Freeman*, 504 U.S. 191 (1992).

¹² See *Grayned*, 408 U.S. at 116 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.").

¹³ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹⁴ See, e.g., *Sable Communications v. FCC*, 492 U.S. 115 (1989) (protecting dial-a-porn services); *Texas v. Johnson*, 491 U.S. 397 (1989) (protecting flag burning); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (protecting salacious satire).

¹⁵ See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

upon the existing doctrine, and suggests several ways in which the current doctrine could be modified—especially by abandoning both the limited public forum analysis and the emphasis on government intent that has become a central focus of the limited public forum cases. The third section applies the revised public forum analysis to three typical nontraditional forum scenarios: regulation of expressive access to government property other than parks and sidewalks, restrictions on controversial advertisements in publicly owned facilities, and regulation of speech in public schools. The fourth and fifth sections apply the proposed revised public forum doctrine to two new forums. The fourth section applies the revised public forum doctrine to the problems presented by content-restrictive government subsidies for speech. The fifth section applies the revised doctrine to recent government efforts to regulate the Internet. The fifth section also addresses the public forum implications of the Supreme Court's recent Internet-regulation decision in *Reno v. ACLU*.¹⁶

I. THE ONLY-PARTLY-PUBLIC FORUM DOCTRINE

The public forum doctrine has a noble heritage. It derives from the most basic mythological image of free speech: an agitated but eloquent speaker standing on a soap box at Speakers' Corner, railing against injustices committed by the government, whose agents are powerless to keep the audience from hearing the speaker's damning words. According to the noble myth of the public forum, protecting such speakers is essential to preserving a Western democratic culture, because democracy can only flourish if citizens are free to speak Truth to Power.

It is an inspiring, but antiquated and somewhat inaccurate image. For one thing, the reality never really fit the noble myth: speakers on street corners have rarely been as concerned with communicating Truth as they have been focused on winning converts or motivating those who are already converted. More importantly, the street corner has long since ceased to be a focal point of either truth-telling or instigating the dissatisfied masses. Modern visitors to the real Speakers' Corner in London's Hyde Park will find little more than a motley collection of eccentrics playing to an audience composed largely of tourists, few of whom care a whit about the local political issues of the moment.

Although the dynamics of real public forums may never have been as pure and honorable as the myth, the essential reality grasped by the public forum concept remains as valid today as it was when thousands of Socialists packed into Union Square in the early days of this century to hang on every word of great progressive orators such as Eugene Debs. The larger reality behind the myth of the debate on the public street-corner is that every culture must have

¹⁶ 117 S. Ct. 2329 (1997).

venues in which citizens can confront each other's ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized into factions that not only cannot come to agreement about the Common Good, but also will not even know enough about other subcultures within the society to engage effectively in the deal-making and horse-trading that is the key to every modern manifestation of democratic government. If the public forum is a myth, it is a myth that is indispensable to democracy, and certainly indispensable to a democracy defined by a constitution such as ours, in which free speech and expression are essential components of our political self-definition. The question, therefore, is why, having recognized the critical importance of public forums to our political culture, has the Supreme Court limited the protections offered by the public forum doctrine to types of forums—i.e., parks and sidewalks—whose importance as places for serious discussion of public issues faded long ago?

A. *Opening the Public Forum*

The public forum doctrine arose from the Supreme Court's rejection of the view that the government could regulate the use of its property in the same ways and to the same extent as a private property owner. This view, drawn from the common law and articulated most eloquently by Oliver Wendell Holmes in the years before he became a hero of free speech proponents,¹⁷ would dominate the Supreme Court's jurisprudence on the subject until the 1930s. Then, in the *Hague*¹⁸ decision, the Supreme Court renounced the near-total deference to state prerogatives inherent in the earlier cases in favor of comprehensive constitutional limitations on government power to restrict the use of public streets and parks by public speakers.¹⁹

Despite the strong pro-speech language for which *Hague* is now best known, it was not inevitable that the case would transform the Court's public forum jurisprudence. For one thing, the language quoted in the introduction to this Article is dicta that appears in a plurality opinion. Also, as Geoffrey Stone and Harry Kalven have pointed out, even the *Hague* plurality did not reject the basic premise of the Holmes position—i.e., that the government possessed

¹⁷ See *Davis v. Massachusetts*, 39 N.E. 113, 113 (1895), *aff'd*, 167 U.S. 43 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

¹⁸ *Hague v. C.I.O.*, 307 U.S. 496 (1939).

¹⁹ See *id.* at 515.

common law property rights equivalent to those of a private landowner.²⁰ Despite accepting this premise, the plurality reached their speech-favorable conclusion by creating what Kalven called "a kind of First-Amendment easement."²¹

Regardless of the tenuous theoretical and precedential value of *Hague*, the decision clearly presaged a major change in the way the Court approached public forum cases. This became clear in the cases coming to the Court in the years immediately following the *Hague* decision. In these cases, the Court reaffirmed its *Hague* dicta and communicated its unwillingness to uphold regulations of speech in public forums based on government interests that were relatively trivial, or which could be addressed in ways other than suppressing speech. Thus, only eight months after *Hague*, the Court held in *Schneider v. New Jersey*²² that municipalities could not prohibit leafleting on public streets and sidewalks based on the governments' desire to prevent littering.²³ Four years later, a similar case arising in Texas provided the Court the opportunity to interpret *Hague* as having rejected the Holmes theory of governmental property rights,²⁴ thus definitively establishing the Court's new theory of public forum jurisprudence.

This new public forum jurisprudence was not an absolute victory for free speech rights. From the beginning, the Court conceded that the use of public forums for "purposes of assembly, communicating thoughts between citizens, and discussing public issues" would require a certain amount of government regulation, if nothing else to prevent two competing demonstrations from

²⁰ See Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238; Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

²¹ Kalven, *supra* note 20, at 13.

²² 308 U.S. 147 (1939).

²³ See *id.* at 162 ("We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.").

²⁴ See *Jamison v. Texas*, 318 U.S. 413 (1943). The Court stated:

The city contends that its power over its streets is not limited to the making of reasonable regulations for the control of traffic and the maintenance of order, but that it has the power absolutely to prohibit the use of the streets for the communication of ideas. . . . This same argument made in reliance upon the same decision [*Davis v. Massachusetts*, 167 U.S. 43 (1895)] has been directly rejected by this Court [in *Hague*].

Id. at 415-16; see also *Saia v. New York City*, 334 U.S. 558, 561 n.2 (1948) ("Though the statement [in *Hague*] was that of only three Justices, it plainly indicated the route the majority followed, who on the merits did not consider the *Davis* case to be controlling.").

marching on the same street simultaneously.²⁵ The Court was careful in each of its early decisions to leave open several avenues for continued government regulation when necessary to “prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.”²⁶ According to the Court, public order and time, place, and manner regulations of activity such as traffic obstruction or disorderly behavior must be permitted even in a public forum because “such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.”²⁷ These concessions have no natural limit, and at times the Court has described the permissible rationales for regulating the public forum so broadly that the regulatory exceptions could easily swallow the freedom whole.²⁸

But even taking into account the unavoidable “public order” and “time, place, or manner” regulations of public forums, and the Court’s occasionally excessive deference to the government in applying these regulatory justifications, the development of the public forum doctrine represented a clear advance for free speech, not only in the actual holdings of the cases, but also in the Court’s broad rhetoric about the importance of speech in the early public forum decisions. In most of the Court’s early public forum cases, the Court emphasized the need to protect public dissemination of “novel and

²⁵ See *Grayned v. Rockford*, 408 U.S. 104, 115 (“two parades cannot march on the same street simultaneously, and government may allow only one”).

²⁶ *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (quoting *State v. Cox*, 16 A.2d 508 (N.H. 1940)).

²⁷ *Schneider*, 308 U.S. at 161.

²⁸ The most obvious instance of this is *Cox v. Louisiana*, 379 U.S. 536 (1965), in which the Court noted that a constitutional guarantee such as freedom of speech “implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order.” *Id.* at 554. From this “avoidance of anarchy” premise, the Court concluded that “[w]e emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.” *Id.* at 555. The Court also hinted in *Cox* that a “uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings” might be constitutional. *Id.* Fortunately, the Court has never applied this wholesale expansion of the time, place, and manner regulatory rationale in the traditional public forum contexts of streets, sidewalks, and parks. However, the governmental property rights theory that underlies the broad *Cox* notion of government regulation is evident throughout the Court’s limited public forum jurisprudence. See *infra* notes 41–98 and accompanying text.

unconventional ideas [that] might disturb the complacent."²⁹ The Court also demonstrated its savvy understanding that regulations ostensibly directed at the manner of speech often cloak the government's disagreement with the content of the speech.³⁰ Thus, it is all the more unfortunate that the Court's ability to creatively envision the public forum's role in protecting unpopular expression failed when the Court began to confront expressive contexts that did not quite fit the mythical mold of Speakers' Corner. After having creatively defined the public forum, the Court soon began building a fence around it to keep the concept from spreading.

B. Closing the Public Forum

In several of the Court's early efforts to apply the public forum analysis to nontraditional forums, the prognosis for broad protection of speech appeared good. In 1966, a plurality of the Supreme Court used the public forum doctrine to overturn the conviction of several civil rights activists who were arrested for conducting a silent sit-in at a segregated public library.³¹ The plurality's reasoning took the Court's existing public forum doctrine to the next logical step, applying to a public library the First Amendment rules applicable to sidewalks and parks. Thus, the plurality applied the First Amendment to protect the right "in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."³² According to the plurality's analysis, the facts characterizing this type of public property were not significantly different than the traditional context of a park or sidewalk. Like the

²⁹ *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

³⁰ *See Saia v. New York City*, 334 U.S. 558 (1948). The Court stated:

In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.

Id. at 562.

³¹ *See Brown v. Louisiana*, 383 U.S. 131 (1966). Justices Brennan and White provided the fourth and fifth votes to strike down the state statute. Justice Brennan relied on an overbreadth analysis and thus did not reach the issue of whether the defendants' actions would be constitutionally protected under an appropriately narrow statute. *See id.* at 147 (Brennan, J., concurring in the judgment). Justice White relied on an Equal Protection Clause analysis, based on the fact that the defendants were excluded from the library because they were black. *See id.* at 151 (White, J., concurring in the judgment).

³² *Id.* at 142.

park and sidewalk, the library was open to the public and was a site traditionally used for the dissemination of ideas. Also, no specific governmental task would be disrupted by silent protests in a library. Thus, the library protesters' activity was limited only by the same sort of time, place, and manner concerns applicable to similar activities in a park.³³ In *Brown*, therefore, the protest was protected, since "there was no disturbance of others, no disruption of library activities, and no violation of any library regulations."³⁴

It was left to the First Amendment "absolutist" Hugo Black³⁵ to harken back to the Holmesian common law model in defending the government's authority to deny some citizens entry to new forums such as public libraries. Justice Black stated:

I have never believed that [the First Amendment] gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. . . . [The First Amendment] does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas.³⁶

Of course, parks and sidewalks were also the government's property, but the simple fact that these traditional speech sites were outdoors seems to have been enough to distinguish them in the mind of Justice Black from the insides of publicly-owned buildings and government meeting halls.³⁷

³³ *Brown* was decided before the Court had settled on its current articulation of the time, place, and manner test, but the references in *Brown* to the prevention of disturbance in the library is the sort of content-neutral regulation of speech in a public forum that the Court has now assimilated into the time, place, and manner analysis. The modern statement of the time, place, and manner test can be found in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). Under this standard, regulations of expression in a public forum "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 293. For a discussion of the interplay between the public forum doctrine and time, place, and manner rules, see *infra* notes 176-90 and accompanying text.

³⁴ *Brown*, 383 U.S. at 142.

³⁵ See Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1962).

³⁶ *Brown*, 383 U.S. at 166 (Black, J., dissenting). See also Justice Black's majority opinion in *Adderley v. Florida*, 385 U.S. 39 (1966), in which the Court upheld trespassing convictions against students protesting outside a jail on a driveway and adjacent grassy area. "The State," Justice Black wrote, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47.

³⁷ *Brown*, 383 U.S. at 157. Justice Black stated:

Over the next decade or so, the Court would employ reasoning similar to that employed by the *Brown* plurality to open other government facilities that had been closed to unpopular speakers. One notable application of the theory was *Southeast Promotions, Ltd. v. Conrad*,³⁸ in which the Court prohibited the city of Chattanooga, Tennessee from barring a production of the musical "Hair" from a municipal theater.³⁹ The Supreme Court treated the matter as an instance of prior restraint in a public forum. The Court dealt with the public forum issue succinctly by focusing on the typical uses of a municipal theater: "The Memorial Auditorium and the Tivoli [Theater] were public forums designed for and dedicated to expressive activities."⁴⁰ It was irrelevant that the government owned the property, and served in effect as the proprietor of a commercial enterprise. As long as the "Hair" production did not conflict with other uses of the auditorium, and there was no time, place, or manner concern such as noise or crowd size, the city was barred by the First Amendment from refusing to rent its facilities to a theatrical production whose message was strongly opposed by the government and the community it represented.

Cases such as *Brown* and *Conrad* were encouraging to speakers seeking access to new and different forms of government-owned property. However, the Court soon foreclosed the possibilities opened by these cases. During the

The problems of state regulation of the streets on the one hand, and public buildings on the other, are quite obviously separate and distinct. . . . Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation. . . . [I]t is incomprehensible to me that a State must measure disturbances in its libraries and on the streets with identical standards.

Id.

³⁸ 420 U.S. 546 (1975).

³⁹ The Chairman of the Board of Directors appointed by the city to run the auditorium testified that the Board had a policy of allowing only "those productions which are clean and healthful and culturally uplifting," *id.* at 549, whereas the Board found that the musical "Hair" "involved nudity and obscenity on stage." *Id.* at 548. The Board reached this conclusion at a time when none of the Board members had seen the play or read the script. *See id.*

⁴⁰ *Id.* at 555; *see also id.* at 563 (Douglas, J., concurring in part and dissenting in part). Justice Douglas stated:

A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk; the forms of expression adopted in such a forum may be more expensive and more structured than those typically seen in our parks and streets, but they are surely no less entitled to the shelter of the First Amendment.

Id.

1970s and early 1980s the Court began limiting the scope of its new public forum decisions by carving out a series of exceptions from the public forum doctrine for particular kinds of public property.

For example, the Court refused to find that the advertising space on a city public transit system constituted a public forum. "Were we to hold to the contrary," the Court declared, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician."⁴¹ The key to this case was the Court's determination that the government had a legitimate interest in regulating certain forums to preserve the forum for a particular function assigned to that forum by the government. By similar logic, the Court upheld a policy barring anti-war activists from making political speeches or distributing leaflets in an otherwise public area of a military base.⁴² The outcome of this case was predictable, given the Court's typical deference toward regulations of speech by the military,⁴³ but it soon became obvious that the Court would judge even civilian forums according to each forum's "special attributes," especially with regard to the "nature and function of the particular forum involved."⁴⁴

Thus, only five years after permitting the government to restrict speech in public areas on a military base, the Court would employ a similar analysis to

⁴¹ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974). The Court also relied on a variation of the common law government-as-property-owner rationale, by emphasizing that the operation of the transit system by the city was a proprietary, not a governmental function. "Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce." *Id.* at 303. Of course, the same could be said of Chattanooga's operation of its Municipal Auditorium. See *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546. Also, it is not immediately obvious why, if the city-as-property-owner can decide to use some of its property for commercial purposes, it could not also exercise its proprietary discretion over other property for non-commercial uses, such as, for example, devoting public park land owned by the city solely to restful, recreational uses, free of bothersome speeches and protests.

⁴² See *Greer v. Spock*, 424 U.S. 828 (1976). For the lengths to which military officials will go to preserve the intellectual decorum on their bases, see *Etheredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995) (upholding Air Force base administrative order prohibiting bumper stickers that "embarrass or disparage" the commander-in-chief, and applying rule to ban bumper stickers of civilian aircraft mechanic, which read "HELL WITH REAGAN" and "READ MY LIPS HELL WITH GEO BUSH").

⁴³ See *Greer*, 424 U.S. at 838. The Court stated: "A necessary concomitant of the basic function of a military installation has been 'the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command.'" *Id.* at 838 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961)).

⁴⁴ *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981).

deem postal boxes non-public forums.⁴⁵ In the postal case, the Court held that "it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated [military bases or jails]." ⁴⁶ Thus, since postal boxes were not subjected to a public forum analysis at all, the essentially commercial government interest in "protect[ing] mail revenues while at the same time facilitating the secure and efficient delivery of the mails" was sufficient to trump the speakers' interest in gaining access to an efficient means of communicating with other citizens.⁴⁷

During this same period, the Court also determined that time, place, and manner regulations should be judged differently depending on the context of the forum. Thus, in *Grayned v. City of Rockford*,⁴⁸ the Court held that regulations limiting speech on a sidewalk outside a school could be justified on time, place, and manner grounds more easily than the regulation of speech in a park.⁴⁹ "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."⁵⁰ Along the same lines, in *Heffron v. International Society for Krishna Consciousness, Inc.*,⁵¹ the Court upheld time, place, and manner regulations of speech at a public fair based on the Court's conclusions about the differences between the nature of groups of people collected on city streets and groups of people at a fair.⁵²

Whether the Court was applying the time, place, and manner doctrine, as in *Grayned* and *Heffron*, or was deeming a forum non-public, as in the postal case, it became obvious during the 1970s and early 1980s that the Court's focus on notions of compatibility and context would give the government a powerful tool to limit speech on public property. Except in the most traditional kinds of

⁴⁵ See *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (upholding postal regulation restricting access to postal boxes exclusively to materials bearing postage).

⁴⁶ *Id.* at 129.

⁴⁷ See *id.*

⁴⁸ 408 U.S. 104 (1972).

⁴⁹ See *id.* at 116.

⁵⁰ *Id.*

⁵¹ 452 U.S. 640 (1981) (upholding Minnesota state fair rule restricting solicitation, and limiting the distribution of literature and leaflets to an assigned location within the fairgrounds).

⁵² See *id.* at 651. The Court drew a distinction between a public street, which it characterized as "a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment," *id.*, and a state fair, which according to the Court attracted "great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions." *Id.*

forums—parks and sidewalks—the government could effectively circumvent the public forum doctrine by simply designating a very specific, narrow, and non-expressive use for a particular piece of public property. The Court's conclusion that the government could suppress speech in a forum simply by asserting its intention that speech was not "the normal activity of a particular place at a particular time"⁵³ was odd in light of the public forum doctrine's express instruction that public property be used for "purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁵⁴ Yet, in 1983, this is precisely what the Court said the public forum doctrine had come to mean.

In 1983, the Supreme Court explicitly authorized the government to close non-traditional forums to most or all of the many forms of private expression that the government must tolerate in parks and on sidewalks. In *Perry Educational Association v. Perry Local Educators' Association*,⁵⁵ the Court created the three-tier system that continues to define the Court's public forum analysis today. According to the *Perry* opinion, a government-owned forum can be defined as a traditional, "quintessential public forum[]";⁵⁶ a non-traditional designated public forum "which the State has opened for use by the public as a place for expressive activity";⁵⁷ or a non-public forum, i.e., "[p]ublic property which is not by tradition or designation a forum for public communication."⁵⁸

At first glance, the *Perry* Court's statements regarding the First Amendment rules that apply to each type of forum seem favorable to speech. For example, the Court asserts that government regulation of speech in a non-traditional, designated public forum "is bound by the same standards as apply in a traditional public forum,"⁵⁹ which means that the government can only impose limited time, place, and manner restrictions on speech in that forum. Thus, once a court deems a non-traditional forum "public," the speaker is well on the way to gaining access to that forum. The other side of the coin, however, is the Court's treatment of non-public forums. Under the *Perry* three-tier scheme, once a forum is deemed a non-public forum, the Court reverts to the old common law government-property approach to define the government's authority to dictate public access: the government, like a private property

⁵³ *Grayned*, 408 U.S. at 116.

⁵⁴ *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

⁵⁵ 460 U.S. 37 (1983).

⁵⁶ *Id.* at 45.

⁵⁷ *Id.*

⁵⁸ *Id.* at 46.

⁵⁹ *Id.*

owner, can close such forums to expression altogether, so long as it does not do so selectively according to the viewpoint of the speaker.⁶⁰ In practice, the government will almost always win disputes over access to a non-public forum.

As this analysis indicates, *Perry* has made the characterization of a disputed government forum the key to modern public forum analysis. Once a new forum is labeled either public or non-public, the battle over whether private speech can occur in that forum is usually decided. Unfortunately, *Perry* also skewed the criteria by which these characterizations are decided in favor of the government. Under *Perry*, it is not difficult for the government to construct a plausible case that any new or non-traditional forum falls into the non-public category. Thus, the third type of forum identified by the *Perry* opinion—the non-public forum—is much larger than one would suspect given the Court's pro-speech comments in *Perry* and the broadly protective approach toward speech evident in previous public forum cases such as *Brown* and *Conrad*.

Two aspects of the *Perry* approach toward characterizing forums have been instrumental in denying public access to non-traditional forums. First, *Perry* further entrenched the Court's growing tendency to assess the character of a non-traditional forum by reference to the government's intent as to how that forum should be used. Second, although the Court recognized in *Perry* that non-traditional forums could be converted into public forums by intentional government designation, it also provided the government a handy tool for limiting the scope of designated public forums by allowing the government to open the forum only to certain types of speech (i.e., speech that the government seeks to foster), while leaving the forum closed to other speech that the government opposes. Thus, "[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."⁶¹

These two aspects of *Perry* greatly increase the government's power to foreclose expression in non-traditional forums. *Perry* created a system in which the government has two prime opportunities to win a dispute over the characterization of a new forum. In any case in which the government has foreclosed speech in a non-traditional forum, the government will initially argue under the first aspect of the *Perry* analysis that it did not intend to open the forum to expression at all. If, as is usually the case, there is contradictory evidence that the government has already invited some expression in the forum, the government will then fall back on the second aspect of *Perry*, asserting that the expression previously permitted in the forum involves different groups or topics than the applicant's proposed expression. Because the second aspect of

⁶⁰ See *id.*

⁶¹ *Id.* at 46 n.7 (citations omitted).

the *Perry* analysis provides that a designated public forum can be limited in virtually any way the government wants—i.e., either by subject matter or the identity of the speaker—the government should (if *Perry* were applied consistently) almost always prevail.

The typical operation of the limited public forum argument can be seen in *Perry* itself. The case involved an application by a union to communicate with public school teachers through the school district's interoffice mail system.⁶² The school board denied the union access to the mail system because another union, which was the currently designated representative of the teachers, had exclusive access to the system.⁶³ When this exclusivity arrangement was challenged by the competing union under the public forum doctrine, the school board's first argument was that it had not created even a limited public forum by operating the interoffice mail system.⁶⁴ However, as is typical in limited public forum cases, the school board's argument was contradicted by the fact that it had routinely permitted groups such as the YMCA, the Cub Scouts, and other community and church groups to communicate with school personnel by using the interoffice mail system.⁶⁵ Under the second aspect of the *Perry* analysis, these problematic facts did not significantly harm the school board's defense to the competing union's First Amendment claim. According to the Supreme Court, the school district may have created a limited public forum for the Girl Scouts by inviting the Cub Scouts to use the mail system, but it did not create a public forum for unions.⁶⁶ The Court simply viewed the government's intent in opening the forum very narrowly. Outside the very specific parameters of the speech invited by the government, the forum owned by the government remained a closed, non-public forum: "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."⁶⁷

If the government retains entirely "the right to make distinctions in access on the basis of subject matter and speaker identity,"⁶⁸ then the designated/limited public forum category identified in *Perry* becomes virtually useless. All exclusions from government-owned forums will be based on the speaker's identity or the subject matter of the speaker's speech. And as *Perry*

⁶² See *id.* at 40–41 (discussing the *Perry* facts).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 48.

⁶⁶ See *id.*

⁶⁷ *Id.* at 39.

⁶⁸ *Id.*

itself indicates, the phrase "speaker's identity" can be read very narrowly.⁶⁹ In *Perry*, the Court allowed the government to deny one speaker (the outside union) access to a forum, while granting a second speaker of the same type (the inside union) full and free access to that same forum, based on the government's contention that the inside union had a different relationship to the audience based on its insider status.⁷⁰ By this logic, political incumbents would be allowed to argue that they, but not their adversaries, should be given exclusive access to public meeting halls and auditoriums based on the incumbents' need to service the immediate needs of their constituents.

Perhaps the best news to come out of *Perry* is that the courts have usually refrained from pushing the *Perry* logic to this extreme. Even so, lower courts applying the *Perry* analysis have generated some bizarre results in cases involving non-traditional forums. Like the result in *Perry* itself, many of these post-*Perry* lower court decisions are based on hypertechnical distinctions and counterintuitive conclusions regarding both the scope of the contested forum and the nature of the government's intent regarding speech in that forum. For example, one recent public forum case in the Second Circuit involved a dispute over the use of the "Spectacular," a large billboard looming over the lobby of Penn Station.⁷¹ An artist sought to rent the space from Amtrak.⁷² The artist planned to mount a photomontage satirizing Coors beer advertisements,⁷³ accompanied by a text "criticiz[ing] the Coors family for its support of right-wing causes, particularly the contras in Nicaragua."⁷⁴ Amtrak rejected the montage, based on Amtrak's asserted policy that political advertising was not permitted on the Spectacular.⁷⁵

This is a prime example of a "new forum" case. The Penn Station Spectacular is basically a government-owned indoor billboard. Obviously a

⁶⁹ *Id.* (characterizing school's forum limitations as "based on the status of the respective unions rather than their views").

⁷⁰ *Id.*

⁷¹ See *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650 (2d Cir.), *amended on denial of rehearing*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

⁷² See *id.* at 653. Prior to the Second Circuit's ruling discussed in the text, the Supreme Court had ruled that Amtrak is a government actor for purposes of applying the First Amendment. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995).

⁷³ See *Lebron*, 69 F.3d at 653. The montage contained the caption "Is It the Right's Beer Now?" and included "photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them." *Id.*

⁷⁴ *Id.*

⁷⁵ See *id.* at 654.

billboard is not a traditional public forum, but it is government property, and the property is routinely held out by the government as an avenue for the communication of ideas in a context where government operations will not be hindered by the expression. Thus, the Penn Station Spectacular should be a good candidate for an extension of the public forum doctrine. Nevertheless, the Second Circuit used a particularly constricted application of the *Perry* analysis to reject the artist's First Amendment claim against Amtrak.

The court's first approach to the public forum question was to treat the Spectacular as the relevant forum, divorcing the no-politics policy regarding the large billboard from the contrary policy permitting political advertisements on the many other advertising spaces Amtrak leased throughout Penn Station.⁷⁶ Considering the Spectacular as a distinct forum, the court concluded that Amtrak's consistent practice of renting the billboard only to commercial advertisers rendered the Spectacular "a non-public forum, or perhaps . . . a limited public forum opened for purely commercial speech."⁷⁷ In operating the Spectacular, the government was acting in its role as a proprietor of advertising space, not a regulator of speech, and like any good business entity, the government had to be concerned about offending its customers.

Unfortunately, the artist's petition for rehearing in the Court of Appeals pointed out that certain aspects of the record undermined the court's assumption that Amtrak's policy regarding the Spectacular was separate from the broader policy applicable to all other advertising space in Penn Station.⁷⁸ The court responded by amending its original opinion, ignoring its previous definition of the forum and explaining away the seemingly political messages of advertisements Amtrak had previously permitted about matters such as homelessness, AIDS and the environment.⁷⁹ The court concluded that "Amtrak is probably entitled to consider such [previous] advertisements 'public service announcements' within the meaning of its standard licensing agreement," rather than political speech analogous to the proposed work critical of Coors.⁸⁰

The Second Circuit's analysis in this case demonstrates the flexibility of the *Perry* standard, and how this flexibility often works to the government's advantage. Courts that are so inclined have an easy time ruling in favor of the government in a new forum case: they can define the forum so narrowly that it includes only one small corner of the relevant public space (for example,

⁷⁶ See *id.* at 655.

⁷⁷ *Id.* at 656.

⁷⁸ See *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 89 F.3d 39, 40 (2d Cir. 1995) (Newman, J., dissenting to denial of rehearing).

⁷⁹ See *id.*

⁸⁰ *Id.* at 40.

focusing on one billboard rather than all advertising spaces). If that approach doesn't work, then they can creatively describe the subject matter permitted in the forum so that it excludes the topic of the proposed speech. Thus, "public service" speech about admittedly political issues is permitted, but "political" speech is not. Coors can present itself to the world as a fun-loving provider of good, clean, commercial fun, but a dissenting artist is not permitted to rain on Coors' parade by noting other consequences of the company's actions. The government-owned forum is available for speech, but only speech that fits the government's model of what its "customers" want to hear.

Even government property that looks very much like a park or sidewalk—both of which the Court continues to characterize as traditional, "quintessential" public forums⁸¹—is not immune from the restrictive implications of the *Perry* analysis. For example, the Eleventh Circuit Court of Appeals has used *Perry* to reject a newspaper's public forum claim concerning a large open area at an interstate highway rest stop.⁸² The court itself acknowledged that the characteristics of the interstate highway rest areas in question "frequently resemble those found in city parks, e.g., grassy areas, restrooms, water fountains, parking areas, [and] picnic benches."⁸³ Nevertheless, the court decided that the rest area was not a traditional public forum because "[i]nterstate rest areas, like interstate highways, are relatively modern creations,"⁸⁴ which were "not to be planned for use as local parks."⁸⁵ Likewise, the court held that the rest areas were not designated or limited public forums because the areas have the limited purpose of "facilitat[ing] safe and efficient travel by motorists,"⁸⁶ rather than fostering communication. Once the court found some way to avoid treating an avowedly park-like space as a park—and therefore as a "traditional public forum"—the emphasis placed by the *Perry* analysis on government intent gave the government an easy victory in the case.⁸⁷

⁸¹ See *Perry*, 460 U.S. at 45.

⁸² See *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991).

⁸³ *Id.* at 1203–04.

⁸⁴ *Id.* at 1203.

⁸⁵ *Id.* at 1204.

⁸⁶ *Id.* at 1203.

⁸⁷ See *id.* at 1202. The good news is that the flexibility of the *Perry* analysis also permits lower courts to mold their perceptions of particular forums in a speech-friendly way. On the matter of interstate highway rest areas, see *Jacobsen v. Howard*, 904 F. Supp. 1065, 1070 (D.S.D. 1995) (holding unconstitutional South Dakota statute prohibiting placement of newsracks on sidewalks at interstate rest areas): "The State's interests in meeting the safety, rest, and information needs of its interstate travelers are not jeopardized if newspaper publishers are permitted to engage in their constitutionally protected activities at interstate rest

Sidewalks—another “quintessential,” traditional public forum—have also occasionally received short shrift under the *Perry* analysis. The Supreme Court itself rejected a public forum claim regarding a publicly-owned sidewalk in *United States v. Kokinda*.⁸⁸ The claim arose as part of a First Amendment defense to arrests of several volunteers for the National Democratic Policy Committee.⁸⁹ The individuals involved were distributing literature and soliciting donations on a sidewalk running from a post office to its adjacent parking lot, in violation of Postal Service regulations.⁹⁰ The Court upheld the restriction of speech on the sidewalk, asserting that even though this particular piece of property *looked* like a sidewalk, it did not really *operate* as a sidewalk. “The mere physical characteristics of the property cannot dictate forum analysis.”⁹¹ In *Kokinda*, the relevant sidewalk “was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.”⁹² The Court never made clear why the nature of the sidewalk changed because only a limited number of destinations could be reached on that sidewalk, nor did it explain why unobtrusive speech (such as calmly asking postal patrons: “Would you like to make a donation?”) would in any way interfere with the government’s operation of a post office. Instead, the Court took the *Perry* route and emphasized the government’s preferences about the use of its sidewalk.⁹³ Once the public forum issue becomes a matter of government intent, the answer is usually going to be the same: “The Postal Service has not expressly dedicated its sidewalks to any expressive activity.”⁹⁴ Ergo, the speakers in *Kokinda* lost.

It is not difficult to project where this line of analysis can lead. One district court has held that a public sidewalk leading to an equally public beach is not a public forum because “[t]he sidewalk is new and small; it does not even extend the full length of the beach. It was created to accommodate traffic to and from

areas.” *Id.* The bad news is that the Eleventh Circuit’s perceptions are more typical than those of the district court quoted here.

⁸⁸ 497 U.S. 720 (1990).

⁸⁹ *See id.* at 723.

⁹⁰ *See id.* The regulations permitted the distribution of some types of literature, but prohibited soliciting contributions, distributing commercial advertising, and campaigning for public office. *See id.* at 724. As the Court noted in *Kokinda*, “[s]olicitation is a recognized form of speech protected by the First Amendment.” *Id.* at 725.

⁹¹ *Id.* at 727.

⁹² *Id.* at 728.

⁹³ *See id.* at 732–33.

⁹⁴ *Id.* at 730.

the beach and, only having been built two years ago, has not been a traditional site for expressive conduct.”⁹⁵ Of course, all sidewalks are built to accommodate traffic from one place to another, and by definition a new sidewalk will not have been “a traditional site for expressive conduct.”⁹⁶ The irony is that if the government may declare new sidewalks non-public forums, these sidewalks will never develop into “traditional sites for expressive conduct” because the police will arrest all speakers for entering a non-public forum. The court’s reasoning creates a logical loop, but it is consistent with the Supreme Court’s analysis in *Perry*.

The implications of such reasoning potentially extend to all public spaces. The same court that denied access to the new sidewalk also held that the public beach to which the sidewalk led was not a public forum either, noting that the “sidewalk, contoured concrete sand barrier wall and newly constructed portals demarcate the beach as a special area subject to greater restriction.”⁹⁷ But if a sidewalk, a wall, and portals demarcate a public open space as “a special area subject to greater restriction,” then is the quintessential urban park—New York City’s Central Park (to which the court’s broad description applies)—suddenly no longer a quintessential public forum? Aren’t all parks set off from the surrounding real estate in a way that makes them similarly special? If so, doesn’t the *Perry* designated public forum analysis (if applied rigorously) exterminate the traditional public forum? And, therefore, isn’t there something fundamentally wrong with this analysis?

Indeed, there *is* something wrong with an analysis under which courts may refuse to recognize sidewalks as sidewalks, and which permits the government to win First Amendment cases simply by announcing its intent that speech be excluded from a particular government-owned venue. Although many of the more egregious applications of this analysis occur in the lower courts, the primary fault lies with the Supreme Court for creating the complex calculus of government intent, traditional property use, and compatibility between speech and forum function, which has characterized public forum analysis since *Perry*. There have always been dissenters to the *Perry* analysis on the Supreme Court, such as Justice Brennan, who in his dissent to *Perry* suggested an approach similar to that advocated in this Article.⁹⁸ Recently the group of *Perry* skeptics on the Court has been joined by an unlikely ally: Justice Kennedy. Justice Kennedy’s approach does not contain the entire solution to the many problems posed by *Perry*, but his approach provides a starting point for the ultimate

⁹⁵ *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1061 (S.D. Fla. 1994).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1062.

⁹⁸ Compare *Perry*, 460 U.S. at 63 n.7 (Brennan, J., dissenting) with sources cited *infra* notes 115–98 and accompanying text.

solution to these problems—i.e., abandoning *Perry* altogether. The next section discusses both Justice Kennedy's solution and my own.

II. A MODEST PROPOSAL TO REOPEN THE PUBLIC FORUM

The complications and contradictions introduced into the public forum analysis by *Perry* have not escaped the notice of the Supreme Court. Many of the present Justices on the Court have expressed dissatisfaction with the state of the law in this area. The post-*Perry* public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close. It is therefore no surprise that one of the most important recent cases to confront the intricacies of the public forum doctrine in the Supreme Court produced no fewer than four different approaches to the public forum doctrine, none of which garnered the support of a majority of the Court. This case—*International Society for Krishna Consciousness, Inc. v. Lee*⁹⁹—provides a scorecard of the present status of the public forum doctrine on the Court. The case also provides an insight into Justice Kennedy's thinking on the subject, which is significant because he may contribute the fifth vote to overturn or substantially revise *Perry* in some future case.

A. *Perry's Messy Legacy*: *International Society for Krishna Consciousness, Inc. v. Lee*

In *International Society for Krishna Consciousness, Inc. v. Lee*,¹⁰⁰ the Supreme Court was forced for the second time in five years to assess the forum status of a publicly-owned airport.¹⁰¹ This issue had come to the Court in a previous case, but the Court resolved that case on overbreadth grounds,¹⁰² which left lower courts badly split on applying *Perry* in the airport context.¹⁰³ The facts in *Lee* were similar to other airport cases: Members of the Krishna sect sought to distribute literature and solicit donations inside the terminals at the three major public airports controlled by the Port Authority of New York and New Jersey. The Port Authority permitted such activities on the sidewalks

⁹⁹ 505 U.S. 672 (1992).

¹⁰⁰ 505 U.S. 672 (1992).

¹⁰¹ *See id.* at 675.

¹⁰² *See Board of Airport Comm'ns v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1987). *Jews for Jesus* involved a resolution by public airport commissioners prohibiting all "First Amendment activities" at the Los Angeles International Airport. *See id.* The clumsy phrasing of the resolution made the Court's overbreadth holding almost inevitable.

¹⁰³ *See Lee*, 505 U.S. at 677 n.2 (collecting conflicting lower court cases).

outside the terminals, but prohibited both distribution and solicitation inside the terminals.¹⁰⁴

As in all *Perry* cases, the Court had to resolve several issues before deciding whether the government or the speaker prevailed in the case. First, the Court had to decide whether the airport was a public forum.¹⁰⁵ Then, the Court had to decide which standard applied to the airport forum, and apply the relevant standard to both the distribution of literature and the solicitation of funds.¹⁰⁶ Given the complexities of the public forum doctrine and the facts in the case, several outcomes were possible, and various members of the Court managed to endorse four different assessments of the constitutional protection provided to speech in this context.

With regard to the public forum issue, a four-person plurality composed of the Chief Justice and Justices White, Scalia, and Thomas was joined in a separate concurrence by Justice O'Connor to produce a holding that an airport is neither a traditional nor designated public forum.¹⁰⁷ Then, as to whether the distribution of literature was permissible inside the terminals, Justice O'Connor broke with the plurality and joined the other four members of the Court in ruling in favor of the Krishnas. O'Connor argued that even if the airport terminal is not a public forum, restrictions on speech must still be reasonable, and "reasonableness" is determined in reference to the forum's "special attributes" and "surrounding circumstances."¹⁰⁸ Because of the many commercial establishments already permitted in the terminal, O'Connor noted, the Port Authority is essentially running "a shopping mall as well as an airport."¹⁰⁹ Therefore, O'Connor determined that restrictions on the distribution of Krishna literature in the airport terminal are unconstitutional (even though the terminal is a non-public forum) because the restrictions are not "reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created."¹¹⁰

If leafleting is compatible with other expressive activities that the airport has deliberately invited in the terminal, it would seem that under *Perry* the terminal had become at least a limited public forum for purposes of leafleting. Yet Justice O'Connor denied the public forum designation. Moreover, she also ruled in favor of the state's restrictions on solicitation, despite the fact that her

¹⁰⁴ See *id.* at 675–76.

¹⁰⁵ See *id.* at 679–83.

¹⁰⁶ See *id.* at 683–85.

¹⁰⁷ See *Lee*, 505 U.S. at 674; *id.* at 686 (O'Connor, J., concurring).

¹⁰⁸ See *id.* at 687 (O'Connor, J., concurring).

¹⁰⁹ *Id.* at 689 (O'Connor, J., concurring).

¹¹⁰ *Id.*

“shopping mall” description of the airport terminal suggests that the airport authorities had expressly invited other forms of solicitation. Justice O’Connor concluded that although many other establishments in the terminal were soliciting funds in the form of payment for magazines, food, and other items offered for sale throughout the terminal, the differences between these activities and solicitation by Krishnas and other non-commercial groups “in a nonpublic forum are sufficiently obvious that its regulation may ‘rin[g] of common sense.’”¹¹¹

This is the mess that *Perry*’s legacy has created. Even when a majority of the Court can agree on the characterization of a forum, the Justices cannot agree on what that characterization means. The confusion is not limited to the faction of the Court that tends to deny public forum status to nontraditional forums. In *Lee*, four members of the Court granted public forum status to the airport terminal, but they split on whether regulations restricting solicitation were permissible in such a forum. Justice Kennedy ruled that such regulations constituted permissible time, place, and manner restrictions on speech,¹¹² while the other three Justices ruled that regulation of solicitation was unconstitutional.¹¹³ Likewise, the four Justices who ruled in favor of the Krishnas on the leafleting ban used a completely different analysis than Justice O’Connor, who provided the crucial fifth vote to overturn that regulation despite denying public forum status to the airport terminal.

It is no surprise that decisions such as *Lee* lead to inconsistent results in the lower courts. Given the absence of majority support on the Supreme Court for any coherent theory of public forum jurisprudence, a conscientious lower court judge who must rule on a new public forum case has no option but to engage in a kind of nose-counting jurisprudence—simply counting the noses of Justices who seem to have protected speech (under whatever theory) in a type of forum similar to the one being considered by the lower court. Sadly, the nose-counting style of jurisprudence fostered by cases such as *Lee* is no longer unusual in constitutional law.¹¹⁴ But in the area of public forum jurisprudence there is a

¹¹¹ *Id.* at 690 (O’Connor, J., concurring).

¹¹² *See id.* at 703 (Kennedy, J., concurring in the judgment).

¹¹³ *See id.* at 711–15 (Souter, J., concurring in part and dissenting in part).

¹¹⁴ The Supreme Court has even issued a formal standard to guide lower courts in deciphering the Supreme Court’s splintered decisions: “When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.’” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). This leads to some odd outcomes, as in *Lee* itself, where the opinion stating the “narrowest grounds” is endorsed only by one Justice. In *Lee*, the Court’s

way out of this maze, which is suggested by Justice Kennedy's theoretical approach to the issue of the public forum, if not by his inconsistent application of that theory to the facts of *Lee*.

B. Justice Kennedy's Public Forum Revisionism

Justice Kennedy does not fit the model of the typical judicial conservative when it comes to First Amendment free speech issues. His opinions on First Amendment subjects ranging from prior restraint¹¹⁵ to flag burning¹¹⁶ are worthy of the staunchest judicial free speech advocates. Recently, Justice Kennedy has turned his attention to the public forum doctrine in two major opinions that suggest his disenchantment with the restrictive theory currently governing the area. One opinion is Justice Kennedy's concurrence in *Lee*,¹¹⁷ and the other is his opinion for a majority of the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*,¹¹⁸ in which Justice Kennedy used the public forum paradigm to define the constitutional standard applicable to government programs funding expressive activities. In these opinions, Justice Kennedy underscores the flaws in the existing doctrine, minimizes or rejects most of the basic components of the *Perry* analysis, and provides a hint of the protections that would become available to speakers in government venues if the Court revisits and overrules *Perry*.

Justice Kennedy's *Lee* opinion attacks the two centerpieces of *Perry*'s unfortunate legacy—the Court's requirement of "a long-standing historical practice of permitting speech"¹¹⁹ to identify a traditional public forum, and the

"opinion" on the leafletting issue is the ruling of Justice O'Connor, who provided the fifth vote to protect that speech, but whose opinion was joined by no other Justice. *See Lee*, 505 U.S. at 685–93 (O'Connor, J., concurring). The lower courts have learned to live with such ironies. "Although there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *Blum v. Witco Chem. Corp.*, 888 F.2d 975, 981 (3d Cir. 1989).

¹¹⁵ *See Alexander v. United States*, 509 U.S. 544, 560 (1993) (Kennedy, J., dissenting) (arguing that prior restraint doctrine should prohibit application of forfeiture order to portion of adult bookstore's inventory that has not been deemed obscene).

¹¹⁶ *See Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring) (providing the fifth vote in support of proposition that First Amendment protects flag burning as protest gesture, and noting that "[i]t is poignant but fundamental that the flag protects those who hold it in contempt").

¹¹⁷ *See Lee*, 505 U.S. at 693.

¹¹⁸ 515 U.S. 819 (1995).

¹¹⁹ *See Lee*, 505 U.S. at 694 (Kennedy, J., concurring).

use of government intent to identify a designated public forum.¹²⁰ Kennedy's reason for rejecting the Court's current approach nicely summarizes the fatal flaw in *Perry*: "[This analysis] leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of government."¹²¹ The facts of *Lee* provide an illustration of how the *Perry* system now works to the disadvantage of speech: with regard to the *Perry* historical-use analysis, the *Lee* majority held that airports are relatively new forums, hence there is no long-standing tradition of speech, hence they are not traditional public forums.¹²² Likewise, with regard to the *Perry* government-intent analysis, the *Lee* majority held that "because governments have often attempted to restrict speech within airports, it follows *a fortiori* under the Court's analysis that they cannot be so-called 'designated' forums."¹²³ Thus, in *Lee*, as in many other new-forum cases analyzed under *Perry*, the government is permitted to bar speech from what appears to be an open public space.

Kennedy's solution to the problem is to fundamentally revamp the *Perry* analysis, if not abandon it altogether. "In my view the policies underlying the [public forum] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property."¹²⁴ Kennedy's support for a flexible and broad concept of the public forum is key to successfully applying the public forum doctrine to new and different types of public property. Kennedy recognizes that the old, Speakers' Corner/public park concept of the public forum is no longer very relevant to the modern world. "In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity."¹²⁵

In his *Lee* opinion, Kennedy proposes to replace the emphasis on historical use and government intent with an objective inquiry "based on the actual, physical characteristics and uses of a property."¹²⁶ According to this new

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See id.* at 680 (plurality opinion).

¹²³ *Id.* at 695 (Kennedy, J., concurring).

¹²⁴ *Id.* at 697.

¹²⁵ *Id.* at 697-98.

¹²⁶ *Id.* at 695.

standard, “[i]f the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.”¹²⁷

Kennedy’s proposed revision of the public forum standard does not entirely abandon the traditional reference point of the Speakers’ Corner-type forum, nor does it completely ignore the government’s intent with regard to the permissible uses of a piece of public property. Kennedy lists three “important considerations” in determining whether a piece of government property is a public forum under his revised standard.¹²⁸ Two of these three considerations resemble factors that are already central to the *Perry* analysis: “whether the property shares physical similarities with more traditional public forums, [and] whether the government has permitted or acquiesced in broad public access to the property.”¹²⁹ If these “important considerations” were the primary focus of Kennedy’s new standard, then the standard would not add much to existing analysis. Such considerations, which deny public forum status to anything that does not resemble the context of a very traditional—and now outmoded—model of public discourse, are the very factors that have led to what Kennedy himself identifies as the main flaw in modern public forum analysis, i.e., that “few, if any, types of property other than those already recognized as public forums will be accorded that status.”¹³⁰

It is the third “important consideration” that distinguishes Kennedy’s revised public forum standard from the problematic *Perry* analysis, and which is the focal point of his broader view of protected speech in “new” forums. The third consideration is “whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated to the property.”¹³¹ On its face, this appears to be nothing more than a restatement of the incompatibility analysis previously used by the Court in *Grayned v. City of Rockford*¹³² to uphold a prohibition on speech outside a public school, and in *Greer v. Spock*¹³³ to uphold regulations of speech in the public areas of a military base. But Kennedy’s phrasing of this consideration is significantly different than the Court’s description of “incompatibility” in its earlier cases.

¹²⁷ *Id.* at 698.

¹²⁸ *See id.*

¹²⁹ *Id.* at 698–99.

¹³⁰ *Id.* at 697.

¹³¹ *Id.* at 699.

¹³² 408 U.S. 104 (1972).

¹³³ 424 U.S. 828 (1976).

In the Supreme Court's version of the incompatibility analysis, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹³⁴ Under this view of "incompatibility," the government's preferred use of the forum defines the reference point for every other expressive activity in that forum. Thus, as noted above, the Supreme Court used the incompatibility analysis to uphold rules governing speech in public areas of a military base.¹³⁵ A lower court recently extended the Supreme Court's analysis to uphold a regulation under which a civilian was prohibited from placing on his pickup truck a bumper sticker bearing the inscription "HELL WITH REAGAN," on the ground that the sticker "embarrass[ed] or disparage[d]" the President.¹³⁶ According to the Court of Appeals opinion upholding this regulation, innocuous political speech by a civilian in a public area of a military base could be banned because it was incompatible with the military's need to "foster instinctive obedience, unity, commitment, and esprit de corps" throughout the facility.¹³⁷ The fact that the offending bumper sticker on a civilian's pickup truck did not in any way prevent the government from engaging in its own activities on the base was irrelevant to the Court's application of the incompatibility test. The government's broad authority to narrowly define the scope of permissible expression in a particular forum was the final determinant of whether that expression satisfied the constitutional standard; once the relevant officials made their own determination that the speech was incompatible with their goals, the Court simply deferred to the officials' judgment.¹³⁸

The Court's incompatibility test inevitably works in favor of the government because it depends on the government's own definition of the proper uses of a forum and provides no mechanism for judicial scrutiny of the government's choices. Justice Kennedy's focus on incompatibility cures this problem by reversing the analysis. Under the Court's version of the test, speech is only protected if the speaker proves that his or her speech is not incompatible

¹³⁴ *Grayned*, 408 U.S. at 116.

¹³⁵ *See Greer v. Spock*, 424 U.S. 828, 839 (1976).

¹³⁶ *Etheredge v. Hail*, 56 F.3d 1324, 1328 (11th Cir. 1995). After the change in administration, the plaintiff replaced the sticker noted in the text with one that read "READ MY LIPS HELL WITH GEO BUSH." *Id.* at 1325. Then, after the next election, he replaced the second sticker with one that read "HELL WITH CLINTON AND RUSSIAN AID." *Id.* at 1326.

¹³⁷ *Id.* at 1328 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

¹³⁸ *See id.* ("[M]ilitary officials need not demonstrate actual harm before implementing a regulation restricting speech. . . . [O]fficials . . . had a right to promulgate the order in response to their evaluation that Etheredge's sign constituted a clear danger to military order and morale.").

with the use of the forum as defined by the government—a nearly hopeless task. Under Justice Kennedy's version of the analysis, speech on public property is presumptively protected unless the government proves that the speech would interfere "in a significant way" with the government's own use of the property.¹³⁹ Kennedy thus abandons the Court's emphasis on whether speech is "incompatible" with the government's own stated objectives, in favor of an "interference" analysis, with the burden now shifted to the government, and the presumption running in favor of speech.

Kennedy's interference analysis is clearly intended to impose a significantly higher burden on government efforts to suppress speech on public property than is imposed under the current incompatibility analysis. Kennedy emphasizes that in assessing whether speech interferes "in a significant way" with government activity, "[t]he possibility of some theoretical inconsistency between expressive activities and the property's uses should not bar a finding of a public forum, if those inconsistencies can be avoided through simple and permitted regulations," such as narrow time, place, and manner restrictions.¹⁴⁰ Also, Kennedy emphasizes that the government must approach speech in a new forum in general terms, rather than by focusing on particular instances of speech: "[C]ourts must consider the consistency of [the government's] uses [of property] with expressive activities in general, rather than the specific sort of speech at issue in the case before it."¹⁴¹ Forcing the government to litigate new-forum cases in general terms would prevent the government from singling out specific examples of unpopular speech for suppression, and would also prevent the government from litigating every instance of proposed speech in a new forum. Once a court has determined that speech in general would not interfere with the government's use of the property in question, the government would be obligated to respect future speakers' access to the same forum. Finally, although the government would be permitted to change the nature of the forum from public to nonpublic (as it is permitted to do under current law), Kennedy underscores the difficulty of that task: "[W]hen property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status."¹⁴²

Justice Kennedy's discussion of the interference analysis in *Lee* would go a long way toward clarifying the confusing and speech-hostile nature of current public forum analysis. But throughout *Lee*, Kennedy refers to the "physical

¹³⁹ *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 700.

characteristics” of property subject to his analysis. This emphasis on physical property is fine for new forums that have a distinctive physical existence, but it fails to provide guidance for other cases—such as government regulation of the Internet, for example—that could profit from much of the analysis in Kennedy’s *Lee* concurrence. In *Rosenberger v. Rector and Visitors of the University of Virginia*,¹⁴³ Justice Kennedy broadens his approach to take account of government programs implicating speech that do not necessarily involve the regulation of a discrete piece of physical property. *Rosenberger* thus suggests how the interference analysis can be used in cases far removed from the traditional context of parks and sidewalks.

Rosenberger involved a challenge to the rules governing the allocation of money from the University of Virginia’s Student Activities Fund. The Fund was financed by a mandatory fee of fourteen dollars per semester for all full-time students.¹⁴⁴ The Fund was set up “to support a broad range of extracurricular student activities that ‘are related to the educational purpose of the University.’”¹⁴⁵ The rules of the Fund excluded certain activities from Fund support, including religious and political activities.¹⁴⁶ A “religious activity” was defined as any activity that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”¹⁴⁷ Based on this rule, the University denied funding to a student group, which sought to use the funds to publish a religious newspaper.

Justice Kennedy wrote the majority opinion in *Rosenberger*. He ruled that the denial of university funds to the student group constituted a violation of the group’s First Amendment free speech rights.¹⁴⁸ For present purposes, the important aspect of Kennedy’s opinion in this case is that he treated the student activity fund as a public forum.¹⁴⁹ There is little in Kennedy’s opinion to

¹⁴³ 515 U.S. 819 (1995).

¹⁴⁴ *See id.* at 824.

¹⁴⁵ *Id.* (quoting Appendix to Petition for Certiorari at 61a).

¹⁴⁶ *See id.* at 825.

¹⁴⁷ *Id.* (quoting Appendix to Petition for Certiorari at 66a).

¹⁴⁸ *See id.* at 837.

¹⁴⁹ There is another troublesome aspect of *Rosenberger*, which I will mention briefly but not dwell on here. The case involved the provision of state money to a religious organization to operate a journal with a specifically Christian perspective and content. *See Rosenberger*, 515 U.S. at 865–68 (Souter, J., dissenting). “Even featured essays on facially secular topics become platforms from which to call readers to fulfill the tenets of Christianity in their lives.” *Id.* at 866. The University argued, and the Court of Appeals agreed, that to provide state funds to this endeavor would violate the Establishment Clause of the First Amendment. *See* 18 F.3d 269 (4th Cir. 1994).

Protection of religious speech under the First Amendment is problematic (in this and other cases) because the same Amendment that contains the Free Speech Clause also contains

the Establishment Clause. This complicates the free speech problem in two ways. First, the Establishment Clause prohibits even private religious speech when it occurs in a context where the speech is facilitated by or attributable to the government. The school prayer and bible-reading cases illustrate this point. See *Lee v. Weisman*, 505 U.S. 577 (1992); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Thus, the government must be much more careful when it aids private religious speech than when it aids political or other nonreligious speech. Justice Kennedy himself noted the reason for this in his majority opinion in *Weisman*:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all . . . [T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.

Weisman, 505 U.S. at 591.

The second complication created by the Establishment Clause in *Rosenberger* is the nearly absolute rule against providing state funds directly to finance religious activities. This rule dates from the earliest Supreme Court precedents on the subject. See *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion clause' . . . means at least this . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice their religion."). This rule is simply the institutionalization of James Madison's axiom that a government contribution of even "three pence" to a religious group constitutes an impermissible establishment of religion. See II James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *MADISON* 183-91 (n.d.), reprinted in *Everson*, 330 U.S. at 65-66.

These two strands of Establishment Clause doctrine should cause grave problems for any effort to extend the University of Virginia's Student Activity Fund to explicitly religious undertakings such as a religious journal. Justice Kennedy nevertheless rejected the Establishment Clause arguments against extending the Virginia program to religious activities. His reasons for doing so are, at best, strained. Kennedy argued, for example, that the program was permissible because it also funded nonreligious activities. *Rosenberger*, 515 U.S. at 840-41. Yet the Court has rejected several government efforts to fund parochial schools in programs that were "neutral" in the sense that they also funded secular private schools. See, e.g., *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973). Kennedy also argued that there was a constitutionally significant "degree of separation" between the state and the religious group because the University paid the printer of the group's journal rather than paying the group directly. *Rosenberger*, 515 U.S. at 843-44. Finally, Kennedy resorted to arguing that the religious journal "is not a religious institution, at least in the usual sense of that term." *Id.* These explanations are not sufficient in themselves to explain away the

suggest that he found this a remarkable extension of the public forum analysis. According to Kennedy, "[t]he most recent and most apposite case is our decision in *Lamb's Chapel* [*v. Center Moriches Union Free School District*]." ¹⁵⁰ *Lamb's Chapel* involved a religious group's effort to gain access to a public school auditorium for the group's film series. ¹⁵¹ *Lamb's Chapel*, in turn, was based on previous cases involving access to public school facilities, such as *Widmar v. Vincent*. ¹⁵² *Lamb's Chapel* and *Widmar* fit easily within the public forum analysis because both cases involved physical portions of government-owned property. Kennedy viewed *Rosenberger* as essentially indistinguishable from these cases. "The [Student Activity Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." ¹⁵³ Thus, Kennedy ruled that the University must make funds available to all groups as long as those groups' expressive activities do not undermine some legitimate governmental purpose. "Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." ¹⁵⁴

Cornelius v. NAACP Legal Defense and Education Fund, Inc., ¹⁵⁵ is the only other Supreme Court precedent considering the extension of public forum analysis to "metaphysical" forums such collections of money. In that case, the

Establishment Clause limits on state aid to religious groups such as the one in *Rosenberger*, but for purposes of this Article, I shall focus on the Free Speech Clause aspects of Kennedy's opinion and defer discussion of the Establishment Clause aspects for another day and another article.

¹⁵⁰ *Rosenberger*, 515 U.S. at 830 (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)).

¹⁵¹ See *Lamb's Chapel*, 508 U.S. at 387-89.

¹⁵² 454 U.S. 263 (1981) (holding that university had created a limited public forum by permitting registered student groups to use school facilities for meetings, and that religious student groups must be permitted to use facilities under same rules). In *Lamb's Chapel*, the school district had permitted many other community groups to use the facilities for a variety of purposes. 508 U.S. at 391-92 n.5. Based on this background, the Church argued that the school district had created a limited public forum for similar community activities. See *id.* at 391. The Court noted that this argument "has considerable force," but the actual holding of the case is that the school district had engaged in viewpoint discrimination against the Church, which is prohibited even in a nonpublic forum. *Id.* at 392-93. In *Rosenberger*, Justice Kennedy also ruled that the state had engaged in viewpoint discrimination against the religious group, but rather than avoiding the public/nonpublic forum issue, as the Court had done in *Lamb's Chapel*, Kennedy treats the case as one involving a limited public forum. See *Rosenberger*, 515 U.S. at 830.

¹⁵³ *Rosenberger*, 515 U.S. at 830.

¹⁵⁴ *Id.*

¹⁵⁵ 473 U.S. 788 (1985).

Court used the *Perry* intent analysis to hold that the metaphysical forum was nonpublic. The Court held that the Combined Federal Campaign ("Campaign" or CFC), a charity drive aimed at federal employees, could exclude charities that did not "provide or support direct health and welfare services to individuals or their families"¹⁵⁶ because the government did not intend to create a forum for expression when it created the Campaign.¹⁵⁷ Even though the Court ruled against the speakers seeking access to the CFC, the significant aspect of *Cornelius* is that the Court clearly defined as the relevant forum an instrumentality of communication that had no physical existence. Thus, Justice Kennedy's *Rosenberger* opinion is not a radical extension of the public forum analysis. Even so, the combination of the *Rosenberger* "metaphysical" definition of a forum with Kennedy's interference analysis for determining when speech must be permitted in that forum has the potential to radically transform public forum analysis. It also has implications for the law regarding government subsidies for speech, which thus far has been relatively unfriendly to strong protection of speech under the First Amendment. Before turning to a few examples of how the interference analysis would change existing law, it is necessary to modify Justice Kennedy's standard to permit a more concentrated focus on Kennedy's main point: that public forum determinations should be governed by assessments of whether private expression will interfere with legitimate government activities.

C. Fine-Tuning Justice Kennedy's Interference Analysis

The remainder of this Article discusses the implications of a public forum analysis derived from Justice Kennedy's suggestions in *Lee* and *Rosenberger*. Although there is a clear link between the interference analysis proposed here and Justice Kennedy's version, there are also several differences. The version of the interference analysis proposed in this Article and discussed *infra* is significantly stronger (that is, more speech-favorable) than Kennedy's own version. I have modified Justice Kennedy's analysis to correct four weaknesses that appear in his otherwise generally favorable treatment of speech in public forums.

1. Modification One: Eliminate Consideration of Government Intent in Defining Public Forums

The first weakness in Justice Kennedy's own statement of the interference analysis is his continued reliance on government intent to define the nature of a

¹⁵⁶ *Id.* at 795.

¹⁵⁷ *See id.* at 805.

designated public forum. The extent to which Kennedy continues to rely on this factor is unclear, although Kennedy discusses the role of government intent frequently enough to suggest it plays an important part in his scheme of public forum jurisprudence. In *Lee*, for example, Kennedy cites governmental intent as one of the "important considerations" in determining whether a piece of government property is a public forum under his revised standard.¹⁵⁸ Likewise, in *Rosenberger*, Kennedy cites favorably the element of intent inherent in the old common law model of government-as-property-owner: "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."¹⁵⁹ In *Rosenberger*, Kennedy relied heavily on the finding that the University had intended to "expend[] funds to encourage a diversity of views from private speakers."¹⁶⁰ Kennedy implies that if the University had announced a different intention for the forum, the First Amendment might not apply, even if the mechanics of the program operated in exactly the same way.¹⁶¹

Kennedy's reliance on governmental intent regarding the permissible expressive uses of a particular forum is inconsistent with both the spirit and the letter of the interference analysis. Moreover, to the extent that the government's own intent with regard to a particular forum is allowed to come into play at all, the interference analysis is completely undermined. The interference analysis would be nothing more than a restatement of the *Grayned* incompatibility analysis¹⁶² if "interference" were judged by the government's own stated intent about the proper discussions that could take place within a forum, rather than by an independent judicial assessment of whether private discussions disfavored by the government would interfere "in a significant way"¹⁶³ with the government's conduct of its own affairs. The whole point of Kennedy's interference analysis is to prohibit the government from stating a censorious intent in order to close a forum that realistically could be used for a wide range of private expression without impeding the government's own legitimate activities.

¹⁵⁸ *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698-99 (1992) (Kennedy, J., concurring) (citing as a factor "whether the government has permitted or acquiesced in broad public access to the property").

¹⁵⁹ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹⁶⁰ *Id.* at 834.

¹⁶¹ The illogic of this result is also evident in Kennedy's attempt to reconcile *Rosenberger* with *Rust v. Sullivan*, 500 U.S. 173 (1991). For a discussion critical of Kennedy's conclusions on this subject, see *infra* notes 297-322 and accompanying text.

¹⁶² See *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

¹⁶³ *Lee*, 505 U.S. at 699.

Completely ignoring the government's stated intent regarding the use of public property may seem to risk permitting private speech to intrude into many public spaces where such expression does not belong. However, a pure version of the interference standard would not result in overly extravagant protection of First Amendment rights where such rights clearly are inconsistent with existing uses of government property. Indeed, a pure interference standard would be likely to produce more intuitively correct outcomes than a rigid focus on inevitably tendentious statements of government intent. The next section of this Article contains a detailed argument supporting this conclusion,¹⁶⁴ but for present purposes this point can be illustrated by applying the interference analysis to public school facilities.

It would be obvious under the interference analysis (as it is under the Court's current standard¹⁶⁵) that the First Amendment protects the expressive activities of private student groups using a public university's facilities (including classrooms) after school hours. It would be equally obvious under the interference standard that the same facilities would be off-limits to much private speech during the day when classes are being held. Irrelevant or disruptive expression in a university or public school classroom would not be protected under a pure interference analysis if it interfered with the main point of the relevant government enterprise—teaching students about a certain subject. A student group would have a First Amendment right to use public educational facilities to hold meetings discussing the legalization of marijuana, but the First Amendment would not prevent a public university or school from removing a student from a classroom if the student insisted on loudly advocating the legalization of marijuana during a mid-term exam in a calculus class. The interference analysis would not grant First Amendment rights where they do not belong, but at the same time the interference analysis would improve on the Court's current approach by focusing the analysis on the real issue, and confining the government's power over speech to areas where the government must protect its own activities from interference by private expressive behavior. The Court currently approaches disputes such as these through the prism of governmental intent,¹⁶⁶ but an analysis of intent adds nothing to the salient fact that in some circumstances private expression prevents the government from doing its job. The intent analysis is therefore superfluous, and Justice Kennedy's continued reliance on it is unwarranted.

¹⁶⁴ See *infra* notes 199–293 and accompanying text.

¹⁶⁵ See *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981).

¹⁶⁶ See discussion of the public school forum cases, *infra* notes 252–93 and accompanying text.

2. *Modification Two: Eliminate the Category of the Designated (or Limited) Public Forum*

The second weakness in Justice Kennedy's version of the interference analysis is his continued recognition of the designated public forum category. It is unclear how this category fits into Justice Kennedy's revised scheme of public forum jurisprudence. On one hand, Kennedy's interference theory seems inconsistent on its face with the notion that the government may designate a forum and then use its power to designate that forum to limit the subject matter that may be discussed in the forum. Kennedy's entire theory is dedicated to refuting the notion that speech is protected only in forums "which by history and tradition ha[ve] been available for speech activity."¹⁶⁷ According to Kennedy, "[i]n my view . . . constitutional protection is not confined to these properties alone."¹⁶⁸ Kennedy's general intent to broaden free speech rights beyond the narrow confines of existing forums leads him to express skepticism about the designated public forum category. In his *Lee* concurrence, Kennedy asserts that the Court's designated public forum category "provides little, if any, additional protection to speech."¹⁶⁹

Then, having criticized the restrictive effects of the designated/limited public forum concept, Kennedy goes on in the very next sentence to adopt the ideas he has just rejected.

Where government property does not satisfy the criteria of a public forum, the government retains the power to dedicate the property for speech, whether for all expressive activity or for limited purposes only. . . . I do not quarrel with the fact that speech must often be restricted on property of this kind to retain the purpose for which it has been designated.¹⁷⁰

Similar language appears in Kennedy's opinion in *Rosenberger*.¹⁷¹

These passages cannot be reconciled with Kennedy's interference analysis. The basic theory of the designated public forum concept rests on common law notions of broad government authority to dictate the use of public property. As discussed in the previous section, these common law notions are fundamentally

¹⁶⁷ *Lee*, 505 U.S. at 698 (Kennedy, J., concurring).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 699.

¹⁷⁰ *Id.* (citations omitted).

¹⁷¹ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

at odds with the presumption of public rights of free expression embodied in the Bill of Rights, and the Court has (at least in theory) recognized as much ever since *Hague v. C.I.O.*¹⁷² Also, the designated public forum category depends on the Court deferring routinely to the government's intent to limit speech in a particular forum by both subject matter and speaker identity. This is unacceptable for all the reasons stated succinctly by Justice Kennedy himself in *Lee*: "It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government."¹⁷³

Given his own skepticism about the usefulness of the designated/limited public forum category, it is unclear why Kennedy accedes to its continued existence as part of a revised public forum doctrine. The better approach would be to eliminate the designated/limited public forum category and incorporate the concerns that led to its creation into a pure interference analysis.

A rigorous application of the interference analysis would deal effectively with the one legitimate function that can be asserted in favor of the designated/limited public forum category—i.e., providing a mechanism for extending constitutional protection to at least some speech in forums where other speech would be inconsistent with the nature of the forum. The essence of the interference analysis is the requirement that courts make assessments about the compatibility of speech with the typical uses of a particular forum. The difference between this analysis and the Court's current approach is that the interference analysis focuses on the physical and operative characteristics of the property in question, rather than the government's assertions about how it wants the public to use government property for expressive purposes. All of the legitimate factors that are now considered under the designated public forum analysis would be taken into account when determining whether granting members of the public a right to free expression would significantly interfere with the government's own uses of public property.

Eliminating the designated/limited public forum category would not restructure public forum analysis as radically as it first may appear. Under an interference analysis, the courts would still be able to declare some government property nonpublic forums, which would permit any restrictions on speech that satisfies a simple reasonableness test (which is the standard the Court now applies to nonpublic forums¹⁷⁴). Thus, government property whose nature

¹⁷² 307 U.S. 496 (1939); see also *supra* note 22 and accompanying text.

¹⁷³ *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

¹⁷⁴ Restrictions on expression in a nonpublic forum "must be reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'"

would not justify *any* broad access for public speech or other expression could be closed to expressive activities to the same extent as it is under current doctrine. Thus, the interference analysis would not require courts to give demonstrators free access to the Oval Office of the White House, the atomic research facilities at the Los Alamos National Laboratory, or the nonpublic sections of military bases. Indeed, the interference analysis will have little effect on forums that are now classified as nonpublic. As the next section will demonstrate,¹⁷⁵ the most extensive effects of the interference analysis will come in cases in which the government has dictated subject matter restrictions on expression in certain forums largely to squelch speech that embarrasses the government or that challenges government policy. In cases such as these, the interference analysis would permit the speech if no legitimate government activity will be hampered, even if the speech occurs in what is now classified as a “limited” public forum.

3. *Modification Three: Limit the Application of Time, Place, and Manner Restrictions in Public Forums*

The third weakness in Justice Kennedy’s statement of the interference analysis requires a caveat rather than a modification of Kennedy’s standard. The third weakness has to do with the interplay of the public forum analysis and the application of time, place, and manner restrictions that the Court permits governments to impose on speech in public forums.¹⁷⁶ In Justice Kennedy’s *Lee* concurrence, he used the availability of time, place, and manner restrictions to justify broadening the categories of forums that are open to free expression.¹⁷⁷ His theory seems to be that instead of declaring property off-limits to expression as a nonpublic forum, courts should consider declaring property a public forum, with limitations on speech imposed in the form of time, place, and manner restrictions to take account of the government’s legitimate interests.

United States v. Kokinda, 497 U.S. 720, 730 (1990) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983)). A restriction on speech is “reasonable” if it is “consistent with the [government’s] legitimate interest in ‘preserv[ing] the property . . . for the use to which it is lawfully dedicated.’” *Perry*, 460 U.S. at 50–51 (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981)).

¹⁷⁵ See *infra* notes 199–293 and accompanying text.

¹⁷⁶ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, and manner of protected speech.”).

¹⁷⁷ See *Lee*, 505 U.S. at 699 (Kennedy, J., concurring) (In assessing whether expression would significantly interfere with the government’s use of public property “[c]ourts must . . . consider the availability of reasonable time, place, and manner restrictions.”).

In the abstract, this approach is clearly preferable to the sort of restrictive incompatibility analysis employed in *Grayned*,¹⁷⁸ *Kokinda*,¹⁷⁹ and other cases that seem particularly conducive to the application of ordinary time, place, and manner restrictions. The caveat to this abstract statement is necessary because of Kennedy's application of time, place, and manner restrictions to deny constitutional protection to the solicitation in *Lee*. In *Lee*, Kennedy argued that although leafleting in a public airport is constitutionally protected, leafleting accompanied by solicitation may be prohibited under the rubric of a time, place, and manner restriction.¹⁸⁰ Kennedy argued that since the regulation prohibited only "personal solicitations for immediate payment of money,"¹⁸¹ the "regulation permits expression that solicits funds, but limits the manner of that expression to forms other than the immediate receipt of money."¹⁸² Kennedy argued that solicitation for immediate payment of money "creates a risk of fraud and duress that is well recognized, and that is different in kind from other forms of expression or conduct. Travelers who are unfamiliar with the airport, perhaps even unfamiliar with this country, its customs, and its language, are an easy prey for the money solicitor."¹⁸³

Many of these assumptions are open to question. In response to Kennedy's arguments, Justice Souter pointed out that there was nothing preventing passengers at an airport from simply ignoring the solicitation and walking by the solicitor, and also noted that the Court had protected speech in contexts where the speech was much more directly coercive than the airport solicitors.¹⁸⁴ In any event, Kennedy preferred to treat the ban on solicitation as if it were not a regulation of speech at all; rather, he treated the ban as a regulation of the "manner" of speech, easily justified by the time, place, and

¹⁷⁸ *Grayned v. Rockford*, 408 U.S. 104 (1972) (involving speech on sidewalk outside a school).

¹⁷⁹ *United States v. Kokinda*, 497 U.S. 720 (1990) (involving speech on sidewalk leading to post office).

¹⁸⁰ *Lee*, 505 U.S. at 704 (Kennedy, J., concurring). In the alternative, Kennedy asserted that the prohibition on solicitation may be regulated as symbolic speech, but the difference in nomenclature is irrelevant since the Court now treats symbolic speech and time, place, and manner regulations under the same standard. *Id.* ("[I]n several recent cases we have recognized that the standards for assessing time, place, and manner restrictions are little, if any, different from the standards applicable to regulations of conduct with an expressive component.").

¹⁸¹ *Id.*

¹⁸² *Id.* at 705.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 713 (Souter, J., concurring) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (discussing speech accompanying an economic boycott, in which threats of violence were deemed too divorced from actual violence to lose constitutional protection)).

manner standard. This attempt to skirt the free speech issue denies the content-based distinction between the statement "Give me money now" and "Please fill out this envelope and mail my organization a donation." Under Kennedy's *Lee* opinion, the first statement was prohibited, but the second was not.

The main problem with Kennedy's approach is that he uses a very weak standard for assessing whether a prohibition of speech is a legitimate time, place, and manner regulation. This is not entirely Kennedy's fault; for several years the Court has diluted the time, place, and manner standard to the point where it gives the government a great deal of latitude to silence speech in the guise of regulating the "manner" of speech. The root of the problem is that the Court has failed to enforce systematically the part of the modern time, place, and manner standard that requires such regulations to be "narrowly tailored to serve a significant governmental interest."¹⁸⁵ As Professor Susan Williams has noted, the time, place, and manner test "has developed . . . into a fairly clear and fairly lenient standard. The government interest and tailoring requirements are quite close to the rational basis standard applied to regulations that do not affect fundamental rights at all."¹⁸⁶

The lenient nature of the modern standard is evident in Kennedy's treatment of the solicitation regulation in *Lee*. Even if Kennedy is correct to presume that solicitation often poses a threat of fraud and coercion, the properly focused response to that threat is to regulate the problem directly rather than to ban all solicitation, most of which will not be fraudulent or coercive. As the Supreme Court pointed out in a previous case striking down an overly broad regulation of solicitation, "[t]he [government's] legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentation can be prohibited and the penal laws used to punish such conduct directly."¹⁸⁷

This is not the place for a generalized attack on the flaws in the modern time, place, and manner test. I raise this issue only to insist that the time, place, and manner test should not be allowed to swallow the interference analysis. Virtually unquestioned deference to governmental decisions to suppress speech, such as that exhibited by Justice Kennedy in his discussion of solicitation rules in *Lee*, would give the government an easy alternative to avoid the rules imposed by the interference analysis.

This opening to suppression can be closed (or at least narrowed) in three ways. First, government efforts to suppress speech should be viewed

¹⁸⁵ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹⁸⁶ Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644 (1991).

¹⁸⁷ *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

skeptically. In *Lee*, Justice Kennedy asserted that “[t]he [government] has made a reasonable judgment that this type of conduct raises the most serious concerns, and it is entitled to deference.”¹⁸⁸ Total deference to bald government assertions of potential harm are inappropriate in the context of public forum analysis, where the presumption should always run in favor of unfettered speech. Second, since the courts should not give unquestioned deference to unproved government assumptions, the government should be required to provide some proof that a particular type of expression creates an actual problem in a public forum before the government resorts to a ban on that expression. In *Lee*, the government was not required to produce proof that its officers (or officers at other airports) had actually encountered severe problems with coercive or fraudulent solicitations. Finally, the government should be required to explain (and back up that explanation with facts) why it rejected a less speech-restrictive option to address its legitimate concerns about the effects of expression in a public forum. In *Lee*, which involved the Port Authority rules governing New York City area airports, Justice Kennedy noted that far less restrictive rules were in effect at other airports (such as the Federal Aviation Authority rules governing Washington, D.C. airports¹⁸⁹). Despite the existence of workable rules permitting speech that the Port Authority had banned, Kennedy held simply that “[o]ur cases do not so limit the government’s regulatory flexibility.”¹⁹⁰

Kennedy’s statement is flawed because “regulatory flexibility” should not be the guiding principle governing judicial review of government regulation of speech in a public forum. But this flaw can be corrected easily. The three changes to the Court’s approach to time, place, or manner regulations noted in the preceding paragraph will reduce the “flexibility” currently built into the system, and bring the Court’s time, place, or manner analysis into line with the speech-favorable presumptions of the revised public forum jurisprudence proposed in this Article. With these changes in place, it is possible to concur with Justice Kennedy’s admonition that courts should consider imposing narrow time, place, and manner regulations instead of totally excluding speech from a nontraditional forum.

4. *Modification Four: Abandon the Analogy to Traditional Forums*

The fourth weakness in Justice Kennedy’s *Lee* opinion is his use of an analogy to traditional public forums as a reference point for identifying new

¹⁸⁸ *Lee*, 505 U.S. at 707 (Kennedy, J., concurring).

¹⁸⁹ See 14 C.F.R. § 7.96(h).

¹⁹⁰ *Lee*, 505 U.S. at 707 (Kennedy, J., concurring).

public forums. Kennedy lists as one "important consideration" in defining a new forum "whether the property shares physical similarities with more traditional public forums."¹⁹¹ This is problematic because it ignores the comprehensive changes in communication and social interaction that have occurred in recent years. Linking the public forum doctrine to quaint notions of Sunday strolls by Speakers' Corner will do nothing to open avenues of communication in the world where most modern communication takes place—inside public buildings and halls, alongside public buildings dedicated to activities other than community gatherings, over government-developed networks such as the broadcast media and the Internet, and through programs funded by the government that facilitate the dissemination of ideas throughout the country.

Elsewhere in his *Lee* concurrence, Kennedy acknowledges that the old-fashioned model of parks and sidewalks has little significance to the way modern people actually communicate. "In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity."¹⁹² Thus, the public forum doctrine should be governed by its underlying theme, rather than by some antiquated historical manifestation of that theme: "[T]he purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference."¹⁹³ Kennedy's *Rosenberger* opinion, which extended the public forum analysis to "metaphysical" as well as "physical" forums, underscores the broad scope of protection potentially offered by a revamped public forum doctrine.¹⁹⁴

The version of the public forum analysis proposed in this Article provides a specific framework upon which this increased protection of speech in the modern world can be assembled. As noted throughout this section, the proposal is a development of Justice Kennedy's interference analysis. This proposal shares Justice Kennedy's intention to broaden the protections offered by the public forum doctrine, and also shares his premise that the public forum doctrine is merely a mechanism to effectuate the "broad command of the First Amendment to protect speech from governmental interference."¹⁹⁵ For this reason, the public forum doctrine should not be limited to physical forums,

¹⁹¹ *Id.* at 698–99 (Kennedy, J., concurring).

¹⁹² *Id.* at 697–98.

¹⁹³ *Id.* at 697.

¹⁹⁴ See *Rosenberger*, 515 U.S. at 830.

¹⁹⁵ *Id.*

much less to forums that closely resemble parks or sidewalks. Therefore, borrowing a phrase from Justice Brennan's dissent in *United States Postal Service v. Council of Greenburgh Civic Associations*,¹⁹⁶ and consistent with Justice Kennedy's opinion for the Court in *Rosenberger*, the version of the public forum doctrine proposed here would apply to any instrumentality "specifically used for the communication of information and ideas."¹⁹⁷

5. *A Summary of the Modified Interference Analysis*

This is the gist of the analysis proposed in this Article: The question whether an instrumentality of communication is a public forum depends on whether expressive activity would tend to interfere in a significant way with the government's own activities in that forum. If the government cannot prove the strong likelihood of significant interference, the forum is deemed "public" and the speech must be permitted, subject only to the application of narrow time, place, and manner regulations. Unlike Kennedy's statement of the interference analysis,¹⁹⁸ the version proposed here would take into account the government's actual activities in a particular forum, and would not permit consideration of the government's abstract intent regarding the nature of the forum. Also in contrast to Kennedy's version of the analysis, the version proposed here would eliminate the designated/limited public forum category, depending instead on a direct judicial assessment of the level of interference, coupled with the application of narrowly tailored time, place, and manner restrictions on expression.

With these modifications, the interference analysis suggested by Justice Kennedy can greatly improve both the clarity and the substantive protections offered by the public forum doctrine. By way of illustrating the salutary effects of this analysis, the next three sections apply the strengthened interference analysis to three sets of public forum problems. Part III addresses some of the Court's recent public forum case law, and suggests a reconsideration of some of the Court's conclusions in these cases. Parts IV and V address two "new forum" problems—government subsidy programs and government regulation of the Internet.

¹⁹⁶ 453 U.S. 114 (1981).

¹⁹⁷ *Id.* at 137 (Brennan, J., dissenting).

¹⁹⁸ *See Lee*, 505 U.S. at 699 (Kennedy, J., concurring).

III. THE INTERFERENCE ANALYSIS AND RECENT PUBLIC FORUM JURISPRUDENCE

This Article proposes to revamp the public forum doctrine by recasting it in the form of a strong interference analysis. This analysis is offered as a corrective to the misguided direction of the Court's public forum jurisprudence in recent years—especially since the Court's decision in *Perry*.¹⁹⁹ During this period, the public forum doctrine has become too conducive to government efforts to shut speech out of forums in contexts where the speech poses no real threat to the government's own legitimate activities.

This Article presents the interference analysis as a modest proposal, but the proposal is modest only in that it realigns public forum doctrine with the broad pro-speech themes of the First Amendment and the natural expectations of citizens in an open society. On the other hand, the ramifications of this modest proposal are admittedly immodest in the sense that the proposal would cast into doubt many of the Court's recent precedents favoring government efforts to declare seemingly speech-friendly environments nonpublic forums. Recommending a root-and-branch reconsideration of an entire body of case law is usually the surest way to guarantee that a proposal will be ignored. But in an area where the jurisprudence has deteriorated to the point that lower courts make the public/nonpublic forum determination on the basis of the age of the concrete in a sidewalk,²⁰⁰ maybe root-and-branch reconsideration is a serious possibility after all.

The simplest way to illustrate the positive changes that would flow from adoption of the interference analysis is to reanalyze several recent Supreme Court and lower court decisions in which the courts refused to protect speech under the current public forum doctrine. For purposes of illustration, these precedents are divided into three categories: cases in which the Court has denied speakers access to public property;²⁰¹ cases in which the government, in its role as proprietor of advertising space in public facilities, has refused to rent that space to speakers with controversial views;²⁰² and cases involving speech in public schools, in which the public forum doctrine has been used to justify silencing the speech of students in contexts where student debate should logically be tolerated or even encouraged.²⁰³ These examples will illustrate the

¹⁹⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

²⁰⁰ *See Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1061 (S.D. Fla. 1994) ("The sidewalk is new and small . . . [O]nly having been built two years ago, [it] has not been a traditional site for expressive conduct.").

²⁰¹ *See infra* notes 204–25 and accompanying text.

²⁰² *See infra* notes 226–51 and accompanying text.

²⁰³ *See infra* notes 252–93 and accompanying text.

advantages (or at least the benign effects) of the proposed interference analysis. These examples will also illustrate the insidious operation of the current approach, which not only shuts down speech when the speech poses no particular threat to legitimate activity, but also permits the government to surreptitiously discriminate against disfavored speech and distort debate by explicitly favoring some speakers over others.

A. *The Interference Analysis and Access to Public Property*

Many of the Supreme Court's recent decisions involving access to public property would be cast into doubt by the adoption of an interference analysis because much of the logic in those decisions would be irrelevant under the revised standard. Consider *Perry*,²⁰⁴ for example, which has become the touchstone for the Court's current public forum jurisprudence. In *Perry* the Court allowed a public school system to deny a union access to an interoffice mail system used to communicate between teachers and the school system's administrators.²⁰⁵ The record in the case indicated that the school system had permitted many other groups to use the mail system in the past; these groups included local parochial schools, church groups, the YMCA and the Cub Scouts.²⁰⁶ Also, the school system routinely allowed another union (which was the teachers' certified collective bargaining representative) to use the interoffice mail system.²⁰⁷

Despite the fact that the mail system was already open to many speakers other than school administrators and teachers, and also open to many unofficial messages, the Court declared that the outside union could not send messages through the system because the school administrators operating the interoffice system did not intend to create a public forum.²⁰⁸ Alternatively, the Court held that the system was at most a limited public forum, i.e., limited to messages sent by groups analogous to the YMCA and the Cub Scouts, or messages sent by the inside union in its role as official representative of the teachers, which the Court distinguished from messages sent by the outside union seeking to challenge the teachers' official representatives.²⁰⁹

²⁰⁴ *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

²⁰⁵ *Id.* at 51-52.

²⁰⁶ *Id.* at 39 n.2.

²⁰⁷ *Id.* at 40.

²⁰⁸ *Id.* at 47.

²⁰⁹ *Id.* at 48.

Much of the discussion in the *Perry* majority and dissenting opinions focused on the issue of viewpoint discrimination.²¹⁰ This focus is understandable, because one union was given access to a favored avenue of communication, to which the other union was denied. The inside union's obvious interest in preventing the competing union from easily disseminating its views to the teachers belied the Court's formalistic rationale that the outside union was denied access to the forum not because of its views, but because it lacked the certified union's "status."²¹¹ Contrary to the Court's assertion, the outside union's views were bound up with its outsider status; but by distinguishing between the union's status and its point of view, the Court could conform the school district's actions with the one real constitutional limitation on the regulation of speech in a nonpublic forum—i.e., the requirement that the regulation be viewpoint neutral.

In contrast to the Court's very formalistic (and unconvincing) approach to the *Perry* dispute, the interference analysis would avoid ethereal discussions about whether a speaker was denied access to a forum because of that speaker's "status" or its "views," and would focus instead on what should be the real issue in every public forum dispute: Would private expression in the relevant forum in any way prevent the government from doing its job? In *Perry*, the answer to this question would clearly be "no." The government would be prevented from doing its job in *Perry* only if the volume of additional mail sent through the mail system would effectively prevent the administration from communicating with its teachers through the system. Nothing in the *Perry* record indicates that this was a potential problem, and the history of the system's use as reflected in the record suggests that the school district would be unlikely to muster proof that the system would be overwhelmed if the outside union was permitted access.²¹² Thus, under the interference analysis, the *Perry* school district's interoffice mail system was a public forum, and the district should have been ordered to give the outside union access to that system to distribute its literature.²¹³

²¹⁰ See *id.* at 48–54; *id.* at 55–72 (Brennan, J., dissenting).

²¹¹ *Id.* at 49.

²¹² The school system evidently did not express any concerns about the mail system until the outside union attempted to distribute its materials. The record in the case "[did] not indicate whether any requests for use [had] been denied, nor [did] it reveal whether permission must separately be sought for every message that a group wishes delivered to the teachers." *Id.* at 39 n.2.

²¹³ If the school system in *Perry* could prove that the administration's communication with its teachers would be significantly burdened by permitting outside groups to distribute information, the interference analysis would permit the school to declare the forum nonpublic, and deny access to private speakers. An analysis of the actual burden posed by private speech

The two factors that the *Perry* Court relied upon to deem the interoffice mail system nonpublic—the school’s intent, coupled with the limited public forum doctrine—are irrelevant under the interference analysis. These factors are omitted from the interference analysis because they are inconsistent with the normative underpinning of the analysis—that the First Amendment requires the government to tolerate speech on public property unless that speech directly impedes the government’s own legitimate activities. *Perry* illustrates why this normative judgment should be rigorously enforced. If, as seems clear from the facts of *Perry*, the government could have accommodated the speaker without much effort, why did the government resist the accommodation? The lingering suspicion in such cases is that the government’s real motive in excluding the speaker from the forum is either bureaucratic stubbornness or an unspoken opposition to the speaker’s ideas. Although a stubborn bureaucrat may not share a censor’s intentional malice toward dissenting speakers, both types of government actors cause the same First Amendment harm: speech is silenced for no good reason. Therefore, neither motive is sufficient to override the strong constitutional protection of speech on public property.

Kokinda provides another illustration of this point. *Kokinda* involved a sidewalk leading from a parking lot to a United States Post Office.²¹⁴ The sidewalk was located entirely on public property, and the Court conceded that

also suggests that the interference analysis would change the result in two other cases involving claims similar to *Perry*: *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), and *U.S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).

In *Cornelius*, the Court permitted the government to bar the NAACP Legal Defense and Education Fund and other nonprofit public interest organizations from a charitable campaign directed at government employees, on the ground that the campaign was not a public forum. Under an interference analysis, it is unlikely that the government could show that permitting the public interest groups’ participation would significantly impair the operation of the campaign, especially today, when employee contributions can be deducted and distributed electronically, which eliminates the need to devote extra personnel as the number of recipient groups proliferate.

In *Greenburgh*, the Court upheld a federal statute prohibiting the deposit of unstamped “mailable matter” in an individual’s mail box. Again, the outcome of the decision was inevitable once the Court declared mail boxes nonpublic forums (a conclusion the Court supported primarily by referring to the government’s longstanding assertion of control over the forum). See *Greenburgh*, 453 U.S. at 125–26, 128–29. Under an interference analysis, the outcome in *Greenburgh* would be different unless the government could demonstrate that the volume of unstamped “mailable matter” would fill the mail boxes and make it impossible for the postal service to do its job of delivering the mail. As in *Cornelius* and *Perry*, it is unlikely that the government could meet its burden under the proposed test.

²¹⁴ *United States v. Kokinda*, 497 U.S. 720, 723 (1990).

individuals had generally “been permitted to leaflet, speak, and picket on postal premises.”²¹⁵ Nevertheless, a plurality of the Court upheld a postal regulation prohibiting anyone from soliciting contributions on postal premises because this type of government property, including the sidewalk in question, is not a public forum.²¹⁶ Therefore, the prohibition on solicitation only was required to meet the weak reasonableness standard applicable to nonpublic forums.²¹⁷ The plurality’s rationale for deeming the sidewalk a nonpublic forum was that the sidewalk “was constructed solely to provide for the passage of individuals engaged in postal business.”²¹⁸ By characterizing the sidewalk as a special-purpose sidewalk, the Court avoided applying the traditional public forum doctrine (which apparently only covers general-purpose sidewalks).

The extent of the Court’s efforts in *Kokinda* to demonstrate that a sidewalk is not a sidewalk indicates the lengths to which the Court will go under the present public forum doctrine to characterize a forum as nonpublic. As in *Perry*, the *Kokinda* plurality’s efforts to characterize the forum as nonpublic are disproportionate to the actual harm threatened by the speech in question. The plaintiffs in *Kokinda* were members of the National Democratic Policy Committee, who had set up a table on the post office’s sidewalk to pass out leaflets, solicit contributions, and sell literature. The post office had received several complaints about the offending Democrats, but the only specific complaint in the record came from an individual who objected to the Democrats’ presence “because she knew the Girl Scouts were not allowed to sell cookies on federal property.”²¹⁹ Thus, *Kokinda* did not involve any real disruption of postal activities. The government’s main concern in the case seems to have been figuring out how to deal with the reactions of a bunch of angry girl scouts.

Under the interference analysis, the government could not circumvent the First Amendment so easily. The interference analysis would require the Court to make a much more comprehensive and honest assessment of whether the government’s true interests were implicated by the expressive activity in question. In *Kokinda*, as in *Perry* (and *Lee*, which involved a similar solicitation ban), the answer was clearly “no.” The government’s interest in *Kokinda* was ensuring that postal customers may quickly traverse the sidewalk and do their

²¹⁵ *Id.* at 730.

²¹⁶ *Id.* Justice Kennedy added the necessary fifth vote to uphold the regulation. He did not address the public forum issue, but instead relied on a broad interpretation of the time, place, and manner standard as applied to solicitation, similar to his later opinion in *Lee*. See *id.* at 737–39 (Kennedy, J., concurring).

²¹⁷ See *id.* at 730.

²¹⁸ *Id.* at 727.

²¹⁹ *Id.* at 723 (quoting *United States v. Kokinda*, 866 F.2d 699, 705 (4th Cir. 1989)).

business with the post office without being coerced or threatened on the way. Simple regulations requiring speakers to leave a clear path on the sidewalk, coupled with specific, rigorously enforced prohibitions of coercive or threatening behavior, would protect the government's interests, and the interests of postal customers. The Court should hold unconstitutional any regulation imposing restrictions on speech beyond these narrow time, place, and manner regulations.

In *Kokinda*, as in *Perry*, the government's enthusiasm for a total ban on a particular kind of speech casts doubt on its true motivation. If the government chooses to ban speech instead of enforcing a simple, obvious means to protect its legitimate interests, the implication is that something other than the government's stated interest is behind the regulation. This implication is reinforced by the actual effect of the government bans in question. Broad government regulations of speech such as those in *Perry* and *Kokinda* often impose far greater burdens on speech than the Court acknowledged in those cases. Government rules such as those upheld in *Perry* and *Kokinda* distort debate in a way that has all the negative effects of viewpoint discrimination, even if there is no direct proof that the government was in fact motivated by a desire to suppress one side of a public debate.

In *Perry*, for example, the government's action skewed speech among teachers pertaining to the effectiveness of their union representation, because one union was given direct access to the teachers and the opposing union was forced to undertake the more difficult, less systematic, and much more expensive effort to contact each teacher at home. The *Kokinda* regulation also distorted debate, although the point is somewhat less clear than in *Perry* because the plaintiffs in *Kokinda* were not addressing an issue directly associated with the post office. Nevertheless, in the context of modern suburban life, a sidewalk outside a post office is much more likely to attract a broad cross-section of the public on any given day than, for example, a public park. Thus, groups denied access to this cross-section of the public will be forced to choose other methods of raising funds—such as large-contribution fundraising functions or direct-mail campaigns. And protesters who do not have the resources to do large-scale fundraising may be left with no effective options at all. Thus, the proliferation of *Kokinda*-type regulations of solicitation on public property will skew the debate over many public issues in favor of larger, well-financed lobbying organizations.

Moreover, the broad leeway *Kokinda* gives to government in defining the limits of speech on the property surrounding public buildings can easily be used in other contexts to distort debate about a particular government action. For example, the Eleventh Circuit Court of Appeals has used *Kokinda* to justify upholding a public housing authority regulation that effectively prohibits the

distribution of political literature to the residents of the authority's housing projects.²²⁰ This seems to fly in the face of the Supreme Court's previous statements that "a public street does not lose its status as a traditional public forum because it runs through a residential neighborhood,"²²¹ but because of the vagaries of public forum cases such as *Kokinda*, the rules protecting speech in such traditional forums fall away if the government owns both the street *and* the neighborhood.

In another example of how the *Perry/Kokinda* public forum analysis distorts public debate, the Eighth Circuit Court of Appeals recently relied on *Kokinda* to permit the State of Nebraska to bar members of a welfare rights organization from distributing literature and talking to welfare recipients in the lobby of a local welfare office.²²² As in *Perry*, the state had previously allowed other groups access to the same forum.²²³ Nevertheless, the court held that because the state had screened the speakers it permitted into the forum to determine whether they provided a "direct benefit" to welfare recipients, the forum remained nonpublic with regard to speakers the state decided not to admit.²²⁴ The court rejected the plaintiffs' claim that they were excluded from the forum because of their attacks on welfare reform,²²⁵ but even if there was no invidious motive, the effect is the same: under the current public forum doctrine, the government is permitted to closely control speech to which the public is exposed on public property, and the government's opponent is denied the most effective access to the relevant group's constituency. The elimination of the distorting effect on public debate is one of the strongest arguments for adoption of the interference analysis.

B. *The Interference Analysis and Advertising on Government Property*

Distortions in public discourse similar to those evident in the public property access cases are also evident in the cases dealing with the government

²²⁰ *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995) (citing *United States v. Kokinda*, 497 U.S. 720 (1990)) ("The official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas.").

²²¹ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

²²² *Families Achieving Independence and Respect v. Nebraska Dep't of Soc. Serv.*, 111 F.3d 1408 (8th Cir. 1997).

²²³ The state had previously permitted a volunteer income tax group, a nutritional information group, Head Start, a local community college, and the ubiquitous Girl Scouts access to the forum. *Id.* at 1413 & n.6.

²²⁴ *Id.* at 1420.

²²⁵ *See id.* at 1423.

in its role as proprietor of advertising space. Cases of this sort are not unusual. The *Lebron* dispute, discussed *supra*,²²⁶ involved a Penn Station advertisement critical of a beer manufacturer's policies regarding Central America.²²⁷ Other disputes have involved advertising pertaining to a variety of social or political causes, including: sexual abstinence among teenagers,²²⁸ birth control and family planning advice,²²⁹ AIDS education,²³⁰ abortion,²³¹ criticism of the President,²³² parody of a presidential candidate,²³³ and union criticism of an employer.²³⁴ There is even a Supreme Court decision on the subject, *Lehman v. City of Shaker Heights*, in which the Court upheld a local transit authority's refusal to accept any political advertising on its vehicles.²³⁵

The results in these cases are by no means uniform; sometimes the speaker wins, sometimes the speaker loses. Perhaps this is the bright side of the current public forum doctrine: In applying a standard that depends so heavily on a subjective identification of the relevant forum, and an equally subjective determination of the government's intent vis-à-vis that forum, a court that is so inclined can often creatively interpret its way through the doctrinal morass to a speech-friendly result. On the other hand, the flexibility built into the standard leads to a fair amount of contradictory case law. Sometimes the conflicting

²²⁶ See *supra* notes 71-80 and accompanying text.

²²⁷ See *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, 653 (2d Cir.), *amended on denial of rehearing*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

²²⁸ See *Yeo v. Lexington*, 1997 WL 292173 (1st Cir. 1997) (holding that public high school newspaper and yearbook were public forums), *rev'd*, 1997 WL 748667 (1st Cir. 1997) (en banc) (holding that student control over publications negated panel's finding of state action).

²²⁹ See *Planned Parenthood of S. Nev., Inc. v. Clark City Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (en banc); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985).

²³⁰ See *AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994).

²³¹ See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 937 F. Supp. 425 (E.D. Pa. 1996).

²³² See *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984).

²³³ See *Penthouse Int'l Ltd. v. Koch*, 599 F. Supp. 1338 (S.D.N.Y. 1984).

²³⁴ See *Air Line Pilots Ass'n Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1144 (7th Cir. 1995).

²³⁵ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). The Supreme Court also issued an opinion in *Lebron*, but that opinion dealt only with the state action issue, and did not address the public forum issues. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995).

rulings in this area frustrate even normally sedate judges. For example, in 1991 the Ninth Circuit held that a public school system's operation of school publications (such as yearbooks and school newspapers) did not reflect an intent to create a public forum. Therefore, the appellate court upheld the school system's refusal to sell or print any advertisement that the administration deemed not in the school system's "best interest."²³⁶ Earlier this year, on the other hand, a panel of the First Circuit ruled against a public school system on an identical claim, accusing the Ninth Circuit of "reduc[ing] the Supreme Court's designated public forum doctrine to a circular nullity because it would allow government to use impermissible content-based exclusions . . . as conclusive proof that the forum is not open to the public,"²³⁷ only to be reversed six months later by the en banc First Circuit, which ruled that school publications did not constitute state action, and therefore were not bound by First Amendment restrictions.²³⁸

Although the First Circuit's frustration is understandable, the Ninth Circuit probably has a better grasp of the convoluted logic of current public forum doctrine. This logic sometimes pulls the same litigant in opposite directions, for reasons that have nothing to do with the legality or disruptiveness of the litigant's speech. For example, the Second Circuit justified its ruling that Michael Lebron did not have the right to buy advertising space in Penn Station on the fact that the government had a history of excluding advertisements from that forum based on the content of the ads;²³⁹ conversely, the District of Columbia Circuit held several years earlier that the same Michael Lebron had a First Amendment right to place another political advertisement on advertising spaces in the Washington subway system because the transit authority did not have a history of excluding political advertisements based on content.²⁴⁰ It may be contrary to the thrust of the First Amendment in other contexts, but in the public forum area the Ninth Circuit got it right: the most effective means for the government to close a forum is to develop a history of theoretically impermissible content-based regulation of speech in that forum. Past censorship, therefore, justifies future censorship. The linear thinkers of the First Circuit aside, circularity has become what the modern public forum doctrine is all about.

²³⁶ *Planned Parenthood of S. Nev., Inc. v. Clark City Sch. Dist.*, 941 F.2d 817, 824 (9th Cir. 1991) (en banc).

²³⁷ *Yeo v. Lexington*, 1997 WL 292173, at *11 (1st Cir. 1997).

²³⁸ *Yeo v. Lexington*, 1997 WL 748667 (1st Cir. 1997) (en banc).

²³⁹ *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 89 F.3d 39, 40 (2d Cir. 1995).

²⁴⁰ *See Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984).

Conflict and confusion among the lower courts in applying a complicated First Amendment standard are not unique to the public forum cases. But in this area, the confusion has its source in the inadequacies and illogic of the standard set forth by the Supreme Court, which in turn reflects the Court's tepid support of speech in nontraditional forums. Conflict among the circuits is not the most serious problem in this area; the more serious problem is that the Supreme Court's theory of these cases contradicts the lessons of open civic discourse dictated in the Court's other decisions about abrasive speech in public forums.

The Supreme Court has often stated the principles of public discourse in nearly absolute terms. Justice Harlan once wrote on behalf of the Court in *Cohen v. California* that the First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."²⁴¹ The principle of virtually unfettered freedom in public discourse applies even to highly offensive discourse.²⁴² The Court has also noted that the principle of unrestricted public speech is unmediated by the fact that the expression will be heard or seen by unwilling listeners or viewers: "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech."²⁴³ The rule in cases where sensitive citizens encounter offensive speech favors the speaker: "[T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"²⁴⁴

Unfortunately, once it moves away from the context of the traditional public forum, the Supreme Court quickly renounces its ringing endorsement of the "verbal tumult, discord, and even offensive utterance"²⁴⁵ that characterizes vibrant public discourse. In the Supreme Court's only decision applying the public forum doctrine to publicly owned advertising space, the Court allowed the government to err on the side of protecting the most hypersensitive among us. In *Lehman*, the Court upheld a government-owned transit company's total ban of political advertising on city buses.²⁴⁶ According to the Court, the advertising space was not a public forum (because the city had historically engaged in content-based regulation of speech in the forum), and therefore the city could limit speech in the forum to "innocuous and less controversial

²⁴¹ *Cohen v. California*, 403 U.S. 15, 24 (1971).

²⁴² *See id.* at 25 ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.").

²⁴³ *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

²⁴⁴ *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) (quoting *Cohen*, 403 U.S. at 21).

²⁴⁵ *Cohen*, 403 U.S. at 25.

²⁴⁶ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

commercial and service oriented advertising.”²⁴⁷ In the nontraditional forum context of *Lehman* the Court accepted the captive audience rationale for suppressing speech that it had rejected in *Cohen v. California*, and cautioned that if the city’s alternative was rejected, “[u]sers would be subjected to the blare of political propaganda.”²⁴⁸ So much for the “verbal tumult, discord, and even offensive utterance”²⁴⁹ that the *Cohen* Court had cited as the defining characteristic of public discourse in a free society.

Decisions such as *Lehman* and *Lebron* are all based on either the paternalistic notion that the government has a valid interest in protecting sensitive viewers from offensive speech, or the antidemocratic notion that the government may protect commercial entities or politicians from criticism. Neither rationale is sufficient to overcome First Amendment rights under the interference analysis because neither rationale implicates the government’s ability to do its job. The government’s “job” in these cases is nothing more than the operation of a public transit system, train station, or other communications medium where the advertising is located. It is never part of the government’s job to mediate public discourse or transform chunks of the public sphere into sensory deprivation tanks containing nothing but innocuous and noncontroversial speech. At the most basic level, the First Amendment dictates that subjecting citizens to “the blare of political propaganda” in a public place is a *good* thing. The interference analysis reflects this concept. Therefore, the fact that the public place in question is a bus rather than a park should be irrelevant to the public forum determination.

The public access and advertising cases illustrate how the restrictive themes of the modern public forum doctrine can infect related areas of First Amendment doctrine. In the *Perry/Kokinda* line of cases discussed in Part III.A. *supra*,²⁵⁰ the public forum doctrine provides the government a tool with which to surreptitiously distort debate to favor speakers friendly to the government, thus diluting the traditional First Amendment rule prohibiting the government from regulating the content or viewpoint of speech.²⁵¹ In the advertising cases the ideological distortions are not even surreptitious. The ideological nature of the suppression in these cases is often evident on the face of the government’s decision to deny an advertiser access to the forum. These cases not only dilute the First Amendment content-regulation rules, but they

²⁴⁷ *Id.* at 304.

²⁴⁸ *Id.*

²⁴⁹ *Cohen*, 403 U.S. at 25.

²⁵⁰ See *supra* notes 204–25 and accompanying text.

²⁵¹ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (describing the standard governing content and viewpoint regulation of speech, including the presumption that such regulations are unconstitutional).

also weaken the most basic constitutional themes (represented by decisions such as *Cohen v. California*) that describe what it means to live in a diverse, open society. The third set of cases, which are addressed in the next subsection, are in a sense the worst of all, because the public forum doctrine is used to provide some unfortunate lessons to the next generation of citizens about the proper relationship between individuals and society's authority figures.

C. The Interference Analysis and Speech in Public Schools

In the abstract, public schools and universities should be a model for public expression under the First Amendment. In theory, these institutions are devoted to open debate about every subject, and all opinions must be tolerated no matter how far the speaker deviates from the mainstream. In practice, the courts have often been willing to permit the authorities at public schools and universities to regulate speech extensively. The public forum doctrine has played a role in many of these cases.

As noted in Part II *supra*,²⁵² some regulation of speech in public schools is necessary. No one can be permitted to disrupt classes with loud discussions that are irrelevant to the subject of the class. Likewise, schools cannot be deemed public forums in the sense that unqualified persons can assert a constitutional right to take (or teach) classes. Running an educational institution—especially at the university level—requires selectivity if the enterprise of education is to succeed. The interference analysis incorporates these observations by making the public forum analysis turn on the government's ability to do its job; if the government's "job" is education, then the government must be given the leeway to impose reasonable restrictions that prevent interference with that enterprise. To this extent, the interference analysis is consistent with existing doctrine.²⁵³

Once the government is given the ability to prevent classroom disruptions and make academic judgments about the curriculum and about student and faculty qualifications, however, the interference analysis would make it difficult to justify the exercise of governmental authority to limit student and faculty speech. The application of the interference analysis is therefore consistent with the few Supreme Court cases dealing with government restrictions on speech at

²⁵² See *supra* notes 164–66 and accompanying text.

²⁵³ See *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (recognizing a "university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education").

the university level, which have tended to protect speech.²⁵⁴ In public schools below the university level, on the other hand, the interference analysis would limit the government's control over speech to a far greater extent than the Supreme Court's recent precedents, which have severely restricted First Amendment rights, especially when they are exercised by students.²⁵⁵

The root of the problem in the public school cases is the Supreme Court's overriding theme that "First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'"²⁵⁶ Likewise, since the Court has concluded that a public school does not possess the attributes of a traditional public forum, the relevant standard is determined by reference to the school authorities' intent regarding the use of the forum.²⁵⁷ It should come as no surprise that the Court has been reluctant to find that a school board has intentionally created a public forum for student expression within a school. In *Hazelwood School District v. Kuhlmeier*, the school system established a school newspaper and stated in a written policy that "[s]chool sponsored school publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism."²⁵⁸ Nevertheless, the Supreme Court reversed the lower court's determination that this had created a public forum, on the ground that the newspaper was part of the school's curriculum, over which the government officials had retained total control.²⁵⁹

Thus, the rule in public schools is that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school."²⁶⁰ And the "educational mission" includes not just requiring students in a math class to focus on math; it also includes the sort of decorum regulations outside a classroom that even the Supreme Court acknowledges would be unthinkable outside a school. In *Bethel School District No. 403 v. Fraser*,²⁶¹ for example, a student gave a speech at a student assembly on behalf of a student council candidate. The speech contained some mild sexual innuendo and double

²⁵⁴ See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (prohibiting content-based restrictions on allocation of student activity funds); *Widmar*, 454 U.S. at 263 (protecting rights of student groups to use university facilities for meetings).

²⁵⁵ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

²⁵⁶ *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 682).

²⁵⁷ See *id.* at 267.

²⁵⁸ *Id.* at 269.

²⁵⁹ See *id.* at 267-70.

²⁶⁰ *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

²⁶¹ 478 U.S. 675 (1986).

entendre,²⁶² and was probably intended as a jibe at the school's teachers and principals. It worked. School officials were predictably piqued and, equally predictably, they suspended the student for three days and removed him from the list of candidates for graduation speaker.²⁶³

In explaining why the school had authority to punish a student for making a political speech in a public assembly simply because that speech upset the school authorities, the Court referred to the school's "educational mission," which the Court interpreted broadly to include teaching students the "'habits and manners of civility' essential to a democratic society."²⁶⁴ According to the Court, "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."²⁶⁵ The Court specifically linked the state's role as ethical guardian to its role in regulating offensive speech. The Court noted that although the student had the right to advocate unpopular and controversial views, that right "had to be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."²⁶⁶

In sum, these are the themes that run through all the school speech cases: the schools are not public forums, but are "instruments of the state"; part of the state's "educational mission" in these nonpublic forums is to teach the "habits and manners of civility" as well as math, science, and English; and the rights of students to express themselves in ways that the school officials dislike are balanced against the state's countervailing interest "in teaching students the

²⁶² This is the speech in full:

"I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

"Jeff Kuhlman is a man who takes his point and sticks it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

"Jeff is a man who will go to the very end—even the climax, for each and every one of you.

"So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Id. at 687 (Brennan, J., concurring). The Court called this speech "sexually explicit, indecent, [and] lewd," *id.* at 684, and claimed that "it could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.* at 683.

²⁶³ *See id.* at 678.

²⁶⁴ *Id.* at 681.

²⁶⁵ *Id.* at 683.

²⁶⁶ *Id.* at 681.

boundaries of socially appropriate behavior.”²⁶⁷ The lower courts have taken these principles to heart. The lower courts routinely uphold broad restrictions on student expression at school—especially when the student expresses disrespect for the school authorities. Student expression on t-shirts worn at school has been an especially popular target of the authorities. Here is a representative sample of t-shirt inscriptions that the courts have held are not protected by the First Amendment in the public school context: “Drugs Suck!”,²⁶⁸ “Coed Naked Band: Do It to the Rhythm”,²⁶⁹ “See Dick Drink. See Dick Drive. See Dick Die. Don’t Be a Dick[.]”,²⁷⁰ a caricature of three school officials, portraying them drinking beer and leaning against a fence, with the inscription “It doesn’t get any better than this”,²⁷¹ “Unfair Grades”,²⁷² “Racism”,²⁷³ and “I Hate Lost Creek.”²⁷⁴

Communicative t-shirts are not the only student expression that has been suppressed on authority of the principles stated in *Fraser*. In Minnesota, federal

²⁶⁷ In the background of these principles are the remains of *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Supreme Court upheld a public school student’s First Amendment rights to wear a black armband to school to protest the Vietnam war. The case is different in spirit and letter from the Court’s later decisions on student speech. According to the *Tinker* Court, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Court also asserted the very un-*Fraser*-like notion that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.” *Id.* at 511. *Fraser* did not overrule the venerable *Tinker* decision outright, but the nonpublic forum analysis generated by *Fraser* has reduced *Tinker* to an afterthought in many decisions involving First Amendment rights in schools. One District Court has concisely summarized the view most lower courts now take of *Tinker*: “Although a few courts still employ the *Tinker* Test, we cannot ignore that since the Supreme Court decided *Tinker* in 1969, it has developed an additional construct for evaluating the regulation of speech in public places, namely the public forum analysis.” *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 807 F. Supp. 444, 454 (N.D. Ill. 1992), *vacated in part on other grounds*, 9 F.3d 1295 (7th Cir. 1993). One purpose of this Article is to revamp the public forum doctrine as a means of restoring the influence of *Tinker* in public school speech cases.

²⁶⁸ *Broussard v. School Bd. of Norfolk*, 801 F. Supp. 1526, 1527 (E.D. Va. 1992).

²⁶⁹ *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 158 (D. Mass. 1994).

²⁷⁰ *Id.*

²⁷¹ *Gano v. School Dist. No. 411*, 674 F. Supp. 796, 797 (D. Idaho 1987). The court reasoned that “[t]he administrators are role models, as stated by the United States Supreme Court, and their position would be severely compromised if this T-shirt was circulated among the students.” *Id.* at 798.

²⁷² *Baxter v. Vigo City Sch. Corp.*, 26 F.3d 728, 730 (7th Cir. 1994).

²⁷³ *Id.*

²⁷⁴ *Id.*

courts upheld the suspension of students for distributing a newspaper (the "Tour de Farce"), in which a student referred to vandalism at the home of a high school teacher as "pretty damn funny."²⁷⁵ In Indiana, a federal district court upheld the suspension of students for distributing leaflets urging a "walk-out" to protest unfair school disciplinary rules.²⁷⁶ In New York, a federal district court upheld a ban on distribution of an underground school newspaper that referred to the principal as "King Louis" and "a big liar" with "racist views and attitudes."²⁷⁷

Some of these cases (like *Fraser* itself) involve pure political speech—i.e., speech pertaining to an impending election—which (outside the public school context, anyway) is at the core of the First Amendment. For example, the Sixth Circuit Court of Appeals upheld a Tennessee high school's decision to disqualify an honor student as candidate for student council president after the student made "'discourteous' and 'rude' remarks about his schoolmasters in the course of a speech delivered at a school-sponsored assembly."²⁷⁸ An Arkansas federal district court upheld school rules allowing teachers to veto an outspoken honor student's candidacy for student council.²⁷⁹ Punctuating the school's effort to provide civic education to the Arkansas student, the court calmly concluded

²⁷⁵ *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1390 (D. Minn. 1987), *aff'd*, 855 F.2d 855 (8th Cir. 1988). The Court of Appeals later upheld the school's policy requiring prior review of newspapers and other literature before they could be distributed on campus. *See Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("[W]e have clearly rejected the view that prior restraints are *per se* unconstitutional in the high-school context."). Like other central elements of the First Amendment, the prior restraint doctrine also receives short shrift in public schools.

²⁷⁶ *See Dodd v. Rambis*, 535 F. Supp. 23, 25 (S.D. Ind. 1981).

²⁷⁷ *See Schwartz v. Schuker*, 298 F. Supp. 238, 240 (E.D.N.Y. 1969).

²⁷⁸ *Poling v. Murphy*, 872 F.2d 757, 758 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). This is the offending remark, which was given at a candidates' forum for the student council election: "The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president. I can try to bring back student rights that you have missed and maybe get things that you have always wanted." *Id.* at 759. The students in the audience responded by "clap[ping] their hands, and yell[ing] things like 'way to go, Dean,' and 'we don't like him either.'" *Id.* The school's principal found the remark "'inappropriate, disruptive of school discipline, and in bad taste,'" and disqualified the student from the election. *Id.* In response to the student's First Amendment claim, the federal appellate court lamented that a legal challenge was even possible: "Until recent years, lawyers and educators alike might have found it puzzling that such a question [whether the school violated the student's First Amendment rights] should even be asked." *Id.* at 758.

²⁷⁹ *See Bull v. Dardanelle Pub. Sch. Dist. No. 15*, 745 F. Supp. 1455, 1462 (E.D. Ark. 1990).

that the “[p]laintiff does not have a constitutional right to run for high school student council.”²⁸⁰ The Eleventh Circuit Court of Appeals has even applied the restrictive rules imposed on secondary schools to a university’s student elections. The Eleventh Circuit upheld rules imposed by the administration of the University of Alabama that strictly restricted both the distribution of election literature and the holding of open forums or debates.²⁸¹ The court acknowledged that such rules “could never withstand scrutiny in the ‘real world.’ But this is a university, whose primary purpose is education, not electioneering.”²⁸²

It is an odd process of civic education that teaches students about freedom of speech by routinely denying that freedom—and then admitting that the denial would never be upheld in the “real world.” Perhaps the courts treat student speech so cavalierly because to an adult’s eyes the speech often appears trivial. The republic will not fall if a student has to remove a “Coed Naked Band” t-shirt, and the ramifications of a student government election are obviously less significant than a national presidential election. But focusing on the trivial nature of the speech effectively trivializes the rights in question. These cases are not important because of the messages on the t-shirts; they are important because they teach very specific lessons about the relationship between the ruler (in these cases, the school principal and teachers) and the ruled (in these cases, the students). These cases represent in microcosm the basic spirit of the First Amendment (and for that matter, democracy itself): the individual’s ability to thumb his or her nose at authority in public and not be punished for the gesture.

The lower courts have taken seriously the Supreme Court’s view that the public schools’ educational function includes the “‘inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.’”²⁸³ Thus, the lower courts tend to characterize school speech cases as cases about civic education, and indeed they are. But the lessons these cases teach young citizens are not good ones. The school cases teach that students should respect governmental officials whose idea of values education is to suspend a student for wearing a t-shirt with the inscription “Drugs Suck!” The cases teach that students should defer to the judgment of government officials whose overdeveloped sensitivities perceive Matthew Fraser’s sly comments as obscene and dangerous. The cases teach that if a political candidate’s public statements make the governing powers angry enough, that candidate may find his or her

²⁸⁰ *Id.* at 1461.

²⁸¹ *See Alabama Student Party v. Student Gov’t Ass’n of the Univ. of Ala.*, 867 F.2d 1344, 1345 (11th Cir. 1989).

²⁸² *Id.* at 1346.

²⁸³ *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

name removed from the ballot. In short, the cases teach young citizens to internalize the values of a system that favors authority over liberty and has a hard time distinguishing between the need for civility and the demand for conformity.

The hopeful sign in these cases comes not from the courts but from the students. When faced with judicial approval of governmental overreaction in the name of civic education, the students often educate themselves in ways that will hopefully replenish the reserves of constitutional liberty when they join adult society. In *Fraser*, school officials removed Fraser's name from the ballot for graduation speaker, but the students used write-in votes to elect him graduation speaker anyway.²⁸⁴ When the Tennessee officials punished the "discourteous" student by disqualifying him from the race for student council president, the officials avoided the *Fraser* outcome by announcing that "'any votes cast for [him] will not be counted.'"²⁸⁵ Since the students had no way of electing the offending student to the student council presidency, they responded by electing him senior class president.²⁸⁶ When another school banned "Coed Naked Band: Do It To The Rhythm" t-shirts,²⁸⁷ the students responded by printing new t-shirts. One bore the inscription "Coed Naked Civil Liberties: Do It To The Amendments";²⁸⁸ another was inscribed "Coed Naked Censorship—They Do It In South Hadley";²⁸⁹ and a third had "Coed Naked Gerbils" printed on the front and "Some People Will Censor Anything" on the back.²⁹⁰ Perhaps the school officials in these cases did teach their students something about the "fundamental values necessary to the maintenance of a democratic political system"²⁹¹ after all. Nothing swells the ranks of lifelong civil libertarians like a little direct exposure to the blunt exercise of arbitrary authority.

On a doctrinal level, these cases are a direct result of the Supreme Court's refusal to characterize the students' surroundings at a public school (as opposed to the school's after-hours physical plant) as a public forum. The interference analysis would lead the courts to very different conclusions than the courts have made in the cases discussed above. The interference analysis would start with the assumption that students attending a public school are operating in a public

²⁸⁴ See *Fraser*, 755 F.2d at 1357.

²⁸⁵ *Poling v. Murphy*, 872 F.2d 757, 760 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

²⁸⁶ *Id.* at 764.

²⁸⁷ *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 158 (D. Mass. 1994).

²⁸⁸ *Id.* at 162.

²⁸⁹ *Id.* at 163.

²⁹⁰ *Id.*

²⁹¹ *Fraser*, 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

forum. This assumption is consistent with the broad nature of the educational enterprise, which is defined by an ongoing process of communication between the students and their teachers, and the students and each other.

Moreover, by the Court's own terms, the public education system in our culture is intended to teach students how to behave as citizens of a diverse democracy. The opportunities for student interaction at school assemblies and in common areas are a microcosm of the public sphere those same students will soon inhabit in the larger society. As part of the process of acclimating students to the public sphere, therefore, students should be taught three basic lessons: think for yourself, feel free to criticize authority when necessary, and respect the opinions of your opponents, no matter how offensive. Treating the non-classroom environment of a public school as a public forum—and thereby severely restricting the authority of school officials to regulate student expression such as that in cases discussed above—is a much more logical way to teach these very basic lessons of democratic citizenship. Aside from the unacceptably authoritarian “civic education” arguments in cases like *Fraser*, the only reasonable argument against this approach is that it is much more difficult for teachers and principals to help students deal with the exercise of basic liberties than it is to simply tell them to sit down and shut up. The response to this argument is that if students are not taught how to deal with freedom at a young age, it will be far more difficult to teach them the necessary civic skills once they become full-fledged citizens.

I hasten to emphasize once more that the characterization of public schools and universities as public forums under the interference analysis would not lead to educational anarchy. As noted previously, an interference analysis would permit control of expression in a classroom to the extent necessary to keep the class focused on the relevant subject matter. Likewise, harmful or disruptive behavior would remain subject to regulation. Also, the close confines and peculiar dynamics of a school may permit a school's authorities to regulate specific speech and symbols if the authorities can demonstrate as a matter of fact that particular forms of expression have become instant flash-points equivalent to traditional fighting words. But absent a context defined by an immediate history of race riots or other disturbances instigated by particular symbols, it would be impermissible for a school to outlaw (as a South Carolina school system recently did) “the wearing or displaying of any symbol that depicts heritage or race,”²⁹² or broadly prohibit (as an Iowa school system recently did) the wearing of “[g]ang related . . . “colors,” symbols, signals,

²⁹² Mike Smith, *Banner Combines Confederate Flag, Colors of Black Liberation*, ATLANTA CONST., Apr. 22, 1994, at A4.

signs, etc.”²⁹³ And it certainly would be unconstitutional for school authorities to regulate the student speech in the post-*Fraser* cases discussed earlier in this section, where none of the school authorities could cite evidence that the educational process was interfered with in any way. Once it is recognized that schools should be treated more like parks than prisons, the fact that students applaud and cheer a student council candidate is hardly the kind of disturbance of public order that would justify the contravention of First Amendment rights.

IV. THE INTERFERENCE ANALYSIS AND “NEW” FORUMS: GOVERNMENT SUBSIDY PROGRAMS AS PUBLIC FORUMS

The cases discussed in the previous section all involve the traditional public forum scenario: an individual seeks permission to speak on a piece of physical property owned by the government that the government has closed to some or all private expression. The interference analysis would alter the outcome of many of these cases to permit much more expression than the current public forum doctrine. The next two sections address the application of the interference analysis to two factual scenarios involving “new” forums beyond the traditional context of government-owned physical property: this section will discuss government programs subsidizing speech, and the next section will discuss government regulation of the Internet. In each of these contexts the government has created an instrumentality of communication, which the government has then sought to control through direct regulation of the types of speech or speakers that are permitted to use the forum.

As in the more traditional public forum contexts, the application of a strong public forum analysis would greatly enhance free speech protection in these “new” forums. What follows is not a comprehensive analysis of all the issues arising from government subsidies of speech or regulation of the Internet. Rather, this is a preliminary effort to suggest a conceptual method of dealing with new problems of expression in the public sphere, which have not been addressed satisfactorily in current case law or academic writings. The suggestions here are not entirely novel. As noted in Part II, *supra*, Justice Kennedy’s *Rosenberger* opinion treats one example of a government subsidy as a public forum (although he ultimately rests his opinion on the First Amendment prohibition of viewpoint discrimination).²⁹⁴ Likewise, the District and Supreme Court opinions in *ACLU v. Reno*²⁹⁵—the most prominent case to date on the subject of Internet regulation—are saturated with public forum

²⁹³ *Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303, 1311 (8th Cir. 1997) (holding regulation unconstitutional on vagueness grounds).

²⁹⁴ See *supra* notes 144–57 and accompanying text.

²⁹⁵ 929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 117 S. Ct. 2329 (1997).

overtones, and in effect treat the Internet as a sort of virtual public park.²⁹⁶ The comments below elaborate on these suggestions, and draw from them the beginnings of a systematic analytic framework for dealing with speech in these new forums.

A. *The Unsatisfactory Status Quo: The Distortions and Evasions of Rust v. Sullivan*

At first glance, applying the public forum doctrine to the subsidy cases involves only a small, logical step. After all, the traditional public forum doctrine asserts that government assets (such as a public park) must be set aside for the expressive use of everyone in society, not just for those visitors whose views coincide with those of the government. By analogy, why should public assets in the form of money be treated any differently than a public asset in the form of real property? The untrained eye may find the two classes of assets difficult to distinguish for this purpose, but the courts have always been able to do so easily. In the courts (with the notable exception of the *Rosenberger* decision), the government has usually been permitted to allocate its money in a general spending program however it wants—even if that allocation effectively denies access to an entire category of speakers who have a distinctive point of view on the same subject.

The Court's most definitive statement regarding First Amendment limits on the allocation of government subsidies can be found in *Rust v. Sullivan*.²⁹⁷ In *Rust* a five-member majority upheld speech-restrictive regulations promulgated under Title X of the Public Health Service Act.²⁹⁸ The Act provided federal funding for family-planning services by local government and private non-profit groups. The regulations challenged in the case included a broad provision prohibiting any project receiving Title X money from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning."²⁹⁹ All recipients of Title X funds—including doctors—were "expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request."³⁰⁰ The regulations also prohibited Title X recipients from "encourag[ing], promot[ing], or advocat[ing] abortion as a method of family planning" through lobbying

²⁹⁶ For a discussion of the public forum aspects of the *Reno* decisions, see *infra* notes 333–68 and accompanying text.

²⁹⁷ 500 U.S. 173 (1991).

²⁹⁸ 42 U.S.C. § 300 to 300a-41 (1994).

²⁹⁹ 42 C.F.R. § 59.8(a)(1) (1996).

³⁰⁰ *Rust*, 500 U.S. at 180.

efforts, distribution of literature, or other methods of disseminating information.³⁰¹

These regulations were challenged on First Amendment grounds as impermissible viewpoint regulations, since the regulations permitted (indeed, encouraged) speech by Title X recipients about abortion alternatives, but prohibited any favorable mention of abortion. The Court rejected this argument: "[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."³⁰² The problem is that the "activity" the government chose to fund was speech, and the government's decision to fund only anti-abortion "activity" would have the effect of forcing doctors receiving Title X funds to agree—either explicitly or though enforced silence—with ideas that they vehemently oppose. The Court blithely dismissed this problem with the conclusory statement that the doctors' silence "cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her."³⁰³

The tone of *Rust* treats the plaintiffs' First Amendment complaints almost as if such complaints could not be upheld without undermining the very purpose of government subsidy programs. According to the Court, the communicative distortions inherent in the *Rust* program were inevitable if the program's goals were to be achieved: "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program."³⁰⁴ In this respect, *Rust* is analogous to the Court's limited public forum analysis: once we move beyond the context of traditionally open public property, then the First Amendment gives the government almost complete discretion to decide what expression will be permitted on that property.

At the same time, the Court recognized that there are limits to the government's discretion over the use of its subsidies. For example, the Court recognized that government subsidies to universities are subject to stricter First Amendment limits because "the university is a traditional sphere of free expression [that is] . . . fundamental to the functioning of our society."³⁰⁵ Likewise, the Court noted that the unconstitutional conditions doctrine limits the government's ability to impose speech-restrictive conditions on the expenditure of government money, but the Court defined that doctrine narrowly to cover only subsidy programs that "effectively prohibit[ed] the recipient from engaging

³⁰¹ 42 C.F.R. § 59.10(a) (1996).

³⁰² *Rust*, 500 U.S. at 193.

³⁰³ *Id.* at 200.

³⁰⁴ *Id.* at 194.

³⁰⁵ *Id.* at 200 (quoting *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 605–06 (1967)).

in the protected conduct outside the scope of the federally funded program.”³⁰⁶ Except for these two caveats, *Rust* removes most First Amendment obstacles to the exclusive funding of the government’s favored speakers and viewpoints.

Part II, *supra*, discusses Justice Kennedy’s application of the public forum doctrine to another subsidy program—the student activity fund at the University of Virginia.³⁰⁷ The Court decided this case—*Rosenberger v. Rector and Visitors of the University of Virginia*³⁰⁸—only four years after *Rust*. Despite the fact that Justice Kennedy, who wrote the majority opinion in *Rosenberger*, also joined the majority opinion in *Rust*, the cases seem fundamentally inconsistent. In particular, the implications of Justice Kennedy’s characterization of the subsidy program in *Rosenberger* as a “metaphysical” public forum³⁰⁹ contradict the Court’s extremely deferential treatment of the government’s even more ideologically distorted subsidy program in *Rust*.

In *Rosenberger* (as in *Rust*) the government had carefully constructed the subsidy program to deny funding to one set of activities—among other things, political and religious activities³¹⁰—in order to fund a different set of activities—i.e., extracurricular activities “related to the educational purpose of the University.”³¹¹ Moreover, unlike the *Rust* program, which explicitly denied subsidies to those expressing one point of view on a very specific public policy debate, the University of Virginia program focused on the category of speech—religion—without regard for whether the speaker wanted to use state money to favor religion or to attack it.³¹² Thus, if anything, the *Rosenberger* program was more compatible with the usual First Amendment rules than the *Rust* program, which was upheld despite a First Amendment viewpoint-discrimination challenge. Yet the Court struck down the University of Virginia program at issue in *Rosenberger* as an unconstitutional viewpoint regulation of speech, after rejecting a similar claim in *Rust*. On its face, therefore, *Rosenberger* seems to call into question the *Rust* axiom that “when the Government appropriates public funds to establish a program it is entitled to define the limits of the program.”³¹³

³⁰⁶ *Id.* at 197.

³⁰⁷ See *supra* notes 144–57 and accompanying text.

³⁰⁸ 515 U.S. 819 (1995).

³⁰⁹ *Id.* at 830. For a discussion of this point, see *supra* notes 153–57 and accompanying text.

³¹⁰ *Rosenberger*, 515 U.S. at 825.

³¹¹ *Id.* at 824.

³¹² See *id.* at 895 (Souter, J., dissenting) (noting that university program denied funding “to Muslim and Jewish and Buddhist advocacy as well as to Christian. . . . [I]t applies to agnostics and atheists as well as it does to deists and theists”).

³¹³ *Rust*, 500 U.S. at 194.

Unfortunately, Justice Kennedy did not see things that way. In *Rosenberger*, Kennedy attempted to distinguish *Rust* by focusing on the government's intent in creating the respective programs. According to Kennedy, in *Rust* "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."³¹⁴ Therefore, according to Kennedy, the public forum model he applied in *Rosenberger* did not apply to *Rust* because *Rust* involved the government's own speech. "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."³¹⁵

There are several problems with Justice Kennedy's attempt to distinguish the subsidy programs in *Rust* and *Rosenberger*. First, assuming that the government's intent in creating a subsidy program is relevant to the First Amendment analysis, Kennedy incorrectly identified conflicting governmental purposes in *Rust* and *Rosenberger*. Contrary to Kennedy's interpretation of the two subsidy programs, the basic government intent in both cases was identical: in both programs the government created a subsidy program, but sought to prevent money from that program from funding speech with which the government either disagreed or did not want to be associated. In *Rust* the government sought to avoid funding speech favoring abortion, and in *Rosenberger* the government sought to avoid funding any speech that was not "'related to the educational purpose of the University of Virginia.'"³¹⁶ Because

³¹⁴ *Rosenberger*, 515 U.S. at 833.

³¹⁵ *Id.*

³¹⁶ *Id.* at 824. In contrast to my blunt synopsis of the government policy in *Rust* and *Rosenberger*, the Court chose to engage in a Talmudic interpretation of the motivations for the relevant policies to achieve the majority's desired results. Even if one ignores the obvious effects of the two statutes and attempts to discern some subtle intent in these cases, the Court probably got it wrong. That is, a plausible case could be made that the Court misinterpreted the government's intent in both *Rust* and *Rosenberger*.

With regard to *Rust*, the Court may have misinterpreted the motivations for the relevant government policy when it concluded that the government intended to convey a particular message through private speakers. The case involved a series of regulations implementing Title X of the Public Health Service Act. The regulations issued by the Department of Health and Human Services contained the restrictions on speech, but the statute itself did not. By the *Rust* majority's own admission, Title X "does not speak directly to the issues of counseling, referral, advocacy, or program integrity," *Rust*, 500 U.S. at 184, the legislative history on the subject "is ambiguous and fails to shed light on relevant constitutional intent," *id.* at 185, and the clear thrust of the statute is to provide funds for nonexpressive activities (i.e., health services). It is therefore not at all clear that the regulations restricting speech advocating abortion accurately reflected Congress's intent to use "private speakers to transmit specific information pertaining to [the government's] own program." *Rosenberger*, 515 U.S. at 833.

the government desired to avoid funding disfavored speech in both cases, it seems logical that the outcome of the Court's First Amendment analysis in the two cases should have also been the same. If the government's intent to avoid funding certain speech was respected in *Rust*, the same intent should have been respected in *Rosenberger*.

The second problem with Kennedy's attempt to distinguish *Rust* and *Rosenberger* is that it relies on government intent at all. In his public forum opinions, Kennedy himself has shown why government intent is an inappropriate guidepost for judicial review of a program that restricts speech. As Kennedy has noted, using the government's intent regarding its preferred uses for a piece of public property to determine whether private speech is permissible on that property "leaves the government with almost unlimited authority to restrict speech . . . by doing nothing more than articulating a non-speech-related purpose for the area."³¹⁷ The same analysis that Kennedy finds so compelling in the physical property context also applies logically to the public subsidy cases. The type of property is different, but the principle is the same: if the government is using public money to create an instrumentality of communication, then that instrumentality should be made available to all speakers, without regard to whether the government likes what the speakers might say. Otherwise, the government can avoid its First Amendment obligation to refrain from content and viewpoint regulation of speech simply by saying flatly that only speakers agreeing with the government need apply for public money.

An even more plausible case could be made that the Court misinterpreted the government policy in *Rosenberger*. Contrary to Justice Kennedy's conclusion that the University of Virginia intended to subsidize "a diversity of views" when it created the student activity fund, *id.* at 834, the university unambiguously stated in the relevant policy that none of the money in the fund should be used for any religious or political activity, including speech. *Id.* at 825. Moreover, the university stated explicitly that it would fund only those extracurricular activities that "'are related to the educational purpose of the University of Virginia.'" *Id.* at 824. This linkage of the funded student activities to the university's own objectives makes the fund akin to the student newspaper in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), in which the Court held schools may regulate "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Therefore, if one ignores the obvious thrust of both the *Rust* and *Rosenberger* policies to limit speech, in favor of Justice Kennedy's preferred method of minutely parsing the government's intent, the Court probably should have reached the opposite results in both *Rust* and *Rosenberger*.

³¹⁷ *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

The third problem with Kennedy's analysis of *Rust* and *Rosenberger* is his assumption that the government's authority to speak on matters of public policy necessarily gives the government the power to amplify its "voice" by dictating the speech of private individuals and groups paid by the government through a public subsidy program. The first part of Kennedy's assumption is indisputable: certainly the government may express its point of view on any matter of public policy. Indeed, creating public policy, informing the public about the policy's content, and defending the policy against political opponents is the central purpose of a democratic government. But extending the capacity of the government to control speech beyond the narrow confines of the government itself—that is, beyond the agencies of government, individuals who are elected members of the government, or employees of the government speaking on the government's behalf—is neither necessary to the process of governing nor consistent with the democratic premise that no government can use its general policymaking authority to suppress or overwhelm its opposition and thereby perpetuate its control of the government indefinitely.

It is crucial to remember that references to speech by "the government" are really references to the speech of whatever political faction happened to capture control of the government at the last election. One of the primary purposes of the First Amendment is to ensure that the political faction that won the last election does not abuse the legitimate power it obtains from that victory to manipulate the results of the next election. Therefore, it is necessary to impose strict limits on any victorious faction's ability to "speak" on behalf of the government.

The Court has already recognized several First Amendment limitations on the government's authority to use its control over public resources to suppress speech with which the government disagrees. The most prominent example of these limitations apply when the government seeks to regulate the independent speech of its own employees. For example, the Court has prohibited the government from imposing political affiliation requirements on nonpolicymaking, nonconfidential government employees.³¹⁸ The Court has also prohibited the government from limiting speech by public employees opposing government policy regarding matters of public concern, so long as the employee's speech does not disrupt the effective operation of the workplace.³¹⁹ Likewise, the traditional public forum doctrine prevents the government from suppressing speech in a public park despite the fact—indeed, *because of* the fact—that the government owns the park. The government's ability to use its

³¹⁸ See *Branti v. Finkel*, 445 U.S. 507, 520 (1980); *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

³¹⁹ See *Rankin v. McPherson*, 483 U.S. 378, 392 (1987); *Pickering v. Board of Educ.*, 391 U.S. 563, 574–75 (1968).

control over public assets to infuse the citizenry with a uniform view of public policy must be limited in order to protect the First Amendment model of constant political flux. In our constitutional system, any political faction's control over public assets must be considered temporary, and the First Amendment demands that dissenters to the current regime must have access to the expressive use of those assets to the same extent as the government's acolytes and apologists, so long as universal access to those assets does not significantly interfere with the nonexpressive operations of the government.

Justice Kennedy's deference to the government's desire to control private expression using public assets in cases such as *Rust* would undercut the liberal rules of broad access to public resources Kennedy describes in his public forum opinions. Justice Kennedy's notion that the government may restrict private use of public resources by taking "legitimate and appropriate steps to ensure that [the government's] message is neither garbled nor distorted by the grantee"³²⁰ has no logical stopping point short of Holmes's harsh principle that citizens "have a constitutional right to talk politics, but . . . no constitutional right to be a policeman"³²¹ (which follows from the same logic that led Holmes to defend the common law conception of the public park as property completely under the control of its owner—the government³²²). Kennedy's public forum opinions explicitly renounce the repressive implications of the ownership model of government control over public resources, and thus are deeply inconsistent with his defense of the Court's equally restrictive result in *Rust*.

In recent years, the Supreme Court's protection of public access to public property has been imperfect, but at least for the last fifty years or so the Court has refused to embrace Holmes's all-encompassing view of the government's authority to control private speech by controlling the disposition of public resources. Moreover, to embrace such a concept in a world where the government's tentacles reach into almost every aspect of daily life would eviscerate the most basic First Amendment guarantees.

The better way of handling these problems would be to take Justice Kennedy's notion of a "metaphysical" public forum seriously, and apply the interference analysis to public subsidy cases as well as the more traditional physical-property public forum disputes. As noted in the next subsection, this would protect the speech of government antagonists far more effectively than the *Rust* standard, while preserving the government's ability to make policy and articulate its positions publicly.

³²⁰ *Rosenberger*, 515 U.S. at 833.

³²¹ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

³²² See *supra* note 17 and accompanying text.

B. Government Subsidies as Public Forums: The Application of the Interference Analysis

Slight modifications to the interference analysis would be necessary when applying it to the subsidy context, but the basic outline of the analysis would remain the same. In short, the interference analysis would apply to any "instrumentality of communication" created by the government. An instrumentality of communication would therefore be equivalent to what Justice Kennedy's *Rosenberger* opinion termed a "metaphysical" public forum.³²³ Difficulties would obviously arise in determining whether a particular government subsidy program constitutes an instrumentality of communication. These difficulties will be addressed in more detail *infra*, but in brief a public subsidy program constitutes an instrumentality of communication if the program facilitates the dissemination of information or ideas. The programs in *Rust* and *Rosenberger* provide clear examples of programs that would fall into this category because both programs expressly provided government funds for private expression in the form of printed and verbal communication.

Any public subsidy program that is deemed an instrumentality of communication would be subject to the interference standard. Under this standard, the government would be prohibited from imposing any restrictions on the private expressive use of public subsidies unless such expression would significantly and directly interfere with the legitimate nonexpressive operations of the government. The government would be unlikely to satisfy this standard in either *Rust* or *Rosenberger* because there was no indication in either case that the elimination of expressive restrictions in the subsidy programs at issue in those cases would have prevented the respective governments from acting on their own to provide social services (in *Rust*) or conduct university business (in *Rosenberger*). In *Rust*, for example, even if Title X family planning money was provided to doctors associated with Planned Parenthood or other pro-choice groups, and even if those doctors used that money to inform their patients about the availability of abortion services, the government's ability to provide social services under its own terms (including the denial of publicly funded abortions) would be unaffected.³²⁴ The possibility that expression financed by public funds

³²³ See *Rosenberger*, 515 U.S. at 830.

³²⁴ This conclusion is consistent with Robert Post's argument that the government should be permitted to engage in viewpoint regulation of expression only if the government program in which that regulation occurs falls within the government's "managerial domain." Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996). Thus, Post argues, *Rust* would be defensible if the Title X regulations at issue in that case were "located within the boundaries of a managerial regime dedicated to the achievement of legitimate ends." *Id.* at 170. This was not the case in *Rust*, Post emphasizes, because "[i]t is far from clear . . . that

could lead to public opposition to the government's policies would not constitute "interference" under the interference analysis.³²⁵

physicians, even if they have accepted employment in Title X clinics, occupy roles defined by reference to a purely organizational logic, particularly in situations where that logic seeks to override the necessary exercise of independent professional judgment." *Id.* at 173.

³²⁵ The most thoughtful article concerning constitutional limits on subsidized speech regulation reaches many of the same results I am seeking here, but by a very different route. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992). Professor Cole seeks to limit the government's authority to control the subsidized speech of private individuals and groups by defining several "spheres of neutrality" in which government subsidies would be subject to the First Amendment mandate of governmental neutrality over content, viewpoint, and speaker identity. See *id.* at 716-17. Examples of "spheres of neutrality" include traditional public forums, *id.* at 717, public universities, *id.* at 723, the press, *id.* at 731, the arts, *id.* at 739, and professional fiduciary counseling, *id.* at 743. Cole argues that these spheres of human activity require a large degree of freedom from government control to operate effectively, thus government control over those using public assets in these areas should be strictly limited. Cole also suggests an analytic framework for evaluating when limitations on public subsidies are appropriate. Cole's framework considers three factors that focus on the government's role in fostering public debate, the nature of the government's internal operations, and the degree to which unrestricted expression would impede the relevant institution's internal operations. *Id.* at 736-38. Much of what Cole says about his analysis is consistent with the interference analysis proposed in this Article, and the results reached in cases analyzed under the two standards would usually be identical.

Despite the strong similarities between the two standards, I believe the interference analysis is superior to Cole's "spheres of neutrality" analysis for three reasons. First, the discussion of public subsidies in the text accompanying this note is merely one aspect of a much larger reconfiguration of public forum law, the present state of which Cole accurately describes as "one of the most confused and widely-criticized doctrines of first amendment law." *Id.* at 718-19. Thus, the interference analysis would provide a much broader foundation for strong protection of subsidized speech. Second, the interference analysis is less complicated than Cole's three-part analysis, and would therefore provide fewer opportunities for the government to balance away the First Amendment interest in any particular subsidy case. Third, to the extent that Cole's standard depends on the Supreme Court's endorsement of certain spheres of neutrality, the standard stands on a weak foundation. As the discussion in previous sections of this Article indicate, two of the "spheres of neutrality" cited by Cole—the public forum and public universities—are very vulnerable to governmental attacks on dissenting speech under the Court's current doctrine. See *supra* notes 17-98 and accompanying text (detailing flaws in current public forum doctrine); *supra* note 281 and accompanying text (noting that Court's adherence to strong protection of free speech in the educational context is vulnerable to the uncertain applicability of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), in the university context).

In any event, Cole's focus on an institutional analysis is very helpful in areas of First Amendment analysis that lie beyond the scope of the public forum doctrine. In particular, Cole's analysis clearly defines the constitutional limits that should apply to the government's

A few clarifications and a slight modification to the interference analysis are necessary as a preemptive response to three anticipated objections to treating government subsidy programs as public forums. The first objection is that the interference analysis outlined above potentially would require every government expenditure to be matched by a subsidy for the speech of opponents to that expenditure, thus severely inhibiting the government's ability to carry out any political policy.

This objection can be answered by underscoring the limitations inherent in the definition of the interference analysis as applied in the subsidy context. Most public appropriations would not be considered public forums under the analysis proposed here because most appropriations do not create instrumentalities of communication. Thus, the most common public spending programs—including those funding the public safety or social service operations of government—would not even come under the analysis proposed here. Thus, anti-tax groups would not be able to claim a First Amendment subsidy simply because the government has chosen to fund the Internal Revenue Service.

The second potential objection, which is derived from Justice Kennedy's argument in *Rosenberger* defending the Court's *Rust* decision,³²⁶ asserts that if all government programs relating to the communication of ideas are subject to constitutional public forum constraints, then the government itself will never be able to speak in a uniform voice to the citizenry. As Justice Kennedy argues, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."³²⁷ If all government spending for the communication of information creates First Amendment rights under the public forum doctrine, the argument goes, then the government would be required to offer money to the American Friends Service Committee (and every other anti-war group) every time the United States Army spends money to advertise for new recruits.

This objection, like the first, lacks merit because even if the government does fund a program that involves pure expression—such as a public information campaign, in which the government prints and distributes literature

ability to impose restrictions on the expressive activities of governmental and quasi-governmental actors such as Legal Services Corporation attorneys. (First Amendment restrictions on these activities would not come under the modified public forum analysis proposed here, because the public forum doctrine applies only where the government is attempting to control speech by private actors. *See supra* note 323.) For another argument that recent restrictions on Legal Services attorneys violate the First Amendment, *see* Recent Legislation, 110 HARV. L. REV. 1346 (1997).

³²⁶ *Rosenberger*, 515 U.S. at 832–35.

³²⁷ *Id.* at 833.

taking a position on some political, moral, or social issue—the interference analysis proposed here would not apply. To this extent the interference analysis is in accord with Justice Kennedy’s notion that if the government itself wants to promote some policy, then it is entitled to say what it wishes.³²⁸ But unlike Justice Kennedy’s broad application of this axiom to justify *Rust*, the analysis proposed here would insulate government speech from First Amendment limits only when the government itself is speaking—i.e., agencies, officials, or employees speaking on behalf of government. On the other hand, if the government tries to extend its influence by paying for the speech of private actors—i.e., groups or individuals who are not formally part of the government—then the interference analysis would apply and the government would be required to provide subsidies to speakers opposing the government’s policies.

The third possible objection to the application of the interference analysis in the subsidy context rejects the analogy proposed here between physical and metaphysical forums. One key difference between the two types of forums presents a particular problem: if, as asserted in Part II *supra*,³²⁹ the government cannot limit the permissible types of expression in a particular forum, how will the government be able to focus subsidy programs on specific areas of need (grants to artists or family planning programs, for example) without violating the First Amendment rules proposed here? Under the interference analysis, the category of “limited public forums” would be eliminated in favor of a straightforward assessment of whether expression would, in fact, interfere with the government’s use of a specific piece of public property. If this analysis were applied directly to a public subsidy program, every program subsidizing speech would be vulnerable to First Amendment claims attempting to broaden the scope of the subsidy program beyond the parameters set in the statute. After all, if (as argued in Part III *supra*)³³⁰ a school system cannot limit the use of a physical forum—for example, school mailboxes—to expression relating to school business, why should the government be able to limit a metaphysical forum such as a subsidy program to expression about one subject, such as art or family planning? Ironically, the direct application of an unmodified interference analysis to public subsidy programs might doom public financing of art and family planning because no subsidy program could be confined to the targeted subject.

The third anticipated objection presents the most difficult obstacle for the application of the interference analysis to subsidy programs. This objection

³²⁸ See *id.*

³²⁹ See *supra* notes 158–75 and accompanying text.

³³⁰ See *supra* notes 204–13 and accompanying text.

requires a modification of the interference analysis to permit the government to define, in very broad terms, the field covered by a particular subsidy statute. Thus, the government could focus a subsidy program on "art," for example, or even on "sculpture," without being subject to a First Amendment challenge. This modification takes into account the need to limit the scope of a public subsidy statute, in the same way that the physical boundaries of a public park bracket the application of the public forum doctrine to a physical forum. The boundaries of a public park or other physical forum are clear to any observer. But the boundaries of a subsidy program are defined by the statutory scheme itself. In this context, limitations on the field covered by a statute would be analogous to the physical boundaries of a park. Thus, the interference analysis would permit the government to restrict the field covered by a subsidy program, but not the content of expression that takes place within that field.

Applying this analysis to a particular subsidy program will involve the exercise of more subtle judgments than are necessary in defining the scope of a physical forum. It would also involve a slight retreat from the principle stated in Part II, *supra*, that the government should not be permitted to define a limited public forum by imposing narrow subject matter restrictions on speech on public property. With regard to subsidy programs, the government would be permitted to define the coverage of the subsidy by reference to a specific subject matter ("family planning" or "art"), but to ensure protection of First Amendment values, the government's definition of a field covered by a subsidy statute must be stated in very general terms.

The line between the permissible definition of a "field" covered by a subsidy program and impermissible limits placed on the content of speech within that field will not always be obvious. But most subsidy statutes that run afoul of the interference analysis will involve clear-cut governmental efforts to use public resources to distort communication by favoring some ideas and disfavoring others. The statute upheld in *Rust* is one obvious example. The recent Congressional effort to deny public subsidies to offensive art is another. Under the interference analysis, such efforts would be virtually impossible to justify. Congress would be permitted to establish a subsidy program for "art," but it would not be permitted to create a program funding only "decent art." Decency requirements on art subsidies, such as those imposed by recent amendments to statutes funding the National Endowment for the Arts,³³¹ do not

³³¹ The so-called "decency amendment" to the NEA statute required the Chairperson of the Endowment to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American people" when establishing regulations and procedures for issuing grants. 20 U.S.C. § 954(d)(1) (1990). This provision was declared unconstitutional by the Ninth Circuit Court of Appeals on vagueness grounds, and because the provision constituted an impermissible regulation of the content and viewpoint of artistic

define a field of discourse; rather, such limitations are an attempt to distort public discourse by channeling expression about a particular subject in a direction favored by the government.³³² Preventing governmental distortions of public discourse is one of the primary objectives of the public forum doctrine, and has routinely been used to limit the government's ability to ban offensive speech from traditional public forums; the interference analysis would simply apply the same constitutional objective to public subsidies.

In the end, the application of the First Amendment to public subsidy programs seems to be an all or nothing affair. That is, either the government can dictate precisely what recipients of public subsidies can say (the *Rust* model), or the government can dictate nothing to the speakers it subsidizes (assuming no interference with the government's nonexpressive activities), beyond defining very broadly the category of speech that is being subsidized (the model proposed here). There is no logical middle ground because any effort to devise half-measure constitutional protections of subsidized speech will begin by accepting the central premise that funds distributed as a subsidy are, after all, the government's money. Once it is conceded that the government "owns" the money, the government is likely to win most disputes over how that money is ultimately used. The interference analysis denies government control over the use of public funds for expression, but does so under a system that preserves legitimate governmental prerogatives. Under the interference analysis, the government retains the authority to speak on public issues—it simply must do so with internal governmental resources, using public agencies and employees acting in their official capacity. Likewise, the government can always end a subsidy altogether if those in power are sufficiently traumatized by

speech. *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 1997 WL 561768 (U.S. Nov. 26, 1997). The Court skirted the problems posed by *Rust* by declaring artistic speech a "traditional sphere of free expression" (like universities) and by citing the government's intent to encourage a diversity of viewpoints, à la *Rosenberger*. *See id.* at 681–82.

³³² The interference analysis also casts doubt upon the Supreme Court's decision in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), involving the government's selective grant of tax exemptions for lobbying by charitable organizations (a form of subsidy which, since it is designed to facilitate the expression of recipients, would be governed by the interference analysis). The statute upheld in *Regan* denied tax exemptions to all charitable groups engaged in lobbying, except veterans' groups. *Id.* at 546 & n.8. In *Regan*, the field of expression was lobbying, and Congress chose to discriminate within that field between veterans groups and all other charitable organizations. Eliminating the distinction between speakers (either by broadening the scope of the exemption to cover all charitable lobbying, or by eliminating the special preference for veterans) would not interfere in any significant way with governmental operations; therefore, the policy upheld in *Regan* violates the interference analysis.

the notion of subsidizing antagonistic speech, just as the government can sell the land constituting a public park if hostile political demonstrations in that space make the government sufficiently uncomfortable. The government loses nothing under this standard, other than what it did not have in the first place—the authority to dictate how private speakers use public assets.

V. THE INTERFERENCE ANALYSIS AND “NEW” FORUMS: GOVERNMENT REGULATION OF THE INTERNET

In the summer of 1997, on the last day of its 1996–1997 Term, the Supreme Court issued its first comprehensive opinion dealing with government regulation of the Internet. The majority opinion in *Reno v. ACLU*,³³³ which held unconstitutional major provisions of the Communications Decency Act (the “CDA”),³³⁴ provides a broad endorsement of free speech in cyberspace. Much of the opinion is devoted to expansive descriptions of how the Internet has increased the possibilities of human communication beyond anything imaginable only a few years ago. This opinion—which in many respects reflects the even more enthusiastic endorsements of an unrestricted Internet by the three-judge district court panel in the case³³⁵—goes a long way toward solidifying the constitutional protection of speech in cyberspace, but it leaves several issues unresolved. First, the Court notes (although it does not endorse) several less-restrictive means of regulating indecent speech over the Internet,³³⁶ leaving open the possibility that Congress will pass a series of new “baby CDA’s” in the coming years. Second, the opinion does nothing to resolve conflicts over computer use at public institutions, especially universities, where disputes have multiplied with the expansion of the Internet and the World Wide Web. Finally, *Reno* focuses on the problems of regulating the access of minors to sexual speech, an area in which the Court has traditionally given the government substantial regulatory leeway, even in restricting speech that is legal for adults. Because the *Reno* opinion is focused on this fairly specialized regulatory problem, it does not address other censorship efforts that do not involve the protection of minors, such as the recent effort by the State of Georgia to prohibit the use of pseudonyms in communication over the Internet.³³⁷

³³³ 117 S. Ct. 2329 (1997).

³³⁴ 47 U.S.C.A. § 223 (1997).

³³⁵ See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

³³⁶ See *Reno*, 117 S. Ct. at 2348.

³³⁷ See *infra* note 400 and accompanying text.

The Internet is still in its infancy, and the inevitable governmental efforts to control or sanitize the frequently anarchic world of cyberspace have only begun. This section suggests that the clear characterization of the Internet as a public forum will aid in the resolution of conflicts between government regulators and speakers which are bound to proliferate as the expansion of communication in cyberspace continues. Given the novelty of Internet regulation, it is possible to sketch only a preliminary and tentative overview of the consequences of deeming the Internet a public forum. But in at least one arena where disputes are already common—i.e., clashes between administrators and students using computers at a public university—the application of public forum principles would have an immediate and salutary effect.

A. *The Roots of Reno: The Internet as a Public Forum*

It does not require much creativity to characterize the Internet as a public forum after the Supreme Court's *Reno* decision. Indeed, it is not unreasonable to suggest that the *Reno* majority opinion itself treats the Internet as a public forum without actually making the designation explicit. This is evident from the uniformly skeptical stance the Court took toward any regulation of expressive content on the Internet and also from the Court's express refusal to analogize the Internet to relatively closed electronic forums involving broadcast or cable communications, which receive lower levels of constitutional protection than private speech in more traditional public forums.

Prior to *Reno* it was possible that the Court would open the door to extensive government regulation of the Internet by conceptualizing the Internet as merely a slight extension of other electronic media such as radio, television, or cable. The government argued in *Reno* in favor of such an analogy, and even asserted that there "is a stronger justification" to regulate the Internet than there is to regulate broadcasting because "the indecency problem on the Internet is much more pronounced than it is on broadcast stations."³³⁸ This was not simply an academic debate over legal taxonomy; if the broadcast model had prevailed in *Reno*, almost every aspect of speech on the Internet would be subject to extensive and potentially debilitating government regulation.³³⁹

³³⁸ Brief for Appellants at 28–29, *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (No. 96-511).

³³⁹ In the broadcast sphere, the Court has permitted the government to restrict speech the broadcaster wants to broadcast, *see FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (restricting broadcast of indecent programming), and also to force broadcasters to carry speech that they do not want to broadcast, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine, which requires broadcasters to carry responses to personal attacks or editorials involving political candidates). The Court has upheld the

The debate over the applicability of the broadcast model to the Internet mirrors many of the disputes that have arisen over the use of government property in the public forum cases. Indeed, much of the Court's doctrine regarding radio and television rests on the premise that the government may regulate private broadcasters because the private broadcasters are using a public asset—i.e., the airwaves. Thus, in the broadcast regulation context, as in the public forum context, the central issue is whether the government can use its ownership of the expressive asset to control what the government considers immoral, antisocial, or politically antagonistic speech.

The basic theory permitting extensive government regulation of radio and television can be found in *Red Lion Broadcasting Co. v. FCC*.³⁴⁰ In that case, the Court approved the Federal Communications Commission (FCC) "Fairness Doctrine," which required broadcasters to give response time to candidates who have been editorially opposed by the broadcaster, or who have been subjected to other "personal attacks" on the air.³⁴¹ The Court upheld the doctrine as applied to broadcasters on the theory that the allocation of broadcast frequencies used by radio and television stations involves the "enforced sharing of a scarce resource."³⁴² Two complementary assumptions are combined in this phrase: the conception of broadcast frequencies as a public resource, and the characterization of that resource as scarce and therefore subject to governmental allocation. Broadcasters are viewed in *Red Lion* not as aggressively independent members of the Fourth Estate,³⁴³ but rather as public agents of civic education,

application of similar restrictions to cable television companies, *see* *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997) (upholding "must carry" rules requiring cable operators to carry signals of local broadcast stations), although the Court uses a somewhat more stringent standard for content-neutral government regulations of cable than for similar regulations of broadcasting. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-41 (1994). The precise nature of that standard is unclear. *See* *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996) (refusing to make "definitive choice among competing analogies (broadcast, common carrier, bookstore)" and avoiding any "specific set of words" to define standard applicable to regulations of cable programming content). It is equally unclear whether the Court will permit the government to regulate indecent programming on cable as extensively as indecency in broadcast media. *See id.* at 2392 (striking down statutory requirement that cable companies segregate indecent programming on a single, blocked channel and require anyone wanting access to that channel to file a written request, but noting several other less restrictive statutory provisions that have the effect of segregating indecent cable programming).

³⁴⁰ 395 U.S. 367 (1969).

³⁴¹ *Id.* at 373-75.

³⁴² *Id.* at 391.

³⁴³ This role was left to traditional print journalism, to which the Court refused to extend the scarcity/public resource arguments it accepted in *Red Lion*. *See* *Miami Herald v. Tornillo*,

which to a large extent can be guided and controlled by the government. "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."³⁴⁴

In *FCC v. Pacifica Broadcasting*,³⁴⁵ the Court added a third item to its two *Red Lion* rationales for permitting extensive regulation of broadcasting. In *Pacifica*, the Court held that the FCC could prohibit "indecent" radio broadcasts³⁴⁶ during certain periods of the day because broadcasting receives only "the most limited" level of free speech protection.³⁴⁷ According to the Court, radio and television broadcasting is "a uniquely pervasive presence in the lives of all Americans,"³⁴⁸ which "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder."³⁴⁹ Therefore, the government could regulate the content of broadcasts to shift potentially offensive programming to a time when listeners would be unlikely to encounter it inadvertently.

The Court's assumptions about the need to regulate the broadcast media have been subjected to criticism ever since the Court issued its *Red Lion* decision.³⁵⁰ Today, those early criticisms have been overtaken by the empirical

418 U.S. 241 (1974) (unanimously striking down state "right of reply" statute, which gave candidates a right to reply to political attacks in newspaper).

³⁴⁴ *Red Lion*, 395 U.S. at 394.

³⁴⁵ 438 U.S. 726 (1978).

³⁴⁶ "Indecency" was defined as "nonconformance with accepted standards of morality." *Id.* at 439-40. The specific "nonconformance" at issue in *Pacifica* was, of course, George Carlin's comedy routine concerning the notorious "seven dirty words." *See id.* at 751, 755.

³⁴⁷ *Id.* at 748.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *See, e.g.,* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (arguing that further regulation of broadcast journalism will encourage existing tendencies toward editorial blandness); L.A. Powe, Jr., *Or of the [Broadcast] Press*, 55 TEX. L. REV. 39 (1976) (criticizing scarcity argument); William W. Van Alstyne, *The Mobius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539 (1978) (criticizing regulation of broadcasting as inconsistent with First Amendment principle of editorial freedom). The most compelling criticism of the Court's assumptions in *Pacifica* is contained in Justice Brennan's vociferous dissent. *See Pacifica*, 438 U.S. at 762 (Brennan, J., dissenting). Aside from chiding the majority for their "fragile sensibilities" and "acute ethnocentric myopia," *id.* at 775, Brennan used the imagery of the public forum to rebut the Court's description of radio's unwanted intrusion into the sanctity of the home. "[A]n individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at large . . . are more properly

facts of technological development. The rapid expansion of cable, satellite, and computer media has undercut the scarcity logic of *Red Lion*. Indeed, in 1985 the FCC itself issued a report renouncing the Fairness Doctrine and the scarcity theory on which it was based, and subsequently abolished the Doctrine.³⁵¹

Nevertheless, some scholars have used the broad analysis of *Red Lion* to argue that the entire First Amendment should be revamped to permit more government regulation of private speech in order to counterbalance the predominance of speech that they consider unenlightening or antisocial.³⁵² Ironically, these proposals, which are premised on politically progressive objectives such as the need to foster equality, ultimately depend on the very conservative assumptions of governmental ownership and control of the public sphere that were used to uphold strict (and decidedly unprogressive) restrictions on private speech in public forums prior to *Hague v. C.I.O.*³⁵³ When the Court rejected these assumptions in *Hague*, it recognized that the logic of government ownership and control over expressive resources is deeply incompatible with modern notions of democratic limits on government control of popular thought and expression.

viewed as a decision to take part, if only as a listener, in an ongoing public discourse." *Id.* at 764-65.

³⁵¹ "[T]he growth of traditional broadcast facilities" and "the development of new electronic information technologies" have rendered "the fairness doctrine unnecessary." Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 197 (1985). Thus, the FCC abolished the Fairness Doctrine, concluding that it no longer served the public interest and that it violated the First Amendment. *See Syracuse Peace Council v. WTVH*, 2 F.C.C.R. 5043 (1987). The D.C. Circuit Court affirmed the agency's determination. *See Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

³⁵² *See, e.g.,* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986) (using *Red Lion* to support theory that free speech tradition should be modified to permit more government intervention "to safeguard the conditions for true and free collective self-determination"); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1760 (1995) (citing *Red Lion* as an example of "Madisonian model" of First Amendment, under which "governmental efforts to encourage diverse views and attention to public issues are compatible with the free speech principle—even if they result in regulatory controls on the owners of speech sources"); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 620 ("The reasoning in *Red Lion Broadcasting Company v. FCC*... suggests that in some circumstances government regulation may be constitutionally acceptable, or perhaps even constitutionally compelled, in the interest of equalization and diversity."). For an analysis of the many problems with these other recent interventionist theories of free speech jurisprudence, *see* Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996).

³⁵³ 307 U.S. 496 (1939); *see supra* notes 17-30 and accompanying text.

In any event, the Court has never taken the advice of commentators who would have the Court expand the application of *Red Lion* and its progeny; instead, the *Red Lion* doctrine has been limited to broadcasting. The narrow scope of the broadcasting cases is evident throughout the *Reno* decision, in which the Court uses the very specific context of the *Red Lion* and *Pacifica* cases to thwart the government's effort to extend the regulatory rationale of those cases to the Internet. The Court found that *Red Lion* was of little use to the government because the scarcity rationale does not apply to the Internet. "[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity."³⁵⁴ Although the exponential growth of the Internet periodically threatens to outstrip presently available bandwidth, there is no physical limit on the amount of additional capacity that can be added to take account of the medium's future growth. As the Court recognized, the Internet "provides relatively unlimited, low cost capacity for communication of all kinds."³⁵⁵

Pacifica proved equally unhelpful to the government in *Reno*, even though the two cases involved similar restrictions on the transmission of "indecent" materials.³⁵⁶ Ironically, it was the government's earlier success in focusing the Court's attention on inadvertent listeners to offensive broadcasts that undercut the usefulness of *Pacifica* in the Internet case. In contrast to broadcast media, the Court held in *Reno*, "the Internet is not as 'invasive' as radio or television. . . . 'Users seldom encounter content by accident, . . . [and the] odds are slim that a user would come across a sexually explicit sight by accident.'"³⁵⁷ Besides, the Court held, unlike broadcasting, the Internet has not historically been subject to government regulation, and unlike the *Pacifica* regulation, the *Reno* statute provided for a complete ban on the targeted speech, rather than a time, place, or manner relegation of the speech to a late-night time period.³⁵⁸

Emphasizing the differences between broadcasting and the Internet gave the Court several opportunities to characterize the Internet in a way most favorable

³⁵⁴ *Reno*, 117 S. Ct. at 2344.

³⁵⁵ *Id.*

³⁵⁶ Two provisions of the Communications Decency Act were held unconstitutional in *Reno*. The first prohibited the knowing transmission of indecent materials to any recipient under 18 years of age. See 47 U.S.C.A. § 223(a) (1997). The second prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to any recipient under 18 years of age. See 47 U.S.C.A. § 223(d) (1997).

³⁵⁷ *Reno*, 117 S. Ct. at 2343 (quoting *Reno v. ACLU*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

³⁵⁸ See *id.* at 2342-43.

to strong First Amendment protection, and equally conducive to treating the Internet as a new, metaphysical public forum. The Court described the Internet as "vast democratic fora,"³⁵⁹ whose content "is as diverse as human thought."³⁶⁰ Moreover, the Court noted, the growth of the Internet seems to confirm that the public is attracted, rather than repulsed, by the diversity of available ideas in the new forum. In a phrase that directly contradicts the interventionist thrust of *Red Lion* and the other broadcast cases, the Court reaffirmed the central First Amendment principle that operates outside the idiosyncratic area of broadcasting: "[W]e presume that government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."³⁶¹

This assumption is consistent with the Court's protection of expressive diversity in traditional public forums, and many of the metaphors and precedents cited by the Court to support its assumption were drawn from public forum jurisprudence. In describing communication over the Internet, the Court invoked the image of a virtual Hyde Park Corner: "Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."³⁶² Likewise, in rejecting the government's argument that the Internet could be regulated as long as other means of communication remained open, the Court drew an analogy to the traditional protection afforded to leafleters on sidewalks and cited for support one of the Court's oldest public forum decisions. "The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafleting on the streets *regardless of* their content—we explained that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'"³⁶³

Although the Supreme Court did not use precisely the same words, the tenor of its opinion echoes District Court Judge Dalzell's characterization of the Internet as "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen,"³⁶⁴ as well as Dalzell's conclusion that because of its unique character "the Internet deserves the

³⁵⁹ *Id.* at 2343.

³⁶⁰ *Id.* at 2344 (quoting *Reno*, 929 F. Supp. at 842).

³⁶¹ *Id.* at 2351.

³⁶² *Id.* at 2344.

³⁶³ *Reno*, 117 S. Ct. at 2348–49 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

³⁶⁴ *Reno*, 929 F. Supp. at 881.

broadest possible protection from government-imposed, content-based regulation.”³⁶⁵

In light of the strong pro-speech language in *Reno*, there seems little to add in the way of constitutional protection for the Internet. Yet despite its repeated inferences and allusions to public forum principles and precedents, the Court did not definitively assert that the Internet will henceforth be treated as a public forum. This is significant because the *Reno* majority opinion left open at least the theoretical possibility that it might uphold content-based regulations of the Internet that were narrower than the CDA,³⁶⁶ and the separate opinion of Justice O'Connor specifically endorsed the notion that the government could constitutionally “zone” low-value speech within the Internet once the technology to do so becomes available.³⁶⁷ These options, although less comprehensively restrictive than the CDA, would nevertheless pose the same type of threat to the anarchic freedom of the Internet that the *Reno* majority seems intent on preserving. Also, as noted at the beginning of this section, the *Reno* decision does not address regulation of speech outside the sexual arena, where protection of children gives the government a justification that does not apply to other types of expressive content. Finally, *Reno* provides little guidance for dealing with government efforts to regulate the expression of citizens using government facilities to access the Internet, a problem that has already arisen several times in the context of public universities and libraries.

Therefore, despite the strong protection of speech provided by the Court's *Reno* opinion, that opinion leaves open several possibilities for regulation that state and federal governments will sooner or later attempt to use (and in some cases discussed *infra*, have already used) to restrict expression on the Internet. The public forum doctrine, filtered through the interference analysis proposed in this Article, would strengthen the *Reno* holding by providing a speech-favorable framework for analysis of future regulations, and thereby come close to realizing Judge Dalzell's goal of providing “the broadest possible protection from government-imposed, content-based regulation.”³⁶⁸ The next subsection provides a brief consideration of how the public forum analysis would contribute to the analysis of three problems relating to regulation of the Internet beyond the CDA.

³⁶⁵ *Id.*

³⁶⁶ *See Reno*, 117 S. Ct. at 2348.

³⁶⁷ *See id.* at 2352–53 (O'Connor, J., concurring in part and dissenting in part).

³⁶⁸ *Reno*, 929 F. Supp. at 881.

B. Some Preliminary Thoughts on the Regulation of the Internet as a Public Forum

Reno turns out to have been an easy case for advocates of free speech in cyberspace. But the statute in *Reno* was a particularly clumsy first effort by the government to regulate the Internet: the CDA was far too broad, too vague, enacted without any legislative hearings or findings, and at the last minute was tacked onto a much more comprehensive telecommunications statute that had nothing to do with the regulation of speech on the Internet.³⁶⁹ Having lost the battle over the CDA, the government may now attempt to win the war over Internet speech regulation by attempting to limit *Reno* to its facts—i.e., by treating the decision as an inevitable response to ineptly drafted and poorly executed legislation. The *Reno* Court left its decision vulnerable to this tactic, because although the style and tone of the *Reno* majority opinion is very speech-favorable, the substance of the opinion stops short of describing how the Court fits the Internet into the complex web of First Amendment doctrine. For constitutional purposes, *Reno* tells us what the Internet *is not*—it is not broadcasting; but despite all the Court's overtures to unfettered expression over the Internet, we still do not know what the Internet *is*. This is very problematic in a First Amendment universe that depends increasingly on placing new forms of speech in conceptual pigeonholes to determine whether and how much that speech is protected by the Constitution.

The application of the public forum doctrine to the Internet provides a way out of this dilemma by encasing *Reno* in a conceptual framework that would link the opinion to the Court's existing doctrine and prevent future efforts to limit the spirit of *Reno* by tying it to the facts of the failed CDA. Moreover, as noted in Part V.A., *supra*, the characterization of the Internet as a public forum is consistent with the imagery and precedents used by the Court itself to justify its decision in *Reno*.

It is not surprising that Justice Stevens cited several public forum decisions when he wrote the *Reno* majority opinion. The Internet can be considered the operational definition of what Justice Kennedy has called a "metaphysical" public forum.³⁷⁰ Although the Internet has no physical presence in one place (it is, rather, an interconnected network of computers spread throughout the world), it operates as a centralized place where people go to discuss issues, trade information, and peruse words, images, and music. The Internet is, therefore, a forum. Moreover, this particular forum was created by the

³⁶⁹ See the Court's description of the legislative history in *Reno*, 117 S. Ct. at 2338–39 & n.24.

³⁷⁰ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

government (it originated in the Advanced Research Project Agency in 1969³⁷¹) and was financed through much of its development by the National Science Foundation.³⁷² Private companies have now taken over the government's role in providing funds and the actual communications backbone for the Internet, but the essentially public character of the system is the same: from the perspective of speakers, listeners, and viewers, the privatized Internet remains like a public park—the most traditional of traditional public forums—a place where anyone can enter at any time of day and speak on any subject that comes to mind to anyone willing to listen. There are no “no trespassing” signs on the Internet. Therefore, whenever the government intervenes to suppress, limit, or channel communications over the Internet, either through regulation of private speech or by limiting access to the Internet over publicly-available access points provided by the government, any restrictions on speech should be governed by the rules of the public forum set forth in the previous sections of this Article.³⁷³

³⁷¹ See generally KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* 103–36 (1996).

³⁷² See generally *id.* at 240–46.

³⁷³ Because I limit my focus here to direct efforts by the government to regulate the Internet, the state action problem does not arise. However, the clear-cut nature of the Internet as a publicly accessible instrumentality of communication does have implications for the application of First Amendment rules to private Internet Service Providers (ISP's) who engage in content-based restrictions on access to certain portions of the Internet. The most notorious instances of censorship by private ISP's are Compuserve's brief effort to block 200 sex-related Internet sites, and America Online's preemptive strike prior to the passage of the CDA, when America Online decided to censor the word “breast” from its system. The latter effort led to the suppression of discussion groups concerning breast cancer and other women's issues, and was soon abandoned. See Peter H. Lewis, *An On-Line Service Halts Restriction on Sex Material*, N.Y. TIMES, Feb. 14, 1996, at A1; Peter H. Lewis, *Personal Computers: About Freedom of the Virtual Press*, N.Y. TIMES, Jan. 2, 1996, at B14. Other recent examples include the successful efforts of America Online and Compuserve to block all unsolicited e-mail advertisements from another company's customers. See *Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (E.D. Ohio 1997) (issuing preliminary injunction against e-mail advertisements on theory that advertisements constitute a trespass on the property of Compuserve, and are unprotected by the First Amendment); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 437 (E.D. Pa. 1996) (holding that “private online service has the right to prevent unsolicited e-mail solicitations from reaching its subscribers over the Internet”).

The existing First Amendment rules regarding the constitutional protection of free speech on private property were developed in the context of picketing at private shopping centers. See *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Those cases depended on the Court's assumption that speech at a shopping center is incompatible with the designated purposes of the private property. According to the Court in those cases, the First Amendment claim “misapprehends the scope of the invitation extended to the public. The invitation is to come to the Center to do business with the

The following problems indicate how the public forum designation will affect government regulation of the Internet in three typical situations.

1. Problem One: "Zoning" the Internet to Limit Sexual Speech

In contrast to the *Reno* majority's diffuse conceptualization of the Internet, Justice O'Connor's separate opinion in *Reno* offers a pointed vision of what the Internet is and how it fits into the fabric of modern First Amendment jurisprudence. According to Justice O'Connor, regulation of the Internet through statutes such as the CDA amounts to "little more than an attempt by Congress to create 'adult zones' on the Internet."³⁷⁴ She argues that government regulations limiting access to sexually explicit speech on the Internet are nothing more than "zoning laws."³⁷⁵ By describing Internet regulation as an exercise in zoning, O'Connor locates the Internet in an area of First Amendment jurisprudence whose rules have tended to favor very broad governmental restrictions on speech. O'Connor notes that the Court has previously upheld several such laws in what she calls the "physical world."³⁷⁶ She also notes that although the present differences between the physical world

tenants. . . . There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." *Lloyd*, 407 U.S. at 564-65. But in the case of a private company offering members of the public general access to the Internet, the "property" (that is, the ISP's servers that link the customer to the Internet) is not dedicated to a purpose other than speech. Speech is the purpose of this particular type of private property, and if (as I argue in this section) speech on the Internet takes place in a public forum, then a private ISP that provides public access to the Internet should be obligated to follow the rules that define that forum. In other words, the private ISP must permit its customers to have access to all speech in the forum, regardless of what the operators of the ISP think about the content of that speech. As compensation for giving up control over what their customers may access over the Internet, this mandatory access rule would insulate the ISP's from civil liability for tortious speech distributed over their system. *Compare* *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that Compuserve cannot be held liable for defamation distributed over its electronic library because service was mere "distributor" of information and did not exercise editorial discretion over content), *with* *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding that Prodigy could be held liable for defamation because it held itself out as exercising control over the content of speech accessible by its customers). *See also* *Zeran v. America Online*, 958 F. Supp. 1124 (E.D. Va. 1997) (holding that Section 230 of the federal Communications Decency Act—which was not challenged in *Reno*—preempts state-law negligence liability claims against Internet service provider).

³⁷⁴ *Reno*, 117 S. Ct. at 2351 (O'Connor, J., concurring in part and dissenting in part).

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 2353.

and cyberspace make the analogy between the two worlds incomplete, this situation may change soon through the increased use of "gateway technology," such as uniform Web site ratings and the use of adult information numbers to access sites with sexual images.³⁷⁷

According to O'Connor, the ability to construct barriers in cyberspace through the use of these new technologies (which she concedes are still too porous to justify the criminal provisions of the CDA), "make[s] cyberspace more like the physical world and, consequently, more amenable to zoning laws."³⁷⁸ Although the *Reno* majority did not adopt O'Connor's zoning rationale, Justice Stevens seemed to have something similar in mind when he noted that Congress should have considered regulatory measures more limited than the CDA, such as the possibility of "requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes."³⁷⁹

Comments such as these raise the specter of a new generation of "baby-CDA's," such as a government mandate that Internet browser software include an Internet equivalent to the V-chip technology that manufacturers will soon be required to install in all new television sets.³⁸⁰ This technology, in turn, would require some form of uniform ratings system for all Web sites. Whether government requirements of blocking technology or ratings could withstand a First Amendment challenge may ultimately depend on the government's ability to convince the Court to apply Justice O'Connor's zoning theory to this type of Internet regulation.³⁸¹

Despite the superficial similarities between the Court's zoning cases and similar efforts to restrict access to sexual material on the Internet, O'Connor's

³⁷⁷ *Id.* at 2353-54.

³⁷⁸ *Id.* at 2353.

³⁷⁹ *Id.* at 2348.

³⁸⁰ See Pub. L. No. 104-104, 110 Stat. 139-142 (Feb. 8, 1996) (requiring V-chip to block sexually explicit or violent programming).

³⁸¹ In the wake of the *Reno* decision, the Clinton Administration has presently chosen to emphasize voluntary measures (such as the use of currently available programs to block sexually explicit Web sites) rather than new government mandates. See John M. Broder, *Let It Be: Ira Magaziner Argues for Minimal Internet Regulation*, N.Y. TIMES, June 30, 1997, at D1 (discussing White House task force recommendations). However, Senator Dan Coats, who sponsored the CDA, announced that he would "put the force of law" behind Internet industry efforts to promote child-protection software. Elizabeth Corcoran, *Clinton Vows to Work on Web Smut Safeguards*, WASH. POST, July 17, 1997, at C3. In November, 1997, Coats introduced a bill requiring anyone "engaged in the business of the commercial distribution of material that is harmful to minors [to] restrict access to such material by persons under 17 years of age." Criminal fines and prison sentences of up to six months would be imposed on violators. See S. 1482, 105th Cong. (1997).

analogy between zoning in the physical world and "zoning" in cyberspace breaks down quickly. First, although O'Connor repeatedly refers to her theory as a "zoning" rationale, she does not even cite the Court's major previous decisions upholding zoning regulations aimed at sexual speech, such as *Young v. American Mini Theaters*³⁸² or *Renton v. Playtime Theatres, Inc.*³⁸³ These cases have upheld zoning regulations that isolate adult cinemas, nude dancing establishments, and adult bookstores in particular areas of a town, away from residential areas, churches, and schools. One glance at the Court's rationale in these cases underscores the inapplicability of the zoning concept to the Internet.

The First Amendment challenge to the zoning statutes in cases like *Young* and *Renton* revolved around the fact that the zoning statutes in those cases treated parcels of property differently based on the particular type of speech that took place within the property;³⁸⁴ thus, the statutes appeared to discriminate on the basis of content against property used by those engaging in non-obscene (and therefore constitutionally protected) sexual speech. The Court rejected the First Amendment claims in the zoning cases after concluding that the regulations were not primarily concerned with the content of speech, but rather were responses to "the secondary effects of adult theaters."³⁸⁵ According to the Court, the zoning regulations did not constitute attempts to suppress or restrict speech, but rather reflected the community's desire to "prevent crime, protect the city's retail trade, maintain property values," and preserve the character of particular neighborhoods.³⁸⁶

The Court's content-neutral explanation of the government's intent in the zoning cases was somewhat ingenuous in light of the clear focus on the content of speech in the facts surrounding the adoption of the legislation in question,³⁸⁷ but the secondary effects rationale is the Court's official explanation for upholding what would otherwise be impermissible content-based zoning regulations, and that explanation sets clear limits on the extent to which the zoning theory can be extended to other areas. This is a problem for Justice O'Connor because the "secondary effects" explanation does not apply at all to the Internet. Speech taking place on the Internet has no outward manifestation equivalent to a graphic or offensive marquee outside an adult theater. Likewise, it is not possible for groups of unsavory characters to hang around on a street

³⁸² 427 U.S. 50 (1976).

³⁸³ 475 U.S. 41 (1986).

³⁸⁴ See *Young*, 427 U.S. at 52-53 (describing zoning statutes); *Renton*, 475 U.S. at 44 (describing zoning statutes).

³⁸⁵ *Renton*, 475 U.S. at 47.

³⁸⁶ *Id.* at 48.

³⁸⁷ See *id.* at 59-63 (Brennan, J., dissenting) (recounting flimsy evidence supporting "secondary effects" rationale in legislative findings supporting zoning statute).

corner outside a Web site containing sexual expression, and no Web site will lower the property values of an adjacent site. The absence of any plausible concern over crime or property values indicates that the Court's secondary effects rationale for upholding zoning restrictions of indecent speech is inapplicable in the Internet context.

Perhaps the difficulty of extending the secondary effects rationale to the Internet explains why Justice O'Connor ignored the Court's own zoning cases in developing her zoning theory of Internet regulation. Nevertheless, the cases she did muster for support are no more helpful to her cause.³⁸⁸ The decision on which O'Connor relied most heavily to support her zoning rationale is not a zoning case at all. This case—*Ginsberg v. New York*³⁸⁹—upheld a state statute prohibiting minors from purchasing magazines that the state deemed "harmful to minors."³⁹⁰ O'Connor argued that the CDA is akin to the law upheld in *Ginsberg*. Thus, she voted to uphold the CDA as written where the law could be "applied to a conversation involving only an adult and one or more minors,"³⁹¹ and strongly suggested that she would uphold a future version of the CDA once gateway technology makes it possible to "zone" the Internet in a way that preserves adults' access to sexually explicit material on the Internet that is inappropriate for children (in the same way that children were "zoned" out of adult bookstores by the law upheld in *Ginsberg*).

Even if *Ginsberg* can be construed as a zoning case, however, it is no more applicable to the Internet than the Court's more traditional zoning decisions. The difference between *Ginsberg* and the Internet is that in *Ginsberg* a "gateway" mechanism was already in place to enforce the state's statute without altering the nature of the forum in question—i.e., the clerks in stores that sold adult magazines. Therefore, the restriction on sales of sexual materials to minors that the Court upheld in *Ginsberg* would not fundamentally alter the

³⁸⁸ With two exceptions, the relevant First Amendment decisions cited by O'Connor all held that attempts to regulate sexual speech were unconstitutional. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (striking down federal regulation of dial-a-porn services); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 75 (1983) (striking down federal law prohibiting mailing of unsolicited advertisements for contraceptives); *Erznoznik v. Jacksonville*, 422 U.S. 205, 217 (1975) (striking down local ordinance prohibiting drive-in theaters from showing films containing nudity); *Butler v. Michigan*, 352 U.S. 380, 384 (1957) (striking down Michigan statute prohibiting sale to public of any material not fit for children). The only two cases cited by O'Connor that upheld regulations of speech were *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (discussed in text *infra*) and *Roth v. United States*, 354 U.S. 476, 492 (1954) (pre-*Miller* case upholding regulation of obscenity). None of these cases involved zoning regulations.

³⁸⁹ 390 U.S. 629 (1968).

³⁹⁰ *Id.* at 638.

³⁹¹ *Reno*, 117 S. Ct. at 2355 (O'Connor, J., concurring in part and dissenting in part).

basic characteristics of the forum, or inhibit the dissemination of speech in that forum. On the Internet, on the other hand, a similar "zoning" regulation would require basic alterations to the open geography of cyberspace. The interposition of mandatory gatekeeping mechanisms at various points on the Internet would fundamentally change the open nature of the forum and severely hamper the quick, simple, and cheap dissemination of speech through the medium.

Judge Dalzell's structural criticism of the CDA in the lower court's *Reno* decision relates to this point and applies also to more limited attempts to "zone" the Internet: "Because it would necessarily affect the Internet itself, . . . [such regulations] would necessarily reduce the speech available for adults on the medium."³⁹² It is impossible to predict the exact nature of the changes that would occur in response to the "zoning" of the Internet. But it is inevitable that a zoning scheme at least to some extent would close or fracture the uniform and open framework presently characterizing the medium. Once this change occurs, much of the Internet's promise as an instrumentality of communication will be lost forever.

Treating the Internet as a public forum avoids these dangers and is more consistent with both the structure of the Internet and the constitutional tradition of open, even raucous and offensive expression in public forums. The relevant precedents are not the zoning cases and *Ginsberg*, but rather *Cohen v. California*³⁹³ and *Erznoznik v. Jacksonville*.³⁹⁴ Although neither case is technically a public forum case, each decision describes the spirit of unfettered public expression that characterizes existing public spaces in this society—a spirit that permeates the Internet. In *Cohen*, which overturned the conviction of a man for wearing a jacket bearing the words "Fuck the Draft" in a public place, the Court emphasized that the First Amendment was intended to "remove governmental restraints from the arena of public discussion," even if this freedom from restraint results in "verbal tumult, discord, and even offensive utterance."³⁹⁵ In *Erznoznik*, which overturned a local ordinance prohibiting drive-in theaters from showing films containing nudity, the Court likewise emphasized that citizens of a modern democracy will be faced daily with "constantly proliferating new and ingenious forms of expression."³⁹⁶ In such an atmosphere, "[m]uch that we encounter [will offend] our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are

³⁹² *Reno v. ACLU*, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (opinion of Dalzell, J.).

³⁹³ 403 U.S. 15 (1971).

³⁹⁴ 422 U.S. 205 (1975).

³⁹⁵ *Cohen*, 403 U.S. at 24-25.

³⁹⁶ *Erznoznik*, 422 U.S. at 210.

sufficiently offensive to require protection for the unwilling listener or viewer.”³⁹⁷ Both cases rely on the basic proposition that unwilling viewers’ central remedy for offensive speech in public is to “avoid further bombardment of their sensibilities simply by averting their eyes.”³⁹⁸ This is the only remedy that is compatible with the basic nature of all public forums. Both *Cohen* and *Erznoznik* note that the government may limit unwanted intrusions into the home. But by refusing to apply the *Pacifica*-type “intrusiveness” arguments to the Internet, the Supreme Court has already definitively determined that the Internet is a public space, not an intruder into the private space of the home. The application of the public forum doctrine to the Internet would underscore the functional similarities between the physical and the metaphysical public forums. Therefore, offensive speech on the Internet is entitled to at least as much protection as that provided in cases such as *Cohen* and *Erznoznik*, and if the nature of the medium is to be preserved, Judge Dalzell’s conclusion is inevitable: “Congress may not regulate indecency on the Internet at all.”³⁹⁹

2. Problem Two: Regulation of Nonsexual Speech on the Internet

Most regulations of speech on the Internet to date have involved government limitations on the dissemination of sexual speech, but regulation of nonsexual speech is also proliferating. Examples of nonsexual speech regulation include a Georgia statute prohibiting Internet users from using any name to “falsely identify” themselves online,⁴⁰⁰ a Connecticut statute prohibiting communication over a computer network “in a manner likely to cause annoyance or alarm” if the speaker intends to “harass, annoy, or alarm,”⁴⁰¹ a federal statute proposed by Senator Diane Feinstein prohibiting the dissemination of bomb-making information over the Internet,⁴⁰² and proposals

³⁹⁷ *Id.*

³⁹⁸ *Cohen*, 403 U.S. at 21.

³⁹⁹ *Reno v. ACLU*, 929 F. Supp. 824, 877 (E.D. Pa. 1996) (opinion of Dalzell, J.)

⁴⁰⁰ GA. CODE ANN. § 16-9-93.1 (1997). A federal district court has issued a preliminary injunction against enforcement of this statute, holding that the statute is overbroad, unconstitutionally vague, and an impermissible content-based regulation of speech. See *ACLU v. Miller*, No. 1:96-cv-2475-MHS (N.D. Ga. Order filed June 20, 1997), reprinted at <<http://www.aclu.org/court/aclugavmiller.html>>.

⁴⁰¹ CONN. GEN. STAT. § 53a-183(a)(2) (1997).

⁴⁰² The proposed legislation would make it a federal criminal offense to “distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the . . . information . . . in furtherance of an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce.” 143 CONG. REC. S5989 (daily ed. June 19, 1997) (statement of Sen. Feinstein). The Feinstein

by various private groups to prohibit hate speech on the Internet.⁴⁰³ These regulations and proposed regulations target different types of speech, but two factors unify the otherwise disparate attempts to regulate nonsexual communication over the Internet. First, each of the examples listed above involves speech that is generally assumed to be constitutionally protected when it is published or spoken outside the context of the Internet. For example, the Court has twice held that the First Amendment provides a right to speak and assemble anonymously.⁴⁰⁴ Likewise, the Supreme Court has repeatedly held that speech that merely "annoys or alarms" listeners cannot be punished by the government.⁴⁰⁵ The Court has also foreclosed the regulation of hate speech per

proposal was added to the National Defense Authorization Act for Fiscal Year 1998, and was adopted by the Senate by a vote of 94-0. 143 CONG. REC. S6006 (daily ed. June 19, 1997). In support of her proposal, Senator Feinstein recounted her discovery of a text entitled "The Terrorist's Handbook," which she had her staff download from the Internet. 143 CONG. REC. S5990 (daily ed. June 19, 1997) (statement of Sen. Feinstein). According to Senator Feinstein's view of her legislation, anyone posting on their Web site the text of this book, or others like it, would be criminally liable for any action by any person using the information contained in the book. "[I]t is my belief that the person who puts this up on the Internet becomes a conspirator in the ability to commit a major crime in the United States." 143 CONG. REC. S5990 (daily ed. June 19, 1997) (statement of Sen. Feinstein).

The Feinstein proposal, which prohibits the distribution of bomb-making information "in whole or in part," is phrased broadly enough to potentially criminalize even the posting of a link to another Web site that contains the prohibited information. Such a prosecution has already occurred in Germany. The German government prosecuted the left-wing political activist Angela Marquardt for placing on her personal Web site a link to the Dutch Internet site of the German underground journal "Radikal," which has published articles on how to make bombs and derail trains. See Edmund L. Andrews, *Germany's Efforts to Police Web Are Upsetting Business*, N.Y. TIMES, June 6, 1997, at A1. A German judge later held Ms. Marquardt not guilty on the narrow ground that she had established her link to the "Radikal" site before the journal had published the offending articles on bombs and trains. See Edmund L. Andrews, *German Judge Dismisses Criminal Charge Over Internet Link*, N.Y. TIMES, July 1, 1997, at D7.

⁴⁰³ The most prominent proponent of this type of regulation is the Simon Weisenthal Center, which has urged access providers and universities to censor messages that "promote racism, anti-Semitism, mayhem and violence." Peter H. Lewis, *Group Urges an Internet Ban On Hate Groups' Messages*, N.Y. TIMES, Jan. 10, 1996, at A10.

⁴⁰⁴ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."); *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (holding that the First Amendment prohibited Alabama from forcing the NAACP to reveal its membership lists).

⁴⁰⁵ See *Texas v. Johnson*, 491 U.S. 397, 400 (1989) (overturning conviction for burning American flag under state statute prohibiting desecration of flag "in a way that the actor knows will seriously offend" observers) (citing TEX. PENAL CODE ANN. § 42.09(b) (West

se, in the absence of any proof that the speech threatens to cause an immediate breach of the peace.⁴⁰⁶ Finally, although the Supreme Court has never specifically held that publishing bomb-making information is protected by the First Amendment, in the modern era of First Amendment jurisprudence, the Court has adhered to the principle that "if the state is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.'"⁴⁰⁷

1989)); *Gooding v. Wilson*, 405 U.S. 518, 518 (1972) (overturning conviction under statute prohibiting use of "opprobrious words or abusive language"); *Cohen v. California*, 403 U.S. 15, 15 (1971) (overturning conviction applying statute prohibiting "offensive conduct" to actions of individual wearing jacket with inscription "Fuck the Draft"); *Terminiello v. Chicago*, 337 U.S. 1, 1 (1949) (overturning conviction for speech under a statute prohibiting speech that "stirs the public to anger, invites dispute, [or] brings about a condition of unrest").

⁴⁰⁶ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

⁴⁰⁷ *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969) (quoting *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)). In *Stanley*, Justice Marshall continues by noting that "[g]iven the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." *Id.* at 567. Presumably the same principle would apply to a statute that prohibits possession of chemistry information derived from the Internet on the theory that such information would lead to homemade bombs.

In its review of the Senator Feinstein's proposed statute prohibiting dissemination of bomb-making information, the Justice Department itself noted that "[t]he First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination of bombmaking information. The government generally may not, except in rare circumstances, punish persons either for advocating lawless action or for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully." DEP'T OF JUSTICE, SUMMARY OF THE REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE U.S. CONSTITUTION, reprinted at 143 CONG. REC. S5991 (daily ed. June 19, 1997) (statement of Sen. Feinstein). The Justice Department satisfied itself that the Feinstein proposal nevertheless could withstand constitutional scrutiny because of language added to the statute to link the publication to some criminal conspiracy, but Senator Feinstein's statements on the floor of the Senate interpreted the "conspiracy" element of the statute so broadly as to encompass anyone publishing the information: "Mr. President, there is no legal, legitimate use for a phone bomb, for a book bomb, for a baby-food bomb, all of which are described in this handbook. When it is put in this context, the context of criminality, it is my belief that the person who puts this up on the Internet becomes a conspirator in the ability to commit a major

The second factor that characterizes all the recent attempts to regulate nonsexual speech on the Internet is that they are all motivated by a generalized fear of the medium itself. Each of the statutes or proposals cited at the beginning of this subsection seem to be premised on the general sense that dangerous speech is somehow rendered more dangerous because of its appearance on the Internet.⁴⁰⁸ Perhaps this fear of the Internet is merely a response to the often slick and graphic presentation of otherwise unsavory information on many Web sites, or perhaps it is a response to the ease with which the Internet allows anyone to access any information from anywhere in the country (or the world) without the knowledge or supervision of the authorities. In any event, the efforts to restrict the dissemination of antisocial ideas and dangerous information has taken on new urgency with the growth of the Internet.

However well motivated these regulatory attempts may be, they all reflect a paternalistic mindset that is fundamentally inconsistent with the basic thrust of the First Amendment. The nonsexual speech regulations noted above share this characteristic with the underlying premise of the CDA. The proponents of all these regulations do not dispute that the Internet is an instrumentality of public communication; rather, they operate on the assumption that the Internet is too efficient at facilitating communication that the government does not like. As Judge Dalzell noted regarding the government's defense of the CDA, "the Government's asserted 'failure' of the Internet rests on the implicit premise that too much speech occurs in that medium, and that speech there is too available to the participants."⁴⁰⁹ As Judge Dalzell also noted, the concept of "too much speech" and the notion that information is "too available" are both "profoundly repugnant to First Amendment principles."⁴¹⁰

Declaring the Internet a public forum is a response to the fear of "too much speech" on the Internet, and would provide an important reinforcement for existing constitutional protections of social and political dissenters—who are the primary targets of all the statutes cited above. The public forum doctrine began as a way of democratizing speech by providing a communicative avenue for

crime in the United States." 143 CONG. REC. S5990 (daily ed. June 19, 1997) (statement of Sen. Feinstein).

⁴⁰⁸ Senator Feinstein's defense of her statute provides an explicit expression of this fear. According to Senator Feinstein: "[W]e know that materials on the Internet are used by terrorists to commit terrorist acts. We also know that the number of explosive devices now being found are increasing. Authorities have stated that the rise is attributable to a rise in Internet use." 143 CONG. REC. S5990 (daily ed. June 19, 1997) (statement of Sen. Feinstein).

⁴⁰⁹ *Reno v. ACLU*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (opinion of Dalzell, J.).

⁴¹⁰ *Id.*

speakers who lack the resources to publish their views in the more traditional form of a newspaper or magazine. The Internet follows in this tradition. Declaring the Internet a public forum would extend to the new forum the same protections already offered in other public spaces for offensive or antisocial speech. It would also serve as a reminder that public speech—which includes speech disseminated to the public via the Internet—is protected up to the point that the speech acts as a direct incitement to immediate illegal action. The standard for potentially dangerous speech over the Internet should be no different than the standard for speech on a sidewalk or in a public auditorium.⁴¹¹ The Court has long prevented the government from punishing public speakers based on the government's nonspecific fear of public disturbance;⁴¹² if anything, the absence of physical proximity between speaker and listener makes it even less likely that speech over the Internet can pose the kind of immediate dangers to public order that the government legitimately may address. On the Internet, as in other public spaces, therefore, the operative axiom should be that "political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."⁴¹³

3. Problem Three: Limitations on Access to the Internet Through Publicly Owned Facilities

The third Internet regulation problem implicating the public forum doctrine arises whenever the government attempts to limit access to the Internet through public computers. This problem arises in two contexts. The first context involves public universities that attempt to impose limits on faculty and student use of university-owned servers and personal computers. Most of the recent controversies over restrictions on student use of university computers have involved disputes over institutional limits on the viewing or dissemination of

⁴¹¹ For examples of how protective the First Amendment can be of antagonistic speech in public places, see *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913–15 (1982); *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

⁴¹² This principle appears in the political speech cases, see, e.g., *Texas v. Johnson*, 491 U.S. 397, 420 (1989), the hostile audience cases, see, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and the fighting words cases, see, e.g., *Gooding v. Wilson*, 405 U.S. 518, 524 (1972)—all of which apply the same high level of constitutional protection of controversial speech in public places.

⁴¹³ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919)).

sexual and political speech over the Internet.⁴¹⁴ Most of these disputes have occurred at private universities, and so have not produced judicial opinions delving into the First Amendment implications of those restrictions. The few published judicial decisions involving public universities have either been decided through the application of very specialized First Amendment rules,⁴¹⁵ or have generated skimpy and unenlightening general discussions of the relevant constitutional doctrine.⁴¹⁶ The second context in which these issues have arisen involves public libraries, some of which have responded to local political pressure by limiting their patrons' access to controversial sites on the Internet.⁴¹⁷ None of these cases has yet been litigated.

⁴¹⁴ Two prominent examples involve Ivy League universities. Cornell University recently sanctioned four students for using their university computer accounts to send a private e-mail message entitled "75 reasons why women should not have free speech," which was then reposted on the Internet by persons other than the students. *Penalties Decided in E-Mail at Cornell*, N.Y. TIMES, Nov. 17, 1995, at B8. In 1996, Princeton University issued a broad statement prohibiting the use of its computer system for any political or commercial purpose, then clarified the policy to permit political discussions by students and faculty. See Karen DeMasters, *Princeton Clarifies Policy on Electronic Free Speech*, N.Y. TIMES, Aug. 25, 1996, at Sec. 13NJ, p.5.

⁴¹⁵ The most notorious is the Jake Baker case. In this case, the United States Attorney prosecuted a University of Michigan student for posting on Usenet discussion groups a story in which he depicted the rape, torture, and mutilation of a student with the identical name of one of his classmates. The indictment was later dismissed by the federal courts on the ground that the story did not constitute a "true threat." *United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997).

⁴¹⁶ See *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997). This decision is apparently the only reported opinion involving a challenge to a public university's rules limiting student and faculty access to the Internet with university computers. The court ruled that the university president's unilateral decision to block access to a number of newsgroups through university computers was not a violation of the First Amendment, despite the fact that the university conceded that it had acted without extensive investigation of the blocked newsgroups, and that many of the blocked newsgroups did not contain illegal obscene material. The court based its decision in part on its conclusion that the university computers did not constitute a public forum. See *id.* at 955. The court's discussion of this conclusion is contained in a single paragraph. See *id.*

⁴¹⁷ The Orlando, Florida public library has taken the most drastic steps to limit its patrons' access to speech on the Internet, by purchasing and installing on all its public computers the commercial filtering software "Websense." Lisa Brownlee, *On-Line Porn Sorely Tests Librarians' Free-Speech Principles*, WALL ST. J., Apr. 23, 1997, at B1. The Austin, Texas library has temporarily installed similar software pending the adoption of a formal policy on the subject. See *id.* The Boston public library has taken a compromise approach by installing filtering software on 26 computers designated for use by children and leaving the remaining 44 machines free of limits. See Greta Anand, *Library Restricts Some 'Net Access*, BOSTON GLOBE, Mar. 29, 1997, at B2. Some libraries have refused to censor access to the Internet at all. The public libraries in Los Angeles, Madison, Wisconsin, and

Limitations on access to the Internet through public computers raise issues similar to the public subsidy problem discussed in Part IV, *supra*.⁴¹⁸ The computers at public universities and libraries are government property, and under current doctrine the use of these machines by private individuals could easily be treated as yet another form of publicly subsidized speech. As noted in Part IV, the application of current rules governing subsidized speech could make it very difficult to challenge the government's self-imposed restrictions on the public's use of its hardware.⁴¹⁹ But in this context, even more so than with regard to the more typical forms of public subsidy of speech, the public forum doctrine provides a more logical and coherent framework for analyzing the state's interests in limiting the speech that can be sent and received from government computers. Unlike current doctrine, the application of public forum principles would in most cases tend to invalidate limits on the expressive use of public computers.

When the government purchases a computer for public use at a university or public library, the government is essentially providing the public an entrance to an existing forum in which ongoing public discussions address the entire range of human interests. The decision to provide access to the Internet through public computer terminals is therefore the functional equivalent of a government decision to provide access to a park, municipal auditorium, or any other public area where communication regularly takes place. Having provided this access to a preexisting public forum, the government must obey the command of the First Amendment to permit all speakers to say what they want to whoever is willing to listen. This should be the result even under current public forum doctrine, which emphasizes the government's intent in creating a public forum.⁴²⁰

New York City have refused to install filtering software. See Roy Rivenburg, *What They're Checking Out at Libraries*, LOS ANGELES TIMES, July 1, 1997, at E1. The libraries that install filtering software apparently violate the American Library Association's Library Bill of Rights, the official interpretation of which states: "Libraries and librarians should not deny or limit access to information available via electronic resources because of its allegedly controversial content or because of the librarian's personal beliefs or fear of confrontation. Information retrieved or utilized electronically should be considered constitutionally protected unless determined otherwise by a court with appropriate jurisdiction." American Library Association, *Access to Electronic Information, Services, and Networks: An Interpretation of the Library Bill of Rights* (adopted Jan. 24, 1996) (<gopher://ala1.ala.org:70/00/alagophx/ala_gophxfreedom/electacc.fin>).

⁴¹⁸ See *supra* notes 294–332 and accompanying text.

⁴¹⁹ See description of current doctrine *supra* notes 297–306 and accompanying text.

⁴²⁰ See *supra* notes 55–98 and accompanying text.

The nature of the Internet is not a mystery; the government should be on notice that when it allows the public to join ongoing discussions in cyberspace, the government has forsaken the authority to sanitize the forum to fit particular political or social sensitivities. The version of the public forum doctrine proposed in this Article goes one step beyond current doctrine to suggest that the government's intent is subordinate to the nature of the forum in question. With regard to the Internet, the nature of the forum in question is defined by the absence of limits on speech it contains. Therefore, the same rationale that prohibits the government from restricting offensive speech in a park (the nature of which also is defined by unfettered speech) likewise should limit the government's authority to sanitize the speech that its citizens access through the Internet. Although the government may limit its own involvement in this discussion (for example, by prohibiting its employees from using government computers to represent the government's position on a controversial issue in an Internet forum or Web site), the government should not be permitted to limit the participation of citizens who are invited as independent individuals to use government facilities to participate in the forum.

In the most basic sense, public libraries, universities, and the Internet serve exactly the same purpose: to gather together as much information as possible at one easily accessible point, and disseminate that information through ongoing discussions among individuals interested in the subject. On the Internet, as in a university or public library, the open exchange of information and opinions is encouraged because it is essential to the success of the enterprise. Moreover, there is a self-regulating mechanism built into the Internet—individual choice. Just as an individual can choose to walk away from a discussion in a traditional park, anyone can sit at a computer terminal and observe or listen to a speaker over the Internet, or can move to another site if the listener finds the speaker's opinions uninteresting, offensive, or wrong. The Internet truly puts "the decision as to what views shall be voiced largely into the hands of each of us,"⁴²¹ which obviates the need for direct governmental control.

Under the test proposed here, the government has no legitimate interest in limiting access to the Internet over publicly-accessible computers in universities and public libraries unless the failure to do so would substantially interfere with the government's ability to carry out its duties. Everyone agrees that some of the government's legitimate duties will involve the regulation of speech. No one disputes, for example, that the government has the authority to punish the transmission of pirated audio recordings or the distribution of pictures containing explicit visual images of children engaged in sexual acts. If an example of speech is unprotected when placed on a bookshelf, or when it takes

⁴²¹ *Reno v. ACLU*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (opinion of Dalzell, J.) (quoting *Leathers v. Medlock*, 499 U.S. 439, 449 (1991)).

place in a park, it does not become legal merely because the same speech is transmitted over a computer network.⁴²² Therefore, a university or public library should have the authority to prevent those using computers owned by those institutions to copy unlicensed copyrighted materials or child pornography. Likewise, no one disputes that the government may impose limits on the use of a public forum (including parks as well as computers) to prevent one speaker from monopolizing an asset that belongs to the entire community. Therefore, universities and public libraries may impose time limits on computer usage if scarce resources make such limits necessary to give all potential users access to the forum.

Unfortunately, the government is seldom satisfied with this narrow authority. In the cases discussed in this section, the government has demonstrated its unwillingness to limit its regulatory efforts to finding and punishing illegal speech, or protecting access to a limited communicative asset. Rather, in the short time since the Internet was developed, local, state, and federal governments have frequently sought to use their power to prohibit or discourage access to speech whose content is protected by the Constitution. The public forum doctrine denies the government this authority in its dealings with the Internet, just as the doctrine denies the government similar authority in other "new forums." Under the public forum analysis proposed here, as long as unrestricted access to the Internet does not significantly interfere with the government's ability to enforce constitutionally acceptable legal prohibitions on unprotected speech, the government may not use either its regulatory authority or its control over publicly-accessible government property to restrict access to speech the government does not like.

⁴²² The ease with which speech can be transmitted from place to place over the Internet may, however, require limiting the scope of some criminal laws. For example, it is open to question whether the "local community standards" analysis applicable to the first two components of the First Amendment obscenity test make sense in a world where there are few remaining barriers to open and immediate communication between every community throughout the country. See *Miller v. California*, 413 U.S. 15, 30-34 (1973) (applying "local community standards" to analyze whether sexual speech appeals to "prurient interest" and whether speech describes specific sexual activities in a "patently offensive way"); see also *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (holding that state may allow jury to determine for itself the parameters of the relevant local community). The universal accessibility of speech over the Internet, and the unifying tendencies of developments in communications technology generally, undermine the notion of isolated "local community values." These developments suggest that the first two parts of the obscenity test should be judged by the same national standard that now is used in applying the third component of that test, which is used to analyze whether particular expression has serious literary, artistic, or political value. See *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

VI. CONCLUSION

Despite all the recent changes in the nature of public discourse, the public forum doctrine remains at the core of the First Amendment. Symbolically and functionally, the protection of free expression demands that the courts frequently recall the quaint central image of the public forum: a raucous orator on a street corner thumbing his nose at the King's policemen, who look on in powerless frustration because the law prohibits them from silencing the dissident. But the image is not enough to protect speech in the new era of virtual forums and dispersed, untraditional public spaces. The image and the doctrine it produced must be updated for the new era to ensure that the new forums serve the same democratizing purpose as the old.

I have suggested that the existing public forum doctrine is inadequate in three major respects: First, because it limits the key reference point of the traditional public forum to antiquated public spaces that have a decreasing impact on the everyday communicative lives of modern citizens. Second, because the Supreme Court has created a mutated middle category of "limited" public forums that are defined tautologically in terms of the government's intent as to whether speech may take place in the forum. And third, with the exception of the *Rosenberger* decision, the Court has been reluctant to extend the application of the public forum doctrine beyond the context of physical forums—which limits the doctrine's usefulness in an era when an increasing proportion of public debate occurs electronically between conversants who are separated geographically by great distances.

The changes proposed here would cure these defects by replacing the current three-tier public forum doctrine with a simpler two-tier system, in which the government would be permitted to regulate speech in both traditional and nontraditional public forums only if the speech would otherwise significantly interfere with the government's ability to carry out its legitimate duties. Rigorous enforcement of this interference standard would stem the current trend toward a narrowing of the public forum, especially if it is combined with a creative application of the doctrine to what Justice Kennedy terms "metaphysical forums," including government programs funding speech and government regulation of the Internet.

The great democratic tradition of public discussion and debate cannot be protected adequately unless the image of the public forum is updated to conform with the realities of the new era in communication. But with the incorporation of changes such as those suggested in this Article, a reinvigorated public forum doctrine can preserve the legacy of history's eloquent street-corner orators, even after the orators and their venerable mode of communication have disappeared forever.