

BETWEEN GOVERNANCE AND MANAGEMENT:
THE HISTORY AND THEORY OF
THE PUBLIC FORUM

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TABLE OF CONTENTS

I.	THE HISTORY OF PUBLIC FORUM DOCTRINE	1718
A.	<i>Kalven's Reconstruction of the Early Precedents: Of Streets and Private Homes</i>	1719
B.	<i>The Evolution of Modern Public Forum Doctrine.</i>	1724
1.	<i>Adderley v. Florida: The Resurrection of the Davis Syllogism</i>	1724
2.	<i>The Moment of Ambivalence: Grayned, Mosley, and the Categorization of Public Property.</i>	1729
3.	<i>The Period of Experimentation: Lehman and Conrad</i>	1733
4.	<i>Establishing the Basic Doctrinal Framework: Greer v. Spock</i>	1739
C.	<i>The Birth and Death of the "Limited Public Forum"</i>	1745
II.	THE PRESENT CONDITION OF PUBLIC FORUM DOCTRINE	1758
III.	TOWARD A REFORMULATION OF PUBLIC FORUM DOCTRINE	1765

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A.	<i>The Management of Speech Within Government Institutions</i>	1767
B.	<i>Public Forum Doctrine and the Management of Speech Within Government Institutions</i>	1775
1.	The Theory of Managerial Authority and Public Forum Doctrine	1776
2.	The Object of Public Forum Doctrine ..	1781
C.	<i>Reformulating Public Forum Doctrine</i>	1782
IV.	THE DISTINCTION BETWEEN MANAGEMENT AND GOVERNANCE	1784
A.	<i>The Question of Institutional Boundaries</i>	1785
B.	<i>Criteria for Distinguishing Management from Governance</i>	1788
C.	<i>Four Examples</i>	1793
D.	<i>The Meaning of "Public" in Public Forum Doctrine</i>	1797
E.	<i>The Authority of Social Practices</i>	1800
1.	The Malleability of Social Practices	1801
2.	Social Practices and Constitutional Principles	1805
V.	JUDICIAL DEFERENCE TO MANAGERIAL AUTHORITY	1809
A.	<i>The General Structure of Deference Analysis</i>	1810
B.	<i>The Criteria of Warranted Deference</i>	1816
VI.	VIEWPOINT DISCRIMINATION IN THE NONPUBLIC FORUM	1824
A.	<i>When Is Viewpoint Discrimination Impermissible?</i>	1825
B.	<i>The Prohibition Against Viewpoint Discrimination and Warranted Deference</i>	1829
	CONCLUSION	1833

In 1972, the United States Supreme Court introduced for the first time the concept of the "public forum" into first amendment jurisprudence. The concept enjoyed immediate success, and within twelve years had assumed the status of "a fundamental principle of First Amendment doctrine."¹ In the process the concept evolved into an elaborate, even

1. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984). The increasing prominence of public forum doctrine is documented in Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221-22 (1984).

byzantine scheme of constitutional rules² designed to ascertain when members of the general public can use government property for communicative purposes. In general outline, these rules focus tightly "on the character of the property at issue"³ in order to determine whether it is a "public or nonpublic" forum.⁴ If the property is a public forum, the government's ability to regulate the public's expressive use of the property is subject to strict constitutional limitations;⁵ if it is a nonpublic forum, the government is given great latitude in the property's regulation.⁶

Although public forum doctrine has developed with extraordinary speed, it has done so in a manner heedless of its constitutional foundations. The Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories. These rules have proliferated to such an extent as to render the doctrine virtually impermeable to common sense. The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It has received nearly universal condemnation from commen-

2. On the complex nature of contemporary public forum doctrine, see, e.g., M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 4.09 [D], at 4-70-4-73 (2d ed. 1984); Leedes, *Pigeonholes in the Public Forum*, 20 U. RICH. L. REV. 499, 500-01 & n.13 (1986).

3. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

4. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

5. In a public forum:

[T]he government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

United States v. Grace, 461 U.S. 171, 177 (1983) (citations omitted).

6. As a general matter, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." *Cornelius*, 473 U.S. at 806.

tators⁷ and is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes. This Article is intended as a modest step in that direction.

The first section of the Article will trace the history of public forum doctrine with an eye toward uncovering the underlying values which have led the Court to back itself into its present uncomfortable position. The second section of the Article will assess the present condition of what Melville Nimmer, shortly before his untimely death, called the "complex maze of categories and subcategories"⁸ which constitute modern public forum doctrine. Almost none of the special rules characteristic of the doctrine can withstand analytic scrutiny.

The third section of the Article will propose a constitutional theory that is responsive to the values which the history of public forum doctrine reveals have animated the Court, and the theory will in turn lead to a reformulation of

7. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 92-93 & n.182 (1987). In a world of disputatious academic criticism, the unrelenting and unanimous condemnation of contemporary public forum doctrine is truly remarkable. The critics' reasons for rejecting the doctrine are nearly always the same. Public forum doctrine is said to depend upon a "myopic focus on formalistic labels" that "serves only to distract attention from the real stakes" at issue in disputes over public use of government resources for communicative purposes. *Id.* at 93. The doctrine is said to exemplify the kind of formalism that "produces incoherent results untouched by the interplay of considerations that should inform . . . decisionmaking under the first amendment." Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 341 (1986). The doctrine is condemned as "simply . . . an inadequate jurisprudence of labels," Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986), and indicted because it distracts "attention away from the first amendment values at stake in a given case." Farber & Nowak, *supra* note 1, at 1224. It is attacked because it is without underlying "coherent principles," Note, *Public Forum Analysis After Perry Educ. Ass'n v. Perry Local Educators' Ass'n—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 548 (1986) [hereinafter Note, *Public Forum Analysis*] and imposes a "categorization" that fails "to reflect accurately the conflicting interests affected by restrictions on expression." Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 121-22 (1982) [hereinafter Note, *A Unitary Approach*]. For a sampling of the negative commentary attracted over the years by the doctrine, see also Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1308-09, 1317-37 (1979); Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFFALO L. REV. 175, 183 (1983); Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247 (1976); Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 VA. L. REV. 91, 112-15 (1986).

8. M. NIMMER, *supra* note 2, § 4.09[D], at 4-71.

the doctrine that is consistent with contemporary constitutional principles. To summarize this reformulation in a brief and somewhat Delphic manner, public and nonpublic forums should not be distinguished because of the character of the government property at issue, but rather because of the nature of the government authority in question. There are two kinds of government authority, corresponding to two distinct regimes of first amendment regulation. The first is what I call "managerial" authority, with which the state is characteristically invested when it acts to administer organizational domains dedicated to instrumental conduct. In such contexts the government may constitutionally regulate speech as necessary to achieve instrumental objectives. The second kind of authority can be termed that of "governance." It is characteristic of the authority which the state exercises over what Hannah Arendt has called the "public realm,"⁹: the arena in which members of the general public meet to accommodate competing values and expectations, and hence in which all goals or objectives are open to discussion and modification. The government's ability to restrict speech in the public realm is limited by ordinary and generally applicable principles of first amendment adjudication. If the government exercises the authority of governance over a resource which a member of the general public wishes to use for communicative purposes, the resource is a public forum. The resource is a nonpublic forum if it is subject to the managerial authority of government. The fourth section of the Article will discuss in detail the constitutional criteria that distinguish management from governance, and hence public from nonpublic forums.

A number of constitutional consequences flow from this reformulation of public forum doctrine, one of the most important of which is that public forums do not, as the Court has sometimes remarked, occupy "a special position in terms of first amendment protection,"¹⁰ but are instead resources governed by the most generally applicable first amendment standards. These standards do not ordinarily apply, however, in nonpublic forums, in which the state is instead permitted to regulate speech as necessary to achieve

9. H. ARENDT, *THE HUMAN CONDITION* 22-78 (1959); see R. BEINER, *POLITICAL JUDGMENT* 152 (1983).

10. *United States v. Grace*, 461 U.S. 171, 180 (1983).

certain specified objectives. When a court reviews government action in a nonpublic forum, it must decide whether it should independently evaluate the state's instrumental justification for the regulation of speech, or whether it should defer on this question to the judgment of government officials. The question of deference accounts for some of the most controversial aspects of contemporary public forum doctrine, and will be discussed in the fifth section of the Article. In its sixth and final section, the Article will address the difficult issue of the constitutional role of viewpoint discrimination within a nonpublic forum.

The result of all this analysis, it is to be hoped, will be a theory of public forum doctrine that is both practical and constitutionally sound.

1. THE HISTORY OF PUBLIC FORUM DOCTRINE

The phrase "public forum" is traditionally attributed to Harry Kalven's classic 1965 article, *The Concept of the Public Forum: Cox v. Louisiana*.¹¹ In *Cox*,¹² the Court addressed the troublesome issue of street demonstrations in the vicinity of a courthouse. Kalven used the occasion to attempt a major reconsideration of "the problems of speech in public places."¹³ Kalven's basic point was:

[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.¹⁴

The concept of the "public forum" was not for Kalven primarily a tool for categorizing different kinds of government property; his central concern was rather with the pro-

11. 1965 SUP. CT. REV. 1; see, e.g., M. NIMMER, *supra* note 2, § 4.09[D], at 4-69 n.163; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 35 (1975). The United States Supreme Court had occasionally used the phrase "public forum" prior to 1965, although not in the context of a recognizable first amendment theory. See, e.g., *International Ass'n of Machinists v. Street*, 367 U.S. 740, 796 (1961) (Black, J., dissenting); *id.* at 806 (Frankfurter, J., dissenting). The Supreme Court of California, however, had used the phrase in a surprisingly contemporary sense as early as 1946. See *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 545-48, 171 P.2d 885, 890-91 (1946).

12. 379 U.S. 536, 559 (1965).

13. Kalven, *supra* note 11, at 3.

14. *Id.* at 11-12.

tection of that "uninhibited, robust and wide-open" speech "on public issues" which *New York Times Co. v. Sullivan*¹⁵ had recently placed at the center of first amendment concerns.¹⁶ Streets and parks were constitutionally important because they were peculiarly fitted to foster such speech. But Kalven's use of the phrase "public forum" to express this importance was in the long run to prove unfortunate, for it tended to focus attention on categories of public property, rather than on the relationship between such categories and the underlying constitutional value of public discussion.

A. *Kalven's Reconstruction of the Early Precedents: Of Streets and Private Homes*

Kalven cannot be entirely exonerated from contributing to this misunderstanding, however, for his claim that the "concept of the public forum" is "implicit in the earlier cases"¹⁷ appeared to imply that Supreme Court precedents of the 1930s and 1940s had given special constitutional protection to a specific category of public property. This implication, however, was quite mistaken. The precedents relied upon by Kalven did indeed restrict the government's ability to regulate speech within public forums, but they also imposed exactly the same kind of restrictions on the government's ability to regulate speech in circumstances that did not involve public forums.

An important holding relied upon by Kalven for his interpretation of "the earlier cases" was *Schneider v. State*,¹⁸ in which the Court had considered the constitutionality of municipal ordinances prohibiting the distribution of handbills in streets and other public places. The ordinances were defended on the grounds that they were necessary in order to prevent littering. The Court balanced this justification against the ordinance's impact on the exercise of first amendment rights,¹⁹ and concluded that "the purpose to

15. 376 U.S. 254 (1964). See Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

16. Kalven, *supra* note 11, at 3.

17. *Id.*

18. 308 U.S. 147 (1939).

19. The Court stated:

Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise

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."²⁰

Kalven was undoubtedly right in reading *Schneider* as having "an impressive bite" in protecting first amendment concerns,²¹ but it is somewhat more doubtful whether this bite came, as Kalven seemed to claim, from a specific concern for speech in public places. Only four years after *Schneider*, the Court in *Martin v. City of Struthers*²² struck down a municipal ordinance prohibiting the door-to-door distribution of handbills. As in *Schneider*, the Court weighed the first amendment right to distribute and receive information against the state's interest in preventing a "minor nuisance,"²³ and, as in *Schneider*, the Court concluded that the first amendment right must prevail. In *Martin*, however, there was no question of protecting speech in public places, there was only the question of protecting speech.

Martin and *Schneider*, when taken together, suggest that a specific concern for speech in what Kalven later called a "public forum" was not a major component of the Court's analysis. This conclusion is reinforced by a review of the Court's first amendment decisions in the 1930s and 1940s, when virtually every protection extended to speech occurring in public forums was also extended to speech that did not occur in such forums. If the Court held that street demonstrations could not be subject to the whim of official discretion,²⁴ it also held that the distribution of pamphlets in private homes could not be subject to such discretion.²⁵ If

of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

308 U.S. at 161.

20. *Id.* at 162.

21. Kalven, *supra* note 11, at 18.

22. 319 U.S. 141 (1943).

23. *Id.* at 143.

24. *See, e.g.*, *Hague v. CIO*, 307 U.S. 496 (1939); *Kunz v. New York*, 340 U.S. 290 (1951).

25. *See, e.g.*, *Schneider v. State*, 308 U.S. 147, 163-65 (1939). During this period many of the Court's cases invalidating official discretion to regulate speech simply did not distinguish between speech that occurred in public places like

the Court protected provocative speech in the streets,²⁶ it also protected such speech in private halls.²⁷

In short, the precedents indicate that the Court's primary concern was to protect communication, and that the geographical location of the communication played a relatively minor role in that concern. There was, however, one major exception to this generalization, an exception that formed the basis of Kalven's historical reconstruction. That exception was Justice Roberts' famous dictum in his plurality opinion in *Hague v. CIO*:²⁸

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Because of its apparent emphasis on the special importance of speech in streets and other public places, the passage has been cited as the origin of the concept of the "public forum."²⁹ But the passage is deceptive, for the holding of Justice Roberts' opinion is simply that official discretion to suppress speech in public places is constitutionally invalid, and Roberts was equally willing to reach this conclusion with respect to speech in private places.³⁰ Moreover the passage appears to distinguish streets and other public

streets, and speech that occurred in private places like homes. *See, e.g.*, *Largent v. Texas*, 318 U.S. 418 (1943); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

26. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

27. *See, e.g.*, *Terminiello v. Chicago*, 337 U.S. 1 (1949).

28. 307 U.S. at 515-16.

29. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981); M. NIMMER, *supra* note 2, § 4.09[D], at 4-68. The passage has been frequently cited in recent public forum decisions. *See, e.g.*, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Greer v. Spock*, 424 U.S. 828, 835-36 (1976).

30. *See Schneider v. State*, 308 U.S. 147, 163-65 (1939).

places on the basis of "common law notions of adverse possession and public trust," notions that have no logical connection to first amendment values.³¹ The transition from "immemorial" usage to constitutional judgment is so abrupt as to appear to be simply a *non sequitur*.

The transition, however, makes a great deal more sense once it is understood that its purpose is to distinguish an early precedent, *Davis v. Massachusetts*,³² in which the Court had upheld a conviction for making a public address on the Boston Common without first having obtained a permit from the mayor.³³ The defendant in *Davis* had argued that the Common was "the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways," including the making of public addresses.³⁴ The Court rejected this claim, stating that "the common was absolutely under the control of the legislature," and that "[f]or 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."³⁵

If the reasoning of *Davis* were spelled out, it would take the form of a syllogism. The major premise of the argument is that when the government acts in a proprietary capacity, like "the owner of a private house," it can abridge or prohibit speech. The minor premise of the argument is that the government in fact acted in a proprietary capacity with respect to the Boston Common. The conclusion of the syllogism is that the ordinance requiring a citizen to obtain a permit prior to speaking on the Boston Common is constitutional.

The Court in *Davis* defended the minor premise of this syllogism on the basis of state property law. It defended the major premise on the basis of what today would be called the "rights-privilege" distinction. The Court reasoned that

31. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238.

32. 167 U.S. 43 (1897).

33. At issue in *Davis* was a municipal ordinance providing that "No person shall, in or upon any of the public grounds, make any public address . . . except in accordance with a permit from the mayor." *Id.* at 44.

34. *Id.* at 46.

35. *Id.* at 46-47.

because Boston "owned" the Common and could therefore "absolutely exclude all right to use," it necessarily also retained the power "to determine under what circumstances such use may be availed," including circumstances abridging speech, since "the greater power contains the lesser."³⁶

The municipality in *Hague*, relying on *Davis*, had made a similar argument, contending that "the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof"³⁷ Justice Roberts' assertion that streets and parks had "immemorially been held in trust for the use of the public" was meant to deny the minor premise of this argument, that the city was the proprietor of its streets. This explains Roberts' odd conjunction of common law property rights and constitutional principle. What is particularly interesting about Roberts' opinion, however, is that it did not seek to deny the major premise of the municipality's argument. It did not dispute that government could abridge speech were it to act in a proprietary capacity; it merely held that the government's power over the streets and parks was not proprietary in nature.

Viewed in this light, the thrust of Justice Roberts' famous opinion in *Hague* is not that speech in streets and parks is especially important or unique, but rather that the government could not exercise proprietary control over such places. Even though the government "owned" the streets in a technical sense, it still could not freely manage them in the way that a property owner could manage his house. The streets were in some sense "external" to the government, and consequently in regulating them the government was subject to the ordinary constitutional restraints prohibiting the abridgment of speech.

This interpretation of *Hague* is confirmed by the Court's subsequent opinion in *Jamison v. Texas*,³⁸ a decision relied upon by Kalven. In *Jamison*, the Court considered the constitutionality of a Dallas ordinance prohibiting the distribution

36. *Id.* at 48.

37. 307 U.S. 496, 514 (1939). The statute at issue in *Hague* was similar to that in *Davis*. It prohibited "public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City" without a permit from "the Director of Public Safety." *Id.* at 502 n.1.

38. 318 U.S. 413 (1943).

of leaflets upon the streets and sidewalks. The city relied upon *Davis* in defending the ordinance, but its argument was summarily dismissed by the Court, which said that *Davis* had been repudiated by *Hague*. The law, said the Court, was that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word."³⁹

Jamison makes explicit the basis of Justice Roberts' opinion in *Hague*: Constitutional rights are not lost simply because one is on a street that happens to be "owned" by the state. But although first amendment rights do not disappear simply because the state claims to have proprietary control over such places, such rights are on the other hand not particularly puissant *because* they are exercised in a public place. They are simply the same as first amendment rights exercised "elsewhere."

There is, in this reasoning, no "implicit" concept of a public forum, at least insofar as the phrase is meant to signify a special geographical location or category of government property where speech merits unusual protection.

B. *The Evolution of Modern Public Forum Doctrine*

Whatever the accuracy of Kalven's reconstruction of the early precedents, his concept of a public forum was to prove profoundly influential in the development of first amendment doctrine.⁴⁰ In 1972 the Supreme Court, explicitly acknowledging its debt to Kalven, began to use the phrase "public forum" as a term of art.⁴¹ For the next few years, the Court experimented with various definitions of the phrase. By 1976, however, the Court was prepared to fix the framework of public forum doctrine, as we now know it. That framework was heavily indebted to the Court's 1966 decision in *Adderley v. Florida*.⁴²

39. *Id.* at 416.

40. Early examples of the influence of Kalven's article include: *Wolin v. Port of New York Authority*, 392 F.2d 83, 88-91 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968); *Univ. Comm. v. Gunn*, 289 F. Supp. 469 (W.D. Tex. 1968), *appeal dismissed*, 399 U.S. 383 (1970).

41. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 99 & n.6 (1972).

42. 385 U.S. 39 (1966).

1. *Adderley v. Florida*: The Resurrection of the Davis Syllogism

In *Adderley*, the Court was faced with a challenge to the convictions of thirty-two students who had been arrested for trespass on the grounds of a county jail. The students had been protesting the jail's segregative practices, and had refused to disperse at the request of the sheriff, the custodian of the jail. The Court, speaking through Justice Black, summarily rejected the students' claim that their demonstration was protected by the first amendment:

Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate" Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox v. Louisiana* [379 U.S.] at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.⁴³

At first glance, the Court's argument appears inconsistent with the Court's earlier precedents concerning freedom of expression in the streets and other public places. After all, the streets, no less than the jailhouse curtilage, are

43. 385 U.S. at 47-48 (footnote omitted). The passage has exerted great influence on the development of modern public forum doctrine. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799-801 (1985); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 n.31 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *United States v. Grace*, 461 U.S. 171, 177-78 (1983); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 n.10 (1981); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976).

“property under [the] control” of the state. If the state could act like “a private owner of property” with respect to the curtilage, then why not also with respect to the streets?

It might be thought that *Adderley* can be distinguished because the early precedents, in the words of *Jamison*, only applied to “one who is rightfully on a street which the state has left open to the public.” In *Adderley*, however, Florida’s trespass law prohibited the students from being “rightfully” on the jailhouse grounds. This distinction, however, cannot be sustained. Under an ordinance like that at issue in *Hague*, citizens who are “rightfully” on the streets cannot demonstrate unless they first receive approval from the Director of Public Safety. Under a statute like that at issue in *Adderley*, students can rightfully assemble and demonstrate on the jailhouse grounds until ordered to disperse by the sheriff.⁴⁴ In both cases the legality of the demonstration depends upon the approval of a state official. In both cases this power of approval is discretionary and unconstrained by articulated guidelines.⁴⁵ In *Hague*, the Court held that the first amendment precluded the exercise of such power over speech, whereas in *Adderley* it did not.

In *Hague*, however, as in *Jamison*, the Court was concerned with determining the facial validity of ordinances that directly regulated recognized modes of communication, such as leafletting, parading, and assembling.⁴⁶ In *Adderley*, on the other hand, the statute at issue was a general trespass statute that addressed conduct, rather than a medium of

44. The statute at issue provided:

Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specially provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars.

385 U.S. at 40 n.1. Since the curtilage of the jailhouse was not marked with “No Trespassing” signs, and since the public was not generally excluded from the grounds, *id.* at 52 (Douglas, J., dissenting), the students’ demonstration only became an illegal “trespass” upon the disapproval of the sheriff.

45. Neither the statute in *Adderley* nor the ordinance in *Hague* contained guidelines for determining when demonstrations should be permitted. If it is argued that the discretion of the sheriff in *Adderley* was implicitly constrained by his concern for the orderly operation of the jail, it could with equal plausibility be argued that the Director’s discretion in *Hague* was implicitly constrained by a similar concern to preserve the orderly flow of traffic in the streets.

46. *See supra* note 37.

communication.⁴⁷ Just as the prohibition against murder can be applied without constitutional difficulty to the terrorist who uses assassination as a mode of political expression, so a general proscription against trespass can be applied even to those who trespass in order to communicate.⁴⁸ Read in this light, *Adderley* is a very narrow decision, concerned not so much with the government's power to control speech, as with its ability to enact and enforce general regulations of conduct.⁴⁹

47. In his 1965 article on the public forum, Kalven had attacked Justice Goldberg's opinion in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), for distinguishing between "pure speech," and speech mixed with "conduct such as patrolling, marching, and picketing." Kalven, *supra* note 11, at 22. Kalven's point was that all speech necessarily involves physical action, whether it be noise, litter, or gestures, and that the mere presence of such action cannot therefore be by itself the ground for diminishing the first amendment protection that the speech would otherwise merit. *Id.* at 23. Kalven's point is sound, but even if it is accepted it does not follow, as the Court recognized in 1968, that there is no constitutional difference between a statute addressed directly to expression or to a recognized medium of expression, and a statute addressed to conduct that indirectly impacts on particular acts of expression. See *United States v. O'Brien*, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968). In recent years the Court seems to have lost its grip on this important distinction. See, e.g., *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 298 (1984).

48. Distinct constitutional problems may arise, however, if a neutral statute addressed to conduct is enacted or enforced for the primary reason of suppressing speech. See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 598 (1978); Stone, *supra* note 7, at 55-56; Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983). Although it is arguable that in *Adderley* the sheriff transformed the demonstration into an illegal trespass primarily in order to silence the protesting students, Justice Black did not address the important issues arising from this interpretation of the facts. He noted simply that there was "not a shred of evidence in this record" that the sheriff had evicted the demonstrators because he "objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." 385 U.S. at 47.

49. If *Adderley* is narrowly interpreted in this manner, its true descendents in the area of public forum doctrine are decisions like *United States v. Albertini*, 472 U.S. 675 (1985), which dealt with the applicability of general and neutral statutes addressed to conduct. Most public forum cases, however, concern regulations directly applicable to speech or to recognized media of communication. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *United States v. Grace*, 461 U.S. 171 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 n.10 (1981); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Greer v. Spock*, 424 U.S. 828 (1976). Many of these cases cite and rely upon *Adderley*. See *supra* note 43.

Subsequent cases, however, have not read *Adderley* in so narrow a fashion.⁵⁰ The reason lies in *Adderley*'s discussion of *Edwards v. South Carolina*,⁵¹ a case decided several years earlier in which the Court had vacated the convictions of black protestors who had demonstrated on the grounds of the South Carolina State House. The protestors had been charged with the common law crime of breach of the peace, which, like the trespass statute at issue in *Adderley*, appeared to be a neutral regulation of conduct rather than of speech. Black distinguished *Edwards* on a number of grounds. One was that the common law crime at issue in *Edwards* was "so broad and all-embracing as to jeopardize speech, press, assembly and petition"⁵² But a second and ultimately more influential ground of distinction was that the demonstrators in *Edwards* "went to the South Carolina State Capitol grounds to protest," whereas the demonstrators in *Adderley* "went to the jail."⁵³ This difference was constitutionally significant because "[t]raditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not."⁵⁴

Justice Black's reliance on "traditional" usage was no doubt meant to echo Justice Roberts' reference to the "immemorial" use of the streets for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." Black's language implied that even if a general trespass statute could not be applied to prevent demonstrations in the streets or on the grounds of a state capitol,⁵⁵ they could be so applied on the grounds of the jailhouse *because* there was no history of communicative behavior associated with the jail. But this implication made sense only if Justice Black, like Justice Roberts in *Hague*, was writing within the confines of the *Davis* syllogism. From this per-

50. See *supra* notes 43 & 49.

51. 372 U.S. 229 (1963).

52. 385 U.S. at 42.

53. *Id.* at 41.

54. *Id.*

55. Six months before its decision in *Adderley* the Court had specifically reserved judgment on a distinct but related question, stating in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965): "We have no occasion in this case to consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings." Kalven's 1965 article on the public forum was in part a response to the challenge posed by this reservation.

spective, Black's forceful analogy of the government to a "private owner of property" seemed to reassert the major premise of the syllogism, that the government could directly abridge speech when acting in a proprietary manner. And his reference to the absence of a tradition of public access to the jail seemed to refer to the minor premise and to imply that the jail was in fact under the government's proprietary control. And so *Adderley's* conclusion, that Florida officials could use their discretion under the trespass statute to abridge speech within the jailhouse curtilage, seemed to flow naturally from an application of the *Davis* syllogism.⁵⁶

Adderley's actual grounds of decision are ambiguous. But subsequent opinions of the Court which have developed the theory of the public forum, and which have on the whole been concerned with the regulation of speech rather than of conduct,⁵⁷ have interpreted *Adderley* as resurrecting and relying upon the *Davis* syllogism. The irony of this interpretation is that at the time of *Adderley* the syllogism was fast becoming untenable because of the crumbling of the rights-privilege distinction.⁵⁸ But it was upon this foundation that the Court would later choose to erect the edifice of modern public forum doctrine.

2. The Moment of Ambivalence: *Grayned*, *Mosley*, and the Categorization of Public Property

For the decade after *Adderley*, the Court remained uncertain about the status of the *Davis* syllogism.⁵⁹ In 1972, the

56. Justice Black did stress that the sheriff's enforcement of the trespass statute was "even-handed," and that the students were not evicted from the jail because "the sheriff objected to what was being sung or said . . ." 385 U.S. at 47; see *supra* note 48. This focus implied that Black was perhaps prepared in appropriate circumstances to modify the *Davis* syllogism by forbidding viewpoint discrimination even in situations where the government was exercising proprietary control.

57. See *supra* note 49.

58. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

59. In *Adderley* itself, Justice Douglas, speaking for four members of the Court, strongly objected to the syllogism, arguing that all public property should be presumptively open to public speech unless that speech were "anomalous" or inconsistent "with other necessary purposes of public property." 385 U.S. at 53-54. Three years later, in *Tinker v. Des Moines Indep. Community School Dist.*, 393

Court appeared ready to reject it outright. In that year the Court decided *Grayned v. City of Rockford*,⁶⁰ in which it upheld a municipal ordinance prohibiting "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of a school class while "on public or private grounds adjacent to any building in which a school or any class thereof is in session."⁶¹ Faced with a statute that regulated speech in a manner that did not differentiate among private property, streets, or schoolgrounds, the Court, speaking through Justice Marshall, used the occasion to repudiate the major premise of the *Davis* syllogism. The Court stated flatly that "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons."⁶² This was a blunt rejection of the notion that there were certain kinds of public property on which the government, like the owner of a private home, could abridge speech simply by virtue of its proprietary interest.

In place of the *Davis* syllogism, the Court proposed that speech on all public property be subject to "reasonable 'time, place and manner' regulations" which were "necessary to further significant governmental interests."⁶³ In determining whether such regulations were reasonable, the "crucial question" was to be

whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation

U.S. 503 (1969), the Court, in striking down a school regulation prohibiting the wearing of black armbands to protest the Vietnam War, specifically held that the minor premise of the *Davis* syllogism should not apply to a school. The Court said:

[A] school is not like a hospital or a jail enclosure. *Cf. Cox v. Louisiana*, 379 U.S. 536 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. *Cf. Edwards v. South Carolina*, 372 U.S. 229 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966).

393 U.S. at 512 n.6.

60. 408 U.S. 104 (1972).

61. *Id.* at 107-08.

62. *Id.* at 115.

63. *Id.*

must be narrowly tailored to further the State's legitimate interest.⁶⁴

Whereas the major premise of the *Davis* syllogism divides public property into two kinds, proprietary and non-proprietary, *Grayned* took the opposite tack, concluding that all public property be subject to a single unified first amendment test. Whereas the *Davis* syllogism classifies public property without reference to first amendment principles, *Grayned* set forth a regime of constitutional regulation explicitly designed to serve the first amendment value of maximizing social communication. In this focus on the constitutional value of public discussion, *Grayned* exemplified the spirit of Kalven's 1965 article, which it duly acknowledged.⁶⁵

For this reason *Grayned* has remained a touchstone case for many commentators.⁶⁶ It is important to stress, however, that the Court in *Grayned* did not use or adopt Kalven's phrase "public forum." *Grayned* was concerned to reject the perspective that divided public property into constitutionally distinct classifications, and the concept of the "public forum" implied the contrary conclusion, that some public property was subject to unique, especially restrictive first amendment regulation. But in a decision issued on the same day as *Grayned* and also authored by Justice Marshall, the Court did adopt the phrase, once again explicitly acknowledging its debt to Kalven.

That decision was *Police Department of Chicago v. Mosley*.⁶⁷ At issue in *Mosley* was a Chicago ordinance prohibiting picketing or demonstrating "on a public way" within 150 feet of any primary or secondary school building while the school was in session. The ordinance exempted "peaceful picketing of any school involved in a labor dispute."⁶⁸ Noting that

64. *Id.* at 116-17. The Court reinterpreted *Adderley* to stand for the proposition that "demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail." *Id.* at 121 n.49. In fact *Adderley* had contained no showing that the student demonstration had actually "interfered" with the functioning of the jail.

65. *Id.* at 116 n.34.

66. See note 213 *infra*.

67. 408 U.S. 92 (1972). For the references to Kalven see *id.* at 95 n.3, 99 n.6.

68. *Id.* at 93.

the statute distinguished legal from illegal picketing based upon "the message on a picket sign,"⁶⁹ the Court held that:

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.⁷⁰

The reasoning of the Court was far from clear, but it seemed to turn on the distinction between a public forum and other government property.⁷¹ The Chicago ordinance was unconstitutional, the Court ruled, because it attempted to exclude speech from a public forum "based on content alone," and that "is never permitted."⁷² The negative inference was that such an exclusion would have been permissible had it occurred in a nonpublic forum,⁷³ and that public and nonpublic forums were therefore controlled by different first amendment rules. Thus *Grayned's* effort to subject all public property to a single, unified regime of first amendment regulation was undercut on the very day it was issued.

Mosley was not explicit about how government property assumed the status of a public forum, but it implied that this transformation occurred when the state "opened up" the property "to assembly or speaking by some groups."⁷⁴ The exact nature of this "opening-up" process was left ambiguous. It was not clear whether the "public ways" at issue in *Mosley* were public forums because the Chicago ordinance opened them up for use in peaceful labor picketing, or because Chicago permitted them to be used for other, non-

69. *Id.* at 95.

70. *Id.* at 96. The Court used the phrase "public forum" a second time. *Id.* at 99.

71. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983).

72. 408 U.S. at 99.

73. In the absence of such an inference *Mosley's* reiterated references to the presence of a public forum would become puzzling and meaningless. But the inference is itself problematic because it appears to contradict the hints in *Adderley* that viewpoint discrimination in a nonpublic forum would be unconstitutional. *Mosley's* difficulties ultimately turn on its desire to define for the public forum a "special position in terms of First Amendment protection," *United States v. Grace*, 461 U.S. 171, 180 (1983), and they were only the first such difficulties that the Court would experience in its long and frustrating quest to define this "special" position.

74. *Mosley*, 408 U.S. at 96.

picketing forms of communication. In either case, the public forum status of the property was not triggered by traditional usage, but rather by government decisions concerning the deployment of its property. The concept of the public forum advanced in *Mosley* was designed to force these decisions to be made in a non-discriminatory way, so that the government could not "select which issues are worth discussing or debating in public facilities."⁷⁵ In this sense *Mosley*, like *Grayned*, did not accept the major premise of the *Davis* syllogism, for *Mosley* implied that if the government opened up its property to members of the public for communicative use, the government's power to abridge speech was subject to constitutional limitations, even if the property was under the government's proprietary control.

Despite this similarity, however, the two cases were in tension as to the question of whether government property could be divided into distinct categories that were governed by distinct regimes of first amendment regulation. The tension reflects a similar strain in Kalven's article. Kalven wanted simultaneously to stress the general value of facilitating "robust" public discussion and to stress the particular value of speech in public places. *Grayned* is responsive to the first concern; *Mosley* to the second. Modern public forum doctrine developed from *Mosley*, not *Grayned*.⁷⁶

3. The Period of Experimentation: *Lehman* and *Conrad*

After *Mosley*, the concept of the public forum moved to the forefront of the Court's attention. For the next three years the Court explored possible meanings for the concept, as well as various first amendment rules that might be attached to it. Underlying this experimentation was the Court's effort to vindicate Kalven's perception that the public forum should enjoy an especially protected first amendment status. But this perception distorted the Court's earlier precedents, and the Court's attempts to vindicate it during the early 1970s proved unsuccessful, leading the Court to propose harsh and unrealistic constitutional rules for the public forum.

75. *Id.*

76. Hence the irony of Geoffrey Stone's enthusiastic appraisal that in *Grayned* "the right to a public forum came of age." Stone, *supra* note 31, at 251; see Stone, *supra* note 7, at 89 n.171.

In 1974, two years after *Mosley*, the Court decided *Lehman v. City of Shaker Heights*.⁷⁷ *Lehman* adopted from *Mosley* the phrase "public forum," and for the first time the Justices gave the phrase serious and divisive doctrinal attention. In *Lehman*, a political candidate challenged the policy of a municipal rapid transit system which sold space on car cards to commercial advertisers, but which refused to permit the cards to be used for paid political advertisements. On its face the case seemed to be squarely controlled by *Mosley*, for the rapid transit system had opened up the cards to the public for communicative use, and yet was making distinctions based upon "the message on [the] . . . sign." The Court nevertheless upheld the policy, although it was unable to unite behind a majority opinion.

Justice Blackmun, joined by three other Justices, wrote a plurality opinion rejecting the claim that the car cards were a "public forum" as to which the first amendment created "a guarantee of nondiscriminatory access."⁷⁸ First amendment restraints on government regulation of public property, Blackmun wrote, depend upon "the nature of the forum and the conflicting interests involved Here we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare."⁷⁹ Instead the car cards were part of a "commercial venture," and the municipality controlled them "in a proprietary capacity."⁸⁰ The municipality had "discretion" to make "managerial decision[s]," including decisions as to the messages permitted to be displayed on the cards.⁸¹ The Constitution required only that these decisions not be "arbitrary, capricious, or invidious."⁸²

In essence, Blackmun's opinion reached back behind *Mosley* to *Davis*. It seemed to hold that the government's exercise of proprietary control empowers it to abridge speech.⁸³ Blackmun made no effort to justify this holding.

77. 418 U.S. 298 (1974).

78. *Id.* at 301. Justice Blackmun's opinion was joined by Chief Justice Burger and Justices White and Rehnquist.

79. *Id.* at 302-03.

80. *Id.* at 303-04.

81. *Id.*

82. *Id.* at 303.

83. Blackmun slightly modified the *Davis* syllogism by imposing on proprietary control the weak constraint that it not be "arbitrary, capricious, or invidious." *Id.*

His conclusion that the municipality's control over car cards was proprietary in nature rested entirely upon a perceived analogy between the rapid transit system and a private commercial enterprise, so that the system could select which advertising to display "[i]n much the same way that a newspaper or periodical, or even a radio or television station."⁸⁴

If Blackmun's opinion was inconsistent with *Mosley*, it was even more so with *Grayned*. Blackmun's opinion assumed that government property which was a public forum was subject to distinct first amendment rules. *Grayned*, on the other hand, had attempted to subject all government property to a single uniform scheme of first amendment regulation. *Grayned* had also concluded that public claims to speak on government property be determined by an independent judicial examination of "whether the manner of expression [was] basically incompatible with the normal activity of a particular place at a particular time." But the import of Blackmun's opinion in *Lehman* was that in situations of proprietary control the first amendment delegated authority to determine such claims to the discretion of government officials.

The fifth vote for the Court's holding came from Justice Douglas, who wrote an idiosyncratic opinion based upon the view that the car cards violated "the right of the commuters to be free from forced intrusions on their privacy."⁸⁵ The views of the remaining four Justices were expressed in a dissent by Justice Brennan,⁸⁶ which turned explicitly on a theory of the public forum. Citing Kalven's 1965 article, Brennan began his argument with the observation that "[t]he determination of whether a particular type of public property or facility constitutes a 'public forum' requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other."⁸⁷ Once government property is

84. *Id.*

85. *Id.* at 307 (Douglas, J., concurring).

86. Joining Justice Brennan were Justices Stewart, Marshall, and Powell.

87. 418 U.S. at 312 (Brennan, J., dissenting). Hence, "the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted." *Id.*

designated a "public forum," the Constitution requires that it "be made available . . . for the exercise of first amendment rights" and that government regulation of the forum not discriminate "based solely upon subject matter or content."⁸⁸ Citing *Hague* and *Edwards*, Brennan argued that the Court had designated "public streets and parks" and state capitol grounds as public forums.⁸⁹

For Brennan there was simply no question but that the car cards at issue in *Lehman* were a public forum, since by making the cards available for commercial advertising the municipality had "effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation."⁹⁰ He therefore concluded that the system's policy of discriminating among messages based upon their content was constitutionally invalid.

Brennan's dissent was the first effort to set forth a systematic doctrine of the public forum.⁹¹ It was a curious mixture of *Mosley* and *Grayned*. Like *Mosley*, it divided government property into public and nonpublic forums, and imposed strict first amendment regulations on the former. But it rejected *Mosley's* criterion for distinguishing the two kinds of government property, using instead a variant of *Grayned's* "basic incompatibility" test as the means of dividing public from nonpublic forums. In Brennan's hands, however, the *Grayned* test was subtly and fundamentally transformed. Whereas *Grayned* had used the test as a means of subjecting all public property to a single, unified regime of first amendment regulation, Brennan used the test to sep-

88. *Id.* at 313-15 (Brennan, J., dissenting). Brennan continued:

To insure that subject matter or content is not the sole basis for discrimination among forum users, all selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral 'time, place and manner' regulations, narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself.

Id. at 316-17.

89. *Id.* at 312-13.

90. *Id.* at 314.

91. Many of the ideas in Brennan's dissent had first been expressed the previous year, in somewhat more inchoate form, in his dissent in *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 192-201 (1972) (Brennan, J., dissenting).

arate kinds of government property. Property classified as a public forum was subject to stringent first amendment rules, regardless of whether such rules were in any particular instance compatible with the ordinary use of the property. In effect Brennan shifted the focus of analysis from the circumstances of particular speech to the general characteristics of the property at issue.

This shift in focus was integral to Brennan's larger project, which was to distinguish two generic kinds of government property: public and nonpublic forums. The whole point of this project lay in the fact that these two kinds of property were to be subject to distinct regimes of first amendment regulation. When Brennan came to define the first amendment rules applicable to a public forum, he cited *Mosley* for the proposition that in such places content discrimination was strictly forbidden.⁹² Although the tenor of Brennan's dissent was that public forums were subject to unique and particularly stringent first amendment scrutiny, in fact the prohibition on content discrimination did not distinguish such scrutiny from that applicable to private places like public utility billing envelopes or drive-in movie theatres.⁹³ There was a sharp tension in Brennan's dissent between a desire to endow the public forum with a "special position in terms of first amendment protection,"⁹⁴ and an inability to coherently define that protection except in terms of ordinary first amendment principles. The Court continues to struggle with the same tension to this very day.

Nine months after *Lehman* the Court attempted again to define the nature of the public forum. In *Southeastern Promotions, Ltd. v. Conrad*⁹⁵ Justice Blackmun, writing for five Justices, held that because municipal auditoriums were "public forums," their directors could not be given the "discretion" to accept or reject proposed theatrical performances without complying with the procedural safeguards that *Freedman v. Maryland*⁹⁶ had imposed on prior restraints.⁹⁷ It held that

92. 418 U.S. at 315-16 (Brennan, J., dissenting).

93. See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-40 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-12 (1975). In fact in *Adderley* the Court had strongly hinted that viewpoint discrimination would be forbidden even in a nonpublic forum. See *supra* note 56.

94. *United States v. Grace*, 461 U.S. 171, 180 (1983).

95. 420 U.S. 546 (1975).

96. 380 U.S. 51 (1965).

the auditoriums were public forums because, like the car cards in *Lehman*, they were "designed for and dedicated to expressive activities."⁹⁸ Despite its procedural focus, the underlying message of *Conrad* was that in a public forum content discrimination was constitutionally invalid. In his dissent Justice Rehnquist asked if this meant that municipal opera houses had to show rock musicals, or indeed had to open their doors to "any potential producer on a first come, first served basis."⁹⁹

The question went unanswered, but its sting was palpable, harshly illuminating the unsteady foundations of "the all or nothing approach to content regulation in the public forum."¹⁰⁰ That public forum doctrine should have arrived at such a rigid view in only three years is a testament to its extraordinarily rapid development. The doctrine had not only identified a special kind of government property, the public forum, but it had imposed on that property stringent first amendment regulations that seemed unrelated to the property's actual uses. By 1975, the Court could describe the issue in *Lehman* as "whether the city had created a 'public forum' and thereby obligated itself to accept all advertising."¹⁰¹

The reach and power of this reasoning is formidable. If government facilities designed and employed for expressive activities are thereby disabled from making distinctions based upon content, then the ordinary and daily use of a great many government facilities is simply unconstitutional.

97. 420 U.S. at 553-59. In *Conrad*, the directors of the Chattanooga Memorial Auditorium had refused an application to present the musical "Hair" on the grounds that it "would not be 'in the best interest of the community.'" *Id.* at 548. The Court held that the Constitution required that discretionary decisions to lease municipal auditoriums be subject to the following procedural requirements:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Id. at 560.

98. *Id.* at 555. Blackmun distinguished *Lehman* on the uncertain grounds that in *Conrad* there was no "captive audience" analogous to the commuters on the rapid transit system. *Id.* at 556.

99. *Id.* at 572-73 (Rehnquist, J., dissenting).

100. Karst, *supra* note 7, at 252.

101. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 n.5 (1975) (emphasis added).

Government facilities routinely draw distinctions based upon content. Consider, for example, such facilities as a high school classroom, a prison auditorium, a lecture room in a military compound, a meeting room in a government bureaucracy, or a high school newspaper. Public forum doctrine had developed so rapidly that the Court apparently had not had the opportunity to think through these implications. But by the following year a majority of the Court had come to the conclusion that they were unacceptable; in 1976, they abandoned the liberal promise of *Conrad* and *Mosley* and decided a case that definitively fixed the framework of modern public forum doctrine.

4. Establishing the Basic Doctrinal Framework:

Greer v. Spock

The pivotal decision was *Greer v. Spock*,¹⁰² which concerned requests by candidates for national office from fringe political parties for permission to enter the public areas of the Fort Dix Military Reservation for the purpose of distributing campaign literature and holding a meeting to discuss national political issues with U.S. Army personnel and their dependents. These public areas were open to the public without restriction at all times of the day and night.¹⁰³ They were crossed by ten paved roads, including a major state highway.¹⁰⁴ Nevertheless the commanding officer of the Reservation denied the candidates' request, citing two Fort Dix regulations. The first, Fort Dix Reg. 210-26, prohibited "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities . . . on the Fort Dix Military Reservation."¹⁰⁵ The second, Fort Dix Reg. 210-27, prohibited the distribution of political leaflets on the Reservation "without prior written approval of the" base commander.¹⁰⁶ The commander refused to approve the

102. 424 U.S. 828 (1976).

103. *Id.* at 830, 851 (Brennan, J., dissenting). The main entrances to the Reservation were not normally guarded, and at least one entrance contained the sign "Visitors Welcome." *Id.* at 830.

104. *Id.* at 851 (Brennan, J., dissenting).

105. *Id.* at 831.

106. *Id.* Approval could be withheld only if it appeared "that the dissemination of [the] publication presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation . . ." Army Reg. 210-10, Par. 5-5(c) (1970), *cited in* 424 U.S. at 431 n.2.

distribution of leaflets because “[P]olitical campaigning on Fort Dix cannot help but interfere with our training and other military missions.”¹⁰⁷

The Court, speaking through Justice Stewart,⁹ upheld the decision of the base commander. The Court’s reasoning was simple, powerful, and immensely influential. It appropriated the terminology of the public forum which the Court had developed during the preceding four years, but infused it with a new focus on traditional public usage for first amendment activities. Citing Justice Roberts’ “familiar words” in *Hague*, the Court identified public forums as areas that “have traditionally served as a place for free public assembly and communication of thoughts by private citizens.”¹⁰⁸ In such places, the Court said, “there cannot be a blanket exclusion of first amendment activity.”¹⁰⁹ Since it was “historically and constitutionally false” that “federal military installations” have traditionally been characterized by such first amendment activity, it followed that Fort Dix was not a public forum.¹¹⁰

Underlying *Greer*’s approach was an emphatic repudiation of *Mosley*’s definition of a public forum. *Mosley* had held that government property becomes a public forum if it is “opened up to assembly or speaking.” *Greer* specifically held, however, that “[t]he fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum.”¹¹¹ *Greer* also rejected “the principle that

107. 424 U.S. at 833 n.3. The commanding officer also cited the danger of giving “the appearance that you or your campaign is supported by me in my official capacity.” *Id.*

108. *Id.* at 835, 838.

109. *Id.* at 835. In 1965, in *Cox v. Louisiana*, 379 U.S. 536, 555, the Court had reserved judgment on this question. *See supra* note 55. Three years later, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court addressed the question in dicta: “[S]treets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.” *Id.* at 315; *see Lloyd Corp. v. Tanner*, 407 U.S. 551, 559 (1972). The Court’s statement in *Greer* was essentially a recapitulation of this dicta.

110. 424 U.S. at 838.

111. *Id.* at 838 n.10. The Court explained:

The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of

whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the first amendment."¹¹²

In place of *Mosley's* approach, *Greer* defined a public forum as government property which had "traditionally served" as a locus for first amendment activities. Although this definition would within eight short years ascend to the canonical status of "a fundamental principle of First Amendment doctrine,"¹¹³ the Court in *Greer* was silent as to its justification. Justice Roberts had focused on a tradition of public access because in the 1930s the government's claim to proprietary control could plausibly be grounded on common law property rights, and hence it made sense to express the limitations on that control in the language of adverse possession and public trust. But by 1976 this reasoning was untenable. In what would later become an unfortunate pattern, however, the Court in *Greer* made no effort to articulate any connection between its definition of a public forum and a theory of the first amendment.

Greer's incorporation of Justice Roberts' approach in *Hague* fundamentally buried *Grayned's* inquiry into whether a "manner of expression" is "basically incompatible with the normal activity of a particular place at a particular time." *Greer* shifted the focus of analysis away from the impact on a specific institution's ability to function if members of the public were granted a constitutional right of access for communicative purposes. In fact *Greer* did not focus on particular institutions or property at all, but instead inquired into the general characteristics of generic kinds of government institutions and property. Thus *Greer* did not examine the particular attributes of Fort Dix, but rather inquired into the abstract properties of military installations. Its conclusion was therefore generic: a "military installation like Fort Dix" was not a public forum.¹¹⁴

Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

Id.

112. *Id.* at 836.

113. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984).

114. 424 U.S. at 838.

In the Court's view the distinctive characteristics of Fort Dix were relevant only to the issue of whether the public areas of the Fort were in fact part of a military installation. The Court formulated this issue as a question of whether the military had "abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates within the confines of the military reservation."¹¹⁵ For the Court the existence and enforcement of Regulations 210-26 and 210-27 were sufficient to negate any inference of abandonment.¹¹⁶

Having concluded that the public areas of Fort Dix were not a public forum, the Court relied heavily on *Adderley* to describe the powers of the government in a nonpublic forum:

The guarantees of the first amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 48. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, at 47.¹¹⁷

Greer was prepared to rely on *Adderley* for the proposition that the government could regulate speech within the public areas of the Fort as though the government were "a private

115. *Id.* at 837.

116. This reasoning was inconsistent with *Flower v. United States*, 407 U.S. 197 (1972), in which the Court had summarily reversed the conviction of a civilian for distributing leaflets while on a street in the public area of a military reservation. *Flower* turned on the Court's conclusion that the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." *Id.* at 198. The inference of abandonment was explicitly based upon the Court's perception that the public made extensive use of the avenue, and that it was like "any public street." *Id.* *Flower* thus connected the issue of abandonment to the specific and objective characteristics of the property at issue, and in this respect was consistent with *Grayned*, which was decided two weeks later.

For the Court in *Greer*, on the other hand, the actual usage of the public areas of Fort Dix was constitutionally irrelevant to the question of abandonment. Abandonment was instead understood to be determined by the subjective intentions of the military, and hence the lack of abandonment could be conclusively inferred from the military's decision to enforce Regulations 210-26 and 210-27. By this measure, however, the military in *Flower* had also not abandoned a claim of special regulatory interest, since it had chosen to arrest and prosecute the defendant for reentering the military reservation after having been previously barred from the post.

117. 424 U.S. at 836.

owner of property." This was reading *Adderley* broadly, as though the opinion rested upon a resurrection of the *Davis* syllogism, rather than upon a narrow interpretation of the government's power to regulate conduct.¹¹⁸ And *Greer* was prepared to ride the *Davis* syllogism for all it was worth. It held that in a nonpublic forum the government could flatly prohibit first amendment activities, as illustrated by Regulation 210-26, which barred all "demonstrations, . . . political speeches, and similar activities." It held that in a nonpublic forum the government could subject speech to a system of prior restraint, as illustrated by Regulation 210-27, which banned the distribution of "any publication . . . without the prior written approval of the Adjutant General."¹¹⁹ It also held that in a nonpublic forum the government could authorize discretionary suppression of speech, subject only to the limitation that in actually exercising its discretion the government did not act "irrationally, invidiously, or arbitrarily."¹²⁰ "Invidious" discrimination was prohibited, but distinctions based upon content were not.¹²¹

Greer's resurrection of the major premise of the *Davis* syllogism was decisive for the future development of public forum doctrine, although the Court made no effort constitutionally to explain or justify its use of the premise. It simply assumed that in situations of proprietary control the government was empowered to abridge speech.

Although Justice Powell joined the Court's opinion, he also wrote a separate concurrence in which he argued that the issue before the Court should have been resolved by reference to *Grayned's* "basic incompatibility" test. He recognized the tension between this test and the concept of the "public forum," noting that under the incompatibility test the first amendment question could not be decided simply because "the area in which the right of expression is sought to be exercised [is] dedicated to some purpose other than use as a 'public forum.'"¹²² Powell concluded, however,

118. *Adderley* narrowly interpreted could have no relevance to *Greer*, because the regulations at issue in the latter case were addressed specifically to speech. See *supra* notes 46-58 and accompanying text.

119. 424 U.S. at 831, 865-66.

120. *Id.* at 840.

121. See *supra* note 111; 424 U.S. at 838 n.10, 868 n.16 (Brennan, J., dissenting).

122. 424 U.S. at 843 (Powell, J., concurring).

that the regulations at issue met the *Grayned* test because there was a "functional and symbolic incompatibility" between the need for the military to remain a "specialized society separate from civilian society"¹²³ and ordinary political electioneering.

If Powell's opinion evinced unease with *Greer's* use of public forum doctrine, Justice Brennan's dissent registered outright disgust.¹²⁴ In fact Brennan virtually disowned the concept of the public forum, a concept which his own opinion in *Lehman* had been instrumental in advancing. "It bears special note," Brennan wrote, "that the notion of 'public forum' has never been the touchstone of public expression, for a contrary approach blinds the Court to any possible accommodation of first amendment values in this case."¹²⁵ Brennan reviewed precedents like *Edwards*, which he had once claimed established the existence of public forums,¹²⁶ and now concluded that the presence or absence of a public forum was irrelevant to their resolution.¹²⁷

Those cases permitting public expression without characterizing the locale involved as a public forum, together with those cases recognizing the existence of a public forum, albeit qualifiedly, evidence the desirability of a flexible approach to determining when public expression should be protected. Realizing that the permissibility of a certain form of public expression at a given locale may differ depending on whether it is asked if the locale is a public forum or if the form of expression is compatible with the activities occurring at the locale, it becomes apparent that there is need for a flexible approach. Otherwise, with the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale.¹²⁸

Brennan had come to realize the profound tension between public forum doctrine and the Court's approach in *Grayned*. The distinction between public and nonpublic forums necessarily implied distinct regimes of first amendment

123. *Id.* at 844.

124. Brennan's dissent was joined by Justice Marshall.

125. 424 U.S. at 859 (Brennan, J., dissenting).

126. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 313 (1974) (Brennan, J., dissenting).

127. 424 U.S. at 859 (Brennan, J., dissenting).

128. *Id.* at 859-60.

regulation. If the Court in *Conrad* had imposed unduly strict first amendment rules on public forums, the Court in *Greer* had redressed the balance by virtually eliminating first amendment restraints from the management of nonpublic forums. The result was that public and nonpublic forums were divided by a constitutional gulf of enormous and inexplicable proportions, a gulf that was completely inimical to the spirit and purpose of *Grayned*. The authority and irresistible attraction of *Hague*, an attraction that had even seduced Kalven, all but ensured that this gulf would run along the fault line of traditional usage, a line that would assuredly exclude most government facilities from the public forum category.

All this became evident to Brennan in *Greer*, and he responded by attempting to rehabilitate *Grayned*. He pointed to cases like *Tinker v. Des Moines School District*,¹²⁹ in which the Court had set aside school regulations barring speech without being in the least concerned with the question of whether the school was a "public forum." But by then it was too late. The public forum juggernaut had been launched.

C. *The Birth and Death of the "Limited Public Forum"*

The lasting legacy of *Greer* has been a public forum doctrine that sharply distinguishes public from nonpublic forums, and that cedes to the government virtual immunity from independent judicial scrutiny regarding the control of public access to the latter for communicative purposes. This immunity was founded upon *Greer's* use of *Adderley* to reappropriate the major premise of the *Davis* syllogism,¹³⁰ which gives to the government special prerogatives as a proprietor of its property. But since these prerogatives are indefensible to modern sensibilities,¹³¹ the Court has been torn between loyalty to the major premise of the *Davis* syllogism and repugnance at regulations of public access to nonpublic forums that are to contemporary eyes simply intolerable. The sad and fascinating story of the birth and death of the "limited public forum" is an account of how the Court has attempted ineffectually to limit these intolerable regulations

129. 393 U.S. 503 (1969).

130. See *supra* text accompanying notes 117-21.

131. See *infra* notes 200-08 and accompanying text.

and yet to leave intact to the greatest extent possible the immunity conferred by *Greer* upon government control of access to the nonpublic forum.

In order to appreciate the doctrinal tension which led to the creation of the limited public forum, it must be understood that underlying *Greer* were really two distinct inquiries: whether the government could deny access to its property to individuals desiring to use the property for the purpose of engaging in communicative activity, and whether the government could condition such access upon criteria that *discriminated* on the basis of persons or the content of speech.¹³² *Greer* collapsed these two questions. It held that if the government property at issue was not a public forum, access could either be denied wholesale or else granted on a case-by-case basis, so long as such discriminatory access was not granted "irrationally, invidiously, or arbitrarily."¹³³ Conversely, if the property were deemed a public forum, "there cannot be a blanket exclusion of first amendment activity . . ."¹³⁴ Although *Greer* did not explicitly state that access to a public forum could not be granted in a discriminatory fashion, this was by 1976 already firmly accepted doctrine.¹³⁵ For *Greer*, then, the determination of the public forum status of government property simultaneously answered the questions of both access and equal access.

Greer's conceptualization of these questions flowed to a significant degree from the internal logic of the major premise of the *Davis* syllogism. It should be recalled that the premise invested government with the power to impose discriminatory criteria of access to the nonpublic forum *because* of its power to invoke the proprietary prerogative of closing off public access to the forum altogether.¹³⁶ From this perspective the only possible constitutional distinction between nonpublic and public forums was that in the latter the government lacked this proprietary power to impose "a blanket exclusion of first amendment activity."¹³⁷ Thus from the

132. For an illuminating discussion of the distinction between issues of access and issues of discrimination, see Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

133. 424 U.S. at 840, 838 & n.10.

134. *Id.* at 835.

135. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10 n.5 (1975).

136. See *supra* note 36 and accompanying text.

137. 424 U.S. at 835.

major premise of the *Davis* syllogism it followed that in the nonpublic forum the government could both preclude access altogether and create conditions of discriminatory access, and that in the public forum it could not completely prohibit access. The rule against imposing discriminatory criteria of access to the public forum stemmed from the Court's decisions in *Mosley* and *Conrad*.

The problem with collapsing questions of access and of equal access, however, is that it creates tools of analysis that for modern purposes are simply too crude to be of any use. This became apparent within six months of *Greer*. In December of 1976 the Court decided *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,¹³⁸ in which the Wisconsin Employment Relations Commission had issued an order prohibiting a local school board from allowing employee teachers, other than those chosen by the union that was the exclusive collective bargaining representative of the district's teachers, from speaking at the board's open meetings about matters subject to collective bargaining between the union and the board. Under *Greer's* approach, the fundamental question in *Madison Joint School District* was whether the board's meetings should be categorized as a public forum. If so, then not only would the Commission's order be unconstitutional, but in addition the board would be constitutionally prohibited from holding private meetings by completely excluding the public. If the board's meetings were classified as a nonpublic forum, on the other hand, then not only were private meetings permissible, but the board could also impose discriminatory criteria of access to its meetings and the Commission's order would pass constitutional muster.

To modern eyes, however, it seems simply bizarre to bind together in this manner the question of the constitutionality of the Commission's order and the question of the board's ability to hold private meetings. To the Court in *Madison Joint School District*, as to any contemporary constitutional observer, it made good sense to prohibit certain kinds of discriminatory access, even though access to the relevant forum might in some circumstances be altogether eliminated. Although this insight flatly contracts the major prem-

138. 429 U.S. 167 (1976).

ise of the *Davis* syllogism, the Court nevertheless, without so much as acknowledging the public forum doctrine just announced in *Greer*, held both that the board could "hold non-public sessions to transact business," and that the Commission's order was unconstitutional because at public meetings the board "may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."¹³⁹ In an opinion by Chief Justice Burger, the Court characterized the Commission's order as "the antithesis of constitutional guarantees."¹⁴⁰

Madison Joint School District carried radical implications for the doctrinal framework created by *Greer*, for it appeared to open up the nonpublic forum to forms of constitutional scrutiny that were inconsistent with the major premise of the *Davis* syllogism. But the Court ignored these implications for five years, acting as if the dichotomous categories created by *Greer's* appropriation of the premise were still unproblematic.¹⁴¹ The tension between *Greer* and *Madison Joint School District* finally came to the surface in 1981, however, when the Court decided *Widmar v. Vincent*.¹⁴² In *Widmar*, the University of Missouri had made its facilities generally available for use by registered student groups, but had refused to do so for a registered student group seeking to use the facilities for religious worship and discussion. The Court used public forum doctrine to analyze the case. It held that by generally opening up its facilities to student groups, the university had created a "public forum," and that therefore it could not discriminatorily exclude student groups from the forum unless the exclusion was "necessary to serve a compelling state interest and . . . [was] narrowly drawn to achieve that end."¹⁴³

139. *Id.* at 176, 175 n.8. The Court also held that the board could confine its meetings "to specified subject matter." *Id.* at 175 n.8. It was not clear how this could be reconciled with the Court's pronouncement that the board could not be required to discriminate between speakers on the basis of "the content of their speech." *Id.* at 176.

140. *Id.* at 175-76.

141. *See, e.g.,* *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130-33 & n.7 (1981).

142. 454 U.S. 263 (1981).

143. *Id.* at 270. When measured by this stringent standard, the university's exclusion of the religious students was clearly unconstitutional.

In reaching this conclusion, the Court, in an opinion by Justice Powell, refused to be bound by the concept of the public forum set forth in *Greer*. Citing *Madison Joint School District*, the Court specifically held that the university could be prohibited from discriminating "even if it was not required to create the forum in the first place."¹⁴⁴ The Court went even further and intimated in dicta that there could be distinctions among different kinds of public forums. It stated that:

A university differs in significant respects from public forums such as streets or parks or even municipal theatres. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.¹⁴⁵

If *Madison Joint School District* had fractured the simple dichotomous categories created by *Greer*, the approach proposed by *Widmar* threatened to demolish them entirely. *Widmar* postulated a kind of public forum in which the government could exclude the public altogether, and it intimated that there was a spectrum of different kinds of government institutions as to which first amendment questions of access and equal access would be individually determined depending upon an analysis of each institution's special "mission" or purpose. In such a context *Greer's* dichotomous categories of public and nonpublic forums would cease to have meaning, and independent judicial inquiry into institutional mission would threaten the claims of proprietary prerogative to be immune from judicial scrutiny. Justice Powell, who had been uncomfortable with *Greer's* departure from *Grayned*, was apparently using his opinion in *Widmar* to undermine public forum doctrine from within, returning it to the case-by-case flexibility and independent judicial scrutiny characteristic of the *Grayned* approach.

But fourteen months later the Court forcefully checked any further movement in this direction by proposing the new concept of the "limited" public forum. In *Perry Educa-*

144. *Id.* at 268.

145. *Id.* at 268 n.5.

tion Association v. Perry Local Educators' Association,¹⁴⁶ the Court, in an opinion by Justice White, decisively reaffirmed the categorical framework of *Greer*. *Perry* reviewed prior precedents, including *Widmar* and *Madison Joint School District*, and announced that for constitutional purposes there were now three distinct kinds of government property. There was, to begin with, the "traditional," or "quintessential" public forum, which consists of localities that had "by long tradition or by government fiat . . . been devoted to assembly and debate."¹⁴⁷ Exemplary were the "streets and parks" identified by *Hague v. CIO*. In such public forums the government "may not prohibit all communicative activity," and it can "enforce a content-based exclusion" only if it can demonstrate that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."¹⁴⁸ The traditional public forum, in short, was the public forum described by *Greer*, in which the questions of access and equal access are tied together and each is constitutionally guaranteed.

At the other end of the spectrum was the nonpublic forum, which *Perry* also viewed in essentially the same light as *Greer*. Quoting from *Greer* and *Adderley*, *Perry* reaffirmed that in the nonpublic forum " "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." "¹⁴⁹ Hence for *Perry* "the right to make distinctions in access on the basis of subject matter and speaker identity" is "[i]mplicit in the concept of the nonpublic forum."¹⁵⁰ Regulation of public access for communicative purposes to a nonpublic forum must only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."¹⁵¹

Like *Greer*, therefore, *Perry* permitted the government to impose conditions on public access to the nonpublic forum that discriminated on the basis of content. But whereas *Greer*

146. 460 U.S. 37 (1983).

147. *Id.* at 45.

148. *Id.*

149. *Id.* at 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981)).

150. *Id.* at 49.

151. *Id.* at 46.

had drawn the line at "invidious" discrimination,¹⁵² *Perry* sought to prohibit "viewpoint discrimination."¹⁵³ Although the Court's opinion in *Perry* made no effort to clarify the distinction between "content" and "viewpoint" discrimination, Justice Brennan's dissent characterized "content neutrality" as pertaining to the government's ability to choose "the subjects that are appropriate for public discussion,"¹⁵⁴ whereas viewpoint neutrality relates to discrimination "among viewpoints on those subjects"¹⁵⁵

Although *Perry's* account of the nonpublic and traditional public forum were minor variations of the categories proposed by *Greer*, *Perry* still had to account for the circumstances encountered by the Court in cases like *Widmar* and *Madison Joint School District*. These circumstances did not fit easily into the dichotomous categories of *Greer*, and *Perry* attempted to encompass them within a category creating yet a third kind of government property, which it called a "limited public forum."¹⁵⁶ In a formulation echoing that of *Mosley*, *Perry* held that a limited public forum is created when the "State has opened" public property "for use by the public as a place for expressive activity."¹⁵⁷ But whereas the government cannot preclude public access to a traditional public forum,¹⁵⁸ *Perry* was explicit that the government is required

152. See *supra* notes 120–21 and accompanying text.

153. 460 U.S. at 49–50 n.9. In 1981, the Court had reached a somewhat different conclusion, stating in *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. at 131 n.7, that government control of access to a nonpublic forum "must be content-neutral."

154. 460 U.S. at 59 (Brennan, J., dissenting).

155. *Id.* at 61. The cogency of this distinction can be questioned. For example, it is not clear whether it is content or viewpoint discrimination if a citizen who wants to argue that a proper auditorium can only be financed through the imposition of a new and disagreeable property tax is ruled out of order by a school board which concludes that citizens can discuss the subject of building a new auditorium, but not the subject of property taxes. Justice Brennan's formulation, however, remains the best that is available. Cf. Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 218 (1982) (defining viewpoint discrimination as "discrimination between competing viewpoints over a particular issue").

156. 460 U.S. at 47–48. The Court has also called this kind of public forum a "public forum by designation." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 803 (1985); cf., *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568, 2571 (1987).

157. 460 U.S. at 45. See *supra* note 74 and accompanying text.

158. After *Greer* the Court had continued to emphasize this point. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) ("Congress . . . may not by its own *ipse dixit* destroy the 'public forum'").

neither to create nor to maintain public access to a limited public forum.¹⁵⁹ So long as the State does permit access, however, it "is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."¹⁶⁰

On the surface the concept of the limited public forum appeared to be an attempt to respond to the kinds of anomalous circumstances that could not be analyzed in the coarse terms offered by *Greer's* dichotomous categories. It seemed to rest on the simple maneuver of disaggregating the questions of access and equal access. Beneath the surface, however, the concept ruptured the connections between public forum doctrine and the major premise of the *Davis* syllogism. The logic underlying the premise was that the government could impose discriminatory criteria of access to its property if (and because) it could completely shut off such access. In the limited public forum, however, the government can completely block public access, and yet it is constitutionally prohibited from imposing discriminatory criteria of access. But if the Constitution prohibits this discrimination, why does it not also prohibit the government from imposing discriminatory criteria of access to the nonpublic forum? If the prerogatives of proprietary control are not respected in the limited public forum, why should they be respected in the nonpublic forum?

Perry contains no answers to these questions. What is striking about the opinion, however, is its obvious determination to preserve undiminished the government's freedom to regulate public access to its proprietary property, even at the price of obvious and fundamental doctrinal incoherence. This determination is evident both in the first amendment rules which *Perry* chooses to impose on the limited public forum, and in the manner in which *Perry* chooses to distinguish limited from nonpublic forums.

status of streets and parks which have historically been public forums . . ."). One month after *Perry* the point would again be strongly emphasized. See *United States v. Grace*, 461 U.S. 171, 180 (1983) (quoting *Greenburgh*, 453 U.S. at 133).

159. "[A] State is not required to indefinitely retain the open character of the facility" 460 U.S. at 46.

160. *Id.* at 46.

Consider, first, *Perry*'s puzzling assertion that the government's ability to regulate public access to the limited public forum is "bound by the same standards as apply in a traditional public forum." The assertion is manifestly contrary to the very precedents used by *Perry* to create the concept of the limited public forum. In *Madison Joint School District*, for example, the Court had specifically held that the school board could limit public discussion to certain subjects,¹⁶¹ and in *Widmar* the Court had permitted the university to limit its facilities to one class of speakers, namely students.¹⁶² In a traditional public forum, however, as *Perry* was the first to admit, "the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."¹⁶³ Neither *Widmar* nor *Madison Joint School District* was willing to accept the imposition of such a harsh first amendment standard. And it appears that *Perry* itself had difficulties with the standard, for in a strange footnote it asserted that "[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects" ¹⁶⁴

In the context of the doctrinal structure created by *Perry*, the footnote eviscerates the rule that in regulating public access to the limited public forum the government is bound by the same first amendment standards as bind the government's ability to regulate access to the traditional public forum. For *Perry* imposes no first amendment constraints whatever on the government's ability to build discriminatory criteria into the very definition or purpose of the limited public forum, and thus as a practical matter the government remains as free to limit public access to a limited public forum as to a nonpublic forum. This can be seen in

161. See *supra* note 139.

162. See *supra* note 145 and accompanying text.

163. 460 U.S. at 55.

164. 460 U.S. at 46 n.7 (citations omitted). This same internal contradiction persists in the Court's most recent attempt to explicate the theory of the limited public forum. In *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), the Court says both that in a limited public forum "speakers cannot be excluded without a compelling governmental interest", *id.* at 800, and that a limited public forum "may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802.

the facts of the *Perry* case itself. At issue in *Perry* was an inter-school mail system that the Metropolitan School District of Perry Township had made available to the union which was the exclusive bargaining agent of the district's teachers (PEA), but not to a rival union (PLEA). The district had granted access to the system to outside groups like the Cub Scouts, the YMCA, and other civic and church organizations.¹⁶⁵ The Court ultimately ruled that the system was a nonpublic forum and that PLEA's exclusion was "reasonable."¹⁶⁶ But the Court went out of its way to conclude that even if it were assumed *arguendo* that the access granted to the system had "opened it up" into a limited public forum, "the constitutional right of access would in any event extend only to other entities of similar character":

While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.¹⁶⁷

In the end, therefore, it made no difference to the outcome of the case whether the mail facilities were categorized as a limited or nonpublic forum. In either case the school system remained free to build discriminatory criteria of access into the very definition of its mail system. The doctrinal structure created by *Perry* ultimately renders illusory the harsh first amendment constraints formally made applicable to the limited public forum. In *Widmar* and *Madison Joint School District*, on the other hand, less stringent first amendment constraints were used so as actually to limit the government's freedom to control access to the nonpublic forum.

The chimerical quality of the limited public forum is also evident in the manner by which *Perry* chooses to distinguish, or rather not to distinguish, limited public forums from nonpublic forums. It had been black letter law since *Greer* that "a place owned or operated by the Government" does not become "a 'public forum' for purposes of the first

165. 460 U.S. at 47.

166. *Id.* at 48-50.

167. *Id.* at 48.

amendment" simply because "members of the public are permitted freely to visit" it.¹⁶⁸ The origin of the rule lay in *Greer's* forceful rejection of the view expressed in *Mosley* that once the government had "opened up" its property for expressive use by the public, it was thereafter disabled from regulating that use by imposing distinctions between persons and subjects. *Greer* had itself specifically held that the mere fact that "civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum . . ." ¹⁶⁹ In subsequent cases the Court adamantly reiterated this rule,¹⁷⁰ and *Perry* went out of its way to reaffirm it, explicitly holding that the fact that the school district had provided "selective access" to its mail facilities to certain outside organizations like the YMCA and the Cub Scouts "does not transform government property into a public forum."¹⁷¹

The problem, of course, is that the rule lies squarely athwart *Perry's* own definition of a limited public forum, which is keyed primarily to the opening up of government property to the public for expressive use. According to *Perry* both limited and nonpublic forums are characterized by a "selective" or discriminatory degree of access to proprietary government property. The question, then, is what criteria distinguish one from the other. *Perry* offers no such criteria; it gives no hint as to how the "opening up" that creates a limited public forum differs from the "opening up" that leaves a forum nonpublic.¹⁷² The unavoidable inference is that *Perry* chose to let the distinction remain ambiguous so as

168. *Greer v. Spock*, 424 U.S. 828, 836 (1976).

169. *Id.* at 838 n.10. Even before *Greer*, the Court had held in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), that the car cards of a municipal rapid transit system were not a public forum even though they had been opened up to commercial advertisements. See *supra* notes 77-82 and accompanying text; *Perry*, 460 U.S. at 47.

170. See, e.g., *United States v. Grace*, 461 U.S. 171, 177-78 (1983); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981); *Jones v. North Carolina Prisoners Union*, 433 U.S. 119, 134 (1977).

171. 460 U.S. at 47.

172. In fact, *Perry* evidenced some uncertainty as to whether the school's mail system was a nonpublic or limited public forum. On this question it said only that the school district had not "by policy or practice . . . opened its mail system for indiscriminate use by the general public . . ." 460 U.S. at 47. The problem, of course, is that "indiscriminate use by the general public" is quite beside the point, since *Perry* conceded that a limited public forum could, like a nonpublic forum, be created on the basis of "selective access." *Id.*

to leave the government ample room to continue to characterize its property as a nonpublic forum.

The most plausible interpretation of *Perry*, then, is that the Court had come to recognize the inadequacy of *Greer's* dichotomous categories, but that it was unprepared to modify them in any way that would seriously undermine the government's freedom to control public access to property that was not a traditional public forum. Under these circumstances the concept of the limited public forum was doomed from the start. The *coup de grâce* was delivered in 1985 when the Court in *Cornelius v. NAACP Legal Defense & Education Fund* held that the distinction between limited and nonpublic forums turns on the government's intent in opening up the forum:

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. [*Perry Education Ass'n v. Perry Local Educator's Ass'n.*, 460 U.S. at 46]. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. [460 U.S. at 47]. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.¹⁷³

Cornelius' focus on intent solved a good many problems. It explained why the government did not have to create the limited public forum in the first place, and why it could shut it down at will. It rendered intelligible the fact that the government could restrict a limited public forum to particular subjects or speakers. Most important, however, is that the focus on intent had the virtue of candor, for it tactfully withdrew the concept of the limited public forum as a meaningful category of constitutional analysis. If a limited public forum is neither more nor less than what the government intends it to be, then a first amendment right of access to the forum is nothing more than the claim that the government

173. 473 U.S. 788, 802 (1985). The opinion for the Court in *Cornelius* was written by Justice O'Connor, and was joined by Chief Justice Burger and by Justices White and Rehnquist. Justices Brennan, Blackmun, and Stevens dissented. Justices Marshall and Powell did not participate in the case. For a summary of the facts of *Cornelius*, see *infra* notes 380-81 and accompanying text.

should be required to do what it already intends to do in any event.

Cornelius shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum.¹⁷⁴ If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case. There is only one way out of this vicious circle, and it is not very satisfactory. It would require the Court to distinguish between the intent to include the class of speakers or subjects of which the plaintiff is the representative, and the intent to exclude the plaintiff. One problem with this distinction is that it is precious and in practice unworkable. Another problem is that it is inconsistent with the very precedents which had initially prompted *Perry* to propose the concept of the limited public forum. In *Madison Joint School District*, the Commission's order explicitly intended to exclude a class of school employees from speaking about matters that were subject to collective bargaining, and yet the Court found in effect that such an intent was unconstitutional. In *Widmar*, the university explicitly intended to exclude the class of students seeking to use campus facilities for religious purposes, and yet the Court found that intent to be unconstitutional.

The central insight of both *Widmar* and *Madison Joint School District* was that even if government property were a nontraditional public forum, objective circumstances respecting the use of the property can have serious constitutional consequences for a first amendment right of access, government intent notwithstanding. *Cornelius* flatly rejected this insight, and in the process essentially transformed the limited public forum into an empty category. As a result the Court is now left with a public forum doctrine that ties together questions of access and equal access, and that offers no principles of review with respect to the large number of circumstances in which discriminatory access is constitutionally suspect although the access need never have originally

174. From this perspective, the limited public forum has simply become "a nontraditional forum" which the government has chosen to open "for public discourse." *Cornelius*, 473 U.S. at 802. The terms and conditions of that choice are for all practical purposes insulated from constitutional review.

been granted. In short, the Court has taken a long step backwards toward the dichotomous framework of *Greer*.

II. THE PRESENT CONDITION OF PUBLIC FORUM DOCTRINE

Public forum doctrine has for this reason come to revolve with increasing intensity around the line separating the traditional public forum from the nonpublic forum. The placement and rationale of that line is therefore a matter of some importance, but the Court appears to have given it little or no consideration. *Cornelius* is typical when it defines traditional public forums as "those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'"¹⁷⁵

The definition, however, will simply not do. The reference to "government fiat" is ill-considered. It echoes *Cornelius*' own definition of a limited public forum or a public forum by designation,¹⁷⁶ and implies that if government fiat can create a traditional public forum, then it can also terminate it. This would dissolve the traditional public forum into the same vicious circle as that which dissolved the limited public forum. At least since *Greer*, however, the Court has been continuously clear that the state, whatever its intent, cannot cut off access to the traditional public forum by a "blanket exclusion of first amendment activity."¹⁷⁷

The reference to "long tradition," by contrast, directly continues a line of analysis that stems back to *Greer*, and before that to *Hague*. The standard seems to be that if government property has "immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"¹⁷⁸ then the property should be deemed a traditional public forum.

The question is why such a tradition should acquire constitutional immunity from alteration by the state. It would seem insufficient to answer this question simply by reference to the historical fact of the tradition, since it is the peculiar constitutional status of this fact which needs to be

175. *Id.* (quoting *Perry*, 460 U.S. at 45).

176. 473 U.S. at 803; *see id.* at 825-26 (Blackmun, J., dissenting).

177. *See supra* notes 134 & 158.

178. *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

explained. For *Hague*, of course, the passage of time signified a change in ownership, so that a long tradition of public usage meant that the government could no longer claim to be the proprietor of the property in question. Thus the presence of tradition was meaningful because of the minor premise of the *Davis* syllogism. But in our own time, when the major premise of that syllogism carries such scant constitutional weight, this meaning is largely beside the point.¹⁷⁹ We do not now view the technicalities of property ownership as determinative.¹⁸⁰ The Court moved decisively away from these technicalities in *Greer* when it determined the nonpublic forum status of Fort Dix by focussing on the generic characteristics of military installations.¹⁸¹ Technical issues of easement or adverse possession, however, would have had to have been resolved by examining the particular circumstances of the Fort.¹⁸²

The question therefore remains as to why a tradition of public usage should provide the point of distinction between public and nonpublic forums. Unless the Court can articulate why tradition matters,¹⁸³ contemporary doctrine will be left to focus dully on the brute passage of historical time. This is a recipe for crude and arbitrary results.¹⁸⁴ Air-

179. Indeed *Cornelius* does not even attempt to offer a property oriented interpretation of public forum doctrine. Instead *Cornelius* states that "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800; see *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568, 2571 (1987). The problem, however, is that *Cornelius*' image of balancing renders incomprehensible its definition of a traditional public forum. If the Court were truly balancing, the existence of a tradition of public use could at most be probative of the interests to be weighed; the tradition could not possibly be always determinative of the outcome of that balancing, as it is under the Court's present definition of a traditional public forum.

180. This is well illustrated by *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), in which the Court decided that a private citizen's mailbox was a nonpublic forum, even though it was not "owned" by the government.

181. See *supra* note 114 and accompanying text.

182. For a recent example of the influence of *Greer*'s generic focus, see *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984).

183. See generally Krygier, *Law as Tradition*, 5 *LAW & PHIL.* 237, 251-54 (1986).

184. The Court has recognized this fact in other areas. For example, when the Court was attempting to determine if federal regulation impaired the ability of the states "to structure integral operations in areas of traditional governmental functions," it held that "what is 'traditional'" could not be determined by "looking only to the past," since that would "impose a static historical view." *United*

ports, railroad terminals, and parks, for example, share many characteristics that are seemingly pertinent to the assessment of traditional public forum status,¹⁸⁵ but they differ in respect of chronological age, and, in that limited sense, have correspondingly different "traditions." If the Court were to differentiate among these forums on this basis alone, the result, as the Court recently perceived in a related context, would constitute "linedrawing of the most arbitrary sort."¹⁸⁶ Even if the Court's present emphasis on tradition is accepted, therefore, it remains unfounded and incomplete.

The line dividing public and nonpublic forums, however arbitrary, marks the boundary between deeply divergent regimes of constitutional regulation. With respect to the traditional public forum, which the Court has repeatedly stressed "occupies a special position in terms of first amendment protection,"¹⁸⁷ the Court has developed a scheme of constitutional rules that it says applies specifically "[i]n such places":¹⁸⁸

[T]he government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.¹⁸⁹

Despite the Court's tendency to speak of traditional public forums as unique locations, the constitutional rules promulgated by the Court for their governance are identical to the first amendment rules which it has imposed on government action generally. The Court has said that govern-

Transp. Union v. Long Island R.R., 455 U.S. 678, 684, 686 (1982) (quoting Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976)). The Court recognized, in other words, that for legal purposes a tradition must have meaning and that it cannot be reduced simply to the passage of time.

185. For a discussion of these examples, see Note, *Public Forum Analysis*, *supra* note 7, at 556-58 (1986). The Court recently dodged the question of whether an airport was a public forum in *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568 (1987).

186. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 544 (1985).

187. *United States v. Grace*, 461 U.S. 171, 180 (1983); see *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813 (1984).

188. *United States v. Grace*, 461 U.S. at 177.

189. *Id.* (citations omitted).

ment action ranging from zoning ordinances to the prohibition of certain kinds of insertions in public utility billing envelopes can be justified as time, place, and manner regulations.¹⁹⁰ And the Court has also specifically held that any government restriction on "the speech of a private person" can be "sustained" if "the government can show that the regulation is a precisely drawn means of serving a compelling state interest."¹⁹¹

During the 1930s and 1940s the Court did not view public streets and parks as constitutionally unique, but rather concluded that government regulation in such areas was subject to the same kind of constitutional review as government action generally. Decisions of the modern Court have been drawn willy-nilly toward this conclusion, and the modern Court's constant efforts to locate and apply special first amendment rules to the public forum have, with one exception, met with continual frustration. The exception in fact aptly illustrates the misguided nature of the Court's efforts, for it is analytically indefensible.

The exception is the rule, continually reiterated since *Greer*, that there can not be a blanket exclusion of first amendment activities from a public forum.¹⁹² Recently in *United States v. Grace* the Court said that "destruction of public forum status" is "presumptively impermissible."¹⁹³ This rule attempts to establish "the special position in terms of first amendment protection"¹⁹⁴ of the public forum by equating restrictions on access with restrictions on speech. But this equation is false, for it fails to distinguish between the regulation of expression and the regulation of conduct, and hence cannot distinguish between an ordinance banning all political demonstrations and an ordinance authorizing

190. *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 928 (1986); *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 106 S. Ct. 903, 914 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74-76 (1981). The Court self-consciously generalized time, place, and manner analysis from the early public forum decisions. *Buckley v. Valeo*, 424 U.S. 1, 17-18 (1976).

191. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

192. See, e.g., *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568, 2571 (1987); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Greer v. Spock*, 424 U.S. 828, 835 (1976).

193. *United States v. Grace*, 461 U.S. 171, 180 (1983).

194. *Id.*

the construction of a nonpublic forum office building on land that previously underlay a public street. It simply makes no sense to say that the latter is "presumptively impermissible," even if it results in a blanket exclusion of first amendment activities in what was previously a public forum. Ordinary principles of first amendment jurisprudence would have no special difficulty in evaluating the differential impact of these two ordinances on constitutional rights. But in its eagerness to establish some special and ultimately illusory first amendment status for the public forum, the Court has brushed aside these principles, and as a consequence has backed itself into an untenable position.

If the first amendment standards imposed on the public forum have tended to be unduly strict, those imposed on the nonpublic forum have, to the contrary, tended to be unduly lax. Putting to one side for the moment the prohibition on viewpoint discrimination,¹⁹⁵ government restrictions on access to the nonpublic forum need only be "reasonable in light of the purpose served by the forum."¹⁹⁶ The Court has never precisely defined what it means by this "reasonableness" standard, but at a minimum it is clear that it is designed to provide the government the utmost flexibility in managing the nonpublic forum. As the Court said in *Cornelius*, the "Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."¹⁹⁷

Language like this prompted Justice Blackmun, in his dissent in *Cornelius*, to denigrate the "reasonableness" standard as "nothing more than a rational-basis requirement,"¹⁹⁸ which is the genuinely toothless restraint that the due process clause and the equal protection clause impose on all government action.¹⁹⁹ If Justice Blackmun is correct, then the reasonableness standard is simply a doctrinal re-

195. The prohibition is discussed in detail in Section VI. See *infra* notes 387-94 and accompanying text.

196. *Cornelius*, 473 U.S. at 806; see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 49 (regulation of public's access to nonpublic forum must be "reasonable in light of the purpose which the forum at issue serves").

197. *Cornelius*, 473 U.S. at 806 (quoting *Arnett v. Kennedy*, 41 U.S. 134, 168 (1974) (Powell, J., concurring in part)).

198. *Id.* at 821 (Blackmun, J., dissenting).

199. See *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

statement of the major premise of the *Davis* syllogism. If the standard creates no constitutional restrictions that are not already generally imposed on the state by the due process and equal protection clauses, then the standard offers no additional first amendment protection for speech. If the major premise of the *Davis* syllogism is incorrect, however, then the fact that the government is regulating speech is constitutionally pertinent, and the "reasonableness" standard should not be reduced to a rational basis test.

The latter conclusion seems to me inescapable.²⁰⁰ The fourteenth amendment imposes constitutional restrictions upon the "States" as such, not upon the States acting in some capacities and not others. And of course the federal government is in all of its capacities the creation of and therefore bound by the provisions of the Constitution, including the first amendment. Almost twenty years ago a noted commentator could conclude that "the point is now plain: the state is the state, bound by uniform constitutional constraints regardless of the capacity in which it purports to act."²⁰¹ Thus the fact that the government is acting as an employer or a proprietor will not exempt it from the distinct requirements of the equal protection clause,²⁰² or the due process clause,²⁰³ or the commerce clause,²⁰⁴ or the privileges and immunities clause of article IV.²⁰⁵ And, as the Court has plainly recognized in other contexts, there is no good reason why that fact should exempt the government from the requirements of the first amendment.²⁰⁶ The Court has in effect acknowledged the unavoidable logic of this position by imposing a first amendment prohibition on

200. The case against the major premise of the *Davis* syllogism is succinctly set forth in Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1315-24 (1984).

201. Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 UCLA L. REV. 751, 754 (1969) (footnote omitted).

202. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Turner v. City of Memphis*, 369 U.S. 350 (1962).

203. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*, 408 U.S. 593 (1972).

204. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

205. *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984).

206. See *Branti v. Finkel*, 445 U.S. 507 (1980); *Perry v. Sindermann*, 408 U.S. at 597-98; *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

viewpoint discrimination even upon the government acting in its proprietary capacity.

While no one on the modern Court has explicitly defended the extreme perspective associated with the major premise of the *Davis* syllogism, there has been support for the milder position that "the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator."²⁰⁷ This position, understood generously, holds that although the government acting in a proprietary capacity is subject to the constraints of the first amendment, these restraints should be substantively interpreted with the needs of a government proprietor in mind.²⁰⁸ The consequence of such a position would be a reasonableness standard that identified and enforced pertinent first amendment concerns, but which tailored such concerns to the context of proprietary government action.

As a matter of simple internal consistency, this is the kind of reasonableness standard which the Court must have meant to adopt in *Perry*. But as such the standard is a failure. It identifies neither the particular proprietary prerogatives that need to be protected nor the specific first amendment concerns by which the exercise of these prerogatives are to be evaluated. For all practical purposes, public forum doctrine is presently a blank check for government control of public access to the nonpublic forum for communicative purposes.²⁰⁹ To date, the Court has been willing to hold that the first amendment prohibits restrictions on such access only if such restrictions can be justified by "no conceivable governmental interest."²¹⁰

207. *Board of Educ. v. Pico*, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting); see *Rankin v. McPherson*, 107 S. Ct. 2891, 2902 (1987) (Scalia, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 290-91 (1976) (Rehnquist, J., concurring in part, dissenting in part); Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZ. L. REV. 1, 10-12 (1976).

208. See Van Alstyne, *supra* note 201, at 769-71; Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1116 (1980).

209. "The reasonableness standard of judicial review used in [nonpublic forum] cases is essentially no review at all." Dienes, *supra* note 7, at 117.

210. *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568, 2572 (1987).

III. TOWARD A REFORMULATION OF PUBLIC FORUM DOCTRINE

When Melville Nimmer came to analyze public forum doctrine, he saw within it two competing lines of cases. The first, which is associated with the public forum theory that has triumphed in the Court's recent opinions, "assumes that whether or not publicly owned premises are to be regarded as 'public forums' and hence open to the public for communication purposes turns upon factors divorced from the proposed speech itself."²¹¹ The second line of cases, which springs from *Grayned*, "is not concerned with whether the public premises are dedicated to uses which would include the speech activities in issue. Instead, the question put is whether the speech activities would be incompatible with the use to which the premises are dedicated or primarily devoted."²¹² What has truly bewildered most commentators about modern public forum doctrine is that the Court has continually repudiated the second line of cases, despite what commentators view as its obvious superiority.²¹³

211. M. NIMMER, *supra* note 2, § 4.09[D], at 4-70.

212. *Id.*, § 4.09[D], at 4-72.

213. By far the great majority of commentators have advocated that some variant of the *Grayned* approach be adopted. See M. NIMMER, *supra* note 2, § 4.09[D], at 4-73-4-74; L. TRIBE, *supra* note 48, at 690-92; Cass, *supra* note 7, at 1317-18; Karst, *supra* note 7, at 261-62; Stone, *supra* note 7, at 93-94; Werhan, *supra* note 7, at 378-84, 423-24; Note, *supra* note 132, at 138; Note, *A Unitary Approach*, *supra* note 7, at 143-51. There are some signs that the Court itself might be moving in that direction. Justice Blackmun's dissent in *Cornelius* leaned toward a *Grayned* type approach. In an opinion joined by Justice Brennan, he stated that a proper understanding of public forum doctrine "requires that we balance the First Amendment interests of those who seek access for expressive activity against the interests of the other users of the property and the interests served by reserving the property for its intended uses." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 822 (1985) (Blackmun, J., dissenting). He then criticized the Court because, "[r]ather than recognize that a nonpublic forum is a place where expressive activity would be incompatible with the purposes the property is intended to serve," it had instead acted as if "a nonpublic forum is a place where we need not even be concerned about whether expressive activity is incompatible with the purposes of the property." *Id.* at 820-21. In its use of the *Grayned* incompatibility test, Blackmun's opinion seems reminiscent of Justice Brennan's dissent in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). See *supra* note 91 and accompanying text. Justice Stevens dissented separately in *Cornelius* to express skepticism "about the value" of the "analytical approach" implicit in public forum theory. 473 U.S. at 833. Although Justices Marshall and Powell did not participate in *Cornelius*, their sympathy for a *Grayned* type approach is well known. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Greer v. Spock*, 424 U.S. 828, 842

The attraction of *Grayned* is not difficult to appreciate. Its logic begins from the constitutionally congenial premise that the state should not suppress speech unless there is a good reason to do so. The reason for discouraging speech on government property is that it may interfere with the use of that property. If such interference occurs, the state may justifiably prohibit speech; conversely, the absence of interference indicates that the state may lack sufficient grounds to abridge speech. The doctrine proposed by *Grayned* thus invites courts to focus precisely on the relationship between speech and the reasons for its regulation, and it is designed to maximize the speech which the government is constitutionally required to tolerate, consistent with the appropriate and needful use of its property. This design flows naturally from the first amendment's central objective of ensuring "uninhibited, robust, and wide-open" public debate.²¹⁴

Contemporary public forum doctrine, on the other hand, begins from the constitutionally questionable premise that the government is in effect constitutionally unconstrained in its use of certain kinds of state property. It thus does not focus on speech and the justifications for its suppression, but rather on the kind of government property at issue. If the property does not bear a tradition of public usage for expressive activity, first amendment rights can be effectively prohibited, even if the exercise of these rights would be compatible with the ordinary use of the property. The doctrine thus appears to invite the superfluous suppression of speech.

Why, then, has the Court stood by public forum doctrine with such formidable determination? The history of public forum doctrine recounted in Section I provides a clue. In contrast to *Grayned*, public forum doctrine divides government property into distinct schemes of first amendment regulation. From the moment of the doctrine's first contemporary appearance in *Greer*, the Court has consistently used it to demarcate a class of government property in which the first amendment claims of the public are radically devalued and immune from independent judicial scrutiny. The Court has relentlessly pursued this goal despite such

(1976) (Powell, J., concurring); *id.* at 849 (Brennan, J., dissenting); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

214. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

obstacles as the threat of obvious doctrinal incoherence and the absence of underlying constitutional justification.

Thus the history of the doctrine suggests that if it is to be supported by a defensible constitutional theory, it must be one capable of explaining and justifying this strange realm of first amendment devaluation. In this section of the Article, I will sketch the outline of such a theory, and then test its implications against the actual pattern of the Court's public forum decisions. The theory will in turn lead to a radical reformulation of the object and structure of public forum doctrine.

A. *The Management of Speech Within Government Institutions*

The devaluation of first amendment rights characteristic of the nonpublic forum cases is strikingly similar to that developed by the Court in a closely related line of cases dealing with the first amendment claims of individuals who are members of a government institution.²¹⁵ In these cases the Court has concluded that first amendment claims must be subordinated to the authority necessary to administer state organizations.

The constitutional rationale for this conclusion is quite straightforward. Government institutions, like most organizations, have a "hierarchy of formal authority" by which resources are coordinated and manipulated so as to achieve institutional ends.²¹⁶ This authority extends to persons as well as to things, and it extends to the speech of persons as well as to their actions.²¹⁷ The exercise of this authority is

215. The cases are discussed in Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 196-201.

216. J. MARCH & H. SIMON, *ORGANIZATIONS* 194 (1958). In an organization: Authority—that is, institutionalized control—is expected to extend downward through the various echelons of organization, enabling leadership to determine the consequences which ultimately flow from their decisions. While current theories of organization rarely assume this strict and rigid pattern to be fully maintained in practice, hierarchical structure is clearly seen as a standard against which deviations may be judged; the burden of proof seems to lie with exceptions to this rule.

R. DENHARDT, *IN THE SHADOW OF ORGANIZATION* 19-20 (1981); cf. O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 206-239 (1985).

217. To bring a few illustrations to mind, consider, for example, how a school system controls the speech of students and teachers in a classroom, or how a judge manages the speech of lawyers, witnesses, parties and spectators in a court-

inconsistent with what most judges and scholars would recognize as a first amendment right. This can be seen by analyzing a simple case, one that must occur on a daily basis throughout the country. In a government bureaucracy an official says to her subordinate:

Tomorrow is the big staff meeting on Project X. I want you to draft a position paper taking Position A, and I want you to have it on my desk first thing tomorrow morning for review. After I make the changes I think necessary, I want you to attend the staff meeting and present the paper.

The situation, common though it be, is a first amendment nightmare. The subordinate's presentation to the staff meeting is expression that is subject to the prior restraint of his superior, and such prior restraints are "the most serious and the least tolerable infringement on first amendment rights."²¹⁸ The superior is able to dictate whether her subordinate will take Position A, rather than Position B, and hence to subject her subordinate's speech to viewpoint discrimination, despite the fundamental constitutional principle that "the first amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."²¹⁹ And the subordinate's speech is subject to the discretionary control of his superior, despite the "long line" of decisions striking down as "unconstitutional censorship" those statutes making the exercise of first amendment rights "contingent" upon the "discretion" of a public official.²²⁰

It is clear, therefore, that if the most common forms of organizational authority are to withstand constitutional scrutiny, they must be analyzed in a very different fashion than that appropriate when government regulates the speech of a member of the general public. The superior's control over

room, or how a military officer manipulates the speech of a new recruit ("Yes, what?" "Yes, Sir!"). For an illustration of the "constant struggle to suppress . . . dissent" within government bureaucracies, see J. GALBRAITH, *THE ANATOMY OF POWER* 60 (1983).

218. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); see *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

219. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

220. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); see *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 797-98 & n.15.

the speech of her subordinate is somehow constitutionally different from the mayor's control over speech in the Boston Common. It is tempting to wish away this constitutional anomaly by arguing that the subordinate has "waived" his first amendment rights by "consenting" to the terms and conditions of government employment. But this argument will not offer a satisfactory explanation of the way that speech is ordinarily managed within government institutions. First, it is well established that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'"²²¹ A government employee may be taken to have consented to employment, but not, except in some patently fictional sense, to every violation of constitutional rights that a government employer may perpetuate. Second, waiver must be voluntary, but the constant threat of loss of employment and other sanctions within an organizational context makes deeply problematic any determination that constitutional rights have been voluntarily waived.

Third, and most important, the government's need to manage speech within its institutions is the same whether or not an institution's members have voluntarily agreed to participate within it. Government institutions, like most organizations, can be viewed as "formally established for the explicit purpose of achieving certain goals."²²² The goal of the school system is education; the goal of the judicial system is the just and efficient adjudication of cases and controversies; and so on. Managerial authority over speech is necessary for an institution to achieve these goals. A government institution's interest in internally regulating speech

221. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(citing *Aetna Ins. Co. v. Han-nedy*, 301 U.S. 389, 393 (1937) and *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937)).

222. P. BLAU & W.R. SCOTT, *FORMAL ORGANIZATIONS* 5 (1962). As Richard Elmore points out, viewing organizations as hierarchically arranged for the achievement of explicit goals is only one of several models of organizational behavior. Elmore, *Organizational Models of Social Program Implementation*, 26 *PUBLIC POLICY* 185 (1978). It is chiefly a "normative" model, rather than a descriptive one, telling us "how organizations *ought* to function, not necessarily how they actually do." *Id.* at 198. It is a model that is necessary for first amendment analysis, however, because the explicit and socially recognized goals attributed to a government organization provide the only constitutional justification for its suppression of speech. See generally M. DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS* (1986).

is therefore its interest in the attainment of the very purposes for which it has been established, and this interest remains the same whether or not its members consent to the exercise of government authority.

As a result the Court has not in fact determined the constitutional validity of a government institution's internal regulation of speech by reference to concepts of waiver, but rather by asking whether the regulation is necessary in order to achieve the institution's legitimate objectives. Prisoners, for example, do not voluntarily agree to enter confinement, yet the Court has explicitly held that their first amendment rights are subordinate to the attainment of "the legitimate penological objectives of the corrections system."²²³ Elementary and high school students are compelled to attend school, yet the Court has held that student speech, "in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."²²⁴ Military draftees are forced to enter the armed forces, and yet the Court has held that "[s]peech likely to interfere with . . . vital prerequisites for military effectiveness . . . can be excluded from a military base."²²⁵ Government employees, on the other hand, voluntarily agree to work for the government, and yet the Court has not used the doctrine of waiver to dismiss employee claims of first amendment freedom, but has instead analyzed these claims on their merits.²²⁶ The Court has held that employee speech may be regulated so as to promote "the efficiency of the public services [the government] per-

223. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

224. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513 (1969). In *Healy v. James*, 408 U.S. 169 (1972), the Court held that a state university need not tolerate "[a]ssociational activities . . . where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189.

225. *Brown v. Glines*, 444 U.S. 348, 354 (1980).

226. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 142-44 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The one recent exception, *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*), is subject to criticism for precisely this reason.

forms through its employees.”²²⁷ The Court has also held that the fair and expeditious administration of the judicial system justifies subjecting the pretrial speech of litigants to prior restraints issued at the discretion of a trial judge, and that such judicial authority extends equally to plaintiffs, who have voluntarily submitted to a court’s jurisdiction, and to defendants, who have not.²²⁸

The constitutional question in each case is whether the authority to regulate speech is necessary for the achievement of legitimate institutional objectives.²²⁹ This question, however, has rather subtle implications for the concept of independent judicial review. Suppose, in the bureaucratic example which I have sketched, that the subordinate complains in court that he has a first amendment right to present at the staff meeting Position B, in which he personally believes, instead of Position A, which his superior has required him to present. In assessing his claim, the court will have to evaluate two distinct kinds of potential damage to the bureaucracy. The first concerns the possible negative impact of presenting Position B, instead of A. This damage depends upon the consequences of the particular speech at issue; it turns on whether Position B or the manner of its presentation is incompatible with the attainment of institutional goals.

The second kind of potential damage, however, is quite different. It concerns the possible undermining of the superior’s managerial authority should the court countermand her directive. It is evident that if the court were to engage in the practice of second-guessing her managerial authority re-

227. *Connick v. Myers*, 461 U.S. at 142 (quoting *Pickering v. Board of Educ.*, 391 U.S. at 568); see *infra* note 351.

228. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The judge’s control over speech in a courtroom is of course even more extensive, and extends indifferently to parties, witnesses, and spectators. The “trial judge,” as the Court recently emphasized, “has the responsibility to maintain decorum in keeping with the nature of the proceeding; ‘the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.’” *United States v. Young*, 470 U.S. 1, 10 (1985)(quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)).

229. This question is controlling, of course, only when the government is engaged in the management of speech within its own institutions. The fact that the speech of a member of the general public adversely affects the ability of a government institution to achieve its goals is not ordinarily viewed as constitutionally determinative. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

garding speech, that authority would *pro tanto* diminish. The potential for this kind of damage implies that before engaging in judicial review a court must determine whether such review would itself diminish the authority at issue to such an extent as to impair the ability of the bureaucracy to attain its legitimate ends. The decision to withhold independent judicial scrutiny, and hence to defer to the judgment of institutional authorities, does not turn at all upon the nature or circumstances of the particular speech at issue, but rather upon the relationship between the practice of judicial review and the nature of the managerial authority at issue.

The question of judicial deference can be concretely illustrated by comparing two Supreme Court decisions. In *Brown v. Glines*,²³⁰ the Court upheld a military regulation prohibiting Air Force members from circulating petitions on military bases without prior approval of their commanders. The commanders were empowered to censor any petition they felt would create "a clear danger to the loyalty, discipline, or morale" of their troops.²³¹ The Court held that "[s]peech likely to interfere with . . . vital prerequisites for military effectiveness . . . can be excluded from a military base."²³² But the Court did not choose to scrutinize whether the plaintiff's particular petition would interfere with the prerequisites for military effectiveness; instead it focused on the potential damage to military authority that would occur if courts were to engage in the practice of independently reviewing military commands. The Court asserted that the "military mission" requires the maintenance of a form of authority founded on "instinctive obedience,"²³³ and the Court therefore held that "[t]he rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty'"²³⁴ These demands are incompatible with the practice of independent judicial review "[b]ecause the right to command and the duty to obey ordinarily must go unquestioned."²³⁵ Hence the Court concluded that the nature of military authority re-

230. 444 U.S. 348 (1980).

231. *Id.* at 353.

232. *Id.* at 354.

233. *Id.* at 354, 357.

234. *Id.* at 354 (quoting *Parker v. Levy*, 417 U.S. 733, 744 (1974)).

235. *Id.* at 357.

quires that courts as a general matter defer to the judgment of military officials on the question of whether particular petitions would adversely affect the loyalty, discipline, or morale of the troops. The Court was prepared to review that authority only in the exceptional circumstance when it could with plausibility be claimed that it had been exercised "irrationally, invidiously, or arbitrarily."²³⁶

In *Tinker v. Des Moines Independent Community School District*,²³⁷ on the other hand, the Court struck down a school regulation prohibiting the wearing of black armbands to protest the Vietnam war. The Court determined that the legitimate end of the school system is not the creation of students who are "closed-circuit recipients of only that which the State chooses to communicate," but rather the inculcation of "the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."²³⁸ The attainment of this end did not, in the circumstances presented by the case, justify the maintenance of a pervasive and unquestioned form of authority. The Court held that "[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."²³⁹ For this reason school officials, unlike military commanders, cannot prohibit expression on the basis of an "undifferentiated fear or apprehension of disturbance," but can only act on the basis of "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities."²⁴⁰

The constitutional standard adopted by the Court required the school to present evidence sufficient to convince a judge that plaintiffs' speech was incompatible with the educational process. In effect, then, the Court in *Tinker* held that the constitutionality of the school's regulation would be determined by independent judicial review of whether the regulation was necessary for the attainment of the school's educational objectives. The harm which such judicial review might cause to the general authority structure of the school

236. *Id.* at 357 n.15 (quoting *Greer v. Spock*, 424 U.S. 828, 840 (1976)).

237. 393 U.S. 503 (1969).

238. *Id.* at 511, 509.

239. *Id.* at 511.

240. *Id.* at 508, 514.

did not justify deference to school officials, for the nature of educational authority was perceived as quite different from that of military authority.²⁴¹ Because in *Tinker* there was no evidence that the wearing of armbands would potentially disrupt legitimate school activities, or that plaintiffs' speech had actually disrupted these activities, the Court found the school regulation unconstitutional.

By focusing on the relationship between plaintiffs' armbands and the school environment, *Tinker* pursued a form of analysis that was essentially congruent with that of *Grayned*. It asked whether the potential consequences of plaintiffs' proposed speech were incompatible with the normal functioning of the school, and it maintained that this question should be answered through independent judicial inquiry. *Glines*, on the other hand, concentrated on the generic characteristics of military authority, and held that these characteristics justified the Court in generally deferring to the judgment of military officials on the question of whether particular speech was incompatible with the attainment of military objectives. As a result *Glines* created a special realm, similar to that delineated in the Court's nonpublic forum decisions, in which first amendment rights were radically devalued. In *Glines* this realm was not founded upon the major

241. It is important to stress the extent to which the Court's conclusion ultimately rests on its own sense of the educational goals of the school system. Recently the Court has begun to articulate a different perception of education, which, rather than emphasizing "independence" and diversity, concentrates instead on instilling students with a sense of "the boundaries of socially appropriate behavior." *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159, 3164 (1986). "The role and purpose of the American public school system," the Court said in 1986, is to "prepare pupils for citizenship in the Republic It must inculcate the habits and manners of civility" *Id.* (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)). From this perspective the incorporation of habits of obedience to authority is itself an educational goal. As Justice Black said in his dissent in *Tinker*, "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens." 393 U.S. at 524. This understanding of the function of education might well lead the Court to reconsider *Tinker's* refusal to defer to school officials, for it elevates obedience to institutional authority into an independent educational objective. In the years before *Tinker* judicial deference to the judgment of school officials was in fact the rule, and the rule was dependent in no small degree on the perception that, as the Supreme Court of Arkansas said in an influential opinion, "respect for constituted authority, and obedience thereto, is an essential lesson to qualify one for the duties of citizenship, and . . . the schoolroom is an appropriate place to teach that lesson." *Pugsley v. Sellmeyer*, 158 Ark. 247, 253, 250 S.W. 538, 539 (1923).

premise of the *Davis* syllogism, or upon any other such indefensible constitutional notion, but rather upon the logic of judicial deference.

B. *Public Forum Doctrine and the Management of Speech Within Government Institutions*

The constitutional theory underlying the Court's decisions dealing with the internal management of speech has a distinctive structure. When administering its own institutions, the government is invested with a special form of authority, which I shall call "managerial." Managerial authority is controlled by first amendment rules different from those which control the exercise of the authority used by the state when it acts to govern the general public. I shall call the latter kind of authority "governance."²⁴² In situations of governance the state is bound by the ordinary principles of first amendment jurisprudence, but when exercising managerial authority ordinary first amendment rights are subordinated to the instrumental logic characteristic of organizations, and the state can in large measure control speech on the basis of an organization's need to achieve its institutional ends. This instrumental logic even extends so far as to justify courts deferring to the judgment of institutional officials respecting the need to control speech, if such deference is itself thought necessary for the attainment of institutional ends.

There is a striking similarity between this structure and that revealed in modern public forum doctrine. Not only does the theory of managerial authority fit the actual pattern of the Court's public forum doctrine decisions, but it provides a coherent constitutional justification for those decisions.

242. On the distinction between management and governance, see P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 75-120 (1969). The distinction has implications for the analysis of constitutional issues other than those raised by the first amendment. See, e.g., *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987) (search of government employee's office and desk); *New Jersey v. TLO*, 469 U.S. 325 (1985) (search of high school student's purse). This Article, however, will not attempt to assess these implications.

1. The Theory of Managerial Authority and Public Forum Doctrine

The Court's decisions dealing with the internal management of speech suggest that there are two kinds of government authority, management and governance, each controlled by distinct kinds of first amendment rules. Public forum doctrine has the same general structure, distinguishing between public and nonpublic forums, and holding that each is governed by a distinct regime of first amendment rules. Although the Court has struggled to define an especially protected first amendment status for the public forum, its efforts have proved unsuccessful, and the Court's decisions have moved inevitably toward the conclusion that the government's actions within the public forum are simply subject to the same first amendment restraints as are government actions generally. Government authority over the public forum can thus be characterized as a matter of governance.

The Court's views concerning the kind of authority exercised by the government over nonpublic forums, however, have been a good deal more murky. Although the Court has said that the authority of government institutions to control access by members of the general public to internal organizational resources must be "reasonable in light of the purpose served by the forum,"²⁴³ and so invested this authority with the same instrumental logic as that which characterizes managerial authority, it has in fact shown no inclination to take this logic seriously. Under the spell of the major premise of the *Davis* syllogism, the Court has instead tended to view the government's discretion in controlling public access to the nonpublic forum as a matter of inherent power. The problem with the Court's view, of course, is that no one has yet been able to articulate a defensible constitutional justification for this power.

Decisions like *Glines*, however, indicate that the identical discretion in the control of speech which the Court has sought to protect in the nonpublic forum can be explained and justified in terms of the logic of managerial authority

243. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

and judicial deference. These decisions suggest that the Court has in its nonpublic forum cases been concerned all along not with the attribution of substantive power, but rather with the protection of managerial authority from the potentially deleterious effects of judicial review. If this conclusion is accurate, the nonpublic forum cases can be reconceptualized in terms of the underlying theory of *Glines*. Such a reconceptualization would have the advantage of explicitly orienting the Court toward the very values which have in fact animated it during the history of public forum doctrine, thus permitting the Court to begin to analyze and express those values in a principled manner. Public forum doctrine would be released from the disastrous influence of the major premise of the *Davis* syllogism, and the Court's nonpublic forum cases and its decisions dealing with the internal management of speech would be brought together under a single and defensible doctrinal framework.

Reconceptualizing the nonpublic forum cases in terms of the logic of *Glines* would also explain why the Court has persistently rejected what has appeared to commentators to be the ineluctable logic of *Grayned*. *Grayned*'s "incompatibility" test takes into account only the specific harm incident to a plaintiff's proposed speech; it does not recognize the generic damage to managerial authority flowing from the very process of independent judicial review of institutional decisionmaking. By focusing on this damage, the Court can begin explicitly and systematically to explore the conditions under which judicial deference is and is not appropriate. The Court's present focus "on the character of the property at issue"²⁴⁴ is a theoretical dead end, because there is no satisfactory theory connecting the classification of government property with the exercise of first amendment rights. But there is great potential for a rich and principled jurisprudence if the Court were to focus instead on the relationship between judicial review and the functioning of institutional authority.

To conceive the issue in this way, for example, is to see at once that the very decisions which led *Perry* to formulate the concept of the limited public forum involve the exercise of managerial authority as to which the Court believed that

244. *Perry*, 460 U.S. at 44.

deference was inappropriate. In this sense the limited public forum cases display a strong analogy to the structure of *Tinker*. The analogy is clear in *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*.²⁴⁵ The decision recognized that a school board is invested with a different kind of authority in running an open school board meeting than that involved in governing the general public. Although ordinary first amendment principles would plainly prohibit the state from imposing an agenda on public discussion,²⁴⁶ *Madison Joint School District* understood that a board must retain the flexible power to fix agendas for open school board meetings.²⁴⁷

In assessing the constitutional limitations of the board's managerial authority over such meetings, however, the Court chose not to defer to the authoritative judgment of the Wisconsin Employment Relations Commission that teachers who were not authorized union representatives be prohibited from speaking about matters subject to collective bargaining. The Commission was not engaged in the day-to-day supervision of the school board or of its meetings. Its role was rather to oversee certain board decisions respecting its relations with its employees, much as a court might oversee certain decisions of an administrative agency. For this reason the Court correctly believed that it could independently review the merits of the Commission's decision without potentially endangering a necessary structure of managerial authority. Advancing its own conception of the social purposes and meaning of the American institution of open school board meetings, the Court concluded that the Commission's decision was without merit, since there was no "justification" for excluding teachers from the "public discussion of public business" characteristic of such meetings.²⁴⁸

The structural analogy between *Tinker* and *Widmar* is similar, although less complete. The regulation at issue in

245. 429 U.S. 167 (1976).

246. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-38 (1980).

247. 429 U.S. at 175 n.8.

248. *Id.* at 175. Indeed the Court went further and noted that "restraining teachers' expressions to the board on matters involving the operation of the schools would seriously impair the board's ability to govern the district." *Id.* at 177.

Widmar involved prohibiting students from using university facilities for religious worship and religious discussion. *Widmar* plainly recognized that the university was invested with managerial authority to regulate speech as necessary for the attainment of institutional ends. The Court explicitly noted that a "university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."²⁴⁹ Thus *Widmar* did not require a university to "make all of its facilities equally available to students and nonstudents alike,"²⁵⁰ although similar discrimination among persons in the general public would pose an "obvious first amendment problem."²⁵¹ As in *Tinker*, however, the Court concluded that the "mission" of education did not depend upon the exercise of pervasive, managerial authority: The Court stressed that university students participate in an environment that "is peculiarly 'the marketplace of ideas.'"²⁵² For this reason the Court addressed the merits of the university's regulation without apparent concern for potential damage to a structure of authority necessary for the attainment of educational objectives.²⁵³

Unfortunately *Widmar's* analysis of the merits of the case is disappointing. The natural and appropriate inquiry for *Widmar* to have undertaken was whether the University's regulation was compatible with its educational "mission."

249. 454 U.S. 263, 267-68 n.5 (1981).

250. *Id.*; see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups, e.g., *Widmar v. Vincent* (student groups)").

251. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968, 2987 (1986) (Stevens, J., dissenting).

252. 454 U.S. at 267-68 n.5 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)).

253. The Court had also refused to defer to the judgment of educational authorities in *Healy v. James*, 408 U.S. 169 (1972), which concerned the refusal of a state university to recognize Students for a Democratic Society as a campus organization. One can imagine a different outcome, however, if the first amendment claims at issue in a case touch an educational institution in its more managerial aspects, as, for example, if students claim the right to choose the topics for discussion in the classroom. In such a situation the Court may well defer to the managerial discretion of the classroom teacher to control the speech of her students. It was no doubt important to the Court's decision in *Tinker* that the prohibition at issue had not been promulgated by a classroom teacher, but rather by a system-wide meeting of the "principals of the Des Moines schools." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 504 (1969).

But *Widmar* did not follow through on its own insight. Although it explicitly recognized that a "university differs in significant respects from public forums such as streets or parks,"²⁵⁴ it nevertheless adopted and applied, without explanation or justification, the strict scrutiny test which the Court had developed in the context of streets and parks. The abrupt recourse to doctrinal formalism illustrates the intellectually crippling effects of contemporary public forum doctrine.

Taken together, *Widmar* and *Madison Joint School District* indicate that within public forum doctrine there are circumstances in which the Court will invest the government with managerial authority, and yet will not defer to the exercise of that authority.²⁵⁵ In the absence of deference, however, a court must independently evaluate the relationship between the regulation of speech and the attainment of institutional goals. As *Tinker* illustrates, this means that a court must perform an analysis similar in structure and intent to the "incompatibility" test of *Grayned*. Both *Grayned* and *Tinker* held that the government must bear the burden of demonstrating that the consequences of particular speech claims are so undesirable as to justify their denial.²⁵⁶ This allocation of the burden of proof follows from the important first amendment principle that the state ought to tolerate the maximum possible speech, consistent with its own orderly operation. At a minimum this principle implies that speech should not be suppressed unless there is a good reason for doing so, and

254. 454 U.S. at 267-68 n.5.

255. Consider in this light the cases in which the Court has determined that the public has a first amendment right of access to various judicial proceedings. See, e.g., *Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). These cases create strict rules for when a trial judge can exclude members of the public from various proceedings, and enforce these rules by independent appellate review. The implicit premise is that appellate review of such decisions will not impair a trial judge's managerial authority over her courtroom. In contrast, the Court has rejected as unduly impairing managerial authority a constitutional requirement for independent appellate review of a trial judge's decisions respecting the issuance of pretrial restraining orders. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

256. Although the Court made no formal statements to this effect in either *Madison Joint School Dist.* or *Widmar*, the outcome of those two cases is consistent with this conclusion. See also *Healy v. James*, 408 U.S. at 184.

this implication places the burden of persuasion squarely on the government.

2. The Object of Public Forum Doctrine

Because of its reliance on the *Davis* syllogism, the Court presently views public forum doctrine as concentrating "on the character of the property at issue."²⁵⁷ But the extraordinary similarities between public forum doctrine and the Court's decisions dealing with the internal management of speech suggest that the thrust of public forum doctrine lies in a different direction. Both lines of decisions involve the government's invocation of managerial authority to control speech. When that authority is called into question by the first amendment claims of a member of a government institution, we tend to conceptualize the issue as one of the internal management of speech; when it is called into question by the first amendment claims of a member of the general public, the same issue is conceptualized as a matter of public forum doctrine.²⁵⁸ Thus the core of public forum doctrine is a concern with the nature of managerial authority, rather than with the character of government property.

Public forum doctrine is invoked when members of the general public bring the scope of managerial authority into question. It is important to be clear, however, about what it means to bring managerial authority into question. If a newspaper editorializes that a City Council should give municipal employees an increase in salary, the editorial may well affect the Council's managerial relationship with its employees. But the editorial would not call the Council's managerial authority into question, and we would not even be tempted to view the editorial as raising issues of public forum doctrine. This is because the Council's authority over the newspaper is so clearly a matter of governance rather

257. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

258. It should be stressed that the question of who is and who is not a "member" of a government institution is itself problematic. For example, should participants in an open school board meeting be characterized as "members" of the organization created by the meeting, or as members of the general public? The difficulty of characterization afflicts even more formal kinds of organizations. In *Widmar*, for instance, the Court viewed the organizational connection between students and their university to be so dilute as to characterize the issue as one of public forum doctrine, thereby implying that the students were not "members" of the university.

than management. The limits of managerial authority are called into question only when those who are arguably subject to its control resist its direction, and hence render problematic its nature and reach. In public forum cases this characteristically occurs when members of the general public seek to use a resource over which the government claims managerial control.

The object of public forum doctrine, then, is the constitutional clarification and regulation of government authority over particular resources. Public forum cases require courts to decide whether a resource is subject to a kind of authority "like" that characterized by the government's relationship to a newspaper editorial, which is to say like that involved in the governance of the general public, or whether it is subject to a kind of authority "like" that characterized by the government's control over the internal management of its own institutions, which is to say to the authority of management. If the latter, the questions in a public forum case will concern the legitimate objectives of the managerial authority, the instrumental relationship between the attainment of those objectives and the regulation of speech, and the institutional impact of judicial review.

C. *Reformulating Public Forum Doctrine*

The foregoing analysis suggests that public forum doctrine is susceptible to a simple and helpful reformulation. From a constitutional point of view, there is a fundamental distinction between two kinds of authority: management and governance. Two distinct regimes of first amendment regulation correspond to these forms of authority. When the state acts to govern the speech of the general public, it is subject to the restrictions of what we would ordinarily think of as the "usual" principles of first amendment adjudication. Prior restraints are presumptively unconstitutional, as are viewpoint discrimination, official discretion, agenda setting, and so forth. These principles do not automatically apply, however, when the government manages speech within its own institutions. When acting with managerial authority, a government institution may to a significant degree control speech as necessary to attain its legitimate organizational goals, as these goals are understood by a court.

When a member of the general public seeks to use a resource for expressive purposes and the government claims to exercise managerial authority over the resource, the nature of the government's authority must be determined. If that authority is deemed to be a matter of governance, the resource will be viewed as a public forum, and the government will be constitutionally prohibited from controlling the use of the resource for speech except in ways permitted by ordinary first amendment principles. The great decisions of the 1930s and 1940s, in which the Court extended the protections of the first amendment to expression in streets and parks, should essentially be viewed as the Court's determination that despite the government's ownership of these resources, its authority over them was a matter of governance, rather than management.²⁵⁹ So interpreted, these decisions did not establish a "special position"²⁶⁰ for the public forum, but to the contrary assimilated it into the most general framework of first amendment analysis.

If, on the other hand, it is determined that the government may properly exercise managerial authority over the resource in issue, the question for judicial decision is whether the government's regulation of speech is necessary for the achievement of its legitimate institutional ends. If a court determines that it should decide this question, it must engage in an investigation analogous to that proposed by *Grayned*, placing upon the government the burden of demonstrating the necessity for the regulation. But a court has another option, which is to defer on this question to the judgment of institutional authorities. The primary justification for such deference is that the resource is subject to a kind of managerial authority that requires insulation from routine judicial oversight for its effective functioning.

As reformulated in this manner, public forum doctrine does not so much determine the outcome of particular cases, as orient courts toward the kind of reasoning whereby outcomes should be reached. The reformulation of the doctrine has several important advantages. It flows from the values and concerns which the history of public forum doctrine suggests have been the mainspring of the doctrine's

259. See *supra* notes 22-27 and accompanying text.

260. *United States v. Grace*, 461 U.S. 171, 180 (1983).

development, and yet it does so in a manner that sweeps away the Court's antiquated focus on the inherent "proprietary" power of the government and that avoids the vicious circularity of the Court's concentration on government intent. It abandons the Court's fruitless and frustrating quest to define the constitutionally "special position" of the public forum; and with respect to the nonpublic forum it avoids the mistake of crudely binding together questions of access and of equal access, instead subsuming both under a sensible and functionally oriented standard. The reformulation is firmly rooted in the practical problems of administering government institutions, and yet it is also grounded in contemporary constitutional jurisprudence. It maximizes the speech which government must tolerate, consistent with a sophisticated understanding of the necessities of organizational management and an appreciation of the social meaning of particular government institutions.

The reformulation will not of course magically dispel the difficult issues that underlie public forum adjudication, but it will orient courts toward inquiries which are defensible and productive. In the remaining three sections of this Article I will discuss in detail three of these inquiries: The distinction between governance and management; the distinction between structures of managerial authority which require judicial deference and those which do not; and the relationship between public forum doctrine and the prohibition against viewpoint discrimination.

IV. THE DISTINCTION BETWEEN MANAGEMENT AND GOVERNANCE

At present, public forum doctrine distinguishes public from nonpublic forums on the basis of a "long tradition" of use for "assembly and debate." The difficulty with this approach is that the Court has been unable to explain why such a tradition should have special constitutional consequences. As reformulated, however, public and nonpublic forums should be distinguished according to whether government authority over a resource is "like" that characteristic of the internal management of a state institution, or instead "like" that characteristic of the governance of the general public. The reformulation has the advantage of wearing its justification on its sleeve: if the state is governing the general public,

ordinary principles of first amendment jurisprudence should for that very reason be applicable; conversely, if the government is managing the internal affairs of its own institutions, general first amendment principles should be subject to the pressure of special administrative circumstances and undergo corresponding modification. The reformulation raises the question, however, of how to determine whether government authority over a resource is a matter of governance or of management.

A. *The Question of Institutional Boundaries*

This question has an immediate and almost irresistible answer, which is that governmental authority is a matter of management if a resource lies "within" a government organization, but that it is a matter of governance if a resource is located "outside" of the organization's boundaries. It is in fact quite difficult to think about the question of governmental authority without recourse to this spatial metaphor of organizational boundaries.

The problem is that the metaphor does not have any obvious analytic content. As a matter of private ordering, the boundaries of an organization are ordinarily understood to be fixed by consent. I am within an organization when I consent to recognize its authority over me.²⁶¹ But this understanding is not helpful in fixing the boundaries of government institutions for public forum doctrine, because the doctrine deals with governmental authority over resources rather than people, and because the state has the power to sweep resources and individuals into its organizations regardless of their consent.²⁶²

Another common way of thinking about organizational boundaries relates to the organization's power of action. As one study observes, "The organization is the total set of interstructured activities in which it is engaged at any one time and over which it has discretion to initiate, maintain, or end behaviors. . . . The organization ends where its discretion

261. H. SIMON, *ADMINISTRATIVE BEHAVIOR* 110-11 (1957).

262. See, e.g., Carlson, *Environmental Constraints and Organizational Consequences: The Public School and Its Clients*, in *BEHAVIORAL SCIENCE AND EDUCATIONAL ADMINISTRATION: THE SIXTY-THIRD YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION*, pt. II, 264-68 (D. Griffiths ed. 1964).

ends and another's begins."²⁶³ In the case of government organizations, however, this definition is also unhelpful, since state institutions possess the discretion of state power, and the extent to which this power may be exercised is precisely the constitutional issue to be determined.

Modern organization theory, moreover, has come to view "organizations as open systems," whose "boundaries must necessarily be sieves, not shells, admitting the desirable flows and excluding the inappropriate or deleterious elements."²⁶⁴ As a consequence boundaries "are very difficult to delineate in social systems, such as organizations."²⁶⁵ Depending upon one's perspective, one can view "suppliers, customers, inmates, and other types of persons" as "members" within "the organization's domain."²⁶⁶ The problem is further complicated by the fact that the dependence of organizations on their environment gives them incentives to reach out and extend their "control" over important external resources,²⁶⁷ thus pushing their already open boundaries into a state of constant motion.

The indeterminate boundaries characteristic of government institutions is well illustrated by *United States Postal Service v. Council of Greenburgh Civic Associations*,²⁶⁸ in which a civic association challenged the constitutionality of a federal statute prohibiting the deposit of unstamped "mailable matter" in the mailboxes²⁶⁹ of private individuals. The Court approached the case by concluding that the mailboxes were a nonpublic forum, and opining that:

[I]t is difficult to conceive of any reason why this Court should treat a letterbox differently for first amendment

263. J. PFEFFER & G. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* 32 (1978).

264. W.R. SCOTT, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* 180 (1981); see Freeman, *The Unit of Analysis in Organizational Research*, in *ENVIRONMENTS AND ORGANIZATIONS* 336-38 (M. Meyer & Associates eds. 1978).

265. Kast & Rosenzweig, *General Systems Theory: Applications for Organization and Management*, 15 *ACAD. MGMT. J.* 447, 450 (1972).

266. Aldrich, *Organizational Boundaries and Inter-organizational Conflict*, 24 *HUM. REL.* 279, 286 (1971); see C. BARNARD, *ORGANIZATION AND MANAGEMENT* (1948).

267. J. PFEFFER & G. SALANCIK, *supra* note 263, at 113; see J. THOMPSON, *ORGANIZATIONS IN ACTION* 39-44 (1967); cf. O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

268. 453 U.S. 114 (1981).

269. Mailboxes were defined as letter boxes "established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route." 18 U.S.C. § 1725 (1982).

access purposes than it has in the past treated the military base in *Greer v. Spock*, . . . the jail or prison in *Adderley v. Florida*, . . . and *Jones v. North Carolina Prisoners' Union*, . . . or the advertising space made available in city rapid transit cars in *Lehman v. City of Shaker Heights* In all these cases, this Court recognized that the first amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer v. Spock*, . . . the Court cited approvingly from its earlier opinion in *Adderley v. Florida*, . . . wherein it explained that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."²⁷⁰

The passage relies on precedents in which the government was exercising managerial authority over property which it unambiguously owned. The major premise of the *Davis* syllogism, whatever its intrinsic merits, was thus applicable to the facts of these precedents.

What is striking about the passage, however, is *Greenburgh's* effort to appropriate and rely on the premise. Since the mailboxes at issue in *Greenburgh* were purchased and owned by private individuals, this effort is plainly misguided. The government cannot seriously be said to have a proprietary relationship to privately owned mailboxes. But the real thrust of the *Greenburgh* opinion is not that the government is the proprietor of the mailboxes, but rather that the mailboxes should be viewed as part of the internal organization of the Postal Service. The opinion is quite explicit on this point, stating that the mailboxes are "an essential part of the Postal Service's nationwide system for the delivery and receipt of mail,"²⁷¹ and that they must be "under the direction and control of the Postal Service"²⁷² if the Service is "to operate as efficiently as possible a system for the delivery of mail."²⁷³ In effect, therefore, *Greenburgh* perceived the boundaries of the Postal Service as expanding outward to embrace the privately owned mailboxes of individuals, and hence concluded that the Service's regulation of access to these mailboxes should be regarded for constitutional purposes as a matter of managerial authority.

270. 453 U.S. at 129-30 (citations omitted).

271. *Id.* at 128-29

272. *Id.* at 126.

273. *Id.* at 133.

Although *Greenburgh's* conclusion is clear enough, it is far from obvious how the conclusion may be rationally assessed. The usual markers of organizational boundaries — consent and power — offer virtually no guidance in evaluating *Greenburgh's* expansive perception of the institutional boundaries of the Postal Service.

B. *Criteria for Distinguishing Management from Governance*

The Court's decisions addressing the internal management of speech have uniformly concluded that within a government organization expression may be controlled so as to achieve institutional ends.²⁷⁴ This conclusion reflects the perception that in our culture the domain of an organization is one of "instrumental orientation,"²⁷⁵ in which "organization goals" are taken as "value premises."²⁷⁶ The function of an organization is to implement these premises, not to question them, and within its boundaries people and resources are arranged so as to attain this objective. Outside of this organizational domain, however, lies a public realm in which the attainment of institutional ends is taken to be a relevant, but not controlling consideration. In the public realm, assertions of value are not accepted as "premises," but rather are recognized as claims subject to evaluation and assessment. In "public life . . . we jointly, as a community, exercise the human capacity 'to think what we are doing,' and take charge of the history in which we are all constantly engaged by drift and inadvertence."²⁷⁷ In a democracy like our own, the public realm coincides with the arena in which common values are forged through public discussion and exchange.

274. See *supra* notes 223–29 and accompanying text.

275. R. DENHARDT, *supra* note 216, at 38. Talcott Parsons, for example, has written that "the defining characteristic of an organization which distinguishes it from other types of social systems" is its "*primacy of orientation to the attainment of a specific goal.*" Parsons, *Suggestions for a Sociological Approach to the Theory of Organizations–I*, 1 ADMIN. SCI. Q. 63, 64 (1956). Or, as Charles Perrow has more simply written, "Organizations are established to do something; they perform work directed toward some end." C. PERROW, ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW 133 (1970).

276. H. SIMON, D. SMITHBURG & V. THOMPSON, PUBLIC ADMINISTRATION 82 (1950).

277. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 344 (1981).

From a constitutional perspective, then, the distinction between management and governance turns on the priority accorded to proposed objectives. If government action is viewed as a matter of internal management, the attainment of institutional ends is taken as an unquestioned priority.²⁷⁸ But if it is instead viewed as a matter of governance, the significance and force of all potential objectives are taken as a legitimate subject of inquiry. The facts of *Greenburgh* nicely illustrate the difference. To conceptualize the mailboxes as a nonpublic forum "within" the organization of the Postal Service implies that they are a resource at the Service's disposal, and that they can and should be instrumentally manipulated so as most efficiently to achieve the Service's explicit and legitimate goals. To conceptualize the mailboxes as a public forum "external" to the organization of the Service, on the other hand, implies that the attainment of these goals cannot automatically commandeer the use of the mailboxes, and that the Service's claims must be evaluated in light of other competing social interests in the mailboxes' use.

In our democracy the accommodation of competing values occurs through a process of public discussion, a process which is constituted and guarded by general principles of first amendment jurisprudence. These principles characteristically balance or weigh institutional interests, like those asserted by the Postal Service in *Greenburgh*, against the social value of maintaining first amendment rights and hence the very process of public discussion. The *Schneider* case is an early and explicit example of such balancing, where the government's interest in preventing litter was held insufficient to justify an ordinance prohibiting the distribution of pamphlets.²⁷⁹ The implication of such balancing, however, is that in specific circumstances particular institutional objectives can justifiably limit first amendment rights. If an institutional objective is of sufficient importance, and if the appropriation of a public resource is sufficiently necessary to the attainment of the objective, first amendment principles may well permit rights of free expression respecting the resource to be subordinated in carefully limited kinds of

278. Of course a court can and must ultimately determine for itself the nature of a government organization's legitimate institutional ends.

279. See *supra* notes 18-20 and accompanying text.

ways.²⁸⁰ But first amendment principles are designed to ensure that this subordination will always be provisional, the result of a hard fought clarification of competing public values, and that it will never be, so to speak, a matter of course.

This analysis of the constitutional distinction between management and governance is helpful in giving analytic content to the metaphor of organizational boundaries. These boundaries partition off from a public realm a special domain of instrumental action. The limits of that domain are marked by the very instrumental social practices by which organizations are constituted. This can be seen in Sigmund Diamond's study of the early history of Virginia, *From Organization to Society: Virginia in the Seventeenth Century*.²⁸¹ In its early years the Jamestown colony of Virginia had not been established as a "colony" or "political unit," but rather as "the property of the Virginia Company of London," whose objective was to "return a profit to the stockholders of that company."²⁸² The Company was "governed administratively through a chain of command originating in the Company's General Court."²⁸³ From the point of view of the

280. *Greenburgh* is a muddy case because the Court plainly intimated in its footnotes that the statute at issue would survive challenge even if analyzed under such general first amendment principles. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6, 131 n.7 (1981). Indeed Justice Brennan concurred separately on precisely these grounds. *Id.* at 134 (Brennan, J., concurring). In the end, therefore, it made no difference to the Court's actual decision whether mailboxes were or were not conceptualized as a public forum. See M. NIMMER, *supra* note 2, § 4.09[D] at 4-74-4-75.

An example of the Court finding that the attainment of institutional ends should take priority over other uses of a resource, even though the resource is subject to the authority of governance, rather than management, can be found in the recent decision of *Regan v. Time, Inc.*, 468 U.S. 641 (1984), in which the Court upheld restrictions on the photographic reproduction of United States currency. The restrictions were designed "to avoid creating conditions which would 'facilitate counterfeiting.'" *Id.* at 644. Another more venerable example is *Cox v. Louisiana*, 379 U.S. 559 (1965), in which the Court upheld against facial attack a Louisiana statute prohibiting picketing or parading "in or near a building housing a court of the State of Louisiana" with "intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty." *Id.* at 560. The Court reasoned that because the statute was "precise" and "narrowly drawn," and that because "it is of the utmost importance that the administration of justice be absolutely fair and orderly," a "State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." *Id.* at 562.

281. 63 AM. J. SOC. 457 (1958).

282. *Id.* at 459.

283. *Id.* at 471-72.

General Court, the Virginia settlers "were not citizens of a colony; they were the occupants of a status in—to use an anachronistic term—the Company's table of organization."²⁸⁴

The regulation of social life in Jamestown was designed solely to achieve the Company's objective, and it consequently "stripped from people all attributes save the one that really counted in the relationship which the Company sought to impose on them — their status in the organization."²⁸⁵ But as the social life of Jamestown grew more populous and complex, and as individuals began to recognize in each other statuses outside of those instrumentally imposed by the Company,²⁸⁶ institutional roles became less important to the settlers.²⁸⁷ As a consequence the settlers "were no longer willing to accept the legitimacy of their organizational superiors,"²⁸⁸ and "the burden of achieving order and discipline . . . became the responsibility not of an organization but of a society."²⁸⁹ The emergence of this society was marked by the development of an "authentic political system" in which the diverging values and objectives of the colonists were resolved.²⁹⁰

284. *Id.* at 462.

285. *Id.* at 468.

286. Diamond notes:

At one time in Virginia, the single relationship that existed between persons rested upon the positions they occupied in the Company's table of organization. As a result of the efforts made by the Company to get persons to accept that relationship, however, each person in Virginia had become the occupant of several statuses, for now there were rich and poor in Virginia, landowners and renters, masters and servants, old residents and newcomers, married and single, men and women; and the simultaneous possession of these statuses involved the holder in a network of relationships, some congruent and some incompatible, with his organizational relationship.

Id. at 471.

287. Diamond concludes that:

The ultimate stage in the transition of Virginia from organization to society was reached when the settlers came to feel that the new relationships in which they were now involved were of greater importance than the Company relationship, when their statuses outside the organization came largely to dictate their behavior.

Id. at 473.

288. *Id.*

289. *Id.* at 474.

290. *Id.* at 472.

What is most interesting about Diamond's work is the suggestion that the transition from organization to society was constituted by a change in social practices. The settlers of Jamestown who lived within an organization had their roles and statuses functionally defined by the Virginia Company; the settlers who participated in a society enjoyed a wide variety of divergent roles and statuses that could not be said to be instrumentally arranged. The emergence of a political system depended upon the growth of a social system that was sufficiently complex as to engender in its members diverse roles, values and expectations. This symbiotic relationship between diversity and a public realm illuminates why we view that realm as an arena in which conflicting values and expectations are recognized, legitimated, and accommodated.²⁹¹ The instrumental rationality of an organization, on the other hand, is hostile toward this diversity, and requires that the various roles and statuses of its members be subordinated toward the achievement of institutional objectives. Organizations thus strive to ensure that "their personnel should not be influenced by extra-organizational factors,"²⁹² and they attempt functionally to define for their members specifically organizational roles that

291. Paradoxically, as Hannah Arendt writes, the "public realm, as the common world, gathers us together," and yet the "reality of the public realm relies on the simultaneous presence of innumerable perspectives and aspects in which the common world presents itself and for which no common measurement or denominator can ever be devised." H. ARENDT, *supra* note 9 at 48, 52.

292. C. PERROW, *supra* note 275, at 51. Of course this effort can only be partially successful, since

the ideal organization does not exist. One major reason is that the people who perform organizational tasks must be sustained by factors outside the organization. The organization is not the total world of the individual; it is not a society. People must fulfill other social roles; besides, society has shaped them in ways which affect their ability to perform organizational tasks. A man has a marital status, ethnic identification, religious affiliations, a distinctive personality, friends, to name only a few. Today it is customary to call management's attention to the fact that they are dealing with whole persons, rather than with automatons, and that therefore they should be sensitive to human relations. It is less often acknowledged, however, that a great deal of organizational effort is exerted to *control* the effects of extra-organizational influences upon personnel. Daily, people come contaminated into the organization.

Id. at 52.

predominate over the multiple roles and statuses characteristic of the general society.²⁹³

This analysis suggests that for constitutional purposes an organization's boundaries can be recognized by the predominance of functionally defined organizational roles. If a resource is embedded in social practices that are constituted by such organizational roles, the resource can be said to lie within an organization. It is a nonpublic forum and subject to the exercise of managerial authority. On the other hand, if a resource is used by individuals occupying widely different roles and statuses, with correspondingly divergent values and expectations, the resource lies in the public realm, and the state's authority over it is a matter of governance. The resource is a public forum.

C. *Four Examples*

This way of understanding the distinction between public and nonpublic forums may seem a bit abstract, but it in fact yields concrete and useful results, as can be seen by the analysis of four examples. Consider, first, what underlies the Court's perception of the public forum status of streets and parks. Streets and parks are part of the experience of all citizens. We ordinarily use streets and parks in a wide variety of roles and statuses, and hence we subject them to an enormous diversity of competing demands and uses. No one of these uses has automatic priority.²⁹⁴ Officials who regulate streets, for example, are normally torn between facilitating efficient vehicle traffic and accommodating the concededly legitimate demands of those who want to conduct parades, funerals, block parties, or festivals.²⁹⁵ It is this fact,

293. See, e.g., H. SIMON, D. SMITHBURG & V. THOMPSON, *supra* note 276, at 79-82.

294. The very exceptions to this rule illustrate the basic point. Some federal parks, for example, are dedicated to the primary goal of wilderness preservation. If these parks are not in fact subject to competing demands and uses, they are not public forums, despite the Court's generalizations about "streets and parks." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). For this reason speech within such parks may be managed in ways necessary for the attainment of the goal of wilderness preservation, as for instance by prohibiting political demonstrations.

295. See, e.g., Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U.L. REV. 937, 954-56 (1983). To the extent that public behavior with respect to any particular street is oriented toward a single, paramount goal, however, the street is not a public forum. California free-

and not a tradition of public usage for expressive purposes, which underlies the Court's firm and correct conclusion that streets should be seen as public forums.²⁹⁶ The accommodation of the conflicting objectives to which we subject our streets is a matter of public governance, and hence must be evaluated according to the constitutional principles appropriate for such governance. It is especially fitting that streets have traditionally been used for the conduct of that public discussion and exchange by which public governance is ultimately constituted, but this use, like any other, cannot receive unquestioned priority.

The multiplicity of competing roles and expectations characteristic of streets and parks should be contrasted to the social practices surrounding the advertising cards at issue in *Lehman*. There was never any reasonable expectation that the cards were to be made available to the public on any grounds other than those financially or otherwise useful to the rapid transit system. The only role in which the advertising space could be purchased was that of a consumer, and that role was in all pertinent respects functionally defined by the transit system. For this reason the Court was correct in concluding that the cards were not a public forum.

Greenburgh presents a theoretically more interesting decision, for in that case the federal government had attempted by the enactment of a criminal statute to change the social practices associated with mailboxes. Anyone who has unthinkingly dropped a note in a friend's mailbox knows, however, that in everyday life mailboxes are subject to uses other than simply the deposit of stamped mailable matter, which is but another way of saying that we use mailboxes all the time in roles other than those specifically defined by the Postal Service. The government's effort to alter these practices has not been successful. For this reason the Court's decision in *Greenburgh* was incorrect: the mailboxes should have been regarded as a public forum, and the constitution-

ways, for example, are designed and used for the explicit objective of facilitating rapid vehicle traffic. The freeways are therefore not a public forum, and claims to use the freeways for expressive purposes—for demonstrations or for leafletting on their shoulders—should be evaluated in terms of their impact on the freeways' objective.

296. Of course a tradition of public use for expressive purposes can be highly probative of the conclusion that streets and parks are legitimately subject to a variety of competing uses.

ality of the government's effort to restrict access to them evaluated as if it were a restriction on the speech of the general public.²⁹⁷

The analysis of a fourth and final example will illustrate the complexities of distinguishing between management and governance. In *Greer*, members of a political party sought access to the "areas of Fort Dix open to the general public"²⁹⁸ for the purpose of holding demonstrations and handing out leaflets. Civilians "without any prior authorization" were not only "regular visitors" to these "unrestricted areas," but they also "regularly pass[ed] through" them "either by foot or by auto, at all times of the day and night."²⁹⁹ Although the record is not perfectly clear, if these areas were, from a civilian's point of view, like "any public street,"³⁰⁰ and so subject to conflicting uses and roles, then the areas should have been regarded as a public forum, and the government's attempt to restrict speech within them evaluated according to ordinary first amendment principles. The military could no more convert them into a managerial domain by simple fiat than could the Postal Service transform private mailboxes into nonpublic forums by simple decree.

What complicates the situation in *Greer*, however, is that the plaintiffs in the case had sought access to the areas in order to meet "with service personnel."³⁰¹ The issue posed by *Greer* is thus not merely the nature of the military's authority over the open areas of Fort Dix, but also the nature of the military's control over its own service personnel. Whether or not this control should be viewed for first amendment purposes as managerial in nature does not depend at all upon the distinction between public and nonpublic forums, or upon the social practices of members of the general public, but rather upon a substantive analysis of

297. It does not follow, of course, that the Court's judgment upholding the constitutionality of 18 U.S.C. § 1725 is incorrect, since the statute could plausibly be upheld even under ordinary principles of first amendment jurisprudence. See *supra* note 280.

298. 424 U.S. 828, 834 (1976).

299. *Id.* at 851 (Brennan, J., dissenting).

300. *Flower v. United States*, 407 U.S. 197, 198 (1972); see *Greer*, 424 U.S. at 850-51 (Brennan, J., dissenting).

301. 424 U.S. at 832.

the prerogatives of military authority vis-à-vis military personnel.

The relationship between a government institution and its members is not a question that we have so far discussed in any detail, but in *Pickering v. Board of Education*³⁰² the Court held that this relationship can at a certain point cease to be managerial in nature. In that case the Court ruled that in some circumstances the interest of a school board in controlling a teacher's written communication with a newspaper was "not significantly greater than its interest in limiting a similar contribution by any member of the general public," and hence that the constitutionality of the sanctions imposed on the teacher should be evaluated according to ordinary first amendment principles.³⁰³ *Pickering* suggests that the question of whether the restrictions on speech imposed in *Greer* should be viewed as a matter of management or of governance turns on whether the military's interest in controlling access to servicemen in the open areas of the Fort is so attenuated as to be not "significantly greater than its interest" in controlling the speech of members of the general public in those areas.³⁰⁴

Whether or not *Pickering's* approach is ultimately adopted, the lesson of *Greer* is that not every first amendment claim by members of the general public which calls managerial authority into question turns on questions of public forum doctrine. While it is true that the Court should have concluded that the military's authority over the open areas of the Fort involved matters of governance, rather than management, the ultimate ability of the military to control the plaintiffs' access to those areas depended upon the

302. 391 U.S. 563 (1968).

303. *Id.* at 573. The Court held that "in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be." *Id.* at 574. For this reason the Court adopted the test created in *New York Times v. Sullivan*, 376 U.S. 254 (1964), for application to the general public, and held that the teacher could not be punished "absent proof of false statements knowingly or recklessly made by him." 391 U.S. at 574.

304. On this question the Court in *Greer* tells us only that "members of the Armed Forces stationed at Fort Dix are wholly free as individuals to attend political rallies, out of uniform and off base. But the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates." 424 U.S. at 839.

quite different nature of the military's authority over its own personnel. The final irony of *Greer* is that the decision which established the framework of contemporary public forum doctrine did not itself ultimately depend upon the distinction between public and nonpublic forums, but rather on the reach of government's managerial authority over the members of its own institutions.

D. *The Meaning of "Public" in Public Forum Doctrine*

Public forum doctrine is conventionally, although inaccurately, understood to be pertinent only when the public seeks to use government property for expressive purposes.³⁰⁵ This focus on property has disoriented the Court's conceptualization of public forum doctrine, for it has led the Court to conceive the public forum in terms of the opposition between the public and the private, rather than in terms of the opposition between the public and the specifically instrumental.

Property is traditionally associated with a sphere of personal and private freedom, in which the individual, "as against the Government,"³⁰⁶ has the right to be "let alone"³⁰⁷ to enjoy "personal security, personal liberty and private property."³⁰⁸ "One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all

305. See, e.g., *Board of Airport Comm'rs v. Jews for Jesus*, 107 S. Ct. 2568, 2571 (1987); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 814-15 (1985) (Blackmun, J., dissenting); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); Cass, *supra* note 7, at 1287-88; Werhan, *supra* note 7, at 338; Note, *Public Forum Analysis*, *supra* note 7, at 545.

Despite the received wisdom, cases like *Greenburgh* illustrate that public forum doctrine can be applied to resources which the government does not in fact own. *Cornelius* has recently attempted to capture this insight by observing that public forum theory is pertinent whenever a "speaker" seeks "access to public property or to private property dedicated to public use." 473 U.S. at 801. The traditional focus on ownership, however, is evidence of the extreme suspicion with which government claims to manage the speech of the general public are regarded. It is a sign that such claims will not even be entertained unless the government can demonstrate some special and close relationship with a resource that members of the general public wish to use for expressive activity.

306. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

307. *Id.*

308. *Id.* at 474-75.

likelihood have a legitimate expectation of privacy by virtue of this right to exclude."³⁰⁹ From its inception public forum doctrine has associated the "nonpublic" with this image of specifically "private" freedom. *Davis* analogized the government to "the owner of a private house,"³¹⁰ and *Adderley*, in language that has been continually repeated, compared the state to "a private owner of property."³¹¹ It is simply self-contradictory, however, to claim for the government the prerogatives of a sphere of personal privacy, because the government cannot intelligibly claim that it should be "let alone" from its own processes.

It makes sense, on the other hand, to conclude that there are situations in which government can and must organize itself to act through institutions in an instrumental fashion. Such action proceeds toward the attainment of partial ends determined by the value premises of a particular institution, in contrast to the achievement of public ends determined by the community "as a whole."³¹² In the context of public forum doctrine, then, the opposite of the "public" is not the "private," but rather the specifically instrumental.³¹³

Public forum doctrine rests on the distinction between a public realm, in which social values and ends are constituted, and organizational domains, in which these values are taken as premises and implemented. The distinction calls to

309. *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978).

310. 167 U.S. 43, 47 (1897).

311. 385 U.S. 39, 47 (1966); see, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S. 171, 178 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *United States Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976). In *Lebman v. City of Shaker Heights*, Justice Blackmun evoked the metaphor of a private "commercial venture," like any other "newspaper or periodical, or even . . . radio or television station." 418 U.S. 298, 303 (1974). On the influence of the metaphor of private property on public forum doctrine, see Stone, *supra* note 7, at 87.

312. F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 71 (1985).

313. There is, however, a variant usage of the phrase "public forum" in which it does make sense to contrast the public forum with a sphere of personal privacy. In that usage the phrase designates private property which has become so embued with public functions as to become subject to the constitutional limitations placed upon state action. See *Hudgens v. NLRB*, 424 U.S. 507, 538-43 (1976) (Marshall, J., dissenting); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 134 (1973) (Stewart, J., concurring); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 573 (1972) (Marshall, J., dissenting).

mind the difference between what Jürgen Habermas has called a social framework of "symbolic interaction," and a social framework "of purposive-rational action."³¹⁴ The latter is aimed at the realization of "defined goals under given conditions"; the former at the creation of "consensual norms, which define reciprocal expectations about behavior."³¹⁵ The analogy cannot be pressed too far, however, and that for two reasons.

First, government action in the public realm must at times also be instrumental,³¹⁶ and so the ordinary principles of first amendment jurisprudence which govern the public realm must both facilitate such action and yet simultaneously cabin it so that it will not impede the more fundamental processes of symbolic interaction. Second, government action within organizational domains is at times designed for the specific purpose of facilitating symbolic interaction, as occurs, for example, in courtrooms and universities.

Habermas' distinction is helpful, however, because it reminds us that the public realm *must* retain the ability to foster symbolic interaction and cannot be dedicated entirely to purposive-rational action. And, conversely, it forces us to recognize that when organizational domains foster symbolic interaction, they do so for a purpose that frames and limits such interaction. Paradigmatic of such limitations are the restrictive rules of evidence and speech characteristic of a court. One can expect these limitations to be more severe when organizational purposes are narrow and specific, and to be more generous when organizational purposes are broad and diffuse.

The most analytically interesting example of an institution designed to foster symbolic interaction is the town meeting, whose very purpose is the creation of a forum for public discourse and decisionmaking. Even that constitutionally benign purpose, however, when implemented through the authority of a moderator, has the power to limit speech through the imposition of agendas and rules of order and decorum. Many of these limitations are plainly contrary to ordinary first amendment principles.

314. J. HABERMAS, TOWARD A RATIONAL SOCIETY 92-93 (1971).

315. *Id.* at 92.

316. See *supra* notes 279-80 and accompanying text.

This suggests that underlying public forum doctrine lies the notion of public discourse and decisionmaking which occurs without government purpose or design. The stubborn persistence of Justice Holmes' famous metaphor of a marketplace of ideas, despite its many deficiencies, may perhaps be attributed to the fact that it is a precise expression of this notion. The metaphor assumes that public opinion will be formed through a spontaneous process of exchange and communication. Without central planning or design, the market evaluates the partial purposes of the organizations that compete within it. The paradox, of course, is that the market is itself sustained by government rules of interaction. In the economic sphere these rules include the law of property and contracts; in the sphere of communication they include the principles of the first amendment.

The concept of the "public" in public forum doctrine, then, is extraordinarily complex. In part it refers to government facilitation of symbolic interaction. This facilitation, however, must be of a particular kind. If it is oriented toward the achievement of particular purposes or goals, the government's intervention will be perceived as creating a nonpublic forum like a courtroom or a university. The facilitation must instead be passive enough to be appropriated and used by purely private purposes. This points toward a conclusion whose irony should not be missed: in the end the public realm created by public forum doctrine is nothing other than a governmentally protected space for the achievement of private ordering. The irony, of course, has a final twist, for in a democracy like our own private ordering is the very stuff of public will.

E. *The Authority of Social Practices*

The reformulation of public doctrine which I have proposed characterizes a resource as a public or nonpublic forum depending upon the social practices within which it is embedded. Social practices are thus determinative of whether the first amendment claims of members of the general public seeking to use the resource will be evaluated according to the standards of governance or those of management. Ceding this kind of authority to social practices raises two theoretical anomalies that require further attention.

1. The Malleability of Social Practices

The first anomaly is that social practices are themselves partly the result of government action, so that if the state truly wishes to exercise managerial authority over speech, it need only alter these practices in a manner that would justify such authority. Since it is always open to the government to “expand” its organizational boundaries to include a particular resource, keying the definition of a public forum to social practices must in some sense be viewed as circular.

While the descriptive accuracy of this anomaly should be acknowledged, its force as an objection to the proposed account of public forum doctrine depends in large measure upon the function that one expects the doctrine to serve. As reformulated in this Article, the doctrine permits the state to manage speech within its own institutions, but it prohibits the state from attempting to manage the first amendment claims of members of the general public respecting resources that lie within the public realm. Thus the doctrine requires that the Postal Service’s regulation of private mailboxes meet the constitutional standards associated with governance, which is to say that it must pass muster under ordinary principles of first amendment adjudication. For the Postal Service legitimately to assert managerial authority over private mailboxes, the proposed reformulation of public forum doctrine would require the Service to do more than simply assert such authority. The Service would have to fundamentally alter the roles, expectations, and behavior which envelop the use of mailboxes, as for example by placing mailboxes under lock and key controlled by Service personnel. That the doctrine does not itself prohibit the Service from transforming conduct in this way can count as an objection only on the assumption that public forum doctrine should contain within it principles for restraining the expansion of government institutions.

A recent decision in which the Court expressed this assumption is *United States v. Grace*,³¹⁷ in which the Court considered the constitutionality of a congressional statute that prohibited on the sidewalks surrounding the Supreme Court building the “display [of] any flag, banner, or device designed or adapted to bring into public notice any party,

317. 461 U.S. 171 (1983).

organization, or movement.”³¹⁸ The Court held that the sidewalks on the perimeter of its building were a public forum because they were “indistinguishable from any other sidewalks in Washington, D.C.,” and because sidewalks were in general “public forum property.”³¹⁹ The Court then proceeded to use a rather traditional first amendment analysis to strike down the statute on the grounds that it did “not sufficiently serve those public interests that are urged as its justification.”³²⁰ What is fascinating about the decision, however, is that in the course of rejecting the contention that the statute had somehow altered the public forum status of the sidewalks, the Court said:

In *United States Postal Service v. Greenburgh Civic Assn.'s.*, 453 U.S. 114, 133 (1981), we stated that “Congress . . . may not by its own *ipse dixit* destroy the ‘public forum’ status of streets and parks which have historically been public forums” The inclusion of the public sidewalks within the scope of § 13k’s prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of first amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.³²¹

The Court thus appeared to include within contemporary public forum doctrine a principle prohibiting the government from expanding its boundaries to include resources that were previously within the public realm.

It is important to note, however, that the Court’s enunciation of this principle was entirely by way of dicta. The statute at issue in *Grace* could no more destroy “the public forum status” of the Court’s sidewalks than could the statute at issue in *Greenburgh* destroy the public forum status of private mailboxes. Contemporary doctrine holds that public forum status depends upon whether a resource has “tradi-

318. *See id.* at 175; 40 U.S.C. § 13k (1986).

319. 461 U.S. at 179.

320. *Id.* at 181.

321. *Id.* at 180.

tionally . . . been held open to the public for expressive activities.”³²² Under the reformulation proposed in this Article, public forum status depends upon the social practices in which a resource is embedded. In either case public forum status is determined as of the situation prior to the attempted regulation of the resource. On no account, therefore, would the statute at issue in *Grace* be determinative of the public forum status of the Court’s sidewalks.

In asserting that “the destruction of public forum status” is “presumptively impermissible,” then, the Court was reaching out beyond the facts of the case and articulating a principle that would prohibit the state from regulating conduct in such a way as to justify *the future* exercise of managerial authority with respect to a resource presently in the public realm.³²³ So stated, however, the principle appears simply unjustifiable. As a general matter, resources from the public realm ranging from pen and ink to typewriters are incorporated all the time into the managerial domain of state institutions. A principle that would make “presumptively impermissible” the conversion of parkland into an office building would seem implausible on its face.

Of course there are times when the destruction of public forum status does have significant first amendment implications. Suppose, for example, that threats of terrorist attack led the government to block off the sidewalks around the Supreme Court and to permit entrance only with a special pass issued by the Court. In effect the government would have altered the roles and expectations of those using the sidewalks in such a way as to bring the sidewalks within the institutional boundaries of the Court building. The future regulation of speech on the former sidewalks would thus be evaluated by the criteria appropriate for managerial authority. If it is assumed that the transformation of the sidewalks in fact terminated significant communicative activity, including demonstrations, picketing, parades, and the like, the

322. *Id.* at 179.

323. It should be emphasized that the Court’s remarks were doubly dicta, since § 13k was not such a statute. Section 13k regulated certain limited aspects of the speech of the public, but not its conduct, so that even if § 13k were enforced the public would continue to use the Court’s sidewalks in a wide variety of roles and expectations, and the sidewalks would thus continue to be a public forum.

transformation could raise important first amendment questions.

The issue, however, is whether these questions should be addressed through the medium of public forum doctrine. The questions are no different than those raised whenever government action adversely affects the exercise of first amendment rights, and as such are similar to those addressed all the time by ordinary principles of first amendment adjudication. Thus in determining the constitutionality of the government's proposed transformation of the Court's sidewalks, one can expect a court to consider the list of factors normally brought to mind by these principles,³²⁴ including the gravity of the terrorist threat, the extent to which that threat will be averted by the proposed transformation, the nature and extent of the impact of the transformation on the exercise of first amendment rights, the availability of alternative means of exercising those rights, and so forth. Public forum doctrine cannot contribute anything to this analysis. This is because public forum doctrine concerns the generic characteristics of government authority, whereas the constitutionality of the sidewalks' transformation turns on the specific historical justifications and implications of that transformation.

To put the point more generally, the destruction of public forum status may or may not raise significant first amendment questions, depending upon the specific circumstances of the destruction. The evaluation of these circumstances is a matter for determination by the ordinary principles of first amendment adjudication. It is implausible to assert, therefore, that public forum doctrine should contain within it a general axiom that the destruction of public forum status is "presumptively impermissible." The fact that government action may change the social practices determinative of public forum status does not so much make public forum doctrine circular, as illustrate that it is incomplete. Although the state may shut down public forums, it can only do so in ways that themselves conform to the general requirements of the first amendment.

324. Ordinary principles of first amendment adjudication apply because by hypothesis the government's proposed transformation applies to sidewalks that are, *ex ante*, a public forum.

2. Social Practices and Constitutional Principles

The second theoretical anomaly which arises from the proposed reformulation of public forum doctrine concerns the relationship between social practices and constitutional principles. Although the existence and nature of constitutional rights sometimes explicitly depend upon social practices,³²⁵ it is far more common to view these practices as themselves normatively shaped and guided by constitutional principles. By making public forum status dependent upon social practices, however, the proposed reformulation of public forum doctrine removes the doctrine as a source of such legal guidance. It does not permit a court to say, for example, that even though a particular resource is in fact within a state organization and so subject to managerial authority, the resource *should* nevertheless be viewed as within the public realm and hence regulated only according to the standards of governance. Conversely, the doctrine prohibits a court from concluding that the government *should* be able to manage a resource that is in fact located within the public realm. These constraints appear on their face anomalous, particularly in the first amendment area where we commonly view courts as having the affirmative responsibility of independently evaluating the legitimacy of social practices.³²⁶

Whether the anomaly counts as an objection to the proposed reformulation of public forum doctrine, however, depends upon whether attractive alternative principles that are not dependent upon social practices can be offered in order to determine when members of the general public can use institutional resources for communicative purposes. Since there are a potentially endless number of such alternative principles, the anomaly is not a question that can ever be put to rest. It is instead appropriate and even necessary to continually scan the horizon for the appearance of superior constitutional principles.

325. See, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982); *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

326. The anomaly, of course, is also present in contemporary public forum doctrine, for that doctrine views historical social practices as authoritative criteria for the determination of the public forum status of government property.

The most that can be said, then, is that in light of the alternative principles currently available, it is wisest for courts to view social practices as authoritative. Even this softer proposition cannot be definitively established, however, because we are enveloped by an indefinite number of such principles. One response needs to be given to the individual who argues that the government should be free to manage speech whenever necessary; a different response to the person who argues that speech should everywhere be governed;³²⁷ and so on. There can be no general demonstration of the superiority of the appeal to social practices.

The strength of that appeal can be illustrated, however, by comparing it to a plausible competitor — call it the “Free Speech Principle” — which would hold that members of the general public can use resources for communicative purposes whenever necessary for the communicative structure prerequisite for our democracy.³²⁸ In the class of cases dealing with the first amendment claims of those seeking to use for communicative purposes a resource lying within a government organization, the Principle would have a court inquire into the importance of the speech for the maintenance of public discourse; public forum doctrine, on the other hand, would have a court ask whether the claims are compatible with the achievement of organizational purposes. Thus a major difference between the two approaches is that the Principle would countenance disruption of the social practices by which organizations are constituted as instrumental domains for the achievement of institutional goals.

Of course this disruption is not by itself a sufficient reason to reject the Principle. It might be argued, for example, that in *Brown v. Board of Education*³²⁹ the Court was willing to countenance the disruption of a good many social practices in order to achieve the constitutional value of racial equality. In *Brown*, however, the social practices that were disrupted were those of segregation, which was the precise evil that was constitutionally condemned. Segregative practices were deemed irrelevant, as a matter of constitutional law, “to the

327. See, e.g., Note, *A Unitary Approach*, *supra* note 7, at 143–47.

328. See, e.g., D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 219–21 (1986).

329. 347 U.S. 483 (1954).

achievement of any legitimate state interest.”³³⁰ The Free Speech Principle, on the other hand, would disrupt the very social practices that concededly enable the state to achieve constitutionally proper and desirable purposes. Since it would not be credible to argue that first amendment claims should always and in every circumstance take precedence over the attainment of these purposes, a Free Speech Principle very quickly moves to a position of balancing, in which the protection of expression is weighed against the state’s ability to pursue other ends.

Inherent in this balancing, however, is an acknowledgment that the social practices by which organizational domains are constituted have normative constitutional force. The modification of the Principle thus moves it a fair distance in the direction of the proposed reformulation of public forum doctrine. But proponents of the Principle would contend that while public forum doctrine completely subordinates courts to the instrumental reasoning constitutive of organizational domains, the Principle reserves for courts the ability to balance, and hence to retain an appropriate and necessary independence from that reasoning. The difficulty with the Principle becomes apparent, however, when its proponents are forced to specify the exact content of this independence.

Suppose, for example, that the members of a political party wish to hold a rally in support of their candidate in an upcoming election within the office building of a government bureaucracy. Public forum doctrine would have a court ask whether the rally would interfere with the ability of the bureaucracy to attain its ends. Proponents of the Free Speech Principle would want in addition to empower a court to engage in other inquiries. But what inquiries? Is it truly relevant that the pertinent speech is “expression on public issues” and hence occupies “the highest rung of the hierarchy of first amendment values?”³³¹ Or that the upcoming election is close, so that the demonstration might actually make a difference to its outcome? Or that holding the rally in the building is the most cost-effective way of reaching

330. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

331. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

government workers, to whom the party wishes particularly to appeal?

These inquiries seem somehow without conviction. They are an unexceptional example of ad hoc balancing, and yet in this context appear to be abstract and arbitrary. The reason turns on the distinction between the public realm and an organizational domain. Determining first amendment rights by ad hoc balancing seems legitimate in the public realm because speech in that realm is the very means by which social consensus is constituted, so that every consensus in that realm must in some sense be regarded as provisional. Ad hoc balancing reflects the precarious nature of such consensus. It invites "the expression and examination of doubts and disagreements" and "solicits future conversation, by allowing for resolution of this case without predetermining so many others that one 'side' experiences large-scale victory or defeat."³³²

Within organizational domains, however, determining first amendment rights by ad hoc balancing assumes a very different character. This is because in such domains consensus is not experienced as provisional. When we create an organization to achieve a goal, we signify that a decision has been reached and that it is not open for further discussion, but is instead meant to be implemented. Within organizational domains objectives are taken as value premises. The very existence of an organization reflects a wide and fixed social consensus that its resources be used for instrumental purposes. This consensus does not merely subsist in official pronouncements, but is enacted in social practices. A government bureaucracy could not exist unless most everyone concerned, including members of the general public, government workers, and government officials, agree to assume organizationally defined roles when within the bureaucracy's domain. The instrumental subordination of speech is simply the reflection of this enacted consensus. For courts to disrupt this consensus concerning the priority of a functional orientation would require extraordinary and systematic justification. Ad hoc balancing, precisely because it is ad

332. Michelman, *Foreward: Traces of Self Government*, 100 HARV. L. REV. 4, 34 (1986).

hoc, does not contain within it this kind of justification, and so is experienced as abstract and arbitrary.

It does not follow, of course, that such balancing is always unjustified; the conclusion is rather that it is inherently problematic and should therefore be discouraged as a matter of doctrinal arrangement. The urgent and pressing quality of first amendment adjudication, more perhaps than in any other area of constitutional law, continually pushes courts toward problematic decisions, and it would be foolish flatly to rule these out in advance. It is sufficient to deprive them of doctrinal support, and so render more visible and vulnerable their extraordinary quality. Much of the impulse toward independent balancing should in any event be absorbed by the elastic nature of the instrumental standard applicable to nonpublic forums. In this Article I have refrained from speculating as to exactly how strict the means-end nexus must be in order to warrant prohibiting public access to a nonpublic forum, in large part because the nature of this nexus cannot sensibly be given a general or abstract formulation. The character of the nexus will largely be a matter of common sense, and as such it will be sensitive to context and circumstances.³³³ I suspect, however, that as the first amendment concerns normally present in ad hoc balancing become more pressing, they will be expressed in a more or less unconscious tendency to tighten the nexus necessary to sustain the suppression of speech. In the end I think that this flexibility is unavoidable, and, if it does not lead courts to treat the instrumental standard disingenuously as a proxy for other values, it is also not inappropriate.

V. JUDICIAL DEFERENCE TO MANAGERIAL AUTHORITY

If a court determines that a particular resource is a nonpublic forum and hence belongs to the instrumental domain of an institution, the governing principle of constitutional law is that public use of the resource for communicative purposes may be restricted if such use interferes with the effective functioning of the institution. In passing on the

333. For the reasons stated at *supra* note 256 and accompanying text, however, I believe that at a minimum the nexus should be understood as placing the burden on government to demonstrate that the adverse consequences of a particular public use of organizational resources for communicative purposes are so undesirable as to justify the prohibition of that use.

constitutionality of the institution's regulation of the resource, a court can either make its own independent assessment of the compatibility of public use with the attainment of legitimate institutional objectives, or it can defer on this question to the judgment of authorities within the institution. The Court's tendency to defer to institutional judgment in its recent nonpublic forum cases has been the single most controversial aspect of contemporary public forum doctrine, and it is at the heart of the Court's rejection of *Grayned*. In this section I will sketch a framework for analyzing the question of deference within the context of public forum doctrine.

A. *The General Structure of Deference Analysis*

Deference analysis can be conceptualized as divided into three stages. The first stage concerns what may be called the preconditions of deference. Deference occurs when courts retain control over the content of governing constitutional principles, but decide that these principles are best implemented by institutional officials.³³⁴ Thus it is a necessary precondition of deference that a court believe that institutional authorities are aware of the constitutional principles that should guide their judgment and are in good faith attempting to enact those principles. In this sense deference presupposes a relationship of trust between a court and institutional authorities, and is inappropriate if a court has reason to suspect that institutional authorities are unaware of or indifferent to the rule that speech should only be regulated when necessary to attain organizational ends, or if a court doubts that institutional authorities are applying the rule in good faith. Courts ordinarily perceive danger signals when they confront institutional decisions that on the merits seem, to use the language of *Lehman*, "arbitrary, capricious, or invidious,"³³⁵ or, to adopt the phrase of *Cornelius*, "unreasona-

334. Deference should thus be distinguished from what I have elsewhere called "delegation," which occurs when courts delegate to institutional officials the power to determine the constitutional principles by which their decisions will be judged. See Post, *supra* note 215, at 215. Delegation would be consistent with the major premise of the *Davis* syllogism, as would a substantive conclusion that there were no pertinent constitutional principles to constrain the decisions of institutional officials.

335. *Lehman v. City of Shaker Heights*, 418 U.S. at 298, 303 (1974).

ble.”³³⁶ In this limited sense questions of deference and questions of substance are interrelated.

If the preconditions of deference are satisfied, a court can address the second stage of deference analysis, which entails an assessment of the arguments for deference. As a general rule, courts are required to make an “independent constitutional judgment”³³⁷ in cases involving regulation of “supremely precious”³³⁸ first amendment freedoms. There must be a good reason, therefore, to suspend such judgment. It is sometimes argued that one such reason is the respect which courts should have for the “professional expertise” of government officials.³³⁹ But this argument, if accepted, would prove too much, for the prerogatives claimed by expertise are potentially endless, and deference based solely upon such grounds would have no limit. As a result the Court has quite properly been reluctant to engage in the wholesale sacrifice of first amendment rights that automatic deference to expertise would undoubtedly produce.³⁴⁰ Although the school officials in *Tinker* and the military commanders in *Glines* presumably shared equal endowments of professional expertise, the Court chose to defer in the second case, but not in the first.

The contrast between *Tinker* and *Glines* suggests an alternative justification for deference. The distinction between the two cases can be interpreted as resting on differences in the kind of institutional authority at issue, differences which make deference arguably necessary for the attainment of institutional ends in the second case, but not in the first.³⁴¹ This distinction can be generalized into the

336. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985).

337. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984); see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-45 (1978); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

338. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

339. See, e.g., *Turner v. Safley*, 107 S. Ct. 2254, 2262 (1987); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

340. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); Post, *supra* note 215, at 185-86. I do not want to overstate the case, however, for it seems to me that at a certain point considerations of expertise do become important. See *infra* note 371.

341. See *supra* notes 230-41 and accompanying text

following principle: Courts should defer if the exercise of institutional authority at issue is of the kind that requires insulation from judicial review for its effective functioning. I shall call deference which meets this standard "warranted." The justification for warranted deference flows from the definition of the very constitutional right that is at issue. The right of access to a nonpublic forum is in essence the right of a member of the general public to use institutional resources for communicative purposes in a manner that is not incompatible with the attainment of institutional ends. It is anomalous to require that a court itself obstruct the attainment of these ends in order to vindicate such a right.

The difficulty, of course, is that an institution's regulation of its resources may affect constitutional values other than simply an individual's particular right to use these resources for communicative purposes. When this is the case, a court must determine whether the presence of such other constitutional values renders inappropriate the exercise of even warranted deference. This determination involves the third stage of deference analysis, which entails a balancing of the justification for warranted deference against the potential damage to constitutional principles other than those implicated in the management of the speech of particular individuals.

The characteristics of this third stage can be illustrated by considering decisions involving the internal management of speech. The internal management of speech always involves more than merely a particular right to speak by an institution's member; it in addition necessarily involves the definition of that member's larger organizational role. There is thus an intrinsic tension between the organization's functional definition of that role and the member's need to maintain fidelity to external roles and statuses.³⁴² In particular, it is not uncommon for institutions to impose organizational roles that are so "pervasive"³⁴³ as to prevent their

342. On the relationship between organizational roles and external status, see *supra* note 292.

343. The "pervasiveness" of an organizational role is a term of art within organizational theory.

The range of pervasiveness is determined by the number of activities in or outside the organization for which the organization sets norms. Pervasiveness is small when such norms cover only activities directly controlled by the organizational elites; it is larger when it extends to

members from engaging in non-organizational roles that have constitutional value to the larger society. For example, the military may prohibit service personnel from observing required religious obligations,³⁴⁴ or prisons may prohibit inmate correspondence with a court.³⁴⁵ In such cases the issue is not merely the right to practice a particular religious rite or to send a specific letter to a judge, but rather the very ability to enact the constitutionally protected roles of being a religious person or a participant in the judicial process. The general damage to these roles must be weighed against the potential damage to institutional authority resulting from judicial review.³⁴⁶

This tension is well illustrated by *Connick v. Myers*,³⁴⁷ in which the Court concluded that great deference should be given to the authority of government officials to regulate the speech of their employees, holding that “government offi-

other activities carried out in social groups composed of organizational participants; for example, army officers maintain “formalities” in their club. Finally, an organization of its participants in social units which include nonparticipants and which are, at least in part, governed by nonorganizational “external” elites. Schools define “desirable” leisure-time activities of students; some churches specify the candidates they wish their members to support in the political arena.

A. ETZIONI, *A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS* 163 (1961).

344. See, e.g., *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

345. See e.g., *Ex parte Hull*, 312 U.S. 546, 549 (1941).

346. Although courts are willing to protect these extrinsic constitutional values to the extent of refusing to defer to the judgment of institutional authorities, they are on the whole not willing to protect them to the extent of modifying the underlying constitutional principle that speech in such institutions may be regulated if necessary to attain institutional ends. For reasons much like those discussed in Section IV(E)(2), *supra* notes 328–33, courts will not protect speech or behavior that by hypothesis impairs the ability of an organization to function. In this regard *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986), is illustrative. At issue in the case was the refusal of the military to permit an orthodox Jewish officer to wear a religiously required yarmulke. The Court’s opinion upheld the action of the military, holding that it must “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Id.* at 1313. Four Justices dissented, writing three separate opinions. Not one of these opinions took the position that the religious rights of the officer should be protected if they in fact endangered the ability of the military to perform its function. Instead each opinion rejected the claim that the Court should defer to the judgment of military officials, and went on to independently determine that the officer’s yarmulke would work no “substantial harm to military discipline and esprit de corps.” *Id.* at 1326 (O’Connor, J., dissenting); see *id.* at 1318–20 (Brennan, J., dissenting); *id.* at 1323 (Blackmun, J., dissenting).

347. 461 U.S. 138 (1983).

cials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the first amendment."³⁴⁸ The Court set a limit on this deference, however, strongly hinting that if an employee speaks "as a citizen,"³⁴⁹ if his speech "substantially involve[s] matters of public concern,"³⁵⁰ then deference would be inappropriate.³⁵¹ Unlike *Pickering*, which concerned the boundary

348. *Id.* at 146.

349. *Id.* at 147.

350. *Id.* at 152.

351. At first glance *Connick* appears to require courts to balance the first amendment rights of employees against the achievement of institutional goals. *Connick* states that if an employee's speech touches upon a matter of public concern, the employee's interests as a citizen must be balanced against the government's interests "in promoting the efficiency of the public services it performs through its employees." 461 U.S. at 142 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)); *see id.* at 149-50. On closer analysis, however, the image of balancing dissolves into a purely instrumental calculation. Even if an employee's speech involves a matter of public concern, *Connick* holds that "full consideration" must be given to "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *id.* at 150, and that it must be recognized that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part)). *Connick* states that:

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.*

Id. at 151-52 (emphasis added). The question is the nature of the "stronger showing" which must be made in order to justify regulating employee speech that "more substantially involve[s] matters of public concern." In light of the over-all structure of the opinion, I think the most plausible interpretation of *Connick* is that in such circumstances the government cannot depend upon judicial deference to managerial anticipation of harm to institutional culture, but must instead bring sufficient evidence before a court to convince it that the government's restriction of speech is in fact necessary for the attainment of institutional goals. In that case, of course, the court will in effect be reaching an independent, non-deferential decision as to whether the regulation of employee speech is truly required by the need to achieve institutional objectives.

This interpretation of *Connick* is supported by the Court's most recent decision, *Rankin v. McPherson*, 107 S. Ct. 2891 (1987). In *Rankin* a low-level government clerk had been fired for a private remark which the Court interpreted as being about a matter of public concern. Although the Court in *Rankin* reasserted as a general matter the *Pickering* balancing test, *id.* at 2896, the Court's holding that the firing was unconstitutional in fact turned on its conclusion that "there is no evidence that" the remark "interfered with the efficient functioning of the of-

between the management and governance of employee speech,³⁵² *Connick* assumed that managerial authority could be validly exercised, and hence that employee speech could be regulated as necessary to attain institutional ends. But *Connick* also recognized that the organizational role of employee could be defined so pervasively as to destroy the constitutional role of citizen, and so it implied that when the latter role was potentially endangered, independent judicial determination of the relationship between institutional ends and the regulation of speech was justified, notwithstanding the potential damage to institutional authority.

This tension between organizational and constitutional roles, which is so central to the analysis of deference in the context of the internal regulation of speech, does not exist in public forum doctrine. The doctrine involves members of the general public, who by definition are not subject to the imposition of organizational roles. At stake in public forum doctrine is simply the right to use a particular resource for communicative purposes, and since this right is itself defined by the same instrumental principles as inform the determination of warranted deference, the third stage of analysis in public forum doctrine tends as a general matter to be rather weak.

In fact the Court has given serious recognition to only one constitutional value that could potentially override warranted deference, and that is the value involved in prohibiting government institutions from making their resources available to the public in a manner that discriminates on the basis of viewpoint.³⁵³ Although the Court has forcefully

fi ce." *Id.* at 2899. The Court's decision, in other words, depended not upon a balance of two competing values, but upon a purely instrumental calculation performed without deference for the judgment of institutional authorities.

352. See *supra* notes 302-03 and accompanying text.

353. It is sometimes said that the public's use of a particular institutional resource is so essential for the maintenance of public discussion that courts should not defer to administrative judgment in its regulation. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 49-56 (1966) (Douglas, J., dissenting). But the Court has never accepted such an argument, preferring instead to assume that public discussion will continue regardless of the use of any particular government resource. Of course this assumption, like any other, must stand or fall on the strength of its empirical foundations. A different case would be presented if the government owned all the meeting halls in town, instead of the government's hall being only one among many. On the related empirical question of whether the use of certain kinds of government resources is necessary to maintain the availability of inexpensive means of communication, and so to maintain an undistorted marketplace of

enunciated this value, the relationship between the prohibition of viewpoint discrimination and public forum doctrine is rather complex. The relationship will be discussed in detail in Section VI, but the upshot of that discussion is that the constitutional values behind the prohibition can be expected to override warranted deference in only a limited number of circumstances.³⁵⁴

B. *The Criteria of Warranted Deference*

For this reason the Court in cases involving public forum doctrine has tended to concentrate on the question of whether deference is warranted. If it is assumed that with sufficient attention and evidence a court can determine as well as a government administrator whether any particular regulation of speech is necessary for the attainment of organizational ends, the case for warranted deference must rest on the adverse consequences of having a court, rather than an institutional official, make this determination. The analysis of warranted deference must thus turn on the identification and assessment of these consequences.

It is of course not possible to generate an exhaustive catalogue of these consequences. But their nature and variety can be illustrated by examining the relationship between courts and what the sociologist Erving Goffman has called "total institutions,"³⁵⁵ for in such institutions both the need for organizational authority and the distance from judicial culture are at their respective maxima. Analyzing this relationship will permit us to identify three distinct kinds of such consequences, whose relevance to other kinds of government institutions can then be evaluated.

Total institutions, like the military to which the Court deferred in *Greer*, and the prison to which the Court deferred in *Jones*, are organizations that attempt to regulate "all aspects of life . . . in the same place and under the same single authority."³⁵⁶ Total institutions not only physically separate

ideas, compare the views of Justices Stevens and Brennan in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 & n.30, 819-20 (1984).

354. See *infra* Section VI(B).

355. E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4-5 (1961).

356. *Id.* at 6.

their members from the larger society,³⁵⁷ but they also attempt to the maximum extent possible to strip away from their members statuses associated with that society, and to impose instead a uniform institutional identity.³⁵⁸ To accomplish this task total institutions characteristically have pervasive systems of authority which are rationalized in terms of the "avowed goals" of the institution and which are expressed in "a language of explanation that the staff, and sometimes the inmates, can bring to every crevice of action in the institution."³⁵⁹

Judicial review of administrative decisions in the context of total institutions poses the possibility of three distinct kinds of adverse consequences to managerial authority. The first concerns the contamination of the institution. Courts represent the values and expectations of the larger society, and if they override managerial authority in a total institution they import these values and expectations and threaten the institution's isolation. Of course the extent to which this isolation should be preserved is itself an independent and substantive question of constitutional law. In *Greer*, the Court was quite concerned that the military be "insulated from both the reality and the appearance" of being connected with civilian political life.³⁶⁰ In the case of prisons, however, the recent demise of the "hands-off" doctrine indicates a desire to subject prisons at least to some significant extent to the constitutional values of the larger society.³⁶¹

Judicial review of managerial authority in total institutions can cause a second kind of adverse consequence. Because total institutions are physically separated from society, authority in these institutions must control literally every aspect of their members' behavior. Hence such authority is

357. Goffman notes that "[t]heir encompassing or total character is symbolized by the barrier to social intercourse with the outside and to departure that is often built right into the physical plant, such as locked doors, high walls, barbed wire, cliffs, water, forests, or moors." *Id.* at 4.

358. *Id.* at 119-21.

359. *Id.* at 83.

360. *Greer v. Spock*, 424 U.S. at 828, 839 (1976).

361. On the demise of the "hands-off" doctrine, see Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219 (1977); Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-1980*, 2 CRIME & JUST.: ANN. REV. RES. 429 (1980). For an example of the Court's ambivalence regarding the importance of isolating prisons from the general society's first amendment values, see *Procunier v. Martinez*, 416 U.S. 396 (1974).

not a matter of discrete and specific rules, but rather of constituting an entire way of life, one which causes the members of these institutions "to self-direct themselves in a manageable way" ³⁶² Judicial tampering with particular institutional rules will therefore affect not merely the behavior specifically governed by these rules, but also the institutional culture or way of life which the authority structure as a whole is designed to create. Thus, judicial review of military orders may well undermine that "instinctive obedience" thought necessary for the achievement of the "military mission." ³⁶³ Similarly, it is claimed that judicial imposition of specific due process regulations on prisons has had the unanticipated consequence of transforming the general institutional culture by altering the manner in which inmates regard guards, and has thereby caused unexpected problems of inmate violence and security. ³⁶⁴

Such unanticipated consequences to organizational culture are difficult enough to deal with when a court has assumed more or less comprehensive authority for the administering of an institution through the issuance of a structural injunction. They are much more troublesome, however, when, as is characteristically the case in decisions involving public forum doctrine, they arise from judicial review of discrete rules or regulations. In such circumstances a court does not accept responsibility for running an institution, and yet its decisions may set off a chain of unforeseeable effects that have adverse consequences for those who have accepted this responsibility.

The third kind of adverse consequences threatened by judicial review concerns the relationship between rules and unpredictable task environments. Because officials of total institutions manage every aspect of the lives of their members, they must often attempt to exercise their authority in the face of unique and unforeseeable circumstances. Strict rules, however, are unsuitable "where the action to be controlled is non-recurring" and in situations involving "per-

362. E. GOFFMAN, *supra* note 355, at 87.

363. *Brown v. Glines*, 444 U.S. 348, 354, 357 (1980).

364. J. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* 136 (1977); Marquart & Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 19 *LAW & SOC'Y REV.* 557 (1985).

sonalised, individual application."³⁶⁵ In such cases it is desirable that managers exercise discretion.³⁶⁶ To the extent that judicial review entails the imposition of rules, it can thwart this discretion and hence alter and impair the kind of flexible authority structure necessary for the attainment of institutional ends.³⁶⁷

In the context of total institutions, therefore, the very process of judicial review poses three distinct kinds of potentially adverse consequences to organizational authority: contamination, destruction of organizational culture, and the loss of needed flexibility. These consequences are illustrative of the criteria that a court should consider in deciding whether deference is warranted. The pertinence and weight of these criteria will vary depending upon the specific kind of decision, authority, and institution that is at issue, and hence the decision whether to engage in warranted deference must be made on a case-by-case basis. This can be illustrated by contrasting the question of warranted deference in two decisions, *Lehman* and *Perry*, both of which involve decisionmaking by ordinary government bureaucracies.

In *Lehman*, the issue before the Court was whether a municipal rapid transit system could refuse to sell advertising space on car cards to those who wished to purchase the space for political advertisements. Although Justice Blackmun correctly concluded that the cards were a nonpublic forum,³⁶⁸ he incorrectly assumed that this conclusion required the Court to defer to all managerial decisions respecting the use of the cards. But if Blackmun had instead analyzed the specific management decision at issue to determine whether deference was actually warranted, he would have seen that the Court should in fact have made its own independent

365. Jowell, *The Legal Control of Administrative Discretion*, 1973 PUB. L. 178, 202.

366. J. THOMPSON, *supra* note 267, at 117-21. Discretion, of course, is not a blank check. We commonly speak of discretionary decisions as to which the consideration of specific factors is either prohibited or required. See Post, *supra* note 215, at 219.

367. See Glazer, *Should Judges Administer Social Services?*, 50 THE PUBLIC INTEREST 64, 75-77 (1978). Judicial intervention in the administration of one prison, for example, had the effect of depriving guards of discretion and fostering a "bureaucratic-legal order." Marquart & Crouch, *supra* note 364, at 581-84. As a consequence guards felt they could "no longer maintain control and order within the penitentiary," and there was a sharply increasing "rate of serious disciplinary infractions." *Id.* at 580. See Jacobs, *supra* note 361, at 458-63.

368. See *supra* notes 296-97 and accompanying text.

determination of whether the acceptance of political advertising was incompatible with the system's effective functioning.³⁶⁹

The municipal transit system was, after all, a government bureaucracy immersed in the larger society, so there could be no contention that judicial review would illicitly "contaminate" management authority with general social values. Moreover, the decision to restrict the cards to commercial advertising was addressed to members of the general public who were potential customers for the purchase of advertising space; it did not affect or involve the relationship between the transit system and its own employees. The relationship between the system and its potential customers was a contractual one negotiated at arms-length, and hence the system could not have expected to influence its potential customers through the creation of a specifically organizational culture. Thus, the decision to refuse political advertising could not have been said to be part of a general system of authority designed to inculcate an organizational way of life, and judicial review of the merits of the decision would have been unlikely to have unanticipated effects on the structure of internal authority within the transit system. Nor could a very plausible argument be made that the decision inhabited an unpredictable environment, so that the transit system would have to retain a continual flexibility to alter the rule against political advertising. Indeed the rule had been in place and unchanged for twenty-six years.³⁷⁰ Deciding whether the acceptance of political advertising would have been incompatible with the ends of the transit system might have involved complex and difficult matters of business judgment, but as to these questions of judgment

369. Justice Blackmun hypothesized a number of possible justifications for the refusal to accept political advertising:

Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians.

Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974). He did not, however, independently scrutinize any of these reasons.

370. *Id.* at 300-01.

there was no particular reason to believe that a court could not have reached as accurate a decision as a transit official.

For all these reasons, deference in *Lehman* was not warranted.³⁷¹ The circumstances of *Perry*, on the other hand, create a demonstrably stronger case for judicial deference. *Perry* concerned a school board's management of an internal

371. A rather different case would be presented if the transit system had never allowed any advertising cards on their cars. One can imagine a political candidate bringing a lawsuit in such circumstances, arguing that the transit system should be required to install advertising cards for political announcements and that such cards were compatible with the attainment of the system's goals as evidenced by the practices of other jurisdictions. If the transit system replied that it had never provided such cards, and had neither the administrative nor economic ability to do so now, my instinct is that a court would defer to the system's judgment without making an independent determination as to the merits of the case.

Such deference, of course, would have to be justified by reference to different principles than those examined in the text. Two such principles come to mind. The first turns on notions of relative competence. As courts are asked to leapfrog over existing practices, rather than marginally to alter those practices, problems of information and unanticipated consequences grow geometrically more difficult. The distinction might be conceptualized as that between a court making policy and a court overseeing the implementation of an existing policy: the former obviously demands far greater expertise. The distinction suggests a second way in which judicial deference in these circumstances might be understood. To make policy is to fundamentally define the nature and goals of an organization. Although this task is implicit in much public forum doctrine, courts might well believe that the task also has its limits.

Both these principles of deference are matters of degree, and both seem relevant primarily when a plaintiff asks a court to transcend the common sense boundaries of its proper function. That is why these principles emerge from hypothetical illustrations rather than from actual cases. That these principles of deference express a generally shared sense of appropriate limitations on judicial decisionmaking is evidenced by the fact that public forum suits asking for courts actually to create official resources for private expressive use are quite rare.

Such suits are closely related, however, to a more common kind of litigation, which concerns the "opening-up" of government institutions to public view. See, e.g., *Houchins v. KQED*, 438 U.S. 1 (1978). This kind of litigation does not so much involve claims by members of the general public to commandeer government resources for their own first amendment purposes, as claims that the interior of a government institution should be made accountable and visible to the general public. They thus involve complicated questions not only of the reach of the government's managerial authority over its own resources and personnel, but also of the affirmative structural requirements of the first amendment for the facilitation of public discourse. This is not the place for a full investigation of these questions, but only for the limited observation that the Court's decisions in this area appear to have been deeply influenced by considerations of deference much like those just discussed. Hence it is no surprise that the one institution which the Court has been most aggressive about opening up to the public is the judicial system. See *supra* note 255. Not only does the Court possess expertise in the area of judicial management, but it also can speak confidently about the nature and goals of courts. Thus the ordinary barriers to using constitutional law to set organizational policy are greatly diminished with respect to the judicial system.

mail system whose "primary function" was "to transmit official messages among the teachers and between the teachers and the school administration."³⁷² The Court characterized the system as a nonpublic forum,³⁷³ and proceeded in effect to defer to the decision of the school board to exclude a minority union (PLEA) from access to its system. The Court assumed that PLEA should be treated as a member of the general public, and hence characterized the case as one involving public forum doctrine.³⁷⁴

Whereas in *Lehman* the decision to refuse political advertising did not affect the relationship between the bureaucracy and its employees, in *Perry* the decision to exclude

372. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1983).

373. Support in the record for this conclusion is somewhat ambiguous. The Court stated:

Local parochial schools, church groups, YMCA's, and Cub Scout units have used the system. The record does not indicate whether any requests for use have been denied, nor does it reveal whether permission must separately be sought for every message that a group wishes delivered to the teachers.

Id. at 39 n.2. It is possible, but not likely, that the mail system might have been regarded locally as a form of public resource to be used by private community groups to communicate with teachers and school children. These groups might thus have perceived the school board to have abandoned any claim to organizational dominance in the use of the system, and acted as though the system were a form of public mail available for use for a wide variety of private and personal purposes. The Court, however, rejected this view of the evidence, stating:

If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material.

Id. at 47. The Court's characterization of the mail system as a nonpublic forum, in other words, was dependent upon its not unreasonable perception that in the absence of strong contrary evidence it was most likely that all concerned understood that their use of the system was conditioned upon their being of service to the school's purposes, so that the system remained within the organizational domain of the board.

374. One of the fascinating aspects of *Perry* is the problematic character of this assumption. See *supra* note 258. It is not clear, however, that the assumption makes any actual difference to the outcome of the case. Even if PLEA were viewed as an internal employee of the school board, and thus *Perry* were characterized as a decision involving the internal management of speech, deference would still be appropriate unless it could be demonstrated that the school board's regulation had actually endangered an independent constitutional role of PLEA.

PLEA was directly connected to this relationship. PLEA's exclusion was part of the labor contract negotiated between the board and the union which had been certified as the teachers' exclusive bargaining representative (PEA),³⁷⁵ and the exclusion was no doubt one of PEA's demands.³⁷⁶ The school board, like any large scale employer, no doubt wished to use its authority as an employer to engender in its employees "not just a passive but an active attitude toward the furtherance of the organization's objectives. . . . Active rather than merely passive participation and cooperation is almost essential if an organization is to attain even moderate efficiency."³⁷⁷ The decision at issue in *Perry* is thus part of the larger question of the school system's organizational culture, and hence judicial review of that decision could risk causing unanticipated adverse effects on the general relationship between the board and its employees. The decision is also one that calls for the exercise of discretion rather than fixed rules. The potential ability of the board to alter its decision to exclude PLEA gives it leverage in negotiating with PEA, and in other circumstances the board might well decide to more generally open up the mail system.³⁷⁸ Thus the imposition of a fixed judicial rule regarding the use of the mail system may well impair needed flexibility.

Although both *Lehman* and *Perry* involve decisions of large and rather ordinary government organizations, deference is warranted in the second case, but not in the first. The contrast arises because of differences in the kinds of decisions subject to review in the two cases, and illustrates that the determination of warranted deference does not depend upon the "type" of institution at issue, but rather upon a reasoned application of the various criteria of warranted deference to the specific facts of an actual case. Because deference involves such a serious abdication of the judicial obligation independently to protect individual constitutional rights, courts should be cautious in finding warranted defer-

375. 460 U.S. at 40.

376. *Id.* at 70 n.12 (Brennan, J., dissenting).

377. H. SIMON, D. SMITHBURG & V. THOMPSON, *supra* note 276, at 81.

378. Indeed until 1978, shortly before the *Perry* lawsuit was initiated, the school board permitted both the minority and majority unions to use the mail system. 460 U.S. at 39; *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1287 (7th Cir. 1981), *rev'd sub nom.* *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983).

ence. Needless to say, courts should exercise independent review with respect to the decision of whether or not to defer.

VI. VIEWPOINT DISCRIMINATION IN THE NONPUBLIC FORUM

If there is one doctrinal rule that appears to have the universal approval of the Justices, it is that the regulation of speech in a nonpublic forum must be "viewpoint neutral."³⁷⁹ That the Court is indeed serious about this rule is illustrated by its recent decision in *Cornelius v. NAACP Legal Defense & Education Fund*,³⁸⁰ where it held that although the Combined Federal Campaign [CFC], an annual charitable fundraising drive conducted in the federal workplace, was a nonpublic forum, the government's exclusion from the CFC of legal defense and political advocacy organizations would be unconstitutional were it to be based upon impermissible "viewpoint-based discrimination."³⁸¹

Like most forms of discrimination, viewpoint discrimination can be measured in terms of either purpose or effect. *Cornelius* clearly tilts toward the former perspective. Justice O'Connor's opinion for the Court³⁸² speaks of viewpoint discrimination as regulation "based on the desire to suppress a particular point of view," or as founded on "a bias against the viewpoint advanced by the excluded speakers," or as "impermissibly motivated by a desire to suppress a particular point of view."³⁸³ Justice Brennan's dissent in

379. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985). See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46, 49 n.9; *id.* at 57-62 (Brennan, J., dissenting). Some commentators have strongly concurred in the Court's universal prohibition of viewpoint discrimination. For example, Geoffrey Stone has concluded that the "government can never justify a restriction on otherwise protected expression merely because it disagrees with the speaker's views." Stone, *supra* note 48, at 229. Paul Stephan has noted that the requirement of viewpoint neutrality "seems an essential concomitant of any rational system of freedom of expression." Stephan, *supra* note 155, at 233.

380. 473 U.S. 788 (1985).

381. *Id.* at 811. At issue in *Cornelius* was the constitutionality of Executive Order No. 12, 404, 3 C.F.R. 151 (1984), which specified "the purposes of the CFC" and identified "groups whose participation would be consistent with those purposes." 473 U.S. at 811.

382. See *supra* note 173.

383. 473 U.S. at 812-13. In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court was more ambiguous:

The general principle that has emerged . . . is that the First Amendment forbids the government to regulate speech in ways that favor

Perry,³⁸⁴ on the other hand, strongly focuses on the “effect” of the discrimination at issue.³⁸⁵ Whichever perspective is adopted, however, the Court’s flat prohibition on viewpoint discrimination is a confusing and inappropriate rule for the nonpublic forum.

A. *When Is Viewpoint Discrimination Impermissible?*

Analysis of the relationship between public forum doctrine and the prohibition against viewpoint discrimination must begin with the observation that viewpoint discrimination is a regular and unavoidable aspect of the internal management of speech. When a bureaucratic official instructs her subordinate to present at a staff meeting position A rather than position B, her actions have both the intent and effect of viewpoint discrimination. The same is true when a classroom teacher requires his students to draft papers supporting, rather than attacking, the United States involvement in the Vietnam War. The same is also true when an Army general commands his staff to draft a defensive plan relying on strategic, rather than conventional weaponry. As these examples suggest, it is probably not too outlandish an exaggeration to conclude that government organizations would grind to a halt were the Court seriously to prohibit viewpoint discrimination in the internal management of speech.

In public forum doctrine, however, the issue is not the internal management of the speech, but rather the control of organizational resources vis-à-vis members of the public. Public forum doctrine’s prohibition against viewpoint discrimination might derive from special concerns, not present in decisions dealing only with the internal management of

some viewpoints or ideas at the expense of others. . . . [T]here is not even a hint of bias or censorship in the City’s enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express.

Id. at 804.

384. Justice Brennan dissented in *Perry* on the grounds that the school board had engaged in unconstitutional viewpoint discrimination by permitting PEA access to the interschool mail system but denying such access to PLEA. His dissent was joined by Justices Marshall, Powell, and Stevens.

385. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 64–65 (1983).

speech, about the distortion of "the ordinary workings of the 'marketplace of ideas,'"³⁸⁶ or about "the principle of equal liberty of expression"³⁸⁷ when applied to members of the general public. These concerns are real and important, but the difficulty is that they cannot realistically be captured by a flat prohibition against viewpoint discrimination.

This is because organizations are not self-sufficient. They have open boundaries and "must transact with other elements in their environment to acquire needed resources"³⁸⁸ These resources include individuals who are members of the general public, in the form of outside experts, independent contractors, consultants, temporary labor, volunteer workers, and the like. When an organization uses such individuals to attain its ends, it must manage their speech in the same way that it manages the speech of its own members. For this reason a flat prohibition against viewpoint discrimination will restrict and perhaps strangle necessary exchange between state institutions and their environments.

The point can be illustrated by considering the facts of *Jones v. North Carolina Prisoners' Labor Union*,³⁸⁹ in which a nonpublic forum prison had extended access to outside organizations like "the Jaycees, Alcoholics Anonymous, and the Boy Scouts."³⁹⁰ The reason was obvious: Prison officials believed that such organizations served "a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators"³⁹¹ These outside organizations apparently offered services and expertise which the prison officials were unable to generate from within the purely internal resources of the prison. If the Court were serious about imposing a ban on viewpoint discrimination, however, the services and expertise of Alcoholics Anonymous could be obtained only at the price of granting equal access to groups promoting drunkenness or drug abuse. Such a price

386. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 101 (1978); see Stephan, *supra* note 155, at 233; Stone, *supra* note 7, at 55.

387. Karst, *supra* note 11, at 26; Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 134-35 (1981).

388. J. PFEFFER & G. SALANCIK, *supra* note 263, at 2.

389. 433 U.S. 119 (1977).

390. *Id.* at 133.

391. *Id.* at 134.

would of course be unacceptable, and as a result the prison would be thrown more and more onto its own internal resources at enormous cost to the attainment of legitimate penological goals.

The justification for incurring this cost would be far from clear: if we permit prison wardens to instruct their subordinates to give lectures on drug reform but not on the advantages of drug use, why should we disable wardens from bringing in outside groups to perform the identical task? In what way is the latter any more a distortion of the marketplace of ideas than the former? And if the principle of equal liberty of expression protects members of the general public from discrimination vis-à-vis one another, but is not triggered when a warden gives lectures on drug reform to prisoners but refuses permission to members of the public to talk to prisoners on the advantages of drug use, why should the principle be triggered when the warden entrusts his task to individuals in the general public who have become, for some limited purposes, equivalent to organizational members?

The situation would be quite the opposite, however, if a warden were to permit Baptists to address inmates, but not Methodists. In such circumstances our perception would no doubt be that access to the prison was not being granted to aid in the accomplishment of legitimate penological objectives, but rather to assist the warden's favorite religious denomination. We would view this as illicit, as distorting the marketplace of ideas, or as violating the principle of equal liberty of expression exemplified by the prohibition against viewpoint discrimination. The prohibition has bite, in other words, when an institution permits selective access to members of the public for reasons other than the achievement of legitimate institutional ends.

If this were the only content of the prohibition against viewpoint discrimination, however, the prohibition would qualify merely as a corollary to the more fundamental principle that public access to nonpublic forums cannot be regulated except as necessary to attain institutional objectives. At most the prohibition might be conceived as expressing an independent constitutional value sufficient to override warranted deference. But in fact the prohibition has greater content than this, as can be seen by the following example.

Suppose prison officials permit a citizens' group supporting an initiative to issue bonds for the construction of new prison facilities access to prison facilities for news conferences and so forth, but deny such access to citizens' groups opposing the initiative. It is clear in the example that officials are engaging in viewpoint discrimination to serve the institutional purpose of building better prison facilities, and that this is a legitimate institutional objective. Yet we would nevertheless condemn the discrimination. The reason, I think, is that the citizens' groups have not been incorporated into the organizational domain of the prison and endowed with specifically organizational roles, so that the regulation of their speech is not analogous to the internal management of speech. Unlike Alcoholics Anonymous in *Jones*, the citizens' groups are not performing internal management functions that prison officials themselves could perform had the institution sufficient resources.

We might generalize this example by concluding that the prohibition against viewpoint discrimination, insofar as it has independent analytic content, depends upon the relationship between members of the public and the internal functioning of an institution. If members of the public are performing what we would characterize as specifically organizational roles, the prohibition against viewpoint discrimination is not triggered. The prohibition will bite, on the other hand, if, as in the case of the citizens' groups advocating prison construction bonds, institutional resources are made available for speech that is not seen as intrinsic to an internal institutional function. Underlying the distinction is the insight that viewpoint discrimination is constitutionally permissible if it is sufficiently similar to the internal management of speech.

The pertinent inquiry, then, concerns the question of when members of the general public have assumed quasi-organizational status so that the regulation of their speech is "like" the internal management of speech. The Court has, in fact, been rather generous in finding that this status has been assumed. In *Greer*, for example, the commanding officer of Fort Dix testified that civilian visitors to the Fort would be permitted to speak to soldiers depending upon whether the content of their proposed speech furthered the

military "mission."³⁹² The Court chose to overlook this viewpoint discrimination, evidently because it considered the boosting of military morale to be an internal management function.³⁹³ Similarly, in *Perry* the Court ignored obvious examples of viewpoint discrimination,³⁹⁴ apparently because it believed that the majority union was endowed with a quasi-organizational status. It is fair to say, however, that the Court has been far from self-conscious about exploring the limits of such status, and that the hard work of hammering out its precise parameters remains to be done.

B. *The Prohibition Against Viewpoint Discrimination and Warranted Deference*

An important and unresolved question of public forum doctrine is whether the prohibition against viewpoint discrimination will override warranted deference. The question can be divided into two inquiries: Whether courts should defer to the judgment of institutional officials that members of the general public have acquired quasi-organizational status, and whether courts should defer to the judgment of institutional officials that discriminatory criteria of access to a nonpublic forum are necessary for the attainment of institutional ends.

With respect to the first inquiry, it seems clear to me that the prohibition against viewpoint discrimination should override warranted deference. This is because the determination of the quasi-organizational status of members of the general public is fundamentally a matter of legal characterization. There is no particular reason for institutional officials to be concerned with this determination, and hence there is no prior institutional decision to which deference can be due. In the final analysis, therefore, it must be up to a court to determine whether or not institutional regulation of the speech of members of the general public is "like" the internal management of speech.

392. 424 U.S. 828, 868 n.16 (1976) (Brennan, J., dissenting).

393. See, e.g., *id.* at 838 n.10.

394. In *Perry*, not only was the school board's distinction between minority and majority unions a blatant example of viewpoint discrimination, see 460 U.S. 37, 64-66 (1983) (Brennan, J., dissenting), but so also was the fact that it permitted its mail system to be used by "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units, . . ." *id.* at 39 n.2, rather than, for example, by groups promoting alcoholism, organized crime, or bizarre religious practices.

With respect to the second inquiry, however, institutional officials are concerned with the attainment of institutional ends, and hence can be expected to have made an initial determination regarding the relationship of viewpoint discrimination to the achievement of these ends. If deference to this determination is otherwise warranted, the deference can be overridden only if the prohibition against viewpoint discrimination reflects a constitutional value that both transcends the particular right to speak at issue and is of sufficient importance to outweigh the justification for deference. Since the prohibition is intended in part to protect the marketplace of ideas from distortion, and since this is a value which transcends the question of whether any particular individual is or is not permitted to speak, the real question facing the Court is whether this value should override the need for warranted deference. The Court has responded ambivalently to this question. In cases like *Jones*, *Greer*, and *Perry*, the Court has deferred to managerial judgment regarding the functional justification for viewpoint discrimination. In *Cornelius*, on the other hand, the Court displayed deep uncertainty.

It was clear to the Court in *Cornelius* that plaintiffs' claims for access to the CFC would affect the general climate of employer-employee relationships within the federal government, and that for this reason deference was warranted regarding managerial decisions concerning the use of the CFC. But it was also evident to the Court that the CFC itself was not closely related to the attainment of any specific organizational objectives, but was instead a means of affecting the surrounding environment in ways unrelated to any particular organizational mission. Indeed the Court stated that the CFC "was designed to lessen the Government's burden in meeting human health and welfare needs by providing a convenient, nondisruptive channel for Federal employees to contribute to non-partisan agencies that directly serve those needs."³⁹⁵ It is not obvious how such a purpose serves the organizational mission of any particular government institution. And if the CFC were a means of channelling public access to accomplish general, rather than specifically institutional purposes, viewpoint discrimination, like that entailed

395. 473 U.S. 788, 795 (1985).

in the distinction between groups engaged in direct charitable distributions and groups engaged in legal defense and political advocacy,³⁹⁶ would be unconstitutional.

The Court dealt with these conflicting imperatives in an odd manner. In contrast to *Perry*, where the Court despite a strong dissent simply refused seriously to entertain the question of viewpoint discrimination, *Cornelius* chose not to defer on this question, and instead remanded the case for what will no doubt be an intrusive judicial examination of the subjective motivation of administrative officials.³⁹⁷ But *Cornelius* also explicitly deferred to and accepted "the validity and reasonableness of the justifications offered by the Government for excluding advocacy groups from the CFC," including the contention that "controversial groups must be eliminated from the CFC to avoid disruption" in the workplace.³⁹⁸ Thus the Court deferred to the "objective" justifications for discriminatory access, at the same time as it independently set off in quest of "subjective" motivations that might underlie and be distinct from these justifications.

This is the kind of Solomonic solution that kills the baby. It is a compromise that serves none of the interests of public forum doctrine. If deference to managerial judgment is necessary to protect a structure of institutional authority, then surely that protection will be eviscerated by judicial inquiry into the subjective motivations of government officials. If the prohibition on viewpoint discrimination is an important constitutional principle, then surely it is not because of the possibly impure motivations of government officials, but rather because of the objective effects of viewpoint discrimination on the liberty of citizens and the marketplace of

396. *See id.* at 832-33 (Blackmun, J., dissenting):

By devoting its resources to a particular activity, a charity expresses a view about the manner in which charitable goals can best be achieved. . . . Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint-based

397. The Court said: "We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand." *Id.* at 812-13.

398. *Id.* at 812.

ideas.³⁹⁹ *Cornelius*' solution is muddled precisely because it avoids direct confrontation with the underlying doctrinal issue, which concerns whether and under what circumstances the prohibition against viewpoint discrimination can override warranted deference.

One way to approach this issue is to ask why the Court in *Cornelius* was moved to acknowledge the issue of viewpoint discrimination, while remaining content to ignore it in decisions like *Jones*, *Greer*, and *Perry*. The cases differ because in the latter three decisions it was intuitively obvious that institutional officials engaged in viewpoint discrimination to achieve specifically institutional goals, whereas this intuition was not apparent in *Cornelius*. The very meaning of warranted deference, however, is that a court will defer to the judgment of institutional officials regarding the instrumental grounds for regulating speech, even if these grounds are not intuitively apparent.⁴⁰⁰ But in *Cornelius* the presence of viewpoint discrimination, coupled with the absence of any obvious institutional justification for the CFC, evidently tilted the balance away from deference. One could generalize the result in *Cornelius* into the principle that the prohibition against viewpoint discrimination overrides warranted deference in those cases where the relationship between the discrimination and the attainment of organizational goals is not immediately apparent.

The Court in *Cornelius*, however, stopped short of accepting this principle, instead settling for an unstable compromise judgment that is ultimately untrue to the constitutional concerns underlying the case. At some point or another the Court will have to abandon this compromise, and clarify the circumstances under which viewpoint discrimination will override warranted deference. When it does so, the basic instinct of *Cornelius* might prove a helpful guide.

399. Redish, *supra* note 387, at 131-35; Stephan, *supra* note 155, at 233; Stone, *supra* note 386, at 101.

400. Assuming, of course, that the regulation does not appear to be so irrational as to seem "arbitrary, capricious or invidious."

CONCLUSION

"We had the experience but missed the meaning," T.S. Eliot writes in *The Dry Salvages*.⁴⁰¹ The observation illuminates a great deal of the twisted and unhappy history of public forum doctrine. The Court has sharply experienced the necessity of protecting the administrative integrity of government institutions, and yet has been unable to capture the meaning of that experience. It has instead concentrated on questions of government property and the constitutional license of the proprietor, questions that are deservedly anomalous in modern first amendment jurisprudence. Fortunately the Court's instincts have proved truer than its doctrine, for underlying its actual judgments there is discernible a more or less defensible pattern of decision.

This Article has attempted to trace that pattern. It begins with the line between governance and management. When the state acts to govern the speech of the general public, it truncates the very process of discussion and exchange by which public ends and public actions are determined. For this reason, the first amendment imposes rather stringent restrictions on such governance. When the state acts internally to manage speech within its own institutions, on the other hand, public ends are taken as given and as socially embodied within the form and objectives of a government organization. First amendment restrictions on the internal management of speech thus turn in the main on whether the management is necessary in order to attain organizational purposes.

The line between governance and management corresponds to the distinction between the public and nonpublic forum. If a resource is subject to managerial authority, it is a nonpublic forum and its use for communicative purposes can be routinely subordinated to the discretion of state officials, frozen through prior restraints, and in many circumstances subjected to viewpoint discrimination. All of this is presumptively forbidden to the government when a resource is a public forum and can only be regulated according to the standards of governance. This is not because the public forum receives especially strict constitutional protection, but rather because restrictions on speech within the public fo-

401. T.S. ELIOT, *THE COMPLETE POEMS AND PLAYS* 133 (1962).

rum are controlled by ordinary principles of first amendment adjudication.

There is no magic talisman to distinguish public from nonpublic forums. As a society, however, we recognize managerial domains by the presence of an instrumental orientation embodied in the exclusion of roles and statuses inconsistent with the attainment of organizational ends. Contemporary public forum doctrine can be interpreted as groping toward a similar recognition when it makes the distinction between public and nonpublic forums turn on a tradition of public access for expressive purposes, since in most circumstances such a tradition will be deeply incompatible with the proscription of all but narrowly organizational roles and statuses.⁴⁰² The tradition, however, is not constitutive of the distinction between public and nonpublic forums, but is rather probative of underlying social practices that are themselves determinative of the authority ceded to the government in the regulation of speech.

When reviewing government control of access to a nonpublic forum, a court must decide whether to determine independently if the control is necessary for the attainment of legitimate institutional ends, or whether to defer on this question to the judgment of institutional authorities. In most cases, the distinction between the two approaches turns on whether judicial deference is itself necessary in order for a state organization to function effectively. If the government decision at issue entails a kind of authority which requires flexibility and discretion to function effectively, or which is part of the creation of a specific organizational culture for the management of the affected institution, there are strong justifications for judicial deference. These justifications may be overridden, however, if the management of the resource entails viewpoint discrimination that is not obviously directed toward the attainment of institutional ends.

The underlying pattern of contemporary public forum doctrine, in short, reflects an emerging sociology of institutional authority, as well as a pervasive and important strug-

402. Special environments like universities may constitute an exception to this generalization, since in such environments the culture of academic freedom might instrumentally connect a tradition of public access for expressive purposes with the achievement of educational objectives.

gle between a public realm and an organizational domain of instrumental rationality. Seen in this light, public forum doctrine has much to teach us about the nature and limits of our democracy.

