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Calvin R. Massey
UC Hastings College of the Law, masseyc@uchastings.edu

Author: Calvin R. Massey

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by
CALVIN MASSEY*

The public forum[1] problem—to what degree and in what manner may governments regulate or forbid speech on public property?—has never been satisfactorily resolved by the Court. The Court's public forum doctrine has oscillated between two conflicting visions of the free speech guarantee. One vision—the "affirmative" theory—sees the First Amendment as obligating governments to act affirmatively to promote increased public discourse. As much public property as possible ought to be open for speech. The other vision—the "negative" theory—sees the First Amendment as obligating governments to remain scrupulously neutral in public discourse. So long as public property is closed to speech in a fashion that does not alter the content or outcome of public discourse the free speech principle is not offended. To compound the difficulty of choosing between these two visions, the Court has formulated its public forum doctrine—which determines the amount of judicial scrutiny any particular speech restriction on public property receives—almost entirely by categorizing the property.

In the last twenty-five years the Court has created the public forum doctrine, a labyrinth of conflicting rules for determining how much deference ought to be accorded governmental decisions to limit public access to public property for speech purposes. The aim of the Court's project is to sort public property into two categories: the public forum and the non-public forum. Restrictions of speech in the public forum must be reasonable time, place, and manner regulations that are content-neutral, narrowly tailored to advance "a significant

 Professor of Law, University of California, Hastings College of the Law. I appreciate Vik Amar's comments on an earlier draft.

1. Harry Kalven is generally credited with coining the term. *See* Harry Kalven Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 11-12 ("[I]n an open, democratic society the streets, the parks, and other public places are . . . a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.").

government interest, and leave open ample alternative channels for communication."[2] Absolute bans on speech in a public forum must be "narrowly drawn to accomplish a compelling governmental interest."[3] By contrast, the non-public forum can be closed to speech on the basis of the "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."[4] The Court further subdivides the public forum into two subcategories—the unlimited public forum and the limited public forum. The unlimited public forum consists of public spaces that either (1) are so traditionally endowed with unlimited public access that they are deemed open to all speakers, or (2) have been deliberately dedicated by government to all speech purposes.[5] The limited public forum consists of public property that has been voluntarily opened to some, but not all, speakers.[6]

Since characterization of public property is the fulcrum for moving from minimal to intermediate scrutiny of governmental speech restrictions the Court should pay especial care in crafting its method for deciding this issue. There should be a high level of confidence that the Court's taxonomy of public spaces is well-suited to deliver results consonant with the foundational principles of the free expression guarantee. Alas, there is little evidence in the United States Reports of such a relationship. The Court's doctrine is crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee. We can do better.

It is quite possible that the Court started off with a fundamental error—misconceiving the speech issues involved in the public forum problem as *property* issues. But that error—if it is error—is deeply entrenched. There is no practical likelihood that it will be abandoned. Nor is abandonment necessary. The public forum problem can be viewed through the prism of property and still resolved consistently with the increasingly predominant vision of free expression—that governments must remain neutral with respect to public debate but need not actively promote such discourse. The

2. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

3. *Id.*

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

5. *See, e.g., id.* at 802 ("The Government [creates a] public forum... only by intentionally opening a nontraditional public forum for public discourse."); Arkansas Ed. Television Comm. v. Forbes, 118 S. Ct. 1633, 1641 (1998).

6. Int'l Soc. For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992), described the designated public forum as public "property that the state has opened for expressive activity by all or part of the public." *Forbes*, 118 S. Ct. at 1641 (1998), described the designated public forum as public property opened "for expressive use by the general public or by a particular class of speakers."

Court must however consider a broader spectrum of free speech issues that are refracted through that prism.

In this article I examine how the Court developed such an inefficacious body of law and offer some normative suggestions concerning how it might reconceive its doctrine to be more aligned with the Court's apparently operative negative theory of free speech. Part One surveys the development of the doctrine and assesses some of the more glaring defects of the present Byzantine categorical structure. In so doing I hope to illustrate how poorly certain Court doctrines function and, perhaps, to reveal why the Court has gone so badly astray.

Part Two is a brief examination of the ad hoc balancing approach with which the Court briefly flirted. Though many commentators prefer this road not taken there are good reasons for its avoidance. Ad hoc balancing is indeterminate, costly, and not necessarily beneficial.

Part Three of this article offers some suggestions for positive change in the doctrine. I argue that the Court's focus on the character of the public property is not so much wrong as incomplete. The problem of the public forum occurs because of the agency problems that inhere in democratic self-governance. Public property is owned by the sovereign people but possessed and administered by the people's agents, public officialdom. But because public property has multiple uses, this agency problem cannot be resolved simply by asserting the principal's paramount right to the property.

The Court's public forum doctrine responds to the varied use of public property by examining the character of the public property to determine whether speech is among its multiple uses. I propose that the Court should determine the scope of the principal's presumptive right of access to public property for speech purposes by making an analogy to the common law doctrine of nuisance. Since the general public owns public property, the use of such property for speech purposes is analogous to the nuisance problem: When does a property owner's use of his property so significantly interfere with the use and enjoyment of another's property that a nuisance is recognized? The balancing formula used to assess nuisance—does the gravity of the harm inflicted by any given use outweigh the social utility of that use?—can be adapted to the public forum problem. In short, the task is to assess the harm inflicted by and utility of speech restrictions on public property as well as to gauge the harm inflicted by speech on public property in relation to the utility of citizen speech on such property. This can only be done if the courts have a clear, consistently applied theory of the function of free speech. If the affirmative theory is used the result is nothing more than another warmed-over version of ad hoc balancing, an approach that the Court

has rightly rejected. If the negative theory is used, however, much of the indeterminacy of ad hoc balancing is eliminated. Moreover, when the negative theory is used to set the standards by which to measure harm and utility, the elements of the Court's existing doctrine can readily be unbundled and repackaged in the harm/utility calculus. In Part Three I attempt to do so and demonstrate how that reformulation would improve the public forum doctrine and avoid most of the indeterminacy and other costs associated with ad hoc balancing.

I. The Evolution of Public Forum Doctrine

The public forum problem arises because most public property has multiple uses. The public forum doctrine is, or at least ought to be, an attempt to mediate the tension between the public's claim to use public property for speech purposes and the government's asserted need to muzzle some or all speech in order to use the property for legitimate non-speech purposes.

The polar extremes can easily be dismissed. Governments might be thought to be the absolute owners of "their" property, just like private owners, and so entitled to oust unwanted speakers at their pleasure. This view, once espoused by Justice Holmes,[7] has long been repudiated. Governments are sovereigns as well as mere property owners, and even their sovereignty is held in trust for the people who gave it to them. The other extreme is no more tenable. Governments cannot perform many of the functions we entrust to them if all of "their" property is open for public speech.

The Court's attempt to fashion a middle position has responded to two diverging principles. One is the idea that the public has a minimal right of access to public property for purposes of communication.[8] The other is the notion that if public property is opened to speech, the government may not choke off such speech selectively on the basis of its content.[9]

While each of these principles limit government regulation, their rationales are not easily harmonized. The former principle is intolerant of absolute bans of speech on public property because it is rooted in the "affirmative theory" of free speech—the idea that the free speech guarantee should actively promote public discourse. Lillian BeVier calls this "the Enhancement model, which ... is committed to the view that First Amendment rules can and ought to

7. *See* Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

8. *See, e.g.*, Schneider v. State, 308 U.S. 417 (1939); Martin v. Struthers, 319 U.S. 141 (1943).

9. *See* Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972).

be effective tools for augmenting both the quality and quantity of public debate, and accepts the corollary proposition that the Amendment sometimes imposes affirmative duties on government to maximize the opportunities for expression."[10] On this view, the free speech clause should in many, if not most, instances compel governments to open public spaces for speech purposes.[11]

The latter principle accepts such bans so long as they are content-neutral (or, perhaps, as we shall see, merely viewpoint-neutral) because it is grounded in the "negative theory" of free speech—the idea that the free speech guarantee should primarily or exclusively restrain governments from meddling with the content or skewing the outcome of public discourse. BeVier calls this "the Distortion model, [under which] ... the essential task of First Amendment rules is to restrain government from deliberately manipulating the content or outcome of public debate and to prohibit it from censoring, punishing, or selectively denying speech opportunities to disfavored views."[12] On this view, the free speech clause should operate to insure government neutrality with respect to speech on public property.

The Court's method of avoiding undue collision is to define some public property as a "traditional public forum," which may neither be altogether closed to speech nor selectively closed on the basis of speech content without proof of the extraordinary justification required by strict scrutiny, and to categorize the remaining public property as either not a public forum at all (leaving governments free to impose any speech restriction rationally related to a legitimate interest) or as a "limited public forum" (which may be closed to all speech purposes except those for which it is opened, so long as the criteria for opening the forum to speech is viewpoint-neutral). The traditional public forum is a nod to the affirmative theory, and the rest of the doctrine is a deep, but ultimately graceless, bow to the negative theory of free speech. A brief synopsis of the development of this taxonomy may be helpful.

A. The Originating Principles of the Public Forum

The Court's first encounter with the public forum was not a success. Davis, a preacher of some sort, was convicted of speaking on Boston Common without a permit. The Massachusetts Supreme Judicial Court, speaking through Oliver Wendell Holmes, Jr., upheld the conviction: "For the Legislature absolutely or conditionally to

10. Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101.

11. *See infra* notes 86-98 and accompanying text.

12. BeVier, *supra* note 10, at 102-03.

forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in his house."[13] In *Davis v. Massachusetts* the United States Supreme Court affirmed: "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[14] The problem with this simple view is the assumption that governments have an absolute right to exclude the people from public property. If this is so at all times and in all places, the concept of the sovereign people is a delusional conceit. In a democracy the government cannot be entirely exogenous to the people. Nevertheless, Justice Holmes and his soon-to-be brethren on the Court conceived of the public forum problem as no problem at all; it was simply a matter of property law, and an owner's right to exclusive possession settled the issue. Thus was born the practice of viewing speech rights on public property through a property prism. If there was any theory of free speech involved it was a crudely negative one.

The *Davis* rationale survived for forty years. In *Hague v. CIO*, the Court was asked to invoke *Davis* to uphold a Jersey City ordinance imposing a permit requirement for speech in public places.[15] The Court rejected *Davis*'s expansive rationale and, in doing so, Justice Roberts delivered his famous dictum that, despite the fact that title to the "streets and parks may rest [in governments] 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."[16] Here was an affirmative view—the government was obliged to make some of "its" property available to promote public discourse. As a result, said Harry Kalven, "a kind of First-Amendment easement" for speech was created by prescription.[17] But as with easements of a more prosaic sort, what is the scope of this prescriptive easement for speech?

The breadth of the Roberts dictum in *Hague* was more apparent than real. In *Cox v. Louisiana*, although the Court overturned the conviction of civil rights demonstrators for breach of the peace, Justice Black described the scope of the easement for speech as

13. Commonwealth v. Davis, 39 U.S. 113, 113 (1897).
14. 167 U.S. 43, 48 (1897).
15. 307 U.S. 496 (1939).
16. *Id.* at 515.
17. Kalven, *supra* note 1, at 16.

extending to all public spaces "where people have a right to be for [speech] purposes."[18] This begs the question, of course, but the way in which it does so is instructive. Black's formulation makes speech rights dependent upon the speaker's rightful presence on public property, and this suggests that the government's rights as property owner are the paramount determinant of such speech rights. A slightly different phrasing, but one drawing upon the same theme, was undertaken by Justice Frankfurter in *Niemotko v. Maryland*.[19] To Frankfurter, the public forum problem boiled down to a balancing of "the interest in allowing free expression in public places" against preservation of "the primary uses of streets and parks."[20] There can be little argument over the *primary* uses of streets and parks—transportation and recreation. On this view, speech that interferes to any material degree with these primary uses is not constitutionally protected. The definitive principle is the use to which the government, as holder of title to property, has dedicated the property. Once again, property rights, conceived for the most part to govern the competing claims of private citizens, effectively control the scope of the public's easement for speech on public property. The Black formulation was endorsed by a majority of the Court in *Adderley v. Florida*:[21] "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."[22] From this perspective, there is not much room on public property for the "uninhibited, robust, and wide-open" speech that the Court says is essential to public discourse[23] and which is at the core of the affirmative theory of free speech.

Black's and Frankfurter's resolution of the public forum problem is only one narrow band in the spectrum of solutions revealed by the property prism. The Roberts dictum conceived of the public's right to speak on public property as part of a general right to disseminate ideas, entailing a minimum right of access to public property for this purpose. The Black and Frankfurter position is consistent with, even if not necessarily required by, the principle that public property opened to speech must be opened evenhandedly. But government attempts to censor speech by opening public property to some speakers, or some subjects, have met a mixed fate, suggesting that evenhandedness is not sacrosanct when it comes to speech on public property. The early cases viewed departures from neutrality

18. 379 U.S. 536, 578 (1965) (Black, J., concurring and dissenting).
19. 340 U.S. 268 (1951).
20. *Id.* at 276 (Frankfurter, J., concurring).
21. 385 U.S. 39 (1966).
22. *Id.* at 47.
23. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

skeptically, striking down municipal ordinances that vested unfettered discretion in public officials to decide which speakers could distribute leaflets on city streets[24] or could use sound amplification equipment.[25] But at almost the same moment the Court upheld a regulation prohibiting street demonstrations without a permit, where official discretion concerning the permit was limited "to considerations of time, place and manner so as to conserve the public convenience."[26] Thus was born the principle, actuated by negative free speech theory, that content-neutral restrictions of speech in the public forum are acceptable so long as the government has good and sufficient reason for their imposition.

The negative theory principle of even-handedness and the affirmative theory of general access quickly collided. In order to prevent littering, a quartet of New Jersey cities banned all leafleting in the public streets. The regulations were even-handed; all leafleting, no matter what subject or viewpoint might be advanced, was banned. The regulations did not deny all access to the public streets for speech purposes; only speech conducted through the leaflet medium was affected. In *Schneider v. State*, the Court invalidated these regulations because there were less speech restrictive means available to accomplish the legitimate objective of preventing littering.[27] If one viewpoint could be said to prevail, it was the "general access" principle. Evenhandedness, in the form of content-neutrality, was not enough. The traditional public forum is open for speech, and even content-neutral restrictions on speech must be a last resort to accomplishment of legitimate regulatory goals.[28] Or so it seemed, until *Kovacs v. Cooper*, in which the Court upheld a Trenton, New Jersey ordinance banning all "loud and raucous" sound trucks from the city's streets.[29] A three-justice plurality sustained the regulation on the ground that it was not a flat ban. Joining the plurality in the result were Justices Jackson and Frankfurter, both of whom thought it was a flat ban but concluded that outright bans were permissible so long as they were not attempts to censor.[30] The dissenters also thought that the ordinance was a flat ban but contended that the Court's toleration of a flat ban of an entire medium was inconsistent with *Saia* and offensive to the "basic

24. *See* Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

25. *See* Saia v. New York, 334 U.S. 558, 562 (1948).

26. Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941).

27. 308 U.S. 147, 162-65 (1939).

28. *See* Martin v. Struthers, 319 U.S. 141 (1943) (city ordinance prohibiting the distribution of literature by ringing a house doorbell or otherwise summoning the occupants struck down).

29. 336 U.S. 77, 89 (1949).

30. *See id.* at 97-98.

premise of the First Amendment [—] that all . . . instruments of communication . . . shall be free from governmental censorship or prohibition."[31]

The early cases suggest, at best, a draw between affirmative and negative theory, or may simply illustrate the Court's indecision concerning which theory is best suited to resolution of the public forum problem.

B. The Binary Nature of the Present Doctrine

The Court's willingness, displayed in *Kovacs*, to tolerate content-neutral flat bans of particular media in the public forum eventually was transformed into the Court's pigeon-hole approach to the public forum problem. Speech in a public forum, whether the forum is traditional or voluntarily created, receives the full measure of constitutional protection. Speech on public property that is not a public forum receives little protection.

Speech restrictions in the traditional public forum must be "reasonable time, place, and manner restrictions" that are "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[32] The narrow tailoring requirement does not, however, mean the regulation must be the least speech-restrictive way of accomplishing the government's objective. According to *Ward v. Rock Against Racism*, "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," the regulation is sufficiently narrowly tailored.[33] The general access strand, exemplified by *Schneider*, is preserved in an attenuated form by the requirement that the speech regulation leave open ample alternative channels of communication. The Court has upheld a "focused picketing" ordinance as inoffensive to this element, reasoning that since only picketing focused upon and taking place outside a particular residence was barred, protesters were free to deliver their message by mail, telephone, door-to-door canvassing, or unfocused street demonstrations.[34] But this element does have some teeth. In *City of*

31. Id. at 102 (Black, J., dissenting).

32. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

33. 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1983) (upholding a National Park Service regulation prohibiting camping in the Mall as applied to a symbolic "tent city" dramatizing the plight of the homeless, even though the Park Service had less speech restrictive avenues of achieving its legitimate objectives of park maintenance).

34. Frisby v. Schultz, 487 U.S. 474, 483-84, 488 (1988).

Ladue v. Gilleo, the Court unanimously voided an ordinance banning the posting of most signs in order to minimize visual clutter.[35] The content-neutral ordinance did not directly implicate the public forum (since it applied to sign-posting on private property) but the Court found the city's near-total foreclosure of signs troubling: "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."[36] Ultimately, the Court was "not persuaded that adequate substitutes exist for the important medium of speech."[37]

Most of the Court's effort has been expended on drawing lines between public property that is a public forum and public property that is not. The Court recognizes that some public property is a traditional public forum—endowed with a presumptive right of public access for speech. All other public fora become so by deliberate dedication to speech use, and that dedication may be unlimited (for all speech purposes) or limited (open for only a defined category of speech). Any other public property is not a public forum of any kind.

The Court's commitment to this taxonomy of public property was made in *Perry Education Ass'n v. Perry Local Educators Ass'n*, in which the Court concluded that a public school district's interschool mail system was not a public forum.[38] The school district had opened the system to a teachers' union that was the collective bargaining agent for the district's teachers and closed it to a rival union.[39] The mail system was not a place "which by long tradition or by government fiat [was] devoted to assembly and debate."[40] Nor had the school district voluntarily opened its mail system "for use by the public as a place for expressive activity."[41] It had merely made its mail system available to a union to enable it to facilitate its representation obligations. The school district might have created a limited public forum by permitting access to the mail system to a variety of civic and charitable organizations, but even if it had done so "the constitutional right of access would in any event extend only to other entities of similar character."[42]

Perry altered public forum doctrine by recognizing the

35. 512 U.S. 43, 58-59 (1994).
36. *Id.* at 55.
37. *Id.* at 56.
38. 460 U.S. 37, 47-48 (1983).
39. *See id.* at 40-41.
40. *Id.* at 45.
41. *Id.* The school district had not "opened its mail system for indiscriminate use by the general public." *Id.* at 47.
42. *Id.* at 48.

government's intent to open or close public property for speech as a determinative element for all public property other than the traditional public fora. This represented a disengagement from the core tension between affirmative and negative theories of free speech. It amounted to a declaration of deference to forum administrators, and perhaps an implicit confession of judicial failure to mediate the theoretical conflict.

C. The Traditional Public Forum

The Court quickly used *Perry* to cut the tap root of the traditional public forum, leaving it a lifeless snag incapable of further growth. The clearest indicators of this indelicate pruning are *United States v. Kokinda*[43] and *International Society for Krishna Consciousness, Inc. v. Lee*.[44] In *Kokinda* the Court upheld a Postal Service regulation prohibiting the solicitation of contributions on postal premises as applied to a political advocacy group that was soliciting contributions on a postal sidewalk leading from the post office to a parking lot.[45] The postal sidewalk was not a public forum at all, much less a traditional public forum, said a four-justice plurality, because the Postal Service had not "expressly dedicated its sidewalks to any expressive activity."[46] Part of the evidence of this lack of dedication inhered in the Postal Service's regulations restricting speech, the very regulations whose validity was at issue.[47] This was a substantial move from *Cornelius v. NAACP Legal Defense and Education Fund*, where the Court had concluded that the Combined Federal Campaign, a charitable fundraising drive conducted annually in federal offices, was not a public forum.[48] The Court in *Cornelius* declared that the government creates a public forum "by intentionally opening a *nontraditional* forum for public discourse. . . ."[49] The decision went on to state that:

> [T]he 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. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. . . . [We] will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer

43. 497 U.S. 720 (1990).

44. 505 U.S. 672 (1992) (decided with a companion case, Lee v. International Society for Krishna Consciousness, Inc. 505 U.S. 830 (1992)).

45. 497 U.S. at 736-37.

46. Kokinda, 497 U.S. at 730.

47. *See id.*

48. 473 U.S. 788, 804-08 (1985).

49. *Id.* at 802.

> that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity."[50]

Kokinda abandoned the qualifiers emphasized in the quoted passage. Not all public sidewalks are created equal; some are more traditional than others.

Krishna Consciousness v. Lee eradicated any lingering doubt that the conception of the traditional public forum had been transmuted into an elegant relic. By a 5-4 vote the Court ruled that airports are not public fora, employing a withered view of tradition to reach the result: "[G]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[51] Justice Kennedy was correct to charge the Court with an "analysis [that] rests on an inaccurate view of history. The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction. . . . [T]he principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse. . . . [U]nder the Court's analysis, even the quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum."[52]

The Court's method of determining what public property is a traditional public forum employs history as a photo album. If there is no faded snapshot of the public property as forum for speech, it has no claim to status as a traditional public forum. It is possible, under this approach, to imagine the creation of a public plaza and thoroughfare in the center of a publicly owned shopping mall, in which solicitation of money for political speech is forbidden and the first amendment is not violated. The opinion would probably contain the phrase, "given the lateness with which the modern shopping mall has made its appearance . . . ." This is, of course, a blockheaded view of history,[53] one that seizes on facts, real or imagined, frozen in the glaciers of an earlier time, as an excuse for avoiding interpretation, context, and nuance. To his credit, Justice Kennedy avoided this error by adopting a functional approach to the traditional public forum: "If the objective, physical characteristics of the property at issue and the actual public access and uses that have

50. *Id.* at 802-03 (emphasis added) (internal citations omitted).

51. 505 U.S. at 680 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1988)).

52. *Id.* at 696-97 (Kennedy, J., concurring in judgements).

53. *See, e.g.*, H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). Chief Justice Rehnquist seems especially maladroit with history. His brand of history is not only ossified, but sometimes imaginary as well. *See* Calvin R. Massey, *The Jurisprudence of Poetic License*, 1989 DUKE L.J. 1047.

been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum."[54]

Kokinda suggests that governments may veto the traditional public forum by creating new places endowed with all the functional attributes of the traditional public forum save deliberate dedication to speech. *Krishna Consciousness v. Lee* echoes the theme by reiterating that it is not enough for public property to possess all the functional attributes of the traditional public forum. Presumably, there must be some limit to this principle. It is hard to believe that the Court would fail to recognize newly created roads, sidewalks, or parks as public fora if the government expressly declared them closed to speech, but I would not care dogmatically to disclaim that possibility.

Whether or not *Kokinda* and *Krishna Consciousness v. Lee* portend the demise of the traditional public forum, they surely indicate a lessened significance and more constricted role for the concept. Though the Court never said so—it did not even hint as much—the diminished importance of the traditional public forum represents a considerable shift toward the negative theory of free speech. After all, the principal rationale for protecting public access to the traditional public forum is to promote and preserve the robust, uninhibited, and wide-open public debate that is central to the affirmative vision of free speech.

Moreover, the increased emphasis on the government's intentions with respect to public property strongly indicates a marked shift toward increased judicial deference to the judgment of forum administrators concerning the advisability of speech on public property. The reason for a taxonomy of public spaces is to settle upon the proper level of judicial scrutiny. A practical question that must be asked is whether there are net costs or benefits produced by having courts rather than forum administrators decide how much speech will occur on public property. In *Kokinda* and *Krishna Consciousness v. Lee* the Supreme Court, by the narrowest of margins, expressed its view that the judgment of forum administrators is presumptively trustworthy.

D. The Limited Public Forum

The category of limited public fora has proven to be a bit chimerical. In theory, the guiding principle seems to be that a government may limit the speech uses of a limited public forum to

54. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring in judgements).

those for which it was voluntarily opened, but its limiting criteria must be content-neutral. Thus, a state fair may open its grounds to exhibitors who distribute printed materials from licensed booths and close its grounds to those who wish to wander throughout them distributing literature to whomever they encounter.[55] A public school may open its facilities to student groups for extra-curricular speech purposes and close them to non-student groups. But the same public school may not close its facilities to student groups seeking to express religious views.[56] Similarly, a public university may decide to use a sequestered portion of student fees to pay the costs of student ideological publications, thus creating a limited public forum in the fund, but still refuse to use the fund to pay the costs of faculty ideological publications. The same university may not, however, refuse to pay from the fund the costs of student religious publications.[57]

If this were the entire body of law, it would seem reasonably coherent. Alas, we must also account for those cases where governments have opened public property that is surely not a traditional public forum to some speech and then used content-based criteria to bar other speech. In the abstract, it would seem that these cases involve an impermissible attempt to create a limited public forum by content-based means. The Court has avoided this problem either by characterizing the property as a non-public forum or by concluding that a limited public forum can be created by content-based but not viewpoint-based means.

Consider the classic case of *Greer v. Spock*.[58] Fort Dix, an important Army training post, barred all partisan political speeches and demonstrations and banned political literature that, in the judgment of the post commander, posed "a clear danger" to military "loyalty, discipline, or morale."[59] The Court upheld these regulations, finding that even though the public was permitted to enter Fort Dix and speak, the post had not been thereby turned into any sort of public forum, limited or otherwise.[60] Thus, the Army was free to impose content-based speech access rules that were rationally related to the legitimate interest of separating military life from partisan politics. Surely military establishments may be closed to speech. No

55. *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-56 (1981).

56. *See generally* Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

57. *See* Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 828-37 (1995).

58. 424 U.S. 828 (1976).

59. *Id.* at 840.

60. *See id.* at 836-38.

one thinks a nuclear missile submarine should be open to public speech, and if the U.S. Navy wants to invite Tom Clancy aboard to speak to the crew it ought not to be seen as creating a public forum. But when the general public is invited onto a military base for a variety of purposes, including speech, and some speakers are selectively ousted it simply will not wash to declare that the military post is not a public forum and leave it at that.[61]

When the public is invited in for some speech it is not credible to say that not even a limited public forum is created. In *Perry* the Court identified the limited public forum as a place opened to some speakers for some limited speech purposes and observed that the "constitutional right of access [to the limited public forum] would . . . extend only to other entities of similar character."[62] Of course, there are many good reasons why speech might be selectively restrained on a military post, but those reasons—maintaining military efficiency, morale, esprit de corps—require a more probing analysis of their weight in relation to the specific speech banned. The Court's binary approach—public forum or not—is ill-suited to the task.

The other method used by the Court to deal with the limited public forum—focusing on viewpoint-neutrality instead of content-neutrality—is a way to defer to forum administrators except where forum administrators have egregiously departed from neutrality. *Arkansas Educational Television Committee v. Forbes* is a good example.[63] Arkansas public television invited the Democratic and Republican candidates for election to the House from Arkansas's Third District to participate in a televised debate. Forbes, an independent candidate with no support, no money, no campaign organization, and no prospects, was excluded. The Court upheld the exclusion after concluding that no designated, or limited, public forum had been created. "[G]overnment does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, '*obtain permission*' to [speak]."[64] So long as permission is not granted or withheld on the basis of the speaker's viewpoint, selective exclusion is valid. Forbes was excluded because he was not a serious candidate, because of his views.[65] The focus on viewpoint discrimination makes some sense because exclusion of particular viewpoints rather than entire categories containing a variety of views is a more pointed departure from

61. *See, e.g.*, United States v. Albertini, 472 U.S. 675 (1985).
62. Perry Educ. Ass'n, 460 U.S. 37, 48 (1983).
63. 118 S. Ct. 1633 (1998).
64. *Id.* at 1642 (emphasis added).
65. *Id.* at 1643-44.

government neutrality. The Court's treatment of exclusion of religious speakers from public property opened to other speakers exemplifies this approach.[66] But this method is unstable since there is no easy way to tell when the exclusion is of a category comprising multiple views or of a particular viewpoint.

E. Variations on a Familiar Theme: Sovereign or Proprietor

Woven through the cases that conclude that public property is not a public forum, whether limited or traditional, is the notion of the Janus-faced government: Fierce Sovereign, demanding obedience, or Honest Tradesman, merely trying hard to stay afloat. When governments wield the sovereign's sword to restrict speech on public property, the property is more apt to be seen as a public forum. When governments act like shopkeepers to muzzle troublesome speakers the property is apt to be treated as not a public forum. A typical statement of this view is the Court's obiter dictum observation in *Krishna Consciousness v. Lee*: "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."[67] Governments do have multiple roles. There are times—when the policeman stops you for speeding—that the government is pure sovereign. There are times—when the municipal bus stops for you—that the government is almost pure businessman. But the clarity of this distinction is illusory, since governments are simultaneously sovereigns and proprietors.[68] No matter how hard it tries to be a simple merchant the government can never completely sheath the sword of sovereignty. By contrast, it is easy for the government to shed the merchant's smock and act as unalloyed sovereign. The slippery nature of this distinction suggests that there is a real possibility that it is used more as explanation for the result than as an analytical device for determining the proper result.

The city of Shaker Heights, Ohio barred all political advertising on its city-owned buses, though it eagerly sought other advertising for its buses. In *Lehman v. City of Shaker Heights* the Court upheld the ban, after concluding that the advertising space on city buses was not

66. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995).

67. International Soc'y for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672, 678 (1992).

68. *But see* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1784-1809 (1987); Michael Wells and Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

a public forum.[69] "[T]he city is engaged in commerce. . . . [The advertising space], although incidental to the provision of public transportation, is a part of the commercial venture."[70] The city was just another vendor of advertising media, and its exclusion of political advertisements was an unremarkable "managerial decision,"[71] no different than fare decisions or "changing schedules or the location of bus stops."[72] Indeed, the city was no more than a commercial competitor: "In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed [on its buses]."[73]

The city's exclusion of *political* speech was not only reasonable, but actually a good thing: "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."[74] These matters are problems only because the city is *not* just a private bus service, but *the government.* Who cares whether political advertisements on a Greyhound bus suggest that Greyhound favors or opposes Bill Clinton? Greyhound management might, if either perception had an adverse impact on revenue, but Greyhound's perceived favoritism is of no consequence to the democratic process. Perceived favoritism by incumbent governments is quite another matter. This may suggest that the Court was correct, after all, to defer to the city's decision to bar political advertisements.[75] Perhaps, but the avenue to that conclusion is surely not the line of reasoning that goes: 1) The city's buses are just like a private business; 2) Political advertising on those buses would impeach the government's impartiality in partisan political contests; and 3) Ad space on the city's buses is not a public forum. This is not very helpful either to clarity or honesty of analysis.

Another leg in the development of the theme of government as mere business manager was *United States Postal Service v. Council of Greenburgh Civic Ass'ns*,[76] in which the Court upheld the constitutionality of a federal law prohibiting the deposit of unstamped "mailable matter" in letter boxes owned by private citizens. Although the federal government did not own the mail boxes it did

69. 418 U.S. 298, 302-04 (1974).
70. *Id.* at 303.
71. *Id.* at 304.
72. *Id.*
73. *Id.* at 303.
74. *Id.* at 304.
75. *See infra* text accompanying notes 142-47.
76. 453 U.S. 114 (1981).

own the Postal Service, and the Court perceived the mail boxes to be "under the direction and control of the Postal Service . . . [because the mail boxes are] an essential part of the Postal Service's nationwide system for the delivery and receipt of mail."[77] This is more than a little remarkable. If the mail boxes are private property there would not seem to be a public forum issue at all. It is only by virtue of their inextricable connection to public postal service that the mailboxes become *de facto* public property. The same connection provides the support for the conclusion that this *de facto* public property is closed to public speech "just like" a private business might close its property to public speech. This reasoning, however, reveals the lack of utility of the sovereign-proprietor distinction. No other vendor of postal services—Federal Express, UPS, DHL, or a 12-year-old child eager to distribute flyers—has like ability to curb its competition. It is because the Postal Service is the government that it can declare private mail boxes available only to it. True, Federal Express does not have to deliver parcels intended for UPS though left in a Federal Express "drop box," but Federal Express may not make it a crime to leave them in its boxes. There may be good reason for upholding the federal statute at issue in *Greenburgh* (after all, it is a content-neutral restriction) but the claim that the Postal Service is just a commercial vendor of document delivery services is an inadequate reason.

The government-as-proprietor motif was continued in *Kokinda* and *Krishna Consciousness v. Lee*. In her plurality opinion in *Kokinda*, Justice O'Connor relied on the fact that Congress intended the Postal Service "to be run more like a business" than the Post Office Department it replaced.[78] Invoking *Lehman* for the proposition that speech regulations need only be "reasonable" when the government acts as a proprietor, O'Connor agreed with the government's assertion that "it is reasonable to restrict access to solicitation, because solicitation is inherently disruptive of the Postal Service's business."[79] In *Krishna Consciousness v. Lee* Chief Justice Rehnquist concluded that "airports are commercial establishments funded by users fees and designed to make a regulated profit."[80] That was enough: "The restrictions . . . need only satisfy a requirement of reasonableness."[81]

Robert Post has argued that this distinction, with some

77. *Id.* at 126, 128-29.

78. United States v. Kokinda, 497 U.S. 720, 732 (1990) (quoting Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512 519-20, and n. 13 (1984)).

79. *Id.* at 732.

80. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 682 (1992).

81. *Id.* at 683.

modification, is coherent. He claims that "a resource . . . embedded in social practices . . . constituted by such organizational roles . . . lie[s] within an organization . . . . [and] is a nonpublic forum."[82] By contrast, "a resource . . . used by individuals occupying widely different roles and statuses, with correspondingly divergent values and expectations, . . . lies in the public realm . . . [and] is a public forum."[83] By his reckoning the advertising space at issue in *Lehman* "was in all pertinent respects functionally defined by the transit system . . . [and thus] not a public forum."[84] There are two problems with this conclusion. First, to analyze it on Post's own terms, the advertising space was made available to all speakers except political speakers. Any number of "individuals occupying widely different roles and statuses, with correspondingly divergent values and expectations," were offered access to Shaker Heights' bus advertising space. Political speakers, however, were excepted. The only "social practice" in which access to the advertising space was "embedded" was the governmental decision that it would not be a good idea for the buses to carry political advertising. The second problem is the inescapable fact that even a purportedly managerial decision, when made by government, is silently backed by sovereign power. To see the point, imagine two bus drivers; one drives for Greyhound, the other for a government. Each driver politely informs entering passengers that, to insure tranquility, political talk is forbidden aboard the bus. But the government driver has an AK-47 slung over his shoulder. Which "managerial" decision packs more punch?

The problem with the sovereign-proprietary distinction is not so much that it is difficult to detect which face the government is wearing (though that is indeed difficult) but that the government is always a sovereign. Even when governments act "just like" proprietors they are still governments. The King may roll up his shirtsleeves and sit down in the pub to drink ale with the common folk, but he is still the King. The ever-present specter of unasserted sovereign authority makes the government proprietor fundamentally different from the neighborhood greengrocer. It cannot be otherwise, however much we may wish it were. Abraham Lincoln is supposed to have asked people, "How many legs would a dog have if you call a tail a leg?" After the gullible interlocutor replied "five" Lincoln would quickly admonish him: "Four; calling a tail a leg doesn't make it so."[85]

82. Post, *supra* note 68, at 1793.

83. *Id.*

84. *Id.* at 1794.

85. *See* JOHN BARTLETT, *Familiar Quotations* 542b (Little, Brown & Co., 13th ed. 1955).

II. Ad Hoc Balancing: The Road Not Taken

No discussion of the present public forum muddle is complete without mention of the alternative approach suggested by the Court's dicta in *Grayned v. City of Rockford*.[86] A Rockford ordinance forbade anybody on property "adjacent" to any school in which class is in session from "the making of any noise . . . which disturbs or tends to disturb the peace or good order of such school session."[87] Grayned was convicted of participating in a noisy demonstration on a street adjoining a high school. The Court affirmed, concluding that the ordinance was sufficiently well tailored to address the city's important interest of maintaining a tranquil learning environment. In assessing this, the Court thought that "the nature of a place, 'the pattern of its activities'" was pivotal: "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[88]

This formulation was hailed as a new dawn. "In this passage," claimed Geoffrey Stone, "the right to a public forum came of age. No longer does the right to effective freedom of expression turn on the common law property rights of the state, and no longer does it turn on whether the particular place at issue has historically been dedicated to the exercise of First Amendment rights."[89] At the time, it was reasonable to expect that the public forum problem would develop into a context-specific assessment of the incompatibility of speech and governmental purposes. As Stone envisioned it, courts should "seek a fair accommodation of the individual's interest in effective exercise of [expression], the public's interest in receiving the communication, and legitimate counterveiling [sic] interests of the state."[90] A case-by-case balancing of these interests would evolve. The Supreme Court, however, did not cooperate. As we have seen, the Court spurned this possibility, preferring to develop a categorical public forum doctrine heavily dependent upon specific historical traditions and governmental intentions concerning specific tracts of public property.

The commentators' enthusiasm for this approach is rooted in their preference for the affirmative theory of free speech. The affirmative theory regards more speech as an unqualified good. Governments are obligated to make every effort to promote more speech. The "incompatibility" test appears to presume that all public

86. 408 U.S. 104, 116-17 (1972).

87. *Id.* at 107-108.

88. *Id.* at 116.

89. Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 251-52.

90. *Id.* at 254.

property is open to speech unless the government can demonstrate that the particular speech is "incompatible" with the "normal" governmental uses of the public property. By presumptively opening the public property to speech, public discourse was thought to be advanced in at least two important ways. First, making public property available "to those who are unable to afford more expensive means of communication to reach an audience"[91] increases the quantity of public discourse. Second, "expressive access to public property allows government action to be challenged at its locus and facilitates political and societal changes through peaceful and lawful means,"[92] thus improving the quality of public discourse.

There is, however, quite a bit to be said in favor of the categorical approach. Perhaps the most persuasive case is made by Lillian BeVier, who argues that the categorical approach employs useful generalities "about the kinds of places where denials of access tend systematically to trigger well-founded concerns about deliberate governmental abuse and distortion[,] . . . thus conserv[ing] judicial resources for those circumstances in which the risks of abuse and distortion are high and . . . important systemic gains from judicial intervention" are likely to be achieved.[93] The bright-line rules of the categorical approach make "outcomes turn on fewer relevant variables" and force "the variables themselves [to] reflect systematic risks of government abuse."[94]

By contrast, BeVier argues that the ad hoc balancing exemplified by the *Grayned* dictum is inherently inaccurate. Case-by-case balancing "cannot be precise unless each of the factors considered, their relative weight, and the effects of alternative decisions can be specified, and a definite criterion of judgment can be articulated."[95] But this is not likely to occur because all too often the particular is weighed against the general. The temptation is to weigh a speech claimant's particular speech in a particular place against a general governmental need to manage public spaces, or to weigh the government's particularized need to bar specific speech from a specific place against the general need for robust, uninhibited public debate. BeVier doubts whether this weighing will ever be anything other than "impressionistic,"[96] a process that makes fine art but lousy constitutional law.

91. Edward J. Neveril, Comment, *"Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1185, 1189 (1996).

92. *Id.*

93. BeVier, *supra* note 10, at 121.

94. *Id.* at 113.

95. *Id.* at 116.

96. *Id.* at 117.

Moreover, the balancing approach involves assessment of factors that are inherently indeterminate. What, exactly, is incompatibility? It might be speech that totally precludes any government use of the property. It might be speech that significantly interferes with government use of the property. It might be speech that merely impedes such government use. What are the "normal" government uses of property? Is there an idealized norm, or ought we refer to past practices and, if so, for how long ago?

Finally, to the extent that ad hoc balancing is an exercise in advancing the affirmative theory of free speech, BeVier argues that it suffers from the lack of "specified—much less of specifiable—norms"[97] against which to measure the gains in public discourse that might be achieved by invalidation of any given closure of public property to speech. Nor are there any reliable ways accurately to measure the costs of such judicial decisions.[98]

Whether or not the Court's embrace of categories was a conscious reaction to the indeterminacy of balancing, any reformulation of the public forum problem that departs significantly from categorizing the place of speech must address this problem. Moreover, since the categorical approach is designed to make courts defer to the judgment of bureaucrats who manage public property,[99] an approach that departs from this system must justify the benefits of increased judicial intervention.

III. Speech as Nuisance

Almost nobody has anything good to say about the Court's public forum doctrine. Robert Post claims that "[t]he doctrine has . . . become a serious obstacle not only to serious first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It . . . is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes."[100] That was said ten years ago and, if anything, the doctrine has since become more obdurately categorical. Virtually everyone but a majority of the Court agrees on some of the doctrinal deficiencies. It is "strained and formalistic," mere "doctrinal pigeonholing;"[101] characterized by a "myopic focus on formalistic labels;"[102] producing confusion and "diverting attention from the real

97. *Id.* at 118.
98. *Id.* at 119-21.
99. *See supra* text following note 54.
100. Post, *supra* note 68, at 1715-16.
101. United States v. Kokinda, 497 U.S. 720, 742043 (1990) (Brennan, J., dissenting).
102. Geoffrey K. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987).

first amendment issues;"[103] ultimately "yield[ing] an inadequate jurisprudence of labels."[104]

The critics are likely to share a common vision of the free speech guarantee—the notion that the free speech clause should operate affirmatively to create ever more and wider opportunities for public discourse, the fuel of true democratic governance.[105] Consequently, the typical reform urged by the critics is some version of the *Grayned* incompatibility test.[106]

But not everyone shares this viewpoint, and so not everyone is critical of existing public forum doctrine. The most important dissenters continue to be those whose views matter most—the majority of the Court that has created the categorical public forum doctrine. Their view derives from the belief that the free speech clause "restrain[s] government from deliberately manipulating the content or outcome of public debate,"[107] not that it should be a vehicle for the active promotion by governments of public discourse.

It is entirely possible that both affirmative and negative theorists agree that free speech is a means to an end. The roster of ends which free speech serves includes self-governance,[108] the search for truth,[109]

103. Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234 (1984).

104. C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986).

105. This position is exemplified by the Court's stated commitment in *New York Times Inc. v. Sullivan*, 376 U.S. 254 (1964), to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270.

106. Perhaps the most sophisticated of these theorists is Robert Post, who proposed focusing not upon "the character of the government property at issue, but . . . [upon] the nature of the government authority in question." Post, *supra* note 68, at 1717. Post saw governments acting as either managers or governors and would permit governments to curb speech "as necessary to achieve [its] instrumental objectives" of management. *Id.* But when acting as a governor—wielding authority over "the arena in which . . . the general public meet[s] to accommodate competing values and expectations"—the free speech clause should tightly constrain governments from restricting speech. *Id.* To Post, a public forum is any resource over which governments exercise governance authority and "which a member of the general public wishes to use for communicative purposes." *Id.* The same resource is a nonpublic forum if it is only subject to the state's "managerial" authority. *Id.* See also text following *supra* note 81. Other critics propose simpler reforms that boil down to a restatement of *Grayned*. *See, e.g.*, G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949.

107. BeVier, *supra* note 10, at 103.

108. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). See also Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 116-22 (1992).

109. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That. . . is the theory of our Constitution."); JOHN

the development of moral virtue,[110] the cultivation of tolerance,[111] the maintenance of a safety valve to preserve social stability,[112] and a check on government power.[113] Theorists often fasten upon these ends as values that governments must affirmatively promote.[114] But they need not do so. It is equally plausible that these ends will be served by a free speech clause that restrains government intervention in speech only to insure that government remains neutral in the arena of public debate. Public discourse that is untainted by governmental controls or subtle influences enables the citizens to govern themselves, find their own truths, develop the only moral virtue that matters—individual moral virtue, learn tolerance by necessity, vent nonsense or utter wisdom, and reveal the awful truths of the sausage factory of government. If government simply stays out of the way of public discourse, the people's good sense will take care of the ends of free speech. It is a conceit of the more-government-is-better crowd to insist that governments should be in the business of actively promoting citizen speech.

I do not propose to enter into the debate concerning the relative merits of affirmative and negative First Amendment theory. It isn't much of a debate since virtually all of the academicians are acolytes of the activist government.[115] The reason for eschewing the debate, however, is that the impact of affirmative theories on real

STUART MILL, ON LIBERTY 34 (Elizabeth Rapaport ed., Hackett Publ. Co. 1978) (1859) (arguing that free speech produces truth and prevents truth from being treated as "dead dogma"); JOHN MILTON, *Areopagitica*, *in* 4 THE WORKS OF JOHN MILTON 347 ("Let [Truth] and Fals[e]hood grapple; who ever knew Truth put to the wors[e], in a free and open encounter."). *See also* Massey, *supra* note 108, at 122-26.

110. *See* MILTON, *supra* note 109 at 346 (explaining that moral virtue inheres in moral choice and that requires freedom to choose). *See also* Massey, *supra* note 108, at 126-28.

111. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 10 (1986) ("[f]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint."). *See also* Massey, *supra* note 108, at 129-30.

112. *See* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (arguing that free speech allows social grievances to be aired and conflicts resolved "without destroying the society"). *See also* Massey, *supra* note 108, at 130.

113. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527-42 (asserting that free speech serves to "check[] the abuse of power by public officials"). *See also* Massey, *supra* note 108, at 131-32.

114. See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1411-16 (1987), for an assessment of prevailing First Amendment theories that conform to this pattern.

115. Among the few negative theorists are Lillian BeVier, Ronald A. Cass, and, perhaps Frederick Schauer. *See* BeVier, *supra* note 10; Cass, *supra* note 103; FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHIC ENQUIRY, 113-30 (1982) (suggesting that the meaning of free speech is best found in principles of negative liberty—freedom from governmental restraint).

constitutional law (as distinguished from academic commentary) is virtually nil. I take it as a given that the neutral government vision prevails, and that that vision is the driving force behind the Court's present focus upon the character of public property as the determinant of speech protection. I wish to carry on the public forum debate on the Court's own terms. To do that, I will stipulate that the primary purpose of the free speech clause is to insure government neutrality in public discourse. I will also agree that, as applied to the public forum problem, this principle requires some focus on the character of the public property at issue.

The Court's focus on the character of public property centers on two questions. What traditional use has been made of the property? What are the government's intentions and policies with respect to use of the property? These questions are no doubt appropriate for a property-based inquiry, but they surely do not exhaust the questions that might be asked as part of a property-based analysis.

When Harry Kalven examined the first stirrings of the modern phase of public forum doctrine, he declared "that what is required is in effect a set of Robert's Rules of Order for the new uses of the public forum."[116] However, he admitted, "the designing of such rules poses a problem of formidable practical difficulty."[117] Thirty three years later the Court's solution is not so much a Robert's Rules of Order as a constitutional Congress of Vienna brokered by judicial Metternichs. But just as the Congress of Vienna was an attempt to bolster royal privilege against a rising flood of democratic populism, this latter-day territorial apportionment of public spaces into "speech free" and "free speech" zones is equally reactionary. The term "reactionary" is a bit of a red flag—the usual connotation in academic America is of a sour, dimwitted, bigot—but I disclaim any such connotation. I mean only to state that the categorical approach is reactive to the facts of the cases and the Court's perception that the speech judgments of public official forum managers are presumptively valid. Ronald Cass has portrayed the Court's free speech decisions as ritualized three-act plays "devoid of hard-edged analysis."[118] Act one is a statement of the facts. Act two is "liturgical . . . consisting of quotations . . . [that] appear almost bereft of analytic content."[119] Act three is "the announcement of today's result."[120] Cass politely avers that "this sketch . . . is as much

116. Kalven, *supra* note 1, at 12.
117. *Id.*
118. Cass, *supra* note 114, at 1409.
119. *Id.*
120. *Id.*

caricature as photograph,"[121] but there is no gainsaying that most, if not all, analysis germane to the public forum problem has been eliminated by the categorical approach.

A. Doctrinal Diagnosis and Prescription

The problem, if not the solution, is simple: Public speech on public property can be a nuisance. And it is to nuisance law that we should look to complete the property metaphor for the public forum problem. Public property is owned by the public; if we truly believe that in democracy governments are not exogenous. Public speakers on public property are, in one sense, speaking on their own property and thus do not require an easement to speak. Since the public owns public property, the use of such property for speech purposes is analogous to the nuisance problem. Of course, our government agents must have some power to exclude us, the principals, in order to carry out our agency mandate. That simply restates the public forum problem. The Court's solution is to reduce dramatically the scope of judicial review (and correspondingly increase the power of forum managers) by characterizing ever more public property as non-public fora. The Court's presumption is that forum managers—the agents—are either correct in cases of principal-agent conflict about speech on public property or, more probably, that the cost of correcting their errors by more intensive judicial review is greater than the incremental benefit.

What are the costs and benefits of closer judicial scrutiny of speech restrictions imposed by forum managers? The answer must depend, in part, on the nature of the doctrine used to ratchet judicial scrutiny up a notch or two. BeVier has attempted to answer this question in terms of a comparison "between ad hoc judicial decision making and a categorical approach."[122] Advocates of the ad hoc approach argue that "there is a high correlation between particularized judicial decision making and substantively correct decisions,"[123] but BeVier concludes that this supposed benefit is imaginary. First, the values balanced are not commensurate.[124] Second, the value balancing urged by ad hoc advocates is in the service of the affirmative vision of free speech, and there is no way to specify a usable norm by which to measure the increment in public discourse produced by opening more public property to speech.[125] Not only is it impossible to measure how much more public discourse

121. *Id.*
122. BeVier, *supra* note 10, at 115.
123. *Id.* at 116.
124. *See id.*
125. *See id.* at 117-18.

is created by each act of judicial intervention, it is impossible even to know how much public discourse is "enough."

Moreover, BeVier has identified three types of costs imposed by increased judicial review. First, if judicial second-guessing exceeds some unknown threshold, the authority of forum managers will be so eroded that they will be unable to devote public property effectively to its non-speech uses.[126] Second, forum managers may react to increased judicial oversight by excluding even more speech, in order to raise the stakes and thereby "decrease the likelihood of access claims being made."[127] Third, making the courts a friendly receptacle for access claims "increases the risk that access claimants will engage in self-interested strategic behavior" by overstating the benefits of their speech and ignoring the external costs of their behavior.[128] Only if forum managers systematically and significantly undervalue speech would this cost be minimal.

To have any hope of success, a reconceived public forum doctrine must deliver the benefits the ad hoc approach does not and avoid the costs identified by BeVier. The asserted benefit of the approach that follows is that it will produce more accurate results in terms of negative free speech theory—it will more effectively restrain governments from skewing public discourse through denial of access to public property for speech. Employment of negative free speech theory avoids the indeterminacy problem identified by BeVier and associated with affirmative free speech theory. To avoid the incommensurable value problem it is important to frame the factors to be compared in a single metric. The costs of increased judicial review of the decisions of forum managers can not be completely eliminated; the task is to formulate an alternative that minimizes those costs to the point that net gains can reasonably be expected.

Nuisance law seeks to determine when one person's use of his property so significantly interferes with the use and enjoyment of another's property that a nuisance is recognized. The formula most commonly employed to assess nuisance asks whether the gravity of the harm inflicted by any given use outweighs the social utility of that use.[129] Adapted to the public forum problem, the task is to compare

126. *See id.* at 120 (citing Post, *supra* note 68, at 1772).

127. *Id.* at 120.

128. *Id.* BeVier likens public property to a commons "susceptible to overexploitation or abuse by anyone who can require others to absorb the costs of her use while enjoying most of the gain herself." *Id.*

129. *See* RESTATEMENT (SECOND) OF TORTS, § 826(1) (1979) (To determine the unreasonableness of intentional conduct, and thus nuisance, courts should consider whether "the gravity of the harm outweighs the utility of the actor's conduct."). There is also a minority strand of nuisance law that eschews this balancing and focuses instead on whether the level of interference with another's use of land is sufficiently high to cross a

harm and social utility. There are two types of harm and two aspects of social utility, because the problem in any case is to assess speech and the government's restrictions on speech. A given restriction imposes some harm and delivers some benefit. A given speech in a particular public place at a particular time imposes some harm and delivers some benefits.

(1) Purposeful Departures from Neutrality.

There is a threshold inquiry, however, that must be made before turning to the problem of creating a usable norm for comparing these harms and benefits. Since the objective of negative free speech theory is to prevent governmental departures from neutrality in public discourse, the first question is whether the purpose of any given speech restriction is to alter the content or outcome of public discourse. If so, the restriction should be presumed to be invalid and subjected to strict scrutiny. If not, the analysis should proceed to the next stage—the comparison of the harms and benefits produced by the speech and the restriction.

The problem with purpose inquiry is, of course, to decide how to identify purposes. With respect to speech restrictions on public property there are two ways in which this might be done. Evidence of actual purpose is perhaps the best evidence. If governments admit that their objective is to skew public discourse, or reveal that objective in legislative deliberations or other internal communications, the forbidden purpose ought to be treated as conclusively established. Absent evidence of actual purpose, a forbidden departure from neutrality ought to be inferred if the speech restriction is viewpoint-based, excluding speakers only because of the particular perspective they bring to public discourse. Restrictions that are content-based but not viewpoint-based (those that exclude entire categories of speech regardless of the speaker's perspective) ought not trigger the presumption of invalid purpose, but the content-based nature of the restriction is relevant to the assessment of harms and benefits that follows.

This distinction between viewpoint-based and content-based restrictions echoes the Court's rhetoric and what it actually has done with respect to the limited public forum. "Once it has opened a limited forum, . . . [t]he State may not exclude speech where the distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint."[130] Some content-based restrictions are however

nuisance liability threshold. *See, e.g.*, Jost v. Dairyland Power Coop., 172 N.W. 2d 647, 653 (Wis. 1969).

130. Rosenberger v. Rector and Visitors of Univ. of Virginia., 515 U.S. 819, 829 (1995),

permissible. The exclusion of political speech from Fort Dix in *Greer v. Spock*,[131] or from bus advertising space in *Lehman v. City of Shaker Heights*,[132] are apt illustrations.[133] Other content-based restrictions are not permissible. The foremost examples include *Widmar v. Vincent*,[134] *Lamb's Chapel v. Center Moriches Union Free School District*,[135] and *Rosenberger v. Rector and Visitors of the University of Virginia*,[136] where the Court invalidated the exclusion of religious speakers from public property open to other speakers of the same *genus*. Of course, the line between content-based and viewpoint-based restrictions is blurry at best. Religious speech can be thought of as a discrete category or as a particular perspective on philosophical and existential issues. Political speech may be a discrete category or a specific perspective within public discourse. The Court's chosen vantage point reflects its predisposition to defer to the judgment of forum managers. The Court saw no viewpoint discrimination in the exclusion of political speech in *Greer* or *Lehman*, but the exclusion of religious speech in *Lamb's Chapel* and *Rosenberger* was perceived as viewpoint discrimination.[137]

Despite the Court's judgment, I would contend that the restrictions at issue in *Greer*, *Lehman*, *Widmar*, *Lamb's Chapel*, and *Rosenberger* are all content-based. In these cases, the entire category of speech was closed. Given the indeterminacy of distinguishing between viewpoint-based and content-based restrictions, it is appropriate to define viewpoint-based restrictions narrowly. Restrictions that close off entire subjects or categories of speech, regardless of the multiple perspectives contained within the category

(quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 804-06 (1985)). *See also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-94 (1993).

131. 424 U.S. 828, 839-40 (1976).

132. 418 U.S. 298, 302-03 (1974).

133. Of course, the Court said that Fort Dix was not a public forum of any kind, and so the content-based exclusion was evaluated under minimal scrutiny. *See Greer*, 424 U.S. at 838. But this conclusion is implausible, since the military post was generally open to the public for speech as well as other purposes. Similarly, the bus advertising space at issue in *Lehman* was characterized as a non-public forum, despite the fact that the space was open to all other advertisers. *See* 418 U.S. at 303.

134. 454 U.S. 263 (1981).

135. 508 U.S. 384 (1983).

136. 515 U.S. 819 (1995).

137. *See Lamb's Chapel*, 508 U.S. at 393 ("[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious standpoint."); *see also Rosenberger*, 515 U.S. 831 ("[V]iewpoint discrimination is the proper way to interpret the University's objections to [the religious speaker]. . . . Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.").

selected by the forum manager, ought to be considered content-based. Restrictions that effectively focus on the speaker's perspective, or that selectively close off perspectives within a category of speech, are viewpoint based.[138] Denials of access to subversive political speakers, or Roman Catholics, or advocates of gay marriage, are surely viewpoint-based. Fortunately, this distinction is not terribly critical. The harmful content-based restriction that lacks utility will fail the harm-benefit comparison that follows. But we need not even engage in that comparison if the government has chosen to restrict speech access on the basis of some narrowly drawn perspective on public discourse.

(2) Comparing Harm and Utility.

If the speech claimant cannot prove that the government's purpose for restricting speech on public property is to alter the outcome or content of public discourse the analytical focus should shift to comparing the harm and the utility of the particular speech[139] with the harm and utility of the restriction upon speech. There are four quadrants to this matrix: 1) the quantum of harm inflicted by the restriction, 2) the utility of the restriction, 3) the quantum of harm inflicted by the particular speech, and 4) the utility of the particular speech. It should be obvious that these factors cannot be measured in a commensurate fashion unless we have a common reference point from which to assess the quantum of harm and utility delivered in each of these four dimensions. From the negative perspective upon free speech, the common reference point is the degree to which the factor in question contributes to a governmental departure from neutrality. Thus, the four quadrants can be rephrased as four

138. *See, e.g., Rosenberger*, 515 U.S. at 831.

> The "assertion that no viewpoint discrimination occurs because the [University of Virginia] discriminate[s] against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that subject is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Id.

139. I will use the term "particular speech" as a term of art in this section. By that term I mean to describe the specific speech the claimant has made or wishes to make on the public property at issue and at the time and in the manner the claimant has actually spoken or proposes to speak.

questions, each designed to measure this tendency to induce government departure from neutrality.

(a) Harm Inflicted by the Speech Restriction

The harm of a speech restriction can be measured in terms of the effect of the restriction. The more a restriction skews public discourse, the more of a departure from neutrality it is. The measurement problem is that we do not know, and probably cannot know, how much public discourse is altered by the public's lack of speech access to any given public property. The best that can be done is to ask a second-best sort of question: Are there adequate alternative public spaces for the speech that is restricted? If not, this is a "high harm restriction." If so, this is a "low harm restriction."

Existing doctrine asks this question in a different way. If the public property is a public forum and the speech restriction is "content-neutral,... narrowly tailored to serve a significant government interest, and *leave[s] open alternative channels of communication*," it is constitutionally valid.[140] But if the public property is not a public forum this question is never asked. Some may contend that this question is framed to accommodate the affirmative vision of free speech, since it seems to contemplate the promotion of more public discourse. From a negative perspective, the existence of adequate alternatives for the particular speech is of interest only because the government has closed to speech the site of the particular speech. The government closure may or may not be a sufficient departure from neutrality to merit judicial intervention. Surely part of the analysis necessary to determine the point inheres in some assessment of the *effect* of the governmental closure on public discourse.

(b) Utility of the Speech Restriction

In terms of negative speech theory, the utility of any particular speech restriction ought to be measured by how well the restriction advances the neutral, non-public discourse related purposes of government with respect to use of the public property that is the site of the particular speech. Without the restriction, would legitimate government functions be materially impeded in scope and time, not just briefly or mildly inconvenienced? If so, this is a "high utility restriction." If not, this is a "low utility restriction."

Existing doctrine asks a weaker version of this question in quite a different context. If the public property is not a public forum, the

140. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983))(emphasis added).

speech restriction need only be reasonable, and reasonableness depends in part on whether the restriction rationally serves a legitimate governmental objective. The method by which a nonpublic forum is limited to some speakers must also be "reasonable in light of the purpose served by the forum."[141] If the government opens school facilities after hours to student groups and excludes some students it must articulate a plausible, legitimate objective to be attained by this exclusion. On its face, such an exclusion seems unconnected to the purpose of the forum—providing space for extracurricular student activities. Assessment of the utility of the speech restriction is designed to focus on the correlation between the restriction and the effective accomplishment of legitimate government goals.

(c) Harm Inflicted by the Particular Speech

The harm inflicted by particular speech is *not* interference with legitimate government uses of the public property. That issue is properly dealt with in terms of the utility of the speech restriction. Instead, applying negative speech theory, speech inflicts harm to the extent that the particular speech impeaches, in appearance or fact, government neutrality in public discourse. To phrase it as a question: Does the particular speech cause government neutrality in public debate to be doubted? If so, this is "high harm speech." If not, this is "low harm speech."

By this measure, not much citizen speech is likely to constitute "high harm speech." But this is not a null set. Consider *Lehman v. City of Shaker Heights* once more.[142] The particular speech—Harry Lehman's plug for his election to the Ohio legislature as an old-fashioned fellow—was thought by the Court to present the specter of implicit government endorsement of his candidacy. If Lehman's placards, along with the usual plethora of commercial advertising, fully occupied the bus advertising space, leaving no room for the opposition's advertisements, might the public cynically assume some governmental favoritism for Lehman? Even if there was in fact no favoritism the appearance alone worried the Court. Permitting any political advertising in the city-owned buses would create "lurking doubts about favoritism, and sticky administrative problems . . . in parceling out limited space to eager politicians."[143] Here the Court recognized the concept of "high harm speech," as I use that term.

Consider also *Capitol Square Review & Advisory Board v.*

141. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

142. 418 U.S. 298 (1974).

143. *Id.* at 304.

Pinette.[144] In accord with content-neutral "time, place and manner" rules, the Ku Klux Klan sought and was denied permission to erect an unattended Latin cross on a traditional public forum fronting the Ohio capitol. The government argued that its restriction was justified in order to avoid violating the Establishment Clause. The Court disagreed, and analyzed the case entirely on Establishment Clause grounds.[145] But even as an Establishment Clause case it is noteworthy that five justices, in four separate opinions, endorsed the view that private religious expression could be attributed to the government.[146] Justice Thomas was (hopefully) correct to conclude that "[t]he erection of . . . a cross [by the Klan] is a political act, not a Christian one."[147] Either way—political or religious—the fundamental issue in *Pinette* was whether citizen speech on public property would be perceived as endorsed by government. A majority of the Court accepted the idea that some private speech on public property can cause government neutrality in public debate to be questioned. That is "high harm speech."

(d) Utility of the Particular Speech

The utility of the particular speech is *not* measured by its proximity to some core conception of the intended purposes of free speech. We are not about separating "high value" speech from "low value" speech. Instead, working from my theoretical premise that public forum doctrine should be guided by the negative vision of free speech, the question to be asked is: Would public discourse be materially deprived of this voice if the restriction is upheld? If so, this is "high utility speech." If not, this is "low utility speech."

To be sure, this factor may be the mirrored twin of the harm of the restriction. Both factors seek to probe the question of whether the speaker will be heard if the restriction is upheld. The difference is subtle. Analysis of the harm of the restriction requires determining whether there are alternative *public spaces* for the speech. Analysis of the utility of the speech focuses on whether the particular speech is

144. 515 U.S. 753 (1995).

145. *See id.* at 760

146. Justices O'Connor, Souter, Breyer concurred in the judgment, having concluded that "on the facts of this case there is 'no realistic danger that the community would think the [State] was endorsing religion or any particular creed.'" 515 U.S. at 772 (O'Connor, J., concurring) (quoting Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993). Justices Stevens and Ginsburg dissented. Justice Stevens was convinced that "the State's maintenance of the Klan's cross in front of the Statehouse conveyed a forbidden message of endorsement." *Id.* at 800. Justice Ginsburg agreed, noting the absence of any legible, sturdy, disclaimer stating "unequivocally that Ohio did not endorse the display's message." *Id.* at 817.

147. *Id.* at 770 (Thomas, J., concurring).

likely to be voiced *anywhere* if the speech restriction is upheld. The reason for this distinction is that when examining the harm of the restriction it is appropriate to look at the effects on public discourse in relation to public property, since it is the closure of public property to speech that raises any issue whatever. But when examining the utility of speech the concern should properly shift to whether this speech will enter public discourse at all if the forum of public property is denied. As with its mirrored twin, this factor might be thought to be derived from affirmative speech theory. However, it is not an attempt to maximize public discourse; it is an attempt to decide whether the government action will have a sufficiently non-neutral effect on public discourse to warrant judicial intervention.

Given the close connection between speech utility and harm of the restriction, these factors may often be Siamese twins. If a given restriction is a "high harm restriction" it is likely that the particular speech will be "high utility speech." Similarly, "low harm" restrictions are apt to be paired with "low utility" speech. But not always.

Consider the following recent controversy in San Francisco. The National Park Service, administrator of miles of public beachfront along San Francisco Bay and the Pacific Ocean, closed some of its beaches to unleashed dogs. Dog owners, angry that one of the last decent spots for a dog to run unleashed had been closed, mounted a petition gathering and information distribution campaign on the public beaches, hoping to reach other dog owners and influence public opinion. The Park Service responded by imposing strict limitations on these speech activities that effectively eviscerated the dog owners' efforts.[148] Under conventional analysis, the *Grace* heightened scrutiny test applies (assuming that beachfront parks are traditional public fora) and resolution of the issue turns on the importance of the objective underlying the speech restriction, the fit of the restriction to that objective, and the adequacy of alternative channels of communication.[149] The harm/utility calculus[150] would assess this problem by concluding that the speech restrictions are highly harmful (there is no other public space where this particular message can effectively be conveyed) and of low utility (the function of recreation is hardly disturbed by a few leafleters and petition

148. The Park Service required advance reservation of times for such speech, limited the speech to a single person, and foreclosed any speaker from repeating the speech activity for a considerable period of time.

149. *See* United States v. Grace, 461 U.S. 171, 182-83 (1983).

150. This assumes that the ostensibly content-neutral and viewpoint-neutral speech restrictions were not motivated by a desire to close the beaches to opponents of the dog ban. In actual fact, that is a highly debatable point.

gatherers). The particular speech is of low harm (nobody would think speech protesting government action is attributable to the government) and is probably of low utility (the dog owners, backed by the San Francisco SPCA, are surely likely to be heard in public discourse). This combination (which might be unusual) ought to produce a conclusion that the restrictions are void. The high harm and low utility of the restriction, when weighed against low harm, low utility speech, ought to doom it as an impermissible departure from government neutrality.

B. Applications of the Prescription

Is all of the foregoing just another academic theory, with no practical value? Possibly; but I hope not, and this section is designed to demonstrate that there is some practical value in this reconception. To do so, I have attempted to foresee some (surely not all) of the objections and to answer them.

(1) It's too complicated.

This analytical mode looks more complicated than it really is. Depending on whether you treat speech utility as fungible with harm of the restriction, there are sixteen or twelve possible patterns. But most of these patterns are probably imaginary. By examining past cases in terms of this proposed doctrine, only about five patterns emerge.

(a) Easy Cases

A case could, for example, present a "high harm, low utility restriction" coupled with "low harm, high utility speech." This is, in fact, a relatively easy case and is exemplified by *Rosenberger v. Rector & Visitors of Univ. of Virginia*.[151] The restriction at issue was the University of Virginia's refusal to fund student religious publications from a fund, raised by mandatory student fees, devoted to paying for student publications. The restriction was a "high harm" one since there were no alternative public funds available for student religious publications. The restriction—denial of funds sequestered for publication subsidies—was "low utility" since there was no neutral, legitimate state objective. Indeed, most of the argument was over this point. Virginia maintained that its objective was to comply with the Establishment Clause; the Court disagreed. The particular speech—Wide Awake, a student religious publication—was "low harm" since it posed no realistic possibility that it would create the impression that

151. 115 S. Ct. 2510 (1995).

Virginia had departed from neutrality in public debate.[152] In the context of state-funded student publications presenting virtually every conceivable social and political viewpoint, the addition of Wide Awake created no risk of government non-neutrality. Indeed, the risk of non-neutrality was most clearly posed by the refusal to fund Wide Awake. Finally, the particular speech was "high utility" since the likelihood of its publication was virtually nil without access to the state-controlled fund. This combination—a high harm, low utility restriction impeding low harm, high utility speech—demands judicial intervention.

The other easy pattern—a low harm, high utility restriction impeding high harm, low utility speech—is exemplified by *Cornelius v. NAACP Legal Defense & Educational Fund.*[153] The Court upheld an executive order excluding political and advocacy groups from participation in the Combined Federal Campaign (CFC), an annual fundraising campaign for charity conducted in federal offices during working hours through voluntary efforts of federal employees. The Court first concluded that the CFC was not a public forum, then concluded that the exclusion was reasonable. The excluded "speakers have access to alternative channels, including direct mail and in-person solicitation outside the workplace,"[154] the participation of political advocacy groups would be controversial and "disruptive of the federal workplace,"[155] and exclusion of political advocacy groups would "avoid the appearance of government favoritism."[156] Transposed to a different idiom, this suggests that the Court saw the exclusion as a low harm, high utility restriction impeding high harm, low utility speech. The only thing that made the case at all hard was the requirement, imposed by current doctrine, of characterizing the CFC as either a public forum or not. If that issue was removed the Court could have focused entirely on the factors that drove its decision anyway.

It is also interesting to note that the Court remanded *Cornelius* to determine whether the exclusion "was impermissibly motivated by a desire to suppress a particular point of view."[157] The purposeful

152. As can be seen from *Capitol Square Review & Advisory Board v. Pinette*, 1515 U.S. 753 (1995), this issue can easily be conflated with the question of the utility of the restriction. In the context of private religious speech on public property the utility of the restriction—conforming to the Establishment Clause—is inextricably linked to the harm posed by the speech—the increased possibility that the speech will create perceived departures from governmental non-neutrality.

153. 473 U.S. 788 (1985).

154. *Id.* at 809.

155. *Id.* at 810-11.

156. *Id.* at 813.

157. *Id.* at 812-13.

departure from government neutrality with respect to public discourse should always trigger strict scrutiny, no matter what public forum dialect the Court is speaking.

(b) Harder Cases

Most of the interesting cases are not easy, and they present a variety of patterns. Some will be considered here.

Perry is a particularly tough case—a low harm, low utility restriction impeding low harm, low utility speech. Perhaps it is not surprising that the Court deferred to the forum administrator. In *Perry*, a teachers' union (though not the recognized collective bargaining agent) was denied access to an internal mailbox system of the school district while a rival union (which was the collective bargaining agent) was given access to the mailboxes.[158] This was a low harm restriction because the restriction was quite narrow. The excluded union could have used the U.S. mail, attached leaflets to car windows in the faculty parking lots, left stacks of leaflets at each school for voluntary pickup, or employed public property in other ways to communicate with teachers. The utility of the restriction was also low because the interference with legitimate government functions was slight. A few more pieces of junk mail in the school district's mailboxes is not much of an impediment to school business. The particular speech had almost no prospect of causing government neutrality to be questioned so it was low harm speech. The speech was low utility. Given the many other opportunities for disseminating its message it was unlikely that the excluded union would never enter public discourse at all. This pattern is the "small-stakes" pattern. While the litigants care deeply, from a broader constitutional perspective this pattern is not of much significance. Under a negative theory approach, there is not much reason to disturb the judgment of the forum administrators. Of course, from the affirmative theorist's perspective public discourse would be enhanced by ordering access and so courts ought to do so.

Kokinda and *Krishna Consciousness v. Lee* are variations on the *Perry* pattern.[159] Though the restrictions were low harm and the speech was both low harm and low utility, the Court fractured over the utility of the restriction. In *Kokinda* there was little harm in excluding political speakers and solicitors from the postal sidewalk; they could have relocated a few yards away on the municipal sidewalk. While it is true that postal patrons would not then pass by as a matter of course, the removal of speakers to a point where postal

158. 460 U.S. 37 (1938).

159. *See generally* United States v. Kokinda, 497 U.S. 720 (1990); International Soc'y for Krishna Consciousness, 505 U.S. 672 (1992).

patrons must consciously go to them only diminished the level of public discourse but did not skew either its content or outcome. The presence of speakers was not much of an inconvenience either to postal patrons or to postal employees although it is true that Justice O'Connor, speaking for a plurality, declared that it was "reasonable to restrict access... to solicitation, because solicitation is inherently disruptive of the Postal Service's business."[160] This may indicate her view that the restriction was actually of high utility. There was not much realistic risk that the particular speech—partisan political tracts and the like—would create the impression of governmental endorsement of the speech. Nor was there any risk that the Democratic party—the speaker involved—would go unheard if kept off the postal sidewalk.

Krishna Consciousness v. Lee is the most interesting one of this trio. The Port Authority of New York and New Jersey banned solicitation of money and distribution of literature in the three airports it operates.[161] The Court upheld the solicitation ban and voided the distribution ban after concluding that airports were not public fora.[162] Applying current doctrine, the solicitation ban was deemed reasonable and the distribution ban was not. Justices O'Connor and Kennedy were the swing voters, concurring with different camps on each of the solicitation and distribution issues. To O'Connor, solicitation was "incompatible with the airport's functioning.... '[A] person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.'"[163] To Kennedy, the fact that the regulation barred only solicitation coupled "with immediate payment of money" was critical.[164] Immediately successful solicitation, thought Kennedy, "creates a risk of fraud and duress" that was enough to justify the restriction.[165] In essence, Kennedy and O'Connor saw the solicitation ban as a low harm, high utility restriction. The crucial issue for each Justice was the perceived high degree of interference with the legitimate air transport function of an airport. On this point, the remaining justices in the majority coalition agreed.[166] The dissenters from the judgment upholding the solicitation ban essentially saw the

160. 497 U.S. at 732.

161. *See id.* at 675.

162. *See id.* at 683.

163. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 at 689 (O'Connor, J., concurring) (quoting Kokinda, 497 U.S. at 734).

164. *Id.* at 704 (Kennedy, J. concurring).

165. *Id.* at 705.

166. Chief Justice Rehnquist, joined by Justices Scalia, White, and Thomas, formed a group of four that concluded that (1) airports were not public fora, and (2) prohibition of both solicitation and distribution was reasonable. *See id.* at 679, 685.

restriction as of low utility, arguing that there was minimal interference with the legitimate functions of the airport since persons solicited "can simply walk away or walk on."[167] In any case, the harm and utility of the particular speech did not enter into the calculus. By my reckoning, the particular speech was low harm, low utility speech.

The distribution ban produced a different schism. A four justice plurality composed of Kennedy, Souter, Stevens, and Blackmun regarded airports as public fora, applied heightened scrutiny, and concluded that the restriction was neither narrowly tailored to address the government's legitimate concern about pedestrian congestion nor did it leave open ample alternative channels of communication.[168] Transposed, this meant that the plurality thought that the distribution ban was a high harm, low utility restriction. The dissenting group of four—Rehnquist, White, Scalia, and Thomas—focused almost entirely on the perceived interference with airport functioning that distribution posed: "Leafleting presents risks of congestion similar to those posed by solicitation.... [T]he distribution ban, no less than the solicitation ban, is reasonable."[169] Whatever their view of the harm of the restriction (probably low harm) they were sure that it was a high utility restriction. Justice O'Connor provided the necessary fifth vote to strike down the distribution ban. Although she did not agree that airports were public fora she thought that the ban was unreasonable because the interference with legitimate airport functioning posed by literature distribution was minimal. In short, she saw the distribution ban as a low harm, low utility restriction but, unlike the Court in *Perry*, was unwilling to defer to the judgment of forum managers. Perhaps, without saying so, she also saw the restriction as high harm.

Krishna Consciousness is a fine illustration of the way that present doctrine deflects judicial focus. The Court split on the question of whether airports were public fora, an issue that is vital to determining the standard of review. For most members of the Court the conclusions followed inexorably. But the issues that really divided them were not issues of proper characterization of public

167. *Id.* at 713 (Souter, J., concurring in part and dissenting in part). The dissenters on this point, Justices Souter, Stevens, and Blackmun, applied higher scrutiny because they thought that airports were traditional public fora. *See id.* at 711. The solicitation ban failed that scrutiny because the ban was not sufficiently narrowly tailored to accomplish the government's legitimate objective of preventing coercion. Because this group believed that the coercive effect of solicitation was slight (and hence the interference with legitimate functioning of an airport was slight) the ban was viewed as not narrowly tailored. See id. at 713.

168. *See Krishna Consciousness*, 505 U.S. at 693-709.

169. Lee v. Int'l Soc'y for Krishna Consciousness, 505 U.S. 830, 831 (per curium) (Rehnquist, J., dissenting).

property so much as they were disagreements about the harm and utility of the restrictions. This division would be more usefully debated if it were cast in terms of some common metric for determining the harm and utility of the restriction at issue. Since the Court's public forum doctrine is largely the product of the government neutrality, or negative, vision of free speech, it would clarify the debate if that theoretical core were more directly related to the doctrine.

Lehman v. Shaker Heights is another illuminating case.[170] Having concluded that advertising space on city buses was not a public forum, the Court upheld an exclusion of political advertising.[171] Since the city was just like a merchant, it would be a substantial interference with its commercial objectives to require it to accept political advertising.[172] The restriction was of high utility. Political advertisements would create "lurking doubts about favoritism."[173] The speech was high harm speech. It might also be true that the restriction was a low harm one since there was probably other public property available for Lehman's political speech (though the Court did not say since it had concluded that no public forum was involved), and that the speech was low utility since it was pretty clear that Harry Lehman would spend his political advertising dollars somewhere.

Consider *Greer v. Spock* again.[174] The Court upheld a ban of partisan political speech as reasonable after concluding that an army base is not a public forum. This viewpoint-neutral ban was designed to keep the military "free of entanglement with partisan political campaigns of any kind," a legitimate objective "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."[175] This passage surely indicates a belief that the restriction was highly utile and may also suggest that the particular speech was highly harmful. If so, *Greer* fits the same pattern as *Lehman*—a low harm, high utility restriction impeding high harm, low utility speech.

Finally, *Arkansas Educational Television v. Forbes* illustrates the relatively rare pattern of high harm, high utility restrictions applied to low harm, low utility speech. Fringe candidate Ralph Forbes probably had little other meaningful access to public property for his feckless campaign, but forcing public television to accommodate

170. 418 U.S. 298 (1974).

171. *See id.* at 303-04.

172. *See id.* at 304 ("Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed.").

173. *Id.*

174. 424 U.S. 828 (1976).

175. *Id.* at 839.

every conceivable fringe candidate would create journalistic chaos in candidate debates. Forbes' participation in the debate would not create any apparent or actual governmental endorsement of his (or his rivals) views. Apart from the debate, Forbes would still have plenty of opportunity to speak. Justice Stevens, dissenting, argued that the discretion exercised by public television regarding invitations to participate in the debate was so bereft of standards that, as in past such public forum cases,[176] the exclusion could be treated as a purposeful departure from government neutrality.

Thus it appears that the Court is already considering these factors, though incompletely and indirectly. The abandonment of the pigeonhole approach in favor of the harm/utility calculus would simplify matters. There would always be divisions over whether a given restriction is highly utile or not, or whether the particular speech poses a material risk of impeaching government neutrality in public discourse, but at least these divisions would be open rather than carried out via arguments about whether a given piece of public property is or is not a public forum. The arguments over harm and utility would also be couched in terms of negative speech theory, thus providing a common metric for these arguments.

(2) It has all the problems of ad hoc balancing.

The problem with ad hoc balancing—assessing whether the particular speech is incompatible with the normal government purposes of the public property in question—is that it is indeterminate. It is indeterminate because it has no common metric for measuring incompatibility. The lack of a common metric is tied to the fact that ad hoc balancing is used exclusively by affirmative theorists. Since the point of affirmative free speech theory is to obligate governments to promote an ever-expanding public discourse, there is no referent that can be used to determine incompatibility. Like the current thinkers in cosmology—the universe is ever-expanding—affirmative thinkers have created a free speech cosmology that posits constantly expanding public discourse with government as a principal agent of expansion. Cosmologists merely describe an ever-expanding cosmos, but affirmative speech theorists prescribe continual expansion. If public discourse is ever-expanding the frontier of incompatibility recedes always with the rate of expansion. This is of absolutely no help to principled judicial determination. With this as the alternative, it is little wonder that the Court has stayed with categorical approach to the public forum

176. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Saia v. New York, 334 U.S. 558 (1948); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

problem.

The harm/utility calculus is relatively free of this defect. There is a constant referent: To what degree does the particular speech or restriction produce a departure from government neutrality with respect to public discourse? The universe of public discourse can expand or contract in accordance with the taste of the citizenry. The job of the courts is to make sure that, whatever the size of public discourse, governments do not alter its content or outcome. Disagreement in the application of this principle is inevitable, but the Court is already divided in the application of its present doctrine. The test for new doctrine ought not be whether it promises to eliminate completely all difference of opinion. If we could devise such doctrine we wouldn't need judges; computers would do just fine.

(3) The proposed framework offers no improvement upon the current doctrine.

To examine this contention it is necessary first to note that the current doctrine is an exercise in implementing a negative, or governmental neutrality, vision of free speech. Of course, not every justice is committed to this view, but the neutrality view is the preferred position of a majority of the Court. With that as a given, the problem with current doctrine is that it focuses on second-order issues. We worry about whether public property is a public forum because we want to identify those situations where we doubt that forum managers can be trusted properly to assess the harm and utility of their speech restrictions and the affected speech. Instead of making that assessment directly we substitute the second-order question: Is the property a public forum?

The argument for continued reliance on characterizing property as a public forum or non-public forum is that it will avoid the costs of increased judicial intervention in the management decisions of forum administrators. But this argument has two defects. First, it ignores the costs of determining the forum status of any given piece of public property. Second, it assumes that any other mode of analyzing the public forum problem will increase judicial vetoes of the speech decisions of forum managers.

The costs of determining forum status are not negligible. The most obvious cost is the dead weight litigation cost of determining forum status. The dividing line is none too clear, as the small but steady trickle of public forum cases in the Supreme Court indicates. Litigation in the Supreme Court is, of course, the proverbial tip of a litigation iceberg in the nation's state and federal trial courts. If the line cannot be drawn clearly enough to prevent litigation over its location, perhaps it is not such a good line. An even larger cost, though difficult to quantify, is the cost created by the Court's attempt

to make the forum status line clear enough to deter litigation about it. Cases such as *Kokinda*[177] and *Krishna Consciousness v. Lee*[178] indicate a willingness to define the public forum in a fashion so restrictive that it promises to shrivel into a tiny raisin of streets, colonial-era village greens, and explicitly created new fora. The cost of this is likely to be seen in more restrictive forum management. Forum managers, knowing that their judgments will be accorded great deference by courts, will likely overestimate the cost of speech and underestimate the cost of speech control on public property. Forum managers have incentive to do so because such action makes their jobs easier and keeps their expenses down. In terms of negative speech theory this is only a problem to the extent forum managers begin to exclude speech in a fashion that skews public discourse. But this problem is not imaginary. If almost nothing is a public forum, and speech restrictions need only be reasonable, there can be no certainty that courts will review carefully a forum manager's decision to employ high harm, low utility restrictions to exclude low harm, high utility speech. As a result, a major cost of the continued insistence on determining forum status is likely to be an increase in the incidence of deviation from government neutrality in public discourse. That cost is paid in the coin of diminished self-government.

The contention that rejection of the forum status approach will increase judicial vetoes of forum management decisions rests on the assumption that the only replacement is affirmative theory-driven ad hoc balancing. As demonstrated above, that assumption is not well-founded. A negative theory-driven assessment of harm and utility is not likely to increase materially the number of judicial vetoes of forum management decisions. The harm/utility calculus would, however, make the judicial intervention that does occur more accurate and more justified in terms of free speech theory.

(4) The Court will never adopt it

Alas, this objection is probably true. But doctrine does change as our ambient circumstances are reconceived. All that I can do is offer the idea and explain the reasons for its preferment. The academician's job is then done. It is up to the men and women in the arena to decide whether this is a better tool for the hard job of constitutional interpretation.

Conclusion

The public forum problem has never been resolved adequately

177. 497 U.S. 720 (1990).
178. 505 U.S. 672 (1992).

because the Court has attempted to straddle two incompatible theories of free speech. The affirmative theory—the notion that governments are obliged to promote public discourse—tugs in the direction of ever-expanding public access to public property. The negative theory—the idea that governments are obliged to remain neutral in public discourse—pulls in the direction of equal access rather than expanding access. The doctrinal edifice that bridges this chasm relies on determining the forum status of public property—public forum or not?—to ascertain the standard of review. This came about because early in the development of public forum doctrine the Court conceived of the public forum problem in terms of property. Affirmative theorists have the whip hand when the property is a public forum; otherwise, the negative theory of government neutrality rules. Because the Court has severely constricted the public forum concept, affirmative theory today is merely a vestigial element in public forum doctrine.

The contemporary doctrine suffers from a number of defects. Most importantly, it displaces attention to a second-order issue—forum status—when judicial focus ought to be on identifying forum management decisions that involve significant departures from government neutrality in public discourse. The Court has not reconceived its doctrine, though, because the usual alternative is an affirmative theory-driven approach that relies on an ad hoc balancing of the incompatibility of the particular speech at issue with the normal government functions of the public property at issue. The ad hoc balancing approach is infected with terminal indeterminacy because there is no possible stable referent that can be used to measure "incompatibility."

There is a better approach that combines the Court's preference for the negative, or government neutrality, vision of free speech and its preference for perceiving the public forum problem in part as a property issue. First, government restrictions of speech on public property should be presumed invalid (and strict scrutiny should apply) if the government's purpose for the restriction is to depart from neutrality with respect to public discourse. This purpose can be found by evidence of actual purpose or, inferentially, if the restriction is viewpoint-based. Second, if the government's purpose for the restriction is benign, courts should examine the harm and utility of both the speech restriction at issue and the particular speech in terms of the extent to which the restriction or speech induces a significant departure from government neutrality with respect to public discourse.

This harm/utility calculus is derived from the common law concept of nuisance. Just as a property owner may not use his property to deprive another property owner of his use and enjoyment

of property, so a member of the public (the sovereign owner of public property) may not use "his" property to deprive the rest of the public (via our sovereign agents, the bureaucrats) of the use or enjoyment of public property for the legitimate purposes of government. It turns out that the elements of this analysis are already in use by the Court, but in a diffused, attenuated, and inconsistent way that is produced by the Court's employment of forum status as a threshold device.

The harm/utility calculus would improve the theoretical clarity and substantive accuracy of the public forum problem without producing much, if any, of the costs that are associated with the affirmative theory driven notion of ad hoc balancing. Maybe it should be given a try.