

DOES ANYBODY REALLY NEED A LIMITED PUBLIC FORUM?

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A large portion of the physical property and means of communications in this country is owned or controlled by the government.¹ Consequently, an important constitutional law issue is the extent to which speakers may use such property to exercise First Amendment protected speech rights.² To resolve this question, the United States Supreme Court uses “a forum analysis.”³ The underlying premise of this framework is that the right to use government property for speech purposes and the standard of judicial review that applies for government exclusions depend on how the property is categorized.⁴ The Court has “identified” three basic categories of forums.⁵ These

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¹ See Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1287 n.1 (1979) (noting that as of “1974 governments owned . . . nearly 40% of all land in the United States”); see also *infra* notes 99–1–3 and accompanying text (mentioning various government-controlled means of communications).

² The First Amendment does not protect all speech. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1771, 1773 (2004) (pointing out that there are large categories of “what would be called ‘speech’ in ordinary language” that are not encompassed within the First Amendment). If the First Amendment does not protect the speech at issue, there is no First Amendment right to exercise that speech on government property. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (“[W]e must first decide whether solicitation . . . is speech protected by the First Amendment, for if it is not, we need go no further.”); cf. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (“The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment.”); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (attempting to deny access to a public forum based on its alleged constitutionally proscribable obscene content).

³ *Cornelius*, 473 U.S. at 800.

⁴ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (“The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.”).

⁵ *Cornelius*, 473 U.S. at 802.

are the traditional public forum, the designated public forum, and the nonpublic forum.⁶

The Court has also identified the limited public forum as a fourth category.⁷ Some commentators and individual Justices have concluded that the Court has drained the limited public forum of any practical significance.⁸ Nonetheless, it lives on as a shell. Its continued existence has caused doubt and confusion among the Federal Circuit Courts of Appeals particularly as to its relationship to the designated public forum and the nonpublic forum.⁹ The prevailing view in those courts is that it is a subset

⁶ *Id.*

⁷ See *Perry*, 460 U.S. at 37, 46 n.7 ("A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects." (citations omitted)).

⁸ See *Cornelius*, 473 U.S. at 825 (Blackmun, J., joined by Brennan, J., dissenting) ("The Court's analysis empties the limited-public-forum concept of meaning . . ."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (opining that the Court has "shr[u]nk[] the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum"); Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255, 1285 (1995) (similar); see also Nathaniel 'Than' Landman, Comment, *Constitutional Law: The End of the Limited Public Forum?*, 25 WASHBURN L.J. 375, 384 (1986) (arguing that the Court has "eliminate[d] the concept of the limited public forum").

⁹ See *Gilles v. Blanchard*, 477 F.3d 466, 474 (7th Cir. 2007) (noting that various and confusing terms have been used to describe the "fourth category" of forum including "'the limited designated public forum' (versus the 'true forum'), the 'limited public forum,' or the 'limited forum'"); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1203 & n.8 (9th Cir. 2006), *rev'd in part, vacated in part*, 480 F.3d 891 (9th Cir. 2007), *cert. denied*, 76 U.S.L.W. 3022 (U.S. Oct. 1, 2007) ("The contours of the terms 'designated public forum' and 'limited public forums' have not always been clear."); *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 382 (4th Cir. 2006) (noting that the Supreme Court "has never squarely addressed the difference between a designated public forum and a limited public forum"); *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) ("[O]ur Circuit's analysis of what constitutes a 'designated public forum,' like our sister Circuits', is far from lucid. Substantial confusion exists regarding what distinction, if any exists between a 'designated public forum' and a 'limited public forum.'"); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 n.4 (1st Cir. 2004) (noting that the First Circuit has used the term limited public forum as a "synonym" for both a designated public forum and a nonpublic forum, but "adopt[ing] the usage equating limited public forum with non-public forum"); *Summum v. City of Ogden*, 297 F.3d 995, 1002 n.4 (10th Cir. 2002) ("A 'limited public forum' is a subset of the nonpublic forum classification."). See generally Ronnie J. Fisher, Comment, *"What's in a Name?": An Attempt to Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639, 643-69 (2003) (collecting and discussing the Federal Circuit Courts of Appeals cases).

of the former,¹⁰ but there is also authority that it is a subset of the latter.¹¹ One common way the circuit courts have described the limited public forum is as "a subcategory of the designated public forum, where the government opens a nonpublic forum but reserves access for only certain groups or categories of speech."¹²

This Article analyzes the Court's forum structure. It argues that it is time to bury the limited public forum as a separate and distinct category because as a practical matter it serves no useful purpose. Instead, it proposes that the Court analyze speaker access issues in terms of open and restrictive forums. Such an approach would make the analysis in forum cases easier, more direct, and less confusing.

I. THE STANDARDS OF REVIEW IN FORUM CASES

There are two different standards of review for judging the constitutionality of government exclusions in forum cases¹³: They are reasonableness and strict scrutiny. Under the reasonableness standard, only exclusions that are content or viewpoint discriminatory are required to be justified by some narrowly drawn compelling interest;¹⁴ but exclusions that are content neutral¹⁵ and viewpoint neutral are only required to be reasonable.¹⁶ By contrast, under strict scrutiny all exclusions are

¹⁰ See *Glover*, 462 F.3d at 1203 n.8; *Bowman*, 444 F.3d at 976; *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 225 (3d Cir. 2003); *Chiu v. Piano Indep. Sch. Dist.*, 260 F.3d 330, 346 n.12 (5th Cir. 2001).

¹¹ *Ridley*, 390 F.3d at 76 n.4 (equating limited public forums with nonpublic forums); *Summum*, 297 F.3d at 1002 n.4 ("A 'limited public forum' is a subset of the nonpublic forum classification.").

¹² *Glover*, 462 F.3d at 1203 n.8; see also cases cited *supra* note 10.

¹³ A third standard of review applies to regulations that do not absolutely exclude speech from a forum, but regulate its time, place, and manner. Such rules must be "content neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

¹⁴ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (questioning, but not deciding, whether the Establishment Clause would provide a compelling reason for viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (applying strict scrutiny to a content based exclusion from a limited public forum).

¹⁵ The content neutrality requirement is discussed *infra* notes 178–220 and accompanying text.

¹⁶ For cases stating the viewpoint neutral and reasonableness requirement in the context of nonpublic forums, see *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S.

required to be narrowly drawn to serve some compelling interest regardless of whether they are content neutral, viewpoint neutral and reasonable.¹⁷ The application of these standards in the forum cases is discussed below.¹⁸

II. THERE ARE ESSENTIALLY TWO TYPES OF FORUMS

Although the Court has "identified" four categories of forums, there are essentially only two. Forums are either open or restrictive. An open forum is generally available for all speakers and topics; a restrictive forum is available only for certain speakers and topics.¹⁹ Forums are created either by the Court as a matter of constitutional interpretation or by government designation.²⁰

III. THE TRADITIONAL PUBLIC FORUM IS A COURT-CREATED OPEN FORUM

The Court has held as a matter of constitutional interpretation that public sidewalks, streets and parks are traditional public forums.²¹ Such places are deemed, as a matter

788, 806 (1985); *Perry*, 460 U.S. at 46, 48-49. For cases stating the principle in the context of limited public forums, see *Good News Club*, 533 U.S. at 106-07; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The reasonableness requirement is discussed below in notes 221-58 and accompanying text.

¹⁷ *Forbes*, 523 U.S. at 677; *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 45.

¹⁸ See *infra* notes 23-25, 114-17, 127-285 and accompanying text.

¹⁹ See generally *Perry*, 460 U.S. at 45-47 (describing the various types of forums).

²⁰ *Id.*

²¹ *Id.* at 45; see, e.g., *United States v. Grace*, 461 U.S. 171, 179-80 (1983) (sidewalks surrounding the Supreme Court). The public forum doctrine has its origin in Justice Roberts's well known dictum in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-16 (1939) (plurality opinion).

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

Id.

of First Amendment right, to be generally open to all speakers and topics.²² Government exclusions of speakers or subjects from traditional public forums based on content²³ or otherwise²⁴ are subject to strict scrutiny. Such exclusions must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that interest."²⁵

The rationales for a First Amendment right for speakers to use traditional public forums—public sidewalks, streets, and parks—for speech purposes is said to be that such property "has as a principal purpose promoting 'the free exchange of ideas,'"²⁶ and that such places "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. . . . from ancient times."²⁷ These rationales seem of doubtful validity.

First of all, the Court has never cited any authority to support the assertion that streets and parks "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, . . . from ancient times."²⁸ Certainly, as late as 1895, this proposition escaped no less an authority than Justice Holmes. As a member of the Supreme Judicial Court of Massachusetts, he held that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public

²² See *Perry*, 460 U.S. at 45.

²³ See *id.* (stating that content based exclusions from a traditional public forum are subject to strict scrutiny).

²⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (stating generally that exclusions from a traditional forum are subject to strict scrutiny); see also *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (similar).

²⁵ *Cornelius*, 473 U.S. at 800; accord *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (citing *Cornelius*, 473 U.S. at 800); *Lee*, 505 U.S. at 678; *Perry*, 460 U.S. at 45. The government, however, may enforce time, place, and manner restrictions. See *supra* note 13.

²⁶ *Lee*, 505 U.S. at 682 (quoting *Cornelius*, 473 U.S. at 800).

²⁷ *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion).

²⁸ *Id.*; see, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); cf. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) [hereinafter *Content-Neutral Restrictions*] (characterizing the "public trust" rationale as "artificial and fictitious"). There may, however, be "historical antecedents for the right to petition for grievances." *Adderley v. Florida*, 385 U.S. 39, 51 n.2 (1966) (Douglas, J., dissenting) (citing and discussing authorities).

park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."²⁹

The Court's other rationale for the public's right to use public sidewalks, streets, and parks as public forums—that such property “has as a principal purpose promoting ‘the free exchange of ideas’”³⁰—is, as Justice Kennedy has asserted, “a most doubtful fiction.”³¹ As he has observed, “[i]t would seem apparent that the principal purpose of streets and sidewalks . . . is to facilitate transportation, not public discourse, and . . . the purpose for the creation of public parks may be as much for beauty and open space as for discourse.”³²

Perhaps the most sensible rationale for the traditional public forum doctrine is that “access to public property . . . is essential to effective exercise of first amendment rights.”³³ As the Court has articulated it, the underlying purpose of the First Amendment, is to “‘assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”³⁴ This “[f]reedom of discussion . . . embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”³⁵ Consequently, “[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs,” but apply to “matter[s] of public interest” generally.³⁶

The interchange of ideas implies “communication” to others,³⁷ not simply “wagging one’s tongue.”³⁸ Thus, the “First

²⁹ *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895), *aff’d sub. nom. Davis v. Massachusetts*, 167 U.S. 43 (1897).

³⁰ *Lee*, 505 U.S. at 682 (quoting *Cornelius*, 473 U.S. at 800).

³¹ *Id.* at 696 (Kennedy, J., concurring in the judgment).

³² *Id.* at 696–97; see also *United States v. Kokinda*, 497 U.S. 720, 744 (1990) (Brennan, J., dissenting) (similar).

³³ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1306 (Aspen Publishers 5th ed. 2005) (discussing CASS SUNSTEIN, *REPUBLIC.COM* (Princeton Univ. Press 2001)).

³⁴ *Miller v. California*, 413 U.S. 15, 34–35 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

³⁵ *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1966) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

³⁶ *Id.*

³⁷ Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) (noting that “[w]hatever else may or may not be true of speech, as an irreducible minimum it must constitute

Amendment [must] protect[] the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'"³⁹ To get their attention, some means of communication is required. Not everyone has a printing press, and even in the era of e-mail and instant messaging, not everyone has a computer or is computer literate.⁴⁰ Besides, a face-to-face encounter may still be the most effective means of communicating ideas.⁴¹ Furthermore, if the additional First Amendment rights "of the people peaceably to assemble, and to petition the Government for a redress of grievances"⁴² are to have any practical meaning at all, there must be some right to assemble somewhere. Consequently, the most logical places for people to assemble to exchange ideas are sidewalks, streets, and parks that are generally open and where members of the public have every right to be,⁴³ regardless of whether or not free expression is their principal purpose and has been from time immemorial.

Nonetheless, using one or both the rationales that a property's principal purpose must be free expression and that it

communication...[which] in turn, implies both a communicator and a communicatee—a speaker and an audience").

³⁸ Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 EMORY L.J. 1, 22 (2006) (using the term "wagging one's tongue").

³⁹ *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

⁴⁰ See *Adderly v. Florida*, 385 U.S. 39, 50–51 (1966) (Douglas, J., dissenting) ("Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a... limited type of access to public officials."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-24, at 987 (2d ed. 1988) (noting that "streets, sidewalks, and parks" are "indispensable... to people who lack access to more elaborate (and more costly) channels" of communication).

⁴¹ See SUNSTEIN, *supra* note 33, at 30–32 (noting that keeping streets and parks open to speakers "promotes three important goals" because it (1) "ensures that speakers can have access to a wide array of people," (2) "allows speakers not only to have general access to heterogeneous people, but also to specific people and... institutions with whom they have a complaint," and (3) "increases the likelihood that people generally will be exposed to a wide variety of people and views").

⁴² U.S. CONST. amend. I.

⁴³ Cf. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring in the judgment) ("Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action."); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) ("One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.").

must have been so used immemorially, the Court has narrowly defined the traditional forum category.⁴⁴ Public property other than sidewalks, streets, and parks, such as residential mailboxes⁴⁵ and utility poles,⁴⁶ do not qualify; nor do all sidewalks, streets, and parks. In particular, the Court has also denied traditional forum status to streets and sidewalks that are enclosed within other government property.

For example, in *Greer v. Spock*⁴⁷ the Court held that a military base was not a public forum even though unrestricted areas of the base had roads and footpaths that were freely open to the public.⁴⁸ In his dissent, Justice Brennan argued that these unrestricted areas did "not differ in their nature and use from city streets and lots where open speech long has been protected."⁴⁹ The majority, however, focused on the fact that a military base was involved. It reasoned that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false."⁵⁰ The function of a military base is "to train soldiers, not to provide a public forum" and "[a] necessary concomitant of the basic function of a military installation has been the 'historically unquestioned power of (its) commanding officer summarily to exclude civilians from the area of his command.'"⁵¹

⁴⁴ Cf. *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) (complaining that the "public forum categories—originally conceived of as a way of preserving First Amendment rights . . . have been used . . . as a means of upholding restrictions").

⁴⁵ *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981) (holding that "[t]here is neither historical nor constitutional support for the characterization of a letterbox as a public forum").

⁴⁶ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (holding that the appellees "fail[ed] to demonstrate the existence of a traditional right of access respecting such items as utility poles for the purposes of their communication comparable to that recognized for public streets and parks").

⁴⁷ 424 U.S. 828 (1976).

⁴⁸ *Id.* at 830. Despite the apparent public access, "[m]ilitary police regularly patrol[ed] the roads within the reservation, and they occasionally stop[ped] civilians and ask[ed] them the reason for their presence." *Id.*

⁴⁹ *Id.* at 861 (Brennan, J., dissenting).

⁵⁰ *Id.* at 838 (majority opinion).

⁵¹ *Id.* (quoting *Cafeteria Workers v. McElory*, 367 U.S. 886, 893 (1961)). The Court distinguished *Flower v. United States*, 407 U.S. 197 (1972), in which the Court reversed the conviction of a civilian who was arrested for distributing leaflets on a street within the limits of a military base. *Greer*, 424 U.S. at 835-37. The Court said

Similarly, in *International Society for Krishna Consciousness, Inc. v. Lee*,⁵² the Court, in a five to four decision on this point, held that an airport terminal was not a traditional public forum. Justice Kennedy, writing for the dissenters, argued that parts of the terminal's corridors that were freely open to the public were public forums. He reasoned that they were analogous to public streets in that they were "broad, public thoroughfares full of people and lined with stores and other commercial activities" and that "while most people who come to . . . airports do so for a reason related to air travel, . . . this does not distinguish an airport from streets or sidewalks, which most people use for travel."⁵³ The majority, however, focused on the fact that an airport was at issue. They reasoned that airports are not traditional public forums because they have not "immemorially . . . time out of mind' been held in public trust and used for purposes of expressive activity,"⁵⁴ and they do not have "as a principal purpose promoting 'the free exchange of ideas.'"⁵⁵

In addition, the Court in a five to four decision in *Adderley v. Florida*⁵⁶ held that there was no constitutional right to exercise speech and assembly rights on a driveway and grassy areas on government property that housed a jail.⁵⁷ The Court said that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."⁵⁸

In *United States v. Kokinda*,⁵⁹ however, the Court was equally divided four to four on whether a sidewalk leading from a parking lot to the front door of a post office was a traditional

that *Flower* was different because the street at issue "was a public thoroughfare in San Antonio no different from all other public thoroughfares in that city, and that the military had not only abandoned any right to exclude civilian vehicular and pedestrian traffic from the avenue, but also any right to exclude leaflete(e)rs." *Id.* at 835.

⁵² 505 U.S. 672 (1992).

⁵³ *Id.* at 700 (Kennedy, J., concurring in the judgment).

⁵⁴ *Id.* at 680 (majority opinion) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

⁵⁵ *Id.* at 682 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

⁵⁶ 385 U.S. 39 (1966).

⁵⁷ *Id.* at 45-48.

⁵⁸ *Id.* at 47.

⁵⁹ 497 U.S. 720 (1990).

public forum.⁶⁰ Both the sidewalk and the parking lot were entirely on post office property and were used only for post office business.⁶¹ The property was located along a major highway and was separated from it by a public sidewalk that ran parallel to the road.⁶² The speakers argued that "although the sidewalk [was] on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum."⁶³ Justice Brennan agreed. In his dissent he took the position that sidewalks are sidewalks⁶⁴ and the fact "that the walkway at issue [was] a sidewalk open and accessible to the general public [was] alone sufficient to identify it as a [traditional] public forum."⁶⁵

Justice O'Connor disagreed. In her plurality opinion, she maintained that neither the "mere physical characteristics of the property"⁶⁶ nor the fact that it is "open to the public" determine whether it is a traditional public forum.⁶⁷ Instead, the "critical" question was its "location and purpose."⁶⁸ The postal sidewalk was in fact not a traditional forum because it did not "have the characteristics of public sidewalks traditionally open to expressive activity."⁶⁹ Such sidewalks are "constructed . . . to facilitate the daily commerce and life of the neighborhood or city"⁷⁰ and are "'continually open, often uncongested, and constitute not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people . . . [could] enjoy the open air or the company of friends and neighbors in a relaxed environment.'"⁷¹ By contrast, the sidewalk at issue "was constructed solely to assist the postal patrons to negotiate the space between the parking lot and the front door of the post

⁶⁰ Justice Kennedy provided the fifth vote to uphold the government regulation at issue on the ground that it was not necessary to decide whether the sidewalk was a public forum because even if it was, the regulation was a reasonable time, place, and manner regulation. *Id.* at 737-39 (Kennedy, J., concurring).

⁶¹ *Id.* at 723 (plurality opinion).

⁶² *Id.*

⁶³ *Id.* at 727.

⁶⁴ See generally *id.* at 740-49 (Brennan, J., dissenting).

⁶⁵ *Id.* at 745.

⁶⁶ *Id.* at 727 (plurality opinion).

⁶⁷ *Id.* at 729.

⁶⁸ *Id.* at 728-29.

⁶⁹ *Id.* at 727.

⁷⁰ *Id.* at 728.

⁷¹ *Id.* at 727 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640, 651 (1981)).

office, not to facilitate the daily commerce and life of the neighborhood or city."⁷²

On the other hand, sidewalks, streets, and parks that otherwise qualify as traditional public forums do not lose their status merely because they go through residential neighborhoods⁷³ or surround public⁷⁴ or private property.⁷⁵ For example, in *United States v. Grace*⁷⁶ the Court held that the sidewalks surrounding the Supreme Court are traditional public forums.⁷⁷ It reasoned that those sidewalks are

indistinguishable from any other sidewalks in Washington, D.C. . . . [as] [t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.⁷⁸

IV. THE GOVERNMENT MAY CREATE FORUMS FOR SPEECH

Unless the property qualifies as a traditional public forum, there is no constitutional right of access to government property for speech purposes absent government permission.⁷⁹ If it chooses, however, the government may create a forum for speech that otherwise would not exist, but it has no obligation to do so.⁸⁰ A majority of the Court has consistently held that "[t]he First

⁷² *Id.* at 728. Justice Brennan responded that it was "irrelevant that the sidewalk . . . [was] constructed only to provide access to the [post office]" and that it "[ran] only between the parking lot and the post office entrance." *Id.* at 744 (Brennan, J., dissenting). He noted that "[p]ublic sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes" and that the "[e]xistence of a public forum does not turn on a particularized factual inquiry into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare." *Id.*

⁷³ *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (holding that "[n]o particularized inquiry into the precise nature a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora").

⁷⁴ *United States v. Grace*, 461 U.S. 171 (1983) (sidewalks surrounding the Supreme Court).

⁷⁵ *Hill v. Colorado*, 530 U.S. 703 (2000) (sidewalks in front of entrances to abortion clinics).

⁷⁶ 461 U.S. 171 (1983).

⁷⁷ *Id.* at 180.

⁷⁸ *Id.* at 179-80.

⁷⁹ See *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (no constitutional right protest on jail property); see also *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-80 (1992) (summarizing public forum rules).

⁸⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803-04 (1985).

Amendment does not guarantee access to property simply because it is owned or controlled by government⁸¹ and "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted."⁸²

The rationale for limiting speaker access to government property to traditional public forums and to forums that the government voluntarily creates is said to be that "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."⁸³ Thus, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."⁸⁴

No one on the Court has really disputed the fact that the Government needs to control its own property.⁸⁵ Governments must be able to exercise their constitutional and statutory powers without interference from members of the public who wish to protest or otherwise use government property for speech purposes. Several Justices, however, have argued for a more "flexible approach."⁸⁶ They have complained that the Court's public forum doctrine "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government."⁸⁷ In addition,

to place such discretion in any public official, be he the 'custodian' of the public property or the local police

⁸¹ U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

⁸² Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984).

⁸³ *Adderley*, 385 U.S. at 48.

⁸⁴ *Id.* at 47.

⁸⁵ Some of the most prominent First Amendment scholars have also agreed that government needs "flexibility" in controlling its own property. See Cass, *supra* note 1, at 1316 n.160 ("Professors Chafee, Emerson, and Meiklejohn . . . share the belief that government should make some public property available for speech uses but also agree that government should retain considerable flexibility in fulfilling this obligation.").

⁸⁶ *Greer v. Spock*, 424 U.S. 828, 860 (1976) (Brennan, J., dissenting).

⁸⁷ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgment).

commissioner, is to place those who assert their First Amendment right at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government.⁸⁸

Consequently, over time, ten Justices have urged that the right to use public property for expressive purposes should turn on whether the speech is compatible with the normal functions of property.⁸⁹ No five of these Justices, however, sat on the Court at the same time. As a result, the Court continues to apply rigid rules rather than a more functional approach. It has been argued that such a result might be justified on the grounds that the existing rules "provide ample opportunity for free expression" and "pose[] no real threat to the market place of ideas."⁹⁰ Moreover, expanding the scope of access to public property would only "make some speech marginally more effective . . . [b]ut to require such access would necessarily interfere with competing government interests and involve the courts in an endless series of highly subjective and unpredictable judgments."⁹¹

Since the government-created forum is dependent on government discretion, it is inherently a narrow category. Nonetheless the Court has expanded its scope in one important respect. Speakers often do not seek access to tangible physical property. Instead, they seek access to some government-controlled "channel of communication."⁹² Consequently, the Court has held that in defining the scope of government-created forums, it would focus on the precise "access sought by the speaker."⁹³ Thus, such forums are not limited to particular places,⁹⁴ whether "spatial or geographic,"⁹⁵ such as a plaza

⁸⁸ *Adderley*, 385 U.S. at 54 (Douglas, J., dissenting) (citation omitted).

⁸⁹ See *Lee*, 505 U.S. at 694-703 (Kennedy, J., concurring in the judgment, joined on this point by Blackmun, J., Stevens, J., and Souter, J.); *Greer*, 424 U.S. at 843 (Powell, J., concurring); *id.* at 860 (Brennan, J., joined by Marshall, J., dissenting); *Adderley*, 385 U.S. at 54-55 (Douglas, J., joined by Warren, C.J., Brennan, J., and Fortas, J., dissenting).

⁹⁰ *STONE*, *supra* note 33, at 1322.

⁹¹ *Id.*

⁹² *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985).

⁹³ *Id.*

⁹⁴ See *id.* at 800-02 (discussing the fact that forums are not limited to "tangible government property").

⁹⁵ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

surrounding a statehouse,⁹⁶ a municipal auditorium,⁹⁷ and university meeting facilities.⁹⁸ Instead, any government-controlled means of communication can qualify.⁹⁹ As a result, such things as a charity drive,¹⁰⁰ a candidate debate,¹⁰¹ an internal mail system,¹⁰² and even the expenditure of money to support private speech¹⁰³ potentially can be government-created forums. This is consistent with the underlying purpose of the First Amendment, which is to assure the free exchange of ideas.¹⁰⁴

Under the Court's lexicon, property that the government voluntarily opens to speakers is categorized as either a designated public forum, a limited public forum, or a nonpublic forum. One of the principle areas of confusion in the current law is the relationship between these three types of forums.

V. GOVERNMENT-CREATED OPEN ACCESS FORUM

If the government chooses it may create a forum that is generally open for all topics and speakers. The Court has characterized such an open access forum as a designated forum of "unlimited character"¹⁰⁵ that "may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech."¹⁰⁶

Under the Court's construct, whether the Government in fact has created a designated public forum that is generally available for speech depends on intent: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public

⁹⁶ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

⁹⁷ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁹⁸ *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981).

⁹⁹ *Cornelius*, 473 U.S. at 800-02.

¹⁰⁰ *Id.* (holding that on the facts, the Government had not created a public forum).

¹⁰¹ *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (holding that on the facts the Government had not created a public forum).

¹⁰² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (holding that on the facts the Government had not created a public forum).

¹⁰³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995) (holding that the university had created a limited public forum).

¹⁰⁴ See *supra* notes 33-39 and accompanying text.

¹⁰⁵ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

¹⁰⁶ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

discourse.”¹⁰⁷ In determining the government’s intent, “the Court has looked to the policy and practice of the government.”¹⁰⁸ It “has also examined the nature of the property and its compatibility with expressive activity.”¹⁰⁹ “[T]he location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction.”¹¹⁰ Consequently, the Court “will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will [it] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”¹¹¹ Furthermore, the government does not create a public forum merely because “‘members of the public are permitted freely to visit a place owned or operated by the Government.’”¹¹² In addition, even if the government has created a designated forum, it “is not required to indefinitely retain the open character of the facility.”¹¹³

To the extent that the government has created a designated public forum that is generally available for all speakers and topics, it is “the functional equivalent of a traditional public forum.”¹¹⁴ Consequently, the same access rules apply to both¹¹⁵ even though the government “was not required to create the forum in the first place.”¹¹⁶ Strict scrutiny applies and “speakers cannot be excluded without a compelling governmental interest.”¹¹⁷

Because designated public forums and traditional public forums are functionally equivalent, the Court has sometimes not distinguished between them. For example in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, Justice

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Lee*, 505 U.S. at 680.

¹¹¹ *Cornelius*, 473 U.S. at 803 (citations omitted).

¹¹² *Lee*, 505 U.S. at 680 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

¹¹³ *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

¹¹⁴ G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 958 (1991).

¹¹⁵ *Lee*, 505 U.S. at 678.

¹¹⁶ *See Perry*, 460 U.S. at 45.

¹¹⁷ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *see also Perry*, 460 U.S. at 45; *Lee*, 505 U.S. at 678. Of course, the government may impose time, place, and manner restrictions. *See supra* note 13.

O'Connor, writing for a 4-3 majority, used the term "[t]raditional public fora" to describe "places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" ¹¹⁸

Similarly, in *Capitol Square Review & Advisory Board v. Pinette*, ¹¹⁹ a ten-acre state-owned plaza surrounding a statehouse had been opened to the public for speech purposes for more than a century. ¹²⁰ In addition, a state statute made "the square available 'for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose.'" ¹²¹ Was the plaza a traditional public forum, a designated public forum, or both? The lower courts held that it was a traditional public forum. The Court did not decide the question presumably because it was unnecessary to do so; either way the exclusion at issue was subject to strict scrutiny. ¹²²

VI. GOVERNMENT-CREATED RESTRICTED ACCESS FORUMS

If the government chooses it may not only create a forum that is generally open for all subjects and speakers, but it may also create a forum that is restricted to certain speakers and subjects. Under the Court's construct, such forums are characterized as either limited public forums or nonpublic forums. ¹²³ Thus, "a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum or he is not a member of the class of speakers for whose especial benefit the forum was

¹¹⁸ *Cornelius*, 473 U.S. at 802 (emphasis added) (quoting *Perry*, 460 U.S. at 45). It appears that Justice O'Connor misquoted *Perry*. In *Perry*, Justice White, writing for the majority, did not say that "[t]raditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius*, 473 U.S. at 802. What he did say was that "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45.

¹¹⁹ 515 U.S. 753 (1995).

¹²⁰ *Id.* at 757.

¹²¹ *Id.* (quoting OHIO ADMIN. CODE 128:4-02(A) (1994)).

¹²² See *supra* notes 114-17 and accompanying text. On the facts of *Pinette*, the plaza was probably a designated public forum rather than a traditional public forum. While a century is a long time, it is doubtful that a plaza surrounding a statehouse could meet the test of being a place that immemorially, time out of mind, since ancient times, has had as a principal purpose the free exchange of ideas.

¹²³ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (limited public forum); *Perry*, 460 U.S. at 49 (1983) (nonpublic forum).

created”¹²⁴ Similarly, “[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech.”¹²⁵ Instead, it “may be justified in ‘reserving [its forum] for certain groups or for the discussion of certain topics.’”¹²⁶

A. *Nonpublic Forum Cases and the Articulated Distinction Between the Two Types of Restricted Forums*

In a series of nonpublic forum cases, the Court has treated limited public forums and nonpublic forums as separate and distinct categories. It has characterized the limited public forum as a type of designated public forum in the sense that it is government property that the government has intentionally designated as available for limited speech purposes.¹²⁷ It has used the term nonpublic forum to describe government property that does not qualify as a public forum, traditional or designated, even though the government has permitted access to some speakers and excluded others.¹²⁸ The articulated technical difference between the two categories is that in nonpublic forums inclusions and exclusions are made on a “selective,” case-by-case basis, whereas in limited public forums government property is made “generally” available for certain speakers and topics.¹²⁹ The reason for making the distinction is said to be that

¹²⁴ *Cornelius v. NAACP Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (citations omitted); see also *Perry*, 460 U.S. at 49 (stating that in a nonpublic forum, the government may “make distinctions in access on the basis of subject matter and speaker identity”).

¹²⁵ *Good News Club*, 533 U.S. at 106.

¹²⁶ *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

¹²⁷ See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 680 (1992) (describing designated public fora as being “of a limited or unlimited in character—property that the State has opened for expressive activity by part or all of the public” and noting that “[t]he decision to create a public forum must . . . be made ‘by intentionally opening a nontraditional forum for public discourse’” (quoting *Cornelius*, 473 U.S. at 802)). At the margins it is sometimes not clear whether the government has designated public property for open access or limited access. See *infra* note 211 and accompanying text (discussing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)).

¹²⁸ See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676–78 (1998) (candidate debate); *Lee*, 505 U.S. at 678–80 (airport terminal); *Cornelius*, 473 U.S. at 802–06 (charity drive); *Perry*, 474 U.S. at 46, 49 (school mail system).

¹²⁹ *Forbes*, 523 U.S. at 679–80.

exclusions from the former are subject to a stricter standard of review than exclusions from the latter.¹³⁰

For example, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, a school district, pursuant to a collective bargaining agreement, granted the union that represented the district's teachers access to its interschool mail system but denied such access to a rival union.¹³¹ The latter argued that the mail system had become a limited public forum because it previously had had equal access to it, and because the district had permitted its "periodic use by private non-school connected groups."¹³² Justice White, writing for the majority, rejected these arguments and took pains to establish that the mail system was a nonpublic forum.¹³³

Justice White held that the mail system was not a limited public forum. He viewed such forums as a type of designated public forum that "the state has opened for use by the public as a place for expressive activity."¹³⁴ The excluded union's prior equal access did not create "a limited public forum generally open for use by employee organizations;" instead, it "simply reflected" that at the time "both unions represented the teachers and had legitimate reasons for use of the system."¹³⁵ The fact that the district had permitted groups such as "the YMCA, Cub Scouts, and other civic and church organizations to use the facilities" also did not create a limited public forum because "there [was] no indication in the record that the school mailboxes and interschool system [were] open[ed] for use by the general public."¹³⁶ Instead, "[p]ermission to use the system to communicate with teachers [had to] be secured from the individual building principal" and "[t]his type of selective access does not transform government

¹³⁰ *Id.* at 677, 682; *Cornelius*, 474 U.S. at 800; *Perry*, 460 U.S. at 46.

¹³¹ 460 U.S. at 39-41.

¹³² *Id.* at 47.

¹³³ *Id.* at 47-49.

¹³⁴ *Id.* at 45. In apparent contradiction, Justice White at one point of his opinion defined a limited public forum as a "public forum . . . limited . . . [to] certain groups . . . or for the discussion of certain subjects," *id.* at 46 n.7, but at another point he asserted that such "distinctions may be impermissible in a public forum," *id.* at 49. Presumably, what he meant to say was that such distinctions are impermissible in a designated public forum that is generally open to all speakers and topics.

¹³⁵ *Id.* at 48.

¹³⁶ *Id.* at 47.

property into a public forum."¹³⁷ Furthermore, Justice White supposed that even if access by such groups created a limited public forum, the union would be outside its scope.¹³⁸ Any such forum would be "generally open for use" only by "other entities of similar character . . . that engage in activities of interest and educational relevance to students."¹³⁹ It "would not as a consequence be open to an organization . . . [that] is concerned with the terms and conditions of teacher employment."¹⁴⁰

Since the mail system was a nonpublic forum, not a limited public forum, Justice White held that the exclusion was not subject to strict scrutiny.¹⁴¹ Instead, it only had to be viewpoint neutral and reasonable.¹⁴² In applying that standard, he engaged in an analysis of the underlying facts and concluded that the differential access accorded the two unions was viewpoint neutral because it was based on their "status"—the included union represented the teachers, the excluded union did not—not on any different points of view they may have had on labor or other issues.¹⁴³ Similarly, he reasoned that the "differential access" policy was reasonable because it "enable[d]" the included union, as representative of all the teachers, to carry out its duties as the exclusive bargaining agent.¹⁴⁴ By contrast, the rival union did "not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes."¹⁴⁵ The exclusion was also reasonable because it "serve[d] to prevent the District's schools from becoming a battlefield for inter-union squabbles,"¹⁴⁶ and because "substantial alternative channels . . . remained open" for the rival union to communicate with the teachers.¹⁴⁷

Similarly, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the federal government permitted "an

¹³⁷ *Id.*

¹³⁸ *Id.* at 48.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 46.

¹⁴² *Id.*

¹⁴³ *Id.* at 49–50.

¹⁴⁴ *Id.* at 50–51.

¹⁴⁵ *Id.* at 51.

¹⁴⁶ *Id.* at 52 (quoting *Haukvedahl v. Sch. Dist. No. 108*, No. 75C-3641 (N.D. Ill. 1976)).

¹⁴⁷ *Id.* at 53.

annual charitable fund-raising drive . . . in the federal workplace during working hours."¹⁴⁸ An executive order:

limited participation to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families," and specifically excluded those "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."¹⁴⁹

Plaintiffs, who were excluded because of their efforts to "influence public policy," brought suit arguing that their exclusion was unlawful because the charity drive was a "limited public forum for use by all charitable organizations to solicit funds from federal employees."¹⁵⁰ In a four to three decision, the Court rejected the argument.¹⁵¹

As did Justice White in *Perry*, Justice O'Connor, writing for the majority in *Cornelius*, considered limited public forums to be a subset of public forums¹⁵² that are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."¹⁵³ She asserted that in such forums "speakers cannot be excluded without a compelling government interest," but that "[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"¹⁵⁴

Justice O'Connor concluded that the charity drive was a nonpublic forum and that the exclusion of advocacy groups was reasonable. She asserted that "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."¹⁵⁵ To determine intent she looked to the government's "policy and practice" and "examined the nature of

¹⁴⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 474 U.S. 788, 790 (1985).

¹⁴⁹ *Id.* at 795 (quoting Exec. Order No. 12,404, 48 Fed. Reg. 6685 (Feb. 10, 1983)).

¹⁵⁰ *Id.* at 804.

¹⁵¹ *Id.* at 802-06. Two Justices did not participate in the decision. *Id.* at 813.

¹⁵² See *id.* at 802-03 (using limited forum cases as examples of "public forums").

¹⁵³ *Id.* at 802.

¹⁵⁴ *Id.* at 800.

¹⁵⁵ *Id.* at 802.

the property and its compatibility with expressive activity.”¹⁵⁶ In this case, “[t]he Government’s consistent policy [had] been to limit participation in the CFC to ‘appropriate’ voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials.”¹⁵⁷ She asserted that “[s]uch selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.”¹⁵⁸ The charity drive was “not create[d] . . . for purposes of providing a forum for expressive activity;” rather, it was “designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by *lessening* the amount of expressive activity occurring on federal property.”¹⁵⁹ Furthermore, the fact that “[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer” supported the conclusion that the charity drive was a nonpublic forum, not a limited public forum.¹⁶⁰

Having found the charity drive to be a nonpublic forum, Justice O’Conner proceeded to determine whether the exclusion of advocacy groups was reasonable “in light of the purpose of the forum and all of the surrounding circumstances.”¹⁶¹ She reasoned that given the nature of the property the exclusion was reasonable because it was designed “to minimize disruption to the federal workplace, to ensure the success of the fundraising effort, [and] to avoid the appearance of political favoritism.”¹⁶²

Building on *Perry* and *Cornelius*, the Court in *Arkansas Educational Television Commission v. Forbes*¹⁶³ also treated the limited public forum as a type of designated public forum¹⁶⁴ that was separate and distinct from the nonpublic forum, and asserted that exclusions from the former were subject to strict scrutiny,¹⁶⁵ while exclusions from the latter were only required to

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 804.

¹⁵⁸ *Id.* at 805.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 805–06.

¹⁶¹ *Id.* at 809.

¹⁶² *Id.* at 813. The Court “decline[d]” to decide whether the exclusion was viewpoint discriminatory because the issue “was neither decided below or fully briefed before [the] Court.” *Id.* at 812–13.

¹⁶³ 523 U.S. 666 (1998).

¹⁶⁴ See *id.* at 678–79 (using *Widmar v. Vincent*, 454 U.S. 263 (1981), a limited public forum case, as an example of a designated public forum).

¹⁶⁵ *Id.* at 677 (“[i]f the government excludes a speaker who falls within the class

be viewpoint neutral and reasonable.¹⁶⁶ In the case, a public television station invited the Democratic and Republican candidates for a congressional seat to participate in a debate, but excluded a third party candidate.¹⁶⁷ Justice Kennedy, writing for the majority, held that the debate was a nonpublic forum, not a "designated public forum," and that the exclusion was viewpoint neutral and reasonable.

Justice Kennedy based his conclusion that the debate was a nonpublic forum on "the distinction between 'general access,' which indicates the property is a designated public forum, and 'selective access,' which indicates the property is a nonpublic forum."¹⁶⁸ He held that "the government 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, as individuals, 'obtain permission' to use it."¹⁶⁹ Thus, the debate was a nonpublic forum, not a designated public forum, because the government did not intend to create the latter.¹⁷⁰ The debate was not generally available to all candidates for the congressional seat as it "did not have an open microphone-format."¹⁷¹ Instead, the government engaged in selective access, by making "candidate-by-candidate determinations as [to] which of the eligible candidates would participate."¹⁷²

to which a designated public forum is made generally available, its action is subject to strict scrutiny").

¹⁶⁶ *Id.* at 682.

¹⁶⁷ *Id.* at 670-71.

¹⁶⁸ *Id.* at 679 (citations omitted).

¹⁶⁹ *Id.* (citations omitted).

¹⁷⁰ *Id.* at 677 ("The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.") (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

¹⁷¹ *Id.* at 680.

¹⁷² *Id.* Justice Kennedy argued that the "distinction between general and selective access further[ed] First Amendment interests." *Id.* at 680. It "encourage[s] the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open its property at all." *Id.* "Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability on the other, a public television broadcaster might choose not to air candidates' views at all." *Id.* at 681. This would "diminish the free flow of information and ideas" and would "inescapably dampen[] the vigor and limit[] the variety of public debate." *Id.* (quoting *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 656 (1994); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964)) (internal quotation marks omitted).

Even though the debate was a nonpublic forum, not a limited public forum, Justice Kennedy emphasized that nonpublic status alone did not give the government “unfettered power to exclude any candidate it wished.”¹⁷³ He then proceeded to analyze the underlying facts to determine whether the exclusion was viewpoint neutral and reasonable. He concluded that it was because it was “beyond dispute that [the third party candidate] was excluded not because of his viewpoint but because he had generated no appreciable public interest.”¹⁷⁴ He also noted that since there are usually a number of “candidates” who “qualify for the ballot,” “[o]n logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would ‘actually undermine the education value and quality of debates.’”¹⁷⁵

B. *The Standard of Review in Restricted Forum Cases*

Despite the dicta in the nonpublic forum cases that a different and stricter standard of review applies for exclusions from limited public forums than from nonpublic forums, the fact is that in practice the Court has applied the same standard of review in both cases.¹⁷⁶ That standard is that content and viewpoint neutral exclusions must be reasonable and content or viewpoint discriminatory exclusions are subject to strict scrutiny.¹⁷⁷

1. The Content and Viewpoint Neutrality Requirements

There is no question that absent some compelling interest,¹⁷⁸ exclusions from both nonpublic forums and limited public forums must be viewpoint neutral in the sense that the government may not discriminate based on the point of view a speaker may have

¹⁷³ *Id.* at 682.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 681 (quoting TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, LET AMERICA DECIDE 148 (1995)).

¹⁷⁶ See *supra* notes 127–75 and accompanying text (discussing the nonpublic forum cases); *infra* notes 259–84 and accompanying text (discussing the limited public forum cases).

¹⁷⁷ See *supra* notes 127–75 and accompanying text (discussing the nonpublic forum cases); *infra* notes 259–84 and accompanying text (discussing the limited public forum cases).

¹⁷⁸ Cf. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (questioning, but not deciding, whether the Establishment Clause would provide a compelling reason for viewpoint discrimination).

on a particular subject.¹⁷⁹ The content neutral requirement is more problematic. The nonpublic cases do not explicitly require that exclusions also be content neutral, and there is conflicting authority on the issue in limited public forum cases.

The Court has held that, absent a compelling interest, exclusions from a limited public forum must be content neutral. In *Widmar v. Vincent*, a university created a limited public forum when it made its meeting "facilities generally available to registered student groups."¹⁸⁰ In setting the boundaries of the forum, however, it excluded student groups that desired to use the facilities for "'purposes of religious worship or religious teaching.'"¹⁸¹ The Court found that the exclusion was based on the religious content of the speech and applied strict scrutiny.¹⁸² In addition, in *Perry*, the Court stated in dictum that in a public forum created for limited purposes, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."¹⁸³

Nonetheless, in *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁸⁴ the Court did not carefully distinguish between subject matter discrimination and content discrimination.¹⁸⁵ In that case the Court assumed that the university had created a limited public forum¹⁸⁶ by providing funding for certain student groups, including funds to cover the

¹⁷⁹ *Forbes*, 523 U.S. at 682 (stating the rule in the context of a nonpublic forum and finding no viewpoint discrimination); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 48-49 (1983) (same); see *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 812-13 (1985) (stating the rule in the context of a nonpublic forum but not deciding the issue); see also *Good News Club*, 533 U.S. at 106-07 (stating the rule in the context of a limited public forum and finding viewpoint discrimination); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-37 (1995) (same).

¹⁸⁰ *Widmar v. Vincent*, 454 U.S. 263, 264-65 (1981).

¹⁸¹ *Id.* at 265 n.3 (quoting the "pertinent" university regulation).

¹⁸² *Id.* at 269-70 (stating that such "content based exclusions . . . must serve a compelling interest and . . . [be] narrowly drawn to achieve that end").

¹⁸³ *Perry*, 460 U.S. at 46 & n.7.

¹⁸⁴ 515 U.S. 819 (1995).

¹⁸⁵ For an article discussing the Court's attempts to distinguish between content and subject matter discrimination and suggesting possible solutions, see Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978-1979). See also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 239-42 (1983) (similar).

¹⁸⁶ *Rosenberger*, 515 U.S. at 829.

cost of printing student-run publications.¹⁸⁷ The funding guidelines, however, prohibited funding for “‘religious activit[ies],’ . . . defined as any activity that ‘primarily promotes or manifests a particular belie[f] in or about an ultimate reality.’”¹⁸⁸ Under these guidelines the university denied funding to a student run publication that was “established ‘[t]o publish a magazine of philosophical and religious expression,’ ‘to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,’ and ‘[t]o provide a unifying focus for Christians of multicultural backgrounds.’”¹⁸⁹

The university specifically argued that the exclusion was based on the religious content of the speech.¹⁹⁰ In response, Justice Kennedy, writing for the majority, noted that while the government may limit access to a limited public forum to certain speakers and topics,¹⁹¹ “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”¹⁹² Nonetheless, he went on to assert that

in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purpose of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.¹⁹³

Justice Kennedy avoided confronting the full implications of his assertion that content discrimination might be permissible by finding that the exclusion was viewpoint discriminatory.¹⁹⁴

Justice Souter, writing for the four dissenters, also seemed to ignore any distinction between content discrimination and

¹⁸⁷ *Id.* at 824.

¹⁸⁸ *Id.* at 825 (quoting the funding guidelines).

¹⁸⁹ *Id.* at 825–26.

¹⁹⁰ *Id.* at 830–33.

¹⁹¹ *Id.* at 829.

¹⁹² *Id.* at 828.

¹⁹³ *Id.* at 829–30.

¹⁹⁴ *Id.* at 830–31. Justice Kennedy reasoned that “[b]y very terms of the . . . prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.” *Id.* at 831. As he saw it, “[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.” *Id.*

subject matter discrimination. Unlike Justice Kennedy, Justice Souter thought that the university had engaged in permissible subject matter discrimination,¹⁹⁵ not impermissible viewpoint discrimination.¹⁹⁶ As he saw it, the university's Guidelines "simply den[ied] funding for hortatory speech that 'primarily promotes or manifests' any view on the merits of religion; they den[ied] funding for the entire subject matter of religious apologetics."¹⁹⁷ Even if Justice Souter were correct that the case involved subject matter, rather than viewpoint, discrimination, the University had asserted that it had denied funding because of the religious content of the speech.¹⁹⁸ Justice Souter recognized that the Court had "struck down . . . attempt[s] to regulate the content of speech in" a limited public forum.¹⁹⁹ However, he apparently saw no constitutional infirmity with the government engaging in content discrimination when defining the scope of the subject matter permitted in such a forum.

Notwithstanding *Rosenberger*, there should be no doubt that in defining the scope of the speakers and subjects permitted in limited and nonpublic forums, the government, absent some compelling interest, may not engage in content discrimination. Clearly, in preserving such forums for their intended purposes, the government may exclude certain subjects. The whole point of limited and nonpublic forums is that the government has the discretion to define the scope of the forums that it creates. Consequently, a school board may create a limited public forum that confines its school board meetings to school board business.²⁰⁰ The military and a public transit system respectively may create nonpublic forums that exclude political speech on a military base²⁰¹ and on public transportation.²⁰² Of course, any such exclusion has the incidental effect of "discriminating" against the content, including viewpoint, of the

¹⁹⁵ See *id.* at 893 n.12 (Souter, J., dissenting) (asserting that if "determinations are made on the basis of a reasonable subject-matter distinction, but not on a viewpoint distinction, there is no violation [of the Free Speech Clause]").

¹⁹⁶ *Id.* at 895.

¹⁹⁷ *Id.* at 896.

¹⁹⁸ *Id.* at 831-33 (majority opinion).

¹⁹⁹ *Id.* at 888 (Souter, J., dissenting).

²⁰⁰ *Madison Joint Sch. Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167 (1976).

²⁰¹ *Greer v. Spock*, 424 U.S. 828 (1976).

²⁰² *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

excluded speaker's message. The point, however, is that in defining the scope of restricted forums, the government may not exclude speakers and subjects "because of [agreement or] disagreement with the message" that the excluded speaker seeks to "convey[.]"²⁰³ In other words, there must some

²⁰³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

One exception to the content neutral, viewpoint neutral requirement is that the government may make content based decisions when it spends its own money to express its own message. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (stating that the Court has "permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message"). There are two cases that might be read to permit the government to make content based decisions even when it subsidizes private speech. In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the pertinent statute required the NEA to judge grant applications based on "artistic excellence and artistic merit . . . , taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.* at 576 n.* (quoting 20 U.S.C. § 954(d)(1) (2000)). Justice O'Connor, writing for the majority, held that this standard did not necessarily discriminate based on viewpoint. *Id.* at 580-87. She also seemed to suggest, however, that content based judgments were permissible. *Id.* at 585 (noting that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding"). Nonetheless, surely the government cannot engage in content discrimination in the sense of denying funding "based on hostility . . . towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Justice O'Connor seemed to recognize this point when she noted that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" *Finley*, 524 U.S. at 587 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)). On the actual facts of the case, the subsidy was not based on hostility to content even though it had an incidental effect on content. Instead, the subsidy was based on the articulated content neutral, viewpoint neutral, reasonably objective standard of "artistic excellence." *Id.* at 576. In other words, the subsidy discriminated based on the constitutionally permissible reason of poor artistic merit, not on the constitutionally impermissible reason of disagreement with the underlying message.

In *United States v. American Library Ass'n*, 539 U.S. 194 (2003), the federal government provided financial assistance to public libraries to provide internet access on the condition that they install software to block images unprotected by the First Amendment, including obscenity, child pornography, and material that is harmful to minors. *See id.* at 199 (plurality opinion). Such blocking software, however, is not perfect; it may block speech that is constitutionally protected. *See id.* at 201. Consequently, one of the issues was whether installation of the software violated the First Amendment. *Id.* at 203. In answering this question, a plurality of the Court asserted "that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public." *Id.* at 204. Any content discrimination in the case, however, was clearly de minimis since, upon request, a library was free to unblock any inadvertently blocked First Amendment protected images. *Id.* at 209; *id.* at 214 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring).

A subsidy case in contrast to *Finley* and *American Library Ass'n* is *Legal*

articulable reason for the exclusion other than "hostility—or favoritism—towards the underlying message expressed,"²⁰⁴ or the underlying facts must "refute[] an inference of [such] discrimination."²⁰⁵

Neither of the foregoing existed in *Rosenberger*. The university argued that the Establishment Clause mandated the exclusion,²⁰⁶ and that in any event, the Constitution permits government to discriminate based on content when it spends its own money to subsidize even private speech.²⁰⁷ The majority rejected both contentions.²⁰⁸ Consequently, all that was left was the bare desire to discriminate without any constitutionally justifiable reason. This surely indicates that the exclusion amounted to no more than disagreement with, if not outright hostility toward, the religious content of the speech. Therefore, the university did not simply exclude a subject matter; instead, it went further and engaged in content discrimination.

The restriction on such content based exclusions follows in part from the prohibition on viewpoint based exclusions. As the majority recognized in *Rosenberger*, viewpoint discrimination is "a subset" of and "an egregious form of content discrimination."²⁰⁹ Thus, prohibited viewpoint discrimination in both nonpublic and limited public forums is, by definition, also prohibited content discrimination.

Viewpoint discrimination is not, however, a necessary element of content discrimination. For example, in *Widmar v. Vincent*, the university's exclusion of a registered student group from a limited forum was based on the religious content of its speech, rather than on any viewpoint the group had on any

Services Corp. v. Velazquez, 531 U.S. 533 (2001). In that case, the federal government provided funds to the Legal Service Corporation to provide legal services in civil cases to persons who could not afford them. *Id.* at 536. A condition of the grant prohibited representation that "involve[d] an effort to amend or otherwise challenge existing welfare law." *Id.* at 536–37. Justice Kennedy, writing for the majority, held that when "private speech is involved, . . . Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 548–49.

²⁰⁴ *R.A.V.*, 505 U.S. at 386.

²⁰⁵ *Gilles v. Blanchard*, 477 F.3d 466, 473 (7th Cir. 2007).

²⁰⁶ *Rosenberger*, 515 U.S. at 837.

²⁰⁷ *Id.* at 832–33.

²⁰⁸ *Id.* at 832–46.

²⁰⁹ *Id.* at 829, 831.

particular subject.²¹⁰ Similarly, in *Southeastern Promotions, Ltd. v. Conrad*, a municipal theater board's denial of a promoter's application to use what was apparently a limited public forum²¹¹ for a production of the show *Hair*, was based on the alleged obscene content of the production, not on its anti-draft, anti-war, or other viewpoint.²¹²

Content discrimination, whether alone or in the form of viewpoint discrimination, is subject to strict scrutiny because it "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."²¹³ Such "restrictions 'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"²¹⁴ "Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes th[e] essential right" that is "[a]t the heart of the First Amendment;" namely, "that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."²¹⁵

These same principles apply when the government creates a limited public forum or a nonpublic forum. The government may restrict such forums to certain speakers or topics, but any such restrictions are subject to strict scrutiny if they

²¹⁰ *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (referring to the exclusion as content based).

²¹¹ 420 U.S. 546, 548 (1975). The Court found that the auditorium was a designated forum but did not express any view as to the type of public forum. *Id.* at 555. The auditorium's "dedication booklet" stated that the purpose of the auditorium was "to make [it] the community center of [the city]; where civic, educational [sic] religious, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory." *Id.* at 549 n.4. This language seems to suggest that the forum was a limited one in that it was generally available but only for those named topics and speakers. As a practical matter, however, the permitted uses were so broad that it could be argued that the forum was a designated public forum generally available for all speakers and subjects. *Cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993) (noting there was "considerable force" to the argument that similar broad language created a forum similar to a traditional public forum).

²¹² *Conrad*, 420 U.S. at 548.

²¹³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

²¹⁴ *Id.* (quoting *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

²¹⁵ *Id.*

discriminate because of content of the message. The reason is that such discrimination also "pose[s] the inherent risk that the Government seeks...to suppress unpopular ideas or information" contrary to the underlying purpose of the First Amendment.²¹⁶

This is analogous to the rule articulated in *R.A.V. v. City of St. Paul*.²¹⁷ In that case, the Court held that government regulations even of speech, such as fighting words, that is otherwise outside the scope of the First Amendment, is subject to "a 'content discrimination' limitation."²¹⁸ In other words, even though the government may proscribe such speech, it may not do so "based on hostility—or favoritism—towards the underlying message expressed."²¹⁹ Similarly, even though the government may restrict limited public forums and nonpublic forums to certain speakers and subjects, it may not do so because of the content of the speaker's underlying message.²²⁰

2. The Reasonableness Requirement

Exclusions from both nonpublic and limited public forums are not only required to be content and viewpoint neutral, but they are also required to be reasonable. In nonpublic forum

²¹⁶ *Id.*

²¹⁷ 505 U.S. 377 (1992).

²¹⁸ *Id.* at 387.

²¹⁹ *Id.* at 386.

²²⁰ The failure to carefully distinguish between constitutionally permissible subject matter exclusions from limited and nonpublic forums and impermissible content based exclusions is also evident in the lower courts as well as in the literature. For example, in *Faith Center Church Evangelistic Ministries v. Glover*, 462 F.3d 1194 (9th Cir. 2006), *rev'd in part, vacated in part*, 480 F.3d 891 (9th Cir. 2007), *cert. denied*, 76 U.S.L.W. 3022 (U.S. Oct. 1, 2007), a panel in the Ninth Circuit, relying in part on *Rosenberger*, held that the exclusion of religious services from a limited public forum was constitutionally permissible because it was a viewpoint neutral and reasonable exclusion of subject matter, even though it conceded that the exclusion was content based. *Id.* at 1207–14; *see also* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 118 (1986) (seemingly equating subject matter exclusions with "content bias"); Post, *supra* note 8, at 1750 (describing speaker and subject matter exclusions from a nonpublic forum as "discriminat[ion] on the basis of content"). *But cf.* Buchanan, *supra* note 114, at 954, 962, 977 (opining that the Court applied a reasonableness standard of review to "content-selective" subject matter exclusions and that such exclusions from a nonpublic forum should be subject to "an intermediate 'careful scrutiny' level of review"); Cass, *supra* note 1, at 1324 (noting that courts should distinguish between "subject-matter restraints" and "message-specific restraints").

cases, the Court has sometimes verbalized the reasonableness requirement slightly differently. It has said that exclusions must be "reasonable;"²²¹ reasonable "in light of the purpose served by the forum;"²²² reasonable "in light of the purpose of the forum and all the surrounding circumstances;"²²³ and "reasonable in light of the purpose of the property."²²⁴ It also has said that "the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."²²⁵ While reasonableness in light of the purpose of the forum versus reasonableness in light of the purpose of the property could be viewed as distinct analytical constructs,²²⁶ it is doubtful whether any of these formulations make any functional difference. Presumably, the rule is that the reasonableness is assessed in light of all the surrounding circumstances, including the nature, function, and purpose of both the forum and the property that encompasses the forum.

In limited forum cases, the Court has simply relied on the nonpublic forum cases for the proposition that exclusions from limited public forums must be "reasonable in light of the purpose served by the forum."²²⁷ This reliance on nonpublic forum cases suggests that the basic rule for assessing the reasonableness of exclusions from both types of forums is essentially the same.

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,²²⁸ however, Justice O'Connor, treating limited public forums as a type of "public forum," suggested in dictum that the application of the reasonableness standard might be different in nonpublic and limited public forum cases. She asserted that "the

²²¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

²²² *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

²²³ *Id.* at 809.

²²⁴ *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

²²⁵ *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981)).

²²⁶ The latter might refer to the nature of the property that encompasses the forum, such as an airport or military base, while the former might refer to the nature of the forum itself, such as a candidate debate.

²²⁷ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (quoting *Cornelius*, 473 U.S. at 806); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 806, and citing *Perry*, 460 U.S. at 46, 49); cf. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (quoting *Cornelius*, 473 U.S. at 806, but not explicitly finding a limited public forum).

²²⁸ 473 U.S. 788 (1985).

avoidance of controversy" might be reasonable in a nonpublic forum, but not in a limited public forum,²²⁹ and that "[i]n contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated."²³⁰ This dictum does not necessarily undermine the assertion that the basic rule for assessing reasonableness in nonpublic and limited public forums cases is essentially the same. Instead, it is best read as confirming the not so startling proposition that the application of the standard to different facts can yield different results.

The reasonableness requirement mandates that restrictions "be reasonable; [they] need not be the most reasonable or the only reasonable limitation[s]."²³¹ Some commentators have viewed this standard as being "highly deferential."²³² In fact, one has asserted that it is "essentially no review at all."²³³ These commentators base their conclusions in part on the fact that at time of their articles, the Court had not yet struck down any exclusion from a nonpublic forum.²³⁴

Nonetheless, this standard does have some bite. For one thing, the Court has not simply deferred to the government's exclusions; instead, it has attempted to reach a reasoned result. This point is illustrated by the way the Court applied the reasonableness standard in *Cornelius, Perry*,²³⁵ and *Forbes*.²³⁶ As previously discussed, the Court in those cases engaged in a reasoned analysis of the underlying facts in order to determine whether the government's rationales were in fact reasonable.²³⁷

The same type of reasoned analysis is evident in other nonpublic forum cases. For example, in *Greer v. Spock*, political candidates were excluded from campaigning on a military base²³⁸ even though certain other "[c]ivilian speakers [had] occasionally

²²⁹ *Id.* at 811.

²³⁰ *Id.* at 808.

²³¹ *Id.*

²³² Stone, *Content-Neutral Restrictions*, *supra* note 28, at 90; *see also* Dienes, *supra* note 220, at 117 (similar).

²³³ Dienes, *supra* note 220, at 117.

²³⁴ *See id.*; Stone, *Content-Neutral Restrictions*, *supra* note 28, at 90.

²³⁵ 460 U.S. 37 (1983).

²³⁶ 523 U.S. 666 (1998).

²³⁷ *See supra* text accompanying notes 131-33, 141-47, 148-51, 161-62, 173-75.

²³⁸ 424 U.S. 828, 832-33 (1976).

been invited to the base to address military personnel.”²³⁹ The Court found that the base was not a public forum²⁴⁰ and that the candidates could be constitutionally excluded.²⁴¹ In upholding the exclusion, however, Justice Stewart, writing for the majority, did not simply defer to the government; instead, he reached a reasoned result based on the underlying facts. He found that the policy “of keeping official military activities . . . free of entanglement with partisan political campaigns of any kind” was “wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control.”²⁴² He also observed that “[u]nder such a policy members of the Armed Forces . . . are wholly free as individuals to attend political rallies, out of uniform and off base. But the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates.”²⁴³

Similarly, in another nonpublic forum case, *Lehman v. City of Shaker Heights*, political advertisements were excluded on a city-owned transit system even though advertisements for goods and services were permitted.²⁴⁴ A majority of the Court upheld the exclusion. Justice Blackmun’s plurality opinion,²⁴⁵ however, did not blindly defer to the government. Instead, he made a reasoned judgment that the exclusion was reasonable because “[r]evenue earned from long-term commercial advertising could be jeopardized by . . . short-term candidacy or issue-oriented advertisements,” and the “blare of political propaganda” created the “risk of imposing upon a captive audience.”²⁴⁶ In addition, “[t]here could be lurking doubts about favoritism, and

²³⁹ *Id.* at 831.

²⁴⁰ See *supra* notes 47–51 and accompanying text; see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (citing *Greer* as a nonpublic forum case).

²⁴¹ *Greer*, 424 U.S. at 838.

²⁴² *Id.* at 839.

²⁴³ *Id.*

²⁴⁴ 418 U.S. 298, 300 (1974); see *Cornelius*, 473 U.S. at 806, 808–09 (citing *Lehman* as a nonpublic forum case).

²⁴⁵ Three Justices joined Justice Blackmun’s opinion. *Lehman*, 481 U.S. at 299. Justice Douglas concurred principally on the ground that the advertisement would impose on a captive audience. *Id.* at 307 (Douglas, J., concurring).

²⁴⁶ *Id.* at 304 (plurality opinion).

sticky administrative problems . . . in parceling out limited space to eager politicians."²⁴⁷

Further support for the proposition that "reasonableness" has some teeth is indicated by the fact that in *International Society for Krishna Consciousness, Inc. v. Lee*,²⁴⁸ a majority of the Court did in fact strike down an exclusion from a nonpublic forum. In that case five members of the Court, including Justice O'Connor in a concurring opinion, held that an airport terminal was nonpublic forum.²⁴⁹ She joined the other four Justices, however, to make a majority striking down a rule that excluded "peaceful pamphleteering" from the terminal.²⁵⁰ Based on an analysis of the underlying facts, Justice O'Connor concluded that it was unreasonable to totally exclude such speech from the nonpublic forum.²⁵¹ She noted that the terminal was a "multipurpose environment" that included "restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs."²⁵² Consequently, she could not "accept that a total ban . . . [was] reasonable without an explanation as to why such a restriction 'preserv[ed] the property' for the several uses to which it has been put."²⁵³

In addition, there is also a limited forum case, *Lamb's Chapel v. Center Moriches Union Free School District*,²⁵⁴ that supports the position that the reasonableness standard requires a reasoned analysis and is not "toothless."²⁵⁵ In that case, the Court of Appeals had held that the property at issue was a

²⁴⁷ *Id.*

²⁴⁸ 505 U.S. 672 (1992).

²⁴⁹ *Id.* at 678-83; *id.* at 686 (O'Connor, J., concurring in the judgment).

²⁵⁰ *Id.* at 692 (O'Connor, J., concurring in the judgment). Justice Kennedy, joined by Justices Souter, Stevens, and Blackmun, argued that the airport terminal was a public forum and that the exclusion was not a reasonable time, place, and manner restriction. *Id.* at 693 (Kennedy, J., concurring). However, a 6-3 majority of the Court upheld the exclusion for soliciting money. *Id.* at 685 (majority opinion); *id.* at 689 (O'Connor, J., concurring in the judgment); *id.* at 703 (Kennedy, J., concurring in the judgment).

²⁵¹ *Id.* at 690-92 (O'Connor, J., concurring in the judgment).

²⁵² *Id.* at 692, 688.

²⁵³ *Id.* at 692.

²⁵⁴ 508 U.S. 384 (1993).

²⁵⁵ *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (using the term in the context of the Due Process Clause of the Fifth Amendment).

limited public forum and that an exclusion was "viewpoint neutral and reasonable."²⁵⁶ On review, however, the Court chided the lower court for "utter[ing] not a word in support of its reasonableness holding."²⁵⁷

It is certainly possible to argue that the reasonableness standard is not rigorous enough, and that all restrictions on speech should be subject to strict scrutiny.²⁵⁸ It is an overstatement, however, to suggest that the application of the standard is no review at all.

C. *The Application of the Standard in Limited Public Forums Cases*

Exclusions from a limited public forum can occur in two ways. First, the government can define the parameters of the forum in a way that excludes certain speakers or subjects. In such a case, the property is a nonpublic forum as to the person or topics excluded. For example, recall that in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, Justice White noted that even if the school district had created a limited public forum for certain "organizations that engage in activities of interest and educational relevance to students" by permitting them to use the internal mail system, the property would still be a nonpublic forum with respect to an organization, such as the excluded rival union, that was "concerned with the terms and conditions of employment."²⁵⁹ Second, the government may attempt to exclude a speaker or subject that otherwise falls within the boundaries of the forum created. As Justice White also suggested in *Perry*, such exclusion might exist if the school district permitted community organizations such as the "Cub Scouts, YMCA's, and parochial schools" to use the mail system but excluded similar organizations such as "the Girl Scouts" and "the local boys' club."²⁶⁰ As we have seen, there is dicta in some nonpublic forum cases to the effect that this second type of exclusion, but not the first, is subject to strict scrutiny.²⁶¹ Nonetheless, in practice, the

²⁵⁶ *Lamb's Chapel*, 508 U.S. at 390.

²⁵⁷ *Id.* at 393.

²⁵⁸ Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142 (1981) (arguing that all restrictions on speech should be subject to strict scrutiny).

²⁵⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983).

²⁶⁰ *Id.*

²⁶¹ See *supra* notes 127-75 and accompanying text.

Court has not applied strict scrutiny as the standard of review in such cases. Indeed, in one case where the claimant was excluded from a limited public forum, even though it otherwise fell within its scope, a majority of the Court essentially said that strict scrutiny does not apply to exclusions from limited public forums; it only applies to exclusions from open access forums that are generally available for all speakers and topics.²⁶²

In fact, the Court effectively has "collapsed the distinction between exclusions that . . . define the contours of the [limited public] forum and those that are imposed *after* the [limited public] forum is created."²⁶³ In both cases, it basically has applied the same reasonableness standard of review that is applicable to exclusions from nonpublic forums.²⁶⁴ As previously noted, under that standard, content neutral and viewpoint neutral exclusions must be reasonable, and only content or viewpoint discriminatory exclusions are subject to strict scrutiny.²⁶⁵ In other words, the Court has not applied strict scrutiny in limited public forum cases on the theory that the government had excluded persons or topics otherwise within its the scope; rather, it has applied strict scrutiny only after making a preliminary determination that the exclusions were either content or viewpoint discriminatory.

For example, in *Madison Joint School District v. Wisconsin Employment Relations Commission*, a school board created a limited public forum when it opened its meetings to the public for school board business.²⁶⁶ Pursuant to an order of the state's Employment Relations Commission, however, it prohibited teachers from speaking on matters otherwise within the scope of the forum.²⁶⁷ The Court held that the exclusion was impermissible, but not because the teachers fell within the

²⁶² *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("[In] a traditional or open public forum the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum.").

²⁶³ *United States v. Kokinda*, 497 U.S. 720, 750 (1990) (Brennan, J., dissenting).

²⁶⁴ See *supra* notes 127-75 and accompanying text (discussing the nonpublic forum cases); *infra* notes 266-85 and accompanying text (discussing the limited public forum cases).

²⁶⁵ See *supra* notes 13113-18 and accompanying text.

²⁶⁶ *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 174 & n.6 (1976); see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) (describing *Madison* as a limited public forum "for the discussion of certain subjects").

²⁶⁷ *Madison*, 429 U.S. at 173.

boundaries of the limited public forum. Instead, it held that the exclusion was impermissible because it was content based without any constitutionally justifiable reason.²⁶⁸

Similarly, in *Widmar v. Vincent*, the university denied access to a limited public forum²⁶⁹ to a student group that otherwise fell within the scope of the forum,²⁷⁰ because the students wanted "to use the facilities for religious worship."²⁷¹ The Court applied strict scrutiny as the standard of review, but not on the ground that speakers fell within the parameters of the limited public forum. Instead, it applied strict scrutiny because the exclusion was content based.²⁷² Only after determining that the exclusion was content discriminatory did the Court require the university to justify the exclusion with a compelling interest.²⁷³

Also, in *Rosenberger v. Rector & Visitors of University of Virginia*, Justice Kennedy, writing for the majority, found that the university had excluded religious subject matter that was otherwise "within" the permissible boundaries of a limited public forum,²⁷⁴ but he did not apply strict scrutiny as the standard of review because of that fact. Instead, he principally relied on nonpublic forum cases for the proposition that exclusions from limited public forums must be viewpoint neutral and reasonable.²⁷⁵ Only after he found that the restriction was viewpoint discriminatory did he address the issue of whether there was some compelling or other constitutionally justifiable reason for the exclusion.²⁷⁶

²⁶⁸ See *id.* at 176 ("Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not . . . discriminate between speakers on the basis of their employment, or the content of their speech.").

²⁶⁹ *Widmar v. Vincent*, 454 U.S. 263, 272 (1981) (referring to the property as a limited public forum).

²⁷⁰ *Id.* at 264-65.

²⁷¹ *Id.* at 265.

²⁷² *Id.* at 269-70.

²⁷³ *Id.* at 269-70. The university argued that the exclusion was justified because it had "a compelling interest in maintaining strict separation of church and state" under the "Establishment Clauses" of both the Federal and [State] Constitutions." *Id.* at 270. The Court, however, held that the Federal Establishment Clause did not prevent the inclusion of religious speakers in the forum, *id.* at 273-75, and that it was "unable to recognize the State's interest as sufficiently 'compelling,'" *id.* at 278.

²⁷⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

²⁷⁵ *Id.* at 829-30 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804-06 (1985) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 49 (1983)).

²⁷⁶ See *id.* at 832-46.

Similarly, in *Good News Club v. Milford Central School*²⁷⁷ and *Lamb's Chapel v. Center Moriches Union Free School District*,²⁷⁸ religious speakers were excluded from public school facilities that were otherwise generally available to members of the public²⁷⁹ for "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community."²⁸⁰ Although the Court in both cases found that the subject matters at issue were within the permissible boundaries of the respective limited public forums,²⁸¹ it did not apply strict scrutiny as the standard of review in either case. In fact in *Good News Club*, Justice Thomas, writing for the majority, specifically stated that in "a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum."²⁸² Instead, relying mostly on nonpublic forum cases, the Court in both cases applied the same reasonableness standard of review that is applicable to exclusions from nonpublic forums, that such exclusions must be viewpoint neutral and reasonable.²⁸³ In both

²⁷⁷ 533 U.S. 98 (2001).

²⁷⁸ 508 U.S. 384 (1993).

²⁷⁹ See *Good News Club*, 533 U.S. at 102-04; *Lamb's Chapel*, 508 U.S. at 386-87.

²⁸⁰ *Good News Club*, 533 U.S. at 102 (quoting N.Y. EDUC. LAW § 414 (McKinney 2000)); see *Lamb's Chapel*, 508 U.S. at 386 (similar).

²⁸¹ *Good News Club*, 533 U.S. at 109 ("[T]he club seeks to address a subject otherwise permitted . . . , the teaching of morals and character, from a religious standpoint."); *Lamb's Chapel*, 508 U.S. at 393-94 (finding "that a lecture or film about child rearing and family values" was "no doubt a subject otherwise permissible" in the forum). In *Good News Club*, the Court assumed that the forum was a limited public forum. 533 U.S. at 106. Although the Court in *Lamb's Chapel* did not explicitly classify the forum, the Court of Appeals had held that it was a limited public forum. 508 U.S. at 390.

²⁸² *Good News Club*, 533 U.S. at 106 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)).

²⁸³ See *Lamb's Chapel*, 508 U.S. at 392-93 ("With respect to public property that is not a designated public forum open for indiscriminate public use . . . , we have said that '[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985))); see also *Good News Club*, 533 U.S. at 106-07 (citing *Perry*, *Cornelius*, and *Rosenberger* for the principle that where "the forum is a traditional or open public forum, the state's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum" and that the restrictions in the latter are required to be reasonable and viewpoint neutral).

cases, the Court held that the exclusions were viewpoint discriminatory²⁸⁴ and that the Establishment Clause did not provide a constitutionally justifiable reason for the discrimination.²⁸⁵

VII. THERE IS NO NEED TO HAVE A LIMITED PUBLIC FORUM

The underlying assumption of the public forum doctrine is that the categorization of government property as a particular type of forum is necessary in order to determine the standard of review for exclusions of speakers and subjects.²⁸⁶ Consequently, the only justification for distinguishing between limited public forums and nonpublic forums is that exclusions from each are subject to a different standard of review. As we have seen, however, there is conflicting authority on this point. In dicta in cases involving exclusions from nonpublic forums, the Court has equated limited public forums with designated open access public forums and asserted that strict scrutiny is the appropriate standard of review.²⁸⁷ Nonetheless, in cases actually involving exclusions from limited public forums, the Court has effectively equated limited public forums with nonpublic forums and has applied the same standard of review for exclusions from the former that it applies for exclusions from the latter.²⁸⁸ That standard is that content and viewpoint neutral exclusions must be reasonable under all the facts and circumstances; content or viewpoint discriminatory exclusions are subject to strict scrutiny. If the standard of review that applies for exclusions from both types of restricted forums is the same, there would seem to be no reason to distinguish between them.

Of course, the fact that the Court has applied the same standard of review in both types of restricted forum cases does not necessarily mean that it must always do so. It did not need to apply a different standard of review in the limited public

²⁸⁴ *Lamb's Chapel*, 508 U.S. at 393-94; *Good News Club*, 533 U.S. at 107.

²⁸⁵ *Lamb's Chapel*, 508 U.S. at 395; *Good News Club*, 533 U.S. at 112-19.

²⁸⁶ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("[W]e must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (discussing the different standards of review that apply depending on the categorization of the forum).

²⁸⁷ See *supra* notes 127-75 and accompanying text.

²⁸⁸ See *supra* notes 259-85 and accompanying text.

forum cases because it was able to strike down those exclusions on the ground that they were either content or viewpoint discriminatory. It still might decide to apply a differential standard in subsequent cases. For example, it could decide to apply strict scrutiny as the standard of review in cases involving exclusions of speakers and subjects that otherwise fall within the scope of a limited public forum. If the Court did decide to apply strict scrutiny in such cases, it could dismiss as dicta contrary language in some limited forum cases to the effect that strict scrutiny does not apply to exclusions from limited public forums.²⁸⁹ There are four reasons why it might choose to do so.

First, there is logic to the dicta in the nonpublic forum cases that limited public forums are a type of designated public forum and therefore should be subject to a stricter standard of review. While the government is not required to create a designated public forum that is generally available for all speakers and topics, if it does, the First Amendment requires that exclusions be subject to strict scrutiny.²⁹⁰ Similarly, while the government may restrict a limited public forum to certain classes of speakers and subjects, it "must respect the lawful boundaries it has itself set."²⁹¹ Consequently, having intentionally decided to make its property generally available for those limited purposes, the government cannot turn around and exclude those who otherwise fall within its scope without some compelling reason.

Second, applying strict scrutiny to exclusions from limited public forums would shorten the analysis. Recall that in all the limited public forum cases, the Court took the preliminary step of finding that the exclusions were either content or viewpoint discriminatory before inquiring as to whether there was some permissible reason for the discrimination.²⁹² The application of strict scrutiny would obviate the need for any inquiry into content and viewpoint neutrality and reasonableness. Once the Court determined that the claimant otherwise fell within the scope of a limited public forum, it could directly confront the issue of whether there was some compelling or other constitutionally justifiable reason for the exclusion.

²⁸⁹ See *supra* notes 274-85 and accompanying text.

²⁹⁰ See *Perry*, 460 U.S. at 45-46.

²⁹¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

²⁹² See *supra* notes 266-85 and accompanying text.

Third, applying strict scrutiny to exclusions from limited public forums might, at least superficially, be seen as more speech protective than a content neutral, viewpoint neutral, reasonableness requirement.²⁹³ The former is obviously a "stricter" standard than the latter.²⁹⁴

Finally, applying strict scrutiny to exclusions from limited public forums would provide a rationale for distinguishing between limited public forums and nonpublic forums. As already noted, there is really no reason to distinguish between them if the standard of review for exclusions from both is the same.

Conversely, the principal disadvantage to applying strict scrutiny to exclusions from limited public forums is that it requires the Court to make a threshold determination as to whether the forum at issue is a limited public forum or whether it is in fact a nonpublic forum that is subject to a different standard of review. This process has caused considerable confusion and uncertainty, and has consumed much judicial effort.²⁹⁵ Moreover, the inquiry seems largely unnecessary. As we have seen, all of the restricted forum cases have been decided based on the application of the same standard of review, regardless of how the forum was characterized.²⁹⁶ Furthermore, there seems to be only one improbable case that in theory might arguably justify distinguishing between nonpublic and limited public forums for purposes of applying a differential standard of review.

That case is a content neutral, viewpoint neutral, reasonable exclusion of a speaker or topic that would otherwise fall within the scope of what, under current law, could be characterized as a limited public forum. Such exclusion would theoretically be permissible under the standard of review that the Court has so far applied in such cases. But if strict scrutiny applied,

²⁹³ Cf. David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175, 214 (1983) (arguing in the context of content neutral time, place, and manner restrictions that "minimal scrutiny is responsible for insulating systematic overprotection of regulatory interests, and underprotection of speech"); Redish, *supra* note 258, at 142 ("[T]he courts should subject all restrictions on expression to the same critical scrutiny traditionally reserved for regulations drawn in terms of content.").

²⁹⁴ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) (noting that strict scrutiny is the "highest scrutiny" and that reasonableness and viewpoint neutrality is "a much more limited review").

²⁹⁵ See *supra* notes 7-11, 127-75 and accompanying text.

²⁹⁶ See *supra* notes 123-85 and accompanying text.

content and viewpoint neutrality and reasonableness would be irrelevant, and the issue would be whether there was some compelling reason for the exclusion.

The fact that no such case has ever reached the Supreme Court, however, may be a good indication that no such case exists. Indeed, it is hard to imagine how an exclusion of a speaker or topic, that would otherwise fall within the boundaries of what is currently categorized as a limited public forum, could be content neutral, viewpoint neutral, or reasonable. Some examples from the cases illustrate this point.

Suppose that in the teacher mail box case, *Perry Education Ass'n v. Perry Local Educators' Ass'n*,²⁹⁷ the rival union had been excluded despite a district policy that permitted all rival teacher unions, including both those who represented the teachers and those who did not, to use the mail facilities. All other things being equal, the exclusion presumably would violate the First Amendment, but not because of any necessity to distinguish between nonpublic forums and limited public forums for the purpose of applying strict scrutiny. Instead, the exclusion would likely be struck down because of a lack of any articulable reasonable, content neutral, viewpoint neutral, constitutionally justifiable basis to support it.²⁹⁸ Certainly, on these facts the exclusion could not be justified on the reasons given in the actual case: differential status and "prevent[ing] the District's schools from becoming a battlefield for inter-union squabbles."²⁹⁹ The fact that the school had created a policy permitting access by all teacher unions effectively renders such defenses untenable.

To take another example from *Perry* that was previously discussed, suppose that despite a policy of permitting community groups that "engage in activities of interest and educational relevance to students," such as "Cub Scouts, YMCAs, and parochial schools," to use the mail facilities, the school district

²⁹⁷ 460 U.S. 37 (1983).

²⁹⁸ Professor Post agrees that the result in *Perry* did not depend on the characterization of the mailboxes as a limited or nonpublic forum, but his point is that the rival union would have been excluded in either case. Post, *supra* note 8, at 1754. I agree with that assertion. My point, however, is that the outcome in restricted forum cases depends on an analysis of the underlying facts, not on the characterization of the forum.

²⁹⁹ *Perry*, 460 U.S. at 52 (quoting *Haukvedahl v. Sch. Dist. No. 108*, No. 75C-3641 (N.D. Ill. 1976)).

denied access to "the local boy's club."³⁰⁰ Regardless of how the forum is characterized, it is difficult to imagine what articulable reasonable, content neutral, viewpoint neutral, constitutionally justifiable reason could possibly validate the exclusion.

Similarly, suppose that in the charitable solicitation case, *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,³⁰¹ the government had permitted all charitable organizations to solicit funds in the federal workplace, instead of, as in the actual case, "limit[ing] participation to 'voluntary charitable, health and welfare agencies that . . . [do not] seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves.'"³⁰² In such a case, the exclusion of a charitable organization that sought to influence policy through litigation would, on its face, be unreasonable, if not irrational and nonsensical. There also would be a strong inference that the exclusion was content or viewpoint based. Certainly, having expressly permitted such organizations to solicit, the government could not justify the exclusion for the reasons articulated in the actual case; namely, that the exclusion was necessary "to minimize disruption to the federal workplace, to ensure the success of the fund-raising effort, or to avoid the appearance of political favoritism."³⁰³ Consequently, there would be no need to characterize the forum as a limited public forum in order to apply strict scrutiny.

Finally, suppose that in the candidates' debate case, *Arkansas Educational Television Commission v. Forbes*,³⁰⁴ the government had excluded the plaintiff candidate even though it had advertised that the debate would have, contrary to what Justice Kenney held in the actual case, "an open-microphone format" in the sense that it was open to all candidates for the congressional seat. On these facts, there clearly would be no need to classify the forum as a limited public forum and apply strict scrutiny. Having declared the forum open to all candidates for the seat, it would be unreasonable to exclude the plaintiff. Again, surely the government could not justify the exclusion for

³⁰⁰ See *id.* at 48.

³⁰¹ 473 U.S. 788 (1985).

³⁰² *Id.* at 795 (citation omitted).

³⁰³ *Id.* at 813.

³⁰⁴ 523 U.S. 666 (1998).

the reasons given in the actual case; that the candidate "had generated no appreciable public interest"³⁰⁵ and that including all such candidates would be "logistical[ly]" difficult.³⁰⁶

As these examples demonstrate, not only has the Court not applied a different standard of review in limited public forum and nonpublic forum cases, but also it is doubtful that there would ever be any necessity to do so. The fact is that all of the restricted forum cases have been, and can be, decided based on the application of the same standard of review: Content neutral and viewpoint neutral exclusions must be reasonable under all the facts and circumstances, and content or viewpoint exclusions are subject to strict scrutiny. What determines the outcome in these cases is the application of this standard to varying facts, not the categorization of the forum as limited public or nonpublic. Consequently, there really is no need to have a limited public forum.

VIII. WHAT THE COURT SHOULD DO NOW

The Court should abandon the distinction between limited public forums and nonpublic forums. Instead, it should analyze speaker access issues in terms of open and restricted forums. When the government excludes a First Amendment protected speaker or subject from an open forum, the standard of review should continue to be strict scrutiny. When the government permits its property to be used for some speakers and subjects, and the forum is not an open one either by tradition or intentional government designation, the property should be considered a restrictive forum. In such cases, the standard of review should continue to be that content neutral and viewpoint neutral exclusions must be reasonable; but content or viewpoint exclusions are subject to strict scrutiny. There are some good reasons for retaining the limited public forum and applying strict scrutiny to exclusions from it. As a practical matter, however, the concept of a limited public forum as a unique category of forum is unnecessary. Treating both the limited public forum and the nonpublic forum as restricted forums, and applying the same standard of review to both, would not likely change any of

³⁰⁵ *Id.* at 682.

³⁰⁶ *Id.* at 681.

the results, but it would make the analysis in such cases easier, more direct, and less confusing.