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PIGEONHOLES IN THE PUBLIC FORUM

Gary C. Leedes*

I. INTRODUCTION

Streets, parks, and similar places traditionally used for purposes of discussion and assembly are public forums¹ where people have liberty to communicate their thoughts.² Persons lacking the status, money or charisma necessary to command coverage by the mass media often desperately seek access to the public forum. Once access is obtained, ideas can be communicated in a cost-effective manner. However, like other first amendment cases, public forum cases are not fungible. The varying weights of competing interests and the instability of ad hoc balancing tests have created a need for doctrinal structure. The Supreme Court's evolving public forum doctrine is an attempt to meet that need.

The Supreme Court "has confronted a wide variety of first amendment access claims"³ in public forum cases, and the resul-

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1. In *Hague v. CIO*, 307 U.S. 496 (1939), the modern Supreme Court's public forum doctrine began to emerge. A city ordinance prohibiting all public meetings in public places without a permit was challenged. In a frequently quoted passage, Justice Roberts' plurality opinion stated:

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.

307 U.S. at 515-16.

2. See *Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12; see also M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 4.09[D] (1984).

3. Note, *Leading Cases, the Supreme Court, 1984 Term*, 99 HARV. L. REV. 120, 203 (1985).

tant law is complex. This article identifies the variables that become pertinent when speakers⁴ claim they have rights of access to government property. It also discusses the concepts of "fully protected," "somewhat protected" and "non-protected" expression.⁵ Several of the government's "reasons" for restricting expressive activity⁶ and five different types of government bans on expression are identified.⁷ Several different types of government discrimination,⁸ the government's various "methods of suppression" and the speaker's "methods of communication" are also described.⁹ Finally, this article discusses the speaker's rights in a public forum, in a limited or designated forum, and in a nonpublic forum.¹⁰

The doctrinal structure of first amendment¹¹ law has become increasingly compartmentalized,¹² and as a result the "pigeonhole" into which a controversy is placed often determines the outcome. Yet, the Court still seems to be groping for clearer cut rules and more manageable principles and standards.

4. The term "speaker" refers to persons who claim they are exercising first amendment rights of speech, press, association, assembly and petition. Another variable, not discussed in this article, is the occupation of the speaker. For example, a government employee's privilege to criticize government officials may be subjected to restrictions not imposed on the general public. See *Connick v. Myers*, 461 U.S. 138 (1983).

5. See *infra* notes 14-24 and accompanying text.

6. See *infra* notes 25-31 and accompanying text.

7. See *infra* notes 32-46 and accompanying text.

8. See *infra* notes 49-68 and accompanying text.

9. See *infra* notes 69-115 and accompanying text.

10. See *infra* notes 116-150. This article does not discuss the speaker's rights of access to private property.

11. The first amendment is implicated when it is plausible to argue that a person has a right to communicate "X." "X" refers to some object of cognition. It could be a word, an idea, a signal or some other symbol that signifies meaning. When the person has the right to communicate "X," the government has a duty not to suppress "X." The government has an obligation not to punish the person for exercising his rights. The author uses the jurisprudential notion that duties and obligations are correlatives to rights. The word "right" is used loosely to embrace first amendment liberties and freedoms. For a more careful and critical analysis of the concept of a right, see A. WHITE, *RIGHTS* (1984).

12. Professor Tribe notes, "This fragmentation of the First Amendment into a grab bag of rubrics under which different types of speech receive different degrees of protection . . . can lead to ridiculous conclusions." L. TRIBE, *CONSTITUTIONAL CHOICES* 218 (1985). He adds, "This sort of pigeonholing endangers the pigeon. If one parses First Amendment doctrine too fine, one may soon discover that little protection for expression remains." *Id.* Tribe's fears notwithstanding, too much unstructured balancing can also be an unsatisfactory first amendment approach because it provides virtually no guidance to lower court judges. In any event, whether pigeonholing is good, bad, or neutral, the purpose of this article is to help practicing lawyers find the pigeonholes into which their cases fit.

II. VARIABLES AFFECTING LEVELS OF JUDICIAL SCRUTINY¹³

A. *Categories of Expression*

The intensity of judicial review depends in part on the kind of expression burdened by a challenged government action. Some ex-

13. The following outline is a summary of the levels of judicial scrutiny, uncomplicated by variables, which might intensify or dilute judicial scrutiny:

A. BANS ON PROTECTED AND SOMEWHAT PROTECTED EXPRESSION IN TRADITIONAL AND LIMITED PUBLIC FORUMS

1. The government's evidence must clearly show that a subordinating, compelling and particularized legitimate interest is substantially furthered. *Schad v. Mount Ephraim*, 452 U.S. 61 (1981); *Village of Schaumburg v. Citizens for Better Env't*, 444 U.S. 620 (1980).
2. The government's restriction must be narrowly tailored, uniformly applied and necessary (i.e., the burden on speech is justified if no less burdensome alternative to a total ban is practicable). The Court should place the burden of justifying a total ban on the government.

B. CONTENT DISCRIMINATION CASES IN TRADITIONAL AND LIMITED PUBLIC FORUMS

1. The government's evidence must clearly show that a subordinating, compelling and particularized legitimate interest is substantially furthered. *See Carey v. Brown*, 447 U.S. 455 (1980).
2. The discrimination must be narrowly tailored and must also be necessary in that no less discriminatory classification is practicable for the furtherance of the government's compelling interests (i.e., no overinclusive or underinclusive classifications). The Court should place the burden of justifying a total ban on the government.
3. Content discrimination refers to discrimination against protected speech on the basis of speaker identity, subject matter or viewpoint.

C. TIME, PLACE AND MANNER RESTRICTION IN TRADITIONAL AND LIMITED PUBLIC FORUMS

1. Evidence must show that a significant legitimate governmental interest is furthered. However, the evidentiary showing need not be as clear and convincing as in flat ban or content discrimination cases. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).
2. There is a diluted, narrowly drawn statutory requirement as well as a diluted less-burdensome-alternative test. *Heffron*, 420 U.S. 640. Note that the less-burdensome-alternative test does not apply in all cases. *See Regan v. Time, Inc.*, 468 U.S. 641 (1984).
3. The Court considers whether there are ample and adequate alternative forums or channels of communication.
4. The restriction must be content neutral; if not, the tests for content discrimination apply (Section B *infra*).

D. RESTRICTIONS IN NONPUBLIC FORUMS (GOVERNMENT PROPERTY NOT OPEN GENERALLY TO PUBLIC FOR EXPRESSION OF IDEAS)

pression is fully protected, and restrictions on fully protected categories of speech frequently trigger the strictest scrutiny.¹⁴ Some specific sub-categories of fully protected expressions, like newsworthy reports,¹⁵ are placed "on the highest rung of the hierarchy, of First Amendment values."¹⁶

Commercial speech,¹⁷ and in some contexts various formulations of sexually explicit speech, are placed in a "somewhat protected" speech category. As a result, the government may limit the number of theaters that show sexually explicit "adult" films. "[I]t is manifest that society's interest in protecting this [category] of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate"¹⁸ Thus, for some categories of expression, a diminished level of judicial scrutiny is appropriate.¹⁹

1. The Court simply asks if the restriction is reasonable and the viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 105 S. Ct. 3439 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *United States v. Greenburg Civic Ass'n*, 453 U.S. 114 (1981).

2. If the restriction is reasonable in light of the forum's primary or dedicated purpose, the restriction will be upheld with great deference.

3. The government's failure to show less burdensome alternatives or ample alternative forums is not fatal to its case.

14. *But see United States v. Albertini*, 105 S. Ct. 2897 (1985) (exclusion from military base upheld because it was based on reasonable grounds).

15. Different kinds of speech are now ranked in importance. For one commentator's rankings, see Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982). Highly ranked are political, religious, philosophical, social and scientific speech. *Id.* at 140-41.

16. *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984).

17. Commercial speech, within the scope of the first amendment, is entitled to less extensive protection than that afforded noncommercial speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983). Commercial speech which proposes an illicit transaction is non-protected speech. *Village of Hoffman Estates v. Flipside, Hoffman Estate, Inc.*, 455 U.S. 489, 496 (1982). Misleading and deceptive commercial speech is also non-protected. *See generally A. Cox, FOREWORD: FREEDOM OF EXPRESSION IN THE BURGER COURT* 32-39 (1981). Therefore, the intermediate level of scrutiny, usually applied when speakers engage in commercial speech, is not employed when the speaker proposes an illegal transaction or engages in misleading and deceptive commercial speech. *See Posades De Puerto Rico Assocs. v. Tourism Co.*, 106 S. Ct. 2968 (1986); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Balancing is also unnecessary in certain cases involving lawyers who initiate personal contacts with persons they desire as clients. *Compare Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

18. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, J.J.).

19. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 929 (1986); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young*, 427 U.S. 50 (1976).

Not all kinds of expression are protected by the first amendment. Restrictions on non-protected expressive categories²⁰ do not usually trigger intensified judicial scrutiny; a different level, minimal scrutiny, is employed. For example, since obscenity is placed in a non-protected speech category, rational bans on obscenity are upheld.²¹

B. *Reasons for the Government's Restrictions on Expression*

Given the right combination of circumstances, the following four reasons will justify governmental decisions that restrict expression:

(1) Protection of the speaker's audience; for example, the government tries to protect children from the corrupting effects of obscenity.²²

(2) Protection of persons likely to be immediately harmed by the speaker's responsive audience.²³ For example, if A's speech incites B to bomb a building, the government restriction protects the intended victims or bystanders from the anticipated, imminent and likely violence (whether or not violence actually occurs).

(3) Protection of a captive sensitive audience²⁴ from messages that are repulsive and intolerable.

(4) Furtherance of regulatory objectives unrelated to cognition.²⁵

When the government bans loud sound trucks and its sole objective is the elimination of eardrum shattering noise, the regulatory objective is unrelated to cognition. The government is not con-

20. In this article, categories of expression outside the coverage of the first amendment are called "non-protected." Categories of expression within the first amendment that rank high in value are called "fully protected." Categories of expression afforded less than full protection are called "somewhat protected." For example, commercial speech and sexually explicit speech do not rank as high as expression that refers to political matters of public concern.

21. See *Miller v. California*, 413 U.S. 15 (1973).

22. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

23. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (states cannot forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

24. See Justice Powell's separate opinion in *Rosenfield v. New Jersey*, 408 U.S. 901, 903-09 (1972), where he argued that the use of scurrilous language in front of an unwilling and sensitive audience assembled at a school board meeting was unprotected by the first amendment.

25. Cognition is the mental process or faculty by which knowledge is acquired; i.e., that which comes to be known through perception, reasoning, intuition, revelation or through some other psychological process or faculty.

cerned with the speaker's general assertions of fact or value or with the audience's receptivity to the speaker's assertions.²⁶ Therefore, an intermediate level of scrutiny is frequently used to determine the reasonableness of such genuine time, place, and manner restrictions.²⁷

The Supreme Court's strictest scrutiny is usually activated when the government is concerned with censorship, i.e., preventing, suppressing or changing the cognitive impact of fully protected communications.²⁸ Note, however, that other legally significant variables may become pertinent²⁹ and therefore alter the outcome. For example, the average citizen may criticize a government official with impunity, but a government employee who criticizes his superior may, in some situations, be suspended without a hearing.³⁰ Because of the many variables involved, not all government restrictions fit neatly into content-based or content-neutral pigeonholes.³¹ The following section further illustrates the fragmentation of public forum doctrine.

C. *Types of Government Bans*

There are several types of government bans of freedom of expression, including *broad* bans on wide ranges of expression, *total* bans on particular modes of expression, *partial* bans that are keyed to content or to time, place and manner considerations, and *complex* bans keyed to modes of expression and content, as well as time, place and manner considerations.³²

26. See *Niemotko v. Maryland*, 340 U.S. 268, 280 (1951) (Frankfurter, J., concurring).

27. The government's method of restraint may affect the level of scrutiny. For example, a prior restraint that is standardless or vague is given close scrutiny. Similarly, the speakers' methods of communicating their message may be intolerable, and therefore heightened judicial intermediate scrutiny is inappropriate.

The Supreme Court's test for time, place and manner restrictions is less strict in cases that do not involve a speaker's access to a forum. In such cases the Court does not usually inquire about less burdensome alternatives and ample alternative channels of communication. *Regan v. Time, Inc.*, 468 U.S. 641 (1984).

28. See *Carey v. Brown*, 447 U.S. 455, 462 n.7 (1980); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95, 98-99 (1972).

29. First amendment principles cannot be easily applied unmodified to "unique forms of expression" like billboard advertising. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 500-02 (1981).

30. See *Arnett v. Kennedy*, 416 U.S. 134 (1974); cf. *Connick v. Myers*, 461 U.S. 138 (1983).

31. See *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 929 (1986).

32. See *infra* text accompanying notes 43-46 (discussion of *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)); see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

A *broad* ban flatly prohibiting "a wide range of expression" is exemplified by a county ordinance that totally and permanently excludes all expression from government facilities, including parks.³³ This type of ban does not discriminate, but denies everyone fundamental access rights to the public forum. Although precedent is not solid, it is safe to assume that such bans are unconstitutional because of substantial overbreadth.³⁴ *Total* bans on particular types of expression also suppress protected speech. Indeed, the cases strongly suggest that there is a rebuttable presumption that a *total* ban on a particular type of speech, for example, charitable solicitation, is unconstitutional.³⁵

It is sometimes difficult to distinguish between a ban restricting a *type* of expression and a *partial* ban restricting the *manner* of expression. A ban on loud sound trucks would restrict the *manner* of expression, but a city's permanent ban on all sound amplification is an overbroad *total* ban on a *type* of expression.³⁶

Professor Gunther suggests that total bans on billboards, posted signs on public property, handbills, as well as bans on sleeping in the park, are examples of total bans "on a particular format."³⁷ Gunther complains that "modern prohibitions on particular formats have . . . been subjected to less intense scrutiny than content-based distinctions."³⁸ Gunther, however, includes symbolic speech formats with "pure speech" formats,³⁹ and bans on *symbolic speech* normally trigger less than strict scrutiny.⁴⁰

A content-neutral partial ban is often permissible. For example, the government may restrict some handbilling on busy subway platforms during rush hour for safety reasons.⁴¹ This type of *partial* ban does not usually violate the first amendment as long as the speaker has other reasonable alternative channels of communication. On the other hand, a content-based partial ban is disfavored

33. See Henrico County, Va., Board of Supervisors' Resolution (January 26, 1983) (on file with University of Richmond Law Review).

34. Cf. *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (ban on live entertainment); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

35. See, e.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

36. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

37. G. GUNTHER, *CONSTITUTIONAL LAW* 1168-69 (1985).

38. *Id.* at 1169.

39. See *infra* text accompanying notes 81-115 (discussion of pure speech).

40. *United States v. O'Brien*, 391 U.S. 367 (1968); see *infra* text accompanying notes 86-88 (further discussion of symbolic speech).

41. See *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977).

because government officials are not competent or trustworthy enough to determine whether the content of the protected expression is worthy of an audience.⁴²

Complex bans are simultaneously based on considerations of content, time, place and manner considerations, and they are also keyed to a particular mode of expression.⁴³ In one difficult case, *Federal Communications Commission v. Pacifica Foundation*,⁴⁴ the Federal Communications Commission (FCC) disapproved of a radio broadcast because the language used was vulgar, indecent, offensive and inappropriate during the mid-afternoon when children were listening.⁴⁵ Broadcasting over radio airwaves was the particular mode of expression involved in *Pacifica*, the use of offensive words was the manner of expression, and the FCC's concern with the undesirable impact of the indecent words was not content-neutral. In sum, the government's action was a *complex* ban partially based on the *content* of a *mode* of expression communicated in an offensive *manner* during certain *times* of the day.⁴⁶

D. *Content Regulation*

The government regulates on the basis of content⁴⁷ when it seeks to favor or disfavor a speaker's viewpoint or choice of subject matter. Discrimination against the speaker because of his membership

42. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 33-34 (1982).

43. Sexually explicit speech is covered by the first amendment, but it is not always considered as a fully protected category of expression. The Court admits that sexually explicit speech does not rank as high as "expression . . . relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). Whether a particular communication which is sexually explicit has any social value must be determined by the form, content and context of the given statement as revealed by all the relevant circumstances. *Id.* at 147-48. In *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Court candidly admitted the obvious: restrictions on expression of editorial opinion lie "at the heart of First Amendment protection." *Id.* at 381. However, the same cannot be said of sexually explicit speech.

44. 438 U.S. 726 (1978).

45. *Id.* at 732.

46. These complex cases defy the Court's "content-based" and "content-neutral" categories. Ordinances restricting the showing of adult films do "not appear to fit neatly into either the 'content-based' or the 'content-neutral' category." *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 929 (1986).

47. See G. GUNTHER, *supra* note 37, at 1164 n.2 (citations of law review articles discussing the many questions intrinsic to the distinction between content-based and content-neutral regulations); see also Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

in a group, his identity, or his status may or may not be impermissible censorship.⁴⁸ The following subsections analyze various types of content regulation.

1. Viewpoint Discrimination

The principle that it is impermissible for the government to discriminate on the basis of viewpoint⁴⁹ is basic in public forum cases.⁵⁰ According to the Supreme Court, the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."⁵¹ Accordingly, when a speaker seems to use government property as a forum, a viewpoint discrimination always triggers strict scrutiny.⁵²

2. Subject Matter Discrimination

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."⁵³ When the government's denial of access to a traditional public forum turns on the basis of the speaker's choice of subject matter, strict scrutiny frequently applies.⁵⁴ However, it is unclear exactly what the

48. See *infra* text accompanying notes 65-68.

49. In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), the Court stated "[T]he general principle that has emerged . . . is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65-74 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980)).

50. See *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972); *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986); see also the cases cited by Justice Brennan in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (dissenting opinion).

51. *Mosely*, 408 U.S. at 92.

52. In fact, the government is not permitted to deny access to a speaker solely to suppress the point of view he espouses. *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113 (7th Cir. 1986) (excellent opinion by Posner, J., citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 105 S. Ct. 3439, 3451 (1985)); see *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (school board could not deny use of public facilities to group because of that group's racist views); cf. *Cohen v. California*, 403 U.S. 15 (1971) (state may not make public display of a four letter word criticizing the draft a criminal offense).

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

54. *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92 (1972).

Court means by "subject matter" discrimination.⁵⁵ For example, restrictions on all political speech are subject matter restrictions only if the term "subject matter" is used very loosely, as it often is. Obviously, a content-based ban on political speech encompasses many different subjects,⁵⁶ and rarely will broad or total bans on protected categories of speech be tolerated.⁵⁷ Moreover, bans which afford commercial speech more protection than noncommercial speech incorporate impermissible content distinctions among categories of speech.⁵⁸

A ban on "controversial" subjects is a very dangerous kind of "subject matter" ban. This kind of a subject matter ban gives the law enforcement official too much discretion. For example, at some city football stadiums, officials have discretion to remove certain signs communicating religious ideas if a message is deemed "controversial." In places open to the public, the government lacks power to "deny use [of the forum] to those wishing to express . . . controversial views."⁵⁹ Before law enforcement officials are turned loose to decide what is controversial, policy makers must, at the very least, articulate reasonably specific adequate guidelines channelling the discretion of law enforcement officials. Otherwise, those

55. Stone, *Restriction of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). Subject matter discrimination can refer to a particular topic such as "the nature of the communist menace," or it can refer to a more general subject such as a labor protest, as opposed to any other kind of protest. Subject matter discrimination can be very abstract, for example, a restriction banning commercial speech as opposed to political speech or vice versa. Presumably, a ban on controversial speech can be subsumed as a form of subject matter discrimination. See *infra* text accompanying notes 53-64.

56. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court did *not* refer to the government's distinctions between commercial and political messages as a distinction based on subject matter. Political and commercial speech were treated as categories of expression containing several subjects. *Id.* at 501-02.

57. Content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 316 (1974) (Brennan, J., dissenting). Too many ideas are banned from the public forum when a fully protected category of speech is totally banned. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (exclusion of religious speech is not content-neutral).

58. See *Metromedia, Inc.*, 453 U.S. 490.

59. See *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986) (citing *Mosely*, 408 U.S. at 95-96). For recent cases holding that sports complexes are nonpublic forums, see *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552 (8th Cir. 1986); *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986); *International Soc'y for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

who police the stadium have leeway to be invidiously selective or arbitrary.

Guidelines specifying what subjects are too controversial should also be subjected to heightened judicial scrutiny. Assuming *arguendo* that the objective of eliminating controversy is itself permissible, the government's decision that subject "A" is more controversial than subject "B" can easily be used as a pretext to conceal impermissible motives. Therefore, rules and guidelines identifying controversial subjects should, in most cases, be treated as suspicious content-based restrictions.

Even in nonpublic forum cases, government action restricting "controversial" subject matter is likely to be arbitrary. Recently, however, the Court failed to carefully examine a ban on controversial charitable solicitation.⁶⁰ The inadequacy of the Court's analysis may be due to the fact that the case involved restrictions on government employees in the workplace, an especially sensitive environment. It would be a mistake for the Court to always defer to government policy makers who deny persons the use of nonpublic forums solely because, in their view, the topic is too controversial.

Yet, by way of contrast, if a government agency holds a public meeting, the agency may reserve the right to control and designate its agenda. A designated agenda does not amount to censorship if agenda topics can be justified on grounds of relevance.⁶¹

Some subjects are incompatible with the normal operation of a public facility.⁶² For example, a public hospital that has a maternity ward but also performs abortions may want to ban certain subjects because of genuine health-related concerns.⁶³ Patients in public hospitals are a captive audience, and they need protection from health-threatening verbal abuse. Therefore, strict judicial scrutiny of subject matter restrictions is usually inapplicable. Such restrictions present less danger of content-based discrimination if

60. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3446 (1985).

61. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 46 n.7 (1983); *City of Madison Joint School Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976); *see also Cornelius*, 105 S. Ct. at 3457-58 (Brennan, J., dissenting).

62. *See Greer v. Spock*, 424 U.S. 828 (1976) (military installation bans speeches of a partisan political nature); *see also United States v. Albertini*, 105 S. Ct. 2897 (1985) (same).

63. *See Low Income People Together, Inc. v. Manning*, 615 F. Supp. 501, 506 (N.D. Ohio 1985). *But see Dallas Ass'n of Community Org. for Reform Now v. Dallas County Hosp. Dist.*, 670 F.2d 629 (5th Cir. 1982), *reh'g denied*, 680 F.2d 1391 (5th Cir.), *cert. denied*, 459 U.S. 1052 (1982).

hospital policy makers intentionally designate appropriate enclaves in the hospital as nonpublic forums.

Suppose the hospital desires to change its lobby from a limited forum to a nonpublic forum. Such a change may be permitted under some circumstances. However, the courts must not allow officials to collapse a limited forum into a nonpublic forum under the pretext of a legitimate purpose. The courts may inquire whether a discriminatory purpose has been a motivating factor in the decision and the burden of coming forward with exculpatory evidence should be on the government since the data base justifying a policy change is usually in the policymaker's exclusive custody. If the courts proceed to rubberstamp all policy changes, then protected speech, compatible with the normal uses of a forum, can be suppressed for impermissible reasons. Unfortunately, the Supreme Court has yet to endorse heightened scrutiny, absent obvious viewpoint discrimination, when limited forums are suspiciously transformed into nonpublic forums.

3. Speaker Identity Discrimination

Restrictions that exclude particular speakers, or a class of speakers, from a traditional public forum are considered presumptively impermissible. As the Supreme Court has noted, "[I]n a public forum . . . the state must demonstrate compelling reasons for restricting access to a single class of speakers . . ." ⁶⁴ However, the government may refuse to open up a place or facility as a forum for expressive activities, save for a limited class of speakers. For example, in *Perry*, the school board legally denied access to the interschool mail system to any "school employee organization" except the teachers' duly elected exclusive bargaining representatives. ⁶⁵ Similarly, in *Widmar v. Vincent*, ⁶⁶ the Court emphasized that a university may exclude speakers when the school's meeting rooms are reserved for and limited to designated registered student groups. ⁶⁷

64. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983).

65. *Id.* at 51-52.

66. 454 U.S. 263 (1981).

67. *Id.* at 267-78 n.5.

E. *Methods of Suppressing Expression: Prior Restraints and Standardless Discretion*

Courts distinguish between methods of prior restraint and methods employing "a sanction applied after the event."⁶⁸ Prior restraints have historically been disfavored.⁶⁹ "By placing discretion in the hands of an official to grant or deny a license [or permit] . . . a statute creates a threat of censorship that by its very existence chills free speech."⁷⁰

Rigorous procedural safeguards are required by the Constitution whenever the law provides that a person needs advance permission to engage in expressive activities arguably covered by the first amendment. Although obscenity is non-protected speech, procedural safeguards are nevertheless necessary when a licensing agency refuses to permit the showing of an allegedly obscene film or a play.⁷¹ One remarkable facet of the Court's prior restraint doctrine is its focus on process.⁷²

More so than other methods of suppressing speech, injunctions frequently chill speech⁷³ because violators can be summarily convicted of contempt of court.⁷⁴ Accordingly, in *New York Times Co.*

68. *Niemotko v. Maryland*, 340 U.S. 268, 281 (1951) (Frankfurter, J., concurring).

69. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 504 (1970).

70. *Niemotko*, 340 U.S. at 282 (Frankfurter, J., concurring).

71. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Freedman v. Maryland*, 380 U.S. 51 (1965).

72. Professor Gunther writes, "The procedural safeguards established by *Freedman* illustrate a wider phenomenon: procedural safeguards often have a special bite in the First Amendment context . . ." G. GUNTHER, *supra* note 37, at 1161 n.3 (1985); see also Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

73. Alexander Bickel wrote, "The violator of a prior restraint may be assured of being held in contempt; the violator of a statute punishing speech . . . may be willing to take his chance, counting on a possible acquittal. A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes." A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

The methods used by governments to obtain injunctions pose special dangers to a system of free expression. For example, procedurally it is easier and quicker to initiate a civil action seeking injunctive relief than to start a criminal prosecution. Arraignments, grand juries, pretrial motions, and jury selection are obviously unnecessary. An application for a temporary restraining order may be heard immediately and, in some cases, it may be heard *ex parte*. *Id.*

74. If an injunction erroneously deprives a person of a constitutional right, persons violating injunctions are punished for contempt even if it is clear that they are exercising fully protected first amendment rights. Contempt, even civil contempt, is punishable by fine and imprisonment. The only exceptions to this rule are when the court issuing the injunction lacks jurisdiction over the subject matter or person.

v. United States,⁷⁵ Justice Stewart held that the Pentagon Papers could not be suppressed in advance of publication unless "disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people."⁷⁶

Prior restraint cases are being compartmentalized into their own special pigeonholes. For example, the Supreme Court's scrutiny in sixth amendment cases is less exacting than the "stricter" scrutiny applicable in the routine prior restraint case.⁷⁷ Moreover, if the speaker's expressive activities are reprehensible,⁷⁸ and akin to a non-protected method of communication, the Court may ignore what is usually a heavy presumption against the constitutional validity of a prior restraint.⁷⁹

F. *Methods of Communication: Pure Speech, Symbolic Speech, and Non-Protected Methods*

Prior restraints and standardless systems of law enforcement are methods of suppression that "create an unacceptable risk of the suppression of ideas."⁸⁰ The method a speaker uses to communicate is also a variable which determines a court's level of scrutiny. This section of the article focuses on three methods of communication:⁸¹ pure speech, symbolic speech, and non-protected methods

75. 403 U.S. 713 (1971).

76. *Id.* at 730. The government could not successfully shoulder this weighty burden of persuasion. The court that issues an injunction is predicting the future because the judge is required to find that the prior restraint is necessary to prevent grave and irreparable harm. If it is said that publication of a news story will endanger national security, the judge who is concerned about his own reputation will be tempted to suppress the story. If the judge permits the story to be published and the story causes harm, the judge will be blamed. The Supreme Court, well aware of this problem, requires the judge to demand from the government an unusually clear and convincing showing of compelling need.

77. *Compare Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) with the opinions of Justices Black, Brennan, and Stewart in *New York Times Co. v. United States*, 403 U.S. 713 (1971). See also Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 540-42 (1977); Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 458-66 (1977).

78. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (former CIA employee not able to publish material about Vietnam War due to agreement with employer).

79. See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

80. See *Secretary of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.13 (1984) and cases cited therein.

81. The text generalizes when it refers to only three methods of communication. The generalizations include a vast spectrum of behavior ranging from a murderer's violent outburst that expresses a hateful disposition having little or no social or cognitive value to a temper-

of expressive activity.⁸²

Pure speech includes conventional verbal communication such as conversing, leafletting, handbilling, publication of newspapers, door-to-door solicitation, and posting of written messages. Pictorial expression is also usually regarded as pure speech. Pure speech usually involves physical movement. The speaker must move his lips, the handbiller must tender someone a printed leaflet, the sound truck blaring a sermon must travel on the streets, and the newspaper must be printed and delivered. Physical movement makes communication possible; it is the means through which a speaker communicates verbally. However, a different function is performed by the symbolic speaker's physical movement; his physical gesture does not merely facilitate communication, but it is a substitute for a verbal message.⁸³ Nevertheless, first amendment rights "are not confined to verbal expression" but embrace other "appropriate types" of protected symbolic speech;⁸⁴ symbolic speech should not be confused with non-protected methods of speech.⁸⁵

In order to qualify as the type of symbolic speech that deserves heightened scrutiny, a speaker must show that (1) his nonverbal conduct communicates a particular message having cognitive value; (2) the message itself is included within a protected category of speech;⁸⁶ and (3) his method of communication is compatible with first amendment values.⁸⁷ The next three subsections elaborate on

ate conversation by a political candidate who is speaking to sidewalk pedestrians about his candidacy.

82. On occasion the Supreme Court and various specialists in constitutional law call non-protected methods of expressive activity "speech plus." The term is sometimes confusing and misleading. Basically, it suggests that pure speech is supplemented by non-protected speech and that non-protected speech can be regulated by the government notwithstanding its close relationship with protected speech.

83. Words themselves, of course, are symbols. Symbolic speech, however, is a nonverbal symbol of an object of cognition.

84. See, e.g., *Street v. New York*, 394 U.S. 576 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966).

85. See, e.g., *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957).

86. Examples of protected categories of speech are non-malicious libel of public officials and public figures, insults (not fighting words), religious speech, and non-obscene artistic speech. Examples of somewhat protected categories of speech are some forms of commercial speech, and some forms of sexually explicit speech. Examples of non-protected speech are perjury, bribery, price fixing, conspiracy to commit crime, most non-political solicitation of crimes, malicious libel, obscenity, child pornography, and fighting words. Note that it is possible for a *method* of communication to be non-protected even if the *message* communicated is in a protected category.

87. If the challenger shoulders the initial burden of persuasion, and unless other variables

these prerequisites.

1. Messages with Cognitive Value

Not all conduct may be labelled as symbolic speech simply because an actor intends to express an idea.⁸⁸ Symbolic speech must "reasonably be understood by the viewer to be communicative."⁸⁹

To be safe, the putative speaker must convince the court that the message intended to be conveyed is a "particularized message" or a "pointed expression," more focused than some vague, inarticulate feeling about nothing in particular.⁹⁰ If the putative speaker conveys nothing but mindless nihilism,⁹¹ he has not conveyed an intelligible, particularized message.

The Supreme Court's emphasis in *Spence v. Washington* concerning the need for a "particularized message"⁹² is insensitive to the evocative power of a symbol "that works mysteriously on the human consciousness so as to suggest more than it can clearly describe."⁹³ Because symbols have the power to instill sentiments that motivate persons to act, perhaps the Court should not always insist on a particularized message. Symbols have the power to tap a vast amount of understanding that transcends any particular message.⁹⁴ Moreover, symbolic speech generates insights that cannot be precisely articulated in terms of categorical thought and language.⁹⁵

increase or decrease the court's level of scrutiny, the government's ban or regulation of symbolic speech is valid only if the government shows that the "conduct itself may constitutionally be regulated" and that the regulation or ban of this kind of symbolic expression "is narrowly drawn to further a substantial governmental interest" that is "unrelated to the suppression of free speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). In public forum cases, the intermediate level of scrutiny used for symbolic speech cases "is little, if any, different from the standard applied to time, place, or manner restrictions." *Id.* at 298; see also *United States v. O'Brien*, 391 U.S. 367 (1968). It is well settled that a speaker's manner of nonverbal expression does not qualify as symbolic speech.

88. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

89. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); see also *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (an intent to convey a particularized message).

90. The Court has stated that "the advancement of a plausible contention" that the speaker is engaged in symbolic speech is insufficient. *Clark*, 468 U.S. at 293 n.5.

91. *Spence*, 418 U.S. at 410.

92. *Id.* at 411.

93. A. DULLES, *MODELS OF REVELATION* 131 (1985).

94. *Id.* at 132 ("A symbol is a sign segment with a plenitude of meaning which is evoked rather than explicitly stated.")

95. *Id.* at 136-37.

Conduct is frequently understood as an intelligible message⁹⁶ only because of the speaker's verbal explanation.⁹⁷ For example, the person who burns his draft card while saying he is opposed to war is using words that clarify the purpose and meaning of his activity. On the other hand, the person who silently burns his draft card, along with other sundry, unrelated items, is not clearly communicating an intelligible message.

Suppose, however, that a farmer murders a banker and exclaims that his homicide is a protest against society's insensitivity toward the economic plight of farmers. If the farmer demonstrates he was motivated by his desire to protest society's aforesaid insensitivity and his violent act is so understood, his message, given its context, has cognitive value,⁹⁸ and thereby satisfies the first of the Court's symbolic speech prerequisites.

2. Messages Within a Protected Category of Speech

A person who has communicated a message having cognitive value is not engaged in the kind of symbolic speech that triggers heightened scrutiny if the message itself is in a non-protected category of speech. For example, if the message communicated by our hypothetical farmer who shoots a banker is intended and understood as "advocacy . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action,"⁹⁹ the

96. In some cases the expressive activity may be facilitative. For example, a creative imaginative act that dramatizes the plight of the homeless may enhance the likelihood that speakers with little money can capture the attention of the mass media and thereby reach a larger audience in a more meaningful way. The facilitative purpose of a sleep-in will have independent status as symbolic speech if it is closely related to expressive activity, is intended to facilitate the dissemination of the speaker's message and is understood to be an intelligible message in its own right. *Cf. Clark*, 104 S. Ct. at 3077 n.7. (Marshall, J., dissenting).

97. In *Spence v. Washington*, 418 U.S. 405 (1974), an individual, Spence, was charged with improper use of the United States flag when he affixed to the flag a large peace symbol fashioned of removable tape. The Court held that such conduct qualified as symbolic speech in part because "the nature of [Spence's] activity, combined with the factual context and environment in which it was undertaken, led to the conclusion that he engaged in a form of protected expression." *Id.* at 409-10. The Court added, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Id.* at 410.

98. However, an argument may be made that the method of communication chosen by the farmer is non-protected and not worthy of first amendment protection because violence is incompatible with the values underlying the first amendment. *See infra* text accompanying note 100.

99. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

farmer's message would clearly be outside the bounds of protected expression. Symbolic conduct does not transform a non-protected category of expression into a protected one.

3. Methods Compatible With First Amendment Values

Expressive activities do not qualify as symbolic speech if the speaker's methods are incompatible with the values undergirding the first amendment.¹⁰⁰ If a farmer kills a banker as a political protest, the Constitution should not be sullied by suggesting that murder furthers first amendment values.

One of the many values underlying freedom of speech is the safety valve function.¹⁰¹ "It is thought that men will be less inclined to resort to violence to achieve given ends if they are free to express themselves through speech advocating such ends."¹⁰² However, if violent methods are used, the prophylactic safety valve function has already failed. Another first amendment value is the open marketplace of ideas¹⁰³ where, theoretically, the truth is discoverable if allowed to surface. However, if the "speaker" uses duress or unduly coercive activities, he cannot credibly claim he is participating in the free trade of ideas. Similarly, the arguments for a participatory democracy¹⁰⁴ do not justify violence, since methods of expression that seek to force intimidated citizens to adopt unpersuasive data, ideas and creeds are obviously undemocratic. "Self-fulfillment"¹⁰⁵ is another value said to underlie the first amendment. Professor Emerson has eloquently written of the enhancement of "personal growth and self-realization" in freedom of speech.¹⁰⁶ Yet, when a speaker's methods cause his victim's severe psychological or physical harm, such intolerable methods usually go far beyond the bounds of "uninhibited, robust, and wide-open" debate.¹⁰⁷

100. Intolerable methods of expressing an intelligible message protected by the first amendment could be called symbolic "conduct" to distinguish these non-protected methods of protected symbolic "speech."

101. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

102. M. NIMMER, *supra* note 2, at § 1.04.

103. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

104. See M. NIMMER, *supra* note 2, at § 1.02 (h).

105. See *id.* § 1.03 (citing *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 96 (1972)). See generally M. NIMMER, *supra* note 2, at § 1.03 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) ("the role of the First Amendment in fostering individual self-expression")).

106. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

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

Courts draw a distinction between protected symbolic speech that encourages or embarrasses a targeted person into action¹⁰⁸ and non-protected intimidating symbolic conduct, which denies coerced, victimized persons the autonomy to choose an alternative course of conduct.¹⁰⁹ Extortion and blackmail are obviously non-protected methods of coercion. Although not as clear, secondary boycotts and economic picketing may be verbal acts that send signals triggering an "automatic response . . . rather than a reasoned response to an idea."¹¹⁰ Such performative speech by labor unions is usually non-protected because courts routinely defer to Congress's judgment concerning unfair picketing by those protesting economic conditions.¹¹¹ Recently, however, the Court has strongly hinted that it will invoke the intermediate level of scrutiny¹¹² in picketing cases that involve political protests.¹¹³

Although intolerable methods of communication using violence or intimidation are generally not protected by the first amendment, nonverbal expressive activity does not lose its protected character simply because it embarrasses persons into action. Indeed, not all concerted expressive activity is removed from the reach of the first amendment simply because of its coercive tendency.¹¹⁴

G. *Categories of Forums*

In the first amendment situations described in the preceding sections of this article, an individual's freedom to speak depended upon numerous variables that interact in complicated ways. The

108. *Id.*

109. This distinction is critical in cases involving the picketing of abortion clinics. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

110. *Id.*

111. See *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 618 (1980) (Stevens, J., concurring). Professor Tribe notes the existence of a notion called the "signal doctrine" that "effectively remove[s] the protection from speech . . . because of its lack of affirmative value in the eyes of the court." L. TRIBE, *supra* note 12, at 399 n.100.

112. See L. TRIBE, *supra* note 12, at 203.

113. See *International Longshoremen's Ass'n v. Allied Int'l Inc.*, 456 U.S. 212 (1982); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957).

114. Compare *Allied Int'l Inc.*, 456 U.S. at 226-27 n.26 with *Claiborne Hardware Co.*, 458 U.S. at 925-26. The Court of Appeals for the Fourth Circuit has held that "absent clear Congressional intent to the contrary," non-violent picketing and boycotts, primary and secondary, are "ordinarily entitled to protection under the first and fourteenth amendments." *Richmond, F. & P. R.R. v. Brotherhood of Maintenance of Way Employees*, 795 F.2d 1161, 1163 (4th Cir. 1986).

forum where one attempts to exercise first amendment rights is another extremely important variable.¹¹⁵

1. The Traditional Public Forum

In traditional public forums, unlike nonpublic forums, "the rights of the state to limit expressive activity are sharply circumscribed."¹¹⁶ More specifically, "[b]ecause a principle purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and when the exclusion is narrowly drawn to achieve that interest."¹¹⁷ Moreover, partial bans keyed to time, place and manner considerations are valid only if they "are narrowly tailored to serve a significant government interest" and leave open ample alternative channels of communication.¹¹⁸

The Court has stated that "streets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."¹¹⁹ Other public places besides streets, parks, malls and sidewalks may also be traditionally open to the public.

A lack of tradition "weighs against public forum status."¹²⁰ For example, in *Edwards v. South Carolina*,¹²¹ the Court reversed the convictions of demonstrators on the State House grounds because the property had traditionally been open to the public. But, in *Adlerly v. Florida*,¹²² the trespass convictions of persons demonstrating on jailhouse grounds were upheld because jailhouses have not traditionally been open to the public. Similarly, in *Greer v.*

115. Farber and Nowak believe that public forum analysis "distracts attention from the first amendment values at stake in a given case." Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context In First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984).

116. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

117. See *Cornelius v. NAACP Defense and Educ. Fund, Inc.*, 105 S. Ct. 3439, 3448 (1985).

118. *Id.* at 3439.

119. See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), *overruled on other grounds*, *Hudgens v. NLRB*, 424 U.S. 507, 518-19 (1976).

120. Note, *A Worthy Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 136 (1982).

121. 372 U.S. 229 (1963).

122. 385 U.S. 39, 41 (1966).

Spock,¹²³ the Court refused to accord public forum status to parts of the Fort Dix military base open to the public because “[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 . . . false.”¹²⁴ The Court has also refused to recognize a letter box as a public forum because “[t]here is neither historical nor constitutional support of the characterization of a letter box as a public forum.”¹²⁵ In short, tradition informs judgment when the question is whether government property is a public forum.

2. The Limited Forum

A government facility not traditionally open to expressive activity may be intentionally “opened for use by the public as a place for expressive activity.”¹²⁶ To the limited extent that a forum is open to the public, government officials are “bound by the same standards as apply in a traditional public forum.”¹²⁷ Therefore, time, place and manner restrictions must be reasonable, and a content-based prohibition is constitutional only if the government can show it is “a precisely drawn means of serving as a compelling governmental interest.”¹²⁸

“[A limited] public forum may be created by government designation of a place or channel of communication for use by . . . certain speakers, or for the discussion of certain subjects.”¹²⁹ Places opened up for limited kinds of expressive activity have included theaters, auditoriums and stadiums. For example, in *Southeastern Promotions, Ltd. v. Conrad*,¹³⁰ a municipal theater had been dedicated to the public as a “community center . . . where civic, educational, religious, patriotic and charitable organizations and associa-

123. 424 U.S. 828 (1976).

124. *Id.* at 838.

125. *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 128 (1981).

126. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

127. *Id.* at 46. *But see United States v. Albertini*, 105 S. Ct. 2897 (1985) (military base not open to public).

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

129. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985) (citing *Perry*, 460 U.S. at 45 n.7); *see also Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (holding state university may not close its facilities to student group desiring use for religious worship).

130. 420 U.S. 546 (1975).

tions may have a common meeting place . . . devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship."¹³¹ The Court described this forum, designated for limited purposes, as a public forum "designed for and dedicated to expressive activities."¹³² Since the Court equated the limited forum with the city's "public streets and parks"¹³³ and since its level of scrutiny was not diminished, the city's ban of the musical "Hair" was an invalid prior restraint that failed to survive strict scrutiny.

3. The Collapsible Limited Forum

The Supreme Court is just developing the distinctions between limited public forums and nonpublic forums and a great deal more clarity is needed. One difficulty is the collapsible nature of the limited forum. On the one hand, "[t]he constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place"¹³⁴ On the other hand, the limited public forum need not be kept open indefinitely.¹³⁵ If the Court's tripartite classification of forums is to remain credible, the limited public forum, although collapsible, should not be collapsible at the whim of an official who suddenly deviates from an established policy, rule,¹³⁶ or practice.

Any repeal or change of a rule that transforms a limited forum into a nonpublic forum or constricts the scope of the policy previously designating the forum's limits should be viewpoint neutral. Moreover, if the government collapses a forum merely to avoid controversy,¹³⁷ the Court should not always defer; it may have to balance competing interests before it designates government property as a nonpublic forum.¹³⁸ The Court has yet to make this point crystal clear.

131. *Id.* at 549 n.4 (quoting trial exhibit).

132. *Id.* at 555.

133. *Id.* at 570 (Rehnquist, J., dissenting).

134. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

135. *Id.* at 46.

136. *See United States v. Nixon*, 418 U.S. 683 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (government agencies are bound by their own substantive rules until duly repealed or amended); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954).

137. *See City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 925 (1986).

138. *See Justice Blackmun's cogent dissent in Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3459 (1985).

4. The Government's Intent to Maintain a Nonpublic Forum

The "nonpublic forum, by definition, is not dedicated to general debate or the free exchange of ideas."¹³⁹ This definition refers us back to the government's intentions concerning the use of the relevant forum. The *Cornelius* plurality stated,

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum The Court has also examined the nature of the property and its *compatibility* with expressive activity to discern the government's intent.¹⁴⁰

Despite the Court's focus on the question whether the subject matter of the expressive activity is compatible with the customary or normal uses of the facility, lower court judges should not assume the Supreme Court is using a compatibility test in lieu of a test based on the government's intent.¹⁴¹ According to the *Cornelius* plurality, the speaker's burden of persuasion is fully met only by "evidence of a purposeful designation" permitting access.¹⁴² Compatibility is but one factor used by judges who are attempting to discern the government's intent. The *Cornelius* plurality emphasizes the relevance of the government's purpose by stating that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity as long as the distinctions are reasonable in light of the *purpose* served by the forum and are viewpoint neutral."¹⁴³ Nevertheless, if a court believes, in light of *all the surrounding circumstances*, that the government restriction is a pretext, this kind of a "sham" may not justify the collapse of a forum. In sum, restrictions on expressive activity, compatible with the functions of a nonpublic forum, are legitimate, so long as they are reasonable in "light of the [genuine viewpoint neutral] purpose

139. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3454 (1985).

140. *Id.* at 3449 (emphasis added; citations omitted).

141. *Accord Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2d Cir. 1986) (Feinberg, C.J.). *But see Low Income People Together, Inc., v. Manning*, 615 F. Supp. 501, 513 (N.D. Ohio 1985).

142. *Cornelius*, 105 S. Ct. at 3451.

143. *Id.* (emphasis added).

of the forum and all the surrounding circumstances."¹⁴⁴

Nonpublic enclaves may exist within a limited public forum. For example, on public school property, certain channels of communication, like internal mail facilities, may be intentionally closed to all but a few designated employees who are given special status.¹⁴⁵ The Court has also held that a particular channel of communication within the federal workplace may be restricted to certain designated charities.¹⁴⁶ Thus, when government property is opened as a limited public forum, part of the area can be intentionally walled off as a nonpublic enclave.

III. CONCLUSION

Many variables combine and interact to increase the level of judicial scrutiny in first amendment cases. However, all of the so-called levels of judicial scrutiny, especially the intermediate level of scrutiny, have been subject to criticism either because of their perceived weaknesses in protecting speech or because of the Court's inconsistent application of such tests.¹⁴⁷ Although it might appear that the levels of scrutiny are divided into three watertight compartments, the intensity variations, when considered realistically, actually combine to form a continuum.

The Court's pigeonholes may be too confining because first amendment freedoms need breathing space. A nonpublic forum concept, solely dependent on the government's intentions, denies speakers access to many places where freedom of speech would further first amendment values.¹⁴⁸ Moreover, access rights in the nonpublic forum discriminate against the less affluent since expressive activities at nonpublic forums may be less costly than alternative forums.¹⁴⁹ Nevertheless, the Court presumes that speakers usually "have access to alternative" channels of communication and supposes that "[r]arely will a nonpublic forum provide the only means

144. *Id.* at 3453.

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

146. *Cornelius*, 105 S. Ct. at 3450-51, 3455.

147. See Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1288 (1979).

148. See *Cornelius*, 105 S. Ct. at 3456 (Blackmun, J., dissenting).

149. *Id.* at 3453. It is possible that the government's choice to keep a forum nonpublic could be adjudged unreasonable if the speaker has at his disposal no other substantial alternative channels of communication. See *Perry*, 460 U.S. at 53.

of contact with a particular audience."¹⁵⁰ We have to wait and see what the Court will do if its presumptions and suppositions turn out to be demonstrably untrue.

Public forum doctrine is admittedly a complicated body of law¹⁵¹ that can become, in the hands of the wrong judge, unduly conceptualistic. On the other hand, many of the Court's pigeonholes reduce the opportunities for ad hoc, and unprincipled, decisions by lower court judges.

Public forum pigeonholes, therefore, are the lesser of two evils. The Court's tendency to adhere to sharply defined categories is understandable. The pigeonholes, the frameworks, the levels of scrutiny, the multi-pronged and multi-tiered tests represent a commendable effort to "bring order to a universe of unruly happenings and to give guidance for the future . . . to others. But it is certain that life will bring up cases whose facts simply cannot be handled by purely verbal formulas, or at least not handled with any sophistication and feeling for the underlying values at stake." When such cases are presented, the courts will have to adjust and recur back to the first principles, which cherish the unique value of public forum access.

150. Professor Robert C. Post, however, points out "that one begins to lose all sense of confidence in the doctrine formulations of the First Amendment law when one sees all the rules aligned with all these many pigeonholes." Letter from Robert C. Post to Gary C. Leedes (April 11, 1986).

151. *Ollman v. Evans*, 750 F.2d 970, 994 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985).

