

New Wine, New Bottles: Private Property Metaphors and Public Forum Speech

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ST. JOHN'S LAW REVIEW

VOLUME 71

SPRING 1997

NUMBER 2

NEW WINE, NEW BOTTLES: PRIVATE PROPERTY METAPHORS AND PUBLIC FORUM SPEECH

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The controversy over regulating indecent material on the Internet, being won so far by speech proponents,¹ reminds one of

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¹ See *Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374 (1996) (invalidating mandatory segregation and blocking of indecent programming over cable leased access channels, and operators' control over indecency on public access channels, but permitting operators to ban indecent programming on leased channels) [hereinafter *Denver Area E.T.C.*]; *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (three judge panel) (overturning portions of Communications Decency Act based on overbreadth and vagueness). For a discussion of the controversy, compare, Todd Copilevitz, *Censoring Cyberspace Centers on Semantics*, DALLAS MORNING NEWS, Dec. 17, 1995, at 4F (stating Christian Coalition demands "stronger tools to keep pornographers [and] pedophiles ... off line"), with Jon Auerbach, *Fences in Cyberspace: Governments Move to Limit Free Flow of the Internet*, BOSTON GLOBE, Feb. 1, 1996, at 1 (stating that Electronic Privacy Information Center director calls government censorship of Internet "Orwellian"); see also James Coates, *No Sure-Fire Way to Shield Children from On-Line Smut*, CHI. TRIB., Feb. 17, 1996, at 1 (arguing that parents, not government, need to monitor child's access to Internet); John J. Keller & Jared Sandberg, *Decency Law for Computers Hits a Glitch*, WALL ST. J., Feb. 16, 1996, at A3 (stating that new law has been challenged as unconstitutional because its definition of indecency is too vague); Joe Kilsheimer, *Law Arrives on Internet Frontier: Sexually Explicit Material Targeted by Decency Act*, ORLANDO SENTINEL, Feb. 11, 1996, at G1 (quoting director of public policy for America Online who noted that there are not enough "Net cops" to enforce the law and "[t]here's not

the Biblical admonition against putting new wine in old bottles:

No man putteth a piece of new cloth unto an old garment, for that which is put in to fill it up taketh away from the garment, and the rent is made worse. Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved.²

Justice Souter was right to surmise that "if [members of the Court] had to decide today ... just what the First Amendment should mean in cyberspace ... [they] would get it fundamentally wrong."³ The Supreme Court Justices' questions comparing the Internet to a telephone, a radio, and a public park, as they heard a recent challenge to the Communications Decency Act, were described by a Washington Post writer as "Nine Justices in Search of a Metaphor."⁴ Searching for alternatives, the Court has fallen back to "old bottles" like *FCC v. Pacifica Foundation*⁵ and the public forum doctrine,⁶ engendering the kind of

enough money in the Treasury" to do so); *It's a Key Week in Court Battle Over Online Indecency Laws*, SEATTLE TIMES, Feb. 15, 1996, at A3 [hereinafter *Key Week*]; George Stuteville, *Coats Fortifies His Bill Attacking 'Cyber-Porn' by Using Legal Precedents*, INDIANAPOLIS STAR, Feb. 11, 1996, at D1; *U.S. Says New Internet Law Should Be Upheld; Courts: Officials Back Ban on Allowing Minors Access to Indecent Material*, L.A. TIMES, Feb. 15, 1996, at D2.

² Jesus' reply was to John's disciples who questioned why Jesus' disciples did not obey all of the Jewish customs, including fasting. *Matthew* 9:16-17 (King James).

³ *Denver Area E.T.C.*, 116 S. Ct. at 2402 (Souter, J., concurring) (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L. J. 1743, 1745 (1995)).

⁴ *Shouting Porn! On a Crowded Net*, WASH. POST, Mar. 30, 1997, at C1. On March 19, 1997, the Supreme Court heard *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) (three judge court), which invalidated the Communications Decency Act's provisions banning patently offensive material on the Internet.

⁵ In *Denver Area E.T.C.*, Justice Breyer, writing for the plurality, chose *FCC v. Pacifica*, 438 U.S. 726 (1978) as his analogy, combining it with interest-balancing and rejecting categorical doctrine. *Denver Area E.T.C.*, 116 S. Ct. at 2386-87 (plurality opinion). Justice Thomas resorted to eminent domain-like arguments, although he did not go so far as to say that the cable regulations were a taking, noting that cable operators have not formally dedicated their property to public use and therefore retain property rights of control. *Id.* at 2426-29 (Thomas, J., concurring in part, dissenting in part). Indeed, in a footnote, he refers to eminent domain concerns when he notes that "[t]he court has never recognized a public forum based on a property interest 'taken' by regulatory restriction." *Id.* at 2427 n.11 (Thomas, J., concurring in part, dissenting in part).

⁶ Compare 116 S. Ct. at 2409 (Kennedy, J., concurring) where Justice Kennedy advocates the application of the public forum doctrine *with id.* at 2426 (Thomas, J., dissenting) (rejecting the public forum doctrine) *and id.* at 2388 (plurality opinion) *and id.* at 2398 (Stevens, J., concurring). Justice Souter suggested that a new categorical rule regarding communicative technology may develop as time goes on, just as the public forum category "settled out" over 40 years. *Id.* at 2402-03.

confusion evidenced in the Internet oral argument:

Court: You're asking us to say that the Internet is not a public forum.

[Deputy Solicitor General Seth P. Waxman]: The Internet is—we don't think it is, but if it is, in any event, it certainly is, like other public forums, subject to reasonable time, place and manner restrictions.

Court: A public forum is something created by the Government, isn't it?

Waxman: Right. We don't think it's a public forum, whereas a park would be but ...

Court: Well, it's a pretty public place, though, because anyone with a computer can get on-line ... and convey information and images, so it is much like ... a street corner or a park, in a sense.⁷

The *Denver Area Educational Telecommunications Consortium v. FCC* case, the passage of the Telecommunications Act of 1996,⁸ and the Supreme Court's denial of certiorari in *Action for Children's Television v. FCC*,⁹ again verify the power of the Federal Communication Commission to regulate non-traditional communication modes, such as computer transmissions.¹⁰ Yet,

⁷ *The Justices and the Analogies*, WASH. POST, Mar. 30, 1997, at C4.

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 18 U.S.C.A. & 47 U.S.C.A.).

⁹ 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996) (challenging constitutionality of Section 16(a) of 1992 Public Telecommunications Act, which restricted indecent radio and television broadcasts to specific hours of day). The court noted that the government has a compelling interest in protecting children under 18 from exposure to indecent programs and that restricting the hours available to broadcasters did not unduly burden the First Amendment. *Id.* at 656. The court, however, found that the distinction between the two categories of broadcasters had no apparent relationship to the compelling interests. *Id.* Thus, the statute was declared unconstitutional because the least restrictive means available were not used to further the government's compelling interest. *Id.* at 683.

¹⁰ *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124-26 (1989) (upholding prohibition on obscene telephone messages, but striking down prohibition on indecent telephone messages); *ACLU v. Reno*, 929 F. Supp. 829, 849 (E.D. Pa. 1996) (upholding temporary injunction against portion of Communications Decency Act which prohibits transmission of indecent communication through telecommunications device to anyone under 18 years of age). *But see* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (plurality) (holding that FCC may regulate indecent radio broadcasts); *Alliance for Community Media v. FCC*, 56 F.3d 105, 129 (D.C. Cir. 1995) (en banc) (upholding constitutionality of portions of Cable Television Consumer Protection and Competition Act of 1992, which FCC implemented to regulate obscene and indecent programming by cable operators), *aff'd in part, rev'd in part sub. nom.*,

these cases, along with the Internet follow-on, *Shea v. Reno*,¹¹ demonstrate both the limitations of those regulatory powers,¹² and the inability of the government to keep up with the public,¹³ to turn from old workhorses like the public forum doctrine¹⁴ to

Denver Area E.T.C., 116 S. Ct. 2374 (1996); *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1543-44 (2d Cir. 1991) (finding it unnecessary to grant preliminary injunction of Helms Amendment, which prohibited commercial providers of indecent telephone messages from communicating their messages to anyone under 18 years old or to anyone else without their consent), *cert. denied*, 502 U.S. 1072 (1992). For an overview of issues surrounding the mass media and the First Amendment, see JONATHAN W. EMORD, *FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT* (1991).

¹¹ 930 F. Supp. 916 (S.D.N.Y. 1996) (three judge court). *Shea* followed *Denver Area E.T.C.* in striking down the Communications Decency Act provisions on patently offensive material on the Internet on overbreadth grounds, rather than resorting to vagueness, as did the court in *ACLU v. Reno*, 929 F. Supp. 829 (E.D. Pa. 1996). However, the court chose to apply strict scrutiny rather than relying on Justice Breyer's more equivocal test in *Denver Area E.T.C.*

¹² See, e.g., *Sable Communications, Inc.*, 492 U.S. 115; *Pacifica Found.*, 438 U.S. 726; *Dial Info. Serv. Corp.*, 938 F.2d 1535, *cert. denied*, 502 U.S. 1072 (1992); *ACLU*, 929 F. Supp. 829.

¹³ For instance, North Carolina is constructing a statewide information "superhighway," linking 110 schools and colleges, state agencies, hospitals, police, and prisons. *North Carolina: A Superhighway Microcosm*, U.S. NEWS & WORLD REP., June 27, 1994, at 14. North Carolina's goal is to add private industry and to ensure access to every resident through his or her local library. *Id.* Internet usage has increased rapidly, from 217 networks linked to the Internet in July 1988, to 46,318 in January 1995; and from 28,174 host computers in December 1987, to 4,852,000 in January 1995. M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1693 (1995). The number of World Wide Web servers has also increased from about 500 in the fall of 1993 to nearly 10,000 in the fall of 1994; and it is estimated that between 30-40 million people had some kind of Internet access at the beginning of 1995. *Id.* at 1693-94. Some have even suggested that e-mail and computer conferencing will bring a renaissance in letter writing and prose. See Philip E. DeWitt, *Bards of the Internet*, TIME, July 4, 1994, at 66.

¹⁴ The public forum doctrine, described in Part I, grew out of two competing viewpoints. One, stated by Justice Roberts in *Hague v. CIO*, 307 U.S. 496, 515 (1939), is that, "[w]herever 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." *Id.* Other justices believe, for speech purposes, public property should be treated as if it were private property. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.45, at 1138 (5th ed. 1995). This position arose from Justice Holmes' view that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Commonwealth v. Davis*, 39 N.E. 113, 113 (1895), *aff'd sub nom.*, *Davis v. Massachusetts*, 167 U.S. 43 (1897). A third view claims a "special right of access by the public to treat public places as a Public Forum." See NOWAK & ROTUNDA, *supra*, at 1138 (citing Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1).

new images befitting the new technology.

Within the context of this Internet dispute, the statute under attack, the Communications Decency Act¹⁵ (CDA), covers telephone, broadcast, cable, and video programming provided by telephone companies,¹⁶ and broadens the ban against indecency¹⁷ to telecommunications.¹⁸ The Act prohibits the use of telecommunications devices to transmit any "comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person."¹⁹ Additionally, the CDA punishes any "obscene or indecent" remark made to a person the sender knows to be under eighteen,²⁰ as well as any sexual "comment, request, suggestion, proposal, image, or other communication" which is patently offensive if it is sent to a child by use of an interactive computer.²¹

¹⁵ Communications Decency Act of 1996 § 502, 47 U.S.C.A. § 223 (West Supp. 1996) [hereinafter CDA].

¹⁶ The definition of "Telecommunications" in the Telecommunications Act of 1996 is cryptic, referring to "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C.A. § 153 (West Supp. 1996).

¹⁷ David Sobel, a lawyer at the Electronic Privacy Information Center, noted that the Justice Department, trying to block a preliminary injunction against the CDA, attempted to convince the court that it was about obscenity. "[I]t isn't.... Indecency is not obscenity," Sobel stated, noting that the Internet was already governed by obscenity law. *Key Week*, *supra* note 1, at A3. Many had favored a standard tied to the phrase "harmful to minors," used in most states to prosecute such crimes, rather than the focus on "indecent" communications. See Copilevitz, *supra* note 1, at 4F.

¹⁸ The CDA consolidates and adds to criminal bans in already existing law. See *infra* notes 19-21 and accompanying text.

¹⁹ CDA § 502(1), 47 U.S.C.A. § 223(a)(1)(A). The "image or other communication" language and the intent section are new to the statute. The statute applies to those who make, create, solicit, or initiate the transmission of such remarks. *Id.*

²⁰ *Id.* § 223(a)(1)(B). Previous federal laws already prevented computer distribution of obscene or pornographic materials harmful to minors, under 18 U.S.C.A. §§ 1465, 2252, and 2423(a) (1996). See 142 CONG. REC. S1180 (daily ed. Feb. 9, 1994) (statement of Sen. Leahy); see also 47 U.S.C. § 223(a)(1)(A), (b)(1) (1994) (banning phone obscenities); 47 U.S.C. § 223(b)(2) (1994) (banning indecent commercial communications by phone to any person under eighteen years of age). Transmitting obscenities over a cable system was previously banned under 47 U.S.C. § 559 (1991).

²¹ 47 U.S.C.A. § 223(d)(1). The three-judge court in *ACLU*, 929 F. Supp. at 858, enjoined each of these provisions, however, on the grounds that the "indecency" language was vague and violative of the free speech and due process clauses. *Id.* The provisions which sought to punish those who permit their facilities to be used to transmit such messages were similarly enjoined. *Id.* at 849 (enjoining sections 223(a)(1)(B) and 223(d)(1) of Act, along with sections 223(a)(2) and 223(d)(2)). In the court's words, these sections "make it a crime for anyone to 'knowingly permit any

The CDA also creates an advisory committee to recommend television ratings,²² mandates the inclusion of signal blocking features on televisions,²³ and requires cable operators to scramble or block channels upon request without charge to nonsubscribers.²⁴ Such operators must also either ensure that service subscribers do not receive sexually explicit adult or other "indecent" programming, or limit children's access to adult material by confining such programming to those hours of the day, determined by the FCC, "when a significant number of children are [not] likely to view it."²⁵ Cable operators are correspondingly

telecommunications facility under [his or her] control to be used for any activity prohibited' in §§ 223 (a)(1)(B) and 223 (d)(1). The challenged provisions impose a punishment of a fine, up to two years imprisonment, or both for each offense." *Id.* at 829.

The Act pertains to anyone in interstate or foreign commerce who uses a computer service to send or display such matter, or who has control of such a facility and knowingly and with intent permits the facility to be used in such a manner. CDA § 502(2), 47 U.S.C.A. § 223(d). It applies whether the user of the service initiated the communication or placed the call. *Id.* § 223(d)(1). The test for what is prohibited is borrowed from the relaxed standard applied to sexual matter restricted from children. See *Ginsberg v. New York*, 390 U.S. 629 (1968). The material covered by the act "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." CDA § 502(2), 47 U.S.C.A. § 223(d)(1).

Violators may be punished up to two years in prison and fined. *Id.* § 223(d)(2). Employers who do not authorize, ratify or recklessly disregard an employee's prohibited conduct are exempt from liability. *Id.* § 223(e)(4). Persons who take good faith measures to restrict access by minors to a communication, whether technologically or by requiring verification of a credit card or personal identification number, are similarly protected from liability. *Id.* § 223(e)(5). Finally, those who provide access or connections to a facility, system or network for transmission, downloading, storage, etc., but do not have control over it, are not liable. *Id.* § 223(e)(1).

Coercion of children into prostitution or criminally prohibited sexual acts is a more serious criminal offense, which was previously barred. See 18 U.S.C. § 2251 (1994) (criminalizing solicitation of minor via computer network); 18 U.S.C.A. § 2423(b) (Supp. 1997) (stating that luring minor into sexual activity through computer communications is illegal). In 1995, Congress passed laws increasing the penalties for these crimes. 142 CONG. REC. S1180 (daily ed. Feb. 9, 1996) (statement of Sen. Leahy).

²² CDA § 551(b)(2), 110 Stat. 56, 140, 142 (to be codified as 47 U.S.C.A. § 303(w)(1)) (effective Feb. 8, 1997, if voluntary rating system not developed by distributors).

²³ CDA § 551(c), (e)(2), 110 Stat. 56, 141-42 (to be codified as 47 U.S.C.A. § 303(x), date of effectiveness not prior to Feb. 8, 1998, FCC to determine specific date) (creating mandatory blocking feature to allow viewers to block all programs with common feature).

²⁴ CDA § 504, 47 U.S.C.A. § 560(a).

²⁵ CDA § 505(a), 47 U.S.C.A. § 561. Previous law contemplated limited access of children to indecent programming by blocking a single channel on which all indecent programs would be aired. 47 U.S.C. § 532(j) (1994).

permitted to reject public access or leased programming which contains "obscenity, indecency, or nudity."²⁶

Although obscene communications have been banned in the past, those statutes, and the cases that parallel them, mark an important moment for the Internet as well as other new technologies, such as cable, that have exploded over the past decade. The federal government's original "yes" to public speech, evidenced by its participation in creating and encouraging the new technologies, has been replaced by an equally firm "no" to certain other kinds of speech.²⁷ The shift is compelling in two ways: first, the CDA, which imitates regulation once restricted to television and radio,²⁸ has broadened the scope of regulated commu-

²⁶ CDA § 506(a), 47 U.S.C.A. §§ 531(e), 532(c)(2); see also *Alliance for Community Media v. FCC*, 56 F.3d 105, 111 (D.C. Cir. 1995) (allowing cable operators to refuse to carry access to matter it reasonably believes is patently offensive).

²⁷ See Auerbach, *supra* note 1, at 1 (quoting Marc Rotenberg, Electronic Privacy Information Director, who described the legislation as "the morning after" and "a cyberspace place shift"). The Clinton Administration has expressed ambivalence regarding regulation of the Internet. See Eric Handelman, Comment, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALBANY L. REV. 709, 713-14 (1995). While Vice President Gore is a proponent of self-regulation on Internet, the Clinton administration has stated only that it supports a continued dialogue to provide parents ways to regulate access to indecent material. *Id.*

The U.S. is not alone in this effort to prohibit such speech. Countries such as Germany, China, and Saudi Arabia are also trying to regulate the Internet. According to Senator Leahy, China is attempting to ensure that no one uses the Internet except through authorized channels. 142 CONG. REC. S1180, S1181 (daily ed. Feb. 9, 1996) (statement of Sen. Leahy). Additionally, German prosecutors tried to cut access to over 200 Internet news groups with the words "sex," "gay," or "erotica" in the name, including support and advocacy groups for gays and lesbians. *Id.*; see also, Kilsheimer, *supra* note 1, at G1 (requiring CompuServe to take action after German prosecutor warned that some erotic pictures might violate German law). Germany has also threatened an Internet access provider with prosecution for permitting a Toronto-based neo-Nazi to use its channels. Auerbach, *supra* note 1, at 1. Vietnam has refused to open its doors to the Internet until it has regulations, and Saudi Arabia permits its Ministry of the Interior to review e-mail accounts and prosecute the ordering of material, such as a Playboy centerfold, over the Internet. *Id.* at 1. One well-cited incident of U.S. censorship involved America Online's blockage of the word "breast" from member profiles, deleting information for breast cancer survivors. See Kilsheimer, *supra* note 1, at G1. See generally, Amy Knoll, Comment, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275 (1996).

²⁸ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974) (clarifying that Red Lion standard will not apply to publishing); *Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117-18 (1973) (plurality) [hereinafter *CBS*]; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (permitting FCC to regulate broadcast media more extensively than print media).

nication vehicles²⁹ despite the absence of communicative "scarcity" used to justify regulation of the broadcast media, including the infamous "Fairness Doctrine."³⁰ The broadcast cases evince the Court's reluctance to stifle speech, since they theorize that a public trust must be imposed on broadcasters primarily to ensure *more* speech, or at least more diverse views.³¹ Otherwise, the Court has been suspicious of governmental control of media content,³² other than obscenity.³³ The CDA, and other recent de-

²⁹ The Government's control over communications in nontraditional public fora such as the media has been termed a scheme which protects press and public forum interests at the highest tier, broadcast medium at a second tier, and common carriers such as telephone companies at the lowest tier. Lynn Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 FORDHAM URB. L.J. 801, 828-31 (1985). For a more detailed explanation of the differences, see Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995).

³⁰ See *CBS*, 412 U.S. 94 (plurality) (finding that CBS was not required, beyond fairness doctrine, to sell advertising time to those seeking to comment on public issues). The "Fairness Doctrine" imposed responsibilities on the broadcaster to provide coverage of issues of public importance which is adequate and fairly reflects different viewpoints. See *id.* at 127; cf. Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 596 (1984) (reviewing ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983) (quoting Professor Pool, who argues that there never really was any spectrum scarcity in broadcast media)). Scarcity of broadcast frequencies does not characterize all communications vehicles regulated by the Communications Decency Act, as the court in *ACLU* pointed out. See *ACLU*, 929 F. Supp. at 873-76 (opinion of Dalzell, J.).

³¹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."). Judge Dalzell relied very heavily on the diversity rationale in striking down the Communications Decency Act provisions, noting that the Internet is one of the few media in today's world that disperses the power of speech into the hands of each of us, including the powerless and non-wealthy. See *ACLU*, 929 F. Supp. at 880-81; see also Krattenmaker & Powe, *supra* note 29, at 1721-22, 1730-31; Lawrence E. Spong, Note, *Cable Television Rights of Way: Technology Expands the Concept of Public Forum*, 20 U. MICH. J.L. REFORM 1293, 1299 (1987) (noting that Congress aimed to diversify fora in passing Cable Communications Policy Act of 1984).

³² As Justice Douglas stated in his concurrence in *CBS*, "one hard and fast principle which [the First Amendment] announces is that Government shall keep its hands off the press." *CBS*, 412 U.S. at 160-61 (Douglas, J., concurring); see also *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (invalidating statute that forbade publicly funded radio and television stations to engage in editorializing).

³³ Senator Patrick Leahy, speaking on the Senate Floor about the Communications Decency Act, noted that child pornographers, child molesters, and obscenity "purveyors" are already subject to prosecution for distributing obscenity harmful to minors and for soliciting minors into sexual activity. 142 CONG. REC. S1180 (daily ed. Feb. 9, 1996) (statement of Sen. Leahy); see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (holding that obscenity has no constitutional protection and may be banned by government in certain or all media).

velopments, such as the must-carry regulations imposed on the cable industry,³⁴ not only expand trust responsibilities to other media, but may signal that Congress finds "scarcity" irrelevant, though some of the judges deciding these cases do not.³⁵

Second, Congress has gone beyond what was necessary to meet the major public concern, namely, ensuring that parents and unwilling viewers can say "no" to unwanted material.³⁶ Such worries could have been met simply by mandating blocking technology for radio and television and perhaps for the Internet,³⁷ though even the Court is divided on whether the technology is sufficiently developed to meet public concerns.³⁸ Television and

³⁴ The Supreme Court has reviewed the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), 535(a) (relevant portion) twice, in *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (plurality) [hereinafter *Turner I*] and 1997 WL 141375 (April 1, 1997) [hereinafter *Turner II*]. The Act provided that cable operators were required to devote a portion of their channels to transmitting local broadcast stations. 47 U.S.C. §§ 534(b)(1)(B), 535(a). In *Turner I*, the Court carved out a middle ground between regulation of television and radio, and the print media, holding that the broadcast standard of earlier cases was not applicable to cable, but refusing to apply strict scrutiny. 114 S. Ct. at 2465. In *Turner II*, the Court held that the must-carry provisions were consistent with the First Amendment, as they were designed to preserve the benefits of free broadcast TV, promote dissemination of information from a multiplicity of sources, and promote fair competition. 1997 WL 141375. Thus, the Court held, such regulations are narrowly tailored to meet the needs of the 40% of households who do not have cable TV. See also Adam R. Spilka, Note, *An Excess of Access: The Cable Communications Policy Act of 1984 and First Amendment Protection of Editorial Discretion*, 8 CARDOZO L. REV. 317, 340-41 (1986) (noting differences between cable and broadcast and effect on First Amendment).

³⁵ See *Denver Area E.T.C.*, 116 S. Ct. 2374, 2418 (Thomas, J., concurring in part, dissenting in part); *ACLU*, 929 F. Supp. at 873 (opinion of Dalzell, J.).

³⁶ In *Sable Communications, Inc. v. FCC*, the Supreme Court noted "that 'the government may not reduce the adult population ... to ... only what is fit for children.'" *Sable*, 492 U.S. 115, 128 (1989) (quoting *Bolger v. Youngs Drugs Prod. Corp.*, 462 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957))); see also *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (recognizing compelling interest in protecting minors from literature that is not obscene to adults).

³⁷ For interactive computer services, the Communications Decency Act gives the FCC the power to describe measures to restrict access "which are reasonable, effective and appropriate" (e.g., blocking devices) but not to "approve, endorse, sanction, or permit the use of such measures." CDA § 502(2), 47 U.S.C.A. § 223(e)(6) (West Supp. 1996). However, blocking technology is available from major services such as CompuServe, America Online and Prodigy. See *CompuServe Reinstates Access to Banned Net Sites*, STAR TRIB. (Minneapolis-St. Paul), Feb. 14, 1996, at 4A. The opinions in the *ACLU* case note the availability of blocking software and the future availability of PICS rating services, and stress that the responsibility for making such decisions belongs with parents. *ACLU*, 929 F. Supp. at 838-42, 883 (opinion of Dalzell, J.).

³⁸ In *Denver Area E.T.C.*, for instance, Justice Breyer championed the use of

radio have been singled out for regulation in the past because "unwilling viewers" are unable to avoid a violent or offensive scene once they turn on their sets.³⁹ Blocking technology, however, makes it fully possible for viewers to "avert their eyes" and avoid the unwanted offense.⁴⁰

To further pursue the "new wine" metaphor, the media cases and the Internet controversy also demonstrate that neither Congress nor the Court is sure in which bottle to "pour" speech utilizing a non-traditional media such as telephone, computer, and television.⁴¹ Joining those commentators and lower courts that

devices in televisions that automatically identify and block certain programs, as less restrictive alternatives to a statutory ban, 116 S. Ct. at 2392. By contrast, Justice Thomas claims that reverse blocking and lockboxes will not successfully block randomly presented programs on leased channels without constant vigilance over programs; and that many will not have the expertise to use these devices. *Id.* at 4736.

³⁹ See *FCC v. Pacifica Found.*, 438 U.S. 726, 759-62 (1978) (plurality) (arguing that television warnings cannot protect viewers from unexpected contact and ability to tune out after hearing language does not undo previous hearing of indecent language).

⁴⁰ See Kilsheimer, *supra* note 1, at G1 (quoting Mike Godwin, legal counsel for Electronic Frontier Foundation, who believes that regulation of broadcast media is fundamentally different from computer communication); Barbara M. Ryga, Comment, *Cyberporn: Contemplating the First Amendment in Cyberspace*, 6 SETON HALL CONST. L.J. 221, 248-50 (1995) (describing "Internet Nanny" which screens child computer users; "George Carlin" software program available through Prodigy, which filters messages posted through service provider; and "InternetRate," proposed voluntary rating system for materials on Internet). *But see* Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1980-88 (1995) (arguing that it is easy to post images but difficult for services to screen them, due to need to rely on specific words without context).

By comparison, the court in the *ACLU* case noted the difficulty and cost of "tagging" information from the sender's end in order to ensure that people can be apprised of indecent material. *ACLU*, 929 F. Supp. at 845-48 (opinion of the Court), 856 (opinion of Sloviter, C.J.). With the CDA, Congress has chosen to prohibit some speech which has previously been protected in public fora. For instance, with a few exceptions such as school settings, *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988) (stating that educators may censor "vulgar or profane" material in high school newspaper produced as part of school's curriculum); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that delivering vulgar school assembly speech could be punished), the Court has not permitted complete censorship of "indecent" materials even for juveniles who are willing recipients. The standard for pornography targeting or depicting children is stricter than the standard for regulating obscenity. *See New York v. Ferber*, 458 U.S. 747, 756-64 (1982) (plurality); *Handelman*, *supra* note 27, at 724-25. Yet, as Justice Brennan points out, not all indecent material is obscene, even as to children. *Pacifica*, 438 U.S. at 767-68 (Brennan, J., dissenting); *see also Hazelwood*, 484 U.S. at 270-73 (reasoning that personal expression on school premises is subject to different censorship standard than speech in authorized school vehicles such as newspapers).

⁴¹ The courts' confusion over the various media involved is shared by the FCC, which regulates various forms of communication. The Communications Act of 1934,

have attempted to "pour" such speech into the public forum doctrine,⁴² the Court's discussions in both *Denver Area E.T.C.* and *Shea* show that the Court has not altogether rejected the "public forum" path for the new technologies or media, even when it speaks about statutory "deference." Behind the broadcast regulation regime lies the implication that the government owns the "property" of the airwaves, or at least their use rights, and therefore has the power to control them in the public interest.⁴³ The

Ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.) which established the FCC to avoid "bedlam on broadcast frequencies," distinguished broadcasters regulated by Title III (such as radio), common carriers such as telephone (Title II), and nonbroadcast radio spectrum users (e.g., CB and mobile radio users). Becker, *supra* note 29, at 818-19. The FCC's decision in 1970 not to separate data processing and communications into two separate industries became more problematic as time went by. *Id.* at 820-22. Meanwhile, cable, which at first was unregulated, came under the FCC umbrella and it was not until the FCC's 1976 Second Computer Inquiry that the FCC reorganized services into basic transmission and enhanced fields. *Id.* at 818-27.

⁴² See, e.g., *Forbes v. Arkansas Educ. Television Communication Internetwork Found.*, 22 F.3d 1423, 1429 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 500 (1994), and *cert. denied*, 115 S. Ct. 1962 (1995) (discussing public television as limited or non-public forum); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335-39 (D.C. Cir. 1985) (applying public forum doctrine to find First Amendment cause of action in suit brought by cable television provider who was forced to stop providing services to United States Air Force base); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1407-09 (9th Cir. 1985) (using public forum doctrine as one of several justifications for reversing dismissal of First Amendment claim by cable television corporation desiring access to public utility poles and conduits), *aff'd*, 476 U.S. 488 (1986); see also Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 377 (1988) (arguing that "rights of access under the Cable Act create a public forum on the operator's property without the operator's consent"); Andrew A. Bernstein, Note, *Access to Cable, Natural Monopoly, and the First Amendment*, 86 COLUM. L. REV. 1663, 1669-72 (1986) (discussing regulation of speech on cable); Wally Mueller, Comment, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Government Response*, 38 DEPAUL L. REV. 1051, 1099-1105 (1989) (arguing that public access channels are limited public fora); Spong, *supra* note 31, at 1299-1309 (arguing that cable companies should have speech rights in access public fora). But see John J. Brunelli, *Why Courts Should Not Use Public Forum Doctrine Analysis in Considering Cable Operators' Claims Under the First Amendment*, 24 AM. BUS. L.J. 541, 545-60 (1987) (positing that public forum analysis is not appropriate to cable regulation); cf. Spilka, *supra* note 34, at 342 (discussing cable television jurisprudence and need for greater First Amendment protections for cable industry); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 294-95 (1992) (arguing for abandonment of public forum doctrine because streets and parks no longer serve their common law roles as fora).

⁴³ See Sen. Larry Pressler, *Telecom Reform: It Ain't Over 'Til It's Over*, ROLL CALL, Mar. 11, 1996, reprinted in 142 CONG. REC. S2207 (daily ed. Mar. 15, 1996) (referring to electromagnetic spectrum as one of United States' "most valuable resources" and discussing Senate's plans to examine federal government's manage-

CDA, particularly with respect to the Internet controversy, may constitute a similar Congressional attempt to declare that the government should have certain ownership-like rights over transmission vehicles,⁴⁴ or computer networks, even though it does not own the actual mechanisms to enable these transmissions. Thus, the Act provides yet another good excuse to revisit the Supreme Court's public forum doctrine.

The tone of the CDA goes farther than the public forum doctrine, moving toward the notion of public property to be used for public good. However, if the Act is stripped of the assumption of government "ownership" over the means of communication, the justification for banning and blocking indecent material becomes more problematic. This is particularly true when the government is regulating what has traditionally been considered "private" speech: speech about private matters, such as sex, and speech involving a small number of participants communicating

ment and allotment of spectrum). The cases, however, differ in their emphasis on who ultimately "owns" the property. In *Red Lion Broadcasting Company v. FCC*, the Court states: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.... It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas ... rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. 367, 390 (1969).

⁴⁴ Although the United States government has not taken complete "ownership and control" over broadcasting, it has created a system which requires private licensing and government regulation. See *CBS*, 412 U.S. at 116; see also *Red Lion Broad. Co.*, 395 U.S. at 389 (quoting *National Broad. Co. v. United States*, 319 U.S. 190, 227 (1943) (stating that "Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations [T]o deny a station license because 'the public interest' requires it 'is not a denial of free speech'")). But see *Yosemite Park & Curry Co. v. United States*, 686 F.2d 925, 934 (Ct. Cl. 1982) (citing *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (stating that power of government to regulate "the airwaves and to issue licenses came not from its ownership of the airwaves but from its sovereign power to regulate certain activities—in the case of the FCC, interstate commerce")). For another view on the ownership of airwaves, see *Brandywine-Main Line Radio, Inc. v. FCC*, where the court asserted that "[t]o say that the airways or spectrum can be owned by anyone is simply to indulge in fantasy. Surely no one seriously supposes that the airways are a thing of nature which can be possessed, occupied, or used in any normal sense of the word." 473 F.2d 16, 67-68 n.21 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (quoting Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 152 (1967)). These cases have also been interpreted as transferred public trust cases. See Becker, *supra* note 29, at 840. For instance, in *CBS*, 412 U.S. at 117-18, Justice Burger underscored the propriety of requiring licensors with a privilege to assume the obligation of attention to matters of public concern. See *infra* notes 423-45 and accompanying text (discussing public trust doctrine).

in a secluded setting.⁴⁵

The literature on the public forum doctrine, especially since its resurrection by Harry Kalven in 1965,⁴⁶ is substantial,⁴⁷ and the cases numerous.⁴⁸ Some commentators have stressed the importance of public space for communication for essentially utilitarian reasons,⁴⁹ while others have recently focused on the

⁴⁵ Of course, not all speech on the Internet resembles a private conversation. Bulletin boards and chat rooms can involve dozens and hundreds of participants, and viewing a Web site is more passive than participatory. But in terms of the public-private distinction which the Supreme Court has used to determine whether a state may regulate the viewing of obscenity, an individual's solo visit to a Web site would seem more analogous to his viewing a pornographic movie in his living room, see *Stanley v. Georgia*, 394 U.S. 557, 568 (1969), than attending an adult theater, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 51 (1973), though perhaps not to his receiving pornography through the mail, see *United States v. Reidel*, 402 U.S. 351, 353 (1971), or transporting it for private use, see *United States v. Orito*, 413 U.S. 139, 140 (1973).

⁴⁶ Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

⁴⁷ See, e.g., David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143 (1992); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Adam M. Kanzer, *Misfit Power, the First Amendment and the Public Forum: Is There Room in America for the Grateful Dead?*, 25 COLUM. J.L. & SOC. PROBS. 521 (1992); Gary C. Leedes, *Pigeonholes in the Public Forum*, 20 U. RICH. L. REV. 499 (1986); Michael J. Mellis, *Modifications to the Traditional Public Forum Doctrine: United States v. Kokinda and Its Aftermath*, 19 HASTINGS CONST. L.Q. 167 (1991); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986); Brett W. Berg, Note, *Diminishing the Freedom to Speak on Public Property: International Society for Krishna Consciousness, Inc. v. Lee*, 26 CREIGHTON L. REV. 1265 (1993); Marianne E. Dixon, Note, *International Society for Krishna Consciousness, Inc. v. Lee: The Failure of the Public Forum Doctrine to Protect Free Speech*, 37 ST. LOUIS U. L.J. 437 (1993); Peter Jakab, Note, *Public Forum Analysis After Perry Education Association v. Perry Local Educators' Association—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545 (1986); Richard T. Pfohl, Note, *Hague v. CIO and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533 (1993); Pamela A. Schechter, Note, *Public Forum Analysis and State Owned Publications: Beyond Kuhlmeier v. Hazelwood School Dist.*, 55 FORDHAM L. REV. 241 (1986); Michael A. Scherago, Note, *Closing the Door on the Public Forum*, 26 LOY. L.A. L. REV. 241 (1992); *The Supreme Court, 1991 Term - Leading Cases*, 106 HARV. L. REV. 163, 279 (1992).

⁴⁸ See cases cited *infra* notes 92-128.

⁴⁹ See THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966) (stating that "expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self"); David A. J.

"communal worth" of free speech in public circles—an effort that espouses the protection of community interests.⁵⁰ Like the "communal" commentaries, this Article focuses on how the Supreme Court implicitly defines the present and future of our communities and the relationship between government and citizen when it uses the public forum doctrine.

Yet, my starting place is not the liberal presumption that speech functions as a vehicle towards achieving a more humane world in the future. In the liberal view, the harm which the Supreme Court's public forum doctrine and similar free speech compromises have caused is to lock us into the status quo, preventing progress toward the good society or the ideal human being. Liberals often justify free speech regimes politically, citing how speech will ultimately guide us towards better self-government. In their view, free speech is necessary if voters are to acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that demarks effective and humane citizenship.⁵¹ Others view free speech as necessary to the improvement (in traditional language) or authenticity (in modern terms) of both the human race and the individual person. Full "humanness," they claim, is inextricably dependent on increasing the freedom and depth of internal, interpersonal and communal dialogue. Richards, for example, describes how speech permits and encourages "the human capacity to create and express symbolic systems" which "nurture[] and sustain[] the self-respect of the mature person."⁵²

My concern is more immediate than whether we have achieved progress toward some far-off enlightened society.⁵³ I am concerned that the Court's public forum doctrine has made an intellectual contribution to the erosion of existing public life

Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

⁵⁰ See Stanley Ingber, *Rediscovering the Communal Worth of Individual Right: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990).

⁵¹ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 (stating that voters have access to knowledge, among other things, required to vote through human communications); see also William J. Brennan, Jr., *The Supreme Court and the Meiklejohn's Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11-12 (1965) (echoing Dr. Meiklejohn's statement that freedom of speech means presence of government).

⁵² See Richards, *supra* note 49, at 62.

⁵³ Justice Kennedy seems to take this view. See Day, *supra* note 47, at 184 (citing *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (plurality) (Kennedy, J., concurring)).

in America, that it has actively aided and abetted the destruction of community. In turning away from the idea that human beings are constituted by their public speech and action,⁵⁴ the Court's doctrine threatens to empty the public square.⁵⁵ By alienating the people from their own property, the Court encourages those who are needed in the public conversation to leave public space, eroding our common, public life. By subverting the traditional self-understanding of the role government and its employees play in public life, and altering the concept of citizenship, the Court's doctrine poses a significant danger to the relationship between the individual and government.⁵⁶ To explore this development, this article will focus first on the Court's discussion of the public forum doctrine in its most recent technology case, *Denver Area E.T.C.*, before returning to the traditional doctrine and to the place where the public forum story can best be told—the government building. Through attention to its traditional development, this article will suggest why new metaphors—new bottles—are necessary for both old public property and the new public “space” of computer/telecommunication. The Nine Justices' search for a metaphor is critical to our conception of public life, not just rhetorical window-dressing. Metaphors create our social realities; as they tell us who we will be in the future, they

⁵⁴ See HANNAH ARENDT, *THE HUMAN CONDITION* 156, 159 (1958). For Arendt, speech and action reveal the distinctness of the human person:

[O]nly man can express [his] distinction and distinguish himself, and only he can communicate himself and not merely something.... Through [speech and action], men distinguish themselves instead of being merely distinct; they are the modes in which human beings appear to each other, not indeed as physical objects, but *qua* men.

... In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world

Id. at 159.

⁵⁵ RICHARD SENNETT, *THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM*, 12-15 (1978) (stating that public squares are intended to “intermix persons and diverse activities”); see also RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE* 86-87 (1984).

⁵⁶ My other concerns are social and ethical and will be discussed elsewhere. The social concern is that the public forum doctrine exacerbates the split between the public and private in American life by relegating speech to the private sphere with the same implications for public life that the Court's marginalization of religious belief has had for religion. The ethical claim is that the public forum doctrine adopts the liberal and, some have argued, patriarchal view of the stranger as enemy, and thereby heightens the perception of the public place as a place of danger rather than of community.

also make our experience coherent.⁵⁷

Until the Internet argument, *Denver Area E.T.C.* most clearly delineated the quarrel within the Court about using a property metaphor to define the new communications media. *Denver Area E.T.C.* considered three provisions of the Cable Television Consumer Protection and Competition Act of 1992,⁵⁸ modified slightly in the Telecommunications Act of 1996.⁵⁹ The first, section 10(a), permitted cable operators to ban patently offensive⁶⁰ material from access channels they lease to others. This section of the Act was upheld by the Court as an appropriately tailored remedy to achieve the "extremely important justification ... [of protecting] children from exposure to patently offensive sex-related material."⁶¹

The *Denver Area E.T.C.* plurality opinion followed the decision in *Pacifica*⁶² in balancing the medium's accessibility to children, its invasion of a homeowner's privacy, and the "extreme" importance of the state's protective interest against the only moderate restriction on speech. This opinion suggests that the Court is likely to uphold the 1996 Act's modification of the rule permitting cable operators to ban a program on a leased channel which "contains obscenity, indecency or nudity."⁶³

⁵⁷ G. LAKOFF AND M. JOHNSON, METAPHORS WE LIVE BY 156 (1980).

⁵⁸ 106 Stat. 1486, § 10(a), 10(b), 10(c), 47 U.S.C. §§ 532(h), 532(j) and 531 note.

⁵⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat. 56, §§ 503-06, 640-41. The most important modifications require cable operators to scramble or block indecent programming without charge for nonsubscribers upon subscriber requests, 47 U.S.C.A. § 560(a), and applies the mandatory scrambling requirement to "sexually explicit adult video service programming." Sections 640 and 641 permit cable operators to refuse to transmit indecent or obscene materials (or those containing nudity) over public or leased access channels. See CDA § 506(a), 47 U.S.C.A. §§ 531(3), 532(c)(2).

Operators must also limit children's access to adult material by limiting such programming to hours of the day determined by the FCC "when a significant number of children are [not] likely to view it." CDA § 505(a), 47 U.S.C.A. § 561. Previous law contemplated limited access by blocking a single channel on which all indecent programs would be put. 47 U.S.C. § 532(j) (1994).

⁶⁰ Targeted material included that which "the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner." 47 U.S.C. § 532(h)(a).

⁶¹ *Denver Area E.T.C.*, 116 S. Ct. 2374, 2386 (1996).

⁶² *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)(plurality).

⁶³ Section 506(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified at 47 U.S.C. 532(c)(2). Of course, speech advocates might argue indecent material or nudity does not rise to the level of patent offense regulated by the 1992 statute. However, if *Pacifica* is indeed the standard, the Court can rely on the fact that it used the terms "indecent" and "patently offensive" inter-

By contrast, the 1992 Act's requirement that operators *must* scramble or block patently offensive programs was overturned by the Court as an unjustified limitation on speech, since less speech-restrictive alternatives are available, like scrambling sex-dedicated channels, blocking on subscriber request, and using V-chips or lockboxes.⁶⁴ The *Denver Area E.T.C.* Court further invalidated the government's transfer of the discretion for blocking patently offensive programs from community programmers to cable operators on public access channels. The Court reasoned that the transfer of the responsibility back to the operator to decide whether to offer patently offensive programs would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear.⁶⁵ Given the Court's rationale, the 1996 additions, which permit operators to block obscene, indecent or nude materials on public access stations, would also seem at risk.⁶⁶

Justice Kennedy's concurring/dissenting opinion in *Denver Area E.T.C.*, joined by Justice Ginsburg, flatly adopted the public forum doctrine as the controlling metaphor for cable. In his view, cable public access channels are a dedicated public forum, despite the fact that they utilize property whose title is held by the cable operator.⁶⁷ In support of this conclusion, Kennedy noted the low cost of access; first-come, first-serve availability of the channels; control and responsibility over shows which rests in the programmer; and frequent use of public facilities to produce and/or transmit such programs.⁶⁸

Indeed, Kennedy suggested that local government franchise contracts with cable authorities have created a property easement in cable property, and partially stripped cable operators of the "right to exclude" programmers from using the property for particular purposes.⁶⁹ Since the government has in turn opened

changeably in that opinion. See 438 U.S. at 731-32.

⁶⁴ 116 S. Ct. 2374, 2397 (1996).

⁶⁵ *Id.* at 2387.

⁶⁶ Section 506(a) of the Telecommunications Act of 1996, to be codified at 47 U.S.C.A. § 531(a), provides that "a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity."

⁶⁷ *Denver Area E.T.C.*, 116 S. Ct. at 2409-10. Kennedy describes leased cable channels as common carriers with appropriate obligations. *Id.* at 2405, 2412.

⁶⁸ *Id.* at 2409.

⁶⁹ *Id.* at 2409-10.

its easement up to the public for general speech uses, with one exception, it has created a fully dedicated public forum, where content regulations will be subject to strict scrutiny, rather than a limited public forum.⁷⁰

Justice Thomas' concurrence/dissent took issue with the public forum characterization, but he did not depart from the property metaphor in the least. For Thomas, *Red Lion* did not apply because "[c]able systems are not public property. Rather, cable systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum."⁷¹ Indeed, he contrasted such property with public forum-available property, namely "property the government owns outright, or in which the government holds a significant property interest consistent with the communicative purpose of the forum to be designated."⁷² The implication, for Justice Thomas, was that since neither the government nor especially a cable programmer seeking access has any property-type interest in cable systems, the only speech interest to be considered is the cable operator's.⁷³ However, for Justice Thomas, the state's compelling interest in protecting children, and supporting parents' moral upbringing of their children, was narrowly served by Congressional bans of indecent material, since parent-initiated blocking alternatives do not easily do the job.⁷⁴

Given the two votes he garnered, Justice Kennedy's public forum position would not seem so significant if not for two facts. First, most members of the Court challenged him on this issue, rather than ignoring his argument in favor of their own distinctions, e.g., the cable act was "forced speech" by the operator,⁷⁵ the Act failed (or did not fail) the strict scrutiny test,⁷⁶ or that a balancing test should be deployed instead of strict scrutiny.⁷⁷ Jus-

⁷⁰ Indeed, Kennedy likens the case not to a bandshell dedicated solely to classical music, as the plurality opinion claims, which would create a limited public forum, but to a band shell which permits all types of music but rap, which would constitute content discrimination in a full public forum. *Id.* at 2414.

⁷¹ *Denver Area E.T.C.*, 116 S. Ct. at 2426.

⁷² *Id.* at 2427.

⁷³ *Id.* at 2427-28.

⁷⁴ *Id.* at 2429.

⁷⁵ *Id.* at 4735-36 (Thomas, J., concurring in part and dissenting in part).

⁷⁶ *Denver Area E.T.C.*, 116 S. Ct. at 2412-13.

⁷⁷ *Id.* at 2384 (plurality opinion).

tice Breyer noted the inflexibility of the public forum doctrine⁷⁸ and suggested that it excluded important interests, such as those of the cable operator.⁷⁹

Separately, Justice Stevens expressed concern that application of the public forum doctrine would chill the government's desire to open new forums, such as public access cable channels, on an experimental basis, though he did not expressly reject the doctrine for public access channels.⁸⁰ Justice Souter concentrated on the "fluidity" of the technology, and the need for the Court to proceed incrementally rather than categorically under the public forum doctrine so it can "[f]irst, do no harm."⁸¹ And, of course, Justice Thomas denied that public regulation can transform private property owned by cable operators, even where the government exacts a contractual promise of access, noting that such public forums can only be found where private property is formally dedicated for streets and parks.⁸²

Justice Kennedy's public forum approach was also important because the plurality did not wholly reject the public forum doctrine as applicable to the new technology. Rather, Justice Breyer merely suggested that it was "unnecessary, unwise" and "too premature" for the Court "*definitively* to decide whether or how to apply the public forum doctrine" to cable, and that the case could be decided without resort to the categories created by the doctrine.⁸³ Indeed, Justice Breyer took the bait, by querying whether the 1992 provisions made a "*totally* open 'forum'" into a limited public forum,⁸⁴ and by siding with Justice Kennedy against Justice Thomas on the public access channel—dedicated easement analogy.⁸⁵ Thus, the public forum debate in *Denver Area E.T.C.* is likely to continue to surface in the new technology cases as the contours of the problems are defined.

⁷⁸ *Id.* at 2384-85.

⁷⁹ *Id.* at 2385.

⁸⁰ Stevens does argue that the leased access channels do NOT create a public forum. *Id.* at 2399.

⁸¹ *Denver Area E.T.C.*, 116 S. Ct. at 2402.

⁸² *Id.* at 2427.

⁸³ *Id.* at 2384.

⁸⁴ *Id.* at 2385.

⁸⁵ *Id.* Justice Breyer notes that the requirement to reserve capacity for public access "is similar" to reserving land for streets and parks in approving a subdivision. *Id.* at 2394. In this part of the opinion, Breyer is joined by Stevens and Souter, making five votes (with Kennedy and Ginsburg) for a possible public forum approach in the future.

As suggested above, a critical Pandora's box that Justice Kennedy's opinion in *Denver Area E.T.C.* re-opens is the question about what and whose property is governed by the public forum doctrine. In addition to reaffirming that public forums are not limited to "physical gathering places" but may include non-real property,⁸⁶ Justice Kennedy pointed out that even quintessential public forums often traverse privately titled lands.⁸⁷

To Justice Thomas's outright denial that privately owned property can ever become a public forum through government regulation,⁸⁸ Justice Kennedy cleverly pointed out that some communications vehicles, such as cable, require the government to contribute some of its property—in the case of cable, easements to string cables under public lands. When a new communications vehicle requires not just the government's oversight but its contribution of resources, the contractual scheme created begins more to resemble shared property rights than governmental regulation, especially if the government's bargained-for restrictions involve speech-related promises by the private owner. The line between co-ownership and regulation may be easier to draw in the case of some technologies, where no government funds, equipment or land are necessary; and harder to draw in others. That these categories may be distinct, however, poses the possibility that even Justice Thomas' private property may be converted into public forum-available property in that "the government holds a significant property interest consistent with the communicative purpose of the forum to be designated."⁸⁹

The unanswered questions that *Denver Area E.T.C.* and the Internet pose make it important to revisit the private property metaphor in traditional settings to see what assumptions it makes about individual relationships with government. Heeding Justice Souter's admonition to "do no harm," this Article will focus more on what is problematical about the existing metaphor than propose what alternatives should take its place for the new communication technologies. However, if we can define what is happening symbolically through the public forum doctrine, we are on the way to reconstructing an ethics of citizenship and gov-

⁸⁶ Kennedy cites *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510 (1995). *Denver Area E.T.C.*, 116 S. Ct. at 2409.

⁸⁷ *Id.* at 2409-10.

⁸⁸ *Id.* at 2427.

⁸⁹ *Id.*

ernment servanthood that will help us name new metaphors for the new world.

I. ONE MORE TIME ON THE PUBLIC FORUM DOCTRINE

Justice Oliver Wendell Holmes is credited with the first enunciation of the public forum doctrine, a doctrine particularly significant because it mixed public power and private right doctrines, two ideas traditionally kept separate.⁹⁰ While the historical development of the doctrine is considerably more complex,⁹¹ Holmes' property metaphor is a good starting point for the discussion.

In *Commonwealth v. Davis*,⁹² then-Massachusetts Supreme Court Justice Holmes argued that prohibiting public speaking "in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."⁹³ By analogizing the government to the owner of a house, and equating public lands with private real property belonging to that owner, Justice Holmes set the stage for later public forum arguments.

These distinctive metaphors of property and person, emanating from such a distinguished jurist, were pursued in Supreme Court cases that followed. In *Hague v. Committee for Industrial*

⁹⁰ See, e.g., MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 41 (1967) (quoting Montesquieu's distinction between political laws from which we acquire liberty—the Roman imperium—and civil laws—dominium—governing individuals' rights over things); Ingber, *supra* note 50, at 24-26 (explaining that constant tension exists between two conflicting traditions of individualism and community).

⁹¹ Several pre-1919 cases, such as *In re Frazee*, 30 N.W. 72 (Mich. 1886), explored protection of speech through challenges to the limitation of government powers, although most such challenges were unsuccessful. See Pfohl, *supra* note 47, at 547 & n.72 (explaining that most state courts faced with public speech cases prior to 1919 decided to uphold municipal restrictions). See generally *id.* at 536, 538-55 (providing historical development of public speech concepts from Civil War through World War II).

⁹² 39 N.E. 113 (Mass. 1895), *aff'd*, 167 U.S. 43 (1897).

⁹³ *Id.* at 113. The Supreme Court unanimously adopted Holmes' position, noting that that the right to exclude, being the greater property power, included the right to constrain use. See *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897); see also *Kalven*, *supra* note 46, at 13 (explaining that U.S. Supreme Court endorsed Holmes' decision and rationale). However, in a case which seems to contradict this metaphor, Judge Holmes held that the City of Boston could not be held liable for damages for shying a horse by firing a cannon on Boston Common since the Common was held "not for emolument or revenue ... but public benefit," so its use can be regulated. SILAS BENT, *JUSTICE OLIVER WENDELL HOLMES* 239-40 (1932).

Organization,⁹⁴ Justice Roberts argued that, “[w]herever 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.”⁹⁵ Thus, Justice Roberts implicitly acceded to Holmes’ metaphors—that the government is a person and that public property is “his” private property—yet amended them using easement theory.⁹⁶ Under Roberts’ version of the public trust doctrine, the government might be the owner, but the public has obtained an easement over the government’s private land.

Although mentions of Holmes’ doctrine occasionally surfaced, and the Court thereafter constructed a rule for judging regulation of public forum speech,⁹⁷ Harry Kalven is often credited with reviving Justice Holmes’ words, and Justice Roberts’ caveat, in his 1965 article.⁹⁸ Kalven sought to constitutionally justify the exercise of speech rights in the civil rights protest cases, proposing that we reconsider public property as a “public forum.”⁹⁹ The issue he raised was whether the “street [as opposed to other public places such as swimming pools which are dedicated to recreational uses such that a discussion of such

⁹⁴ 307 U.S. 496 (1939) (plurality).

⁹⁵ *Id.* at 515 (Roberts, J., concurring). However, Justice Butler noted in his dissent that the ordinance was, in principle, no different from that in the *Davis* case. *Id.* at 533 (Butler, J., dissenting).

⁹⁶ Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (discussing that public forum right is predicated upon established common law notions of adverse possession and public trust); see also Pfohl, *supra* note 47, at 536-38 (tracing three theories underlying modern public forum doctrinal analysis to *Hague*).

⁹⁷ See Stone, *supra* note 96, at 239-41 (citing three cases decided within four years of *Roberts* which described propositions that would govern public forum: *Jamison v. Texas*, 318 U.S. 413 (1943) (holding that assertion of title by state does not permit flat ban on use of streets and parks for speech purposes); *Schneider v. State*, 308 U.S. 147, 161 (1939) (holding that courts must “weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of [speech] regulation”); and *Cox v. New Hampshire*, 312 U.S. 569 (1941) (holding that statute’s time, place, and manner restriction is fair accommodation between public safety and order, and First Amendment rights)).

⁹⁸ Kalven, *supra* note 46, at 12-13; see Day, *supra* note 47, at 154 (explaining that many credit Kalven for public forum doctrine’s separate title and identity); Kenneth L. Karst, *Public Enterprise and the Public Forum: A Comment on Southern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 248 n.7 (noting that Kalven’s publication may have triggered public forum doctrine).

⁹⁹ Kalven, *supra* note 46, at 11-12. Professor Geoffrey Stone described this as a “*Fora Americana*.” Stone, *supra* note 96, at 233.

places as public forums is “unpersuasive”] ... [is] a kind of public hall, a public communication facility?”¹⁰⁰ In other words, is the street private property owned (with its rights of use) by the people rather than the government?¹⁰¹ Yet Kalven failed to pursue the implications of his metaphor, perhaps not knowing where it would lead.

Kalven’s question effectively resurfaced in *Grayned v. City of Rockford*¹⁰² and *Tinker v. Des Moines Independent Community School District*.¹⁰³ Both cases focused on whether differing public uses of a particular forum, including speech, were compatible and could therefore be simultaneously exercised.¹⁰⁴ In what was known as the “incompatibility” doctrine, short-lived as a Supreme Court majority test,¹⁰⁵ the Supreme Court did an about-

¹⁰⁰ Kalven, *supra* note 46, at 12.

¹⁰¹ *Id.* at 16 (explaining that Roberts called for balancing of personal rights and public convenience).

¹⁰² 408 U.S. 104 (1972).

¹⁰³ 393 U.S. 503 (1969).

¹⁰⁴ Even prior to *Grayned* or *Tinker*, contextual interest-balancing was sometimes employed by justices who dissented from opinions upholding speech and assembly rights. See *Edwards v. South Carolina*, 372 U.S. 229, 239-42 (1963) (Clark, J., dissenting) (arguing that good faith determination that disorder was imminent during civil rights protests by State House justified arrest, so long as there was no viewpoint discrimination). The incompatibility doctrine did not rely on the Kalven analysis, but Kalven’s article is occasionally linked with language similar to the doctrine. See, e.g., *Police Dep’t v. Mosely*, 408 U.S. 92, 100-01 (1972) (citing *Tinker* which uses incompatibility doctrine).

¹⁰⁵ The Court turned to the public forum doctrine in place of the incompatibility test just two years after *Grayned*. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality); Day, *supra* note 47, at 157-58 (stating that *Lehman* signaled end of *Grayned*’s approach). Justices Brennan and Marshall later returned to the incompatibility tests in concurring and dissenting opinions. See, e.g., *United States v. Grace*, 461 U.S. 171, 185 (1983) (Marshall, J., concurring in part and dissenting in part); *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 134-35 (1981) (Brennan, J., concurring). Justices Kennedy, Souter, Blackmun, and Stevens advocated a related sort of incompatibility standard in *International Society for Krishna Consciousness Inc. v. Lee*, 505 U.S. 672, 698-99 (1992) (plurality) (Kennedy, J., concurring) [hereinafter *ISKCON*]. Kennedy’s three-part test focuses on the physical similarity of the forum with other public fora, past acquiescence to broad public access to the property, and whether the speech would interfere with the government’s intended use of the property. *Id.*

Moreover, some lower courts have grafted a form of incompatibility doctrine onto the public forum analysis of *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983). For instance, in *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.*, 579 F. Supp. 90, 95 (S.D.N.Y. 1984), *rev’d*, 745 F.2d 767 (2d Cir. 1984), the court went through the *Perry* analysis to determine if there was a dedicated public forum, but then decided that the First Amendment exercise could be banned only when it is “‘unavoidably incompatible’ with the use to which the

face on the question of the public forum. The Court did not ascertain who was the owner of public property, what his property boundaries were, or whether anyone gained an easement interest in his property, by sale or prescription. Rather, the incompatibility doctrine presumed that the people have the right of access to government property. *Grayned* and *Tinker* questioned whether the public's uses of a particular forum were compatible with each other—whether the speech use would disrupt the non-speech use—and thus, whether they could both coincide at the same time.¹⁰⁶ The incompatibility cases are the best available evidence that at least some members of the Court have presumed that “public” property belongs to the people, rather than the government.

The Court's incompatibility cases, however, go somewhat beyond the property scrutinized by Kalven—the property physically situated within the people-owned easement—the street or sidewalk.¹⁰⁷ Both *Grayned* and *Tinker* involved potentially disruptive speech on a sidewalk just outside a public school. Both thus ask whether the speaker is protected if his voice strays beyond the physical boundaries of the public easement, or if the speaker himself physically strays beyond those boundaries. Nevertheless, Kalven's proposal that “Robert's Rules” be used as the governing metaphor within the public forum and his query whether it is not “possible, if difficult, to work out mutually satisfactory arrangements,” come to fruition in the incompatibility doctrine.¹⁰⁸ That doctrine emphasizes the desirability of accommodating both speech and non-speech interests unless the harm caused by the speech to the non-speech interest is both concrete and substantial.¹⁰⁹

At about this same time, the private ownership metaphor

property is dedicated.” Moreover, the district court used the *Grayned* language when asking whether the actual distribution of newspapers through newsracks was “incompatible with or disruptive of the transportation-related function of the forum.” *Id.*

¹⁰⁶ *Grayned*, 408 U.S. at 116; *Tinker*, 393 U.S. at 509, 512-13.

¹⁰⁷ Kalven, *supra* note 46, at 12. “When the citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement.” *Id.* at 13. *Grayned* and *Tinker* involve potentially disruptive speech on a public school sidewalk within hearing distance of the school, and political speech within the public school. *Grayned*, 408 U.S. at 105; *Tinker*, 393 U.S. at 504-05.

¹⁰⁸ Kalven, *supra* note 46, at 27.

¹⁰⁹ See *Tinker*, 393 U.S. at 512-13 (stating that constitutional rights of students could not be abridged absent showing that students' activities materially and substantially disrupt work and discipline of school).

once again emerged in Justice Black's opinions employing similar language¹¹⁰ to decry civil rights demonstrations in *Brown v. Louisiana*¹¹¹ and *Adderley v. Florida*.¹¹² It was not until after 1972, in *Police Department of Chicago v. Mosley*, however, that the Holmes private ownership metaphor began to garner impressive support from members of the Court,¹¹³ including Justices Blackmun,¹¹⁴ Rehnquist,¹¹⁵ Stewart,¹¹⁶ White,¹¹⁷ and O'Connor,¹¹⁸ as well as detractors like Justice Stevens.¹¹⁹

The most significant doctrinal expansion of the Holmes metaphor as it focused on property language occurred in 1983 in *Perry Education Association v. Perry Local Educators' Association*.¹²⁰ In *Perry*, the Court devised a three-category approach to

¹¹⁰ Interestingly, although he does not cite Holmes, Justice Black employs effectively the same language, noting that "[the First Amendment] does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes...." *Brown v. Louisiana*, 383 U.S. 131, 166 (1966) (plurality) (Black, J., dissenting).

¹¹¹ 383 U.S. 131, 151 (1966) (plurality) (Black, J., dissenting).

¹¹² 385 U.S. 39 (1966).

¹¹³ Justice Stevens has claimed that it does not "illuminate the interests at stake" in public forum cases. The Honorable John Paul Stevens, *The Freedom of Speech: Inaugural Address, Ralph Gregory Elliot First Amendment Lecture at Yale Law School* (Oct. 27, 1992), 102 YALE L.J. 1293, 1302 (1993) (explaining that attaching label of true public forum to certain places guarantees "nothing more than freedom from discriminatory treatment").

¹¹⁴ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality) (holding that city advanced reasonable legislative objectives in proprietary capacity and that, accordingly, there was no First Amendment violation).

¹¹⁵ See *ISKCON*, 505 U.S. at 679 (holding that airports are nonpublic fora); *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 132 (1981); *Parker v. Levy*, 417 U.S. 733 (1974) (plurality) (stating that letter box does not constitute traditional public forum).

¹¹⁶ See *Greer v. Spock*, 424 U.S. 828, 835-36 (1976) (citations omitted) (stating that the fact that people are permitted to freely visit place owned or operated by government does not make such place a public forum).

¹¹⁷ See *United States v. Grace*, 461 U.S. 171, 183-84 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

¹¹⁸ See *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Professor Mellis notes the sharp contrast between Justice O'Connor's opinions in *Frisby v. Schultz*, 487 U.S. 474 (1988) (arguing that sidewalks were always public fora) and in *Kokinda*, 497 U.S. 720, 721 (1990) (noting that post office sidewalk did not have characteristics of quintessential public sidewalks, and therefore was not public forum). Mellis, *supra* note 47, at 188-89.

¹¹⁹ Stevens, *supra* note 113, at 1302.

¹²⁰ *Perry*, 460 U.S. at 37. Many lower courts have followed the *Perry* analysis. See, e.g., *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 291-92 (E.D. Pa. 1991); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1287 (M.D. Pa. 1991); *Gannett Satellite*

understanding the property rights of the government in publicly owned real estate.¹²¹ Each of these categories followed the private ownership metaphor. In the first category—quintessential or traditional public forums—reasonable time, place, and manner restrictions are permitted¹²² but content restrictions are largely banned.¹²³ In short, quintessential forums are Justice Roberts' speech easements.¹²⁴ Although in some cases, such forums are established by long-time or immemorial actual use of the property,¹²⁵ the *Perry* Court continued the fiction of general

Info. Internetwork, Inc. v. Berger, 716 F. Supp. 140, 148-49 (D.N.J. 1989), *aff'd in part, rev'd in part*, 894 F.2d 61 (3d Cir. 1990); United Black Community Fund Inc. v. City of St. Louis, 613 F. Supp. 739, 742-43 (E.D. Mo. 1985) (stating that city workplace is not public forum for solicitation of contributions), *aff'd*, 800 F.2d 758 (8th Cir. 1986). One interesting contrast in which clashing private property metaphors were used can be seen in *Pacific Gas & Electric Company v. Public Utilities Commission*, 475 U.S. 1, 17-18 (1986), where the Court decided that a utility commission's right to require billing envelopes to carry political messages did not depend on who owned the extra space in the envelopes.

¹²¹ *Perry*, 460 U.S. at 45-46. The Court does not consistently apply the *Perry* analysis. For instance, in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994) (plurality), the Court held that injunctions carry "greater risks of censorship and discriminatory application" than ordinances, *id.* at 764, and so applied a higher standard than the time, place, and manner analysis, *i.e.*, whether the injunction burdens no more speech than necessary to serve a significant government interest. *Id.* at 765.

¹²² See *Gannett Satellite Info. Network, Inc. v. Township of Pennsauken*, 709 F. Supp. 530, 536 (D.N.J. 1989) (stating that newspaper vending boxes on public streets are in public forum, but city ordinances controlling placement and box form are reasonable time, place, and manner restrictions).

¹²³ In traditional public fora, the Court has required content restrictions to meet the strict scrutiny test. See, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). There has, however, been litigation over what constitutes a content-based restriction. See *Madsen*, 512 U.S. at 762 (rejecting argument that injunction restricting actions of abortion protesters at clinic was content or viewpoint regulation, noting that any injunction applies "only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group ... because of the group's past actions in the context of a specific dispute"). *Id.* In *Madsen*, the Court re-described the question in such cases as whether the government regulates speech on the basis of "hostility—or—favoritism towards the underlying message expressed." *Id.* at 763 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)). But see *Thomason v. Jernigan*, 770 F. Supp. 1195, 1197 (E.D. Mich. 1991) (holding that Planning Commission's decision to vacate cul-de-sac by abortion clinic because of demonstrations is content restriction); *Pineros Y Campesinos Unidos Del Noroeste v. Goldschmidt*, 790 F. Supp. 216, 218 (D. Or. 1990) (striking down statute limiting picketing of agricultural lands as content regulation).

¹²⁴ See *Perry*, 469 U.S. at 45-46 (citing Justice Roberts' landmark opinion in *Hague v. CIO*, 307 U.S. 496 (1939) (plurality)).

¹²⁵ See *Grutzmacher v. Public Bldg. Comm'n*, 700 F. Supp. 1497, 1500 (N.D. Ill. 1988) (describing public uses of Daly Plaza since 1960s). In some cases, other crite-

adverse possession that it confirmed in *United States v. Grace*¹²⁶ but later denied in *United States v. Kokinda*.¹²⁷ That is, the Court concluded that if the public has used particular streets and parks for free expression from time immemorial, all streets and parks (whatever their actual use) are easements for the public's speech.¹²⁸

According to the *Perry* Court, non-traditional dedicated public forums, the second category, are subject to the same speech rules as quintessential forums, but only where the government owner has "dedicated" them to such speech.¹²⁹ Following the dedication theory, the owner (the government) must have intended to make a dedication of his land¹³⁰ to specified public uses,¹³¹ and must have made an act of dedication through a

ria are also used to reach this decision. *See, e.g.*, *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (recognizing religious organization's right, subject to reasonable regulation, to distribute literature and solicit funds in Dallas Airport); *U.S. Southwest Africa/Namibia Trade & Culture Council v. United States*, 708 F.2d 760, 761 (D.C. Cir. 1983) (finding that First Amendment freedoms apply in Dulles Airport).

¹²⁶ 461 U.S. 171 (1983).

¹²⁷ 497 U.S. 720 (1990) (plurality).

¹²⁸ *See Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality) ("[S]treets and parks ... have immemorially been held in trust for the use of the public. "); *see also Madsen*, 512 U.S. at 761 (noting previous public use in finding public forum). Some courts have extended this assumption to other public places, such as state and federal capitol complexes and similar buildings. *See, e.g.*, *ACT-UP v. Walp*, 755 F. Supp. 1281, 1287 (M.D. Pa. 1991) (extending to Pennsylvania state capitol rotunda, but not gallery of House chamber); *Reilly v. Noel*, 384 F. Supp. 741, 746 (D.R.I. 1974) (State House rotunda); *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C. 1972) (U.S. Capitol grounds), *aff'd mem.*, 409 U.S. 972 (1972).

¹²⁹ *Perry*, 460 U.S. at 45-46.

¹³⁰ Courts have held events, as well as land, to be public fora. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 570-71 (9th Cir. 1984) (finding municipal amphitheater to be public forum); *Irish Subcomm. v. Rhode Island Heritage Comm'n*, 646 F. Supp. 347, 352 (D.R.I. 1986) (stating that public ethnic festival, held on public property, is public forum); *North Shore Right to Life Comm. v. Manhasset Am. Legion Post No. 304*, 452 F. Supp. 834, 837 (E.D.N.Y. 1978) (declaring Memorial Day Parade to be public forum). *But see Committee for Creative Non-Violence v. Hodel*, 623 F. Supp. 528, 533 (D.D.C. 1985) (holding Christmas Pageant of Peace not public forum). *See generally* James C. Farrell, Comment, *Should Irish Eyes Be Smiling? The Hidden Issue of State Action in Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 70 ST. JOHN'S L. REV. 313 (1996) (analyzing free speech rights of private parade organizers). Similarly, vehicles of communication such as newspapers may not be public fora. *See Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 151 (D. Neb. 1986) (holding that university newspaper had not been dedicated as public forum), *aff'd*, 829 F.2d 662 (8th Cir. 1987).

¹³¹ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (holding that government does not create public fora through inaction or by allowing limited discussion, but through intentional dedication to public debate);

writing or other action evidencing the owner's intent.¹³² Apparently, such intent to dedicate must be particularly clear when it is made by the government.

The Supreme Court has suggested that even permitting some speech activities on public property¹³³ or opening up public property to general access¹³⁴ does not amount to a dedication of the property for speech purposes. Justice Thomas continued this theme in *Denver Area E.T.C.*, when he suggested that public forum analysis applies only to private property formally dedicated as a public easement, such as subdivision dedications required

Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 293 (E.D. Pa. 1991) (declaring school limited public forum because of governmental intent to allow school to accommodate broad types of communications among students).

¹³² "Dedication requires an offer by the owner of the land and an acceptance by the public.... [It] may be express or implied by language or circumstances." RE-STATEMENT (THIRD) OF PROPERTY § 2.18 cmt. d (Tentative Draft No. 3, 1993); see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (finding city's requirement that commercial property owner who planned to expand must dedicate property for public use constituted governmental taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (holding that under Fifth Amendment, California Coastal Commission could not require landowners who desired building permit to provide public easement across their property without just compensation). As in a private property dedication, courts may also look to the scope of the use granted in determining whether a forum is fully public or limited to certain speech uses. See *Slotterback*, 766 F. Supp. at 292.

¹³³ See *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269 (1988) (holding that school newspaper is not public forum); see also Leedes, *supra* note 47, at 521 (discussing need of governmental intent in dedication of non-traditional forum for public discourse). Similarly, public access alone does not create a public forum. See *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (stating that public housing authority is not public forum by virtue of public access). But see *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1209 (D. Utah 1986) (declaring that Student Bill of Rights including free speech and assembly clauses with time, place, and manner limitation creates limited public forum).

However, the frequency of communicative activity is often used in other cases to establish the existence of a public forum. See *Chabad-Lubavitch of Georgia v. Harris*, 752 F. Supp. 1063, 1068 (N.D. Ga. 1990) (finding state capital plaza used repeatedly for demonstrations is public forum; but private menorah may be banned under reasonable time, place, and manner restrictions).

¹³⁴ *ACT-UP v. Walp*, 755 F. Supp. 1281, 1286 (M.D. Pa. 1991) (holding that open House gallery at State Capitol is not speech dedication even when "public is allowed to roam about unhindered"); see also *Daniel v. City of Tampa*, 843 F. Supp. 1445, 1447 (1993) (open housing authority). Some have even argued that the selection of only one speaker, such as one cable company franchise, evidences an intent not to dedicate. See, e.g., Spong, *supra* note 31, at 1302. This claim would also be consistent with the Court's finding that the school mailboxes in *Perry* were not a public forum because selective access was granted to certain organizations. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1993).

by municipalities as a condition of rezoning.¹³⁵

In *Perry*, the Court effectively found neither an intent to dedicate teachers' mailboxes to general discussion about public issues or even labor issues, nor an act that consummated a dedication, notwithstanding a prior act of permitting Scout flyers and PTA notices to be placed in teachers' mailboxes.¹³⁶ Consistent with the rights of a private property owner, *Perry* and other cases establish that the government can close a dedicated public forum altogether for any apparent reason, except to silence the content of particular speech.¹³⁷

Finally, the third category in the *Perry* analysis consists of nonpublic forums in which the government has exercised its property right of exclusion. In such forums the government has fairly plenary power.¹³⁸ Its rights are distinguished from the rights of a private property holder in two respects. First, unlike the private property owner, the government's regulations must be "reasonable." Second, in contrast to the private property owner, the government cannot choose between viewpoints on the same subject, although it can ban a subject from discussion altogether.¹³⁹

The *Denver Area E.T.C.* case also affirms the Court's occasional suggestions that there might be a fourth category of pub-

¹³⁵ *Denver Area E.T.C.*, 116 S. Ct. at 2426.

¹³⁶ *Perry*, 460 U.S. at 47.

¹³⁷ *Id.* at 46.

¹³⁸ *Id.* Professor Day notes that the public forum doctrine gives the government two bites at the apple, one at the public forum threshold and the other when the substantiality of the government's interest is analyzed in the time, place, and manner test. See Day, *supra* note 47, at 188; see also Jakab, *supra* note 47, at 552-53 (discussing application of nonpublic forum analysis to intersection of two streets where leafleters were stopping cars in *ACORN v. City of Phoenix*, 603 F. Supp. 869 (D. Ariz. 1985), *aff'd*, 798 F.2d 1260 (9th Cir. 1986)). The courts have found nonpublic fora in such cases as *Shopco Distribution Co. v. Commanding General*, 885 F.2d 167, 172 (4th Cir. 1989) (military base residential areas); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 (5th Cir. 1989) (state bar journal); *International Society for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Authority*, 691 F.2d 155, 161 (3d Cir. 1982) (sports complex); *Pritchard v. Carlton*, 821 F. Supp. 671, 677-78 (S.D. Fla. 1993) (Holocaust memorial); and *Clark v. Burleigh*, 841 P.2d 975, 981 (Cal. 1992) (candidate's statement on voter's pamphlet).

¹³⁹ See *Perry*, 460 U.S. at 46; see also *Daniel*, 38 F.3d at 549 (stating that public housing authority can apply reasonableness standard to bar trespassers protesting Gulf War); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 151 (D. Neb. 1986) (holding that university newspaper which is nonpublic forum may use reasonable regulation as long as it is "not an attempt to suppress expression which the state finds offensive, such as not selecting advertising due to its content").

lic forum: limited public fora subject to fairly minimal regulation.¹⁴⁰ Limited fora seem to be those which the government "owner" has dedicated for limited types of speech.¹⁴¹ In these fora, the government cannot only restrict the method of speech, but also its content, as in nonpublic fora.¹⁴² The plurality in *Denver Area E.T.C.* reserved the question of what scrutiny level would be applied to a limited forum, though the opinion intimated that heightened scrutiny would be applied.¹⁴³

Along with the private property metaphor, the Court began to develop a persona for its owner. Ironically, it was Justice Blackmun¹⁴⁴ who, in *Lehman v. City of Shaker Heights*,¹⁴⁵ spoke most directly using personification.¹⁴⁶ Justice Blackmun first

¹⁴⁰ See *Perry*, 460 U.S. at 45 n.7 (finding that public forum may be created for limited purpose such as use by certain groups or for discussion of certain subjects); see also *Widmar v. Vincent*, 454 U.S. 263, 267, n.5 (1981) (public university); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981) (Minnesota State Fairgrounds); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259 (3d Cir. 1992) (public library); *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1079 (9th Cir. 1990) (voter's registration pamphlet); *San Diego Comm. Against Registration & the Draft v. Governing Bd.*, 790 F.2d 1471, 1478 (9th Cir. 1986) (school newspaper); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 547 n.12 (3d Cir. 1984) (high school), *vacated on other grounds*, 475 U.S. 534 (1986); *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 290 (E.D. Pa. 1991) (high school literature distribution policy); *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1385-87 (M.D. Pa. 1987) (junior high school); *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1209 (D. Utah 1986) (university); *Princeton Educ. Ass'n v. Princeton Bd. of Educ.*, 480 F. Supp. 962, 968 (S.D. Ohio 1979) (school board meeting); *Toward a Gay Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632, 638 (D.R.I. 1976) (Old State House, for bicentennial activities). *But see Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alaska 1978) (stating that paperback guide to city services is traditional public forum).

¹⁴¹ See *Heffron*, 452 U.S. at 655 (finding that Minnesota State Fairgrounds is limited public forum); *State v. Linares*, 630 A.2d 1340, 1348 (Conn. App. Ct. 1993) (declaring House gallery to be limited public forum), *aff'd in part, rev'd in part*, 655 A.2d 737 (Conn. 1995).

¹⁴² See *Heffron*, 452 U.S. at 652 (upholding fairground rules which allow visitors to espouse their views throughout fairgrounds, but restrict selling and distribution of goods and solicitation of funds to booths available for rent).

¹⁴³ 116 S. Ct. at 2384.

¹⁴⁴ Blackmun later joined Justice Brennan's dissent in *United States v. Kokinda*, 497 U.S. 720, 739 (1990) (plurality) (Brennan, J., dissenting). Brennan complains about how the public forum doctrine has created "pigeonholes" for speech. See Mellis, *supra* note 47, at 188 (citing *Kokinda*, 497 U.S. at 744).

¹⁴⁵ 418 U.S. 298 (1974) (plurality).

¹⁴⁶ Personification is an ontological metaphor in which a physical object is specified as being a person in order to comprehend experiences with nonhuman entities "in terms of human motivations, characteristics and activities." GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 33 (1980). "The act of personification [is] essential to all storytelling and storyreading. Unless the storyteller can create out of

distinguished between public spaces, a metaphor which focused on the property itself, and government activity, which focused on the owner of the property.¹⁴⁷ Since the city was engaged in commerce, Justice Blackmun likened it to a newspaper, radio or television station that has discretion about what advertising to accept, subject to the "arbitrariness" ban.¹⁴⁸ Thus, by describing how a smart proprietor might think about his advertising, Justice Blackmun effectively imported tort law's governmental-proprietary distinction¹⁴⁹ into public forum law.¹⁵⁰

words characters in whom we can believe, characters who seem to have a vivid independent life, we will not have much interest in the story." J. HILLIS MILLER, *VERSIONS OF PYGMALION* vii (1990).

¹⁴⁷ *Lehman*, 418 U.S. at 302-03. See generally Mellis, *supra* note 47, at 190-92 (criticizing use of government as proprietor to diminish First Amendment protections).

¹⁴⁸ *Lehman*, 418 U.S. at 303.

¹⁴⁹ See *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 54-55 (D. Md. 1975), *rev'd*, 426 U.S. 794 (1976). The district court stated:

[g]overnments in the United States traditionally possess two kinds of power: one, governmental or public, in the exercise of which it is a sovereign and governs its people; the other, proprietary or business, by means of which the government acts and contracts for the private advantage of its constituents and of the government itself When the state exercises its proprietary or business power ... it is subject to no more limitation than a private individual or corporation would be in transacting the same business.

Id. at 54-55. The governmental-proprietary distinction is traditionally used in the context of municipal corporations. See STUART M. SPEISER ET AL., 2 *THE AMERICAN LAW OF TORTS* § 6:9 (1985) (describing debate surrounding distinction in tort law); FOWLER V. HARPER ET AL., 5 *THE LAW OF TORTS* § 29.6 (2d ed. 1986 & Supp. 2 1995). For a general discussion of governmental immunities, see RESTATEMENT (SECOND) OF TORTS §§ 895A-895C (1979). The federal government has not adopted the governmental-proprietary distinction. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); RESTATEMENT (SECOND) OF TORTS § 895A cmt. b (1979). The Federal Tort Claims Act allows a suit to be brought against the federal government "if a private person[] would be liable" in a similar incidence. 28 U.S.C. § 1346(b) (1994). The Supreme Court has held, however, that the phrase "a private person would be liable" does not grant the United States immunity if the action is a function specifically limited to governmental entities. *Indian Towing*, 350 U.S. at 64-65. Additionally, the Court has declared that the "[g]overnment is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947).

¹⁵⁰ The majority in *Lehman*, however, was persuaded not by the proprietary distinction, but by the captive audience theory. Mellis, *supra* note 47, at 192 & n.195.

Justice Scalia also picked up this trend when, dissenting in *Rutan v. Republican Party*, he argued that in government employment, the government acts not "as lawmaker, ... but, rather, as proprietor, to manage [its] internal operatio[ns]," subjecting such employment to a lesser level of scrutiny. 497 U.S. 62, 98 (1990) (Scalia,

Under the personification approach used by the Court in subsequent cases, government is not "government" when it is teaching school, delivering mail, caring for parks, providing public transportation, training soldiers, jailing criminals, or even running an airport.¹⁵¹ It seems to make no difference, in the Court's analysis, whether "government" is doing things traditionally done by a private person or by a government.¹⁵² The "business" of training soldiers and jailing criminals is treated on par with the "business" of delivering mail or running an airport. Similarly, it seems not to matter whether the branch of government under scrutiny is charged with funding itself through sales, like with the post office, or whether it is fully funded with tax dollars, like with the public schools.¹⁵³

J., dissenting) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). Finally, Justice Rehnquist utilized the proprietor metaphor in *International Society for Krishna Consciousness v. Lee*, justifying the treatment of airport terminals as nonpublic fora. 505 U.S. 672, 677 (1992).

¹⁵¹ In *Parker v. Levy*, 417 U.S. 733 (1974) (plurality), and *Greer v. Spock*, 424 U.S. 828 (1976), the Court used this "business" personification theory to describe a traditional government activity, the training of soldiers. *Id.* at 838 (stating that "the business of a military installation ... [is] to train soldiers, not to provide a public forum"). The Court has also resorted to the business metaphor where the government was in the postal business, *United States Postal Serv. v. Council Greenborough Civic Ass'n*, 453 U.S. 114, 133 (1981), in the state fair business, *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981), where the government was an educator, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983), and where government was a park preservationist. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). Justice O'Connor adopted the business personification argument in *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 799 (1985), where government was an employer, and *United States v. Kokinda*, 497 U.S. 720, 731 (1990) (plurality), where again, the government was in the postal business.

¹⁵² In non-federal tort cases, one of the factors determining whether an activity should be classified as governmental or proprietary is "whether the function is one historically performed by government." HARPER, *supra* note 149, § 29.6, at 627. "[I]t is only where the duty is a new one and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed." HARPER, *supra* note 149, § 29.6, at 627 (quoting *Hill v. Boston*, 122 Mass. 344, 369 (1877)); see also *Indian Towing Co. v. United States*, 350 U.S. at 68 ("[I]t is hard to think of any governmental activity ... which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.").

¹⁵³ Another consideration in making tort law's governmental-proprietary distinction is "whether the function is allocated to the municipality for its profit or special advantage or whether for the purpose of carrying out the public functions of the state without special advantage to the city." HARPER, *supra* note 149, § 29.6, at 625. This is not a truly accurate test, however, because "[m]any of the functions now generally considered governmental were privately performed in the not very distant past. *Id.* § 29.6, at 628. Although "[t]he fact that the municipality makes a charge or

Nor does it seem to matter whether the activity in question is one which governments have performed throughout history (*e.g.*, military, prisons); one which governments have usually performed, but in modern times only (*e.g.*, state fairs, dedicating and caring for public parks); one which gradually was ceded by private corporations to the government (*e.g.*, schools);¹⁵⁴ or one in which the government is in competition with private vendors (*e.g.*, transportation).¹⁵⁵ Rather, regardless of the origin and type of government function, the Court invites us to utilize the perspective of a private person who is using his property to accomplish certain business goals—"managing [his] internal operations, rather than acting as a lawmaker with the power to regulate or license."¹⁵⁶

a profit in connection with the service rendered has often been considered ... functions have been held governmental in spite of a charge, and functions have been held proprietary where there is neither a charge nor profit." *Id.* at 628-29.

¹⁵⁴ Speiser states:

[T]he prevailing American view has been that school districts ... are mere public agencies or instrumentalities of the state, often denominated quasi-public corporations ... and that all their authorized functions or activities are of a governmental character. In a number of other jurisdictions, however, the courts have taken the view that school districts ... may exercise functions or engage in activities of a private or proprietary nature and that as to such functions or activities the rule of immunity is inapplicable.

SPEISER, *supra* note 149, § 6:9, at 57-58.

¹⁵⁵ Harper states:

Certain ... activities that are relatively recent additions to the responsibilities of municipal governments are ... typically ... classified [as governmental], *e.g.*, police activity, firefighting, education and public health. On the other hand the operation and maintenance of utilities (waterworks, sewer systems, gas or electric plants, street railways, airports) are generally regarded as proprietary functions. There is conflict among the authorities as to a number of miscellaneous functions that are fairly commonly carried out by municipalities, such as street cleaning, the operation and maintenance of parks and of swimming pools, garbage collection, the performance and reporting of inspections, and the erection and maintenance of public buildings.

HARPER, *supra* note 149, § 29.6, at 631-35.

¹⁵⁶ *Denver Area E.T.C.*, 116 S. Ct. at 2413 (Kennedy, J., concurring in part, dissenting in part) (quoting *ISKON v. Lee*, 505 U.S. 672, 678-79 (1992)). Justice Kennedy, who agrees that the government acting as proprietor is subject only to nonpublic forum review, risks his own argument on the new technologies. If the government is contracting for a property easement on public access channels with the cable operator, it must be acting more as a "proprietor" than regulating as a "lawmaker." But the nonpublic forum doctrine invokes rational basis scrutiny and permits content discrimination, a result that might worry even Justice Stevens, who sees the public forum designation as putting Congress to an "all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas" and

At first glance, the metaphors of "property" and "property owner" seem inviting because they call for the Court to recognize the varied enterprises and needs in which governments engage, and tailor its jurisprudence accordingly. Such an approach suggests the sort of contextualization that contemporary critical scholars are calling for in the application of law to the daily lives of human beings. Property metaphors seem to remove speech doctrine from the abstraction of theories and simple formulas to the specific dynamics of a particular social setting.¹⁵⁷

In practice, however, the trend toward government personification and the privatization of government property has simply added to the formalism and theoretical confusion over public forum jurisprudence. Perhaps the clearest example is *United States v. Kokinda*,¹⁵⁸ where the Court posed the riddle: When is a sidewalk not a sidewalk?¹⁵⁹ In *Kokinda*, the apparent bright-line rule of earlier cases such as *United States v. Grace*,¹⁶⁰ which designated streets, sidewalks and parks as public fora, was undercut by a shift toward the personification approach. The Court held that the postal sidewalk was not the "traditional public forum sidewalk" because it was owned by an enterprise, the government post office.¹⁶¹

From the *Kokinda* twist to the public forum doctrine, a conundrum arises with respect to the judicial values of clarity and predictability.¹⁶² If a forum's classification is no longer deter-

as "dissuading the Government from creating access rights altogether." *Denver Area E.T.C.*, 116 S. Ct. at 2398-99 (Stevens, J., concurring). Yet even Justice Stevens expects that the government open channels "on an impartial basis." *Id.* at 2399 (Stevens, J., concurring).

¹⁵⁷ See, e.g., Thomas Ross, *The Richmond Narratives*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 38, 40-41 (Richard Delgado ed., 1995); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 40, 44-48 (D. Kelly Weisberg ed., 1993).

¹⁵⁸ 497 U.S. 720 (1990) (plurality).

¹⁵⁹ *Id.*; see Scherago, *supra* note 47, at 241 (posing same riddle in discussion of public forum doctrine).

¹⁶⁰ 461 U.S. 171 (1983).

¹⁶¹ *United States v. Kokinda*, 497 U.S. 700, 727 (1990). This line of reasoning originated in *Frisby v. Schultz*, 487 U.S. 474, 497 (1988) (Stevens, J., dissenting), where Justice Stevens suggested that not all public streets rise to the level of public forum.

¹⁶² Professor Day argues that the shift to the property metaphor changed the burden of proof in speech cases. Instead of the state having to rebut a presumption that speech was welcome, the *Kokinda* opinion "started with the *assumption* that public property was closed to the public unless it is 'expressly dedicated ... to expressive activity.'" Day, *supra* note 47, at 189-90 (citing *Kokinda*, 497 U.S. at 730).

mined by its physical characteristics¹⁶³ or communicative purposes,¹⁶⁴ or even by physical notice to the public that they have "entered some special type of enclave,"¹⁶⁵ courts must return to post-hoc, context-dependent determinations.¹⁶⁶ Indeed, *International Society for Krishna Consciousness v. Lee* (ISKCON) suggested that even where public property is both physically and functionally analogous to a public thoroughfare, and where most local courts regard it as such, the public forum doctrine may not apply.¹⁶⁷

From a policy perspective, the personification of government and the immediate move to analogize public property to private

¹⁶³ See, e.g., *Longo v. United States Postal Serv.*, 761 F. Supp. 220, 227 (D. Conn. 1991), *rev'd on other grounds*, 953 F.2d 790 (2d Cir. 1992), *vacated*, 506 U.S. 802 (1992) (rejecting argument that physical characteristics alone should determine forum analysis).

¹⁶⁴ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269 (1988) (noting that school newspaper is not public forum); *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 128 (1981) (stating that letter box is not public forum, though it is used solely for communication). As these cases indicate, even regulations describing communication as permissible do not necessarily create a public forum. These speech cases create the tautological constitutionalism most favored by Justice Rehnquist. See *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality). *But see* *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187 (D. Nev. 1988) (holding that school district's "community use" policy creates public forum, so any restrictions on that policy, even if contained within policy itself, must be justified).

¹⁶⁵ *United States v. Grace*, 461 U.S. 171, 180 (1983) (distinguishing sidewalk outside Supreme Court building, which is generally indistinguishable from other Washington sidewalks, from sidewalk on enclosed military base in *Greer v. Spock*, 424 U.S. 828 (1976)); see Scherago, *supra* note 47, at 255-56.

¹⁶⁶ In *Longo*, for instance, the district court determined that the public forum designation would be dependent on the location and purpose of a publicly owned sidewalk, and made extensive findings about the situation of the sidewalk compared to local thoroughfares. *Longo*, 761 F. Supp. at 227-29.

¹⁶⁷ *ISKCON*, 505 U.S. at 680. Before *ISKCON*, it had come to be accepted that government-owned airports were public fora. See, e.g., *Gannett Satellite Info. Inter-network v. Berger*, 716 F. Supp. 140, 149 (D.N.J. 1989) (citing considerable body of case law recognizing airports as public fora), *aff'd in part, rev'd in part*, 894 F.2d 61 (3d Cir. 1990); *Chicago Trib. Co. v. City of Chicago*, 705 F. Supp. 1345 (N.D. Ill. 1989) (noting that Chicago airport was public forum and that authorities may not seize newsboxes without demonstration of significant government interest and ample alternatives). Citing two other circuit decisions, the court in *Berger* noted that airport concourses are places where "the general public may shop, dine, imbibe, and site [sic] see" and observed that airports "resembl[e] those public thoroughfares which have long been recognized to be particularly appropriate places for the exercise of constitutionally protected rights...." *Berger*, 716 F. Supp. at 149 (quoting *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981)); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975). See generally Leedes, *supra* note 47, at 501-02 (summarizing types of judicial scrutiny applied to various forms of regulation in public fora).

property is more insidious than it may appear. The focus on private property rights as the appropriate analogy for public property not only fails to effectuate the purposes for which speech rights or property rights are designed; it also creates a problematic relationship between citizen and government.

Since the term "private property" is used as the metaphor for how government views public property, it is important to understand the precise nature of the property claim that Justice Holmes and others have made in the public forum cases. Professor Lloyd Cohen distinguishes three types of property rights:

(1) private property - property with respect to which a single person has the rights to exclude, use, and alienate ...; (2) communal property - property which everyone has an identical right to use and from which no one has the right to exclude or alienate ...; and (3) collective property - property with regard to which some political body has the right to alienate, exclude, and define the set of permitted uses and terms of access¹⁶⁸

Although on the surface, the public forum doctrine would seem to be an example of "collective property," the Supreme Court actually appears to have treated government property as the first of these types: private property which happens to be owned by the government. The public forum doctrine developed in these cases suggests that a single "person," the government, owns public land and thus has the entire bundle of rights, including the right to exclude and the right to use as the government sees fit. Even "dedicated" speech areas are subject to the private property regime because although the government as proprietor may decide to open dedicated speech areas, it may just as promptly close them, perhaps even arbitrarily.¹⁶⁹

¹⁶⁸ Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 241 (1992). Cohen argues that the permitted uses for collective property "may be as limited and quasi-private as those with respect to the space shuttle Atlantis or as broad and quasi-communal as state forests." *Id.* Professor Lawrence Lessig has proposed a grouping of speech associations which may have some connection to these distinctions: associations in private, among known parties who choose their conversation partners and topics; associations in public, where participants add to a conversation with no real knowledge about who will read what they write; and associations in construction, where participants enter a virtual room and know with whom they converse, a virtual room subject to community control. Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1746-47 (1995).

¹⁶⁹ See *Berger*, 716 F. Supp. at 148. The state is not required to maintain these designated forums indefinitely. *Id.* It is not clear from the cases whether the government's closure of a dedicated forum will be subjected even to the "arbitrary and irrational" test. While a "non-traditional" or "designated" public forum remains

The one exception to the rule that the government has virtually complete discretion over speech on public property is, of course, the quintessential public forum. Even though public forum jurisprudence treats the government as having granted a prescriptive speech easement to the people, in Cohen's terms, such property is not fully communal property just as a prescriptive easement is not an unlimited property right. Rather, like the prescriptive easement owner, the people have the right or "privilege" to use the property for speech purposes so long as that use is not in derogation of the property owner's—the government's—selected "higher" uses, such as traffic or foot passage.¹⁷⁰

Even in the case of the speech easement, the determination of these higher uses is not, as is implied in the collective property definition, consciously debated and determined by a political body which deliberately defines a set of uses and the terms of access. Rather, it is defined by implication: the legislator enacts legislation regarding traffic safety and the administrator decides that traffic purposes are paramount to speech purposes when he or she decides to arrest the speaker on the street.¹⁷¹ Furthermore, in the case of non-quintessential public fora, the administrator's decisions need not even take into consideration the speech interests at stake. Thus, the administrator's decision to ban speech from public property is much more akin to a private business proprietor's decision to allow certain people into his or her store than it is akin to a public decision to reserve collective property, e.g., wetland preservation.

From both free speech and public life perspectives, government property, particularly government-sponsored cyberspace, would ideally be considered communal property. Yet, because of "real world" constraints, a collective property concept, inhibited

open, though, the government is bound by the same standards as apply to traditional public fora. *Id.*

¹⁷⁰ See *Hague v. CIO*, 307 U.S. 496, 516 (1939) (plurality) (Roberts, J., concurring) (claiming that speech interests are regulable "in the interest of all" and exercised "in subordination to the general comfort and convenience," but not something to be "abridged or denied"); see also *Police Dep't v. Mosley*, 408 U.S. 92, 98 (1972) (noting possibility that state has legitimate interest in prohibiting some picketing to protect public order).

¹⁷¹ See *ACORN v. St. Louis County*, 726 F. Supp. 747 (E.D. Mo. 1989) (banning solicitation at toll booths for pedestrian and traffic safety impliedly subordinated free speech right in traditional public forum to "higher use" of traffic safety), *aff'd*, 930 F.2d 591 (8th Cir. 1991).

by hard review by the courts, is probably the best we can hope for. So long as the government views public property as a private right and, as such, "a legally enforceable claim of one *person* against another, that the other shall do a given act or not do a given act,"¹⁷² both the individual and the public values of speech are undercut.

II. GOVERNMENT PROPERTY AS PRIVATE PROPERTY: A PROPERTY PERSPECTIVE

A brief review of the justifications for awarding and protecting private property rights will reveal why the private property/private person metaphors embedded in the public forum doctrine are flawed when applied to public property.¹⁷³ First, as the "will" theory suggests, the private property metaphor threatens our notion of a limited form of government.¹⁷⁴ Second, as some arguments from possession show, a community understanding of the citizen's role, and particularly the role of the speaker, in public life is at stake.¹⁷⁵ Third, following "fairness" arguments from natural rights or labor theory, a private property regime distorts the self-understanding of the government worker and his or her role.¹⁷⁶ Fourth, following the social relations theory, the private property metaphor runs contrary to the grain of egalitarianism that has demarked our social life.¹⁷⁷ Finally, following consequential arguments such as efficiency, the private property metaphor dislocates the proper authority from balancing competing public values.¹⁷⁸

A. *The "Will" Theory and the Concept of Limited Government*

The application of a "will" theory of property through the metaphor of private property risks serious distortion of our view that government power is limited. If we begin to talk as if the

¹⁷² RESTATEMENT OF PROPERTY § 1 (1936) (emphasis added).

¹⁷³ Here I will follow Singer's organization, which divides property theories into five types: possession; the labor theory of property; rights theories including natural rights, social contract, and human flourishing; consequentialist theories of property, including economic efficiency and utilitarianism; and social relations theories. JOSEPH W. SINGER, PROPERTY LAW 12-23 (1993).

¹⁷⁴ See discussion *infra* Part II.A.

¹⁷⁵ See discussion *infra* Part II.B.

¹⁷⁶ See discussion *infra* Part II.C.

¹⁷⁷ See discussion *infra* Part II.D.

¹⁷⁸ See discussion *infra* Part II.E.

government has its own persona with the ability to "choose" how "he/she" uses that land, we may well forget the basic principles of restraint that characterize our government: first, the principle that the government receives its power from the governed rather than from its own "will"; and second, that even such power is circumscribed not by the limits of the government's own strength, but by constitutional constraints.

Since "positivism" envisions government as similar to a human being,¹⁷⁹ not just in its "proprietary" capacity but also in all opportunities it has to govern, it is not surprising that positivist assumptions color the public forum doctrine. After all, Justice Holmes, often associated with positivist jurisprudence in the U.S.,¹⁸⁰ introduced us to the private property metaphor for reviewing speech claims on government lands.

Just as the positivist concept of the state focuses on the assertion of human will and human force against the natural order as the defining characteristic of government, the positivist concept of property assigns protection rights based on the assertion of human will against land. Conflating these two images into one—that government, like a human being, can will ownership of

¹⁷⁹ According to one principle of classical positivism known as the "command theory of law," law is an expression of human will, reducible to a command "directed toward a class of the public" and "accompanied by sanctions." See Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2064 (1995). Austin stated in 1832:

A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded [W]here [a command] obliges *generally* to acts or forbearances of a *class*, a command is a law or rule [A] class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally.

JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 21, 25-26 (Wilfred E. Rumble, ed., 1995). Under the "sources thesis," another principle of classical positivism, all legal norms stem from and are "promulgated by the legal system's sovereign." Sebok, *supra*, at 2064. According to Jeremy Bentham, every law is the product of a (sovereign) will which is preferred "to the will of any other." *Id.* (quoting JEREMY BENTHAM, *OF LAWS IN GENERAL* 18 (H.L.A. Hard ed., 1970)).

¹⁸⁰ For a discussion of Holmes' positivist ideas, see Mark DeWolfe Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 HARV. L. REV. 937 (1951); Henry M. Hart, Jr., *Holmes, Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951). *But see* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Catherine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988) (characterizing Holmes as pragmatist, not positivist).

land—is not a modern proposition. In this metaphor, the United States has merely followed the Western European tradition of discovery, which permitted countries to “own” large parts of the New World based solely on their claim that these countries had the intent to possess colonies and the ability to enforce their will against native peoples.¹⁸¹

In *Johnson v. M'Intosh*,¹⁸² the Supreme Court recognized this positivist formulation early in the creation of land title, and particularly in the creation of title in the government.¹⁸³ Justice Marshall explained that the right of a society to draw rules for acquiring title is not to be questioned and must “depend entirely on the law of the nation in which [such property] lie[s].”¹⁸⁴ The Court accepted the European concept of discovery as a valid basis for giving title to one European country as against other European countries.¹⁸⁵ The Court further acknowledged that the United States “maintain[s], as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest and also gave a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”¹⁸⁶ If the United States acquired title in this manner, argued Marshall, it may sell or cede that property to private individuals over the objections of resident tribes.¹⁸⁷

In the “will” theory of property, normative concerns, such as fairness to workers, and practical concerns, such as the efficiency of particular ownership, are subsumed under the notion that to “discover” or “want” a property is to have it. To be sure, as even Marshall recognized, not all public land in the United States is a pure result of “will theory”; for instance, the Louisiana Territory was purchased from another sovereign.¹⁸⁸ Yet, the dominant as-

¹⁸¹ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹⁸² *Id.*

¹⁸³ *Id.* at 585 (“It has never been doubted, that either the United States or the Several States, had a clear title to all the land within [its] boundary lines ... and that the exclusive power to extinguish that right, was vested in [the] government”).

¹⁸⁴ *Id.* at 572.

¹⁸⁵ *Id.* at 587.

¹⁸⁶ *Johnson*, 21 U.S. at 587-88.

¹⁸⁷ *Id.* at 587.

¹⁸⁸ See FRANK BOND, *THE LOUISIANA PURCHASE* 13 (2d prtg. 1967) (1933) (“April 30, 1803, France ceded to the United States the territory of Louisiana”); ALEXANDER DECONDE, *THIS AFFAIR OF LOUISIANA* 171 (1976) (stating that United

sumption governing the designation of land as "public property" is that the government "wills" to own everything that is not already in private hands; it is only when the government "wills" to own privately owned property that the problems of taking arise.

The property owner metaphor suggests that once the owner acquires his property by legally accepted norms such as by occupation, labor, adverse possession, or contract, the owner is entitled to exercise every strand of the bundle of rights, including possession, disposal, use, enjoyment of fruits, and destruction.¹⁸⁹ And, as Justice Rehnquist noted in *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁹⁰ and other Fifth Amendment "takings" cases,¹⁹¹ the right to exclude is the first among equals, at least where the individual stands against government.¹⁹² That individual's right is subject only to any prior claims of another property owner, such as an easement owner, and to the demand that he or she not interfere with the rights of adjacent property owners.¹⁹³

States purchased Louisiana territory for total price of \$15 million dollars).

¹⁸⁹ ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 6 (2d ed. 1993). The authors note that these civil law expectations are all protected by the common law, although the rights to possession and exclusion are "rights proper" under the Hohfeldian analysis; and the rights to use (*jus utendi*), enjoy the profits (*jus fructuendi*), and destroy (*jus abutendi*) are properly described as "privileges," *id.* at 6, or the legal freedom as against another for a person to do or not do a given act. *Id.* at 3. The right to transfer or dispose of one's property (*jus disponendi*) is described as a "power," *id.* at 6, or the "ability ... to produce a change in a given legal relation by doing or not doing a given act." *Id.* at 4 (quoting RESTATEMENT OF PROPERTY § 3 (1936)); see also COHEN, *supra* note 90, at 46.

The United States Supreme Court has enumerated the property rights of possession, use, and disposal. See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); see also 63 AM. JUR. 2D *Property* § 1 (1984) (noting that property rights include "the unrestricted and exclusive right to a thing, the right to dispose of it in every legal way, to possess it, use it, and to exclude everyone else from interfering with it, that is, the exclusive right of possessing, enjoying, and disposing of a thing"); 73 C.J.S. *Property* § 5 (1983) (explaining that "[i]t is generally recognized that property includes the right of acquisition, the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion, and the right of disposition").

¹⁹⁰ 458 U.S. 419 (1982).

¹⁹¹ *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within ... [the] category of interests that the Government cannot take without compensation.").

¹⁹² *Loretto*, 458 U.S. at 435 ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). See also COHEN, *supra* note 90, at 46.

¹⁹³ A "usual claim of absolute ownership ... allows one to destroy ... anything he owns if it pleases him, so long as he does not destroy as well the person or property

Pursuing the private property/will metaphor, government may exercise every right it has as against its own citizens¹⁹⁴ after the government has established its right to acquire the property, either by force, as it did originally, or by free or coerced contract.¹⁹⁵ It may use its own land free from public objection, even if that use makes the land a nuclear waste dump; or transfer the land cheaply for private gain.¹⁹⁶ The government has no enforce-

of another." Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1229 (1979).

¹⁹⁴ See COHEN, *supra* note 90, at 46.

¹⁹⁵ Although one party may have no decision about it, it could be argued that a government taking is simply a contract—the agreement of one party to perform (give up his property rights) in exchange for monetary consideration (just compensation). Takings are initially pursued as offer and acceptance. The difference is that the government can force the acceptor to stay at the bargaining table, and, much like an arbitration clause, impose a third party's view about the appropriate value of consideration for the party's property.

¹⁹⁶ See, e.g., *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990) (rejecting challenges to federal government's selection of Yucca Mountain, Nevada as possible national nuclear waste repository site); *Tennessee v. Herrington*, 806 F.2d 642, 651 (6th Cir. 1986) (holding that pursuant to Nuclear Waste Policy Act of 1982, Secretary of Energy is not required to confer with state before recommending site within state as monitored retrievable storage site for nuclear waste). Minnesota's Northern States Power Company (NSP), which currently stores nuclear waste in storage casks at Prairie Island in Red Wing, Minnesota, is attempting to find alternate storage space outside of the state before the legislative deadline of 2002. Tom Meersman, *NSP's Talks on Nuclear Waste Break Off: Storage Sought in New Mexico*, STAR TRIB. (Minneapolis-St. Paul), Apr. 19, 1996, at 8A. It is predicted that maximum capacity will be reached in the year 2002. *Id.* One alternative being negotiated by NSP and other utility companies reliant on nuclear fuel is to ship the waste to Mescalero Apache tribal lands in New Mexico; however, these negotiations broke down in April, 1996. Tom Meersman, *NSP's Options to Store Nuclear Waste Dwindle After Talks Break Down: Used Fuel May Stay in State for Decades*, STAR TRIB. (Minneapolis-St. Paul), Apr. 21, 1996, at 22A. Nuclear fueled utility companies are also lobbying the United States Congress to amend the Nuclear Waste Policy Act of 1982 to allow the creation of a temporary storage cite on federal land until a permanent national site can be constructed. *Id.* at 22A. It is expected that it will be approximately 15 years before a national site is created. *Id.*

In the 1980s, we learned that government may dispose or transfer its land notwithstanding the fact that disposal was to private exploiters of natural resources. James G. Watt, Secretary of the Interior under Ronald Reagan, supported commercial developers by providing "huge tracts of federal land to mining, logging, drilling, and other uses." Emily T. Smith et al., *This Land is Whose Land? Federal Agencies are Taking Heat for Public Land Mismanagement*, BUS. WK., Apr. 24, 1989, at 48.

The government may transfer the land even if the transfer, as by lease, is for little consideration, as with the grazing leases in the Southwest United States. Pursuant to the Taylor Grazing Act of 1934, ranchers in the West may purchase a section of land with water access and then lease large amounts of public land for their cattle to graze upon. William Hart, *Ex-Ranchers Seek Compensation for Land Seized as Missile Range*, DALLAS MORNING NEWS, Apr. 24, 1988, at 41A. Although the Fed-

able obligation to act as a fiduciary of the property belonging to "the government."¹⁹⁷ Unless some Congressional Act designates a particular trusteeship, as the National Parks Act does,¹⁹⁸ no specific "trust" constraints require government to make the highest use of its property. The government is not required to ensure that private competitive uses of public lands are good for the aggregate of private individuals,¹⁹⁹ to ensure that it receives the highest return on land transfers²⁰⁰ or even to account to its citizens for its specific decisions unless there is a congressional inquiry. More correctly, it is presumed that government is making the best use of public property for the benefit of citizens, just as it does in all of its work,²⁰¹ and the presumption is well nigh irrebuttable.

eral Land Policy & Management Act of 1976 orders consideration of environmental effects due to development, requires multiple use management, and dictates that a fair price be paid for public resources, critics argue that the government is not following these mandates. Smith, *supra*, at 49. In terms of grazing alone, it is estimated that the government loses an estimated \$65 million in potential income each year due to low grazing fees charged ranchers. *Id.* at 48. In 1987 alone, management of the grazing program cost the government \$17 million. *Id.* at 49.

¹⁹⁷ "Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). "Consistent with these powers, Congress may control the occupancy and use of the public lands ... protect the public from hazardous conditions on those lands, and regulate wildlife on those lands." *Watkins*, 914 F.2d at 1553 (citations omitted).

¹⁹⁸ National Parks Organic Act of 1916, 16 U.S.C. §§ 1, 2 (1994).

¹⁹⁹ Cohen reminds us that property law does not merely protect possession but determines what share of such goods people acquire. COHEN, *supra* note 90, at 47. Similarly, government as a marketplace competitor with private individuals can use its property to acquire goods for itself, to the disadvantage of individuals. This reality seems opposite to the theory of the Takings Clause, which proposes that government, in its capacity as a proprietor, is bound by standards of substantive fairness in the acquisition of property. *See* U.S. CONST. amend. V.

²⁰⁰ From 1982 to 1989, the Forest Service lost an estimated \$400 million through the granting of timber cutting permits. Smith, *supra* note 196, at 49. In the area of mining, the government continues to sell land for mining at prices set under the Mining Law of 1872. *Id.* at 49. The General Accounting Office reports that at these prices, 12 mining sites would sell for a total of \$16,000. *Id.* at 50. This same land has an appraised value ranging from \$14 to \$47 million. *Id.*

²⁰¹ The Constitution's Property Clause states that "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The U.S. Supreme Court has construed the Property Clause to mean that "[t]he power over the public land thus entrusted to Congress is without limitations." *United States v. City of San Francisco*, 310 U.S. 16, 29 (1940); *see also* *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (noting Congressional power over and entrusted to it under Constitution is unlimited); *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976) (acknowledging that Congress' broad authority to regulate public land includes regulation of animals and ecology).

The chances that government will in fact be held accountable for its decisions on use of public lands, particularly for speech, begin to erode if we accept as a popular axiom that the property belongs to the government and that the government can make "its" "private" decisions about use. Opposition to government action is likely only to be heard in cases where government revokes private use rights such as grazing permits, or in a particular locality where its ownership activity causes something akin to a nuisance. Even in these clashes with private interests, the debate is likely to be framed in terms of a conflict of private rights. In permit revocation cases, the conflict which arises is based on the contention that the government has interfered with a private owner's easement in exercising its land use rights. In the nuisance cases, the debate is likely to center upon the idea that the government's private property use interfered with the harmed owner's private property use.

In cases where no such private property uses are infringed, such as the speech cases, it is not likely anyone will be willing to accept responsibility to ensure that speech is permitted much less welcomed on public lands. Similarly, the government's decision to step into the Babel of voices and act as if it "owns" cyberspace in order to regulate it is likely to be accepted by many as a fact of ownership of the Internet. Individuals will imagine their speech rights to extend to only that which is their own private property, *e.g.*, their private communications through e-mail. As government regulation of the Internet increases, the government will be seen as a limitless sovereign against which individuals can protest, rather than as a host for a public conversation.

B. The Theory of Possession and the Concept of Citizenship

Viewing the private property metaphor from the perspective of possession theory, one can see similar possibilities for erosion of individuals' conception of themselves as citizens, as people who have some rights in and responsibilities for the way in which government property is used. While the theory of possession is often treated as a subset of the "will" theory,²⁰² some scholars have suggested that possession is more properly consid-

²⁰² See CUNNINGHAM, *supra* note 189, at 2 (referring to both theories as "the occupation theory").

ered a labor or social relations theory of property. For instance, Professor Carol Rose has suggested that in economic theory, possession is tantamount to labor, as the useful work of possessing land gives clear notice of who is the owner of the land, which "facilitate[s] trade and minimize[s] resource-wasting conflict."²⁰³ In Rose's view, possession is a communicative act, signaling to all others the individual's intention to have and use the property. If it is clear enough, that communicative act obviates the need for violence or litigation as a means of establishing title.²⁰⁴ Instead, possession encourages a more efficient exchange mechanism, namely bargaining, for the transfer of land for its highest and best use.²⁰⁵

Applying these concepts to the government's use of its land, it is clear that possession theory cannot justify government control over public property, especially with respect to the exercise of free speech rights. The economic argument that possession as communication is efficient in creating clarity has not always been accurate in the case of government. Historically, the government's method of asserting claims over its own property, particularly in the Western states, has been so ambivalent as a communication that it has created many opportunities for bloodshed.²⁰⁶

In more modern times, government has depended on the

²⁰³ Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) [hereinafter *Origin of Property*].

²⁰⁴ *Id.* at 81-82. Similarly, the adverse possession doctrine constitutes a public act requiring the acquiring party to "keep on speaking, lest he lose his title...." *Id.* at 79.

²⁰⁵ *Id.* at 82.

²⁰⁶ In the late 18th and early 19th century, "national land programs never worked as they were meant to work on paper. Field administration was the weak point: feeble, incompetent, corrupt Washington's arm was never long enough or steady enough to carry through." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 232 (2d ed. 1985). In the mid-1800s, the situation was ambivalent:

[P]ublic-land laws were hopelessly inconsistent. Some land was free for settlers; other land was for sale. The government proposed to sell some land to the highest bidder; proposed using other land to induce private enterprise to build railroads; gave other land to the state to fund their colleges. Administration of land laws was notoriously weak.

Id. at 417. The recognition of non-assigned land as public property may have prevented more serious land wars than those that occurred as the West was forced open to European settlement. It is far from clear, however, that the government's exercise of its entire "bundle" of rights, including the right of exclusion, has similarly prevented "non-wasteful conflict" by contending private parties. See *supra* notes 196-200 and accompanying text.

people being "on notice" that unassigned property belongs to the government, that when they walk onto a public playground or into a park or a building with a United States seal, they are walking with the permission of the government. Yet, the implied "notice" of government's intentions for the use of its property is at best ambivalent and at worst non-existent. Such decisions are usually left to the discretion of those government workers who happen to work on the particular parcel of government property. In reality, government intentions with respect to speech and assembly are rarely communicated until after the fact. One does not, for instance, see a sign on the door of a federal building stating, "no petitioning the government permitted" in the same way one might see "no solicitors" on the door of a private business. Similarly, unlike most private property, government rarely marks the boundaries of public land as a way of clarifying ownership and thus preventing conflict. Rather, many existing government markers on public property—State Park or Community Policing Center—implicitly invite people inside.²⁰⁷

The lack of clarity surrounding the government's intent to own and exclude is most sharply illustrated by the number of cases which are brought after speakers have used public land and been evicted. That these speakers bring suits suggests that, at least at the time they elected to speak, some did not recognize the government's "markers" as notice that their speech was off-limits.

More importantly, however, possession as communication has a moral dimension that is inconsistent with democratic ideals about government, specifically the ideals of citizen participation and equal respect. According to Rose, if the "text" which the government follows is a private owner model with strong and regular exercise of the right to exclude, where the people are the "interpretive community" for such a text, government sends a "message" that people are alien to the daily activity of government.²⁰⁸ If government property is "private," I have the right to go to the Bureau of Motor Vehicles only when and if they invite

²⁰⁷ Public notice of the right to exclude is extremely rare. For instance, government only marks exclusion on borders with other nations and in those areas where it has security concerns or has leased property to private owners and so needs to protect its exclusivity. Or occasionally a government building will post a "no soliciting" sign, suggesting that other speech activity is permitted.

²⁰⁸ See *Origin of Property*, *supra* note 203, at 84-85.

me. If I do not come for *their* purposes—to get my driver's license or plate tags—I have violated the duty not to trespass. So when I sit down on the Bureau's government-issued chairs to eat my sandwich, read a newspaper, or merely rest my weary feet, I have been a law-breaker, a bad citizen whom the state is perfectly free to eject with whatever force it desires.

Contrast the private property metaphor with another political-social metaphor historically used to describe how Americans have understood their relationship to the West, the United States "range." The "range" metaphor trumpets, even romanticizes, the right of citizens to roam freely on open, truly public lands, on which they may find a home if they work that land and make it their own. That the metaphor of the "range" is not quite historically correct²⁰⁹ does not minimize its power in American myth.²¹⁰ In the "range" vision, the public would be welcome to use public lands so long as they did not attempt to cordon them off as their own "private" property. In the public forum vision, by contrast, the government has raced the private citizen to the land and staked its claim, so the private citizen must move on to find increasingly scarce, indeed non-existent, "free" land on which to exercise his rights as a citizen.

In the private property metaphor, then, citizens are excluded from ownership over their own public property, and thus over the decisions being made concerning it. If the government has successfully communicated a message of "keep out" to the public—for example, through arrests of speakers and widely

²⁰⁹ See generally FRIEDMAN, *supra* note 206, at 230-34, 414-19 (describing settlement of West and government attempts to regulate public land within settlement).

²¹⁰ This is evidenced by the way in which government often gave property rights to unclaimed Western lands, as with the Oklahoma rush. Lawrence Friedman provides a description of the race to settle the West:

Settlers (and speculators) streamed into the West far ahead of the formal date of sale, sometimes even ahead of the official survey. Theoretically, no one could gain a good title to the land until it was surveyed and sold. But a series of laws gave piecemeal preference (pre-emption rights) to actual settlers, even illegal settlers, or recognized and ratified state policies on pre-emption. Finally, in 1841, Congress passed a general pre-emption law. The head of a family who had settled "in person" on land and "improved" it had first choice or claim to buy the land, up to 160 acres, at the minimum government price.... [T]he most important aspect of the law was its general concept. It removed the last shred of pretense that the squatters were acting either illegally or immorally.

FRIEDMAN, *supra* note 206, at 233-34.

publicized litigation resisting Hare Krishnas' solicitation at airports—then the people *will* keep out of the property and business of government and stick to “their own” business.

Particularly when the rights of public speech and assembly are involved, the message that people should “keep out” poses significant problems. The First Amendment posits an affirmative right to assemble and petition the government for redress of grievances. As the Court has delineated it, this beneficial right protects society against official abuse and governmental indifference.²¹¹ Yet, the effectiveness of such a right is dependent upon citizens who see themselves as “owners” in their government. Citizens who do not imagine themselves as more than individual rights-holders, with citizenship rights and responsibilities toward public work and public space, will not understand that they should be protesting against government acts that do not immediately affect them. If they do not demand that their government treat people according to democratic ideals, then they cannot take affirmative steps to guard those democratic ideals against political abuses. Without ownership, they cannot be excited about political participation, as we saw repeated in the woes of last year's major party convention planners, who worried about “captur[ing] bored television viewers”²¹² using entertainers like Barbra Streisand.

The private property metaphor also poses problems for the value of equal respect, which embraces the notion that all citizens have life experiences and perspectives that must be accounted for in the search for the common good. In the democratic vision, such respect is due each person intrinsically, and his other wishes count the same as each other person's. In the republican vision, each individual has at least information to contribute to reasoning about the common good.²¹³ Yet, the private property metaphor directly encourages the creation of citi-

²¹¹ See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (holding that convictions for “disturbing the peace” and “obstructing public passages” against demonstrator who led demonstration across from courthouse could not stand); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that participating in peaceful march around South Carolina State House was within protesters' constitutional rights).

²¹² *Washington Whispers*, U.S. NEWS & WORLD REP., June 27, 1994, at 24 (Charles Fenyvesi ed.). Ironically, the Democrats, who were most worried, had their convention in Chicago, a place described in 1968 as a “very participatory” convention. *Id.*

²¹³ See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1759-65 (1995).

zenship classes. It empowers the wealthiest to wield not just political power, but also public moral influence, over the poorest.²¹⁴ Citizens, often business owners attempting to "clean up" urban areas in order to attract business, have effectively exploited the metaphor to eject homeless people from the streets where they are panhandling²¹⁵ and arrest those who suspiciously loiter on street corners. Police have also followed public mandates and made sweeps of parks and abandoned buildings where the homeless were sleeping to arrest them²¹⁶ and, in some cases,

²¹⁴ Vagrancy laws have been used since Elizabethan times to control the poor who were forced off their lands. These wandering, unemployed indigents were punished because they were believed to have criminal natures or were a "moral pestilence," as the Supreme Court described in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837). During the Depression, however, when California refused to accept its share of the poor trying to migrate there, the Court in *Edwards v. California*, 314 U.S. 160, 163 (1941), held the California statute making it a misdemeanor for a person to assist in bringing a non-resident indigent into the state unconstitutional. See Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 636-41 (1992) (discussing history of English and American vagrancy laws).

The private property metaphor has been critical in many of the recent controversies involving the poor and marginal in the U.S. In particular, the metaphor affects the homeless, whose numbers are estimated to range from 300,000 to 3 million. See Stephanie B. Goldberg, *In Praise of Skid Row NU Professor Offers Some Surprising Solutions to the Homeless Problem*, CHI. TRIB., June 27, 1994, at Tempo 1 (reviewing CHRISTOPHER S. JENCKS, *THE HOMELESS* (1994)). Christopher Jencks, a Northwestern sociologist, estimated that this epidemic was as much caused by the crack epidemic and the demise of Skid Row housing as de-institutionalization of the mentally ill. See *id.*; see also William W. Berg, Note, *Roulette v. City of Seattle: A City Lives with its Homeless*, 18 SEATTLE U. L. REV. 147 (1994) (discussing impact of homeless laws).

²¹⁵ The courts have split on whether begging is a protected activity or not. Compare *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1449-53 (W.D. Wash. 1994) (holding that Seattle's ban on sitting or lying down on business district sidewalks between 7 a.m. and 9 p.m. was not overbroad, and did not violate due process or equal protection), *aff'd*, 78 F.3d 1425 (9th Cir. 1996), with *Berkeley Community Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1089 (N.D. Cal. 1995) (enjoining enforcement of California ban on begging near ATMs because "solicitation of donations is a form of speech, protected under both the federal and state constitutions").

²¹⁶ See, e.g., *City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 470 (Fla. Dist. Ct. App. 1984) (challenging ordinance prohibiting sleeping in one's car); Paul Ades, Comment, *The Unconstitutionality of 'Antihomeless' Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 596 (1989) (analyzing municipal ordinances banning public sleeping, such as Long Beach ordinance banning sleeping outside between 10 p.m. and 6 a.m.); Kathleen M. Quinn, Note, *Connecticut v. Mooney and Expectation of Privacy: The Double-Edged Sword of Advocacy for the Homeless*, 13 B.C. THIRD WORLD L.J. 87

to confiscate or burn their belongings.²¹⁷

What opposition there has been to the use of the private property metaphor in responding to the homeless situation has been mostly technical, focusing on problems such as vagueness and overbreadth, rather than challenging the metaphor itself.²¹⁸ Although police are occasionally deterred from arrest sweeps by a sympathetic press, public attention and pressure more often focuses on retaining the private property aspects of government property.²¹⁹

Sometimes arguments against use of public lands by the poor and marginal can be framed in terms of general public benefit or utilitarian theory. Private property owners claim that

(1993) (describing Fourth Amendment challenge to search of homeless person's area); Jonathan Eig, *Status of Homeless is Tough Legal Issue: Judges, Cities Wrestle with Question*, DALLAS MORNING NEWS, June 4, 1994, at 31A (discussing permitting removal of shanty town so long as trespassers from all economic brackets are stopped); *Letters to the Editor*, S. F. CHRON., May 14, 1995, at 6 (describing arrest of 2,582 homeless persons under Operation Matrix); Don Morain & Harold Maass, *Compassion for Homelessness is Wearing Thin in Bay Area*, L.A. TIMES, July 20, 1990, at A1 (discussing mayoral ban on sleeping in parks and anti-homeless demonstration demanding that park sleepers leave town); Coleman Warner, *Furor Over Homeless; Sleeping Ban Urged for Jackson Square*, NEW ORLEANS TIMES-PICAYUNE, Aug. 16, 1995, at B1 (reporting urge by sidewalk artists to ban sleeping in French Quarter).

²¹⁷ Police have seized shopping carts from the homeless in San Francisco under Operation Matrix, see Berg, *supra* note 214, at 149, burned their possessions, see Simon, *supra* note 214, at 633, and handcuffed them for many hours without food or water before releasing them. *Id.* at 632. The same police in Santa Ana, California who spotted homeless people by climbing to the roof with binoculars and radioing to officers below, used markers to write numbers on the arms of the homeless. *Id.*

²¹⁸ See Berg, *supra* note 214, at 160-63. While loafing and loitering ordinances have often been successfully challenged for vagueness since *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), sleeping and camping ordinances often survive vagueness and overbreadth charges. See Berg, *supra* note 214, at 161. Some courts have found that sleeping was not protected as an expression. *Id.* at 160. By contrast, in *Parr v. Municipal Court*, 479 P.2d 353 (Cal. 1971), and subsequent cases, courts have struck down loitering and sleeping bans passed with improper motives, e.g., aimed at "hippies" or as a declaration of "war on the homeless." See Berg, *supra* note 214, at 163. Other courts have required intent elements in loitering statutes. See *id.* at 164. Some plaintiffs have, however, challenged the metaphor of private property by arguing that anti-sleeping ordinances violate their right to travel, see Ades, *supra* note 216, at 616-23, although this has not been a very successful argument. See *Seeley v. State*, 655 P.2d 803, 808 (Ariz. Ct. App. 1982) (arguing that prohibition of sedentary activities such as sleeping did not discourage movement).

²¹⁹ In Miami, for instance, about seventy-five persons sleeping around a homeless shelter that was too full to take them were arrested immediately prior to the King Orange Bowl parade in order to eliminate their unsightly presence. Donald E. Baker, Comment, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 417, 417-18 (1991).

the business generated by a clean, safe "suburban-type" downtown will conduce to the benefit of more citizens than will allowing "such people" to occupy public sidewalks and parks.²²⁰ These arguments, however, often smack of property notions. Prominent citizens assert that the government is trustee²²¹ for responsible taxpayers; that business owners and subdivision dwellers "own" the streets, sidewalks and parks, and these non-contributing "types" do not "own" them.²²²

One dramatic example of the government's successful use of the private property metaphor against the poor, directly in a speech context, can be seen in *Young v. New York City Transit Authority*.²²³ In *Young*, the Transit Authority permitted charitable solicitors to solicit money if they obtained authorization, but denied beggars the right to do so.²²⁴ Any beggar who solicited funds from a terminal passersby was ejected from the terminal.²²⁵ While the District Court focused on the similarity of begging and charitable solicitation,²²⁶ the Court of Appeals expressed "grave doubt as to whether begging and panhandling in the subway were sufficiently imbued with a communicative character to justify constitutional protection."²²⁷ The Court of Appeals' opinion, which pays homage to Justice Scalia's "common sense,"²²⁸ is

²²⁰ These arguments sometimes parallel those made in obscenity cases, that permitting some homeless will "signal a breakdown in social order" because passersby who fear the homeless camping out and verbally harassing them will start avoiding public places and then the community altogether. See Berg, *supra* note 214, at 183-84.

²²¹ See *infra* notes 423-45, and accompanying text (discussing public trust doctrine).

²²² A Chicago Sun-Times editorial argued that sleeping bans "are about as cruel as closing times, which are routine in many parks, zoos and public buildings" and as hostile to the poor as "industrial and commercial zoning is hostile to residents." Robert Teir, *Crippling Civic Interaction Isn't a Right*, CHI. SUN TIMES, Jan. 15, 1994, at 16. The editorial complained that the right to sleep on public property "would extend to the White House dining room and Arlington National Cemetery." *Id.*

²²³ 903 F.2d 146 (2d Cir. 1990), *rev'g and vacating*, 729 F. Supp. 341 (S.D.N.Y.) [hereinafter *Young I*].

²²⁴ *Young I*, 903 F.2d at 160.

²²⁵ *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 344-45 (S.D.N.Y.), *rev'd and vacated*, 903 F.2d 146 (2d Cir. 1990) [hereinafter *Young II*].

²²⁶ *Young II*, 729 F. Supp. at 352-53.

²²⁷ *Young I*, 903 F.2d at 153.

²²⁸ The Court cites Circuit Judge Scalia's dissenting opinion in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983), *rev'd by Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), for the proposition that it is common-sense that begging is conduct, not speech. *Young I*, 903 F.2d at 153.

worth quoting at length:

[B]egging is not inseparably intertwined with a "particularized message." It seems fair to say that most individuals who beg are not doing so to convey any social or political message. Rather, they beg to collect money. Arguably, any given beggar may have "[a]n intent to convey a particularized message," e.g.: "Government benefits are inadequate;" "I am homeless;" or "There is a living to be made in panhandling" However, despite the intent of an individual beggar, there hardly seems to be a "great likelihood" that the subway passengers who witness the conduct are able to discern what the particularized message might be²²⁹

The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment. We certainly do not consider it as a "means indispensable to the discovery and spread of political truth." Nor do we deem it as communicating one of the "inexpressible emotions" falling "under the protection of free speech as fully as do Keats' poems or Donne's sermons."²³⁰

Moreover, the Court of Appeals distinguished charitable solicitation on the basis that it, unlike begging, involves "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes."²³¹ Apparently, the verbal statement, "I need money. Can you give me some?" does not convey information or advocate any "cause."

Perhaps more telling, the Court of Appeals brushed off the district court's claim that alms-giving was a traditional virtue. The appellate court countered that while charitable solicitation served community interests, begging was "nothing less than a menace to the common good."²³² Thus, the court failed to give credence to the district court's lament:

While the government has an interest in 'preserv[ing] the qual-

²²⁹ *Young I*, 903 F.2d at 153-54 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

²³⁰ *Id.* at 153-54 (citations omitted).

²³¹ *Id.* at 155 (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

²³² *Id.* at 156 (citing *members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984)).

ity of urban life' and in protecting citizens from [nuisance methods of expression], this interest must be discounted where the regulation has the principal effect of keeping a public problem involving human beings out of sight and therefore out of mind. Indeed, it is the very unsettling appearance and message conveyed by the beggars that gives their conduct its expressive quality.²³³

The impact that the private property metaphor has on the homeless is not pure fancy, but is reality in places such as Long Beach, New York,²³⁴ and San Francisco, California.²³⁵ One does not have to resort to fiction to understand what is being said to homeless people: even though you live here and you have contributed or now contribute taxes to the government, there is not one square foot in this land that you can call your own.²³⁶ A 1996 *Picket Fences* episode exposed this irony. In the story, a mentally damaged Vietnam veteran who returned to his home town was effectively barred from the city limits because he had nowhere to go. Homeless and penniless, he could not sleep on others' private property without breaking trespass laws, he could not sleep in public parks because it was banned by ordinance, and there was no public shelter to house him. Townspeople were outraged at the possibility that they should either have to care for the vet or put up with him sleeping on "their" public land. Fiction solves what real life cannot: the vet died before a court order to build him a shelter was executed.

Still others who enter public lands with some self-conception

²³³ *Young II*, 729 F. Supp. at 358 (citations omitted); see also, Anthony J. Rose, Note, *The Beggar's Free Speech Claim*, 65 IND. L.J. 191, 205 (1989) (stating that "while the beggar's speech amounts, on the surface, to a mere request for funds, her appeal necessarily includes a communication of far greater import") [hereinafter *Beggar's Free Speech*].

²³⁴ The court in *Stoner v. Miller*, 377 F. Supp. 177 (E.D.N.Y. 1974), invalidated a zoning ordinance in Long Beach, New York that prohibited boarding houses from registering persons requiring medical or psychiatric services. Since these were the only places where patients awaiting release from a state mental hospital could stay in Long Beach, they were effectively forced to leave the city. See *id.* at 196; see also Ades, *supra* note 216 at 621-22.

²³⁵ See Simon, *supra* note 214, at 654 (discussing ban of homeless from sleeping anywhere on public land).

²³⁶ Indeed, Professors James Wilson and George Kelling have compared vagrants to broken windows in a building—if the police fail to do anything about drunks or vagrants, an entire community may be destroyed. See Simon, *supra* note 214, at 645 (citing James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 35).

of citizenship, or "ownership" of public property, will be likely to turn from naive idealists to mistrustful cynics. Like Jesse Cantwell wandering around Hartford playing an anti-Catholic record attempting to convert his audience to Jehovah's Witness,²³⁷ they may be either oblivious to or ignorant of the implicit understanding shared by everyone else that public property is not really theirs. These speakers face a rude awakening when the government officer comes to evict them from public property (or cancels their cable access show as "not right for River City.")

Not understanding the implied "ownership" of the government, these "naive idealist" speakers will understandably attribute the government's ejection to "viewpoint discrimination." Assuming that the government's attempts to sweep them out originate from its desire to cleanse public property of their particular message, such speakers will become cynical. The faint-hearted will give up and go home to their privacy while the suspicious will attribute their arrests to government conspiracies. The hope that they will trust the government to hear their next complaint is modest, even though both the faint-hearted and the suspicious need to be heard.

Another class of speakers who will not "keep out," deliberate "trespassers," are stripped of their self-image as citizens in yet a different way. They enter onto public land precisely because they know they are not welcome, hoping and planning to be ejected in order to gain the sympathy of the media-watching public.²³⁸ If they're sufficiently savvy, they will ensure the presence of at least a gawking audience by the grand gesture of protest or the startling choice of location, symbolic action, or noise level. They may even call the media in advance to make sure their "act" receives attention.

When these protesters enter public property, however, they enter inside the metaphor. That is, they enter well aware of their status as trespassers. As trespassers, these speakers accept the power of government to exclude them from decision-making and from ownership of the resources of the polity; their

²³⁷ See *Cantwell v. Connecticut*, 310 U.S. 296, 301 (1940).

²³⁸ See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141-49 (1994) (discussing how civil rights activists intentionally used media coverage to influence public opinion and hasten introduction of civil rights legislation by staging nonviolent protests intended to provoke violence against activists).

speech is poised not to convince, but to protest. Thus, they regard their audience, the officials considered the surrogate owners of public property, as unwilling listeners to whom, at best, they can shake their fists. Their speech will, therefore, be designed to utter a cry of complaint with no expectation that it will be heard and truly considered by the officials to whom they putatively protest, for the inhospitable property owner is unlikely to hear the trespasser's complaint.

Ironically, these deliberate defiers will have succeeded at the very thing which government hopes to deny them by refusing a forum, whether deviously (to quash their content) or in good faith (to prevent disorder). Just as they count on their audience being broadened by television when they are excluded from public space, they will exacerbate the disruption of the government workplace, the irritation of building inhabitants, the invasion of others' privacy—those “evils” the public forum doctrine was designed to avoid.

Similarly, as government continues to regulate the Internet and other forms of interactive communication, we may expect to see more of these “non-owner” dialogues between the citizen and the government. The disruptions, however may be of a different kind. For example, “deliberate defier” techies may use viruses and other technology jammers, or post Unabomber-type manifestos on public Internet spaces to get the government or the press to take notice. The more government treats its own sites as private, and the more it attempts to regulate the “space” of other interactions, the more likely there will be reactions, ranging from resignation to cynicism to paranoia, from its citizens.

Thus, the government's claim to its “private” property by possession slices deep into the rationale for the preservation of speech. On one hand, it immediately excludes those who may have something of genuine importance to contribute to the public discussion of the public's future, and those who may not have the ear of legislators. On the other, it breeds cynicism by those who cross the line with the expectation that they will be heard. To these speakers, the government is, in fact, out to suppress particular viewpoints from the public conversation.

C. The Labor Theory and the Concept of Servanthood for Government Workers

The labor theory of property similarly makes understanding

government lands as private property problematical. An argument that government is entitled, as a laborer, to its property, either by natural right or as a matter of fairness, particularly distorts the self concept of the government worker. Contrary to the ideal of public servanthood—that public employees aid both the general public and specific citizens—the private property metaphor encourages public employees to view government property as their dominion, with themselves as masters.

Though the labor theory of property can be rooted in either natural rights or economic theory,²³⁹ the natural rights version is critical to this particular discussion. Under natural rights theory, the right to possess is an extension of a person's right in his own person.²⁴⁰ John Locke, in his *Second Treatise on Government*, posited:

The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.²⁴¹

As Cohen points out, this equation of labor and desert is assumed to be self-evident by both socialists and conservatives who believe that capital is the result of the savings of labor.²⁴²

Of course, as a theory of natural rights, the labor theory is problematic as applied to a democratic government. If one assigns these "natural" rights to the state, one has to wrestle with a resurrected theory that the state is a natural "being" possessing natural rights, a step which moves even beyond the "divine right of kings,"²⁴³ who are at least persons. Moreover, such an argument does not comport with democratic theory, since it pos-

²³⁹ See Epstein, *supra* note 193, at 1225-30 (discussing roots of and problems with labor theory).

²⁴⁰ See D.R. DENMAN, *THE PLACE OF PROPERTY* 1 (1978).

²⁴¹ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17, para 2.7 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).

²⁴² COHEN, *supra* note 90, at 51.

²⁴³ See ROBERT FILMER, *PATRIARCHA OR THE NATURAL POWERS OF KINGS* (1680) (defending "divine right of kings"). *But see generally* JOHN LOCKE, *First Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 7, 7-118 (Thomas J. Cook ed., Hafner Press 6th ed. 1947) (1764) (criticizing Filmer's "divine right of kings" thesis).

its a creature with a separate will and rights at possible odds with the parameters "the people" impose on their form of government and their laws.

Another derivation from Locke's theory of natural rights assigns rights based on fairness. People are entitled to property in which they have mixed their labor because they deserve it in exchange for their work.²⁴⁴ The corollary works as well: if I have worked to earn property A (such as money), then my transfer of property A to someone in exchange for property B (such as land) is similarly deserved.

It is most difficult to find coherence in the metaphor of "government property" under the labor theory of property. Under this theory, an individual becomes morally entitled to property by mixing his labor with matter found in the state of nature. His exertion of effort plus his claim on property serves as a moral justification for awarding such property to him. To be sure, the assignment of property rights to the government based on the labor theory is more compelling in modern times, when government has expended considerable resources in paving roads and sidewalks, erecting and maintaining buildings, and even managing the forestry of its public lands. The labor theory, however, posits that the owner has a natural right to that which he can subdue. Applying the theory to public property would permit government to resurrect a moral justification for control over lands gained by conquest, a doctrine which modern democratic polity seems not to wish to return.

As applied to government ownership of all "free" land, a fairness doctrine has inherent limitations. For property which the government achieved by conquest, for instance, one must argue that the government "earned" such property by massacring those who stood in the way of its claims.²⁴⁵ Furthermore, the claim that the government deserves public land because it pur-

²⁴⁴ See *Origin of Property*, *supra* note 203, at 73 (citing JOHN LOCKE, *Second Treatise of Government* para. 25, in *TWO TREATISES OF GOVERNMENT* 327 (P. Laslett rev. ed. 1960) (1690)).

²⁴⁵ See generally ALVIN M. JOSEPHY, JR., *THE INDIAN HERITAGE OF AMERICA* 295-343 (1968) (describing European conquest over American Indian tribes); WILCOMB E. WASHBURN, *THE INDIAN IN AMERICA* 126-96 (Henry S. Commager & Richard B. Morris eds., 1975). Referring to the period from the mid-1840s to the mid-1850s, Washburn states that "[t]he greatest real estate transaction in history, effected through wars, treaties, and a mass population movement, had been accomplished." *Id.* at 196.

chased vast tracts from other countries loses its salt given that the taxpayers, and not the "government," supplied the "sweat equity" necessary to achieve the exchange property.²⁴⁶

More importantly, the careless implied assignment of these "natural" rights over public property to individual government workers, rather than the government, may cause real difficulties for challenging speech. A government worker with any significant number of years in service is quite likely to come to think of the government building in which she works, or the government land which he supervises and tends, as his or her "own." The desk space which the worker earned by many years of typing forms slowly fills with family pictures and personal items. The corridor which a government worker travels through from day to day becomes filled with want ads and community announcements.

Indeed, the changes in public space over the past decades which are meant to imply the openness to the public, have paradoxically only reinforced such possessive tendencies. Richard Sennett has described how the changes in public buildings have fortified feelings of isolation from the community and insecurity in those who inhabit them.²⁴⁷ The advent of modern architectural movements has created dead space, full of anxiety and danger, where once there was community space.²⁴⁸ Similarly, the change from enclosed offices to common spaces with work stations, meant to create the illusion of community while cutting down on chatter, has rather increased the anxiety of workers stripped of any personal "space."²⁴⁹

In *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, Erving Goffman helps us understand how the human instinct to create "real property" might be dis-

²⁴⁶ Pointing out the fallacy of assuming that the value of any finished product can be properly attributed to any one person, Cohen asks: "How shall we determine what part of the value of a table should belong to the carpenter, to the lumberman, to the transport worker, to the policeman who guarded the peace while the work was being done, and to the indefinitely large numbers of others whose cooperation was necessary?" COHEN, *supra* note 90, at 51.

²⁴⁷ SENNETT, *supra* note 55, at 12-16.

²⁴⁸ As one example, Sennett notes the replication of International School skyscrapers, which create the illusion of community space through first-floor, open-air courtyards while concealing the fact that no human activity occurs on the first floor, with the exception of passage. *Id.* at 12-13.

²⁴⁹ *Id.* at 15 (noting that "[d]ead public space is one reason ... that people seek out on intimate terrain what is denied them.").

torted in government workers in the circumstances Sennett describes.²⁵⁰ He notes that people will create a sense of ownership in physical space, particularly in settings where they have been stripped of usual protections (rooms, drawers, locks) for their personal property.²⁵¹ In the mental institution which Goffman describes, patients develop "personal territories," ranging from the top of a radiator to a chair in front of the television and "stashes" on their person or on window sills or trees designed to hide and protect their personal possessions.²⁵² A popular old television show, *WKRP in Cincinnati*, made a running gag of this instinct. Newcomers were warned to knock at the door of Les Nessman's invisible "office" before entering, and he was often shown opening the invisible door to this invisible office to let himself out or others in.

Government workers, confronted with the anxiety of depersonalized, insecure space created by such "commons" architecture, have come to see the government building as their own because of their labor. Thus, they are likely to pursue the metaphor of private property through the lens of their own experience when citizens come through the door of the government office.²⁵³ Government supervisors, the "fathers" or "mothers" of the office, are likely to exercise their parental instincts and drive off those whom they perceive to be threatening their workers' privacy or peace. Their subordinates may well see the "stranger" as an intrusion on their space, an invading microorganism in a healthy cell, rather than as the ultimate "bosses" of their work, or even the "customers" they are there to serve.

Even those values which pervade government service for the benefit of the public interest push toward the exclusion of irritating or challenging speech. If government servants are to serve and please, to go by the book, and to be efficient in the performance of their duties, then the irritating speaker challenges each of these values. To serve and please efficiently, the government worker must act to reduce dissonance by finding the first available peace-keeping solution. When immediate compromise of in-

²⁵⁰ Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961), reprinted in PERSPECTIVES ON PROPERTY LAW 1, 1-3 (Robert C. Ellickson et al. eds., 2d ed. 1995).

²⁵¹ *Id.* at 1-3.

²⁵² *Id.* at 3-5.

²⁵³ See JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY 28-31 (1990) (discussing power of social service agencies and social workers).

terests is impossible because of the complexity of issues and emotions, the government supervisor is forced to eliminate dissonance by resorting either to "bureaucratese," following the rules to cut off the argument, or to eviction of the troublemaker.

The implications for speech when the estranged public space meets the intuited "labor" theory of property, reinforced by government values of service and efficiency, are obvious. Those speakers whose speech is either irrelevant to the government worker's perceived notion about the function of his space or threatening to the worker's daily habit and sense of tranquillity are the first to be ejected. Moreover, the government worker is likely to feel quite righteous about the ejection of such a foreigner. After all, the government worker has earned the right to be secure and is also acting for the good of other, more compliant clients who will be upset by the speaker's threat.

A seemingly far-fetched extension of the property metaphor becomes not so unrealistic in real life. For example, a Twin Cities newspaper recently reported that the county prosecutor in Minneapolis expressed displeasure with the independent Domestic Abuse Project (DAP) by trying to strip the project of the attributes of official presence.²⁵⁴ The prosecutor threatened the project's official status by taking away its share of government "property"—attempting to turn off its telephone, having its mail stopped, and trying to eject its workers from their government office space.²⁵⁵ DAP's crime, according to the news report, was its refusal to help the prosecutor gather evidence against a victim's abuser by disclosing confidences of the victim.²⁵⁶ The story shows that by taking away its "property" rights to public space, the prosecutor understood precisely how to discredit the independent DAP in the eyes of the public.

The public employee who brings a labor or political dispute to the office is similarly charged with offending the privacy and tranquillity of his co-workers, a privacy purchased through their years of service. Similarly, the homeless person begging in a public corridor, who will not complete public assistance forms, is perceived as threatening to regulations constraining the caseworker's administration of largesse.²⁵⁷ The right to exclude,

²⁵⁴ MINN. WOMEN'S PRESS, Feb. 21, 1996, at 6-7.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See HANDLER, *supra* note 253, at 21-25 (discussing power of government of-

which protects both the tranquillity and the routine of private life in the home, is the first to be trotted out by the bureaucrat. Meanwhile, other rights in the bundle, such as the rights to share, to permit use, and to exchange, are forgotten.

Again, government-created cyberspace is just as likely to raise the anxieties of government workers who have invested their labor in creating and regulating these spaces, and thus have a sense of "ownership" in what they have created. As computer communication replaces in-office confrontations between the government worker and the uninvited individual, the attempts of the worker to regulate the ways in which the public can interact with him will simply be exacerbated. Indeed, with the computer, the government worker can truly "shut off" conversation in a way that is impossible in a government office without a security escort. Just as government workers now use voice-mail and busy signals to avoid talking to members of the public, they will also have the discretion to "listen," erase, or forward into limbo the complaints or cries for help that come over the computer. Clearly then, the problem of government servanthood under the private property metaphor will increase.

D. *Social Relationships Theory, Power, and Equal Citizenship*

The social relations theories of property create similar difficulties for the notion of government-owned property. These theories understand property to be a relational category²⁵⁸ and emphasize how property regimes can recognize and affect human relationships by creating power and vulnerability in those related through the property.²⁵⁹ As Morris Cohen notes, "we must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings."²⁶⁰

In *Rethinking Democracy*, Carol Gould argues that assignment of property rights to A may give A control over the condi-

ficial over client).

²⁵⁸ See COHEN, *supra* note 90, at 45 (noting that property right is "a relation not between an owner and a thing, but between the owner and other individuals in reference to things").

²⁵⁹ JOSEPH W. SINGER, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1, 41-42 (1991).

²⁶⁰ COHEN, *supra* note 90, at 46-47. Cohen quotes Ahrens, who argues that "[i]t is undoubtedly contrary to the right of personality to have persons dependent on others on account of material goods.' But if this is so," argues Cohen, "the primary effect of property on a large scale is to limit freedom." *Id.* at 54 (citation omitted).

tions that B requires for her own agency.²⁶¹ Property then becomes either an instance of, or tool for, A's domination over B, or of B's freedom from such domination, depending on how it is legally recognized and distributed.²⁶² Similarly, Margaret Jane Radin argues that some property, such as a wedding ring or a piece of clothing, can be constitutive of the self as a "continuing personal entity" in the world.²⁶³ Then the award of such property to A can invest A with the ability to tear B's self-constitution apart.

The danger of viewing government property as identical to personal property becomes quite obvious in the speech context under a social relations view, particularly in Gould's terms. The government may have vast control over the conditions that B requires for her own agency. Imagine a welfare recipient, B, who has been driven to the point of collapse by the bureaucratic requirements that she verify every fact she has recited in her application for welfare benefits if she wants to receive aid. In an attempt to voice her frustration and her right to respect as a human being, which she believes is being threatened by such demands, she goes to the welfare office, where her loud complaints earn her a police escort out of the office.

Under the social relations theory, the government's demand that its "property" rights be respected has not just given the applicant's caseworker the power to force the applicant's compliance with the verification rules, that is, the power to change the applicant's behavior. These rights have also given the government power to force the applicant's silence about the justness of the policy, that is, the power to mute her expression of belief and feeling.

From the standpoint of the constitutional community, the "pall of orthodoxy,"²⁶⁴ which accompanies suppression of the expression of belief, should warrant serious concern for the Court. Moreover, to the extent that the autonomy theory of the speech

²⁶¹ CAROL GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY AND SOCIETY* 179 (1988).

²⁶² *Id.*

²⁶³ Margaret J. Radin, *Property and Personhood*, reprinted in *PERSPECTIVES ON PROPERTY LAW* 8, 9 (Robert C. Ellickson et al. eds., 2d ed. 1995).

²⁶⁴ See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that Jehovah's Witness students are not required to salute flag); Stevens, *supra* note 113, at 1304 (discussing Court's struggle with content-based regulation of speech).

clause holds any water, B's ability to constitute herself as an agent through speech is critical.²⁶⁵ The government's ability to take that speech-agency away from her at the very place where it is likely to do some good—at the source of her maltreatment—precisely threatens her agency. She is more than demoralized by the government's *demand* to exercise its property rights: she is unmasked and unheard.

The equation does not change appreciably for the better if we invest the government worker, rather than the government itself, with the power to dominate by assigning the government's property rights in public space to the government worker. Whether the worker exercises those rights by placing a counter between him or her and our welfare recipient, or requires the government "customer" to wait in a separate office until his number is called, the government is placing the power to exert control over the citizen in the hands of that worker.

As suggested previously, the move toward computer communication between citizen and government worker does not lessen, but rather exacerbates the ability to disempower the constituent. In addition to the government worker's ability to put off a complainer indefinitely in computer interactions, the worker may have the power to identify the speaker, to share the complaint with anyone in the public or any other government office, or to "edit" it to conform to the worker's desires. The power to shame and control by delay and disclosure is simply multiplied.

In the hands of the petty bureaucrat, the power to exclude speech can be used in an abusive manner against all but the most compliant citizen. Yet even in the hands of the most well-meaning government servant, the power to invite or exclude the citizen from public space is especially tempting when the government worker needs some privacy, has had a bad day, or is feeling stressed by demands that may seem more important at the time.²⁶⁶ Even the compliant client may back up the govern-

²⁶⁵ See GOULD, *supra* note 261, at 60-71 (arguing that no agent has more right to free choice, understood as capacity for self-development, than any other agent); see also HANDLER, *supra* note 253, at 19 (observing that clients must complain in order to protect their rights).

²⁶⁶ See HANDLER, *supra* note 253, at 29 ("In public agencies, which chronically lack the resources to meet demand, social workers are relatively powerless to change the situation; thus, they develop various personal coping mechanisms such as withdrawal and client victimization.").

ment servant ready to evict a speaker. He or she too may have had a bad day. In any case, the compliant client may feel a threat to the stability of his or her own relationship to the case-worker or the bureaucracy, however demeaning, which the strain of conflicting voices creates.

E. Efficiency Concerns and the Dislocation of Decision Making

As the labor theory of property suggests, one basis for assigning property rights is utilitarian. That is, property will be used most efficiently and productively for the entire society if exclusive ownership is vested in particular persons. Following the labor metaphor, a government worker may feel duty-bound to eject a speaker, for the work he or she has been assigned in the office is the work that the government prizes most highly. After all, if the government prized speech that highly, it would give the speakers their own office and pay them.

In economic theory, awarding property to the laborer gives the first possessor an incentive to use the land rather than allowing it to run fallow.²⁶⁷ In this view, those who are assured that they will receive the fruits of their work will both use it well and conserve it for the future.²⁶⁸ By contrast, if property is not owned by anyone, or is owned in common, users will attempt to overuse it to gain the most profit, refusing to contribute labor and resources into others' efforts to conserve it. In such a system, a free-rider might immediately obtain more rewards than if he or she cooperated, but the long-term effects of non-cooperation in establishing a property regime are worse for everyone.²⁶⁹ Thus, people enter into private property regimes in order to get their second-best choices.²⁷⁰

²⁶⁷ See Epstein, *supra* note 193, at 1221 (noting that ownership could create effective incentives for development and improvement of property); see also COHEN, *supra* note 90, at 55 (discussing economic justification of private property is maximum productivity); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711 (1986) [hereinafter *Comedy of Commons*] (stating that exclusive control of property encourages owners to invest time and labor into development resources).

²⁶⁸ See *Comedy of Commons*, *supra* note 267, at 711-12 (noting that right to exclude others makes private property fruitful).

²⁶⁹ See *id.* at 712 (discussing idea of "tragedy of the commons" where property open to public is wasted by overuse or underuse). See generally Garrett Hardin, *The Tragedy of the Common*, 162 SCI. 1243 (1968).

²⁷⁰ This story of the "self-interested rational maximizer," as Professor Rose pointed out, has evolved from a fictional history of theory found in the work of Locke

The efficiency theory, as recognized by Justice Rehnquist, is probably the most coherent theory supporting the protection of government property rights similar to those of a private landowner. In this view, awarding public property rights to the government is most likely to result in the most efficient use of such property on behalf of the people. Government, not the private individual, is likely to know and reflect the most individual desires for its use. Of course, this macro conception of efficiency rests on the assumption that government bureaucrats who control property are following a fairly comprehensive legislative scheme which prioritizes the use of public lands.

The micro conception of efficiency as entailing the need for private property rights surfaces in government speech cases such as *Pickering v. Board of Education*²⁷¹ and *Cornelius v. NAACP Legal Defense & Education, Fund Inc.*²⁷² The progression in the arguments in these cases is telling: both cases begin with a focus on employees' rights, shift to the concerns of government as employer, and then imply property rights emanating from that government status.

Thus, in terms of doctrinal progression, the public employment cases first embrace Justice Holmes' notion that public employment is a privilege, such that public employees waive their

and others, to an unstated maxim about the human essence embedded in Western legal regimes of property. See *Comedy of Commons*, *supra* note 267, at 73-75. Indeed, Senator Henry Dawes, having visited the Five Civilized Tribes (Cherokee, Creek, Chotaw, Chikawa, and Seminole) in 1877, made the following moral evaluation after noting their success in preventing pauperism or community debt through a system of common ownership: "They have not got as far as they can go because they own their land in common, and under that [system] there is no enterprise to make your home any better than that of your neighbor's. There is no selfishness, which is at the bottom of civilization." Marjane Ambler, *The Long Tradition of Defying Selfishness*, VII TRIBAL COLL. J. 8 (Winter 1996). The view of the Bureau of Indian Affairs that common ownership was indeed immoral was further evidenced by Indian Commissioner Charles Burke's 1923 admonition to the tribes about their practice of "give-aways" at festive occasions: "You do yourselves and your families great injustice when at dances you give away money or other property, perhaps clothing, a cow, a horse, or a team and wagon." *Id.* Dawes quickly corrected that "moral failing" by sponsoring the Allotment Act, which divided Native American communal lands into individual parcels privately owned by individuals and families, a move which many Native Americans credit with the destruction of their self-sufficiency. See 138 CONG. REC. E873 (daily ed. Mar. 30, 1992) (statement of Rep. Faleomavaega).

²⁷¹ 391 U.S. 563, 564 (1968) (dismissing teacher for criticizing board in letter to newspaper editor).

²⁷² 473 U.S. 788, 813 (1985) (soliciting funds in federal offices limited to particular groups).

rights to speak.²⁷³ Then, rejecting that view, the Court focuses on balancing the interests of the public employee, "as a citizen, in commenting on matters of public concern" and of the state, "as employer, in promoting the efficiency of the public services it performs through its employees."²⁷⁴ Finally, in *Cornelius*, the focus is on property: "The federal *workplace*, like any *place* of employment, exists to accomplish the business of the employer ... [and the] Government has the right to exercise control over *access* to the federal *workplace* in order to avoid interruptions to the performance of the duties of its employees."²⁷⁵

The difficulty with this "private property" view of efficiency is that government managers who exclude speakers from the workplace are being directed by a very narrow notion of what is efficient. They do not always think of efficiency in the sense of "efficacious"—the "power to bring about an intended result"²⁷⁶—when they decide who will be allowed to use property. In speech theory, what will effect the goal of government is active participation by people in discussing the concerns of government (the self-governance rationale), exposition of falsehood (truth-seeking), challenge to abuses of power (checking), and expression of frustration with perceived injustice (the safety valve).²⁷⁷ The government bureaucrat, however, does not figure these speech-related methods for affecting democratic government into his efficiency calculus. Rather, like any specialist in a large bureaucracy, he organizes his department by the norms and goals pre-

²⁷³ See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892) (stating that "[t]here are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech"); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

²⁷⁴ *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); see also *Rutan v. Republican Party*, 497 U.S. 62, 64, 74-75 (1990) (plurality); *Connick v. Myers*, 461 U.S. 138, 140 (1983) (applying *Pickering* balancing test to case involving public employee and questionnaire distribution to fellow workers). It should be noted that this type of internal efficiency rationale is a far cry from the democratic "government neutrality" argument which was implemented in *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), to uphold the Hatch Act, 5 U.S.C. § 7324(a)(2) (1994) (relevant portion).

²⁷⁵ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 813, 805-06 (1985) (emphasis added).

²⁷⁶ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 725 (1989).

²⁷⁷ See THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (Vintage Books 1966) (discussing necessity of maintaining system of free expression).

scribed for that specialty and the tasks necessary to further the general goals of the organization.²⁷⁸

In Robert Presthus' theory, organization by specialization goals is fraught with landmines for the "big picture" of the organization.²⁷⁹ Needing prestige and influence, specialists become so invested in the concerns of their specialty in a competitive workplace that they forget the driving values and concerns of the organization.²⁸⁰ Moreover, the more influence specialists gain, the more they refuse to listen to those in the "line of authority"²⁸¹ who are likely more in touch with the organization's customers.

So too in government, a bureaucrat may forget the ethical "big picture" of democracy for the narrow interpretation which his task imposes on him. This may cause him to shut out voices, whether employees or outsiders, who are closest to the fears and desires of those the bureaucracy is designed to serve. Justice Marshall alluded to this in *Clark v. Community for Creative Non-Violence*²⁸² when he suggested that the biggest danger to speech is not that government will arbitrarily suppress particular speech on the basis of viewpoint, but that the bureaucrat will suppress all speech simply because it creates problems and disrupts the efficient performance of duties.²⁸³

Still more problematic for a democracy is that, even if the organization could run on the views of specialists, there is no "speech" specialist who will protect the values of speech for democratic government. There is no one who can be counted on to advocate for the instrumental utility of speech in the face of conflicting demands by other departments. To the extent that the courts have acted as "speech specialists," the public forum doctrine has stripped them of their organizational checking function by excluding their opinions favoring speech whenever the speaker speaks on "private" government land. It is, of

²⁷⁸ See ROBERT PRESTHUS, *THE ORGANIZATIONAL SOCIETY: AN ANALYSIS AND A THEORY* 28-29 (1962) (discussing specialization of big organizations for greater productivity).

²⁷⁹ *Id.* at 29 (stating that "[e]ach feels that his role is more essential to the organization").

²⁸⁰ *Id.* at 30 (stating that "specialists ... fight[] among themselves about resources and recognition ... [and that] [e]ach department or division tends to become a world in itself").

²⁸¹ *Id.* at 34 (finding that "[k]nowledge ... challenges hierarchical definitions of authority and role").

²⁸² 468 U.S. 288, 301 (1984) (Marshall, J., dissenting).

²⁸³ *Id.* at 313-16 (Marshall, J., dissenting).

course, not beyond a bureaucracy to demand that all of its specialties make speech interests a high priority in their efficiency analysis, but such a demand requires sustained visionary leadership from the bureaucratic head, an unlikely prospect in a democracy that keeps its Presidents only four years. (As a test, we might give government employees a quiz on the values of the "organization" to see how many of them mention speech as a top priority!)

In summary, from a property perspective, the "private property" metaphor employed by the Court in public forum cases has the potential to delegitimize democratic government. In its "will" manifestation, it justifies government action which is unprincipled and unchecked. In its possession garb, it encourages citizens to abandon their public role of oversight for their own private spaces. In its labor form, it encourages the government worker to turn from servanthood to mastery as his way of understanding his relationship with the public. In its social relations form, it threatens the agency of particularly vulnerable members of that public. Finally, as a means of efficiency, property theory elides the responsibility of government to balance competing public values conscientiously and carefully.

III. PRIVATE PROPERTY AND SPEECH JUSTIFICATIONS

Just as the private property metaphor viewed from a property theory perspective raises deep concerns for the quality of our public life, it raises similar concerns when traditional speech justifications are considered. The metaphor of private property becomes particularly problematic when viewed in this context, for it challenges most of the justifications for protecting speech as a preferred individual right: the autonomy rationale, the truth-seeking and checking functions of the First Amendment, and the safety valve and tolerance arguments.²⁸⁴

A. *Rights v. Rights: Speech as Autonomy and as Invasion of Privacy*

In modern times, speech jurisprudence has significantly become aligned with the "autonomy" emphasis which undergirds such unenumerated rights as the right of privacy and the right

²⁸⁴ See Day, *supra* note 47, at 200 (attributing these arguments to Thomas Emerson's book, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970)).

to travel.²⁸⁵ Those who justify speech using the autonomy theory usually argue that autonomy, especially as enhanced through political speech, is valuable to the wider community and thus is not simply a protection against government involvement in private lives.²⁸⁶ Yet, autonomy has increasingly become a critical aspect of the defense of speech in its own right.²⁸⁷

In the public forum literature and cases, the constitutional problem is often defined as a clash between two autonomy rights: the right of the speaker to express himself against the right of the hearer not to have his or her privacy invaded.²⁸⁸ Yet, the use of the private property metaphor is clearly problematic under the "autonomy" rationale for speech, even considering the state interests in protecting workers and others from invasion of their rightful "space."²⁸⁹

The private property metaphor is usually invoked in those cases where the Court seems most disposed to understand the speech right at issue as an autonomy right. Two of Justice O'Connor's public forum decisions will serve as examples. In

²⁸⁵ See *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (finding that right not to have expression censored is meant to "assure self-fulfillment for each individual") (emphasis added).

²⁸⁶ Frank Michelman describes autonomy, or self-government, as the direction of "our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations." Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 26-27 (1986). "[I]ts requisite forum is 'a political community of equals,' where individual reason corresponds to public rational debate. *Id.* (quoting R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983)).

²⁸⁷ Indeed, Dean Gaffney has suggested that for liberals like Bruce Ackerman, the "goal of autonomy [within the context of public discourse] is a *per se* good that is virtually comprehensive." Edward M. Gaffney, *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TUL. L. REV. 1143, 1147 (1990).

²⁸⁸ See Ben A. Montenegro, Note, *Injunction Provisions Establishing Both a Thirty-Six-Foot Buffer Zone Around an Abortion Clinic Entrance and Driveway and Limited Noise Restrictions Do Not Violate the First Amendment, But Other Provisions of the Injunction are Unconstitutional—Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), 25 SETON HALL L. REV. 1530, 1532 (1995) (noting conflict between right to speak and right not to hear).

²⁸⁹ Allen E. Brownstein & Stephen M. Hawkins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1078 (1991) (analyzing potential conflict in protecting both free speech and private property rights).

Cornelius v. NAACP Legal Defense & Education Fund, Inc.,²⁹⁰ plaintiffs sought to solicit contributions for their charities, including the NAACP Legal Defense and Education Fund, Inc., an organization that has conducted or underwritten many of the desegregation cases of the last half of this century.²⁹¹ However, they were excluded because an Executive Order permitted only the "official" federal charities drive, the Combined Federal Campaign (CFC), to solicit employees during working hours.²⁹² Thus, several advocacy groups,²⁹³ including the plaintiffs, were excluded from applying for funds from the official charities drive²⁹⁴ because the CFC limited participation to nonprofit organizations that provided direct health and welfare services to individuals or their families.²⁹⁵

In the view of Justice O'Connor, the solicitation "speech" was a personal interest of the plaintiffs rather than a public good.²⁹⁶ Although such speech furthered the individual's interest in expressing his or her beliefs and commitments, Justice O'Connor concluded that the CFC constituted a "nonpublic forum" and, therefore, that the speech could be prohibited because "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."²⁹⁷ Thus, because it was the government's land, the government could decide whether money given for food and shelter for the needy was a better use of charitable funds than political advocacy and litigation.²⁹⁸

²⁹⁰ 473 U.S. 788 (1985).

²⁹¹ *Id.* at 793-94.

²⁹² *Id.* at 792.

²⁹³ The legal defense fund groups included the "NAACP Legal Defenses and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyer's Committee for Civil Rights Under Law, and the Natural Resources Defense Council." *Id.* at 793.

²⁹⁴ *Id.* at 793.

²⁹⁵ *Cornelius*, 473 U.S. at 795.

²⁹⁶ *See id.* at 799 (finding that literature directly advances speaker's interest).

²⁹⁷ *Id.* at 811.

²⁹⁸ *See id.* at 809. The Court determined that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." *Id.* at 809. The Court stated that: "[h]ere the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." *Id.*

Similarly, in *United States v. Kokinda*,²⁹⁹ Justice O'Connor found that a U.S. Postal Service regulation prohibiting political advocacy leafleting and solicitations upon a public sidewalk leading to the post office constituted a reasonable measure designed to "ensure the most effective and efficient distribution of the mails."³⁰⁰ Given that view, the state's interest in protecting unwilling hearers on the public sidewalk, designed to create access to the post office, outweighed the speaker's personal interest in reaching both willing and unwilling hearers.³⁰¹

In both *Cornelius* and *Kokinda*, Justice O'Connor understood the government to be in the position of choosing between the autonomy rights of speech and privacy, as a landowner could. Thus, if the government, as a landowner, wished to invite on its property those non-threatening persons who wish to conduct their business—such as getting stamps—but not those who wanted to engage others, that property right of the government needed to be respected.

Yet, according to the rights versus rights conception, the government acts as a neutral arbiter among equally respected citizens, adjudicating between speakers and unwilling hearers. In the economic version of such speech arbitration, the government must act to free up the "marketplace" by permitting the hearer to walk away from a deal. However, the hearer is unable to escape from earshot because he is "captive" to the speaker and is forced to "buy" the speech, whether he wants to or not.³⁰² Under this view, articulated in *Lehman v. City of Shaker Heights*,³⁰³ the government recreates market conditions by forcing the speaker to confront the hearer in a place where she can choose whether to place value on the speech (by listening to it) or refuse to put a value on it (by averting her eyes).³⁰⁴

²⁹⁹ 497 U.S. 720 (1990) (plurality).

³⁰⁰ *Id.* at 735.

³⁰¹ *Id.* at 732-33. The Court found that, because solicitation is disruptive to the business of the post office, restrictions banning solicitation on postal sidewalks were reasonable. *Id.*

³⁰² See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (noting that public transportation car card displays may impose view upon captive audience).

³⁰³ *Id.*

³⁰⁴ See, e.g., *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127-28 (1989) (stating that "dial-it" media, such as "dial-a-porn" services, require listener to take affirmative steps to receive communication and thus a "captive audience problem does not exist"); *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating that one has ability to avert one's eyes in courthouse to avoid seeing offensive lan-

In the "spatial" version of the unwilling hearer argument, speakers who invade the non-public forum are violating the privacy and personal space of the hearer, thus causing him or her some substantive harm.³⁰⁵ Government must act by either physically expelling the speaker from the hearer's zone of privacy, by preventing speech from invading the hearer's ears,³⁰⁶ or by distancing the speaker so that the hearer must elect to go closer if he or she wishes to listen.³⁰⁷

In the government workplace, however, the government worker may become confused about his or her role in arbitrating between the speaker and the unwilling hearer who is concerned about his or her "privacy."³⁰⁸ Government workers may misinterpret their neutral arbiter role as a conflict-avoidance responsibility. If they are imbued with a government servant ethic, they may believe that it is their responsibility to ensure that people are "nice" to each other, to de-escalate conflict by removing the person who appears to be causing the conflict. If the workers are concerned about trouble from complaints or lawsuits, they may take the easiest alternative and simply ban any speech from their area of responsibility by disciplining their workers and by evicting everyone else who creates conflict.³⁰⁹ Indeed, within the context of the public forum doctrine, this speech-avoidance mentality gives every incentive to suppress

guage on jacket).

³⁰⁵ Eugene Volokh argues that the captive audience doctrine is really a "privacy of the home doctrine," and that cases such as *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), have been misread to extend the doctrine beyond the home. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1833, 1836-38 (1992) [hereinafter *Workplace Harassment*].

³⁰⁶ See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (censoring indecent language broadcast over radio).

³⁰⁷ See *City of Renton v. Playtime Theaters*, 475 U.S. 41, 52 (1986). In *Playtime Theaters*, the Supreme Court upheld the authority of cities to regulate adult theaters by dispersing them or by concentrating them in a given area. *Id.* This method of speech regulation requires the willing hearer to travel to the designated area in order to listen to the speech. *Id.*

³⁰⁸ See *Workplace Harassment*, *supra* note 305, at 1809-10 (examining incentives for employers to suppress speech of employee and noting that "many of the recently adopted employer anti-harassment policies bear the marks of the employer's concern about liability").

³⁰⁹ Similarly, private employers fearing liability tend to suppress speech which would be protected by implementing overbroad workplace policies that reach even questionable speech and taking disciplinary action against those who violate them. See *id.* at 1809-10. Employers take such measures out of fear that they will be liable for their employees' offensive speech. *Id.* at 1810.

speech and no incentive to encourage it.³¹⁰

Moreover, to turn the tables on the government personification concept used by Justice Blackmun and others,³¹¹ at the very least, the government should make a distinction when it is acting *qua* government and when it is acting *qua* employer. As an employer, its interests are partisan and one-sided. It may elect, in some senses, not to hear even an important speaker by claiming that it must complete its governmental tasks. As the referee between a speaker and an unwilling hearer, however, it must act impartially—as government acts—not favoring the interests of either speaker or hearer except on the basis of some principle applied equally and fairly.

Nevertheless, it is not clear that government, as employer, can always act in a manner that is required of an impartial decision-maker. The *Cornelius* case provides a good example of this potential for confusion and conflict with its neutral role.³¹² In *Cornelius*, the government's interest in its own efficiency was potentially threatened by government employees soliciting each other without limitation in the workplace.³¹³ In such a position, the government can easily resolve any conflict by collecting money through a combined charity drive that includes all charities requesting to be listed, or by designating a time and a place in which individual employees can solicit each other and any manner restrictions it deems appropriate—such as prohibiting flashy signs or the acceptance of credit cards. In *Cornelius*, the government did neither, excluding some charities through the creation of the Combined Federal Campaign.³¹⁴

In *Cornelius*, the government confused its interest in minimizing solicitations in the workplace with its alleged interests in protecting employees' captivity or privacy interests. Fearful that employees might make a bad or coerced choice with their charitable dollars under the pressure of solicitation, the government in *Cornelius* decided for them that "service" charities were more deserving of their contributions than "advocacy" charities; the

³¹⁰ See *id.* at 1810-11 (noting that harassment laws provide incentive for employers to suppress employee speech because such laws impose liability on employer for offensive employee speech, whereas libel laws impose liability on speaker and, therefore, do not encourage employer to restrict employee speech).

³¹¹ See *supra* notes 145-56 and accompanying text.

³¹² *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

³¹³ *Id.* at 795-801, 812.

³¹⁴ *Id.* at 790-91; see also *supra* note 290 and accompanying text.

government, therefore excluded advocacy charities from workplace solicitation.³¹⁵ To justify its policy, the government set forth a "workplace explanation": if an individual employee felt offended or "invaded" by solicitations from "advocacy" charities, then the workplace will be disrupted.³¹⁶

As a neutral arbiter, by contrast, the government would begin with the premise that its employees' interests in avoiding speech were equal in importance to the speakers' interests in speaking. In quintessential public fora, in fact, the Supreme Court has required that one right should not be sacrificed for the other.³¹⁷ In the workplace and other nonpublic fora, however, the government partly prefers the interests of the unwilling hearer over the interests of the willing speaker, ironically preferring the unenumerated right to privacy over the enumerated right to speak.³¹⁸

As *Cornelius* makes clear, in the public forum doctrine, the government chooses the interests of the unwilling hearer *even when the government is not sure if he is unwilling*.³¹⁹ The public forum doctrine bars the speaker from the premises even before the public employee has a chance to decide whether his privacy interests are being invaded.³²⁰ While such a blanket rule might be justified in a circumstance of true captivity, where the hearer literally has no choice of whether or not to listen, it is difficult to understand in a government building, where few employees would be unable to walk away from a speaker.³²¹

Moreover, the captive audience doctrine presumes that the

³¹⁵ *Id.* at 795.

³¹⁶ *Cornelius*, 473 U.S. at 809-10.

³¹⁷ See *Cohen v. California*, 403 U.S. 15, 21 (1971) (finding that when speaker wore his "Fuck the Draft" jacket, unwilling viewers could choose to look or not look, but they could not veto his speech).

³¹⁸ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300, 304 (1974) (affirming governmental ban on advertisement of political candidate in public transportation in order to shield unwilling viewers); *Cornelius*, 473 U.S. 788 (upholding government restriction on solicitation of contributions in federal workplace).

³¹⁹ *Cornelius*, 473 U.S. at 807 ("[The government] contends that there is likely to be a general consensus among employees that traditional ... charities are worthwhile, as compared with ... [advocacy] organizations like respondents.").

³²⁰ See *United States v. Kokinda*, 497 U.S. 720, 727-30 (1990) (plurality) (allowing prohibition on political soliciting and leafletting on public sidewalk in front of post office because postal sidewalk is not traditional public forum).

³²¹ See *Workplace Harassment*, *supra* note 305, at 1838-43 (noting implausibility of "captive audience" doctrine when applied beyond home to workplace).

willing hearer has some other equally accessible venue in which to hear the speaker. In *Pacifica*, for instance, the concurring opinion emphasized that those people who wanted to hear George Carlin's "Seven Dirty Words" monologue could buy records, watch late night television, listen to off-hours radio, go to a theater, or read a book.³²² In the government employment context, however, there is no realistic way that a speaker can gain access to a government employee without tracking him to his home, a threat to his privacy much more substantial than a confrontation in the workplace.

Indeed, the captive audience doctrine, as applied to the unwilling hearers in *Lehman* and *Pacifica*, also presumes that once an unwilling hearer, always an unwilling hearer.³²³ The Court does not believe its own rhetoric: that speech *can* change minds, and that a speaker *can* change the mind of a government official whom he encounters, or that a worker *can* change the mind of a fellow employee whom he solicits.

The public forum doctrine conclusively marks as unwilling hearers all persons who work in public buildings and presumes that no speaker, however candid and compelling his speech, could speak truth that would influence those hearers to act more justly and fairly to those with whom they deal. Apparently, the only people the Court trusts to be willing to hear the speaker and to change their minds are lodged in the halls of Congress, the state legislatures, the courts, and possibly the occasional person passing by on the street, in the park, or on the sidewalk—places where the speaker is assured he can go.

A more insidious consequence of the public forum doctrine, as previously described, is that government workers will start viewing their workspace and the interests which they are assigned as "private." If the government worker recognizes an invasion of his workspace as wrongful, then the stranger who disrupts his space has implicitly committed a wrong against the worker, even though she may have had a legitimate concern relevant to the mission of the government agency. Consequently, the worker can choose to shut out the stranger at his own discretion.

However, even if the problem of speech on government prop-

³²² *FCC v. Pacifica Found.*, 438 U.S. 726, 760 (1978) (Powell, J., concurring).

³²³ *Id.*; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 298 (1974).

erty is conceived as the abstract clash of two autonomy rights—speech and privacy—it is not clear that privacy should triumph. In comparison to the right to freedom of speech, the right to be shielded from speech has a fairly recent history, whether one treats it as a sub-right of speech³²⁴ or as a sub-right of privacy.³²⁵ The right to protection against speech on public property came to constitutional fruition only in the mid-1970s,³²⁶ while the right to privacy as a right to be let alone is largely a child of the 1960s.³²⁷ By contrast, the right to freedom of speech dates back to the adoption of the First Amendment,³²⁸ and the practice of censorship was abandoned years before that Amendment was drafted.³²⁹

In terms of the clash of speech and privacy rights, cases such as *Martin v. City of Struthers*³³⁰ and *Kovacs v. Cooper*³³¹ represent the traditional thinking of the Court that speech versus privacy cases require contextualization and interest-balancing, not a prior determination that privacy clearly outweighs speech as an interest. As the Court in *Martin* stated, it has the obligation to “‘weigh the circumstances and appraise the substantiality of the reasons’” government may have for preferring the interests of the unwilling hearer to the speaker.³³²

³²⁴ See, e.g., *Pacifica*, 438 U.S. at 748 (plurality) (finding that individual's right to be left alone in their own home outweighs First Amendment rights of intruder presenting offensive material); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (plurality) (explaining that rights of free speech do not necessarily extend to speech that offends listener).

³²⁵ See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-09 (1975) (stating that protecting privacy rights of individual justify speech restrictions); *Cohen v. California*, 403 U.S. 15 (1971) (noting that government's ability to restrict speech depends on privacy interests involved).

³²⁶ See *Lehman*, 418 U.S. 298, 304 (1974) (allowing government regulation of public transportation in order to protect unwilling hearers).

³²⁷ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (plurality) (finding penumbral right of privacy in contraceptive decisions); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (extending application of *Griswold*). The right to privacy does, however, have its antecedents in early 20th century theory. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³²⁸ See 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 20.2-20.5 (2d ed. 1992) (providing history of freedom of speech).

³²⁹ See *id.* § 20.5, at 11.

³³⁰ 319 U.S. 141 (1943).

³³¹ 336 U.S. 77 (1949) (plurality).

³³² *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)).

In *Martin*, the Court weighed the circumstances and concluded that a preference for speech over privacy is justified except in situations where a homeowner posts his demand to be undisturbed.³³³ The Court declared that “[f]reedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”³³⁴ In contrast, the Court in *Kovacs* permitted a ban on “loud and raucous” sound trucks used to broadcast messages based upon the need for “reasonable protection” in “homes and business houses” where “easy means of publicity are open,” for example, “by the human voice, by newspapers, by pamphlets, [and] by dodgers.”³³⁵

The Court in *Martin* relied heavily on the notion that, although speakers cannot invade the private property of unwilling hearers, such hearers must declare themselves to be unwilling.³³⁶ Similarly, the Court in *Kovacs* suggested that what is protected are the individuals’ rights to “tranquillity” in their private homes when they are in no position to escape the speech, and thus are captive audiences.³³⁷

Through the late 1960s, the Court preferred the rights of speech over the rights of the unwilling hearer, at least in public spaces. With the exception of narrowly defined “fighting words,” the Court consistently rejected arguments that offensive speech is not appropriate in the public sphere. As late as 1971 in *Cohen v. California*,³³⁸ the Court paved a clear path for the right of speech against the right to be protected from speech.³³⁹ In *Cohen*, which involved the famous “Fuck the Draft” jacket,³⁴⁰ and even later in *Erznoznik v. City of Jacksonville*,³⁴¹ where passing drivers were offended by nudity on drive-in movie screens, the

³³³ *Id.* at 146-48.

³³⁴ *Id.* at 146-47.

³³⁵ *Kovacs*, 336 U.S. at 89 (plurality).

³³⁶ *Martin*, 319 U.S. at 146-49 (noting that householder should assert his right to decide who may enter his property if he is unwilling to receive information from speaker).

³³⁷ *Kovacs*, 336 U.S. at 87.

³³⁸ 403 U.S. 15 (1971).

³³⁹ *Id.* at 26 (holding that criminalizing public display of four-letter expletive without compelling reason violates freedom of expression).

³⁴⁰ *Id.* at 16.

³⁴¹ 422 U.S. 205 (1975).

Court declared that the unwilling viewer could "avert his eyes",³⁴² or make known to potential speakers his disinterest in receiving the information.³⁴³ Yet, until *Denver Area E.T.C.*, the Court seemed to have forgotten the simple "averting" solution, even in places such as airport terminals where it seems easiest to employ.³⁴⁴ The *Denver Area E.T.C.* plurality relied on viewers averting their eyes through viewer-initiated blocking requests, lockboxes, and v-chips as a major way of avoiding offense,³⁴⁵ although the Court noted that these viewer techniques are also backed up by mandatory blocking requirements and local oversight on public access channels.³⁴⁶

Even taking the "autonomy" rationale for speech to be the dominant understanding of the Speech Clause, the public forum doctrine does not enunciate any standards for determining how the government, as property owner, should determine whose autonomy rights should be given preference. As others have discussed at length elsewhere, it is difficult to make a constitutional argument that a speaker's rights should succumb to a listener's rights.³⁴⁷

Justice Brennan repeatedly makes the point, whether it is in the context of censoring school library books³⁴⁸ or dirty words,³⁴⁹ that any clash of autonomy is indeed a three-way conflict between the interests of the speaker, the unwilling hearer, and the willing hearer who might not otherwise easily encounter the message.³⁵⁰ In Justice Brennan's view, the interests of the

³⁴² *Id.* at 212; see also *Cohen*, 403 U.S. at 21.

³⁴³ See *Martin v. City of Struthers*, 319 U.S. 141, 147-48 (1943) (using trespass signs to indicate unwillingness to be disturbed).

³⁴⁴ See *ISKCON v. Lee*, 505 U.S. 672 (1992) (plurality) (upholding ban on solicitation in airport terminal operated by public authority).

³⁴⁵ 116 S. Ct. at 2388 (1996).

³⁴⁶ *Id.* at 2493.

³⁴⁷ See C. Edwin Baker, *Turner Broadcasting: Context-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 74 (suggesting that favoring listener autonomy over speaker autonomy may not adequately serve constitutional goals); Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 240-41 (1990) (noting shift in Court's constitutional analysis concerning speaker's rights and First Amendment rights of recipient); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1086-87 (1997) (discussing potential constitutional argument in striking balance between speaker's rights and listener's right to privacy).

³⁴⁸ *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality).

³⁴⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 762-66 (1978) (plurality) (Brennan, J., dissenting).

³⁵⁰ *Pacifica*, 438 U.S. at 764; *Pico*, 457 U.S. at 867.

speaker and the willing hearer must always trump the interests of the unwilling hearer when it is possible for the unwilling hearer to avoid the message.³⁵¹ The burden is on the unwilling speaker to “avert his eyes” rather than on the speaker and willing hearer to find another place to speak.³⁵²

Still, the public forum doctrine reinforces the notion that the government can arbitrarily decide how to balance the interests of autonomous individuals. In *Cornelius*, the government decided on workers’ charities for them.³⁵³ Similarly, in *Lehman*, the government decided that a bus passenger’s inconvenience in having to avert his eyes from political posters is more significant than a politician’s desire to use such cards to reach an audience who might not easily be reached by other affordable means, or a bus rider’s interest in being informed or even dazzled by a politician’s ad.³⁵⁴ *Lehman* suggests that the government can make such decisions when it believes its ban will increase “sales” of transportation.³⁵⁵ In such a situation, even if its *motives* are self-interested, the government has chosen the interests of the unwilling hearer over those of the speaker and the willing hearer.

Additionally, one needs a fairly atomistic understanding of “autonomy” to conclude that the right to be left alone takes priority over the right to communicate with others. The Court has recognized time and again that each of these rights, taken to its ultimate conclusion, will involve a serious invasion of the other.³⁵⁶ Thus, the solicitor in *Martin* would have to stop if he was turned away at the door, and the sound truck user in *Kovacs* desist if he was blasting his message in a “raucous” and unbearable way into people’s homes.

The problem in most public forum cases is rarely a clash of absolutes where one must choose between a complete right to be left alone with no speech-interaction by another person (the right to live on a desert island), or a right to speak and hear, with no opportunity to shut out the speaker (the “1984” specter of Big Brother speaking to and watching human beings at every single

³⁵¹ *Pacifica*, 438 U.S. at 765-66; *Pico*, 457 U.S. at 867.

³⁵² *Pacifica*, 438 U.S. at 765.

³⁵³ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 807 (1985).

³⁵⁴ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (plurality).

³⁵⁵ *Id.*

³⁵⁶ See *Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989) (considering conflict between personal privacy and freedom of speech).

waking moment). Rather, most public forum cases involve situations where the unwilling hearer can say, "no thanks, leave me alone." Placing such a burden on the unwilling hearer requires him to choose between speaking out or remaining irritated by the unwanted communication.³⁵⁷ Yet, the hardship is hardly the major inconvenience that Justice Rehnquist proffers in *ISKCON*, where he projects people missing flights and airplanes running on delayed schedules because a Hare Krishna disciple selling flowers delays a rushing traveler.³⁵⁸ To the extent that the speaker may be more persistent, criminal assault and battery laws, as well as public regulation of verbal threats, are sufficient to deal with the problem of confrontation.

The public forum cases suggest a greater threat, however, than the threat that a "soft touch"/hearer will be coerced into making a contribution to get out of the clutches of a solicitor.³⁵⁹ In the Court's view, the major threat is that a stranger will pierce the "bubble" of private space which protects us from unwanted encounters with the outside world.³⁶⁰ While this constitutes a separate problem not developed here, the Supreme Court's public forum doctrine effectively encourages us to walk through life in stretches of private space focused on our own immediate wants and needs, rather than risk encountering those who seem outwardly disconcerting, but might indeed teach us something about our world, themselves, or even ourselves.

B. Public Justifications for Speech: Speaking Truth to Power vs. Efficient Government Operations

In addition to autonomy-related arguments, theorists and courts offer public justifications in support of speech. These theorists have claimed that speech serves a foundational purpose in a democratic society. Protecting speech will ensure that we can seek the truth, check government power and criticize abuse,

³⁵⁷ See *supra* notes 164-67 and accompanying text (discussing cases involving "unwelcome" solicitations).

³⁵⁸ *ISKCON*, 505 U.S. at 684.

³⁵⁹ See *United States v. Kokinda*, 497 U.S. 720, 733 (1990) (citation omitted) ("Reflection usually is not encouraged, and the person solicited often must make a hasty decision ... while under the eager gaze of the solicitor.").

³⁶⁰ PATRICK R. KEIFERT, *WELCOMING THE STRANGER* 21 (1992). However, there is little need for protection from the world we choose to encounter because it meets our immediate purposes and needs. *Id.*

or use speech as a "safety valve" for society.³⁶¹ The foundational role of the self-governance and safety valve functions were described by Chief Justice Hughes in *Stromberg v. California*.³⁶² "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, *an opportunity essential to the security of the Republic*, is a fundamental principle of our constitutional system."³⁶³

Yet, these concerns clash precisely with another public interest: the interest in government efficiency. The private property metaphor values efficiency over these traditional speech purposes, even when it is unclear whether the government worker's determination about what is efficient is appropriate.³⁶⁴ Viewed most sympathetically, the government does have a significant interest in controlling collective property. Even though the government's invocation of the public forum doctrine may be an over-enthusiastic attempt to operate efficiently, the government does retain an interest in maintaining a workplace sufficiently free from unwanted distractions so that employees can complete a day's work. Similarly, although the government may escalate the possibility of annoying behavior or the violent response by the speaker by invoking the public forum protection, it has an interest *as government* in protecting its employees and "customers" from unduly invasive speech.

The "workplace efficiency" interest of the government can be, and often is overstated, but it is not trivial. Government workers in most facilities are used to numerous disruptions during the day—personal phone calls, on-the-job problems of co-workers, and emergencies that require them to set aside work involving long-term goals to solve short-term crises. In an imaginary "floodgates" world, if everyone who was disgruntled staged a "sit-in" at the local government office, the chaos of space and sound which would be created would threaten the government's ability to get its work done. In a majoritarian system, where the needs of the many are perceived to outweigh the needs

³⁶¹ See Day, *supra* note 47, at 200.

³⁶² 283 U.S. 359 (1931).

³⁶³ *Id.* at 369 (emphasis added); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (pointing out that speech is necessary to continued building of our culture); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1962) (same).

³⁶⁴ See *supra* notes 276-83 and accompanying text.

of the few, the government has a strong interest in eliminating speech which, for instance, disrupts a Social Security representative's ability to approve claimants for disability benefits, or which floods the computer help-line with inquiries.

Nevertheless, part of the reason that personal calls or case emergencies do not "break the stride" of the government worker is that he or she has come to expect such disruptions as part of the job. Conversely, the uninvited speaker is perceived as a disruption and a threat precisely because his or her appearance is so unusual as to cause distraction and comment. Thus, the government employee may feel some pressure to respond to the speaker in a way he or she would not respond to a regular disruption. That may be so whether the speaker is unknown and disruptive—causing the employee to take some unusual step like calling security or locking an office door—or even familiar, as in *Cornelius*.³⁶⁵

Kokinda and *Cornelius*, of course, represent two more difficult cases in which the emphasis on governmental efficiency creates an imbalance in an unwilling hearer versus speaker contest. In *Cornelius*, the government claimed that the preference for the employee's privacy over the solicitor's speech would save the employee time to do the government's business.³⁶⁶ In *Kokinda*, the government made the ultimate proprietary "bottom-line" argument that there was a need to prefer customer privacy over customer speech.³⁶⁷

Indeed, the proprietary calculus preferring privacy interests for efficiency reasons seems quite simple. In *Cornelius*, to make a plausible claim of harm to government interests, the government needed only show that the speaker's solicitation took an

³⁶⁵ In *Cornelius*, the fact that one's co-worker comes to ask for a charitable donation rather than to do government business may cause the employee to give the solicitor some of his money rather than brush him off with the usual bureaucratic ritual to which both speaker and hearer have become accustomed. It is this irony, of course, which the public forum doctrine exacerbates—the more ironclad the exclusion of "unusual" disrupters, the more disruptive they will seem to be when they appear.

³⁶⁶ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985).

³⁶⁷ See *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality); see also Mellis, *supra* note 47, at 175 (noting that around 40 to 50 postal customers complained about pair of solicitors situated on sidewalk seven foot wide and suggesting patrons were more upset by solicitors' message than anything else).

employee away from his usual working tasks for a moment.³⁶⁸ In *Kokinda*, the government might have effectively made the argument that if solicitors were allowed, people would not traverse the sidewalk to buy stamps.³⁶⁹ If they did not come, or if they came in a bad mood not ready to spend their money, the post office would lose money.

Despite such efficiency interests, the specter of government employees wasting all of their time soliciting and giving charitable gifts is quite easily remedied by a time, place, and manner restriction. As in *Cornelius*, the government can either permit other charities to come into the campaign, or it can provide a brief opportunity for non-approved charities to solicit during work hours.³⁷⁰ Similarly, uninterested patrons such as those in *Kokinda* can be easily protected by clarifying where solicitors may park their tables and how they may approach patrons.

Kokinda raises yet another problem with the private owner metaphor, created when a commercial model is imported, into public organizations, and most particularly, the government. We must ask whether the government should act precisely as a private business owner and maximize its profit at the expense of all other values. The private property metaphor accepts the fact that government, as advertiser, encourages the public to purchase its goods, using only profit to measure whether the business is worthwhile or not. In the *Kokinda* case, this is not so problematic, as it is hard to imagine public harm resulting from overconsumption of stamps and envelopes. A more telling case, however, is *Central Hudson Gas & Electric Corp. v. Public Service Commission*,³⁷¹ where the Court recognized that the state may have an interest against consumption, in this case energy consumption, that justifies suppression of advertising geared at increasing consumers' use of electricity.³⁷²

One might imagine a third circumstance (like the bus card in *Lehman*) that raises the more difficult problem of when government's focus on the "bottom line" must be challenged in

³⁶⁸ See *Cornelius*, 473 U.S. at 792.

³⁶⁹ See *Kokinda*, 497 U.S. at 736.

³⁷⁰ The Court in *Cornelius* failed to consider seriously such a brief opportunity, whether it is a one-hour lunch meeting, a flyer listing non-approved charities, or an opportunity for these charities to hand out leaflets as employees are leaving work.

³⁷¹ 447 U.S. 557 (1980).

³⁷² *Id.*

court.³⁷³ Hypothetically, a government bureaucrat charged with maximizing the government's profit might decide that advertisements for cigarettes, liquor, casinos, or gun shops bring in the most revenue for the state. Or a public oversight committee might decide that giving cable access to Minnesota's fishing booster clubs will be more advantageous to tourism than airing complaints about police brutality. However one might feel about regulating private companies' advertising for these "vices"³⁷⁴ one might still ask whether government should import a private enterprise metaphor to justify its speech choices purely on a profit basis. Expanding such justifications to their logical implications, government could decide to charge schoolchildren for tuition, fees or books,³⁷⁵ or sell public parks to private developers solely in order to gain revenues.³⁷⁶ Indeed, public forum jurisprudence seems to underscore that governments have decided against being "a gentler and kinder government than usually governments are expected to be."³⁷⁷

Another problem with the private ownership metaphor lies in finding the locus of power where public "economic" decisions are made. In *ISKCON*, for example, someone—probably under the proprietorship metaphor—decided that it was not in the best commercial interests of the airport for Hare Krishnas and others to hawk their wares.³⁷⁸ Such person was not accountable to the

³⁷³ Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality).

³⁷⁴ See *Posadas De Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 337 (1986) (challenging constitutionality of Puerto Rico statute and regulations restricting advertising of casino gambling).

³⁷⁵ See, e.g., Betsy Bates & John Westcott, *Sports Fees, Band Fees, Art Fees ... Is This Legal?*, ORANGE COUNTY REG., Oct. 8, 1994, at A01 (describing fees charged by public schools in Orange County, California and student's lawsuit against high school that charged \$1,700 for students to participate in cheerleading); Janet Bingham, *Lawsuit Challenges Fees for Textbooks*, DENVER POST, Sept. 11, 1994, at A1 (describing class action suit brought against Colorado school districts challenging charging of fees for textbooks and instructional materials); Gary Rummier *Taking the 'r' from 'Free'*, MILWAUKEE J. SENTINEL, Nov. 2, 1995, at Neighbors 1 (describing increasing fees charged to public school students); Sherrie Ruhl, *Harford Proposes Tuition for Summer Classes*, BALTIMORE SUN, Nov. 16, 1995, at 2B (describing proposal to charge tuition for summer school at Harford County Schools).

³⁷⁶ See Donald Woutat, *Mineral Rights: Dust Bowl's Heirs Miss a Big Boom*, L.A. TIMES, Mar. 15, 1987, at 1 (discussing reversion of mineral rights to government ownership and government's subsequent lease of these rights to private companies for exorbitant prices).

³⁷⁷ Cf. *Grutzmacher v. Public Bldg. Comm'n*, 700 F. Supp. 1497, 1500 (N.D. Ill. 1988).

³⁷⁸ *ISKCON v. Lee*, 505 U.S. 672, 674-75 (1992) (plurality).

general public authority except in the most indirect way, since airports usually maintain an independent body of directors whose primary concerns are the promotion of efficiency of the particular public function of air transportation and not the general public good.³⁷⁹ It is also doubtful that the public is sufficiently aware of the cost of a non-solicitation regulation at the airport (including the speech cost) to register their views with legislators or even the airport authority. The First Amendment litigation public announcements made at some airports are probably the first indication the public has had that other uses at the airport are even possible. When the airport is swept clean of solicitors, the people who traverse the airport have no way of knowing what they are missing.

Competing with efficiency for the Court's imprimatur are traditional speech concerns. The truth-seeking function of the First Amendment, however, would not seem enhanced by the private property metaphor. As the Supreme Court has construed it, the truth-seeking function concerns the interchange of ideas through discussion, whether one imagines speech through a marketplace metaphor or focuses on the relational aspect of public conversation. If the test of truth is its ability to gain acceptance in the marketplace, as the Court would have it, the essential participant is the "purchaser" of information. Without the purchaser in a market transaction, marketable items like speech have no intrinsic value. It is the purchaser who not only recognizes, but creates, worth in an item, such as speech, by electing to purchase or trade another recognized good for it.³⁸⁰

Some people trade their money for speech, purchasing

³⁷⁹ See, e.g., ALA. CODE § 4-3-5 (1981) (creating airport authority board of directors and description of membership and duties); ME. REV. STAT. ANN. tit. 6, § 302 (West Supp. 1996) (detailing composition and duties of Maine Aeronautical Advisory Board); MICH. COMP. LAWS ANN. §§ 259.801-.802 (West 1990) (forming airport authority and airport authority board); WASH. REV. CODE ANN. §§ 14.08.302, 14.08.304 (1993 & West Supp. 1997) (establishing procedure for creating board of airport district commissioners and description of elections and terms); WIS. STAT. ANN. § 114.14(2) (1988 & West Supp. 1996) (establishing procedure for creation of airport commission).

³⁸⁰ Some suggest, however, that information is a commodity which cannot be left to the market because the producer of information does not consider the benefits of his speech to third persons (particularly as compared to small cost of producing it for large audience) and, therefore, has no incentive to create more information. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-60 (1991).

newspapers and movie tickets, while others trade their time and lend their concentration to the speaker's offer. In some cases, in fact, people place value on speech by investing their emotions in speech. Even in offensive speech, the hearer has personally invested in what the speaker says, though that investment may be expressed as anger, resentment, or fear. Therefore, pursuing the truth-seeking metaphor to its final conclusion, people, at times, trade speech for speech. Through the exchange of expression, individuals attempt to enhance the original understanding of the speaker by exposing his falsehoods and refining his truths, to reach Pareto optimality in which, in terms of wisdom, everyone is better off.³⁸¹

In the interpersonal view, speech similarly becomes the connective tissue between two people who, even if momentarily, share what is deeply significant in their own lives in a way that changes the world outside them. In the case of "private" speech with intimates, one discloses one's inner thoughts and feelings in a reciprocity of vulnerability with the other in an attempt to make objective, shared reality of what is until the moment of speech merely subjective thought. Intimate self-disclosure without a partner to hear and respond is unsatisfying in part because it does not fulfill the psychological need of the speaker to externalize his emotions and thoughts as a way of getting distance upon the self and its concerns. Unheard private speech also fails to bridge that brief common universe of trust and understanding of the other that creates a new historical moment between speaker and hearer.

Even in "public" speech, where the speaker and hearer rehearse their arguments using the mask of their social roles, the drama of public speech without an audience is an uncompleted ritual. Speech depends upon the response of the audience for its completion, given the expectation that the hearer will be won over by it. To be sure, the expectation carries many risks, from embarrassment to rejection; but a public speech carries always the freight of response by another. Indeed, like any argument or drama, the response of the audience re-creates the play by revis-

³⁸¹ Farber, however, notes that some of the most insightful speech is presented by "kooks, and cranks," those whose motivations for speech are primarily non-financial, and that they perform a valuable social function in a society in which financial rewards are viewed as the only rational motive for the production of information. *Id.* at 580.

ing its essentials as the production ensues—an appellate advocate molds her arguments to the questions of the judge; a good actor changes inflection, gesture, and even words in response to the tears, the laughter, or the derision of an audience.³⁸²

As the public forum doctrine strips controversial speakers of an audience, it similarly changes the “moment of truth” in the “speech drama.” Public forum speech is reduced to soliloquy or to “preaching to the choir”—to people who are most likely not listening to the speaker anyway because they presumably agree with what he has to say. The chance that there will be an encounter between falsehood and truth, half-truth with full truth, or truth with itself, in a situation where the speaker’s words fall on ears deafened by the agenda of the hearer, is at best slim.

Similarly, the First Amendment’s checking function also fails miserably under the public forum doctrine. The doctrine is most likely to be invoked to “bounce” the speaker off public property when the message threatens the intended audience. That threat may be a “truth-seeking” threat, as in the civil rights cases, when the hearers do not want to acknowledge the message not only because they disagree with it, but also because they are in denial about its genuineness.³⁸³

The threat of speech may also be a power threat. In *Perry Education Association v. Perry Local Educators’ Association*, the teachers’ union was permitted to post messages in the teachers’ boxes because it had gained the approval of the teachers and the acquiescence of the school system.³⁸⁴ PLEA, the rival union, was refused entrance to the teachers’ boxes because its message was critical of the approved union and threatened that union’s status quo and “labor peace.”³⁸⁵ By excluding the speech of the rival union, the teachers’ union gained the power to control reception of the truth, and the power to remind both insiders and outsiders that, as victor, it had the privilege of the audience.

³⁸² In earlier times, the criticality of the audience for the speaker was more pronounced. In Shakespeare’s day, for instance, actors would happily repeat scenes or change dialogue at the behest of the audience, and would talk back to those in the audience who wanted to add their “two cents’ worth” to the action. KEIFERT, *supra* note 360, at 21-22. The House of Commons retains this practice of ritual interchange between speaker and audience when the Prime Minister comes to “speak.”

³⁸³ See *Beggar’s Free Speech*, *supra* note 233, at 209 (“[T]he beggar conveys information regarding the true extent of her individual need in the appeal itself.”).

³⁸⁴ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 39-40 (1983).

³⁸⁵ *Id.* at 52.

The private property metaphor recognizes such speech—speech that threatens falsehood with the truth, threatens power abuse with criticism, threatens hearers with emotions and engagement—as valuable only when it threatens in “quintessential” public fora. Yet, it is obvious that the opportunities for private citizens to threaten an abusing government by confrontation will be minimal if their right is confined to public sidewalks, streets, and parks. These are locations where one finds politicians generally only before election day and only when they think the mood of the crowd will be favorable.

The Supreme Court similarly suggested how ineffective speech in “quintessential” public fora may be when it scoffed at the notion that a lonely picketer on the sidewalk in front of the Court might threaten the Court’s impartiality by influencing the Court’s decision through his speech.³⁸⁶ Unless one is prepared to mount a Million Man March, to be arrested for disrupting traffic,³⁸⁷ or to build a homeless camp in Lafayette Park,³⁸⁸ the effect speakers may have on an intended audience, those in power, is certainly questionable.

By contrast, in the 1960s civil rights demonstration cases, the Court worked with a different understanding: that the proper place of the speaker *is* on public property. Although the Court used a variety of doctrines to invalidate convictions against black protesters,³⁸⁹ the view of some outspoken Justices, particularly Justice Douglas, was that public property is precisely the place where protesters *should* be³⁹⁰ since they speak

³⁸⁶ See *United States v. Grace*, 461 U.S. 171, 182-83 (1983).

³⁸⁷ *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 113 (D.C. Cir. 1977) (involving class action suit against police officers for violating demonstrators’ constitutional rights during seven different demonstrations, including one along Pennsylvania Avenue).

³⁸⁸ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

³⁸⁹ See *Brown v. Louisiana*, 383 U.S. 131 (1966) (plurality) (public library sit-in); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (sidewalk loitering); *Cox v. Louisiana*, 379 U.S. 536 (1965) (demonstration outside courthouse); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (protest march around State House).

³⁹⁰ See *Brown*, 383 U.S. at 141-42. To be sure, Justice Douglas’ view on the publicness of public property was not unanimous. See e.g., *Adderley v. Florida*, 385 U.S. 39 (1966) (concluding that government property was private property and that government had right to exclude public from jails); *Cox*, 379 U.S. at 575 (Black, J., dissenting) (asserting that exclusion of public from courthouse was permissible). The expectation, however, that public property belonged to the public precisely in those times when government deludes itself about its constitutional obligations carried the day in most of these cases.

truth to power in precisely those places where power has undermined democratic values.

Even if the audience for one's "truth-seeking" or "checking" is the average man on the street who will confront his legislator with the pamphleteer's claims, our construction of public space has made the opening of government property for speech uses imperative. Justice Kennedy understates the situation when he says, "[m]inds are not changed in streets and parks, as they once were."³⁹¹ As the shopping center speech cases support, except for a few downtown city streets, if one is going to find an audience, the place to do it in America is at the mall.³⁹²

The quintessential public fora, where people have the irrevocable right to speak, have become virtually useless as speech forums, except for preassembled audiences. With the exception of the Mall in Washington, D.C., one will find few crowds in urban public parks available to a speaker mounting a soapbox or soliciting support. Sidewalks have been transformed from places for meeting acquaintances to conveyor-like tracks for hurried pedestrians afraid to look strangers in the eye. As most courts pretend not to recognize, handing out leaflets in a busy urban street is likely to be dangerous for the lonely pamphleteer,³⁹³ and it is "more unlikely that the intended communication will reach its intended audience."³⁹⁴ Indeed, a dusty rural road might be a more effective and safer forum.³⁹⁵

The use of the metaphor of "public forum" is also ironic given the restrictions placed upon it by the Supreme Court's doctrine. In the Athenian forum, public speaking and political debate occurred in the heart of the Athenian economy. The forum was in the literal marketplace, where every citizen had to come to

³⁹¹ See *Denver Area E.T.C. v. FCC*, 116 S. Ct. at 2414 (Kennedy, J., concurring and dissenting).

³⁹² See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980) (soliciting signatures in privately owned shopping center); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 311 (1968) (picketing supermarket located in large shopping center).

³⁹³ See *ACORN v. St. Louis County*, 726 F. Supp. 747, 753 (E.D. Mo. 1989) (applying "narrowly tailored" test and permitting county to ban soliciting by weaving among traffic at toll booths), *aff'd*, 930 F.2d 591 (8th Cir. 1991).

³⁹⁴ *Pineros Y Campesinos Unidos Del Noroeste v. Goldschmidt*, 790 F. Supp. 216, 220 (D. Or. 1990) (stating court's response to suggestion that field laborers should picket in urban areas).

³⁹⁵ See, e.g., *id.* at 220 (applying traditional public forum doctrine to rural roads by harvesting sites where laboring picketing was occurring).

transact business.³⁹⁶ Politics, including in the wider sense discussion of the good and true and beautiful, was understood not as apart from daily life, but as integrally connected with such daily tasks as buying food, clothing, and services.³⁹⁷

For the modern Court, the "marketplace of ideas" has become ethereal, an idea or a symbol rather than a real place where people talk about real subjects. Privately owned malls and stores where people go to conduct the business of daily life have, for the most part, effectively excluded controversial speech. Sports and entertainment centers, also privately owned, have similarly barred public speech by the design of their entrances. Speakers' attempts to bring their messages to transportation centers, another place where masses of people converge, have been stymied by the Supreme Court, most recently in *ISKCON*.³⁹⁸

The use of the private ownership metaphor encourages the exclusion of disturbing speech from the only locations where it is likely to have some utility. Under the metaphor, government (as owner) not only has the right, but also the encouragement of the Court, to exclude speech which disturbs the government. After all, any prudent property owner would expel those annoying him, calling him names, or demanding that he shape up. Justice Marshall noted that the tendency of bureaucracy is to suppress anything that will threaten the status quo or the equilibrium of a particular place.³⁹⁹ As suggested earlier, if the Court encourages bureaucrats to understand government property as their own, such speech is likely to be excluded, whether the property managers agree with it or not, on the basis that it is disruptive to those who are using the government property for "legitimate" reasons.⁴⁰⁰

The ability of speech to function as a safety valve for those who are fed up with government policies by providing the opportunity for words to take the place of violence is also undercut by the public forum doctrine. According to the "safety valve" ra-

³⁹⁶ See ERNEST BARKER, GREEK POLITICAL THEORY: PLATO AND HIS PREDECESSORS 21 (5th ed. 1979).

³⁹⁷ See *id.* at 21-22.

³⁹⁸ 505 U.S. 672 (1992) (plurality).

³⁹⁹ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 312 & n.10 (1984) (Marshall, J., dissenting).

⁴⁰⁰ See Leedes, *supra* note 47, at 517 ("[P]erformance speech by labor unions is usually non-protected because courts routinely defer to Congress' judgment concerning unfair picketing by those protesting economic conditions.").

tionale, strongly emotional speech may be necessary to avert violence by permitting the speaker to vent his frustrations in an acceptable manner.⁴⁰¹ Yet, such venting may be perceived as a prelude to violence by passersby in government buildings. Their interest in avoiding violence at all costs will lead them to find a security guard to evict the speaker or to search out the location of their anonymous computer "crank." As previously suggested, a speaker violating the public forum boundaries may be evicted not because of the threat of the message itself, but because hearers perceive the speech to violate their zone of privacy, even if they agree with it. For instance, government workers passing through building halls on their way to work may approve of the Girl Scouts, but they may not be happy if the Girl Scouts leaflet them on ways to improve the environment or try to sell them cookies.

Exclusion of emotionally charged speakers from public places, however, precisely undercuts the "safety valve" rationale. A distraught speaker is unlikely to have his frustrations vented *except* in the encounter with another who will hear him. The fully emotional speaker, upset with his lack of control over government decisions, who is ordered out of public space where he is trying to communicate his frustrations, is likely to understand that order as a further threat to his ability to participate in controlling the situation.⁴⁰² If the government wrests away the control that the speaker has obtained by selecting the forum and standing his ground, the truly distraught and now publicly shamed speaker may "up the ante" in some dramatic way. In the most extreme cases, the speaker may "retake his territory" by putting up some significant resistance to arrest, inflict indirect harm, such as stalking or harassment of public officials, or even escalate the encounter through direct violence. Or the speaker may lose control and hurt someone else—a passerby, a wife, a

⁴⁰¹ See *id.* at 516. "It is thought that men will be less inclined to resort to violence ... if they are free to express themselves through speech advocating ... [their] ends." *Id.* (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.04 (1984)).

⁴⁰² Imagine an angry constituent who comes to his legislator's office and is told that he has to leave because it is not a public forum. The security guard has prevented him from using his intelligence, his power of speech to name his problem, as well as any feeling of control over his circumstance and any chance to change a public official's mind. If he is ejected in front of others, knowing that passersby are imagining him to be a criminal or a mentally disturbed misfit, the shame he feels is likely to turn to rage.

child, or himself.

IV. ALTERNATIVES TO THE EXISTING PUBLIC FORUM DOCTRINE: A PROPERTY PERSPECTIVE

The decision facing the government employer, however, is not an all or nothing choice between the public forum doctrine or anything-goes "floodgates"⁴⁰³ any more than our social governance choices are anarchy and tyranny. Speech regimes which impose rules of limitation, but not exclusion, can effectuate government interests without critically harming speech interests.

Ironically, the Supreme Court has recognized as much in its "time, place and manner" (TPM) test, ill-named now that the Court has replaced the "place" part by the public forum doctrine in all but quintessential fora.⁴⁰⁴ The TPM doctrine recognizes that content-neutral regulation may permit speech without harming its essential character as communication with an intended audience, including government and its employees.⁴⁰⁵

As the Court succinctly described it in *United States v. Grace*, the "time, place and manner" test recognizes that government restrictions modifying the circumstances of speech can appropriately respond to all of the interests involved in a public setting, including the property interests of government.⁴⁰⁶ *Grace* permits the government to enforce reasonable restrictions on speech only if the restrictions " 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' "⁴⁰⁷ Thus, so long as the government does not interfere with the

⁴⁰³ See generally COHEN, *supra* note 90 (discussing private property versus communal property).

⁴⁰⁴ According to *Grace* and *Perry*, the TPM test applies only in quintessential public fora or (as long as the government holds them open) public fora. *United States v. Grace*, 461 U.S. 171, 177-78 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Thus, in non-public fora, the propriety of the speaker's "place" will not be judged by the four-part TPM test, but by the reasonableness of the Government in excluding him. See *Perry*, 460 U.S. at 46.

⁴⁰⁵ See *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995).

⁴⁰⁶ *Grace*, 461 U.S. at 177-78.

⁴⁰⁷ *Id.* at 177 (quoting *Perry*, 460 U.S. at 45). *Grace* also holds that "a particular type of expression" can only be prohibited if the prohibition is "narrowly drawn to accomplish a compelling governmental interest." *Id.* Farber and Nowack propose a three-part test for balancing speech and government interests: articulation, permissibility, and balancing. Farber & Nowack, *supra* note 47, at 1243.

communication itself, it may in certain circumstances regulate the way in which such communication is made.⁴⁰⁸

Unlike the public forum doctrine, the *Grace* test puts the burden of proof on the government with respect to its decisions as property owner. First, it requires that the government interest be compelling, thus creating a somewhat higher burden than the "reasonableness" test in nonpublic fora.⁴⁰⁹ Second, by requiring narrow tailoring, the Court has mandated that the government must carefully analyze the interests involved and impose restrictions that are not substantially overbroad.⁴¹⁰ Significantly, though, the Court's view of narrow tailoring in this context permits more flexibility than the "least restrictive alternative" language applied in content cases.⁴¹¹ Narrow tailoring is more like a "close enough" standard which focuses on whether the government is better off (in terms of its proffered interests) with the regulation than without it. Yet, unlike the "least restrictive alternative" language, the narrow tailoring requirement has been taken seriously, and has been employed to strike down TPM restrictions such as the restriction on picketing the Supreme Court.⁴¹²

Justice Breyer offers a different alternative in *Denver Area E.T.C.*, borrowed more from *Pacifica* than the TPM doctrine, one which has its pros and cons. He would permit the regulation of speech "to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without im-

⁴⁰⁸ Farber and Nowack propose that content neutrality is the keystone, and that TPM restrictions pose "relatively little threat" to the First Amendment. See Farber & Nowack, *supra* note 47, at 1237.

⁴⁰⁹ *Grace*, 461 U.S. at 177. In most cases, however, the "compelling" requirement has not resulted in greater speech protection. See generally Farber & Nowack, *supra* note 47, at 1239.

⁴¹⁰ See *Grace*, 461 U.S. at 177 ("[R]estrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.").

⁴¹¹ See *Ward v. Rock Against Racism*, 491 U.S. 781, 797-99 (1989) (overturning Second Circuit decision applying least restrictive alternative test to content regulation case). In overturning the Second Circuit, the Court essentially modified the principle that a restriction is not narrowly tailored where less restrictive means of regulation are available. See Eugene Volokh, *Freedom of Speech Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2423-25 (1996).

⁴¹² *Grace*, 461 U.S. at 171. However, the Court's explanation about why a picketer does not threaten the impartiality of the Supreme Court sounds more like a "give me a break!" test of government plausibility than a "how fine did you draw the line?" test of government precision.

posing an unnecessarily great restriction on speech," and adapted to "the balance of competing interests and the special circumstances of each field of application."⁴¹³

Under the TPM test, Justice Breyer's formulation, or the *Grayned* incompatibility test,⁴¹⁴ the government's understanding of the character of public property is not the sole key to balancing opposing interests. As we know from the cases, however, *Grace* and *Grayned* rest on different notions of public property. By presuming that the government can, with sufficient cause, exclude the speaker if "ample alternatives" are available, the *Grace* test still relies on a private property theory. While the "ample alternatives" language would seem to give courts wide latitude to consider the relative effectiveness of speech on government property versus speech in a remote "quintessential public forum," in practice the availability of any public forum in the vicinity seems to be sufficient to meet the requirement.⁴¹⁵ The *Grayned* test, by contrast, presumes that government property is the property of both the government and the people and that both are properly on the premises if the activity in which they are engaged is not mutually incompatible.⁴¹⁶ On first glance, Justice Breyer's test would not seem to impose any presumption about property ownership, though it is perhaps too early to tell.

The difference between the property rights presumptions in *Grace* and *Grayned* is not trivial. In *Grace*, if the government has important, well-defined interests which might be compromised and the speaker can go elsewhere, the government wins.⁴¹⁷ Under *Grayned*, if the government has important interests but they are not actually and substantially compromised, the

⁴¹³ 116 S. Ct. 2374, 2384 (1996).

⁴¹⁴ See *supra* notes 102-09 and accompanying text (discussing incompatibility doctrine).

⁴¹⁵ One commentator has proposed that whether a forum is public should be measured in part by whether equivalent private publications, or competitors, are available for the speech; but if the state has a monopoly on the outlet, it should be a public forum. See Schechter, *supra* note 47, at 253-55.

⁴¹⁶ See Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 77-78 (1994). The decision in *Grayned*, as described by Professor Werhan, was unique in that it was unitary and speech protective. *Id.* at 78. The *Grayned* test applied to all forms of public property and presumed the speaker, as a member of the general public, had a right to access the property. *Id.*

⁴¹⁷ See *Grace*, 461 U.S. at 177 (noting government's ability to restrict expressive conduct where ample alternative channels of communication exist).

speaker and the government both may stay on their "own" property, *even if* the speaker might have had "ample alternatives."⁴¹⁸ In addition, the balancing set forth in *Grace* is still a theoretical one. The government is not put to its proof that its significant interest is impaired by the speech, and the "narrowly tailored" requirement is read through the theoretical lens of a judge who was not present during the attempted communication. Using *Grayned* (and presumably Justice Breyer's test in *Denver Area E.T.C.*), the Court tests this compatibility contextually, not abstractly.⁴¹⁹ The *Grayned* test specifically requires proof of incompatibility at the *specific place* and the *specific time* in which the speaker wishes to speak.⁴²⁰

One criticism of *Grayned*, which will receive more attention, is that it is much too contextual to yield principles that can be relied on by either government or the speaker in a particular case. Thus, what results may be the kind of disruption that the government fears, since speakers will always find their speech precisely relevant to and thus compatible with the forum they choose. Moreover, like any contextual test, such as the *Brandenburg* incitement test,⁴²¹ it is open to arbitrary enforcement based on dislike of content or speaker more than a blanket test like the public forum doctrine.⁴²²

A perhaps more important criticism of *Grayned* is that the presumption that individual citizens share property rights to public space with the government is simply wrong-headed. After

⁴¹⁸ See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1729-31 (1987) (noting that *Grayned* decision strongly opposed government's right to treat public property as if government owned such land exclusively).

⁴¹⁹ For an exception to contextual testing, see *Greer v. Spock*, 424 U.S. 828, 844 (1976) (Powell, J., concurring), where Justice Powell explains the concepts of "functional and symbolic incompatibility"—the notion that speech as a symbol of independent thought and partisan choice is incompatible with the military as a symbol of government impartiality and uniform mental discipline; see also Berg, *supra* note 47, at 1273-76 (describing compatibility test laid down by Justice Kennedy in *ISKCON*, 505 U.S. 672 (1992)).

⁴²⁰ See Dienes, *supra* note 47, at 121 (noting difference in *Brown v. Louisiana*, 383 U.S. 131 (1966) (plurality), if interest-balancing is used compared to public forum doctrine).

⁴²¹ *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (invalidating statute prohibiting mere advocacy of violence).

⁴²² See, e.g., Dixon, *supra* note 47, at 462. In *ISKCON*, Justice Kennedy also criticized subjectivity in forum analysis, arguing for a "return to an objective examination of the physical characteristics and uses of the property," while Justice Souter argued for a *Grayned* type incompatibility test. *Id.* at 455.

all, the government represents everyone and uses space on behalf of everyone, while the individual uses space only on behalf of himself. In a democracy, critics argue, *everyone* wins over any *one*. This debate over public use versus use by members of the public might lead to a "public trust" notion of the public forum.⁴²³ While the public trust doctrine has an interesting history of application in environmental law, it has not been seriously applied to the free speech debate.⁴²⁴ Under the modern public trust analogy, the Supreme Court would require the government to act as trustee of government property on behalf of the people, and allow common use wherever the public interest required. Justice Kennedy might have implied such an argument in *Denver Area E.T.C.*, when he suggested that the "locally accountable" mixed public-private management/financing scheme through which public access channels are operated is the place where important

⁴²³ Originally, the public trust doctrine was a narrow doctrine derived from Roman and then English law which stripped the king of his power to prohibit common use of rivers, the sea, and the shore for navigation and fishing. See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 647 (1995). The traditional principles of the public trust doctrine as adopted in Colonial America are: (1) all tidelands and lands under navigable waters were owned by the original thirteen states at the time of the American Revolution as successors in sovereignty to the English Crown, and each subsequent state was endowed with similar ownership rights at the time of its admission into the Union; (2) the states own these lands subject to a "public trust" for the benefit of all their citizens with respect to certain rights of usage, particularly uses related to maritime commerce, navigation, and fishing; and (3) all lawful grants of such lands by a state to private owners have been made subject to that trust and to the state's obligation to protect the public interest from any use that would substantially impair the trust. See Daniel G. Kagan, *Private Rights and the Public Trust: Opposing Lakeshore Funnel Development*, 15 B.C. ENVTL. AFF. L. REV. 105, 123-24 (1987) (tracing development of public trust doctrine). Moreover, any such conveyed lands must be used by their private owners so as to promote the public interest and not unduly interfere with the public's several rights under the public trust doctrine. JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COAST* 3-4 (1994).

⁴²⁴ Beginning in 1970, the doctrine gained some modern currency in efforts to protect environmental and recreational resources against private spoilage. Many authors credit Professor Joseph Sax with expanding the public trust doctrine to natural resources. See, e.g., Gerstenblith, *supra* note 423, at 648. More recently, the public trust doctrine has been used to set aside wetlands and other natural resources in need of protection from economic use by individuals, whether they are titleholders of the land or members of the general public. See, e.g., *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972); *State v. Land Concepts, Ltd.*, 501 N.W.2d 817 (Wis. Ct. App. 1993); *Village of Menomonee Falls v. Wisconsin Dep't of Natural Resources*, 412 N.W.2d 505 (Wis. Ct. App. 1987).

decisions such as censorship should be made.⁴²⁵

In some ways, the rationale Professor Joseph Sax advocates for application of the public trust doctrine in environmental law fits well in the free speech/public forum debate. First, Sax argues that some resources are such that "their free availability tends to mark the society as one of citizens rather than of serfs."⁴²⁶ This argument mimics the rationale of Justice Roberts and other members of the Court in the quintessential public forum cases, which suggest that the availability of streets and parks for speech is essential if people are to interact as citizens rather than strangers in a dangerous world.⁴²⁷

Second, Sax notes that certain natural resources "are so particularly the gifts of nature's bounty" that they ought to be reserved for the whole of the populace.⁴²⁸ This argument is particularly fitting in the public forum debate because government property already belongs to the public. Thus, such property cannot be claimed by private citizens as beyond the interests of the people individually or as a whole.

Third, Sax claims that the public trust doctrine is the most effective tool to enforce public duties to preserve natural resources.⁴²⁹ In this sense, the change in focus of government employees from a private property metaphor to a public trust metaphor might be crucial. The shift might alleviate the problem of the public employer or employee guarding "his" space. Explicit direction to public employers not to consider government property as their own might lessen the instances where public employers and employees unwittingly start to mark territory. It could serve to revitalize the notion that government work is public work, not private work disrupted by public concerns.

⁴²⁵ 116 S. Ct. at 2417 (Kennedy, J., concurring and dissenting).

⁴²⁶ Joseph L. Sax, *The Public Trust in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).

⁴²⁷ See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (recognizing picketing and parading in streets as methods of expression entitled to First Amendment protection); *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965) (finding breach of peace statute preventing students from demonstrating in public violative of First Amendment); *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (noting that demonstration on State House grounds to express grievances reflects an exercise of basic constitutional rights "in their most pristine and classic form"); *Hague v. CIO*, 307 U.S. 496, 513 (1939) (plurality) (upholding injunction prohibiting city from violating labor union members' speech and assembly rights).

⁴²⁸ Sax, *supra* note 426, at 484.

⁴²⁹ *Id.* at 485.

Moreover, the "trust" concept also gives rise to special fiduciary values—the trustee of a property must deal with the property with a higher level of care than he deals with his own property.⁴³⁰ The trustee cannot waste property like an absolute owner can. His rights to alienate and use property are subject to the requirement that he make the best possible use of the property.⁴³¹ If the Court reinforces the notion that the government acts as a trustee of the people's property, rather than the ruler of its own, through a "public trust" concept of the public forum, the government employee may be forced to confront the possibility that individual speech interests are part of the public interest—indeed, the possibility that speech interests are the higher public use, not that they are antithetical to it.

The trust concept, which assumes that government property is collective property, not private property, appropriately recognizes government workplaces as the type of property suited to the imposition of a trust.⁴³² From a public policy standpoint, government workers should not be driven to conserve public property by the incentive that they will receive personal value from it at a later date. They should conserve government property because that is their job. Although government property is ultimately scarce in the sense that at some point sufficient incompatible uses would prevent its efficient use for its intended purposes, it is not scarce in the "commons" sense of the word. That is, allowing some reasonable number of speakers onto government property will not result in waste, nor will it detract from the "enjoyment" of government workers, if "enjoyment" is properly defined as the ability to do their jobs rather than as a personal choice of their surroundings. A speaker does not necessarily take resources from the government worker which are essential to his productivity in the way that a worker in the commons takes land away from someone else who could be tilling it.

⁴³⁰ See Kagan, *supra* note 423, at 125 (explaining fiduciary duties placed on states as trustees of public trust properties).

⁴³¹ Sax, *supra* note 426, at 477 (listing burdens placed on state because of fiduciary duties, including duty to preserve public trust lands for intended uses).

⁴³² In the economists' views, property which should be put into communal ownership is the property which cannot be made more efficient by granting private property rights. Under the theory of the tragedy of the commons, property which is not assigned to individual use will be despoiled by people who deplete it without any incentive to continue restoration for the future. By contrast, communal property is property where scarcity is not a factor; one person's use of the property will not detract from the enjoyment by any other.

It is also not true, as Professor Lloyd Cohen suggests, that in the government property setting, an expanded public trust doctrine will be used to avoid the appropriate balancing of the costs and benefits of speech as compared with other government activity.⁴³³ In Professor Cohen's view, the takings doctrine is more efficient than the public trust doctrine because it makes the majority pay for an individual's property, which forces the majority to weigh public gains against the individuals' losses to make sure that the public gain is significant.⁴³⁴ By contrast, the use of the public trust doctrine in speech cases does not avoid the question of costs and benefits. Rather, it requires such a question to be raised. Under the Supreme Court's current public forum doctrine, the government can evict a speaker without making any evaluation of the costs associated with the loss of the speech to the individual, to society, which might have benefited from the speech, or to the government workers the individual may challenge.

Using the marketplace metaphor, when the government silences a speaker under the public forum doctrine, it has decided that such speech has no value in the marketplace.⁴³⁵ The government views such speech as an irrational personal frivolity, free to be discarded without payment to the individual for "taking" the effectiveness of his speech for an important government purpose. A public trust regime for speech, by contrast, would force government administrators to decide whether the public interest would be served by allowing both speech interests and the government's administrative interests to occupy the same place. Therefore, a public trust regime could recognize that speech has public value in addition to its private value, whatever its content or its viewpoint. A change in the Court's public forum doctrine could be a critical moment in the recognition of speech not as a private whim, but as a valuable, indeed

⁴³³ Cohen, *supra* note 168, at 262.

⁴³⁴ *Id.* at 261. Narrowing the taking of private property under the public trust doctrine forces society to make sure that property is only taken over when necessary, not for purposes in which society is only "mildly interested." *Id.* at 262.

⁴³⁵ Value within the marketplace metaphor not only includes any personal value that the speaker may attach to the speech, but also the social value of the speech for all participants as well as the value of openness in decision-making in the democratic marketplace. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 9 (1984).

vital, public activity.⁴³⁶

Despite these arguments, adapting the public trust doctrine to the public forum is not analogically perfect. The idea that we should be borrowing from the public trust doctrine suggests the irony of the public forum doctrine. We are now dipping into a doctrine expanding public rights to individual *private property* so that we may expand public rights to speech on *public property*. The public trust doctrine has traditionally been such a narrow exception to the private property rule precisely because we have conceived of private property as having a high instrumental value, both constitutionally and economically.⁴³⁷ With government property, by contrast, there is no private owner and therefore it seems anomalous to talk about how far we should limit the public trust in speech to protect the government from the people.

More problematically, in its modern adaptation in ecological protection cases, the public trust doctrine imposes a collective, not communal, property regime on public property. When wetlands are protected under a public trust doctrine, they are not open for the use of everyone. Indeed, they are closed to the use

⁴³⁶ For twenty years, under the public forum doctrine, the Court has moved toward treating speech as essentially a personal, emotive activity which bears no critical relationship to the life of the community, even while reaching for rhetoric that recognizes the public value of speech in its "content discrimination" cases. "Content discrimination" cases include those cases in which the Court reviews total bans on the content of speech, either within particular settings or from public discourse altogether. For example, when one looks at categorical balancing cases, which permit banning of certain speech content, such as inciting speech, fighting words, and libel, one still finds lofty language recognizing the foundational necessity of protecting freedom of speech. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (plurality) (libel); *Miller v. California*, 413 U.S. 15, 20 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942) (fighting words). By contrast, this sort of language is conspicuously missing in the more recent majority opinions curtailing speech protection on public forum grounds. *See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that Combined Federal Campaign drive is nonpublic forum); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (finding that internal school mail system is nonpublic forum); *Greer v. Spock*, 424 U.S. 828 (1976) (stating that military bases are nonpublic fora).

⁴³⁷ *See Kagan, supra* note 423, at 125 (noting narrow nature of traditional public trust doctrine and recent expansion of said doctrine by courts). Under our system, private property protects the individual against the majority's desire to use what the individual has earned and protects his security and his need against brute majoritarian force, unless the government chooses to buy him out. *See id.* (explaining difficulties involved in removing private land from its owner to create public trusts under traditional trust doctrine).

of everyone, including the title-holder, for some general benefits we derive as a society that do not inhere in the actual use of the property itself. Applying the modern view of the public trust doctrine to speech, lawmakers would have the power to decide which compelling interests benefit the community as a whole, and exclude any use by anyone, including speakers, that would derogate from those interests.

Thus, while it would be an improvement on the current doctrine to move from viewing government as "private property" to viewing it as "collective property," the modern public trust doctrine would not give any particular right to the individual to use public property for speech purposes. As a result, such a move runs contrary to the common wisdom of speech doctrine, embodied in the marketplace metaphor, that while speech is most important for the public good, the majority is rarely in the position of deciding what speech is for its own good.⁴³⁸ Instead, in the metaphor, that decision is entrusted to the "numerous private choices of individuals" in the marketplace. Under the autonomy rationale for speech, moreover, human dignity demands that we ignore the collective observation about what is best for the public in favor of protecting the individual humanity of the speaker, so that the individual speaker does not become a means to the public's utilitarian ends.⁴³⁹

The more traditional interpretation of the public trust doctrine strikes at the heart of what is at stake in speech challenges on government property. Like the speech easement, the public trust doctrine traditionally invaded private property only when the public's use of the private property was long-standing and the public interest high.⁴⁴⁰ Applying this traditional form of

⁴³⁸ See Ingber, *supra* note 435, at 9-10 (discussing importance of individual speech in self-governance and need for government to remain outside of decision-making process).

⁴³⁹ *Id.* at 10-11 (examining autonomy arguments in marketplace of ideas debate).

⁴⁴⁰ In the paradigm of cases expanding the public trust doctrine, the states ordered private beach owners to open their sandy areas for walking, boat landing, and other recreational activities because these areas were directly necessary to the use of rivers, lakes, and oceans that had been reserved for the public "immemorial." See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363 (N.J. 1984) (citations omitted); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969). Thus, it was proper for the courts to argue that the private property owner had no reliance interest in his ability to exclude and that his residually small interest in exclusion was overcome by the public's interest in use.

public trust, the government acts not to preserve collective property but to preserve (in limited form) communal property. That is, the government's imposition of a public trust on private land permits each individual citizen to enter and actually use the property for his own purposes so long as they are within the parameters of the trust. Although the property is not fully communal in Cohen's sense—property which everyone has the right to use and no one has the right to exclude—it comes very close within these parameters.⁴⁴¹

However, in its traditional form, the public trust doctrine probably provides no more help than the quintessential public forum doctrine because it effectively mimics on private land what the quintessential public forum doctrine does on public land. In this traditional form, the public trust doctrine is dependent on long use by the public, either of the trust land itself (*e.g.*, the beaches) or of adjacent property which is served by the trust land (*e.g.*, the ocean).⁴⁴² The quintessential public forum doctrine is similarly dependent on the long use of that forum by the public for speech purposes.⁴⁴³ Literal adaptation of the public trust doctrine would, at most, open slightly the "curtilage" of existing quintessential public forums to speech.⁴⁴⁴ Extension of the public trust doctrine to airports, postal sidewalks, and government workplaces where the Court has not protected speech would make a significant difference in the return of public speech, if the requirement that property have been used from

⁴⁴¹ It is appropriate to exclude some uses which would interfere with the basis for the public trust imposition. For instance, a person whose use of the beach for commercial fishing destroyed it for recreational purposes might arguably be prohibited from that use. However, the public trust principle, particularly as enunciated in *Matthews*, 471 A.2d at 368-69, would not allow the exclusion of particular individuals from public trust property, even if they were unwilling to pay for its upkeep. Thus, it was proper for the courts to argue that the private property owner had no reliance interest in his ability to exclude, and that his residually small interest in exclusion was overcome by the public's interest in use.

⁴⁴² See *supra* note 423 and accompanying text (reciting history and tradition of public trust doctrine). Extensions of the public trust doctrine without the requirement that the property have been used from time immemorial, *e.g.*, to airports and postal sidewalks and government workplaces where the Court has not protected speech, would make a significant difference in the return of speech to its public place.

⁴⁴³ See *Schechter*, *supra* note 47, at 244 ("A public forum ... is state property that has been used throughout history for purposes of assembly and the communications of thoughts between citizens.")

⁴⁴⁴ For example, people could speak on grassy berms next to public sidewalks or in government buildings surrounding parks.

“time immemorial” were dropped.

In addition, the Court could meld two assumptions of the “new” and the “traditional” public trust doctrine: (1) like preservation of the wetlands, preservation of public lands for speech uses, even against the private interests of government administrators, is necessary to preserve the vitality of the democratic ecosystem which is interconnected to these speech “wetlands”; and (2) the public forum doctrine will open public lands not to speech uses dictated by the government, as in the *Perry* case,⁴⁴⁵ but speech uses which individuals select, much as the beach user decides how he will exercise his communal rights protected by the public trust to collect shells, fish, or sunbathe.

Indeed, this focus on the communal nature of the Internet was a key factor in the court’s decision in *ACLU v. Reno*.⁴⁴⁶ In *ACLU*, the court made extensive findings demonstrating the decentralization of the Internet, the easy means of accessing it through various other networks, and the significance of these facts in terms of the rationale for protecting free speech.⁴⁴⁷ As Judge Dalzell argued:

[I]f the goal of our First Amendment jurisprudence is the “individual dignity and choice” that arises from “putting the decision as to what views shall be voiced largely into the hands of each of us” ... then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.⁴⁴⁸

A final solution is to reject completely a property approach to the problem of speech on government-owned property in favor of an interest-balancing approach. That appears to be the approach that Justice Breyer’s plurality in *Denver Area E.T.C.* prefers, at least for now. The Court could simply use the “time place and manner” doctrine without the public forum gloss, or the incompatibility doctrine, or perhaps a new analogy, such as harassment law. A property approach, however, usually has the advantage of clarity and predictability. Both the government

⁴⁴⁵ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

⁴⁴⁶ *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

⁴⁴⁷ *Id.* at 830-36 (opinion of the court), 872-74 (opinion of Dalzell, J.).

⁴⁴⁸ *Id.* at 881-82 (quoting *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (citation omitted)).

and the speaker, at least theoretically, know where the government's property stops and the public's property begins (at quintessential public fora). The government and the speaker can plan according to where their activities are permitted. The speaker does not have to worry about arbitrary enforcement, such as being kicked off the premises while a speaker with a less objectionable message is allowed to stay. The government's business can proceed absent unwanted interference from speakers. The courts can resolve speech disputes merely by asking whether the speaker stepped over the government's property line or not, whether he was invited by the government or not, and whether the invitation was revoked or not.

Yet, as suggested earlier, whatever the property approach does for clarity and predictability, its ability to recognize that speech is public and a publicly valuable act is minimal. Such an approach recognizes the public place as essentially brittle, unable to tolerate the slightest speech disruption. Government employees are viewed as essentially vulnerable, unable to make good choices about whether to listen to the speaker, reason with him, or even agree with him.⁴⁴⁹ To give the solicitor in *Cornelius* the opportunity to make his charitable pitch to his co-worker, which the Court did not require the federal government to do, would merely require his fellow employees to tolerate some slight intrusion on their efficiency, their feelings, and their privacy.⁴⁵⁰ More generally, to permit speakers on all, not just quintessential, public lands is simply to tolerate some isolated idiosyncratic behavior and some occasional distracting speech. If the speech becomes truly disruptive, the incompatibility doctrine permits the government to oust the speaker.⁴⁵¹ If the speech becomes disruptive because of the manner of presentation (too noisy, too flashy, too physically threatening), or because of the sheer amount of speech (too many speakers, too much time

⁴⁴⁹ By contrast, in private workplaces, courts have been reluctant to find liability for even repeated offensive conduct, unless it is explicitly prohibited, e.g., by Title VII's ban on harassing speech, although some courts have gone outside the strict confines of sexual harassment to find otherwise protected speech problematic. See, e.g., *Workplace Harassment*, *supra* note 305, at 1800-06.

⁴⁵⁰ *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

⁴⁵¹ See generally *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1054 (2d Cir. 1983) (reciting history of incompatibility doctrine in Supreme Court decisions). See *supra* notes 102-09 and accompanying text for general discussion of incompatibility doctrine.

taken), the TPM doctrine is available to regulate the speaker's actions.

To the extent that the public forum doctrine is justified by its protection of the public employee's "personal space" rather than the government's interest in disruption, the Court could look to existing harassment law for guidance. Since *Meritor Savings Bank v. Vinson*,⁴⁵² courts have recognized that invasion of "personal space" in a public setting, such as a workplace, must be governed by different rules than a similar invasion on one's private property. Traditionally, truly private rights, such as the right to protect one's physical person or one's land, can be invaded by a single act.⁴⁵³ Harassment law recognizes that in public settings, where the "space" invaded is space shared by employees, the legal tolerance threshold must be somewhat higher, approaching abuse.⁴⁵⁴

The law of harassment as it has developed in areas from Title VII employment discrimination to criminal stalking laws⁴⁵⁵ focuses on the harm caused by repetitive invasion of personal space, the intent of the harasser to cause harm to the victim, and the nature and level of the invasion as necessary elements to establishing a harm. In particular, acts of physical invasion, such as offensive touching or physical threats, have generally received much less legal protection than harassing speech.⁴⁵⁶

⁴⁵² 477 U.S. 57 (1986).

⁴⁵³ A trespass requires only one incident of physical invasion of land; an assault and battery only one blow.

⁴⁵⁴ See generally Juan F. Perea, *Strange Fruit: Harassment and the First Amendment*, 29 U.C. DAVIS L. REV. 875 (1996); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996). Title VII harassment, for instance, must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment' " based on the employee's race, sex, religion, or national origin. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

⁴⁵⁵ For a list of current state stalking laws, see Eileen S. Ross, Note, *E-Mail Stalking; Is Adequate Legal Protection Available?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 405, n.2 (1995). Maine and Arizona are the only states that have not enacted criminal stalking laws; however, both states use their existing laws to criminalize stalking. Harvey Wallace, *Stalkers, the Constitution, and Victims' Remedies*, CRIM. JUST., Spring 1995, at 16.

⁴⁵⁶ See, e.g., *Meritor Sav. Bank*, 477 U.S. at 65. Other non-verbal harm can include damage to coworkers' equipment and refusal to work with an employee because of race, sex, or other banned criteria. *Workplace Harassment*, *supra* note 305, at 1800. See *supra* note 455 and accompanying text for articles providing examples of stalking.

Much like the law of nuisance, the law of harassment is based on a personal interest-balancing approach which accepts that some inappropriate, even wrongful, invasion of a person's space and time must be tolerated before the law will step in to protect the victim.⁴⁵⁷ When the invasion becomes too intolerable, even in a single instance, because the abuse is "truly harrowing" and of no benefit except for "the sadistic pleasure it gives to the speaker,"⁴⁵⁸ the law responds. When the invasion becomes intolerable not because of a single instance but because a smaller harm becomes a greater harm through repetition, such as sexual remarks over a long period of time, the law responds.⁴⁵⁹ When the harasser's actions demonstrate that he is intent on creating a "hostile environment" and when he is successful in doing so, the law steps in to stop it.⁴⁶⁰ Thus, harassment law expects the object of harassment to be tough, but not to be a powerless victim.

In the speech context, an approach that focuses on the nature and level of invasion, considering its repetition, and possibly the apparent intent of the harasser, could better assist in distinguishing speech that needs to be stricken from public places from speech that should be tolerated, even in "nonpublic fora." A regime such as the public forum doctrine, which permits the government to eject or regulate for even an isolated case of disruptive speech, has great power to exclude even the most timid "back-talk" in public space.⁴⁶¹

In terms of the government's interest in efficiency, low-level speech disruptions on a one-time or occasional basis should be counted as part of the cost of doing business as a public agent. As the speaker elevates the nature of the invasion, however, moving from a loud protest about the government's action to a

⁴⁵⁷ See Alan E. Brownstein, *Rules of Engagement for Culture Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1169-70 (1996) (explaining that while harassment laws strive to protect victims of targeted private speech, victims are expected to accept mild public harassment under First Amendment).

⁴⁵⁸ *Workplace Harassment*, *supra* note 305, at 1807.

⁴⁵⁹ See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1514-15 (9th Cir. 1989) (holding that egregious racial and sexual comments on daily basis violate Title VII); see also *Workplace Harassment*, *supra* note 305, at 1807-09.

⁴⁶⁰ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993) (holding that hostile work environment constitutes sexual harassment).

⁴⁶¹ See *Workplace Harassment*, *supra* note 305, at 1811 (noting that even hostile environment test will suppress isolated instances of offensive speech because of concern about where line is drawn).

direct threat of harm to public employees, the government has both the right and the responsibility to step in to eject the speaker. Similarly, speakers who inundate a particular public place so repeatedly that long-term effectiveness of the workplace or the public service is undercut can be evicted under a harassment theory. Finally, in cases where the speaker's apparent interest, as judged over a repetitive period of threatening or invasive speech acts, is not to communicate but to harass the hearer with a sheer barrage of words, the state could step in and evict the speaker.⁴⁶²

Even on the Internet, a harassment standard coupled with mandated blocking technology for purposes of protecting unwanted exposure to information on a one-time basis might better serve Congress' purposes.⁴⁶³ Other than the "immediate offense" problem posed by messages sent to children and uninterested adults, the CDA nods in this direction by banning communications which are "obscene, lewd, lascivious, filthy, or indecent, with the intent to annoy, abuse, threaten or harass another person."⁴⁶⁴ Thus, the Act recognizes that the major threat to adult interests on the Internet is speech which is intended not to communicate but to harm.

Good test cases for an altered speech doctrine that concentrate on harassment-type interest-balancing rather than property rights are the abortion clinic picket cases, represented by *Madsen v. Women's Health Center, Inc.*⁴⁶⁵ In *Madsen*, the property test found the petitioners in a quintessential public forum, albeit on the edge of private property, so their speech was presumptively protected.⁴⁶⁶ The *Grace* test then asked the significance of the state interest, the question redefined in injunction cases as "whether the challenged provisions of the injunction burden no more speech than necessary,"⁴⁶⁷ and the availability of ample alternatives. Under the *Grace* test, as applied in *Madsen*,

⁴⁶² Prosecution of a speaker on the basis of intent, however, is a more significant risk; and standards for defining and proving such intent would need to be developed carefully by the courts.

⁴⁶³ Such blocking technologies would allow adult users to control access to questionable sites on the Internet while continuing to allow speakers to convey their messages to the masses. See *supra* notes 37-38 and accompanying text.

⁴⁶⁴ CDA, § 502(1), 47 U.S.C.A. § 223(a)(1)(A) (West Supp. 1996).

⁴⁶⁵ 512 U.S. 753 (1994) (plurality).

⁴⁶⁶ *Id.* at 769-71 (including clinic property, sidewalk and adjacent street, private property adjacent to clinic, and private property across street within "buffer zone").

⁴⁶⁷ *Id.* at 765.

the speakers won some ground. They were permitted to try to communicate with unwilling patients approaching the clinics and to show gruesome pictures to those inside; they could protest on private property next to the clinic (with the owner's permission); and they could protest around staff residences, subject to possible time and manner restrictions.⁴⁶⁸ But the speakers also lost: they were prohibited from blocking access to the clinic, and from making noise which would pervade the clinic walls.⁴⁶⁹

Insofar as new patients are concerned, the Court's ruling in *Madsen* makes sense. As long as the speakers do not use language which may be proscribed for other reasons (e.g., threats of violence, fighting words), they should be allowed to approach new patients to try to change their minds.⁴⁷⁰ Absent an atmosphere of violence or direct intimidation, such patients at worst have suffered the isolated assault similar to a non-threatening, oblique sexual remark directed at a worker. While such speech may be reprehensible, it does not meet an actionable threshold. At best, new patients may learn something from the speakers which may change their minds, which might bring them closer to the truth or change how they exercise their autonomy.

For the speakers and the clinic staff hearers at the time the injunction is issued, however, the dispute no longer has much to do with speech. After so many repetitions, the speakers' argument that they are still engaged in a pure speech act—a communication which creates an objectively real history and a personal relationship between speaker and hearer—loses much of its force. The likelihood that the speakers are using speech to harass or wear down the audience, and not to communicate, becomes stronger. Similarly, the vulnerability of their audience increases as a result of the "captivity" in which the staff works. It is then more likely that the clinic staff and clients will change their behavior not because they have "purchased" the pro-life message in the marketplace but only so they can escape the pounding of the speech.

To move the analogy to government buildings and the Internet, a similar harassment test would permit individual speakers

⁴⁶⁸ *Id.* at 771, 774-75.

⁴⁶⁹ *Id.* at 769, 772-73.

⁴⁷⁰ See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 733, 744 (1994) (plurality) (striking provision preventing protesters from approaching patients within 300 feet of clinic as violative of First Amendment).

to protest in all types of public places, so long as they do not cross the line that distinguishes communication from harassment. An isolated, non-threatening demand for justice by a welfare recipient would be treated differently than a two month long, daily, noisy sit-in by a community group or the jamming of computer lines with nonsensical messages. By contrast, a speaker who is effectively "stalking" his government employee victim with speech would be properly dismissed from government premises, not on the basis of the content of his speech, but on the objectively demonstrated evidence that he repeatedly and mercilessly imposed it on his hearer. However, government workers, who have lived with long-standing but polite pickets so long that they have become part of their routine, may not be able to use an invasion of privacy or disruption in the workplace rationale as a means of ejecting the picketers and silencing speech.

VI. CONCLUSION

In property terms, the Court's decision to return to a contextual analysis, whether the TPM test, the incompatibility test, or a new test based on the harassment analogy, would move the Court farther from a "private property" analogy. Ideally, the Court would employ a true "communal property" regime, in which all citizens, whether they are government employees or disruptive speakers, were entitled to equal access and use of government property. Such communal use for speech would be subject only to the requirement that speakers not invade government workers' space in ways which were truly disruptive of the long-term functioning of the office or truly harassing to the worker.

In the real world, however, the need for clarity and predictability for government workers' sense of security and stability in their daily work may mean that, at least on physical government property, we must settle for a limited "collective property" regime. That is, we may need to accept a test which gives some deference to government regulations that spell out speech conditions in advance, but which have been through some "legislated," thoughtful process based on important state interests, not the whim of an individual administrator who dislikes a particular speaker. For instance, the government may appropriately determine that certain kinds of workspaces are off-limits, such as private offices to which workers can retreat to avoid "captivity,"

areas with sensitive equipment or confidential information, sites of danger or where extreme quiet is essential, or confidential e-mail lines. Similarly, noise regulations, rules about hours for speech activity, limits on the vehicles of expression and its repetition⁴⁷¹ may be necessary to ensure that legitimate government and worker interests are protected.

Where the government regulates, however, the courts minimally should be earnest in their application of the TPM doctrine. Most importantly, the courts must take the "narrow tailoring" requirement seriously to ensure that such regulations protect government's and workers' long term interests against harassment not disruptions or invasions of privacy which are of no consequence. Thus, the narrow tailoring requirement should be modified to require the government to prove some actual or threatened damage to its efficiency; or in the case of worker interests, that the speaker persisted in bombarding the hearer despite his clear manifestation of unwillingness to listen.

Second, the Court should adopt the presumption of the "incompatibility" test that both speech and government activity can exist simultaneously unless some actual threat to the government activity is shown, rather than asking only whether the speaker has "ample alternatives." The Court should properly apply the "ample alternatives" test even for disruptive speech in order to ensure that the speaker's alternatives constitute a plausible alternative to reach those who must hear for the speech to be effective. Thus, if a citizen is attempting to change the mind of a government worker, a park which is five blocks down the street is not sufficiently "ample" to reach that worker because it does not effectively reach the intended audience.

Third, the Court should require sufficient notice to speakers about the rules for speech on public property. Signs posting noise or hour regulations, or signs indicating that certain areas of government land are restricted, easily solve the problem of the appearance or reality of government arbitrariness in permitting some speakers but not others. Legends on web sites, much like the etiquette rules posted on bulletin boards, can make the public aware of what is expected in their interactions with government. Moreover, like similar marker signs on other public

⁴⁷¹ For instance, the government might wish to ban oversized posters, audiovisual aids, even excessive use of e-mail or other computer communication devices in order to avoid bombardment of workers.

buildings such as museums and galleries, such signs welcome as much as they exclude, for the act of saying that speech in some places and times is forbidden is also the act of saying that in other places and times it is welcomed.⁴⁷²

A poor version of such “welcoming marker” speech has been the loudspeaker announcements at many airports, warning travelers that people exercising their First Amendment rights have the right to do so. While most such announcements have been begrudging (and their repetition sometimes annoying), they reinforce the speaker’s freedom to exercise his rights and give the willing hearer the opportunity to search out such speech, just as the publicity about Speaker’s Corner in London notifies people where they can go to hear political speech.

More importantly, such “welcoming markers” protect the potential unwilling hearer by warning him that he is not in private space. They remind him that he is in public and that he should be prepared to interact with a public face to those speakers he might encounter. Welcoming marker signs or announcements in other public buildings will similarly remind those who traverse them that such halls belong to the people, not to private individuals, and that they are precisely the places for conversations about public matters.

A “welcoming marker” regime is most sorely needed on new technologies which the government is regulating, particularly the Internet. The Internet is a truly amazing invitation by the federal government to speech. The federal government could have participated in the construction of a network that was limited only to those who were using it for government-approved purposes, as it has done with most public property; or refused to help, making access so expensive that it was out of the reach of the ordinary citizen, as the government has effectively done with radio and television licenses.

Instead, the federal government went beyond the minimum to welcome speech rather than racing after it to regulate it, one of the few times it has done so since the creation of the post office. The explosion of truly democratic speech—the ability of people from even the poorest countries to share their thoughts with those of the richest—has been remarkable. The Communications Decency Act is the first sign that the government’s

⁴⁷² See KEIFERT, *supra* note 360, at 120-21, 132-34.

“welcoming” of all sorts of speech by all sorts of people may be coming to an end. The potential for the repression of speech is illustrated by China’s response to the Internet, which has been to censor certain political speech and require users to employ the Internet only at locations that can be monitored by the government.⁴⁷³

As the courts confront the first limitations on the use of the Internet, their understanding of how property theory applies to government financed and controlled resources beyond the government’s real property will have a telling effect on the future. Their perception of the Internet as the government’s “private property” which can be restricted by content, by speaker and hearer, even by economic level, as “collective property” subject to specific legislative mandate of use (as the CDA is), or as “communal property” open to all with only those restrictions necessary to make it available to all, will make a profound difference in the national conversation.

⁴⁷³ See 142 CONG. REC. S1180, S1181 (daily ed. Feb. 9, 1996) (statement of Sen. Leahy); Ian Johnson, *China Censors its Internet; Police Monitor Internet for Unpopular Ideas; Viewers Risk Prison*, BALTIMORE SUN, Feb. 23, 1996, at 1A.