

# WHAT RUDY HASN'T TAKEN CREDIT FOR: FIRST AMENDMENT LIMITS ON REGULATION OF ADVERTISING ON GOVERNMENT PROPERTY

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## I. INTRODUCTION

Who would have dreamed that the Mayor would object to more publicity? But that is what this case is all about. Our twice-elected Mayor, whose name is in every local newspaper on a daily basis, who is featured regularly on the cover of weekly magazines, who chooses to appear in drag on a well-known national TV show, and who many believe is considering a run for higher office, objects to his name appearing on the side of City buses.<sup>1</sup>

Thus District Court Judge Shira Scheindlin expressed the court's astonishment that New York City's mayor, Rudolph Giuliani, would request that the Metropolitan Transportation Authority ("MTA") pull an ad from city buses because the ad mentioned his name and thereby violated his "right to publicity."<sup>2</sup>

The disputed advertisement was for New York Magazine, a periodical known for its witty commentary on New York City politics in general and Giuliani

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1. New York Magazine v. Metropolitan Transit Auth., 987 F. Supp. 254, 256 (S.D.N.Y. 1997), *aff'd sub nom* New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123 (2d Cir. 1998). The show on which the mayor appeared in drag was *Saturday Night Live*. See Robert M. O'Neil, *Giuliani Bus Ads Shielded As Political Satire, Courts Say Despite Pleas of Big Apple Mayor*, LEGAL BEAT (Winter 1998) (visited Oct. 11, 2000) <<http://www.mediainst.org/digest/98winter/oneil.html>>. In Spring 2000, Mayor Giuliani withdrew from the U.S. Senate race in New York State due to ill health. See *What's New World-Wide*, WALL ST. J., May 22, 2000, at A1.

2. New York Magazine v. Metropolitan Transit Auth., 987 F. Supp. at 256.

in particular.<sup>3</sup> The magazine contracted with MTA to display the ad on the side of seventy-five city buses in November and December 1997, just after the Mayor had won re-election in a campaign that had been criticized for crediting the Mayor with all the city's successes.<sup>4</sup> The ad that New York Magazine tried to run featured the New York Magazine logo accompanied by the following text: "Possibly the only good thing in New York Rudy hasn't taken credit for."<sup>5</sup>

What have become of the First Amendment guarantees of free speech and free press if a city can censor ads on its public buses to appease the target of the ads' political humor, the city's angry mayor? Although the U. S. District Court for the Southern District of New York and the U. S. Court of Appeals for the Second Circuit<sup>6</sup> both upheld the First Amendment rights of *New York Magazine* against the mayor and city's attempts to suppress the ad, the threat to First Amendment values posed by New York City's conduct is not an aberration on the legal landscape. In the past few years, advertisers and governments around the country have clashed repeatedly in court over whether government can refuse to run certain ads on advertising space it leases on government property.

In Ohio, for instance, the City of Cincinnati's transit authority refused to run a union's ad on city buses; the ad showed union members protesting in front of the Hyatt Regency Hotel in downtown Cincinnati during a meeting of management-side labor lawyers.<sup>7</sup> In Arizona, the City of Phoenix rejected an ad for an anti-abortion group, Children of the Rosary.<sup>8</sup> The ad included the group's logo (a fetus surrounded by a rosary connected to a cross) and text that read, "'Before I formed you in the womb, I knew you'—God. Jeremiah 1:5. Choose Life. Children of the Rosary."<sup>9</sup> In Pennsylvania, the public transportation authority for the Philadelphia area similarly refused to display an anti-abortion ad on subways and trains.<sup>10</sup> The ad, from another anti-abortion group, stated, "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer."<sup>11</sup> In Chicago, the city agency that leases advertising space in O'Hare Airport refused to run a pilots' union's ad critical of United Air Lines, one of the largest advertisers in O'Hare.<sup>12</sup> In Massachusetts, the transportation authority refused to run a series of ads in subway cars that promoted condom use as a way to stop the spread of the AIDS

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3. See *id.* at 257.

4. See *id.* at 257, 261.

5. *Id.* at 257.

6. See *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998).

7. See *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

8. See *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998).

9. *Id.* at 975.

10. See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998).

11. *Id.* at 245.

12. See *Air Line Pilots Ass'n. v. Department of Aviation of Chicago*, 45 F.3d 1144 (7th Cir. 1995).

virus.<sup>13</sup> Each ad included a picture of a condom and a headline that got the viewer's attention through sexual innuendo or double entendre.<sup>14</sup> "Read this before you get off" stated one ad; "Haven't you got enough to worry about in bed?" and "You've got to be putting me on," stated two others in the series.<sup>15</sup>

And it is not just local municipal governments participating in this trend towards censoring advertisements. Back in New York City a few years before the *New York Magazine* case, Amtrak, acting as an agency or instrumentality of the federal government, rejected an ad critical of the Coors beer family for its support of certain right-wing causes.<sup>16</sup> The rejected ad showed images of happy Coors drinkers juxtaposed with Nicaraguan peasants threatened by a missile-like Coors can hurtling towards them.<sup>17</sup> The text asked "Is it the Right's Beer Now?" and stated that Coors is "the Silver Bullet that aims The Far Right's political agenda at the heart of America."<sup>18</sup>

Whenever such highly charged, provocative ads are refused government ad spaces, suspicion is raised that government is doing what the First Amendment says government cannot do—censoring views with which it disagrees. If the obviously controversial nature of the ads' topics and messages suggests that many of these cases may indeed involve illicit government motives, the courts' decisions in these cases suggest that hidden viewpoint discrimination knows no political boundaries. Sometimes the advertisers espousing left-wing causes win (ads for condom use to prevent AIDS<sup>19</sup>) and sometimes they lose (ad criticizing the Coors family<sup>20</sup>). Sometimes right-wing advertisers win (anti-abortion ad in Philadelphia<sup>21</sup>) and sometimes they lose, too (anti-abortion ad in Phoenix<sup>22</sup>). If the absence of a consistent political pattern to these decisions is reassuring for First Amendment jurisprudence, the absence of consistent legal reasoning among these decisions is not.

This Article examines these inconsistencies and the more general problems they represent: how to apply public forum doctrine when the government is in the business of selling advertising space on government property, and how to combine that doctrine with commercial speech regulation when the advertisement proposes a commercial transaction. Part II reviews the leading Supreme Court cases dealing with public forum doctrine, emphasizing those cases

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13. See *AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994).

14. See *id.* at 3.

15. *Id.*

16. See *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650 (2d Cir. 1995).

17. See *id.* at 653 (citing *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 995 (S.D.N.Y. 1993)).

18. *Id.*

19. See *AIDS Action Comm.*, 42 F.3d 1.

20. See *Lebron*, 69 F.3d 650.

21. See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998).

22. See *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998).

that have been most influential in recent legal battles over government restrictions on ads on government property. Part III describes in more detail the district and appellate court decisions in *New York Magazine*. It also examines the opinion of dissenting Circuit Judge Cardamone as an example of how the ambiguities of public forum doctrine typically divide courts. Part IV compares the reasoning in the *New York Magazine* opinions to the rationales of similar recent cases involving ads on public transportation, including the anti-abortion ad cases in Phoenix and Philadelphia, the public-service ad case in Massachusetts, the airport ad case in Chicago, and the New York case of the ad criticizing Coors.

In the final section, this Article demonstrates how the recent advertising-on-government-property cases prove right the prognostications of a generation of critics of public forum doctrine and commercial/noncommercial speech distinctions, critics both on the bench and in the academy.<sup>23</sup> Whatever one's theory of the First Amendment, whether an "affirmative" theory concerned with improving both the quality and quantity of public debate<sup>24</sup> or a "negative" or "distortion" theory concerned only with restraining government from deliberately

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23. For criticism of public forum doctrine from the Court, see, e.g., Justice Brennan's dissents in *United States v. Kokinda*, 497 U.S. 720, 740 (1990); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 308 (1974); Justice Blackmun's dissent in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 813 (1985); Justice Kennedy's concurrence and Justice Souter's partial dissent in *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Kennedy concurrence at 693, Souter concurrence and dissent at 703); and Justice Stevens's dissent in *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 683 (1998).

For criticism of public forum doctrine from legal scholars, see, e.g., David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143 (1993); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); Daniel Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309 (1999); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); David A. Stoll, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: International Society for Krishna Consciousness, Inc. v. Lee*, 59 BROOK. L. REV. 1271 (1993); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 (1974); Edward J. Neveril, Comment, *"Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1185 (1996).

24. For examples of affirmative theories of the First Amendment, see, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1 (2d. ed. 1988); Farber & Nowak, *supra* note 23; Harry Kalven, Jr., *The New York Times Co. Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191 (1964); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

manipulating public debate,<sup>25</sup> a bedrock principle of First Amendment law is that government may not censor speech because it disagrees with the speaker's message. Unfortunately, the recent advertising cases show that public forum doctrine and the commercial/noncommercial speech dichotomy fail in this most fundamental way to guard speech from bias by government officials and courts. This Article concludes that if neither the older ad hoc balancing approach nor the current rule-based categorical approach works well to protect speech on government property, the most practical solution may be to strengthen the "floor" of public forum doctrine, its "nonpublic forum" default category. Doing so would ensure that, at a minimum, classifications like "nonpublic forum" or line-drawing between commercial and noncommercial speech do not invite easy evasions on government property of the First Amendment's prohibition of government censorship.

## II. PUBLIC FORUM DOCTRINE AND ADVERTISING ON GOVERNMENT PROPERTY

In 1983, the Supreme Court decided *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*,<sup>26</sup> the landmark public forum case that has become the analytical model for most recent government advertising cases. Yet *Perry* was not the first time the Court faced the issue. Nine years earlier, in *Lehman v. City of Shaker Heights*,<sup>27</sup> the Supreme Court had to decide whether a city could refuse to display an ad for a political candidate on its public transit system. The city had a long-standing policy of accepting only commercial and public-service advertising on the fifty-five cars of its electronic railroad line between Shaker Heights and Cleveland.<sup>28</sup> The petitioner was a candidate for the office of State Representative to the Ohio General Assembly for the district that included the City of Shaker Heights.<sup>29</sup> The proposed ad contained a picture of the candidate and the following text: "HARRY J. LEHMAN IS OLDFASHIONED! [sic] ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT State Representative—District 56 Harry J. Lehman."<sup>30</sup>

The petitioner argued that the First Amendment guaranteed him equal access to the publicly owned and controlled ad space. The Court disagreed, emphasizing that the City was acting in a proprietary capacity, as a business providing a service (public transportation).<sup>31</sup> Rather than providing a public forum, the ad spaces were part of this larger commercial venture.<sup>32</sup> Just as private

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25. For examples of negative or distortion theories of the First Amendment, see Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 (1992); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987).

26. 460 U.S. 37 (1983).

27. 418 U.S. 298 (1974).

28. *See id.* at 300–01, 308.

29. *See id.* at 299.

30. *Id.*

31. *See id.* at 303.

32. *See id.*

businesses could pick and choose advertisers, the city transit system had discretion to make reasonable choices concerning the type of advertising displayed in its vehicles.<sup>33</sup> Provided that the city's policies were not "arbitrary, capricious or invidious," the Court would defer to the city's judgments about how best to run a public transit system, including its advertising spaces.<sup>34</sup> Here, the Court accepted the city's reasons for its exclusion of political ads on public transit.<sup>35</sup> These reasons included the potential negative impact on long-term commercial advertising, the disturbance to a captive audience of commuters caused by the "blare of political propaganda," and the possible appearance of government favoritism towards individual political candidates.<sup>36</sup>

Justice Brennan, joined by three other justices, dissented.<sup>37</sup> Brennan criticized the majority for overturning traditional First Amendment priorities by according more protection for commercial ads than for political speech.<sup>38</sup> Brennan also disputed the "reasonableness" of the city's justifications.<sup>39</sup> Commercial and public service advertising could be as controversial and disturbing as any political ad, so it made no sense to discriminate between them on that basis.<sup>40</sup> Commuters could avert their eyes from the written ads, so they were not a captive audience.<sup>41</sup> Further, the city could dispel any appearance of favoritism by neutral regulations that did not make subject-matter distinctions and by disclaimers in the ads.<sup>42</sup>

Nine years later in *Perry Education Ass'n.*, another 5-4 decision, the Court held that an interschool mail system was not a public forum, and therefore, the school system could restrict speakers' access so long as the restriction was reasonable in light of the purpose of the forum and was not illicit viewpoint discrimination.<sup>43</sup> At the heart of the case was a collective-bargaining agreement between the school district and the newly-elected teachers' union that was serving as the teachers' exclusive bargaining representative.<sup>44</sup> The agreement provided that the school district would deny rival unions access to teachers' school mailboxes and to the district's internal mail system.<sup>45</sup> The rival teachers' union sued, claiming that its First Amendment rights were violated by its exclusion from a mail system open not only to the incumbent union, but to the YMCA, the Cub Scouts, and other civic and church organizations.<sup>46</sup> In reaching its conclusion, the majority set out a method for determining the degree to which government may

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33. *See id.*

34. *Id.*

35. *See id.* at 304.

36. *Id.* at 304.

37. *See id.* at 308-22 (Brennan, J., dissenting).

38. *See id.* at 315 (Brennan, J., dissenting).

39. *Id.* at 318-22 (Brennan, J., dissenting).

40. *See id.* at 319 (Brennan, J., dissenting).

41. *See id.* at 320 (Brennan, J., dissenting).

42. *See id.* at 321-22 (Brennan, J., dissenting).

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

44. *See id.* at 39.

45. *See id.*

46. *See id.* at 41, 47.

restrict the public's use of government property for expressive activity.<sup>47</sup> This determination depends on how the property is characterized, whether as a traditional public forum, a designated public forum, or a nonpublic forum.<sup>48</sup>

A traditional public forum is a place "which by long tradition or by government fiat" has been "devoted to assembly and debate," such as a street or park.<sup>49</sup> Content-based restrictions on speech in this forum are subject to strict scrutiny.<sup>50</sup> A designated public forum is "property which the State has opened for use by the public as a place of expressive activity;"<sup>51</sup> here, too, content-based restrictions are subject to strict scrutiny.<sup>52</sup> However, a designated public forum may be created for a limited purpose, such as use by certain groups or for the discussion of certain subjects.<sup>53</sup> Finally, where public property is not a public forum either by tradition or designation, the government can regulate speech provided its regulations are reasonable in light of the purpose which the forum serves, and are not an effort to suppress expression "merely because public officials oppose the speaker's view."<sup>54</sup> Under this analysis, the Court found that the interschool mail system was a nonpublic forum and that the public school district, a government actor, was reasonable in deciding to allow some groups to use the mail system, such as the YMCA and Cub Scouts, and to exclude others, like the rival teachers' union.<sup>55</sup>

Justice Brennan, again writing the opinion for the four dissenters, found the school system's distinctions between speakers to be viewpoint discrimination, "censorship in its purest form," because the distinctions favored a particular viewpoint on labor relations.<sup>56</sup> "[T]he teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [the respondents]."<sup>57</sup> He emphasized the right to equal protection in one's exercise of First Amendment freedoms, unhindered by "the whims or personal opinions of a local governing body."<sup>58</sup>

After *Perry*, the most significant Supreme Court decision to follow in the advertising-on-government-property cases was *Cornelius v. NAACP Legal Defense & Educational Fund*.<sup>59</sup> In *Cornelius*, a group of legal defense funds argued that they were unconstitutionally excluded from an annual charity drive

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47. See *id.* at 44-46.

48. See *id.*

49. *Id.* at 45.

50. See *id.*

51. *Id.*

52. See *id.*

53. See *id.* at 46 n.7.

54. *Id.* at 46.

55. See *id.* at 46-49.

56. *Id.* at 62 (Brennan, J., dissenting) (quoting *Perry Local Educators' Ass'n v. Hohl*, 652 F.2d 1286, 1296 (7th Cir. 1981)).

57. *Id.* at 65 (Brennan, J., dissenting) (quoting *Perry* at 1296).

58. *Id.* at 57 (Brennan, J., dissenting) (quoting *Niemotko v. Maryland*, 340 U. S. 268, 272 (1951)).

59. 473 U.S. 788 (1985).

conducted in the federal workplace to raise money from federal employees, the Combined Federal Campaign ("CFC").<sup>60</sup> Groups denied access to the charity drive included the NAACP Legal Defense & Education Fund, the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense & Education Fund, the Federally Employed Women Legal Defense & Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights Under Law, and the Natural Resources Defense Council.<sup>61</sup> The CFC based its exclusion of these groups on its policy requiring that the CFC participant charities provide direct health and welfare services to individuals, a policy that specifically excluded "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."<sup>62</sup>

After finding that charitable solicitation of funds is a recognized form of protected speech under the First Amendment,<sup>63</sup> the Court conducted a *Perry* analysis to determine the extent to which government can restrict expressive activity in the forum.<sup>64</sup> But before deciding which category of forum was at issue, the Court first had to define the relevant forum.<sup>65</sup> How narrowly or broadly the forum is defined affects the likelihood it can be characterized as a designated public forum rather than a nonpublic forum. Here, the Court chose a narrow definition, construing the relevant forum not as the federal workplace but as the CFC.<sup>66</sup> The Court reached this conclusion by focusing on the access sought by the speaker: not general access to the workplace, but access to the charity drive specifically.<sup>67</sup>

Clearly the CFC was not a traditional public forum under the *Perry* typology, as it was literally neither a public street nor a park.<sup>68</sup> The real question was whether the CFC was a limited public forum for use by all charitable organizations to solicit funds from federal employees or whether it was a nonpublic forum to which only selective access was granted to a specific, narrowly defined class of organizations.<sup>69</sup> The Court found that the CFC was a nonpublic forum.<sup>70</sup> Because the CFC was first created to minimize the disruption in the federal workplace caused by unlimited solicitation activities, it represented an effort to lessen expressive activity on public property, not increase it through the opening of a public forum.<sup>71</sup> Having categorized the CFC as a nonpublic

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60. *See id.* at 790.

61. *See id.* at 793.

62. *Id.* at 795.

63. *See id.* at 799.

64. *See id.* at 800-13.

65. *See id.* at 800-02.

66. *See id.*

67. *See id.*

68. *See id.* at 802.

69. *See id.* at 804-06.

70. *See id.* at 806.

71. *See id.* at 805.



forum, the Court then only had to apply *Perry*'s reasonableness and viewpoint neutrality standards to the CFC's decision to exclude political advocacy groups.<sup>72</sup>

The CFC's justifications for excluding advocacy groups included the potential disruption to the fundraising effort caused by the inclusion of controversial organizations and the possible appearance of government favoritism or "entanglement with particular viewpoints."<sup>73</sup> The Court accepted these justifications as reasonable under the *Perry* standard; it also accepted as reasonable that government could decide some charities are "more beneficial" than others.<sup>74</sup>

Despite finding the CFC's justifications "facially neutral and valid," the Court remanded the case to determine whether the CFC policy as applied was viewpoint-neutral, or whether the CFC's reasons were pretexts concealing a bias against the views of the excluded speakers.<sup>75</sup> Indeed, there was evidence of selective, discriminatory enforcement of the policy.<sup>76</sup> Many organizations that did not provide direct health and welfare services were allowed to participate in the CFC, including World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee.<sup>77</sup>

Although Justice Blackmun, in a dissent joined by Justice Brennan, presented his objections as a disagreement with the majority's interpretation of the *Perry* public forum analysis, his objections taken as a whole express disagreement with *Perry* itself.<sup>78</sup> His dissent is notable for two reasons. First, it anticipates the problems with public forum doctrine that would surface again and again in the lower courts in the fifteen years following *Cornelius*. Second, Justice Blackmun's dissent influenced a future generation of advocates of balancing approaches to speech-on-government-property disputes.<sup>79</sup> Blackmun believed that the essence of public forum doctrine is a balancing of the expressive interests of the speaker and the free-speech interests of society against the government's interest in preserving its property for its intended uses.<sup>80</sup> This balance should be struck through a compatibility test assessing the extent to which permitting the expressive activity would cause interference with the uses to which the property is normally put.<sup>81</sup>

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72. See *id.* at 806.

73. *Id.* at 807.

74. *Id.* at 808-09.

75. *Id.* at 811-13.

76. See *id.* at 812.

77. See *id.*

78. See *id.* at 813-33 (Blackmun, J., dissenting).

79. See, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 693-709 (1992) (Kennedy, J., dissenting), discussed *infra* notes 124-127 and accompanying text. See also generally Gey, *supra* note 23 (recommending an interference-analysis balancing approach). For a discussion of the significance of Justice Blackmun's public forum opinions, see William S. Dodge, *Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 165 (1998).

80. See *Cornelius*, 473 U.S. at 820-22 (Blackmun, J., dissenting).

81. See *id.* (Blackmun, J., dissenting).

According to Blackmun, the majority wrongly believed it could circumvent this necessary balancing of interests simply by labeling the forum "nonpublic."<sup>82</sup> Worse, the majority's characterization of the nonpublic forum was the product of circular reasoning that would allow practically any forum besides public streets and parks to be labeled nonpublic.<sup>83</sup> If any exclusion of a speaker is evidence that the government did not intend to create a public forum, then any speaker denied access would, by the very fact of his or her exclusion, never be able to prove there was a public forum. As a result, the speaker would never be able to receive more than "reasonableness" scrutiny of the government's speech restriction.<sup>84</sup>

Blackmun believed that the *Perry* analysis called for strict scrutiny whenever government distinguished between speakers in defining a forum.<sup>85</sup> If a court's mere labeling of a forum "nonpublic" entitled government to lenient "reasonableness" scrutiny, then the First Amendment meant nothing more than a ban on official viewpoint discrimination.<sup>86</sup> The difference between a nonpublic forum and a limited public forum, properly defined, was a matter of degree: they differed only to the extent that access was limited and the property at issue was compatible with expressive activity.<sup>87</sup>

In addition, Blackmun objected to the Court's leniency towards government restrictions where the government is acting as proprietor rather than lawmaker.<sup>88</sup> A balancing of interests based on a compatibility test would suffice to take into account the government's interests as proprietor.<sup>89</sup> Blackmun also objected to the definition of the traditional public forum, because it failed to provide for new, modern sites of expressive activity like airports and government-owned shopping centers, or for places that lack a history of expressive activity but are sought by the public as a forum because of the place's connection to an issue of public debate.<sup>90</sup> Under the *Perry* analysis, the guarantees of the First Amendment appear to depend either on an accident of history or on the grace of the government.<sup>91</sup>

Finally, Blackmun found the CFC's exclusion of the legal defense funds to be, on its face, viewpoint discrimination.<sup>92</sup> To choose among charities based upon how each group believes it can best serve the needy (e.g., through provisions of food and shelter or through social advocacy) is a preference for the view that

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82. See *id.* (Blackmun, J., dissenting).

83. See *id.* at 813-14, 823-25 (Blackmun, J., dissenting).

84. See *id.* at 825 (Blackmun, J., dissenting).

85. See *id.* at 826 (Blackmun, J., dissenting).

86. See *id.* at 814-15 (Blackmun, J., dissenting).

87. See *id.* at 819 (Blackmun, J., dissenting) ("The line between limited public forums and nonpublic forums...is really more in the nature of a continuum....").

88. See *id.* at 821, 826-27 (Blackmun, J., dissenting).

89. See *id.* (Blackmun, J., dissenting).

90. See *id.* at 822 (Blackmun, J., dissenting).

91. See *id.* (Blackmun, J., dissenting).

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

charitable goals are best met through existing social policy and the status quo.<sup>93</sup> Furthermore, the CFC appeared not to enforce its own policy; seventy-four percent of the organizations given access to the CFC did not meet its eligibility requirements of direct provision of food and shelter to the needy.<sup>94</sup> Blackmun pointed out that the "government favoritism" concern could be taken care of by a disclaimer.<sup>95</sup> Also, it was not clear why the CFC's acceptance of other organizations was not equally subject to "favoritism" concerns.<sup>96</sup> Blackmun rejected avoidance of controversy as a legitimate reason for government to restrict speech.<sup>97</sup> Citing *Tinker v. Des Moines School District*,<sup>98</sup> he noted that the government must demonstrate "that the excluded speech would materially and substantially interfere with the other activities for which the government property was intended."<sup>99</sup> If anything, the evidence in the record showed the opposite: contributions to the CFC increased during each of the years that respondents participated in the campaign.<sup>100</sup>

In a separate dissent, and in even stronger terms than Justice Blackmun used, Justice Stevens expressed disbelief with the CFC's claims of viewpoint neutrality.<sup>101</sup> The CFC denied access to the legal defense funds because of disagreement with the causes they espoused, according to Stevens.<sup>102</sup> The viewpoint discrimination here was so egregious, he believed, that no public forum analysis was really necessary.<sup>103</sup> The justifications advanced by the CFC for excluding advocacy groups were so specious that "they actually lend support to an inference of bias."<sup>104</sup> Stevens was particularly offended by the CFC's avoidance-of-controversy argument, noting that one could use the same rationale to justify forbidding discussion of politics, recent judicial decisions, or sporting events.<sup>105</sup> In a footnote, Stevens wryly observed that "[e]xpressions of affection for the Dallas Cowboys would surely be forbidden in all federal offices located in the District of Columbia if the avoidance-of-controversy rationale were valid."<sup>106</sup>

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

94. See *id.* at 828 (Blackmun, J., dissenting).

95. *Id.* at 829 (Blackmun, J., dissenting).

96. *Id.* (Blackmun, J., dissenting).

97. See *id.* (Blackmun, J., dissenting).

98. 393 U.S. 503 (1969).

99. *Id.* at 830 (Blackmun, J., dissenting) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969)).

100. See *id.* at 830 (Blackmun, J., dissenting).

101. See *id.* at 833-36 (Stevens, J., dissenting).

102. See *id.* at 833-35 (Stevens, J., dissenting).

103. See *id.* (Stevens, J., dissenting).

104. *Id.* at 835 (Stevens, J., dissenting).

105. See *id.* at 836 (Stevens, J., dissenting).

106. *Id.* at 836 n.4 (Stevens, J., dissenting). Justice Stevens's alertness to viewpoint discrimination in speech restrictions and his skepticism of government's justifications are just as evident in his recent dissent in *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666 (1998), where he harshly criticized the Majority for allowing the government unfettered discretion in regulating speech on government property. See *id.* at 683-95 (Stevens, J., dissenting). See also *infra* notes 130-138, 315.

Since *Perry* and *Cornelius*, four Supreme Court decisions have further fortified the Court's speech-restrictive, deferential-to-government public forum doctrine.<sup>107</sup> In *United States v. Kokinda*,<sup>108</sup> volunteers for the National Democratic Policy Committee, a political advocacy group, tried to distribute literature and solicit contributions on the sidewalk in front of a United States Post Office.<sup>109</sup> A postal regulation banned soliciting contributions on postal premises.<sup>110</sup> The Court, in a plurality opinion, invoked the distinction between the government acting as proprietor and as lawmaker and upheld the regulation.<sup>111</sup> The Court reasoned that the sidewalk was not part of the city sidewalks but was part of the postal premises, constructed solely to provide for the passage of individuals engaged in postal business.<sup>112</sup> Thus, the Post Office's sidewalk was a nonpublic forum, and the restriction on soliciting contributions needed only to be examined for reasonableness in light of the forum's purpose and viewpoint neutrality.<sup>113</sup> The Court accepted the Postal Service's explanation that solicitation is inherently disruptive of the postal service's business, because it impedes the normal flow of traffic.<sup>114</sup> The regulation banning solicitation was found to be content-neutral and viewpoint-neutral, because all groups were banned from soliciting on the Post Office's sidewalk, regardless of their views.<sup>115</sup>

In *International Society for Krishna Consciousness v. Lee*,<sup>116</sup> the Court upheld a ban on solicitation, but not a ban on distribution of literature, in public airport terminals.<sup>117</sup> Here again, the Court emphasized that the government was running a commercial establishment to make a profit, not to promote free speech.<sup>118</sup> The airport terminals were deemed to be nonpublic fora because they were too modern to be "traditional public fora" and the government had not

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107. Two post-*Cornelius* Supreme Court decisions are the exceptions to this trend. Both cases involved the use of public education funds or facilities for religious groups. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court declined to assign a public forum category to the after-hours use of school property. *See id.* The Court found the public-forum analysis unnecessary because the school district's exclusion of a church that wished to show a film on family issues constituted impermissible viewpoint discrimination. *See id.* at 391-92. In *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995), the Court held that a public university's student activity fund was a limited public forum and that the exclusion of student publications with religious perspectives was viewpoint discrimination. *See id.* at 837.

108. 497 U.S. 720 (1990)

109. *See id.*

110. *See id.* at 724.

111. *See id.* at 725-26, 737.

112. *See id.* at 727.

113. *See id.* at 730.

114. *See id.* at 732-33.

115. *See id.* at 736.

116. 505 U.S. 672 (1992).

117. *See id.* The ban on distribution of literature was declared invalid in the companion case, *Lee v. International Soc'y for Krishna Consciousness*, 505 U.S. 830 (1992).

118. *See International Soc'y for Krishna Consciousness*, 505 U.S. at 682.

intentionally opened them for expressive activity.<sup>119</sup> Therefore, the bans were subject only to reasonableness and viewpoint neutrality requirements.<sup>120</sup> The Court then accepted as reasonable the government's too-disruptive-to-business rationale for banning solicitation.<sup>121</sup> Although the Court cited the *Perry* nonpublic forum standard requiring reasonableness *in light of the purpose of the forum* and viewpoint neutrality, the Court seemed only to require a more general "reasonableness" akin to rational basis review, and never inquired at all about the possibility of viewpoint discrimination.<sup>122</sup>

In separate concurring opinions, Justices O'Connor and Kennedy proposed more rigorous review of government speech restrictions. Explaining why a ban on distribution of literature would not be reasonable although a ban on solicitation was reasonable, O'Connor took a broader view than the Court on what the purpose of the forum was (it was multipurpose, she said, as much a shopping mall as an airport) and a stricter look at how International Society for Krishna Consciousness's activities might or might not interfere with those purposes.<sup>123</sup> In effect, she was interpreting the nonpublic forum standard in a more demanding, speech-protective way than did the rest of the Majority.

Justice Kennedy argued that the corridors and shopping areas (at least those outside of passenger security zones) of government-owned airports are public forums.<sup>124</sup> Kennedy objected to the narrowness of the traditional public forum category for leaving little scope for the development of new public forums.<sup>125</sup> He also objected to forum analysis's reliance on government intent as the determinant of forum category and hence scrutiny levels.<sup>126</sup> Kennedy proposed a test for public forum status based on the objective, physical characteristics of the property and the actual public access and uses that government had permitted there.<sup>127</sup> The test would focus judicial attention on whether expressive activity in general (not just the specific sort of speech at issue, such as solicitation) would significantly interfere with the actual governmental uses of the property.<sup>128</sup>

Most recently, the Court has denied public forum status, and the accompanying highly speech-protective standard of judicial scrutiny, to a Congressional candidate debate sponsored by a state-owned public television broadcaster and to a federal funding program for the arts. In *Arkansas Educational Television Commission v. Forbes*,<sup>129</sup> the Court upheld the public television broadcaster's exclusion of Forbes, an independent candidate, from a televised debated between candidates for election in Arkansas's Third Congressional

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119. See *id.* at 680, 683.

120. See *id.* at 679.

121. See *id.* at 683-84.

122. See *id.*

123. See *id.* at 685-93 (O'Connor, J., concurring).

124. See *id.* at 700 (Kennedy, J., concurring).

125. See *id.* at 697-99 (Kennedy, J., concurring).

126. See *id.* at 699-700 (Kennedy, J., concurring).

127. See *id.* (Kennedy, J., concurring).

128. See *id.* (Kennedy, J., concurring).

129. 523 U.S. 666 (1998).

District.<sup>130</sup> The majority opinion, delivered by Justice Kennedy, reflected none of the modifications to public forum analysis that Kennedy recommended six years earlier in his *International Society for Krishna Consciousness* concurrence. Instead, the *Perry* forum analysis was used. According to the Court, the broadcaster's selectivity in determining who could participate in the debate showed that the government did not intend to designate a public forum; thus, the debate was a nonpublic forum, from which government speaker-exclusions need only be reasonable and viewpoint-neutral.<sup>131</sup> The broadcaster's justifications for excluding Forbes, including his unpopularity with voters, the opinions of news organizations that he was a marginal candidate, and his lack of financial support, were found to be reasonable and viewpoint-neutral.<sup>132</sup> Indeed, the way the Court articulated the *Perry* nonpublic forum category suggests that all advertising on government property should be nonpublic forums: "[G]overnment does not create a designated forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it."<sup>133</sup> Further complicating the already hard-to-define *Perry* categories, the *Forbes* opinion hinted that there is a silent fourth *Perry* category: government property can be either a nonpublic forum or not a forum at all.<sup>134</sup> What the difference might be between the two or how one draws the line between them, the Court did not say.

In *National Endowment for the Arts v. Finley*,<sup>135</sup> the Court did not find public forum analysis applicable to a government funding program for the arts.<sup>136</sup> Instead of opening a forum for expressive activity, the government was acting as a patron, providing selective subsidies based on criteria that could permissibly be vague and subjective provided there was no invidious viewpoint discrimination.<sup>137</sup> The opinion suggests that in that silent fourth *Perry* category hinted at in *Forbes*, the "not a forum" category, all bets are off, and nearly any restriction on speech and nearly any reason offered to exclude speakers will be constitutional.

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130. See *id.*

131. See *id.* at 678-79.

132. See *id.* at 682-83. Justice Stevens, in his dissent, found the broadcaster's justifications for excluding Forbes ad hoc, subjective and standardless. See *id.* at 684 (Stevens, J., dissenting). Stevens objected to the nearly limitless discretion that the Court's decision accorded to government to pick and choose among speakers. See *id.* at 686 (Stevens, J., dissenting). Regardless of whether the forum is a designated public forum or a nonpublic forum, the state's reasons must be specific, argued Stevens. See *id.* at 690 (Stevens, J., dissenting). He recommended that the broadcaster's justifications for excluding Forbes be judged by the same limitations on discretion that the Court in *Shuttlesworth v. Birmingham* placed on government licensing/permit programs. See *id.* at 691 (Stevens, J., dissenting) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)). *Shuttlesworth* required that government's reasons for exclusions be narrow, objective, and definite. See *id.*

133. *Id.* at 679.

134. See *id.* at 678.

135. 524 U.S. 569 (1998).

136. See *id.* at 586.

137. See *id.* at 589.

The *New York Magazine* case and the similar advertising cases making their way through the courts in recent years must be seen against this background of an arguably incoherent public forum doctrine, a Supreme Court fractured over how to interpret and apply the doctrine, and a twenty-plus-year judicial pattern of increasing tolerance for speech restrictions and deference to government's judgments when it claims to act as a proprietor. Of all the recent advertising-on-government-property cases, *New York Magazine* merits special consideration for several reasons. First, of course, it shows illicit government motive in speech regulation at its most egregious, with a mayor known as the Emperor of New York<sup>138</sup> ordering a city agency to remove an ad that insulted him. The case also dramatically illustrates the line-drawing problems of the commercial/noncommercial speech dichotomy, the definitional problems of public forum doctrine, and the perplexity courts face when these two complicated legal doctrines overlap and clash. Most important, the Second Circuit's extraordinary, unconventional resolution of the dispute, when viewed together with Justice Stevens's dissent in *Forbes*, points to a means of repairing public forum doctrine to better protect speech on government property.

### III. *NEW YORK MAGAZINE* V. METROPOLITAN TRANSPORTATION AUTHORITY

#### NEW YORK MAGAZINE

Possibly the only good thing in New York Rudy hasn't taken credit for

Although District Court Judge Scheindlin expressed astonishment that New York's limelight-seeking Mayor would object to the use of his name in an ad,<sup>139</sup> the legal arguments that defendant Metropolitan Transportation Authority ("MTA") offered justifying its decision to remove the offending ads were not far-fetched. The MTA believed it should pull the ad because it violated the Mayor's rights under section 50 of the New York Civil Rights Law, which provides, "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person ... is guilty of a misdemeanor."<sup>140</sup> The MTA's Advertising Standards, which governed the contract between *New York Magazine* and MTA, prohibited the display of any advertisement that violated section 50.<sup>141</sup> The contract further provided that all advertising copy was subject to the approval of MTA.<sup>142</sup> Finally, MTA argued that the ad violated the city's

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138. Indeed, this is the title of a contemporary biography of Mayor Giuliani. See ANDREW KIRTZMAN, *RUDY GIULIANI, EMPEROR OF THE CITY* (2000).

139. See *New York Magazine v. Metropolitan Transit Auth.*, 987 F. Supp. 254, 256 (S.D.N.Y. 1997), *aff'd sub nom* *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998).

140. *Id.* at 257 n.1.

141. See *id.* at 258.

142. See *id.*

Conflict of Interest Board policy, which mandates that public servants should not use their official titles to promote a book or the interests of a for-profit entity.<sup>143</sup>

Before evaluating the MTA's arguments, Judge Scheindlin began by analyzing the First Amendment claim of *New York Magazine*.<sup>144</sup> Establishing the existence of state action in the conduct of New York City and MTA, both governmental actors, Judge Scheindlin proceeded to ask if, and to what extent, the *New York Magazine* ad was protected speech under the First Amendment.<sup>145</sup> To answer that, Judge Scheindlin inquired whether the ad could be categorized as commercial speech, a form of speech protected by the First Amendment but accorded lesser protection than other forms of constitutionally guaranteed expression.<sup>146</sup> The Supreme Court's definition of commercial speech is "speech that does no more than propose a commercial transaction."<sup>147</sup> All advertising is not necessarily commercial speech. On the other hand, advertising that includes information linking the product to a topic of current public debate does not necessarily entitle it to the higher protection given noncommercial speech.<sup>148</sup>

Judge Scheindlin found the *New York Magazine* ad to be a hybrid of commercial speech and political satire.<sup>149</sup> Its central purpose was to sell magazines, but it also mocked the city's Mayor.<sup>150</sup> In keeping with traditional First Amendment jurisprudence, this hybrid must be classified as either commercial or noncommercial speech. The court concluded that the ad was essentially commercial because it was a paid ad, it did not comment on a current event (the election occurred several weeks before the ad was to run), its primary purpose was to sell magazines and not to satirize the Mayor, and the magazine had a "more appropriate forum" for its political speech, namely the magazine itself.<sup>151</sup>

The court distinguished the case from *Penthouse v. Koch*,<sup>152</sup> where it had found that a *Penthouse* ad caricaturing then-presidential-candidate Walter Mondale was political speech deserving full First Amendment protection.<sup>153</sup> The chief difference was that the *Penthouse* ad commented on a current political campaign while the *New York Magazine* ad was less tied to current events.<sup>154</sup> It was "merely a comment on the political style of the Mayor."<sup>155</sup> Also, the political statement in the *Penthouse* ad was not directly related to the nature of the

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143. See *id.*

144. See *id.* at 260.

145. See *id.*

146. See *id.*

147. *Id.* at 261 (quoting *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993)).

148. See *id.*

149. See *id.*

150. See *id.*

151. *Id.*

152. 599 F. Supp 1338 (S.D.N.Y. 1984).

153. See *id.*

154. See *New York Magazine*, 987 F. Supp. at 262.

155. *Id.*



magazine being sold.<sup>156</sup> The *New York Magazine* ad, by contrast, "inextricably intertwined" its political message with its commercial message; the ad's political comment was representative of the contents, the political and social commentary of the magazine it was selling.<sup>157</sup>

Having categorized the speech as commercial, the court applied the four-part test from *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*<sup>158</sup> to determine whether governmental regulation of commercial speech violated the First Amendment.<sup>159</sup> First, commercial speech must concern lawful activity and not be misleading.<sup>160</sup> Second, the asserted governmental interest must be substantial.<sup>161</sup> Third, the government's regulation must directly advance the governmental interest asserted.<sup>162</sup> Finally, the regulation must not be more extensive than is necessary to serve that interest.<sup>163</sup> Because the advertisement at issue was not misleading and related to lawful activity, the government had to justify its regulation by demonstrating that it had a substantial interest in the regulation and that the regulation directly advanced that interest.<sup>164</sup>

The court then abruptly switched analytical gears, moving from *Central Hudson*'s test of commercial speech regulation to public forum doctrine, because the speech at issue was not only commercial but sought access to government property (the exteriors of city buses).<sup>165</sup> The public forum doctrine standards for judicial evaluation of government speech regulations are sometimes higher than the *Central Hudson* standard (e.g., compelling state interest and narrowly tailored means are required for traditional or designated public fora)<sup>166</sup> and sometimes lower (e.g., reasonable in light of the forum's purpose and viewpoint-neutral for nonpublic fora).<sup>167</sup> Applying the Supreme Court's *Perry* analysis, the court categorized the exterior of MTA buses, the relevant forum, as a designated public forum because of MTA's general acceptance of commercial and political advertising.<sup>168</sup> In making this determination, the court distinguished *Lehman*<sup>169</sup> and *Lebron*,<sup>170</sup> both of which involved far more limited access to the advertising

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156. *See id.*

157. *Id.* at 262 n.4.

158. 447 U.S. 557 (1980).

159. *See id.* at 566.

160. *See id.* at 262-63.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See New York Magazine v. Metropolitan Transit Auth.*, 987 F. Supp. 254, 263 (S.D.N.Y. 1997).

165. *See id.*

166. *See, e.g., Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983).

167. *See, e.g., United States v. Kokinda*, 497 U.S. 720 (1990).

168. *See id.* at 264.

169. *See Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *see also* discussion *supra* Part II.

170. *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993 (S.D.N.Y. 1993), *aff'd* 69 F.3d 650 (2d Cir. 1995); *see also* discussion *infra* Part IV.

space.<sup>171</sup> At this point, however, the standards of *Central Hudson* and public forum doctrine appear to clash: where public forum doctrine applies strict scrutiny to government regulation in a public forum, *Central Hudson* requires only a substantial government interest. The court applied the *Central Hudson* standard without explaining why this standard trumped the public forum standard. Nor did the court explain what would have happened had the forum been nonpublic and the choice between *Central Hudson*'s higher standard and public forum doctrine's more permissive rational basis standard.<sup>172</sup>

Applying the *Central Hudson* standard to the MTA's arguments justifying its removal of the *New York Magazine* ad, the court quickly rejected the conflict-of-interest argument as inapplicable.<sup>173</sup> Here, the Mayor was not using his position as public servant for financial gain; nor was he endorsing a product.<sup>174</sup>

Next, the court addressed the city's chief argument, that the ad violated the Mayor's "right to publicity" under section 50 of New York Civil Rights Law.<sup>175</sup> Given the statute's purpose of "protect[ing] privacy without preventing publication of matters of public interest," the court found that the purpose of the statute was not served by excluding the ad; the Mayor of New York City, as a highly visible public figure, must expect to be "the subject of all kinds of public comments, even in advertisements."<sup>176</sup> Further, the ad commented on Giuliani's professional persona, not on his private life.<sup>177</sup> Any benefit obtained by the magazine through use of the Mayor's name resulted from the ad's political humor, not from an association between Giuliani and the magazine.<sup>178</sup>

The Court also determined that the judicial exceptions to section 50,<sup>179</sup> an incidental use exception and a public interest exception, both applied to the *New York Magazine* ad.<sup>180</sup> In the context of ads for books and periodicals, New York courts recognize an exception for incidental use in ads or other promotional materials that "convey the nature and content."<sup>181</sup> The public interest exception permits use of photographs of persons without their consent where the photos "relate to a magazine, newspaper article, or film concerning newsworthy events or subjects of public interest, including political events, social events, scientific news, and stories of consumer interest."<sup>182</sup> The court found that the use of the Mayor's

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171. In *Lehman*, all political ads were prohibited; in *Lebron*, only purely commercial advertising was allowed.

172. See *New York Magazine v. Metropolitan Transit Auth.*, 987 F. Supp. 254, 264-65 (S.D.N.Y. 1997).

173. See *id.* at 265.

174. See *id.*

175. See *id.* at 265-66.

176. *Id.* at 266.

177. See *id.*

178. See *id.*

179. See *supra* text accompanying notes 138-139.

180. See *New York Magazine*, 987 F. Supp. at 266-69.

181. *Id.* at 267 (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 131 (2d Cir. 1984)).

182. *Id.* at 267.

name in the ad's political joke conveyed the nature and content of *New York Magazine*, and that the ad could not have conveyed its public interest message (i.e., mockery of the Mayor's eagerness to take credit for the City's achievements) without mentioning him.<sup>183</sup> Thus, the court concluded that section 50 did not apply to the advertisement, and since there remained no substantial government interest justifying the ad's removal, the district court granted *New York Magazine* preliminary injunctive relief on its § 1983 claim that MTA violated its First Amendment rights.<sup>184</sup> MTA was enjoined from refusing to display the ad and ordered to reinstate it.<sup>185</sup>

The United States Court of Appeals for the Second Circuit, in a 2-1 decision, affirmed the grant of preliminary injunctive relief against MTA, but on different grounds.<sup>186</sup> On appeal, MTA argued first that the exterior of the city buses was a nonpublic forum, so that the removal of the ad need only be reasonable and viewpoint-neutral.<sup>187</sup> MTA also argued that even if the ad space on the buses' exteriors was a designated public forum, section 50 of the New York Civil Rights Law did apply and represented a substantial government interest that was directly advanced by the removal of the ad, thus satisfying the *Central Hudson* standard for regulation of commercial speech.<sup>188</sup>

Judge Oakes, writing for the majority, agreed with the district court that the exteriors of the buses were designated public forums because, unlike the advertising spaces in *Lehman* and *Lebron*, the forums in this case were open to all types of advertising, commercial and political.<sup>189</sup> "Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy..."<sup>190</sup> Furthermore, where the MTA's main motive was to uphold the law (i.e., section 50) rather than to promote its commercial interests as the operator of a public transit system, it was acting not as a proprietor but in its traditional role as regulator.<sup>191</sup>

After finding the advertising space on the buses to be a designated public forum, the Second Circuit took an approach quite remarkable both in public forum

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183. See *id.* at 268-69. Note that MTA argued that even the substitution of "Mayor" for "Rudy" in the ad would have violated section 50. See *id.* at 269 n.8.

184. See *id.* at 269-70.

185. See *id.*

186. See *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998).

187. See *id.* at 125.

188. See *id.*

189. See *id.* at 130.

190. *Id.*

191. See *id.* Here is another instance of confusion in public forum doctrine. Is "proprietor" status a factor in choosing to characterize a forum as nonpublic? Or does it modify the degree of scrutiny whatever the forum classification, so that where government acts as "proprietor," even regulation in a public forum will be given more judicial deference?

jurisprudence and in commercial-speech regulation caselaw. Instead of examining the validity of applying section 50 or whether its application constituted a substantial government interest, the court decided that MTA's removal of the ad was a form of prior restraint, which is presumptively unconstitutional.<sup>192</sup> Even if commercial speech may be an exception to the prohibition on prior restraint under *Central Hudson*, the procedural safeguards required for prior restraint should not, the court said, be relaxed regardless of whether or not the speech is commercial.<sup>193</sup> Otherwise, First Amendment protection from prior restraint will depend on local transit authority officials deciding whether or not complex blends of political and commercial speech (like the *New York Magazine* ad) should be characterized as commercial.<sup>194</sup>

The court then turned to the *Central Hudson* test itself to justify requiring safeguards against prior restraint of commercial speech.<sup>195</sup> In this case, prior restraint violated the *Central Hudson* requirement that the regulation be no more extensive than necessary to serve the asserted government interest.<sup>196</sup> Because MTA would not suffer irreparable harm in displaying the ad, the prior restraint was more extensive than necessary.<sup>197</sup> Instead of enforcing section 50 through its advertising policy, and thus exercising prior restraint, the MTA had to display the ad and leave it to Mayor Giuliani to sue for violation of his section 50 publicity right.<sup>198</sup>

Judge Cardamone's dissent in *New York Magazine* provides another illustration of how the incoherence of public forum doctrine continues to fracture courts. First, he believed the ad did violate section 50 and did not come within

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192. See *id.* at 131–32. For a discussion of the pro-First-Amendment aspects of the district court's opinion, see O'Neill, *supra* note 1.

193. See *New York Magazine*, 136 F.3d at 131–32. In support of this interpretation, Judge Oakes cited cases in two other circuits that have applied the requirement of procedural safeguards to prior restraint of commercial speech: *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *In re Search of Kitty's East*, 905 F.2d 1367, 1371–72 & n.4 (10th Cir. 1990).

194. See *New York Magazine*, 136 F.3d at 131:

[E]ven the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA. While the Advertisement served to promote the sales of a magazine, it just as clearly criticized the most prominent member of the City's government on an issue relevant to his performance of office...protecting the right to express skeptical attitudes toward the government ranks among the First Amendment's most important functions....We need not decide whether the Advertisement is actually commercial speech or core-protected speech; the difficulty of the question alone convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech.

*Id.*

195. See *id.* at 131–32.

196. See *id.* at 132.

197. See *id.*

198. See *id.*

either of its exceptions.<sup>199</sup> Second, he found that MTA was acting in its proprietary capacity.<sup>200</sup> Although he admitted that the city buses' ad space was a limited public forum, he interpreted public forum doctrine to mean that when the government regulates the reserved nonpublic uses (i.e., the uses not expressly allowed by government), its speech regulations only need to be reasonable and viewpoint neutral.<sup>201</sup> Thus, if the ad violated section 50, and if ads violating section 50 were uses of the forum not expressly allowed, then any reasonable explanation for excluding the ad would suffice.<sup>202</sup>

#### IV. ADVERTISING ON GOVERNMENT PROPERTY: THE ONGOING MUDDLE OF PUBLIC FORUM DOCTRINE AND COMMERCIAL/NONCOMMERCIAL SPEECH DISTINCTIONS

Seen as a commercial speech case, *New York Magazine v. Metropolitan Transportation Authority* represents a continuation of the welcome trend begun in *44 Liquormart, Inc. v. Rhode Island*<sup>203</sup> of bringing commercial speech more fully within the protection of the First Amendment.<sup>204</sup> But to the extent that protection for commercial speech rests on public forum doctrine—as it will whenever businesses seek to advertise their products or services on government property—that protection is no sure thing. Given the difficulties of classifying speech as commercial or noncommercial, the vagaries of public forum doctrine may jeopardize the protection of all speech.

Most of the recent cases involving advertising on government property concern controversial political or public service advertising and the extent to which government can restrict it. The irony in many of these cases is that commercial advertising, traditionally accorded less protection as commercial speech, winds up being given more protection when government tries to restrict access to the forum to commercial advertising only. Instead of attempts to show that commercial speech is political, as in *New York Magazine*, some of the recent cases involve political speech trying to pass as commercial.

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199. See *id.* at 132–33 (Cardamone, J., dissenting).

200. See *id.* at 133 (Cardamone, J., dissenting).

201. See *id.* at 134 (Cardamone, J., dissenting).

202. See *id.* (Cardamone, J., dissenting). Judge Cardamone's reasoning is circular. It would effectively eliminate strict scrutiny of regulations in the designated public forum, because government could always argue that the ad it was excluding was, for whatever ostensibly offending reason, outside of what it expressly allows. That same reason would then only have to be rational and viewpoint neutral. The real problem is not the dissent's reasoning, however, but the doctrine itself, particularly its unworkable taxonomy of forums and its uncertain relationship to the also unworkable proprietor/regulator distinction.

203. 517 U.S. 484 (1996).

204. See *id.* (unanimously striking down a state ban on truthful advertisement of liquor prices). For a discussion of the trend towards broader freedom for commercial speech through judicial emphasis on the aim of the regulation rather than the nature of the speech, see Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123 (1996).

In *Children of the Rosary v. City of Phoenix*,<sup>205</sup> for example, the city banned noncommercial advertising on municipal buses.<sup>206</sup> The advertiser, an anti-abortion group, tried to get around the restriction by revising its ad to include a sales pitch for a bumper sticker.<sup>207</sup> Thus, in addition to the text, "Before I formed you in the womb, I knew you."—God. Jeremiah 1:5, Children of the Rosary. CHOOSE LIFE!", the ad included the following: "Purchase this message as a bumper sticker for your vehicle! Contact [phone number]."<sup>208</sup> The Arizona Civil Liberties Union, a co-plaintiff in the case, tried the same tactic, and submitted an ad for display on city buses that read, "The ACLU Supports Free Speech for Everyone. To purchase this bumper sticker please call [phone number]."<sup>209</sup> Although the Supreme Court defined commercial speech as speech which "proposes a commercial transaction,"<sup>210</sup> and the City of Phoenix incorporated that standard into its advertising policy,<sup>211</sup> the city rejected the ads as noncommercial, political advertising of the kind the city banned on its buses. The Ninth Circuit upheld the city's decision.<sup>212</sup>

Due to the city's prohibition on noncommercial advertising, the city bus ad spaces were categorized as nonpublic forums.<sup>213</sup> Only the reasonableness and viewpoint-neutrality standards were therefore applied to the exclusion of the anti-abortion ads.<sup>214</sup> The court accepted the argument that where the government was acting as a proprietor, it was reasonable to forbid noncommercial speech, because to allow it would risk the appearance of government favoritism, might produce outbreaks of violence on public transportation, and could cause loss of income from commercial advertisers who might decline to share the forum with political and religious messages.<sup>215</sup> "These are reasonable legislative objectives advanced by the city in its proprietary capacity," concluded the court, citing to *Lehman* and *Cornelius*.<sup>216</sup> The Ninth Circuit also found that exclusion of the ads was viewpoint neutral, based on the absence of any evidence that the city accepted other noncommercial advertisements while rejecting the plaintiffs' ads.<sup>217</sup> Nor did the

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205. 154 F.3d 972 (9th Cir. 1998).

206. *See id.*

207. *See id.* at 975.

208. *Id.*

209. *Id.*

210. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989).

211. *See Children of the Rosary*, 154 F.3d at 983 & n.4.

212. *See id.* at 983.

213. *See id.* at 976–78.

214. *See id.* at 978–79.

215. *See id.* at 979.

216. *Id.*

217. The city did accept noncommercial ads under pre-existing contracts entered into under an older city advertising policy. *See id.* at 980. In a case too recent to include in the text of this article, the City of Atlanta's public transit agency announced its intent to exploit the commercial/non-commercial speech dichotomy so that in the future the agency could avoid having to run abortion ads. *See Abortion Ads Appear in Atlanta*, AP, Sept. 12, 2000, available in Westlaw, 2000 WL 26674597. Metropolitan Atlanta Rapid Transit

court see a danger of viewpoint discrimination in the tricky line-drawing required to label an ad offering for sale a bumper sticker "noncommercial" rather than "commercial." The Ninth Circuit agreed with the district court that the bumper sticker ads of the Children of the Rosary and the Arizona Civil Liberties Union were "noncommercial" ideological communications.<sup>218</sup>

*Children of the Rosary* gives force to the Second Circuit's opinion in *New York Magazine* of the dangers of allowing First Amendment protection to depend on whether local government officials choose to categorize speech as commercial or noncommercial. Where ads contain mixed or multiple messages, line drawing is so difficult it becomes almost arbitrary. Is the *New York Magazine* ad really more commercial or more political? On what scale does one measure it, and how does one weigh context as opposed to content? Isn't the anti-abortion group selling a bumper sticker and therefore proposing a commercial transaction? Should government regulations based on arguably illusory distinctions between commercial and noncommercial speech be the foundation of public forum characterizations, the determinant of levels of judicial scrutiny, and thus, ultimately, the determinant of how much protection courts will provide against illicit viewpoint discrimination? Should such regulations ever survive even rational basis scrutiny in the context of First Amendment speech?<sup>219</sup>

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Authority ("MARTA") had tried to refuse abortion ads as "too controversial" despite having previously accepted ads for gay rights, racial and religious tolerance, AIDS awareness, pregnancy counseling, and adoption services. *See id.* In June 2000, a federal court found MARTA's reason for refusing the ads "too vague." *See National Abortion Fed'n v. Metropolitan Atlanta Rapid Transit Auth.*, No. 1:99-CV-1090-CAP, 2000 WL 1370440 (N.D. Ga. June 7, 2000). Forced by the court to run the ads on city buses, MARTA responded by announcing that in the future it will allow only commercial advertising. *See Abortion Ads Appear in Atlanta, supra.*

218. *See Children of the Rosary*, 154 F.3d at 982.

219. Justice Brennan thought they could not. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 308-22 (1974) (Brennan, J., dissenting). Justice Noonan, in his dissent in *Children of the Rosary*, was similarly skeptical of line-drawing between commercial and noncommercial advertising:

Commercial media advertising can be full of political and religious content. In this way a radio station in Phoenix, like a station in San Francisco, could advertise on the buses that it broadcasts Rush Limbaugh with a photo of the man accompanying the sales pitch. A Christian radio station could promote its product with a cross and a relevant message. A movie house could announce the return of *The Last Temptation of Christ* with an illustration of the Magdalen....The Phoenix ordinance, as applied, fails to mark off a realm of ideology-free speech from a realm where ideologues with businesses to advertise can flourish.

154 F.3d at 985 (Noonan, J., dissenting). For other cases involving mixed commercial-noncommercial speech, see *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989) (finding that including home-economics information in Tupperware parties did not make them noncommercial where State University system banned operation of commercial enterprises on campuses); *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983) (including literature about venereal diseases and family planning with advertisements for condoms did not make the ads noncommercial speech); *Valentine v. Chrestensen*, 316 U.S.

An anti-abortion ad case in the Third Circuit had an opposite outcome, with the court finding the transit authority's removal of the ad unreasonable.<sup>220</sup> In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*,<sup>221</sup> the conflict between the decisions of the district and appellate courts arose not from the characterization of the speech as commercial or noncommercial, nor from their disagreement over the nature of the forum (although they did disagree), but ultimately from their divergent opinions of what it means for the government to act "reasonably" in removing an ad.<sup>222</sup> The ad at issue asserted "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer."<sup>223</sup> The ad was accepted by Transportation Displays, Inc. ("TDI"), the licensee of Southeastern Pennsylvania Transportation Authority ("SEPTA"); TDI managed the placement of ads on SEPTA's buses, trains, and facilities.<sup>224</sup> Several weeks after the ad was displayed in Philadelphia's Suburban Station and in twenty-five subway and commuter rail stations in the Philadelphia area, SEPTA received a copy of a letter written by Dr. Philip Lee, Assistant Secretary of Health for the U.S. Department of Health and Human Services.<sup>225</sup> The letter stated, "This ad is unfortunately misleading, unduly alarming, and does not accurately reflect the weight of the scientific literature....We strongly object to the ad because it appears to be based on studies that are inconclusive, biased, and poorly designed."<sup>226</sup> In response, SEPTA directed TDI to remove the ad.<sup>227</sup>

The district court found that the SEPTA ad spaces were nonpublic forums because SEPTA "presented ample evidence that" in its role as proprietor, "it retains firm control over the types of advertising which may be displayed in its stations. It has rules and standards."<sup>228</sup> Although ninety-nine percent of ads submitted to SEPTA were accepted, the district court found that, rather than showing the kind of general access indicative of a public forum, the numbers

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52 (1942) (including protest against city law on back of handbill containing commercial ad did not make it non-commercial).

The majority in *Children of the Rosary* argued that if the government's restriction on noncommercial advertising could be evaded by the simple device of tacking on an offer for bumper stickers, the government's ability to act as a proprietor and control access to a nonpublic forum would be undermined. See *Children of the Rosary*, 154 F.3d at 981. But controlling access through standards that are uncertain in application endangers free speech, providing easy cover for illicit government viewpoint discrimination.

220. See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998).

221. 148 F.3d 242 (3d Cir. 1998).

222. See *id.* See also *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 937 F. Supp. 425 (E.D. Pa. 1996).

223. *Christ's Bride Ministries*, 937 F. Supp. at 428.

224. See *id.*

225. See *id.*

226. *Id.*

227. See *id.*

228. *Id.* at 431.



merely reflected the fact that ninety-nine percent of the ads were "garden variety commercial advertisements."<sup>229</sup>

Given the nonpublic forum determination, the court then applied reasonableness and viewpoint neutrality standards.<sup>230</sup> It found that it was reasonable for SEPTA to remove the ads based on the representation of a high government official in the U.S. Department of Health and Human Services that the ad was an "alarmist message trumpeting to the public inaccurate and misleading health information."<sup>231</sup> SEPTA had no obligation to do its own research on the link between abortion and breast cancer because, as a transportation authority, it lacked medical expertise.<sup>232</sup> Furthermore, the government's removal of the ads was viewpoint neutral since SEPTA had previously accepted advertisements from both sides of the abortion debate.<sup>233</sup>

The Third Circuit reversed. The appellate court disagreed with the forum characterization, holding that it was a designated public forum because at least ninety-nine percent of all ads were posted without objection by SEPTA.<sup>234</sup> However, it found that even if the district court's forum characterization had been correct, the government's decision to remove the ad was not reasonable in light of the purpose of the forum.<sup>235</sup> SEPTA did not show that the ad interfered with the intended purpose of the forum,<sup>236</sup> and it did not have a clear specific policy in place under which it could justify the ad's exclusion or the exclusion of similar ads.<sup>237</sup> Finally, the advertiser was not given an opportunity to defend its ad or to clarify it.<sup>238</sup> SEPTA "acted as a censor," the court concluded.<sup>239</sup> Although the Third Circuit did not overtly accuse SEPTA of viewpoint discrimination, the "censor" label suggests that where government has no clear policies in place and the government cannot justify its restrictions based on reasons addressing the forum's purpose, illicit government motive—that is, censorship—is probable.

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229. *Id.*

230. *See id.*

231. *Id.* at 432.

232. *See id.* at 434 ("We find it reasonable for SEPTA, a transportation authority with no medical expertise, to rely solely on the medical opinion of a physician who is a high government health official. It had no duty to investigate further before taking action.").

233. *See id.*

234. *See Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 251–52 (3d Cir. 1998).

235. *See id.* at 255.

236. *See id.* at 256. Recall that under the *Perry* analysis, the speech regulation must be reasonable *in light of the purpose of the forum*. *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 49 (1983).

237. *See Christ's Bride Ministries, Inc.*, 148 F.3d at 257 ("SEPTA has left us to guess why, in terms of the purpose of the forum, it excluded CBM's [Christ's Bride Ministry's] ad, and why, and to what extent other ads will also be excluded....SEPTA has in place no policy, old or new, written or unwritten, governing the display of ads making contested claims.").

238. *See id.*

239. *Id.*

The lack of clear, specific, narrowly drafted government standards or policies that are consistently enforced has often been the problem in these advertising-on-government-property cases. In *Cincinnati*, SORTA, the regional public transportation authority, refused to accept a pro-union wrap-around bus advertisement, relying on its policy that excludes ads which are "controversial" and requires ads to be "aesthetically pleasing."<sup>240</sup> Here again, the forum characterization was not crucial because the vague, overbroad standards would pass neither strict scrutiny (if a public forum) nor a "reasonableness" test (if a nonpublic forum).<sup>241</sup> Even if the standards were not vague and overbroad, they were not reasonably applied where the evidence showed little that was "controversial" about the actual ad and where the only evidence of the ad's failure to meet the aesthetic requirement was the testimony of a state transportation official that he, personally, found the ad aesthetically displeasing.<sup>242</sup>

In *AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transportation Authority*, the court went one step further.<sup>243</sup> Where the courts in *Christ's Bride Ministries* and the *Cincinnati SORTA* case reached decisions that would come out the same regardless of the public forum characterization, the court in *AIDS Action Committee* dispensed with public forum analysis altogether.<sup>244</sup> In this case, the Massachusetts Bay Transportation Authority ("MBTA") refused to run seven public service ads on subways and trolley cars; the ads promoted the use of condoms to help stop the spread of AIDS.<sup>245</sup> Each ad had a large color picture of a condom wrapped in a package, a message explaining that latex condoms are effective in preventing the transmission of AIDS, and a headline using sexual innuendo and double entendre to get the viewer's attention.<sup>246</sup> For example, one headline stated, "Read this before you get off."<sup>247</sup> Around the same time that the MBTA rejected the condom ads, it accepted and ran two sexually suggestive ads for the movie *FATAL INSTINCT*.<sup>248</sup> Both ads prominently featured the bare, crossed legs of a seated woman with visible cleavage but whose face was mostly obscured.<sup>249</sup> In one ad, the woman suggestively ate a hot dog; the headline "Come

240. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 346 (6th Cir. 1998).

241. *See id.* at 348-49. For an argument that "controversial" is a red flag for viewpoint discrimination, see Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 115-22 (1996).

242. *See United Food*, 163 F.3d at 355-58.

243. *See AIDS Action Committee of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1 (1st Cir. 1994).

244. *See id.* at 9.

245. *See id.* at 4.

246. *See id.*

247. *Id.* The remaining headlines in the ad series were as follows: 1) Haven't you got enough to worry about in bed?; 2) Even if you don't have one, carry one; 3) Simply having one on hand won't do any good; 4) You've got to be putting me on; 5) Tell him you don't know how it will ever fit; 6) One of these will make you 1/1000th of an inch larger. *See id.*

248. *See id.* at 5.

249. *See id.* at 5.

here often?" was displayed at crotch level.<sup>250</sup> In the other ad, the headline "Opening Soon" was displayed at crotch level across the woman's bare, crossed legs.<sup>251</sup>

The MBTA rejected the condom ads under its policy against accepting ads which describe sexual conduct in a patently offensive way or contain graphic representations pertaining to sexual conduct.<sup>252</sup> The General Manager of the MBTA stated in an affidavit that the running of the FATAL INSTINCT ad had been a mistake because it was "vulgar and inappropriate."<sup>253</sup>

The court first determined that the MBTA policy was a type of content discrimination,<sup>254</sup> but decided not to apply public forum doctrine to determine the nature of the forum and the extent to which government may regulate it. Because the record of the MBTA's past practices of accepting or excluding ads was not well developed, it was "exceedingly difficult to say whether the MBTA designated the interiors of its cars as public fora,"<sup>255</sup> and therefore the court "decline[d] to anchor an important First Amendment ruling on so fragile a foundation."<sup>256</sup> In addition, the court decided not to apply public forum doctrine because of its "relatively murky status."<sup>257</sup>

Instead, the court directly addressed the question of viewpoint discrimination, which would be forbidden in any forum, traditional or designated or nonpublic.<sup>258</sup> It found content discrimination giving rise to an appearance of viewpoint discrimination in the MBTA's rejection of the AIDS Action Committee ("AAC") ads when it allowed the FATAL INSTINCT ads.<sup>259</sup> The latter were "at least as sexually explicit and/or patently offensive as the AAC ads; they contain provocative photographs not found in AAC; and they involve a less protected type of speech—commercial speech—than that in the AAC ads."<sup>260</sup> The appearance of

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250. *Id.*

251. *Id.*

252. *See id.*

253. *Id.*

254. *See id.* at 8–9. Content discrimination occurs when the government makes distinctions based on the content, or subject matter, of speech. For example, a rule allowing only public service ads would be content based. A rule allowing only ads promoting abstinence would be viewpoint based. Viewpoint discrimination is usually seen as a subset of content discrimination that is particularly repellent to First Amendment values. *See* *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995). Often, it is difficult to distinguish content and viewpoint discrimination, as was the case in *Rosenberger*, where a public university's restriction against funding student religious publications could be seen as either content discrimination (a distinction between religion and other, permissible subject matter for the publications) or viewpoint discrimination (a distinction between publications with religious points of view and those with non-religious points of view). *See id.* at 831–32.

255. *AIDS Action Comm.*, 42 F.3d at 9.

256. *Id.*

257. *Id.*

258. *See id.* at 10–12.

259. *See id.*

260. *Id.* at 10.

viewpoint discrimination was also found in the conventionality of the accepted ads in contrast to the rejected condom ads.<sup>261</sup> The FATAL INSTINCT ads were “more overtly sexual and more blatantly exploitative; but they represent the conventional exploitation of women’s bodies for commercial advertising. The condom ads, by contrast, represent sexual humor addressed to men’s bodies and—because of the connection to AIDS—are also capable of provoking homophobic reactions from the public, and did.”<sup>262</sup>

Perhaps the court’s rejection of public forum doctrine, or the other courts’ perfunctory marches through the analysis only to show it doesn’t affect the outcome, suggests that what First Amendment protection really means in the area of government regulation of advertising on government property is protection from illicit government viewpoint discrimination.<sup>263</sup> Such viewpoint discrimination, hard to prove except in the most blatant cases like *AIDS Action Committee*, appears to be just below the surface in *SORTA* (the government disliked the pro-union message), in *Christ’s Bride Ministries* (the government disagreed with the anti-abortion group’s claim about a link between breast cancer and abortion), and in *New York Magazine* (the government was offended by the ad’s message, mocking the mayor).

Two further cases demonstrate just how problematic public forum analysis and the commercial/noncommercial dichotomy are when the First Amendment rights of advertisers are at stake. In *Airline Pilots Ass’n v. Department of Aviation of Chicago*,<sup>264</sup> a pilots’ union sought to display an ad in O’Hare Airport that was critical of United Airlines for dismantling the regional airline Air Wisconsin, causing hundreds of Air Wisconsin employees to lose their jobs.<sup>265</sup> The City of Chicago, which owns O’Hare Airport, rejected the ad, explaining that the City earns four million dollars each year from United’s advertising.<sup>266</sup>

The district court conducted a public forum analysis, beginning with a definition of the relevant forum as O’Hare Airport.<sup>267</sup> Accepting the defendants’ argument that they had a consistent practice of excluding political advertising from O’Hare, the district court found that O’Hare was a nonpublic forum and the regulation was reasonable.<sup>268</sup>

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261. See *id.* at 12.

262. *Id.*

263. See, e.g., *Christ’s Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, 163 F.3d 341, 348–49 (6th Cir. 1998). For an argument that all First Amendment law has as its primary, if unstated, goal the detection of improper governmental motives, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

264. 45 F.3d 1144 (7th Cir. 1995).

265. See *id.* at 1147–48.

266. See *id.* at 1148.

267. See *Air Line Pilots Ass’n v. Department of Aviation of Chicago*, No. 93 C 6696, 1994 WL 23075, at \*2–3 (N.D. Ill. Jan. 20, 1994).

268. *Id.*

The appellate court defined the relevant forum much more narrowly: the display cases to which the pilots' union sought access.<sup>269</sup> It then remanded the case for a reconsideration of the nature of the forum.<sup>270</sup> The court hinted that "nonpublic forum" was not the correct answer, advising the lower court to look carefully at the past practices of accepting ads for the display cases and warning that if "political ads" are excluded, the court should be skeptical toward the way "political" is interpreted by the city when it applies its advertising standards and should look closely at whether the city applies them consistently.<sup>271</sup>

Should the district court on remand find a public forum, the appellate court instructed, then strict scrutiny should be given to the regulation; the court should not defer to the city simply because it was acting as "proprietor" rather than "lawmaker."<sup>272</sup> If the court decided the forum was nonpublic and applied a "reasonableness" standard, the appellate court cautioned that the city's fear of offending United Airlines by running the union ad would not only be an unacceptable reason, it would be impermissible content, or even viewpoint, discrimination.<sup>273</sup> Nor would the exclusion of an entire category of speech—say, political speech—save the exclusion of the union's ad from viewpoint discrimination.<sup>274</sup> "The line between commercial speech and political speech is far too tenuous to allow the distinction to do the work the district court would have it do," the appellate court explained.<sup>275</sup> "The district court should not retreat into broader categories of speech with some imagined or hypothetical meaning. Instead, the proper focus concerns whether or not the forum has included speech on the same general subject matter."<sup>276</sup> As Judge Flaum in his concurring opinion pointed out, it may be unreasonable to claim "political" ads are more disruptive to the airport's function than commercial ads: "[I]t seems unlikely that a commercial advertisement for *Penthouse Magazine* would disrupt travel less than a political announcement exhorting people to 'Get out and vote.'"<sup>277</sup>

In addition to questioning whether categorizing ads as commercial and noncommercial could ever be the reasonable basis to exclude one category of ads, the court cast doubt on public forum doctrine in two ways. First, the court implied that a change in how one defines the relevant forum (i.e., display case or airport) could potentially affect the outcome of the case and the extent to which plaintiffs' speech receives First Amendment protection.<sup>278</sup> On the other hand, one could get

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269. See *Air Line Pilots Ass'n*, 45 F.3d at 1151–52. For a much earlier, pre-*Cornelius* Seventh Circuit case upholding the First Amendment right of the advertiser, see *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985).

270. See *Air Line Pilots Ass'n*, 45 F.3d at 1154–55.

271. *Id.* at 1155–60.

272. *Id.* at 1158.

273. See *id.* at 1157.

274. See *id.* at 1159–60.

275. *Id.* at 1160.

276. *Id.*

277. *Id.* at 1162 (Flaum, J., concurring).

278. See *id.* at 1151.

the desired outcome regardless of how the public forum analysis was worked out, as the court suggested in its hints to the district court on remand, sounding very speech-protective and very willing to find for the union's ad.<sup>279</sup>

In *Lebron v. National Railroad Passenger Corp. (Amtrak)*,<sup>280</sup> after the case went to the U.S. Supreme Court for a determination of whether Amtrak was a governmental actor (it was, said the Court),<sup>281</sup> the case was remanded to the Second Circuit to address Lebron's First Amendment claim. An artist who creates political billboard displays, Lebron contracted with Amtrak's leasing agent to rent the Spectacular, an enormous 10 x 103 foot billboard in the rotunda of New York's Penn Station.<sup>282</sup> The ad that Lebron wished to display there was a photomontage critiquing the Coors beer family for its support of right-wing causes, especially the Contras in Nicaragua.<sup>283</sup> Amtrak refused to display the ad on the grounds that it was "political."<sup>284</sup> Rather than conducting a *Perry*-type public forum analysis, the district court began by examining Amtrak's advertising policy to see if it was "(i) clearly set forth, (ii) not so vague as to be subject to abuse, (iii) consistently applied and (iv) not based on viewpoint."<sup>285</sup> The policy examined was for Penn Station as a whole, not the Spectacular specifically.<sup>286</sup> The court found that the policy was not clearly set forth, was vague, and was not consistently applied.<sup>287</sup> Furthermore, the policy might be void for viewpoint bias if it excluded ads for being "controversial, in bad taste, or inconsistent with the taste and preferences of the majority of the community."<sup>288</sup> Amtrak was ordered to give Lebron access to the Spectacular for his ad.<sup>289</sup>

The Second Circuit criticized the district court's approach for failing to examine the specific policy regarding ads on the Spectacular, as opposed to ads on Amtrak property generally.<sup>290</sup> Defining the relevant forum narrowly, the appellate court concluded that because the Spectacular had only been used thus far for commercial promotions, it was a nonpublic forum. The exclusion of Lebron's ad needed only be reasonable and viewpoint-neutral.<sup>291</sup> Giving much weight to Amtrak's role as proprietor, the court found it reasonable for Amtrak to exclude political ads from the Spectacular to avoid criticism and the appearance of government favoritism.<sup>292</sup> The majority of the court did not question the ability of

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279. See *id.* at 1160.

280. 69 F.3d 650 (2d Cir. 1995).

281. See *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 513 U.S. 374 (1995).

282. See *Lebron*, 69 F.3d at 653.

283. See *id.*

284. *Id.* at 654.

285. *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 1001 (S.D.N.Y. 1993).

286. See *id.*

287. See *id.* at 1001-04.

288. *Id.* at 1004.

289. See *id.* at 1005.

290. See *Lebron*, 69 F.3d at 655-56.

291. See *id.* at 656.

292. See *id.* at 658.

Amtrak officials to draw lines between political and commercial speech. Furthermore, it did not find viewpoint discrimination, even though, under Amtrak's policy, Coors could run an ad encouraging the purchase of its beer but Lebron's critical treatment of the same subject matter, discouraging purchases of Coors beer, would be rejected as "political."<sup>293</sup>

In his dissent, Chief Judge Newman objected to the majority's extraordinarily narrow interpretation of the relevant forum, pointing out that even the restricted view of the relevant forum in *Air Line Pilots Ass'n* was of display cases throughout O'Hare Airport, not one particular display case.<sup>294</sup> At the very least, the forum should be defined as the rotunda of Penn Station where the Spectacular was located.<sup>295</sup> The viewpoint discrimination would then be apparent because other advertising space in the rotunda had already been leased for ads with political content.<sup>296</sup> The Chief Judge also criticized the majority for overemphasizing the history of commercial promotions on the Spectacular and disregarding the absence of a clear and well-understood policy.<sup>297</sup> Finding viewpoint discrimination in the exclusion of political ads, in that Coors could promote its beer but Lebron could not oppose it,<sup>298</sup> the Chief Judge thus called into question the commercial/noncommercial speech dichotomy. Although he stopped short of questioning the utility of public forum doctrine, his dissenting opinion suggests as much by showing how manipulation of the definition of the relevant forum at the first stage of public forum analysis might completely alter the rest of the analysis and the outcome of the case.<sup>299</sup>

## V. A PROPOSAL TO PREVENT VIEWPOINT DISCRIMINATION IN THE NONPUBLIC FORUM

The First Amendment rights of advertisers on government property deserve stronger protection than they currently receive under public forum doctrine. The doctrine, as a generation of critics both on the bench and in the academy have pointed out,<sup>300</sup> is, in practice, a sequence of potentially arbitrary line-drawings that permit courts to mete out First Amendment protections as they choose. First, no clear principles guide courts in defining the relevant forum. The

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293. *But see Lebron*, 69 F.3d at 659 n.4 (calling this argument "plainly specious" because the subject matter of Lebron's ad was not the merits or demerits of Coors beer).

294. *See id.* at 660-61 (Newman, C.J., dissenting).

295. *See id.* at 661 (Newman, C.J., dissenting).

296. *See id.* (Newman, C.J., dissenting).

297. *See id.* at 662 (Newman, C.J., dissenting).

298. *See id.* at 662 (Newman, C.J., dissenting) ("[Lebron] makes a substantial argument that viewpoint-based discrimination is occurring when government allows an ad promoting the sale of a product, but purports to prohibit an ad opposing a product because of the views of its manufacturer.").

299. For a critique of the appellate court's manipulation of the relevant forum definition (part of a broader critique of public forum doctrine) by one of Lebron's attorneys in the case, see Jonathan Bloom, *A Funny Thing Happened to the (Non)Public Forum: Lebron v. National Railroad Passenger Corporation*, 62 BROOK. L. REV. 693 (1996).

300. *See supra* note 22.

"forum to which the speaker seeks access" is no less ambiguous than the phrase "relevant forum." It could mean a single billboard in a train station, the exterior of a bus, all display cases in an airport, one room in a train station, the entire airport or train station, or all transit-authority-controlled advertising spaces.<sup>301</sup> Second, the three forum categories, which determine the level of scrutiny courts should apply, overlap, forcing courts to make potentially arbitrary distinctions. For example, government property that could just as reasonably be labeled a designated public forum as a nonpublic forum must be forced into one of these categories, with the choice often depending on what outcome the court desires. The "traditional public forum" category fails to protect speech on sidewalks<sup>302</sup> and fails to protect speech in newer public spaces like airports.<sup>303</sup> No clear principles articulate the degree of access restriction necessary to turn a designated public forum into a nonpublic forum, and the courts' reliance on government intent means that any governmental exclusion of a speaker can be used to justify a nonpublic forum categorization. It also means that a history of past content-based discrimination can serve to justify present and future discrimination. Finally, when courts scrutinize governments' reasons for their speech restrictions, they accept such problematic, and potentially arbitrary, distinctions as that between government acting as "proprietor" and government acting as "lawmaker" or "regulator," as well as between commercial and noncommercial speech. While line drawing may be a feature of all legal decisions, categorical approaches that invite such line drawing simultaneously invite outcome-determinative manipulation that is especially troublesome where free speech rights are at stake.

The *New York Magazine* case demonstrates many of these problems with reconciling First Amendment rights of advertisers and the responsibilities of governments that own the advertising spaces. The ad itself was both commercial and political, creating a quandary for the district court when it tried to apply both the *Central Hudson* commercial speech test and the *Perry* public forum analysis,<sup>304</sup> and a quandary for the appellate court which broke with tradition when it applied the ban on prior restraint to speech that was at least partly commercial.<sup>305</sup> Because the city's advertising standards incorporated the city's civil rights law on publicity rights, the government wore both its "proprietor" hat and its "regulator" hat when it enforced its advertising policy; the district court saw one hat (proprietor) and the appellate court saw the other (regulator). Although the decisions of both courts

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301. See, e.g., *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 513 U.S. 374 (1995) (defining relevant forum as single billboard in train station); *New York Magazine v. Metropolitan Transit Auth.*, 987 F. Supp. 254 (S.D.N.Y. 1997) (defining relevant forum as exterior of buses); *Air Line Pilots Ass'n. v. Department of Aviation of Chicago*, No. 93 C 6696, 1994 WL 23075, at \*2-3 (N.D. Ill. Jan. 20, 1994) (defining relevant forum as entire airport).

302. See *United States v. Kokinda*, 497 U.S. 720 (1990).

303. See *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

304. See generally *New York Magazine v. Metropolitan Transit Auth.*, 987 F. Supp. 254 (S.D.N.Y. 1997).

305. See generally *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d. Cir. 1998).



were speech-protective, they provide only limited guidance for other courts facing disputes over advertising on public property. The district court provided no explicit method for harmonizing the *Central Hudson* test and the public forum analysis, and its arguments for classifying the hybrid commercial-political ad as commercial seemed unsatisfactory, particularly when the government's rejection of the ad was due to its political message. The appellate court's admirable decision to apply prior restraint doctrine to commercial speech was possible here where the government was trying to enforce an independent law through its advertising policy. This is not often the case, though, when governments regulate speech in their advertising spaces. It is not clear that traditional prior restraint doctrine, of the kind utilized in freedom-of-the-press cases, would apply where the government was doing no more than enforcing its advertising standards.

If First Amendment jurisprudence in the final analysis is an assortment of tests to ferret out illicit government motives behind speech restrictions,<sup>306</sup> would hidden viewpoint discrimination be more readily detected by replacing public forum analysis with a single, multi-factored test for all government forums? Such a test, a version of the type advocated in the past by Justices Brennan and Blackmun, and currently by Justice Kennedy, would balance the government's interests against the speaker's interests and society's interests in free speech.<sup>307</sup> Courts would examine the forum's actual, objective purposes, its compatibility with the expressive activity in question (which is to say, the extent to which speech would interfere with the forum's primary purpose), the history of speech regulation in the forum (both policy and practice), and the existence of procedural safeguards to prevent arbitrary, subjective or inconsistent application of the speech regulations.<sup>308</sup> The analysis would not turn on the ultimately arbitrary line between a designated public forum and a nonpublic forum. Nor would it rely on the arguably useless category of "traditional public forum" which seems to mean only public streets and parks, and even they are not always considered public forums.<sup>309</sup> The analysis would also not depend on what category one placed the speech into, whether commercial or noncommercial. If the government regulations themselves made such distinctions, they would be suspected of potential viewpoint discrimination unless they could truly be justified in light of the purpose of the forum. But arguments like "commercial ads are less controversial" or "political ads create the appearance of favoritism" would be greeted with skepticism.

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306. See generally Kagan, *supra* note 263.

307. A multifactored balancing approach is advocated by Justice Blackmun and Justice Brennan in their dissent in *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 822 (1985) (Blackmun, J., dissenting). A similar approach is recommended by Justice Kennedy in his concurrence in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 693 (1992) (Kennedy, J., concurring). For a related "interference analysis" approach, derived from Justice Kennedy's concurrence in *Lee*, see Gey, *supra* note 23.

308. See Kagan, *supra* note 263.

309. See *United States v. Kokinda*, 497 U.S. 720 (1990) (holding that sidewalk outside Post Office was a nonpublic forum).

Nevertheless, as judges and legal scholars have frequently argued, such balancing tests are inherently no less malleable, no less vulnerable to the subjective biases of judges and juries, than categorical approaches.<sup>310</sup> If categorical approaches like public forum doctrine in practice are so confusing and manipulable that they fail to provide guidance to lower courts and local governments regarding the requirements of the First Amendment, balancing tests have produced confusions of their own, where each court's weighing of interests seems ad hoc and arguably unprincipled, the interests being weighed incommensurate.<sup>311</sup>

In *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, Professor Kagan convincingly argues that First Amendment doctrine, as developed by the Supreme Court over the past several decades, is best explained as a series of devices to detect the presence of improper governmental motives.<sup>312</sup> These improper motives for speech regulation can manifest themselves as speech restrictions where government disagrees with or disapproves of the message; improper motives may also manifest themselves as the privileging of some speech over other speech because government wishes to promote ideas that it favors or that advance its self-interest.<sup>313</sup> According to Kagan, since governmental motive can rarely be directly ascertained, rules like those of public forum doctrine, with its classifications and scrutiny levels, function like evidentiary procedural rules for presumptions and shifting burdens of proof.<sup>314</sup> First Amendment rules reflect judicial assessments of the variable risks of improper motive in different kinds of speech regulations; the rules set scrutiny levels proportionate to the risks.<sup>315</sup> Kagan's explanation of First Amendment law suggests that whether we prefer to formulate that risk-assessment in balancing tests or categorical approaches, what matters more is ensuring that our First

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310. For an argument that balancing tests are inappropriate for First Amendment cases, see, e.g., Sullivan, *supra* note 202, at 158:

Such intensive review of facts under flexible standards or balancing tests creates a host of familiar institutional problems: for example, it collapses the legislative and adjudicative functions, and creates fluctuating precedent that gives uncertain guidance to lower courts and parties.... All these problems are avoided if laws aimed at the commercial message are treated as content-based and subjected to conventional strict scrutiny, which is much more susceptible to summary decision.

*Id.* See also BeVier, *supra* note 24 (arguing that case-by-case balancing is impressionistic and inaccurate). Justice Thomas, in his concurrence in *44 Liquor Mart, Inc. v. Rhode Island*, makes a similar argument. See *44 Liquor Mart v. Rhode Island*, 517 U.S. 484, 526 (1996) (Thomas, J., concurring) (criticizing the *Central Hudson* test as "very difficult to apply" because of "the inherently nondeterminative nature of a case-by-case balancing 'test' unaccompanied by any categorical rules").

311. See *supra* note 309.

312. See Kagan, *supra* note 263.

313. See Kagan, *supra* note 263, at 428-30.

314. See Kagan, *supra* note 263, at 442.

315. See Kagan, *supra* note 263, at 452.

Amendment judicial decision-making functions properly in detection of illicit government motive.

The prevalence of likely viewpoint discrimination in the advertising-on-government-property cases indicates that, in this area of First Amendment law, the motive-detection methods need repair. And where they need repair most is where their motive-detection is weakest: in the nonpublic forum. This ill-defined forum, spilling beyond its border on one side to include what otherwise could be labeled a designated or limited public forum, and on the other side including what might better be labeled a "non-forum," is crucial to speech protection because it has become the default category in public forum doctrine. To pass constitutional muster, a restriction on speech in this category of government property need only be "reasonable in light of the purpose of the forum" and "viewpoint neutral."<sup>316</sup> There is an inherent paradox in that standard, however. Viewpoint discrimination is precisely what all those heightened scrutiny standards are intended to flush out. Without them, with only a reasonableness standard in their place, how does one detect hidden viewpoint discrimination?

Some judges have attempted to shore up public forum doctrine at its weakest point by strengthening the reasonableness requirement, emphasizing that government's reasons for speech restrictions in the nonpublic forum must go beyond merely "reasonable" (as in rational basis scrutiny) and must be reasonable *in light of the purpose of the forum*.<sup>317</sup> Thus, a distinction between commercial and noncommercial speech, which might be legitimate in other contexts, could be seen as unreasonable in the context of advertising spaces on city buses. (If the purpose is public transportation, how would public service ads, for example, interfere?).

A stronger reasonableness standard indeed helps, but it still leaves a viewpoint-neutrality requirement with little mechanism for enforcement. What I propose, alongside this stronger reasonableness standard, is the addition of a test for viewpoint neutrality in the nonpublic forum. In the nonpublic forum, government selections among speakers or their messages should be treated in the same way that the law treats government selections for parade permits or licenses. They are tested by the standard articulated over thirty years ago in *Shuttlesworth v. City of Birmingham*,<sup>318</sup> a standard that itself is a crystallization of thirty previous years of judicial decisions: "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."<sup>319</sup> Such a test would work in tandem with a strengthened reasonableness requirement to protect

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

317. See, e.g., *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 685 (1992) (O'Connor, J., concurring). See also *supra* text accompanying note 123.

318. 394 U.S. 147 (1969).

319. *Id.* at 150-151. The relevance of the *Shuttlesworth* decision to public forum doctrine is suggested by Justice Stevens in his *Forbes* dissent, where he notes that the standardless, ad hoc reasoning used by the public television broadcaster to exclude *Forbes* raises the same concerns about unfettered government discretion addressed by the *Shuttlesworth* Court. See *supra* note 131 and accompanying text.

speech against unfettered government discretion and the very high risk it creates of illicit government motive. Adding such a test to the nonpublic forum category is preferable to discarding public forum doctrine in its entirety in exchange for a balancing test. It is also preferable to suggestions that public forum be repaired at its middle level by improving the definition of the limited or designated public forum and applying intermediate scrutiny to both the forum-limiting classification of permissible speech and exclusions of speakers fitting within the limited forum.<sup>320</sup> The former solution, again, is no less manipulable than the current categorical approach, while the latter solution does not stop the leakage of First Amendment protection through the lax scrutiny applied to restrictions in the default nonpublic forum category—the category into which most government property is placed.

Of the recent advertising-on-government property cases discussed earlier, those with the most speech-protective outcomes, those cases in which the courts were most alert to the possible presence of illicit government motive, were those where the courts' reasoning reveals an implied, if unacknowledged, *Shuttlesworth* standard guiding the decision making. In *New York Magazine v. Metropolitan Transportation Authority*, the Second Circuit's reliance on prior restraint theory to analyze the conduct of government officials restricting advertising on city buses was a close cousin of *Shuttlesworth*'s use of prior restraint theory to analyze government permit and licensing programs affecting speech.<sup>321</sup> The Third Circuit, in *Christ's Bride Ministries, Inc.*, while basing its decision on the reasonable-in-light-of-forum-purpose standard, put such strong repeated emphasis on SEPTA's objectionable lack of clear policies that an implicit *Shuttlesworth* standard appears to be guiding the court's thinking.<sup>322</sup> The Sixth Circuit, in *United Food & Commercial Workers Union, Local 1099*, concluded that the wrap-around ad spaces on buses were designated public fora, but found that even if they were nonpublic fora, the government's policies used to exclude the ads were unconstitutionally "vague" and "overbroad."<sup>323</sup> In effect, the Sixth Circuit is applying what are essentially *Shuttlesworth* requirements that government licensing standards be "narrow, objective and definite."<sup>324</sup> Similarly, the First Circuit, in *AIDS Action Committee of Massachusetts, Inc.*, rightly saw a high risk of illicit government viewpoint discrimination where the government's advertising policy banned ads on the basis of their offense to such ill-defined, subjective measures as "good taste, decency and community standards as determined by the Authority."<sup>325</sup> The court likewise saw a high risk of illicit government motive in

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320. See, e.g., Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000). See also Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 127 (1999).

321. See *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d Cir. 1998).

322. See 148 F.3d 242 (3d Cir. 1998).

323. See 163 F.3d 341, 363 (6th Cir. 1998).

324. *Id.*

325. 42 F.3d 1, 3–4 (1st Cir. 1994).

the government policy banning ads "containing messages or graphic representations pertaining to sexual conduct," particularly where the government tried to use that hazy standard to justify its distinction between an ad for the movie *FATAL INSTINCT*, which it allowed, and an ad promoting condom use, which it refused to allow.<sup>326</sup> The First Circuit, as if implicitly applying a *Shuttlesworth* standard for licensing, was not just concerned with the discriminatory application of the government's advertising policy, but with its lack of narrow, objective, definite standards: "The Policy itself is almost impossible to understand. The purported exclusion of all messages or representations 'pertaining to sexual conduct' is so vague and broad that it could cover much of the clothing and movie advertising commonly seen on billboards and in magazines."<sup>327</sup>

In those advertising-on-government property cases where courts arguably looked right in the face of viewpoint discrimination and then denied its existence, lax reasonableness standards were applied regardless of the specific public forum category decided upon (though usually it was the nonpublic forum). And the courts did not demand anything remotely like *Shuttlesworth*'s "narrow, objective and definite" standards for government speech restrictions.

In *Children of the Rosary v. City of Phoenix*, the Ninth Circuit accepted as reasonable in light of the purpose of the forum such government explanations for a ban on noncommercial ads on city buses as the danger of imputed government favoritism, passenger violence, and loss of advertising revenues.<sup>328</sup> The court was unconcerned with the arguably arbitrary line-drawing that placed ads selling bumper stickers on the "noncommercial" side of the commercial/noncommercial speech dichotomy. Had *Shuttlesworth* standards been applied, the "reasonableness" part of the nonpublic forum analysis might remain the same, but the necessity of narrow, objective, definite standards might have focused greater attention on the questionable legitimacy of the government's line-drawing with respect to ads that in fact proposed commercial transactions.

The district court in *Christ's Bride Ministries, Inc.*, and the Second Circuit in *Lebron* evinced a similarly lax reasonableness requirement and a willingness to overlook the degree of narrowness, objectivity or definiteness in the government's advertising policies.<sup>329</sup> The district court in *Christ's Bride Ministries*, while praising SEPTA for having "rules and standards" governing advertising in its (nonpublic forum) train stations, did not seem bothered that the decision to exclude Christ's Bride Ministries' anti-abortion ad was not based on any of those rules and standards but only on the opinion of an individual

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326. *Id.*

327. *Id.* at 12.

328. *See* 154 F.3d 972 (9th Cir. 1998).

329. *See* *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 937 F. Supp. 425 (E.D. Pa. 1996); *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650 (2d Cir. 1995).

government official in a different government agency.<sup>330</sup> In *Lebron*, the Second Circuit was untroubled by the government's lack of a written advertising policy, was willing to accept the exclusion of "political" ads from one specific advertising space but not from others, and accepted as justification for excluding an ad the government's avoidance of criticism and embarrassment.<sup>331</sup> Again, had *Shuttlesworth* standards, implied or overt, guided the courts' decision-making, the "reasonableness" part of the nonpublic forum analysis might remain the same, but the necessity of narrow, objective, definite standards might have focused greater attention on the dubious criteria relied on by government officials to justify exclusions from government ad spaces.<sup>332</sup>

## VI. CONCLUSION

When the mayor of a large U.S. city thinks he can order the removal from city buses of an ad that offends him, and when courts have difficulty explaining why he can't, the First Amendment guarantee of free speech is in trouble. The quicksilver categories of public forum doctrine defy consistent application, particularly when they depend on the equally mercurial commercial/noncommercial speech dichotomy. As a result, speakers wishing to

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330. See *Christ's Bride Ministries, Inc.*, 937 F. Supp. at 425. On appeal, the Third Circuit emphasized SEPTA's lack of clear policies. See *supra* note 321 and accompanying text.

331. See 69 F.3d 650 (2d Cir. 1995).

332. A combination of a stricter reasonableness standard and a test for viewpoint discrimination based on *Shuttlesworth* might have helped the courts in a spate of recent Ku Klux Klan cases that resemble advertising-on-government-property cases. In one case, the Klan sought on-air acknowledgements as an underwriter of NPR's *All Things Considered* in Missouri. See *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri*, 203 F.3d 1085 (8th Cir. 2000) (upholding exclusion of the Klan because underwriting acknowledgements were government speech, not a forum, and because government as broadcaster could exercise full editorial and journalistic discretion over its underwriting program). In a series of related cases in Texas, Arkansas, and Missouri, the Klan sought acknowledgements on government-posted highway signs of its participation in Adopt-A-Highway litter-collection programs. In most of these Klan cases, the state excluded the Klan based on ad hoc decision-making. The state officials offered such questionable explanations as wanting to shield the public from offense, loss of public support for the state's programs, and, incredibly, the belief that government has a right to reject applicants to government programs based on disagreement with the applicant's views. See *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (upholding Klan's First Amendment right to participate in state Adopt-A-Highway program); *State of Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding state's exclusion of Klan from Adopt-A-Highway program where participation by Klan would violate state and federal court orders regarding desegregated housing project near section of highway that Klan sought to adopt); *Knights of the Ku Klux Klan v. Arkansas State Highway and Transp. Dept.*, 807 F. Supp. 1427 (W.D. Ark. 1992) (upholding Klan's First Amendment right to participate in state Adopt-A-Highway program). For a discussion of how public forum doctrine failed to guide courts in the Adopt-A-Highway cases, see Suzanne Stone Montgomery, Note, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557 (1999).

advertise on government property and governments needing to regulate uses of their property are left guessing about their rights. Neither balancing tests nor categorical approaches have succeeded in protecting speech on government property. Too often, as the recent advertising-on-government-property cases demonstrate, government speech restrictions appear motivated by government's disagreement with or disapproval of the speaker's views. Although public forum doctrine demands viewpoint neutrality even in the nonpublic forum, its least speech-protective default category, the doctrine provides no tools for detecting illicit government motive there beyond subjecting government speech restrictions to a "reasonableness" test.

Because courts typically assign most government property to the nonpublic forum category, it is especially important that it not furnish easy cover for government viewpoint discrimination. Courts reviewing speech restrictions in the nonpublic forum should hold government justifications to a stricter "reasonableness" standard that emphasizes the forum's purposes, and they should test for viewpoint neutrality by insisting that speech restrictions on government property satisfy the constitutional requirements set forth in *Shuttlesworth*: government speech restrictions should be narrow, objective, and definite.

