



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

2-27-2018

Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward

Ronald J. Krotoszynski Jr.

University of Alabama - School of Law, rkrotoszynski@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Ronald J. Krotoszynski Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward*, (2018).

Available at: https://scholarship.law.ua.edu/fac_working_papers/585

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

**Our Shrinking First Amendment: On the Growing
Problem of Reduced Access to Public Property for
Speech Activity and Some Suggestions for a Better
Way Forward**

Ronald J. Krotoszynski, Jr.

78 OHIO STATE LAW JOURNAL 779 (2017)



This paper can be downloaded without charge
from the Social Science Research Network
Electronic Paper Collection:
<http://ssrn.com/abstract=3130200>

Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward

RONALD J. KROTOSZYNSKI, JR.*

Contrary to the central thesis of this Symposium on “Our Expanding First Amendment,” this Article posits that the scope of certain First Amendment protections actually has contracted, rather than expanded, over time. More specifically, the Roberts and Rehnquist Courts have issued decisions that significantly restrict access to public property for speech activity. Under the rubric of the public forum doctrine, less public property is available today for speech activity than was the case under the precedents of the Warren and Burger Courts. Moreover, even with respect to government property that constitutes a traditional or designated public forum, the federal courts have permitted government to burden, or even banish, speech activity through the adoption and enforcement of time, place, and manner (TPM) regulations. By way of contrast, during the Warren and Burger Court eras, the federal courts generally presumed that government property must be available for speech activity; the burden fell squarely on the government to justify denying access to public property for First Amendment activities.

* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. *Our Shrinking First Amendment* constitutes part of a larger, book-length project: *The Disappearing First Amendment: On the Decline of Freedom of Speech and the Growing Problem of Inequality Among Speakers* (forthcoming Yale University Press 2019). The author wishes to thank the editors of the *Ohio State Law Journal* for inviting him to present an earlier draft of this Article at a symposium dedicated to considering “Our Expanding First Amendment.” I hope that the editors will not mind terribly my contrarian thesis—namely, that the scope of the First Amendment’s protections has contracted, rather than expanded, in some important contexts—notably including access to public property for speech activity. I also wish to thank the law faculties at the Cornell University Law School, the University of Texas School of Law, the Emory University School of Law, the University of Washington School of Law, the Ohio State University Moritz College of Law, the University of Alabama School of Law, the Lewis and Clark Law School, the Seattle University School of Law, and the University of Oregon School of Law, which all hosted faculty workshops associated with this Article and my larger book-length project. A number of individual legal scholars provided very useful, and constructive, comments and suggestions on earlier iterations of this Article: David Anderson, Ash Bhagwat, Mark Brandon, Caroline Mala Corbin, Mike Dorf, Michael Heise, Margot Kaminski, Sandy Levinson, Lyrisa Lidsky, Gerry Moohr, Andy Morriss, Marty Redish, Steven Shiffrin, Joel Schumm, David Super, Mark Tushnet, Chris Walker, Chris Wells, and Tim Zick. The University of Alabama Law Foundation provided generous financial support, in the form of summer research grants, which greatly facilitated my work on this scholarly endeavor. Finally, the usual disclaimer applies: Any and all errors and omissions are the sole responsibility of the author.

This Article posits that the contemporary public forum doctrine, in conjunction with the TPM doctrine, vests too much discretionary power with government to squelch speech activity on public property. Instead of using a rigid, categorical approach to decide whether government must make public property available for speech activity, the federal courts should instead use a functional approach to decide what constitutes a public forum—essentially the approach used by the Warren and Burger Courts. Simply put, public spaces compatible with First Amendment activity should be available for such activity. Second, federal courts should be less ready to sustain TPM regulations—particularly when the context of their adoption suggests a censorial motive. It is probably unrealistic to propose a complete return to the open balancing test that prevailed under the Warren and Burger Courts. Even if this is so, however, the public forum and TPM doctrines could be reformed to create, literally, more breathing space for First Amendment activities essential to sustaining the project of democratic self-government.

TABLE OF CONTENTS

I.	INTRODUCTION: OUR SHRINKING FIRST AMENDMENT AND REDUCED ACCESS TO PUBLIC PROPERTY FOR SPEECH ACTIVITY	781
II.	FACILITATING DEMOCRATIC DELIBERATION BY PROVIDING WOULD-BE SPEAKERS WITH ACCESS TO PUBLIC PROPERTY FOR EXPRESSIVE ACTIVITIES: A POSITIVE FIRST AMENDMENT RIGHT OF ACCESS TO GOVERNMENT PROPERTY UNDER THE WARREN AND BURGER COURTS	790
III.	THE PUBLIC FORUM AND TIME, PLACE, AND MANNER DOCTRINES VEST GOVERNMENT WITH BROAD DISCRETION TO LIMIT OR PROHIBIT SPEECH ACTIVITY ON PUBLIC PROPERTY	796
IV.	TOWARD A RENEWED COMMITMENT TO MAKING PUBLIC SPACE RELIABLY AVAILABLE FOR SPEECH ACTIVITY	803
V.	CONCLUSION.....	816

I. INTRODUCTION: OUR SHRINKING FIRST AMENDMENT AND REDUCED ACCESS TO PUBLIC PROPERTY FOR SPEECH ACTIVITY

Over time, the federal courts have become predictably and consistently less willing to force government—at all levels—to make public property available for First Amendment activities.¹ For would-be speakers who do not own property suitable for holding a mass protest or rally—or even for a peaceful picket or leafletting exercise—access to government-owned property is simply essential to their ability to speak. To the extent that the government may ban expressive activity from its property, would-be speakers will face the unenviable task of finding a private property owner who is willing to make land available to them for their protest.²

¹ See, e.g., *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (holding that sidewalks within a U.S. Post Office parking lot, adjacent to the main post office building, that were generally open to postal service customers were not a public forum and could be closed to speech activity); *Hodge v. Talkin*, 799 F.3d 1145, 1158–61 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016) (holding that the open public plaza in front of the U.S. Supreme Court building “to be a nonpublic forum” and observing that the plaza’s status as a nonpublic forum “is unaffected by the public’s unrestricted access to the plaza at virtually any time”); *Oberwetter v. Hilliard*, 639 F.3d 545, 552–54 (D.C. Cir. 2011) (holding that the Jefferson Memorial, in Washington, D.C., is not a public forum for First Amendment activities); *Boardley v. U.S. Dep’t of the Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010) (holding that national parks are not presumptive public forums and that “to establish that a national park (in whole or part) is a traditional public forum, Boardley must show that, like a typical municipal park, it has been held open by the government for the purpose of public discourse”); *United States v. Kistner*, 68 F.3d 218, 219, 222 (8th Cir. 1995) (finding that the Jefferson National Expansion Memorial, commonly known as the “St. Louis Arch,” constitutes a public forum, but nevertheless sustaining the National Park Service’s creation of five designated “free speech zones” within the park and limiting First Amendment activity to these areas). Two principal problems exist. First, federal courts are broadly deferential to government decisions to label a park or memorial a “non-public forum,” which empowers the government to essentially ban expressive activities from the venue. *Hodge*, 799 F.3d at 1157–58. Second, federal courts accept draconian regulations on speech activities within traditional public forums that exist to advance interests in “tranquility” and “the safety and attractiveness” of the government’s property. *Kistner*, 68 F.3d at 222. Both the designation of parks and monuments as nonpublic forums, and the aggressive use of time, place, and manner regulations, significantly reduce the space available for speech activity. See *infra* notes 14–16, 117–31 and accompanying text.

² For example, Cindy Sheehan wished to protest President George W. Bush’s Iraq War policies in a direct and personal way—and was able to accomplish this objective when a private property owner with land adjacent to the route used by President Bush’s motorcade going to and from his ranch in Crawford, Texas permitted her to use it for protest activity. See Elisabeth Bumiller, *Bush and the Protestor: Tale of 2 Summer Camps*, N.Y. TIMES (Aug. 22, 2005), <http://www.nytimes.com/2005/08/22/politics/bush-and-the-protester-tale-of-2-summer-camps.html> [<https://perma.cc/CRE5-9QXK>]. Sheehan had initially used the shoulder of a county road for her protest, but the local government enacted a ban on such activity on public property. See Associated Press, *Mother’s Antiwar Protest Prompts New Law*, N.Y. TIMES (Sept. 30, 2005), <http://www.nytimes.com/2005/09/30/us/national-briefing-south-texas-mothers-antiwar-protest-prompts-new-law.html>

For a variety of reasons, however, private property owners are not apt to respond with alacrity to requests to use their property for various forms of social, economic, or political protest activity.³ It should not be surprising that private companies operating shopping malls, hotels, theaters, amusement parks, and the like generally would prefer to avoid the potential controversy of being associated with highly unpopular causes and speakers.⁴

Of course, if one owns property suitable for speech activity, or has the ability to rent property to engage in speech activity, lack of access to government-owned property does not matter. So too, if the speech activity in question is highly popular and uncontroversial, both government and private property owners are likely to be willing to host it voluntarily.⁵ For example, the organizers of a mass participation event to raise funds for breast cancer research are likely to have an easier time finding public or private space for a rally than the Ku Klux Klan or Nazi Party. Accordingly, the burden of declining access to public property for speech activity falls much more heavily on some speakers

[<https://perma.cc/LJK2-PKKS>] [hereinafter *Mother's Antiwar Protest*]. The county government also prohibited parking on twenty-three miles of county roads to make staging protests near the President's ranch more difficult. *See id.* In response, Sheehan purchased a five acre parcel of land, using proceeds from her deceased son's military death benefits to do so. *See* Associated Press, *War Critic Buys Land in Same Town as President Bush's Ranch*, N.Y. TIMES (July 28, 2006), <http://www.nytimes.com/2006/07/28/us/28brfs-004.html> [<https://perma.cc/J884-VRQP>]. The land was proximate to President Bush's ranch in Crawford, Texas, and her ownership of it enabled Sheehan to maintain her "Camp Casey" anti-war protest in honor of her deceased son, Casey Sheehan, who was killed while serving on active duty in Iraq. *See id.*; *see also* Associated Press, *War Protestor Will Sell Land by Bush Ranch*, N.Y. TIMES (June 10, 2007), <http://www.nytimes.com/2007/06/10/us/10sheehan.html?fta=y&pagewanted=print> [<https://perma.cc/X4X8-J7EJ>]. Thus, Cindy Sheehan literally had to acquire property in order to speak her version of truth to power. Moreover, she did so only after the local government used its ownership rights over public property—rights of way along county roads—to banish dissent. *Mother's Antiwar Protest, supra*.

³ *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 518–21 (1976) (holding that private mall owners need not permit expressive activities on mall property); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563–64, 569–70 (1972) (sustaining a mall owner's decision to prohibit leafletting and picketing at a large shopping mall in Portland, Oregon). *But cf.* *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 86–87 (1980) (upholding, against a First Amendment challenge, the California Supreme Court's interpretation of the state constitution to create a right of access to privately-owned shopping centers for peaceful fixed leafletting activities); *Marsh v. Alabama*, 326 U.S. 501, 504–09 (1946) (holding that a private corporation that undertakes all of the duties and responsibilities of a municipal government constitutes a state actor and, therefore, must permit and facilitate First Amendment activities within the company-owned town).

⁴ *See PruneYard*, 447 U.S. at 87 (rejecting a mall owner's complaint that private speech occurring in a large shopping mall inevitably would be attributed to the mall owner because (1) the protesters' messages "will not likely be identified with those of the owner" and (2) the mall's owner easily could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand").

⁵ *See infra* note 6 and accompanying text.

than on others—and will correlate strongly with the popularity or unpopularity of both speakers and messages.⁶

But it was not always thus.⁷ To be sure, the broadly protective decisions of the Warren Court might well have had as much to do with the identity of the speakers seeking access to public property for speech activity as with the generic requirements of the First Amendment.⁸ Although the Supreme Court consistently has embraced viewpoint- and content-neutrality as central aspects of the nation's commitment to safeguarding the freedom of speech,⁹ it would require almost willful blindness to ignore the fact that the most broadly protective free speech decisions of the 1960s invariably involved civil rights protests in the Deep South.¹⁰ Nevertheless, as the antiwar protests of the Vietnam era exploded in the late 1960s and 1970s, the Supreme Court did not resile from its general approach—an approach that started with the presumption that public spaces suitable for expressive activity should be available for such activity.¹¹

Going back to the Supreme Court's landmark decision in *Hague v. Committee for Industrial Organization*, decided in 1939, the federal courts have required government entities to make public property available for speech activity.¹² As late as the 1960s, the federal courts generally held that government property should be presumptively available for speech activity.¹³ Under the contemporary public forum doctrine, however, the ability of the government to restrict access to public property for speech activity has increased

⁶ See HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140–41, 145 (1965) (discussing the problem of the “heckler veto” and the need for federal courts to be vigilant in thwarting efforts to empower a heckler’s veto over speech by unpopular speakers on public property); see also Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413–17 (1986) (citing Kalven’s seminal work on the problem of a heckler’s veto, discussing the problem of the heckler’s veto, observing that private market power can be used to silence unpopular speakers, and positing that government efforts to limit the censorial power of non-government actors could enhance rather than inhibit the vibrancy of the marketplace of ideas).

⁷ See *Brown v. Louisiana*, 383 U.S. 131, 138–43 (1966) (holding that the government must regulate speech activity “in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all” and requiring a local government to make the public library available for a silent civil rights protest).

⁸ See, e.g., *Cox v. Louisiana (Cox I)*, 379 U.S. 536, 538–39 (1965); *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 566–67 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 229–30, 237 (1963).

⁹ *Citizens United v. FEC*, 558 U.S. 310, 339–41 (2010); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813–14 (2000); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972). As Justice Thurgood Marshall explained in *Mosley*, “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Mosley*, 408 U.S. at 95.

¹⁰ See *supra* note 8.

¹¹ See *infra* notes 19–22 and accompanying text.

¹² See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511–12, 524–25 (1939).

¹³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

significantly;¹⁴ simply put, the strong presumption of access to government property for speech activity no longer exists.¹⁵ Thus, during the Warren and

¹⁴ See Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 440, 447 (2006) [hereinafter Zick, *Expressive Topography*]; Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581–83, 585–86 (2006); see also Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 548–54 (2009) (describing and critiquing various government efforts to suppress if not eliminate public dissent on government-owned property). Professor Tabatha Abu El-Haj has documented how governments (at all levels) increasingly marginalize speech in public places through burdensome regulations and argues that “[a]ll of these requirements undercut the possibility of large, spontaneous gatherings in the streets.” *Id.* at 549.

¹⁵ See, e.g., *Hodge v. Talkin*, 799 F.3d 1145, 1150, 1165 (D.C. Cir. 2015) (rejecting a First Amendment challenge to a federal statute that bans protest on the large, elevated marble plaza located in front of the United States Supreme Court because of “the government’s long-recognized interests in preserving decorum in the area of a courthouse and in assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure”). However, the statute regulated considerably more speech than was necessary to secure this interest. See 40 U.S.C. § 6135 (2012). Section 6135 bars protest on the plaza regardless of whether the Supreme Court is actually in session. See Pete Williams, *Supreme Court Rebuffs Challenge to Protest Limits*, NBC NEWS (May 16, 2016), <http://www.nbcnews.com/news/us-news/supreme-court-rebuffs-challenge-protest-limits-n574651> [<https://perma.cc/4FGN-ANGY>]. It is difficult to see how a protest on the plaza in mid-August, when the Justices are usually not even on the premises, could possibly influence, or give the appearance of undue influence, on the Justices. The statute bans virtually all expressive activity on the plaza, making it illegal to “parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.” 40 U.S.C. § 6135. The district court found the statute was overbroad insofar as it covered the plaza, which looks and functions as a public meeting space and, with respect to the plaza, applies regardless of whether the Supreme Court is actually in session during a particular protest. See *Hodge*, 799 F.3d 1150, 1154–55. The D.C. Circuit made no effort to require the government to tailor § 6135’s speech restrictions narrowly to protect the dignity and integrity of the Supreme Court’s oral arguments. See generally *id.* Judge Srikanth Srinivasan, writing for the majority, described the front plaza as the private enclave of the Supreme Court, which he characterized as a “nonpublic forum” that constitutes “the elevated front porch of the Supreme Court building.” *Id.* at 1159. Judge Srinivasan also dismissed as irrelevant the fact that the Supreme Court Police do not consistently seek to enforce the speech ban, routinely permitting some speech activity (including large public protests). See *id.* at 1161–62. Obviously, the selective enforcement of a speech ban on public property raises a serious danger of content- and viewpoint-based discrimination against particular speakers and messages. I do not suggest that the federal government cannot declare the Supreme Court building itself off-limits to expressive activity, including noisy protests, but to extend the ban to a broad space generally entirely open and available to the public, and to characterize it as the Justices’ private “front porch,” reflects a gross disregard for the practical ability of ordinary citizens to participate in the process of democratic deliberation. *Id.* at 1159. Cf. *id.* at 1160 (“[T]he Supreme Court plaza’s status as a nonpublic forum is unaffected by the public’s unrestricted access to the plaza at virtually any time.”). That Judge Srinivasan, a federal appellate judge often mentioned as a potential Supreme Court nominee for a presumably progressive Democratic president, could write such a speech-hostile opinion demonstrates quite clearly that contemporary judicial

Burger Court eras, federal courts more often than not began their First Amendment analysis in cases involving denials of access to government property by assuming a general duty on the part of the government to make public property available for First Amendment activity—provided that the proposed use was otherwise compatible with the property’s more regular uses.¹⁶ Today, by way of contrast, the burden has shifted to would-be speakers to show that government property constitutes a traditional public forum or a designated public forum. This shift in the burden of proof means that Warren Court decisions involving the use of public property for speech activity would not be decided in favor of would-be speakers today.¹⁷

Under the Warren Court’s approach, a public library could be used for a silent protest against segregation; it is doubtful that federal courts would reach the same result under the public forum doctrine.¹⁸ So too, during the Burger Court era, a military base could be used as a place to protest the Vietnam War.¹⁹ It is highly doubtful that the contemporary Supreme Court would reach the same result under the public forum doctrine. During the Warren and Burger Court eras, the First Amendment analysis generally required the government to justify proscribing or restricting speech on its property—rather than requiring a would-be speaker to establish that the particular real property at issue constituted either a traditional or designated public forum.²⁰

antipathy toward would-be speakers seeking to use public property for First Amendment activity is widespread and knows no ideological limits. *See* Julie Zauzmer, *What Would a Hindu Justice Mean for the Supreme Court?*, WASH. POST (Mar. 10, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/03/10/what-would-a-hindu-justice-mean-for-the-supreme-court/?utm_term=.a279133bbb4d [<https://perma.cc/4WZG-LW93>].

¹⁶ *See infra* notes 18–20 and accompanying text.

¹⁷ *Cf.* *Williams v. Wallace*, 240 F. Supp. 100, 105–09 (M.D. Ala. 1965) (holding that the First Amendment required Alabama to make a major U.S. highway available for the Selma-to-Montgomery March, a multi-day protest event, because the location had a direct link to the legal wrongs being protested and also constituted a proportionate response to these legal wrongs, and ordering the state to make its property available for the protest march and rally).

¹⁸ *Brown v. Louisiana*, 383 U.S. 131, 138–40 (1966); *see* Zick, *Expressive Topography*, *supra* note 14, at 497 (“Under current forum analysis, the library, like most contested places, would most likely be considered a ‘non-public’ forum. This approach fails to place the library in local and more general historical perspective.”).

¹⁹ *Flower v. United States*, 407 U.S. 197, 198 (1972) (per curiam). Base officials prohibited John Flower from distributing anti-Vietnam War leaflets at Fort Sam Houston, in San Antonio, Texas. *See* *United States v. Flower*, 452 F.2d 80, 81–82, 89 (5th Cir. 1971), *rev’d*, 407 U.S. 197 (1972). The Fifth Circuit held that the government could prohibit speech activity on the base, *see id.* at 82–86, but the Supreme Court reversed, holding that Flower had a First Amendment right to use the base’s property to leaflet and promote an anti-Vietnam War rally. *See Flower*, 407 U.S. at 198.

²⁰ *See, e.g., United States v. Grace*, 461 U.S. 171, 182–84 (1983); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

For example, it would be easy to characterize a prison, in categorical terms, as a kind of First Amendment dead zone. Yet, the Burger Court did not take this approach.²¹ Instead of holding that prison officials may ban or restrict speech activities without being responsible for respecting First Amendment values because a prison is neither a public forum nor a designated public forum, the Supreme Court instead held that “a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”²²

Under this approach, “challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system.”²³ To be sure, the majority in *Pell* rejected the specific claim at bar—the right of a prisoner to participate in an in-person, face-to-face interview with a journalist.²⁴ Nevertheless, the locus of the expressive conduct—a prison—did not entirely foreclose the First Amendment claim from being considered on the merits and the government had to shoulder a significant burden of justification to prohibit otherwise protected First Amendment activity.²⁵

Today, however, the baseline has shifted—and shifted rather dramatically. Would-be speakers are largely limited to using property of the government’s own choosing for their speech activity—and must do so at a time when the government deems it convenient to make the property available for speech activity.²⁶ If the government designates particular public property a nonpublic forum, any speech regulations that can be characterized as “reasonable” are

²¹ See *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

²² *Id.*

²³ *Id.*

²⁴ See *id.* at 827–28. It bears noting that the prison did not bar alternative forms of communication between inmates and members of the press—such as through written letters and presumably also telephone calls. *Id.* at 827–29.

²⁵ *Id.* at 822. By way of contrast, the Supreme Court’s current approach to substantive due process and equal protection-based challenges to economic and social legislation reflects a posture of abject deference to the government, which has no burden of justification whatsoever. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–16 (1993). Instead, a plaintiff challenging economic or social legislation that does not burden or abridge a fundamental right must prove a negative—namely that no rational legislator could find that the law in question bears a rational relationship to any legitimate state interest. See *id.* at 313 (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”). *Pell*’s approach simply does not reflect a similar level of deference to prison officials with respect to the First Amendment rights of prisoners. See *Pell*, 417 U.S. at 826–28.

²⁶ See Abu El-Haj, *supra* note 14, at 548–54, 586–88. Professor Abu El-Haj posits that “there is good reason to think that current regulatory choices are undermining the meaningfulness of public assemblies for participants as well as their effectiveness as a mechanism to influence and check government.” *Id.* at 587.

perfectly constitutional.²⁷ Government may also create spaces that are reserved either for particular speakers or particular messages (or both). Limited-purpose public forums, such as a theater dedicated to presenting theatrical performances suitable for children, may exclude categorically proposed speech that falls outside the designated users or purposes.²⁸ A forum created for a particular group of speakers, for example current students at a state-operated college or university, may be categorically closed to local townsfolk.²⁹ Thus, the government as property owner often enjoys a freedom of action that mirrors that of a private land owner.

It is easy enough to say, “But if it is the government’s property, why shouldn’t the government be permitted to decide by whom it may be used and for what purposes it may be used?” The answer to this question is both simple and straightforward: government as a property owner should not be able to leverage its ownership of property to burden or prevent the expression of dissenting voices.³⁰ First Amendment doctrine should reflect a fundamental social commitment to facilitating the process of democratic self-government in order to ensure that “everything worth saying shall be said.”³¹ If, as Professor Alexander Meiklejohn posited, “[t]he principle of the freedom of speech springs from the necessities of the program of self-government,”³² then courts committed to enforcing First Amendment values should analyze government actions through the prism of whether they advance, or impede, the ongoing process of democratic deliberation. My thesis in this Article is that the approach used by the Warren and Burger Courts advanced these values, whereas the

²⁷ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech . . .”).

²⁸ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46–47 (1983). *But cf.* *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555–61 (1975) (rejecting a city’s effort to limit the kinds of programming that could be presented at a municipally-owned and operated performing arts space because the use restrictions constituted impermissible prior restraints).

²⁹ See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 668–70 (2010) (recognizing that government entities can and do create limited-purpose public forums and may limit access to such forums to certain speakers and particular kinds of speech without violating the First Amendment); Lyriisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1984–86 (2011) (describing and discussing the concept of a limited-purpose public forum and its application in *Christian Legal Society*).

³⁰ See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 10–12, 33–35, 41–48 (1999) (proposing a general interpretative approach to enforcing the First Amendment that privileges speech of a dissenting cast and arguing that dissent lies “at the heart of the First Amendment”). Professor Shiffirin explains that “[m]y suggestion will be that a free speech theory accenting protection for dissent fares better than a theory based in the protection of political speech or liberty.” *Id.* at 33; *see id.* at 91 (“Free speech theory should be taken beyond protecting or tolerating dissent: the First Amendment should be taken to reflect a constitutional commitment to *promoting* dissent.”).

³¹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

³² *Id.* at 26.

approach currently in vogue, and which came to full flower during the Rehnquist and Roberts Courts, does not.³³

This Article proceeds in three main parts. Part II begins by considering some iconic decisions of the Warren and Burger Courts.³⁴ Because the Warren Court decisions often involved speech associated with the civil rights movement, it would be reasonable to question whether or not the outcomes reflect a generalized commitment to making public property available for speech activity or rather targeted support of a cause that most of the incumbent Justices subjectively supported.³⁵ However, later judicial decisions, issued during the Burger Court era, did not involve civil rights protesters or efforts to end Jim Crow and racial segregation and, yet, still generally used the same open-ended balancing approach to resolve disputes about access to government property for speech activity—with the government having to shoulder the burden of justifying denials of access to public property for speech activity.³⁶ Indeed, even in cases involving locations such as prisons and military bases, the Burger Court used a balancing approach—rather than a categorical approach—to determine whether the government has a First Amendment obligation to make its property available for speech activity.³⁷

The Article continues, in Part III, by contrasting the more categorical approach of the Rehnquist and Roberts Courts, which relies on an initial characterization of particular government-owned property to prefigure the extent to which the government must make it available for private speech activity.³⁸ Moreover, even if this initial analysis leads to the conclusion that property should generally be available for speech activity, a second level of analysis considers whether government restrictions on expressive activity using the property are content and viewpoint neutral and constitute reasonable time, place, and manner restrictions.³⁹ To state the matter simply, the tables have turned and the burden has shifted from the government to justify restricting speech on its property to would-be speakers to prove that they have a legal right to use the property for speech activity.

³³ For a history of the public forum doctrine's theoretical and doctrinal origins and development into the early years of the Rehnquist Court, see generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713 (1987).

³⁴ See *infra* notes 58–82 and accompanying text.

³⁵ See *infra* notes 58–73 and accompanying text.

³⁶ See *infra* notes 87–98 and accompanying text.

³⁷ See *infra* notes 143–50 and accompanying text.

³⁸ See *infra* Part III.

³⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

Part IV considers how First Amendment values could be better secured and advanced if the federal courts were to move the analytical baseline back toward the more speech-friendly approach of the Warren and Burger Courts.⁴⁰ Simply put, the government should always have to shoulder the burden of justifying why public property cannot be made available for private speech activity. I do not suggest that no categorical rules should exist—some government spaces, for example, a judge’s chambers, should be subject to categorical exclusions from use for expressive activities. However, the governing doctrinal framework should presume a generalized duty on the government’s part to facilitate, rather than impede, activities protected under the First Amendment. More specifically, federal courts should not use a historical approach to determine whether a particular kind of government property should be available for private speech activity but instead should revert back to the functional approach that the Warren and Burger Courts routinely deployed.⁴¹

Finally, Part V offers a brief summary and overview of the arguments set forth in this Article.⁴² The First Amendment decisions of the Warren and Burger Courts imposed affirmative obligations on the government to facilitate speech activity by providing access to government-owned property—even when government officials would have preferred to deny the would-be protesters access. Today, however, the government enjoys broad discretion to ban protests from public property—even from property like national parks and public memorials that would otherwise seem to constitute traditional public forums.⁴³ Moreover, even in a traditional public forum, the contemporary federal courts routinely have sustained content neutral, reasonable time, place, and manner restrictions that significantly restrict the availability of public property for speech activity.⁴⁴

⁴⁰ See *infra* Part IV.

⁴¹ Cf. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (holding that an airport concourse does not constitute a public forum and, accordingly, that the government may impose reasonable speech regulations that restrict or prohibit speech activity within the concourse area—even though it otherwise functions in many respects as a de facto government-owned and operated shopping mall).

⁴² See *infra* Part V.

⁴³ See, e.g., *Oberwetter v. Hilliard*, 639 F.3d 545, 552–54 (D.C. Cir. 2011) (upholding a ban on protest activity at the Jefferson Memorial). For a relevant discussion, see Zick, *Expressive Topography*, *supra* note 14, at 487–505 (discussing the relevance of particular spaces and access to specific potential audiences to expressive activity and arguing that even though spaces are not inherently fungible, current First Amendment time, place, and manner jurisprudence presumes one space is just as good as another for expressive activity). Professor Zick argues that “[c]ourts should again be thinking in terms of the new expressive topography when assessing spatial adequacy. Places are *unique*.” *Id.* at 504. It necessarily follows that “denying access to contested places is a substantial restraint on messages targeting those places.” *Id.*

⁴⁴ See, e.g., *United States v. Kistner*, 68 F.3d 218, 222 (8th Cir. 1995) (upholding National Park Service TPM regulations that severely limited protest activity within the St. Louis Arch park).

If we truly believe that a well-functioning democratic polity requires a vibrant ongoing dialogue among citizens about government and its officers,⁴⁵ including a strong, if not unyielding, commitment to protecting the freedom of political speech,⁴⁶ then the federal courts must require the government to make more public spaces available for public protest and to do so more reliably. Simply put, ownership of property should not be a de facto precondition of participating in the process of democratic deliberation.

II. FACILITATING DEMOCRATIC DELIBERATION BY PROVIDING WOULD-BE SPEAKERS WITH ACCESS TO PUBLIC PROPERTY FOR EXPRESSIVE ACTIVITIES: A POSITIVE FIRST AMENDMENT RIGHT OF ACCESS TO GOVERNMENT PROPERTY UNDER THE WARREN AND BURGER COURTS

The Supreme Court, in the nineteenth century, took the view that government, as the owner of a property interest, could regulate the use of its property more-or-less exactly as a private property owner could manage its property.⁴⁷ Consistent with this logic, if the government possesses the power to close property that it owns entirely to speech activity, then it should hold a concomitant power to decide what kinds of expressive activity it will tolerate on its property. As then-Justice, and later Chief Justice, Edward D. White explained in *Davis*, “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”⁴⁸ This perspective reflects the view that government, as the owner of real property, has the constitutional power to decide what uses it will permit on what is, after all, the government’s property.⁴⁹

Over time, however, the Supreme Court came to reject the analogy of the government to a private property owner and began to require the government to make public spaces available for First Amendment activities. Thus, in *Hague v. Committee for Industrial Organization*, the Justices squarely rejected a claim more-or-less identical to the government’s claim in *Davis* and, if not expressly

⁴⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

⁴⁶ See *Snyder v. Phelps*, 562 U.S. 443, 458–61 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52–56 (1988). For a general discussion of how and why contemporary First Amendment law disallows the regulation of offensive or outrageous speech, either directly or through the imposition of civil liability by juries, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 624–32 (1990).

⁴⁷ See *Davis v. Massachusetts*, 167 U.S. 43, 47–48 (1897).

⁴⁸ *Id.* at 48.

⁴⁹ This view has resurfaced from time to time in majority opinions. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988) (“The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.”).

overruling it, signaled that *Davis*'s approach no longer commanded a majority of the Court.⁵⁰

Writing for a plurality, but with a majority supporting this portion of his opinion, Justice Owen Roberts explained that the First Amendment limits the government's authority to regulate its real property in ways that impede expressive activities protected by the First Amendment. He explained that:

We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁵¹

In other words, the government, in its capacity as a property owner, must make real property available for expressive activities—even if it would prefer not to do so. This approach clearly gives the First Amendment a significant affirmative, or positive aspect; the Free Speech and Assembly Clauses do not merely prevent the government from acting to prohibit speech and assembly, but also require the government to lend its affirmative assistance to such activities.

Thus, unlike other provisions of the Bill of Rights—indeed, even other provisions of the First Amendment itself, such as the Press Clause—the Free Speech and Assembly Clauses empower citizens to make positive demands of assistance, in the form of access to government-owned property, for speech activity. Although Justice Roberts does not directly link this obligation to provide affirmative support to expressive activities to the project of democratic self-government, his language plainly acknowledges the relationship between speech and assembly, on the one hand, and democratic self-government, on the other.⁵² After all “views on national questions” and discussion of “public questions” plainly relate to the process of democratic deliberation that is necessary to sustain democratic self-government.⁵³ Under the animating theory of *Hague*, the government must afford the general public access to public spaces for the purpose of exercising their First Amendment rights.⁵⁴

⁵⁰ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16, 524–25 (1939).

⁵¹ *Id.* at 515–16.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Subsequent cases make clear that the right to use public property for expressive activities is not without boundaries. To redeploy a phrase first used in the Supreme Court's seminal regulatory takings precedent, "[g]overnment hardly could go on"⁵⁵ if any and every citizen could demand, at will, access to public property for the purpose of engaging in speech activity. *Hague* cannot mean that the imperatives of the government as a manager can never take precedence over the interests of would-be speakers who seek access to public property for speech activity. However, the question is where the burden in such cases should fall. Should it rest with the government to show that particular property cannot be used for speech activity without impeding the legitimate managerial imperatives of the government?⁵⁶ Or rather, on a would-be speaker to show that the government has traditionally permitted particular property to be used for First Amendment activities?

Throughout the civil rights movement, the Supreme Court generally vindicated the use of government property for speech activity—even if the property did not constitute what contemporary jurisprudence would call a "traditional public forum."⁵⁷ For example, a public library is not self-evidently a place that, since time immemorial, has been available for protest activity. Yet, the Supreme Court rejected a claim that a local government could seek to enforce a trespass claim against civil rights protesters who held a protest in a racially segregated, local public library.⁵⁸ So too, South Carolina had a duty to make available the grounds surrounding the state capitol building, even though these grounds were not routinely used for mass protests.⁵⁹ The Supreme Court also invalidated criminal convictions against civil rights protesters who marched from Louisiana's old state capitol building to the local parish (county) courthouse to protest the arrest of student activists who had sought to desegregate local lunch counters in Baton Rouge, Louisiana.⁶⁰

Cox v. Louisiana is highly instructive because the majority opinion, authored by Justice Arthur Goldberg, considers the ability of the government to ensure the smooth functioning of the public courts of law, but concludes that, as applied, a law aimed at protecting courts from the influence of fixed pickets violated the First Amendment.⁶¹ The protesters' facial challenge to the

⁵⁵ Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445 (1915) ("There must be a limit to individual argument in such matters if government is to go on.").

⁵⁶ ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 4–10, 13–16, 237–47, 261–62 (1995).

⁵⁷ See United States v. Kokinda, 497 U.S. 720, 727 (1990) (holding that "[t]he mere physical characteristics of the property cannot dictate forum analysis" and explaining that "regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness").

⁵⁸ See Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

⁵⁹ See Edwards v. South Carolina, 372 U.S. 229, 235–37 (1963).

⁶⁰ Cox v. Louisiana (*Cox I*), 379 U.S. 536, 538–44, 552, 558 (1965); Cox v. Louisiana (*Cox II*), 379 U.S. 559, 573 (1965).

⁶¹ *Cox II*, 379 U.S. at 573.

Louisiana law failed because the state possessed a strong interest in preventing political pressures from being brought to bear on the administrative of justice.

Justice Goldberg explained that:

There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammelled functioning of our courts is part of the very foundation of our constitutional democracy.⁶²

Accordingly, the state could, consistent with the First Amendment, enact a general proscription against fixed pickets at courthouses, so long as the measures adopted are “necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence,” and provided that the statute is “narrowly drawn” to achieve these objectives.⁶³

Justice Goldberg’s analysis, however, involves an open-ended balancing of the government’s interest in safeguarding the impartial administration of justice and the interest of would-be protesters in maintaining a fixed picket near a courthouse.⁶⁴ In considering an “as applied” challenge to the application of the statute on the facts at bar, Justice Goldberg rejected the argument that any and every protest proximate to a courthouse will be prejudicial to the fair and orderly administration of justice.⁶⁵ He also carefully considered precisely how and when the protest took place: “It is undisputed that the demonstration took place on the west sidewalk, the far side of the street, exactly 101 feet from the courthouse steps and, judging from the pictures in the record, approximately 125 feet from the courthouse itself.”⁶⁶ Thus, the demonstration was merely “near” and not “in” the courthouse.⁶⁷ Government officials also had specifically authorized a protest directly across the street from the courthouse grounds.⁶⁸ These factors, considered together and in context, required reversal of the convictions on an as-applied basis.⁶⁹

Justice Hugo L. Black, by way of contrast, agreed that the breach of peace convictions were invalid, but dissented from the majority’s conclusion that the as-applied challenge to Louisiana’s ban on protests near courthouses possessed merit.⁷⁰ He noted that the statute in question, § 14:401, made it unlawful for any person to stage a demonstration proximate to a courthouse with the intent of

⁶² *Id.* at 562.

⁶³ *Id.*

⁶⁴ *Id.* at 565–68.

⁶⁵ *See id.* at 567.

⁶⁶ *Id.* at 568.

⁶⁷ *Cox II*, 379 U.S. at 568.

⁶⁸ *Id.* at 569–70.

⁶⁹ *Id.* at 574–75.

⁷⁰ *Id.* at 580–83 (Black, J. dissenting).

influencing judges and other court officials regarding a pending judicial matter.⁷¹ Justice Black emphasized that this statute prohibited “anyone, under any conditions, [from] picket[ing] or parad[ing] near a courthouse, residence or other building used by a judge, juror, witness, or court officer, ‘with the intent of influencing’ any of them.”⁷² He emphasized that the law sought to protect the judicial process itself “from the intimidation and dangers that inhere in huge gatherings at courthouse doors and jail doors to protest arrests and to influence court officials in performing their duties.”⁷³

Thus, Justice Black argued for a more categorical approach to making government property available for protest activity—and, in Black’s view, a courthouse, and environs surrounding it, could be constitutionally declared “off limits” for speech activity.⁷⁴ Justice Black would have upheld this regulation even though the protest at issue took place near a local courthouse but outside regular business hours, and, therefore, did not pose much of a threat of undue influence.⁷⁵ And, even though other forms of expressive conduct, such as buying television ads, radio spots, or outdoor billboards attacking a particular judge or urging a particular result in a pending case, could present no-less-direct a threat to the integrity of the judicial process, they would have fallen outside the letter of the Louisiana statute.⁷⁶ The Louisiana law was plainly both over inclusive (because it prohibited protests when judicial personnel were absent) and under inclusive (because it did not regulate other speech activity that might unduly influence judges or court personnel regarding pending judicial business).

The majority’s approach, unlike Justice Black’s approach, uses an open-ended balancing test to resolve the relative equities on the facts presented. Because local government officials had approved a location for the protest almost identical to the location actually used, the government’s claim that it had a pressing need to banish the protest from the area near the courthouse rang entirely hollow.⁷⁷ After all, if one side of the street was appropriate for a mass meeting and protest featuring 2,000 participants, then so too was the other. Justice Goldberg’s approach obviously suffers from the risk of subjective application of the balancing test—if a judge were hostile to the message protesters sought to propagate, she could put her thumb on the scale when assessing the risk the protest presented.

This is, to be sure, a nontrivial shortcoming of an open-ended balancing test to determine the suitability of public property for First Amendment activities.⁷⁸

⁷¹ *Id.* at 581–82; LA. STAT. ANN. § 14:401 (2004).

⁷² *Cox II*, 379 U.S. at 581–82 (Black, J., dissenting) (quoting LA. STAT. ANN. § 14:401).

⁷³ *Id.* at 583.

⁷⁴ *See id.*

⁷⁵ *See id.* at 584.

⁷⁶ *See* LA. STAT. ANN. § 14:401.

⁷⁷ *Cox II*, 379 U.S. at 569–72.

⁷⁸ *See* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITION LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 204–05 (2012).

A less categorical approach to determining whether public property should be available for would-be protesters presents a risk of enabling stealth content- or viewpoint-based discrimination by federal judges.⁷⁹ This problem of judicial discretion is no greater, however, than in other contexts, such as how to categorize speech for purposes of applying the First Amendment.

For example, the categorization of speech as “political,” “commercial,” or “obscene” often prefigures its protected or unprotected status under the First Amendment.⁸⁰ Applying categorical labels to particular examples of speech activity involves no less judicial discretion than would the task of assessing whether proposed speech activity is consistent, or inconsistent, with the more regular uses of the particular public property at issue.⁸¹ A balancing approach that weighs the interests of would-be speakers against the interests of the government in reserving property for its more regular uses means that any and all government property could, at least in theory, be available to support expressive activities.⁸²

To be sure, the government’s interest in reserving some public property exclusively for the government’s use will be impossible to overcome—for example, a judge’s chambers or a district attorney’s office. Even so, however, a balancing exercise could work. As I have argued previously, “[a]lthough this exercise creates the possibility of unfairness in individual cases,” the potential benefits of this approach, “more than offset this opportunity cost.”⁸³ In sum, the distinct virtue of Justice Goldberg’s approach is that it forces the government to make a convincing case that it has a good reason for denying access to the property that the protesters seek to use; the burden rests on the state to justify a denial of access, rather than on would-be protesters to establish an affirmative and general right to use the public property for speech activity.

Other properties will obviously be off limits during some periods of time—for example, the government’s interest in using a high school building for educational activities would outweigh the interest of would-be protesters in using the building for a political rally during periods when classes are actually in session. But what about periods, such as the summer break, when the high school is not being used for classes and sits more or less empty and unused? Or periods of the day during the school year when the high school is not being used for instructional activities, such as in the evenings or during the weekend?

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.* at 202–05.

⁸² *See Greer v. Spock*, 424 U.S. 828, 859–60 (1976) (Brennan, J., dissenting) (arguing that “the notion of ‘public forum’ has never been the touchstone of public expression, for a contrary approach blinds the Court to any possible accommodation of First Amendment values in this case” and positing that “[t]hose cases permitting public expression without characterizing the locale involved as a public forum, together with those cases recognizing the existence of a public forum, albeit qualifiedly, evidence the desirability of a flexible approach to determining when public expression should be protected”).

⁸³ KROTOSZYNSKI, *supra* note 78, at 205.

Should a local school board be able to say “our high school auditorium is a non-public forum” and deny access to anyone seeking to use it for First Amendment activities? Even if it constitutes the only facility of its kind in a remote, rural community? And, even if the school board permits its use for noneducational functions, such as serving as an official polling place for primary and general elections?

Lest a skeptical reader think that the Warren and Burger Courts deployed this balancing approach solely for the benefit of civil rights groups whose goals and objectives enjoyed the personal support of the Justices comprising the majority, the practice of using an open-ended balancing test to determine whether the government could deny access to its property continued well into the 1970s and was applied in cases having little or nothing to do with civil rights protesters.⁸⁴ Moreover, the Supreme Court used this approach in cases seeking court-mandated access to publicly-owned venues for speech activities that were even less plausible than a sidewalk adjacent to a county courthouse.⁸⁵

III. THE PUBLIC FORUM AND TIME, PLACE, AND MANNER DOCTRINES VEST GOVERNMENT WITH BROAD DISCRETION TO LIMIT OR PROHIBIT SPEECH ACTIVITY ON PUBLIC PROPERTY

In the 1970s, even as a majority of the Burger Court continued to use an open-ended balancing test to determine whether government property should be available for First Amendment activities, then-Associate Justice William Rehnquist argued, initially in dissent, but eventually in majority opinions, that a more categorical approach was needed to vindicate the government’s legitimate managerial interests.⁸⁶ By the 1980s, and his promotion to the Chief Justice’s office, these views regularly came to command a majority of the Justices.⁸⁷ Instead of squarely placing a burden of justification on the government when it denied access to public property for speech activity, the Supreme Court instead required would-be speakers to establish that the property

⁸⁴ See *supra* notes 19–25; see *infra* notes 143–49 and accompanying text.

⁸⁵ See *infra* notes 146–53 and accompanying text.

⁸⁶ For an excellent discussion of how the government’s role as a manager could justify at least some speech restrictions in government workplaces and on government property, see generally Robert C. Post, Essay, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

⁸⁷ See, e.g., *United States v. Kokinda*, 497 U.S. 720, 725–28 (1990). Two decisions in the late Burger Court period embrace the public forum doctrine. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (“[T]he Court has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’” (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981))).

that they wished to use constituted either a public forum or a designated public forum.⁸⁸

By the 1990s, spaces that clearly could be used for expressive activities, such as airport concourses, were judicially declared to be off limits, nonpublic forums, and closed to speech activity.⁸⁹ In addition to an increasingly restrictive definition of public forums, the Supreme Court also adopted a test for analyzing restrictions on the use of public forums that allowed very broad restrictions on speech activity within traditional and designated public forums.⁹⁰ The combined screening effects of a very limited universe of highly regulated public forums and designated public forums significantly restricted the public property potentially available to host First Amendment activities.

In fairness, a turn toward a more categorical approach to determining whether the First Amendment requires the government to make public property available for speech activity first appeared during the Burger Court's later years⁹¹ and continued to gain jurisprudential traction into the 1980s.⁹² By the early 1980s, the public forum doctrine was sufficiently well-established that Justice Byron White, in *Perry*, was able to read existing precedents as creating three, and possibly four, typologies of government property.⁹³ Nevertheless, the public forum doctrine did not reach full flower until the Rehnquist Court.⁹⁴

Although some legal scholars point to decisions such as *Southeastern Promotions, Ltd. v. Conrad*⁹⁵ and *Lehman v. City of Shaker Heights*⁹⁶ as constituting the Supreme Court's initial embrace of the public forum doctrine, these decisions, in point of fact, did not establish the rigid public forum doctrine

⁸⁸ *Perry Educ. Ass'n*, 460 U.S. at 45–46.

⁸⁹ *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679–83 (1992).

⁹⁰ *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁹¹ *Perry Educ. Ass'n*, 460 U.S. at 45–48.

⁹² *See Cornelius*, 473 U.S. at 800–06.

⁹³ *Perry Educ. Ass'n*, 460 U.S. at 45–46, 46 n.7.

⁹⁴ *See infra* notes 100–31 and accompanying text.

⁹⁵ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁹⁶ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

enforced by the federal courts today.⁹⁷ Later decisions, such as *Greer v. Spock*,⁹⁸ reverted to the more open-ended balancing test used in cases like *Brown v. Louisiana*.⁹⁹ Until the 1980s, the suggestion that the government could categorically exclude speech from its property unless the property constituted a traditional public forum or a designated public forum appeared exclusively in *dissenting* opinions.¹⁰⁰

⁹⁷ See, e.g., Post, *supra* note 33, at 1733–39. Professor Post points to *Greer v. Spock*, 424 U.S. 828 (1976), as “[t]he pivotal decision” in the development of the public forum doctrine. See Post, *supra* note 33, at 1739. Viewed from the vantage point of doctrinal developments in 1987, this proposition seems quite reasonable—after all, *Greer* was the first case to invoke the metaphor of a “public forum” in a majority opinion. *Greer*, 424 U.S. at 838. Nevertheless, as I explain in some detail below, *Greer* actually used a balancing, rather than a categorical, approach to determining whether the government had an obligation to make particular property available for speech activity. See *infra* note 98. It is certainly fair to posit that *Greer* constitutes the first majority Supreme Court opinion that adopted the nomenclature of the “public forum,” but *Greer*’s application of the doctrine, in hindsight, was considerably more demanding of the government than later applications of the more fully developed public forum doctrine. See *infra* notes 122 and 139 and accompanying text.

⁹⁸ *Greer v. Spock*, 424 U.S. 828 (1976). To be sure, Justice Potter Stewart’s majority opinion in *Greer* makes a passing reference to the concept of certain government property constituting a public forum. *Id.* at 836 (“The Court of Appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now.”). Despite on offhand reference to government property as a public forum, Justice Stewart’s opinion carefully weighs the government’s asserted interests for prohibiting a partisan political rally from a suburban New Jersey army base—it does not simply declare the base to be a nonpublic forum and sustain the government’s speech restrictions. See *id.* at 837–40. Thus, although *Greer* does feature the phrase “public forum,” the case itself does not actually adopt a rigid, categorical approach to analyzing whether the government has an obligation to make property available for speech activity. But see Post, *supra* note 33, at 1739–43 (arguing that *Greer* laid the theoretical and doctrinal foundation for the development of the public forum doctrine). Professor Post suggests that “*Greer*’s resurrection of the major premise of the *Davis* syllogism was decisive for the future development of public forum doctrine, although the Court made no effort constitutionally to explain or justify its use of the premise.” *Id.* at 1743. This is undoubtedly true—*Greer* does not proceed from a strong presumption that government property otherwise suitable for proposed speech activity must be made available to the would-be speakers. Even so, however, *Greer* demands far more by way of government justification than later cases, such as *Cornelius*, which requires nothing more than that speech regulations in nonpublic forums be “reasonable.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 800–01, 806–07 (1985).

⁹⁹ *Brown v. Louisiana*, 383 U.S. 131, 141–43 (1966).

¹⁰⁰ See, e.g., *Flower v. United States*, 407 U.S. 197, 199–200 (1972) (Rehnquist, J., dissenting); *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 583 (1965) (Black, J., concurring in part and dissenting in part).

Justice Hugo Black pioneered the argument that the government could exclude speech from public property if the property did not constitute a traditional public forum. He made this argument in very strong terms in *Cox II*, but in dissent. Black argued in *Cox II* that a categorical proscription against protest activity proximate to courthouses did not offend the First Amendment: “Justice cannot be rightly administered, nor are the lives and safety of prisoners secure, where throngs of people clamor against the processes of justice right outside the courthouse or jailhouse doors.”¹⁰¹

Similarly, Justice William Rehnquist advocated a categorical approach to evaluating denials of access to government property in cases presenting government efforts to prohibit speech activity on public property. Justice Rehnquist began to sketch his vision of the public forum doctrine in his dissenting opinion in *Flower*, a case that invalidated a ban against leafletting on a portion of a military base in San Antonio, Texas, that was generally open to the public.¹⁰²

Then-Justice, and later Chief Justice, Rehnquist argued that:

[C]ivilian authorities may draw reasonable distinctions, based on the purpose for which public buildings and grounds are used, in according the right to exercise First Amendment freedoms in such buildings and on such grounds. Simply because some activities and individuals are allowed on government property does not require the abandonment of otherwise allowable restrictions on its use.¹⁰³

Harking back to the reasoning of *Davis*, the government as a property owner may select the kinds and scope of expressive activity that it will permit on its property.¹⁰⁴

Two years later, Justice Rehnquist renewed his effort to reduce the imposition of involuntary First Amendment easements on government-owned property. His dissenting opinion in *Southeastern Promotions* makes a largely identical argument to his *Flower* dissent, namely, that “if it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers,” then the city should be able to refuse to rent the venue for the purpose of mounting a racy, adult-oriented traveling production of the musical *Hair*.¹⁰⁵ In other words, if the government creates a forum for expressive activity, then the government may decide both who may use the forum and the expressive purposes for which it may be used.

¹⁰¹ *Cox II*, 379 U.S. at 583 (Black, J., concurring in part and dissenting in part).

¹⁰² *Flower*, 407 U.S. at 199–200 (Rehnquist, J., dissenting).

¹⁰³ *Id.* at 200.

¹⁰⁴ See *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

¹⁰⁵ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 572 (1975) (Rehnquist, J., dissenting).

It was not until 1983, and Justice Byron White's opinion for a five-to-four majority in *Perry*, that the public forum doctrine enjoyed a full explication and the clear support of a majority.¹⁰⁶ Justice White's *Perry* opinion organizes earlier cases into categories and posits the existence of three, or perhaps four, distinct classes of public property: (1) traditional public forums, (2) designated public forums, (3) and nonpublic forums.¹⁰⁷ Justice White hints at a fourth category—a limited-purpose public forum—and subsequent cases have made clear that this constitutes a distinct subcategory comprised of forums, whether physical or intangible, that the government creates and designates for the exclusive use of particular speakers, content, or both.¹⁰⁸ In *Perry*, however, Justice White lumps limited-purpose public forums in with designated public forums;¹⁰⁹ subsequent cases, however, have distinguished them and given the government broad authority to subsidize particular speakers or speech.¹¹⁰

The specific forum at issue in *Perry*, an internal mail system created and maintained by a public school district,¹¹¹ was not generally open to the public and, although not reserved exclusively for internal school district communications, was used primarily for official communications between the school district's administration and the district's employees.¹¹² Even under the more open-ended balancing test of *Brown v. Louisiana*,¹¹³ it is doubtful that the First Amendment would have supported a generalized right of access by the public to the school district's internal mail system. Indeed, even the dissenting Justices in *Perry* did not posit a universal right of public access, but instead argued that an association of teachers seeking to challenge the incumbent collective bargaining representative should be granted equal access to the internal mail system as the incumbent teachers' union already enjoyed.¹¹⁴

Thus, Justice William J. Brennan, Jr.'s dissent did not posit that the internal mail system should be generically available to any and all comers, but instead characterized the exclusion of a rival employees' union as a form of viewpoint discrimination in a forum that had been made available for speech of the sort that the rival union wished to propagate.¹¹⁵ Justice Brennan's dissent also used a functional analysis that assessed the compatibility of the proposed speech with the particular government-created forum and found that the proposed speech

¹⁰⁶ See generally *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 37–55 (1983).

¹⁰⁷ *Id.* at 45–46.

¹⁰⁸ See *id.* at 46 n.7; see also *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679–83 (2010).

¹⁰⁹ *Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

¹¹⁰ See, e.g., *Christian Legal Soc'y*, 561 U.S. at 679 n.11.

¹¹¹ *Perry Educ. Ass'n*, 460 U.S. at 39–40.

¹¹² See *id.* at 47–48.

¹¹³ *Brown v. Louisiana*, 383 U.S. 131, 141–43 (1966).

¹¹⁴ See *Perry Educ. Ass'n*, 460 U.S. at 60–62 (Brennan, J., dissenting).

¹¹⁵ *Id.* at 61–62.

came within the subject matter of the forum and would not unduly burden its use for its more regular purposes.¹¹⁶

Perry represented a near-complete victory for the Black/Rehnquist categorical approach to assessing whether particular public property should, in general, be available to the public for the exercise of First Amendment rights. Subsequent cases, decided under the Rehnquist Court, quickly consolidated this doctrinal innovation and ossified it. The Supreme Court narrowly defined the concept of a public forum and used a very strict, tradition- and history-based approach to exclude new kinds of forums—such as charitable fundraising drives among government workers,¹¹⁷ a sidewalk and parking lot at a post office,¹¹⁸ and airports.¹¹⁹ Taking quite literally *Hague*'s language about places that had, since time immemorial, been available for use for expressive activities,¹²⁰ the conservative majority recognized very broad government discretion to prohibit speech activities on publically-owned property.¹²¹

In short, the Supreme Court increasingly granted the government broad authority to determine for itself whether or not its property would be generally available for speech activity. It did so, as Chief Justice Rehnquist explained, because “[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”¹²² In other words, managerial imperatives justify limiting or even proscribing the use of government property for speech activity. Under this approach, the government does not operate under any general duty to create free speech easements on its property unless it chooses to do so voluntarily (by creating a designated public forum)¹²³ or the property at issue constitutes a traditional public forum using a history-based test (which categorically excludes new types of government property from ever becoming a traditional public forum).¹²⁴

Concurrently, with respect to a public forum, the Rehnquist Court adopted a policy of sustaining against First Amendment challenges content- and

¹¹⁶ See *id.* at 63–66.

¹¹⁷ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

¹¹⁸ *United States v. Kokinda*, 497 U.S. 720, 729–30 (1990).

¹¹⁹ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679–81 (1992).

¹²⁰ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

¹²¹ See *Kokinda*, 497 U.S. at 725–26.

¹²² *Int'l Soc'y*, 505 U.S. at 678.

¹²³ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985) (“The Government did not create the CFC [Combined Federal Campaign] for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes.”).

¹²⁴ See *Int'l Soc'y*, 505 U.S. at 680 (“[T]he tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity . . .”).

viewpoint-neutral reasonable time, place, and manner (TPM) regulations.¹²⁵ Thus, even if a would-be speaker was able to prevail on the preliminary question of whether particular government property should be available for speech activity, clearing this initial hurdle was merely a necessary, and not sufficient, condition for obtaining access to government property for protest activity.¹²⁶ The government retained broad discretion to regulate the terms and conditions under which a traditional public forum (or designated public forum) could be used for speech activity.¹²⁷

Justice Anthony Kennedy, writing for the majority in *Ward*, explained that

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”¹²⁸

The *Ward* test sounds considerably more demanding in theory than it proves to be in practice.¹²⁹

First, the federal courts do not look very deeply into the government’s actual motives for enacting TPM regulations;¹³⁰ thus, the adoption of limits on protest activity near abortion clinics after Operation Rescue comes to town does not make TPM regulations content-based.¹³¹ Second, the federal courts are not terribly demanding regarding either the government’s purpose or the fit between the means used to achieve the government’s substantial goal and actual

¹²⁵ See *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989).

¹²⁶ *Id.*

¹²⁷ See *id.* at 791 (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”).

¹²⁸ *Id.*

¹²⁹ See KROTOSZYNSKI, *supra* note 78, at 27–31 (discussing the insufficiency of the standards governing time, place, and manner restrictions).

¹³⁰ See *id.* at 28–31.

¹³¹ *Hill v. Colorado*, 530 U.S. 703, 719–20, 725–30 (2000). The *Hill* majority bizarrely claimed that a speech ban near abortion clinics was “not a ‘regulation of speech’” but instead “a regulation of the places where some speech may occur.” *Id.* at 719. Similarly, in *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court ignored a clear congressional purpose to help propagate particular kinds of programming—namely local programming, educational programming, and news and public affairs programming—over other kinds of content and used local television stations as a de facto proxy for entities that will create and distribute programming of the sort that Congress favored. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644–48 (1994). But cf. *id.* at 677–78 (O’Connor, J., concurring in part and dissenting in part) (arguing that the preference for locally-based, educational, and news and public affairs programming constituted a government preference for this kind of content and rendered the must carry provisions of the Cable Act content-based regulations of speech).

attainment of the goal itself.¹³² Third, and finally, the “ample alternative channels for communication” requirement may be satisfied if one could upload a blog post to the internet or hand out leaflets somewhere else.¹³³ As I have observed previously, “[p]rovided that government is willing to restrict all speakers alike, the time, place, and manner doctrine, as explicated in *Ward* and subsequent cases, imposes relatively few absolute limits on such regulations.”¹³⁴

IV. TOWARD A RENEWED COMMITMENT TO MAKING PUBLIC SPACE RELIABLY AVAILABLE FOR SPEECH ACTIVITY

The Supreme Court’s motive in adopting a categorical approach to define and structure the public’s right to use government-owned property for speech activity is easy to understand: The public forum doctrine provides bright-line rules that are easy to state and relatively easy to apply. Accordingly, lower federal and state courts will usually reach the same results regarding the nature of a particular forum—whether traditional, designated, limited-purpose, or nonpublic. The TPM doctrine also provides an easy to state, and relatively easy to apply, framework for determining whether government imposed limits on public, designated, and limited-purpose public forums trench too deeply on the exercise of expressive freedoms. Both the categorization exercise and the TPM doctrine vest the government with substantial managerial discretion to reserve public property for the specific purposes that led the government to acquire the property in the first place. Given the challenges the government faces in running vast bureaucracies, the random use of government property by private citizens for speech activity could easily lead to chaos and disruption.¹³⁵

In sum, the public forum and TPM doctrines both protect the government’s ability to operate its myriad programs on a day-to-day basis. The federal courts also have disallowed government efforts to parcel out access to public property for speech activity based on the viewpoint or content of the proposed speech activity.¹³⁶ Government officials also must apply TPM regulations with an even hand and such regulations must advance an important government interest and leave open ample alternative channels of communication.¹³⁷ It would be wildly wide of the mark to suggest that the Rehnquist and Roberts Courts have returned

¹³² See KROTOSZYNSKI, *supra* note 78, at 27–28.

¹³³ See *id.* at 27–39.

¹³⁴ *Id.* at 31.

¹³⁵ See POST, *supra* note 56, at 237–47 (discussing the dangers of First Amendment jurisprudence undermining the government’s ability to attain legitimate, managerial goals).

¹³⁶ *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133–36 (1992). Writing for the *Forsyth County* majority, Justice Harry Blackmun observed that “[t]his Court has held time and again: ‘Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.’” *Id.* at 135 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984)).

¹³⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

the First Amendment baseline to *Davis v. Massachusetts*.¹³⁸ Under the existing doctrinal rules, the government clearly may not restrict speech on public property with as free a hand as a private citizen or corporation may restrict speech on privately-owned property.

Nevertheless, the Rehnquist and Roberts Courts have reset the balance in the government's favor and have done so to a significant degree. Access to government property for expressive activities is considerably more circumscribed today than it was in the 1960s or 1970s.¹³⁹ Persons seeking access to government property for speech activity now have to meet an initial burden of convincing a court that the specific property they seek to use constitutes a traditional or designated public forum—or that it is a limited-purpose public forum and the proposed speakers or speech activities fall within the class of speakers or speech authorized to use the forum.¹⁴⁰ Even if a plaintiff meets this initial burden, the government will still prevail if the denial of access results from viewpoint- and content-neutral reasonable time, place, and manner restrictions.¹⁴¹ TPM restrictions, aggressively applied, can reduce the space available quite considerably—to a small circle or two within a major public park, such as the St. Louis Arch, in downtown St. Louis, Missouri.¹⁴²

Thus, the problem is two-fold: Federal courts too easily permit the government to adopt self-serving classifications of public property that banish protesters and protest activity. And, even with respect to public property that cannot be entirely closed to speech activity, the government may adopt burdensome, and highly effective, regulations that severely limit the availability of the property for First Amendment activities. In the days of the Warren and Burger Courts, neither of these propositions held true. Government property was presumptively available for speech activity, and the government had to establish why its proposed use for speech activity constituted too great a burden for the government to shoulder.¹⁴³ Moreover, federal courts viewed efforts to aggressively limit use of traditional public forums to prevent speech activity with skepticism. *Cox v. Louisiana*¹⁴⁴ provides a good example—if government

¹³⁸ *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

¹³⁹ Compare *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) (holding that public school students may engage in political protest activity while on school district property), with *Hodge v. Talkin*, 799 F.3d 1145, 1150, 1165 (D.C. Cir. 2015) (rejecting a First Amendment challenge to a federal statute that bans protest on the large, elevated marble plaza located in front of the United States Supreme Court because of “the government’s long-recognized interests in preserving decorum in the area of a courthouse and in assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure”).

¹⁴⁰ See *supra* notes 108–31 and accompanying text.

¹⁴¹ See *Ward*, 491 U.S. at 791 (“[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech . . .”).

¹⁴² See *United States v. Kistner*, 68 F.3d 218, 221–22 (8th Cir. 1995).

¹⁴³ See *supra* notes 86–88 and accompanying text.

¹⁴⁴ See generally *Cox v. Louisiana (Cox I)*, 379 U.S. 536 (1965); *Cox v. Louisiana (Cox II)*, 379 U.S. 559 (1965).

officials authorized a protest on one side of a public street proximate to a county courthouse, then they could not object to the use of sidewalks on the opposite side of the street.¹⁴⁵

To permit a mass protest near a courthouse, on an as applied basis in the context of a state law that sought to protect judges and court officials from improper influences, constitutes a remarkable commitment to securing and advancing First Amendment values. So too, ordering military officials to permit protest activity on a military base represents a strikingly broad, and deep, commitment to facilitating the process of democratic deliberation that is essential to the maintenance of democratic self-government.¹⁴⁶ Although the Burger Court ultimately declined to extend its initial ruling mandating access to military bases for speech activity,¹⁴⁷ it did so in an opinion that did not declare, in categorical terms, that such facilities may be closed entirely to the public and declared free speech-free zones.¹⁴⁸ Indeed, the Burger Court even declined to adopt a categorical approach to declaring a prison off limits to any and all forms of expressive activity.¹⁴⁹

The Warren and Burger Courts essentially treated the First Amendment as a font of affirmative, positive obligations on the government to lend its assistance to would-be speakers through selective access to government-owned property. The government could not pick and choose which speakers and messages it would lend its support in the form of access to public property—instead it had a duty to facilitate all comers. To be sure, this approach had the effect of significantly increasing the social cost of speech activity on public property.¹⁵⁰ When half of a major U.S. highway is used for a major civil rights protest, rather than for vehicular traffic, drivers seeking to use the highway to get from Point A to Point B incur a nontrivial cost.¹⁵¹ So too, the use of public spaces for speech activity makes the space less available for other activities—if a group of New Age women descend upon the interior of the Jefferson Memorial to dance, the quietude of the interior space is disrupted for those who simply wish to contemplate the neo-classical interior and massive sculpture of Jefferson.¹⁵²

The same, however, could be said of having Dr. Martin Luther King, Jr. speak at the rally associated with the iconic August 27–28, 1963, March on Washington for Jobs and Freedom, from the interior space of the Lincoln

¹⁴⁵ *Cox II*, 379 U.S. at 562, 569–70, 574–75.

¹⁴⁶ *See* *Flower v. United States*, 407 U.S. 197, 197–98 (1972) (per curiam).

¹⁴⁷ *See* *Greer v. Spock*, 424 U.S. 828, 836 (1976).

¹⁴⁸ *See supra* notes 98–103 and accompanying text.

¹⁴⁹ *See* *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

¹⁵⁰ *See* *Williams v. Wallace*, 240 F. Supp. 100, 109 (M.D. Ala. 1965).

¹⁵¹ *See id.* at 106–12.

¹⁵² *But cf.* *Oberwetter v. Hilliard*, 639 F.3d 545, 552–54 (D.C. Cir. 2011) (upholding a government ban on protest within the interior of the Jefferson Memorial because it does not constitute a “public forum” and the regulations were content- and viewpoint-neutral and otherwise “reasonable”).

Memorial, to the mass audience attending the rally on the National Mall, and also those persons watching King's speech live on broadcast television.¹⁵³ Should the government be free to banish protests from both spaces? On the theory that they exist solely for reverential contemplation of Jefferson and Lincoln—rather than expressive activities associated with political, ideological, or religious beliefs?

The Warren and Burger Courts were willing to force government entities to justify refusals of access to public property with persuasive reasons that demonstrated the incompatibility of speech activity with the more regular uses of public property. Moreover, during this era, the Supreme Court also entertained “as applied” challenges to speech restrictions that were otherwise valid on their face—such as proscriptions against efforts to bring extra-judicial pressure to bear on state court judges and court personnel.¹⁵⁴ In sum, the federal courts routinely pushed the government to facilitate speech by making public property available for First Amendment activities.

The contemporary First Amendment demands much less of the government with respect to making public property available for private speech. To be sure, the government is free to make property available for speech activity, but it has a much narrower obligation to do so—both with respect to the kind of property it must open to expressive activities and with respect to the terms and conditions it imposes on private citizens who wish to use public property for protest.¹⁵⁵ Of course, if a would-be speaker owns the property necessary to speak, and therefore does not require access to government property as a locus for their speech, the Rehnquist and Roberts Courts have aggressively protected the right of private property owners to use their property for expressive purposes.¹⁵⁶

The public forum doctrine was firmly established by the final years of the Burger Court¹⁵⁷ and ossified quickly under the Rehnquist Court.¹⁵⁸ Over forty

¹⁵³ Dr. King gave his iconic *I Have a Dream* speech at the mass outdoor rally on the National Mall—a rally that served as the capstone for this event and constituted a pivotal moment in the nation's long struggle to secure basic civil rights and equal citizenship for all. See OFFICIAL PROGRAM FOR THE MARCH ON WASHINGTON (1963), <https://www.ourdocuments.gov/doc.php?flash=true&doc=96> [https://perma.cc/2BPN-PFR3]; see also Martin Luther King, Jr., *I Have a Dream Address at the Lincoln Memorial* (Aug. 28, 1963), reprinted in MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 217, 217–20 (James Melvin Washington ed., 1986).

¹⁵⁴ See *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 568–75 (1965).

¹⁵⁵ See *United States v. Kokinda*, 497 U.S. 720, 726–27, 737 (1990).

¹⁵⁶ Compare *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994) (invalidating a ban on the placement of lawn signs on private residential property bearing political or ideological messages), with *Kokinda*, 497 U.S. at 727–30 (upholding a postal service regulation banning leafletting on postal service property).

¹⁵⁷ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

¹⁵⁸ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (holding that airport concourses do not constitute public forums and, therefore, government may adopt and apply any reasonable restrictions on speech activity on airport grounds).

years later, calling for the Supreme Court to abandon completely the public forum doctrine is likely to be unsuccessful. Moreover, it is hardly surprising that the federal courts would prefer categorical rules that permit the easy and consistent disposition of litigation that seeks access to government property for speech activity to an open-ended balancing test that requires courts to reconsider the availability of public property for speech activity on a case-by-case and ad hoc basis. Accordingly, calling for a return to the open-ended balancing approach of *Brown v. Louisiana* will not prove to be a successful strategy for making more public property reliably available for First Amendment activities.¹⁵⁹

A more realistic alternative to a wholesale repudiation of the public forum doctrine would entail finding a mechanism for improving on the existing public forum framework. Happily, there are some potential improvements that could shift the burden from would-be protesters to prove a constitutional right of access to public property to the government to establish a clear legal right to deny access to particular property. Indeed, some areas of First Amendment law already work in this fashion—for example, the government generally must prove that the risk of violence associated with speech activity is so clear and present a danger that it justifies silencing an unpopular speaker.¹⁶⁰ We do not allow the government to establish categorical rules that certain kinds of highly unpopular speech may be proscribed because of a risk of unrest or violence; by parity of reasoning we should be more willing to require the government to show that providing access to particular kinds of government property would be unduly disruptive to government operations.

It also bears noting that the rule against silencing an unpopular speaker because of the potential for public disorder, or even violence, also imposes significant financial burdens on the government, on an entirely involuntary basis, and effectively forces the government to expend scarce resources in order to facilitate speech activity in public spaces.¹⁶¹ Police budgets are not infinite and the costs of policing radically unpopular speakers could be quite significant. Yet, under the First Amendment, the government may not invoke the cost of providing protection to unpopular speakers as a basis for requiring them to cease speaking.¹⁶² In this sense, the First Amendment creates a positive duty on the government to facilitate private speech. Moreover, this aspect of the First Amendment constitutes well-settled law.¹⁶³ Access to public property through

¹⁵⁹ See *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

¹⁶⁰ See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam); *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949).

¹⁶¹ See *Williams v. Wallace*, 240 F. Supp. 100, 109 (M.D. Ala. 1965).

¹⁶² See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–36 (1992).

¹⁶³ See *Terminiello*, 337 U.S. at 4; see also *Forsyth Cty.*, 505 U.S. at 133–36 (finding government ordinance basing permit fee on content of message facially invalid); *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969) (invalidating convictions for disorderly conduct based on a hostile crowd reaction to an entirely peaceful protest march and holding that a “peaceful and orderly” march comes within “the sphere of conduct protected by the

a free speech easement is simply another form of involuntary speech subsidy—the question that federal judges must ask and answer is the degree to which government entities should possess discretion to deny this subsidy to would-be speakers.

The main virtue of the pre-public forum doctrine era cases was a functional approach to determining whether public property could be used for First Amendment activities.¹⁶⁴ Rather than relying on the government's (potentially self-serving) labels for particular property or even on the government's declared purpose for owning property, the federal courts would instead consider the kinds of activities the government permitted voluntarily and the consistency, or inconsistency, of speech, assembly, petition, and association-related activities in those spaces. Even if the Supreme Court retains the public forum framework, the question of whether a space constitutes a traditional or designated public forum could be determined using a functional approach, rather than a formalistic historical approach that would exclude many important public spaces from use for protest simply because the spaces did not exist in 1791 (for example, an airport or train station).¹⁶⁵

First Amendment values would be better advanced if more government property were available for use by private citizens seeking to engage their fellow

First Amendment" despite a hostile audience reaction); Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118, 1118, 1122–23 (1949) (describing, discussing, and analyzing the then-"relatively neglected" problem of permitting a hostile audience's reaction to serve as a basis for silencing speech and proposing that speech should not be proscribed if it is otherwise "independently lawful").

¹⁶⁴ See *Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972) (using a functional approach focused on "the nature of a place" to determine whether it may be used for public protest activity). Justice Marshall emphasized that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

¹⁶⁵ See *id.* It also bears noting that Justice Kennedy has argued strongly in favor of using a functional approach to public forum analysis rather than a rigid historical approach. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693–94 (1992) (Kennedy, J., concurring) ("Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat."). Kennedy posited that "the Court's public forum analysis in these cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment." *Id.* at 694. He objected that the majority's approach "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government." *Id.* at 695. In his view, the determination of whether government property constitutes a public forum "must be an objective one, based on the actual, physical characteristics and uses of the property." *Id.* Thus, Justice Kennedy's approach would consider the actual day-to-day uses of government property rather than the label that the government attaches to particular property. Applying this approach, he concluded that an airport concourse constitutes a public forum. *Id.* at 697–703. Justice Kennedy's approach is consistent with the approach of the Warren and Burger Courts in cases like *Brown*, *Pell*, and *Greer*. See *supra* notes 14–25 and accompanying text.

citizens over matters of public concern. A more contextualized, functional approach to identifying public forums would open up more public property for speech activity without forcing federal judges to reinvent the wheel every time a would-be protester seeks access to government property that cannot be regularly used for speech activity without undermining or precluding the government from maintaining its regular operations. I do not propose returning generically to an open-ended balancing exercise—instead, I propose revising the definitional exercise to consider more carefully actual uses of government property rather than the label affixed to a particular place.

To the extent that the government permits property to be used by the public for activities that are not much different from leafletting or fixed pickets, it should not be permitted to close the property to would-be speakers who seek to engage in expressive activity protected under the First Amendment. For example, if a government building features a courtyard generally open to the public, and through which members of the general public may pass, linger, or sit, it seems easy enough to permit someone to linger or sit while wearing a t-shirt with a political message or holding a sign. The disruption caused by someone occupying space within the courtyard while drinking a cup of coffee or reading a newspaper is essentially, if not exactly, the same. Thus, if a government-owned space is otherwise open to the public for one set of activities (i.e., drinking coffee or reading a newspaper), the public space also should be open for speech activity that is no more disruptive.

Declaring public property otherwise open to any and all members of the public to be a nonpublic forum, and thereby closing it to all forms of expressive activity, should not be an available option.¹⁶⁶ The federal courts should deny the government the power to pick and choose arbitrarily what public property will be deemed suitable for speech activity regardless of the actual characteristics, and regular day-to-day uses of the property, that the government actually permits.¹⁶⁷ If the Boston Common is open to those who wish to stroll, exercise, or read, then it should be equally open to those who wish to brandish political signs.¹⁶⁸

On the other hand, and by way of contrast, a city water treatment plant is closed to the public for all purposes and, accordingly, closing it to speech activity would be constitutionally unobjectionable. If the government closes

¹⁶⁶ *But cf.* *Hodge v. Talkin*, 799 F.3d 1145, 1157–62 (D.C. Cir. 2015) (declaring a large plaza in front of the U.S. Supreme Court a “non-public forum” and sustaining, against a First Amendment challenge, a federal law banning all First Amendment activity within the plaza).

¹⁶⁷ *But see id.* at 1160–62 (holding constitutionally irrelevant the Supreme Court’s tolerance of expressive activity on the plaza by lawyers and litigants presenting oral arguments to the Supreme Court, in addition to selective enforcement of the ban with respect to some protests by non-litigants because the Supreme Court’s approach to doling out access to a nonpublic forum need only be “reasonable” and these practices of limited use were not self-evidently unreasonable).

¹⁶⁸ *Cf.* *Davis v. Massachusetts*, 167 U.S. 43, 46–47 (1897) (upholding a ban on protest activity within the Boston Common, even though the property was generally open to members of the public).

property to the public for all purposes, it is far less likely to be engaged in an effort to burden or squelch protected speech activity. When the government targets expressive activity for disfavored treatment, however, the federal courts should react with a healthy degree of skepticism about the government's motives—and their consistency with the First Amendment.¹⁶⁹ If assessing motive seems a difficult task for courts,¹⁷⁰ simply applying a functional approach would avoid difficult exercises in ascertaining the government's purpose in closing public property to speech activity. To state the point more directly, the actual and everyday uses of government property, rather than a government-affixed label or the historical origins of the particular kind of property, should control the First Amendment analysis and outcome.

Second, federal courts should be more receptive to as applied challenges to denials of access to particular property and also to TPM regulations. Even if the government may constitutionally close certain categories of public property to speech activity, federal courts should nevertheless consider whether, on a particular set of facts, the First Amendment requires mandated access for a

¹⁶⁹ See Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1061–64 (2015) (discussing the reasons for applying strict scrutiny to content-based speech regulations, noting that “content-based laws are of greater constitutional concern than content-neutral laws,” and explaining that “strict scrutiny generally applies to content-based laws because the Court is highly suspicious of the proposition that particular messages can cause social harm”). Professor Bhagwat argues that even when a valid regulatory interest seems to justify a content-based speech regulation, such as Los Angeles County, California's ban on the production of so-called bareback pornography, *see id.* at 1044–46, 1070–72, courts should still be skeptical about the government and its actual motives for seeking to suppress speech. *See id.* at 1064 (arguing that even under intermediate scrutiny review of regulations that burden speech “it is important that such scrutiny not be excessively deferential to the government,” with particular consideration of whether “the effect of the law is to completely eliminate particular content, as opposed to merely limit its creation”).

¹⁷⁰ Compare *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (declining to assess Congress's real purposes in enacting a statute when the statute's language bears a clear plain meaning because of the difficulties in ascertaining legislative purpose and explaining that “we have historically assumed that Congress intended what it enacted”), and *Palmer v. Thompson*, 403 U.S. 217, 224–26 (1971) (claiming, contrary to well-established case law, that “no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it” and arguing that “there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters”), with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 540–41 (1993) (explaining that “facial neutrality is not determinative” of a law's constitutionality and holding that a reviewing court must consider “among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body”), and *Hunter v. Underwood*, 471 U.S. 222, 228–32 (1985) (invalidating a facially race-neutral 1901 Alabama state constitutional provision that stripped certain felons of their voting rights because “zeal for white supremacy ran rampant at the convention” that enacted the provision and this improper discriminatory motive rendered the provision inconsistent with the Equal Protection Clause).

particular group of speakers because of a nexus between the speakers and their message and the space at issue.¹⁷¹

Indeed, one could read *Brown v. Louisiana* narrowly as permitting the particular protest in the local library because a silent protest did not disrupt other uses of the library and because the protest targeted the operation of the library on a racially segregated basis.¹⁷² In other words, a different kind of protest, seeking to call attention to a different cause wholly unrelated to the public library, might not enjoy First Amendment protection.¹⁷³ The government's ability to deny access to its property depended on the burden the protest imposed on the government's ability to achieve its objectives and also on the relationship of the speech to the venue.¹⁷⁴ Even if most forms of protest, and most protesters, could not demand to use a public library's circulation desk area for a political protest, the civil rights protesters, engaged in a silent protest of the racially segregated operation of that specific public library, stood on different First Amendment ground.¹⁷⁵

So too, Judge Frank M. Johnson, Jr.'s order in *Williams v. Wallace*¹⁷⁶ plainly takes into account the nature of the protest and the nexus between the forum and the speakers.¹⁷⁷ Even if most protesters could not routinely commandeer a federal highway for a multi-day, fifty-two mile march, the Southern Christian Leadership Conference (SCLC), in response to a massive state-wide effort to suppress the voting rights of African-American citizens, possessed a qualitatively different kind of claim that justified greater access to public property than the First Amendment would ordinarily require.¹⁷⁸ Simply put, a different First Amendment analysis—and outcome—should and did occur.¹⁷⁹

Judge Johnson considered carefully the petitioning cast of the proposed speech activity and the legal responsibility of state and local officials for serious constitutional deprivations of basic civil and political rights before issuing an

¹⁷¹ See generally TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2009).

¹⁷² *Brown v. Louisiana*, 383 U.S. 131, 141–43 (1966).

¹⁷³ See *id.* at 142–43.

¹⁷⁴ See *id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

¹⁷⁷ See *id.* at 106–09.

¹⁷⁸ See KROTOSZYNSKI, *supra* note 78, at 185–207; see also Ronald J. Krotoszynski, Jr., *Could a Selma-Like Protest Happen Today? Probably Not*, L.A. TIMES (Mar. 7, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0308-krotoszynski-selma-march-protest-doctrine-20150308-story.html> [<https://perma.cc/9C9L-MUJ7>].

¹⁷⁹ See KROTOSZYNSKI, *supra* note 78, at 200 (noting that “[t]he proportionality principle permits courts to make rational distinctions between proposed uses of public forums for speech activities,” explaining that this principle “permits most groups to be relegated to less busy corridors but holds out the possibility of using major highways and byways under sufficiently compelling circumstances,” and positing that it “permits courts to match venues for speech activities with the speaker’s need to speak and the community’s need to hear”).

injunctive order permitting the march to proceed as proposed.¹⁸⁰ Both the identity of the speakers and the relationship of the speech to the particular forum factored very heavily into Judge Johnson's First Amendment analysis.¹⁸¹

To be sure, considering a speaker's identity and message does involve content-, and perhaps even viewpoint-, based factors. It might seem counterintuitive to use a speaker- and content-based screen to determine access to public property for speech activity. However, upon more careful reflection, these objections are not fatal flaws and do not doom this approach to granting targeted access to public property to some speakers but not to others. As I have previously argued, "Judge Johnson was correct to recognize enhanced rights of access to public property for petitioning speech seeking a redress of grievances from the government entity being both petitioned and protested against through the same hybrid petitioning activity."¹⁸²

First, and most important, the public forum doctrine already permits the government itself to limit access to public property for speech based on the would-be speaker and her message.¹⁸³ The entire concept of a limited-purpose public forum entails the government creating a forum accessible by some speakers, and for some messages, but not others.¹⁸⁴ If the government may limit access to forums based on the would-be speakers' identities and the content of their proposed speech, and federal courts are competent to assess the fair enforcement of such restrictions, it seems implausible to say that "as applied" access to public property cannot work. If courts are capable of superintending forum access limits in the context of limited-purpose public forums, then they are also capable of considering "as applied" requests for access to nonpublic forums or under terms and conditions that violate otherwise constitutionally valid TPM regulations. The federal courts have not signaled any problems with the creation of limited-purpose public forums; if speaker-based and message-based limits are capable of judicial implementation in this context, then identical considerations in the context of nonpublic forums should be equally feasible.

Second, First Amendment doctrine is rife with content-based distinctions. Pornography and commercial speech receive less robust First Amendment

¹⁸⁰ *Williams*, 240 F. Supp. at 106–11.

¹⁸¹ *See id.* at 106–09.

¹⁸² KROTOSZYNSKI, *supra* note 78, at 186; *see* Ronald J. Krotoszynski, Jr., Essay, *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1414 (1995) (noting that "[a]lthough the specific circumstances that led Judge Johnson to embrace the proportionality principle in 1965 are, thankfully, long gone, the problem of ensuring that adequate public space is available to accommodate meaningful social protest remains" and suggesting that "[p]roperly understood and carefully limited, the proportionality principle can continue to help vindicate democratic values today, just as it did . . . in Selma").

¹⁸³ *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹⁸⁴ *See* *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679, 685 (2010); *Rosenberger*, 515 U.S. at 829.

protection than political speech.¹⁸⁵ In order to apply content-based rules of this sort, federal judges must ascertain the content of the speech and place it within one category or another.¹⁸⁶ If federal courts can determine whether speech is commercial or political in nature,¹⁸⁷ then they are also quite capable of determining whether a nexus exists between a particular government-owned property and a proposed protest that would take place on that property.¹⁸⁸

Suppose, for example, that military police on an army base shoot and kill an unarmed intruder found on base property. Suppose further that allegations of racial bias arise within the community as a possible motive for the shooting. Is it unthinkable that the base commander might have to make base property available for protest activity on these facts, even if the base is not otherwise available as a locus for expressive activities? Moreover, would it vest federal judges with too much discretion to engage in the kind of analysis that would allow a local civil rights organization to stage a march that crosses base property

¹⁸⁵ Compare *Snyder v. Phelps*, 562 U.S. 443, 452–53 (2011) (holding that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection”); and *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (opining that “[t]he First Amendment ‘‘has its fullest and most urgent application’’ to speech uttered during a campaign for political office’’) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)), with *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980) (noting that multiple precedents “have recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech” (internal quotations omitted) and holding that such speech is “therefore accord[ed] a lesser protection . . . than . . . other constitutionally guaranteed expression”), and *Miller v. California*, 413 U.S. 15, 23–24 (1973) (observing that “[t]he First and Fourteenth Amendments have never been treated as absolutes” and upholding the constitutional power of the state and federal governments to regulate, or even proscribe, obscene speech).

¹⁸⁶ See, e.g., *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 513–15 (7th Cir. 2014).

¹⁸⁷ See *id.* at 517–20, 522.

¹⁸⁸ See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 452–56 (1985) (arguing that the federal courts should seek to protect jealously the central “core” of the First Amendment to ensure that it functions effectively as a check on the suppression of dissent—and dissenters—in times of national crisis); William Van Alstyne, Essay, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1640–43, 1646–48 (1996) (arguing that First Amendment doctrine can, and should, be nimble enough to draw meaningful distinctions between different kinds of speech and to afford political speech related to the process of democratic self-government a higher measure of constitutional protection than other kinds of speech). Both Professors Blasi and Van Alstyne argue that courts can, and should, use content-based metrics to afford some speech differential, favorable treatment because the speech relates to the central purposes of the First Amendment. I do not mean to minimize the real risks associated with judicial discretion and the protection of unpopular speakers and speech. Even so, however, if one posits that existing access to public spaces for expressive activity would remain in place, the risks associated with providing enhanced access to public property in some instances should be manageable. Moreover, as previously noted, see *supra* notes 184–87 and accompanying text, existing First Amendment doctrine, particularly the limited-purpose public forum doctrine, already relies on speaker and content-based metrics—but does not seem to cause federal courts serious difficulties with implementation.

without requiring the base to be open to any and all would-be protesters? The answers to these questions are quite obvious—if we truly view freedom of speech as integral to the process of democratic deliberation and government accountability, then a federal court faced with a lawsuit seeking an injunction that orders the base commander to facilitate a protest march on base property should not be resolved with a two-line order that tersely states that a military base is not a public forum.

Finally, one might reasonably ask, in the era of the internet, if silence on the street corner, to use Professor Owen Fiss's wonderful and apt metaphor, really matters.¹⁸⁹ The short answer: It does. A speaker who wishes to use one modality of speech should not be relegated to another; just as the government may not order speakers to engage—or refrain from engaging—in speech featuring a particular viewpoint or content,¹⁹⁰ the First Amendment should also prohibit the government from regulating the particular modality of speech that a would-be speaker may use to communicate her message.¹⁹¹

Other reforms in the application of the TPM doctrine could also help to create and sustain needed breathing room for the exercise of expressive freedoms in public places. The federal courts should apply the content-neutrality requirement in a more demanding fashion and not simply accept the facial neutrality of a speech regulation as sufficient to establish that the regulation passes the first prong of the *Ward* test.¹⁹² In cases like *Hill v. Colorado*,¹⁹³ the federal courts have been highly credulous of government claims that speech regulations were content-neutral, even when the facts and circumstances surrounding the adoption of the TPM regulations strongly suggest a government purpose to silence a particular speaker or message.¹⁹⁴ In other contexts, such as ferreting out discrimination based on race¹⁹⁵ or religious belief,¹⁹⁶ the federal courts make a serious effort to ascertain the real or actual purpose of a facially-neutral enactment.¹⁹⁷ This same methodological approach should be deployed to assess content-neutrality when applying the *Ward* test.¹⁹⁸

¹⁸⁹ Fiss, *supra* note 6, at 1408.

¹⁹⁰ See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972).

¹⁹¹ See *Martin v. City of Struthers*, 319 U.S. 141, 143–45 (1943); *Schneider v. State*, 308 U.S. 147, 162 (1939).

¹⁹² *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989).

¹⁹³ *Hill v. Colorado*, 530 U.S. 703, 723 (2000).

¹⁹⁴ See *id.* at 719–20, 723. The *Hill* majority went so far as to claim that a ban on protest outside abortion clinics was not even a regulation of “speech” but merely of “conduct.” *Id.* at 719 (“Rather, it is a regulation of the places where some speech may occur.”). This approach has the effect of rendering any and all TPM regulations content neutral because they too only seek to regulate “the places where some speech may occur.” *Id.*

¹⁹⁵ *Hunter v. Underwood*, 471 U.S. 222, 228–32 (1985).

¹⁹⁶ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 540–41 (1993).

¹⁹⁷ See, e.g., *Hunter*, 471 U.S. at 228–32.

¹⁹⁸ See KROTOSZYNSKI, *supra* note 78, at 28–30.

Second, the federal courts should press the government to provide an actual reason for the creation and enforcement of TPM regulations—rather than simply accept vague assertions that particular TPM regulations advance an important government interest. In this regard, federal judges should not blithely credit highly generalized invocations of security concerns as a basis for banishing dissent from public spaces.¹⁹⁹ At present, however, courts are inclined to be extremely deferential to government invocations of security and public safety rationales for speech bans on public property and to require very little in the way of “narrow tailoring” to achieve the government’s important or substantial purpose.²⁰⁰

Third, and finally, the ample alternative channels of communication prong of the *Ward* test should take into account whether the available alternative means of communication are likely to permit the would-be speaker to reach the same audience no less reliably, effectively, and efficiently than through a public protest. For example, a protest of a NATO meeting proximate to the meeting venue for a group of NATO officials is far more likely to be heard and seen by NATO officials than a random blog post or Tweet.²⁰¹ At present, however, this aspect of the *Ward* test does not take into account the efficacy of the alternative means of communication in reaching the speaker’s preferred audience.²⁰² As the saying goes, if a tree falls in the forest, and no one sees it, the event might as well not have happened. What is true of trees falling in forests holds doubly true of public protest aimed at engaging the general citizenry to support or oppose particular government policies and actions.²⁰³

These reforms in the application of the *Ward* test for TPM regulations would substantially improve the application of existing doctrine and would materially shift the burden to the government to justify refusals to make public property that admittedly comprises a public forum available for speech activity. However, and as I have argued previously,²⁰⁴ a more general and systematic

¹⁹⁹ See *id.* at 31–50 (discussing the many cases in which the lower federal courts have reflexively credited the government’s claim that draconian limits on public protest were necessary for reasons of public safety and security); see also *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1217–21 (10th Cir. 2007).

²⁰⁰ *Citizens for Peace in Space*, 477 F.3d at 1221 (“While an extremely important government interest does not dictate the result in time, place, and manner cases, the significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis.”).

²⁰¹ See *id.* at 1217–20.

²⁰² See *Bl(a)ck Tea Soc’y v. City of Bos.*, 378 F.3d 8, 13–14 (1st Cir. 2004).

²⁰³ See KROTOSZYNSKI, *supra* note 78, at 34 (“The key doctrinal point here is that the Free Speech and Free Assembly Clauses apparently do not afford *any* protection to a would-be speaker’s interest in speaking to a particular audience in real time, even if he seeks to do so by utilizing a classic traditional public forum, such as a street, side-walk, or park.”); see also Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1682 (2016).

²⁰⁴ See *supra* notes 166–75 and accompanying text.

reorientation of First Amendment theory and doctrine is needed in this important area of law.

Simply put, the Roberts and Rehnquist Courts have been far too solicitous of the government's unsubstantiated claims of managerial necessity—and have credited weak, to the point of spurious, claims that speech bans or TPM regulations are necessary in order for the government to function efficiently. Resetting the balance in favor of greater access to public property for speech activity would not seriously endanger or prevent the government from achieving its legitimate purposes. Nor would it mean that public parks, streets, and sidewalks would devolve into total chaos as protesters commandeered such spaces at will. Instead, adopting such theoretical and doctrinal innovations would help to advance and facilitate broad-based participation in the process of democratic self-government by ordinary people who lack the ability to use their own private property to access the marketplace of ideas.

V. CONCLUSION

The right of ordinary citizens to use public property for First Amendment activities has declined over time from the 1980s to the present.²⁰⁵ During the Warren and Burger Court eras, the federal courts were much more willing to require the government to facilitate private speech by ordering access to government-owned property for First Amendment activities.²⁰⁶ The First Amendment gave rise to a positive right of access—a free speech easement—to public property.²⁰⁷ Beginning in the early 1980s, and accelerating into the 1990s, the Supreme Court retreated from this commitment in favor of granting the government considerably broader discretion to manage public property as it thinks best.²⁰⁸

To be sure, the Supreme Court is unlikely to jettison the public forum doctrine at this point in time. Simply put, too much water has flowed under the doctrinal bridge. The perfect, however, should not be the enemy of the merely good—or in this instance, the better. It would be possible to modify the operation of the public forum doctrine to shift the balance away from unfettered government discretion to grant or withhold access to public property toward a model in which the government has to shoulder a higher burden of justification for refusing to make public property available for protest activity. Defining “public forums” in functional terms, rather than historical terms, would

²⁰⁵ See Zick, *Expressive Topography*, *supra* note 14, at 447.

²⁰⁶ See, e.g., *Williams v. Wallace*, 240 F. Supp. 100, 107–09 (M.D. Ala. 1965).

²⁰⁷ Zick, *Expressive Topography*, *supra* note 14, at 445.

²⁰⁸ See *Hodge v. Talkin*, 799 F.3d 1145, 1150, 1165 (D.C. Cir. 2015) (rejecting a First Amendment challenge to a federal statute that bans protest on the large, elevated marble plaza located in front of the United States Supreme Court because of “the government’s long-recognized interests in preserving decorum in the area of a courthouse and in assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure”).

constitute a good first start.²⁰⁹ In addition, the federal courts should signal a greater willingness to consider “as applied” challenges both to denials of access to nonpublic forums and also to otherwise-valid TPM regulations of public forums.

If freedom of speech is a necessary condition for the maintenance of democratic self-government, then government, at all levels, should be required to incur costs and inconveniences in order to facilitate democratic deliberation among the citizenry. Just as the government cannot limit voting rights to those with a minimum amount of property, the government should not have the discretion to leave access to the political marketplace of ideas entirely to private market ordering. I do not suggest that the government should be able to limit, or level down, the ability of those with property to use their property for speech activity. But, citizens who wish to protest government policies, like Cindy Sheehan,²¹⁰ should not be forced to purchase real property in order to do so effectively.

It is possible to imagine a limited, affirmative right to use government property for speech and to adopt a doctrinal framework that fully honors this baseline commitment to safeguarding democratic deliberation. The Warren and Burger Courts’ open-ended balancing approach might have vested too much discretion with trial courts and undoubtedly produced inconsistent results in cases presenting similar facts. Even so, it would be possible to move toward an Aristotelean “virtuous mean”²¹¹ between the extremes of treating the government as if it were just another private property owner and permitting citizens to appropriate government property for First Amendment activities whenever and wherever they choose.

In sum, under the Rehnquist and Roberts Courts, the balance has shifted too far in favor of government discretion to deny would-be speakers access to public property for protest. A course correction that places a higher burden of justification on the government for resisting free speech easements on public property would better serve our core commitment to freedom of expression as an essential condition for democratic self-government to flourish.

²⁰⁹ See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693–96, 701–03 (1992) (Kennedy, J., concurring) (rejecting a categorical, historical approach to analyzing whether government property constitutes a public forum and proposing instead an open-ended, contextual, functional approach that would consider the actual day-to-day uses of particular property).

²¹⁰ See *supra* note 2.

²¹¹ See ARISTOTLE, *NICOMACHEAN ETHICS* 42–53, ¶¶ 1106a5–1109b (Terence Irwin trans., 1985); see also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 286–88 (1996) (discussing the Aristotelian notion of the virtuous mean that lies between problematic extreme forms of behavior that reflect either a surfeit or a shortage of a particular character trait).

