Chapter X: Public Forum Doctrine

When First Amendment activities take place on government property, the nature of that property is a crucial element in First Amendment analysis. Government property is divided into three types of property: traditional public forums, designated forums, often referred to as limited public forums, and the remainder, which are classified as nonforums. The right to exercise First Amendment rights varies with the way the government property is classified.

The concept of what are now called traditional public forums was first suggested in *Hague v. CIO*, 307 U.S. 496 (1939), a case involving an effort by labor organizers to provide the public in Jersey City, New Jersey with information about the National Labor Relations Act. The application of local ordinances prevented the organizers from distributing leaflets in public parks and on city streets and holding meetings in public places. In its decision finding the city's actions to be a violation of the constitution and finding the ordinances void on their face, the Court stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. *Id.* at 515-16 (Roberts, J.).

After recognizing the importance of the use of the streets and parks, the Supreme Court next considered cases in which it confronted the issue of how to distinguish between constitutional and unconstitutional limits on the use of the streets and parks. Over time, it also addressed the issue of access rights to other types of government property. The Court eventually divided government property into three categories: traditional public forums, such as streets, sidewalks, and parks, designated or limited public forums, and nonforums. It also identified the ways in which each of these categories could be regulated as well as how to identify into which category particular government property belonged.

A. Traditional Public Forums

1. UNITED STATES v. GRACE
461 U.S. 171 (1983)

JUSTICE WHITE delivered the opinion of the Court.

In this case we must determine whether 40 U.S.C. § 13k, which prohibits, among other things, the "display [of] any flag, banner, or device designed or adapted to bring into public notice

any party, organization, or movement" in the United States Supreme Court building and on its grounds, violates the First Amendment.

I

In May 1978 appellee Thaddeus Zywicki, standing on the sidewalk in front of the Supreme Court building, distributed leaflets to passerby. The leaflets were reprints of a letter to the editor of the Washington Post from a United States Senator concerning the removal of unfit judges from the bench. A Supreme Court police officer approached Zywicki and told him, accurately, that Title 40 of the United States Code prohibited the distribution of leaflets on the Supreme Court grounds, which includes the sidewalk. Zywicki left.

In January 1980 Zywicki again visited the sidewalk in front of the Court to distribute pamphlets containing information about forthcoming meetings and events concerning "the oppressed peoples of Central America." Zywicki again was approached by a Court police officer and was informed that the distribution of leaflets on the Court grounds was prohibited by law. The officer indicated that Zywicki would be arrested if the leafletting continued. Zywicki left.

Zywicki reappeared in February 1980 on the sidewalk in front of the Court and distributed handbills concerning oppression in Guatemala. Zywicki had consulted with an attorney concerning the legality of his activities and had been informed that the Superior Court for the District of Columbia had construed the statute that prohibited leafletting, 40 U.S.C. § 13k, to prohibit only conduct done with the specific intent to influence, impede, or obstruct the administration of justice. Zywicki again was told by a Court police officer that he would be subject to arrest if he persisted in his leafletting. Zywicki complained that he was being denied a right that others were granted, referring to the newspaper vending machines located on the sidewalk. Nonetheless, Zywicki left the grounds.

Around noon on March 17, 1980, appellee Mary Grace entered upon the sidewalk in front of the Court and began to display a four foot by two and a half foot sign on which was inscribed the verbatim text of the First Amendment. A Court police officer approached Grace and informed her that she would have to go across the street if she wished to display the sign. Grace was informed that Title 40 of the United States Code prohibited her conduct and that if she did not cease she would be arrested. Grace left the grounds.

On May 13, 1980, Zywicki and Grace filed the present suit in the United States District Court for the District of Columbia. They sought an injunction against continued enforcement of 40 U.S.C. § 13k and a declaratory judgment that the statute was unconstitutional on its face. The District Court dismissed the complaint for failure to exhaust administrative remedies. The Court of Appeals determined that the District Court's dismissal was erroneous and went on to strike down § 13k on its face as an unconstitutional restriction on First Amendment rights in a public place. The Government appealed from the Court of Appeals' judgment. We noted probable jurisdiction.

II

Section 13k prohibits two distinct activities: it is unlawful either "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," or "to display therein

any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Each appellee appeared individually on the public sidewalks to engage in expressive activity, and it goes without saying that the threat of arrest to which each appellee was subjected was for violating the prohibition against the display of a "banner or device." Accordingly, our review is limited to the latter portion of the statute. Likewise, the controversy presented by appellees concerned their right to use the public sidewalks surrounding the Court building for the communicative activities they sought to carry out, and we shall address only whether the proscriptions of § 13k are constitutional as applied to the public sidewalks.

Our normal course is first to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." We agree with the United States that the statute covers the particular conduct of Zywicki or Grace and that it is therefore proper to reach the constitutional question involved in this case.

The statutory ban is on the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U.S.C. § 13k. It is undisputed that Grace's picket sign containing the text of the First Amendment falls within the description of a "flag, banner, or device." Although it is less obvious, it is equally uncontested that Zywicki's leaflets fall within the proscription as well.

We also accept the Government's contention, not contested by appellees, that almost any sign or leaflet carrying a communication, including Grace's picket sign and Zywicki's leaflets, would be "designed or adapted to bring into public notice [a] party, organization or movement."

III

There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment. It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will. Although whether the property has been "generally opened to the public" is a factor to consider in determining whether the government has opened its property to the use of the people for communicative purposes, it is not determinative of the question. We have regularly rejected the assertion that people who wish "to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." There is little doubt that in some circumstances the

government may ban the entry on to public property that is not a "public forum" of all persons except those who have legitimate business on the premises. The government, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."

IV

It is argued that the Supreme Court building and grounds fit neatly within the description of nonpublic forum property. Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. Property is not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours. Under this view it would be necessary only to determine that the restrictions imposed by § 13k are reasonable in light of the use to which the building and grounds are dedicated and that there is no discrimination on the basis of content. We need not make that judgment at this time, however, because § 13k covers the public sidewalks as well as the building and grounds inside the sidewalks. As will become evident, we hold that § 13k may not be applied to the public sidewalks.

The prohibitions imposed by § 13k technically cover the entire grounds of the Supreme Court as defined in 40 U.S.C. § 13p. That section describes the Court grounds as extending to the curb of each of the four streets enclosing the block on which the building is located. Included within this small geographical area, therefore, are not only the building, the plaza and surrounding promenade, lawn area, and steps, but also the sidewalks. The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave. In *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981), we stated that "Congress . . . may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums. . . ." The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property. The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be

treated as such for First Amendment purposes.

V

The Government submits that § 13k qualifies as a reasonable time, place, and manner restriction which may be imposed to restrict communicative activities on public forum property such as sidewalks. The argument is that the inquiry should not be confined to the Supreme Court grounds but should focus on "the vicinity of the Supreme Court" or "the public places of Washington, D.C." Viewed in this light, the Government contends that there are sufficient alternative areas within the relevant forum, such as the streets around the Court or the sidewalks across those streets to permit § 13k to be considered a reasonable "place" restriction having only a minimal impact on expressive activity. We are convinced, however, that the section, which totally bans the specified communicative activity on the public sidewalks around the Court grounds, cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests that may be thought to undergird § 13k. Our reasons for this conclusion will become apparent below, where we decide that § 13k, insofar as its prohibitions reach to the public sidewalks, is unconstitutional because it does not sufficiently serve those public interests that are urged as its justification.

Section 13k was part of an 11-section statute, enacted in 1949, "[r]elating to the policing of the building and grounds of the Supreme Court of the United States." The occasion for its passage was the termination of the practice by District of Columbia authorities of appointing Supreme Court guards as special policemen for the District. This action left the Supreme Court police force without authority to make arrests and enforce the law in the building and on the grounds of the Court. The Act, which was soon forthcoming, was modeled on the legislation relating to the Capitol grounds. It authorizes the appointment by the Marshal of special officers "for duty in connection with the policing of the Supreme Court Building and grounds and adjacent streets." Sections 2-6 of the Act prohibit certain kinds of conduct in the building or grounds. Section 6, codified as 40 U.S.C. § 13k, is at issue here. Other sections authorize the Marshal to issue regulations, provide penalties for violations of the Act or regulations, and authorize the Court's special police to make arrests for violation of the Act's prohibitions or of any law of the United States occurring within the building and grounds and on the adjacent streets. Section 11 of the Act, 13 U.S.C. § 13p, defines the limits of the Court's grounds as including the sidewalks surrounding the building.

Based on its provisions and legislative history, it is fair to say that the purpose of the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum. Section 6, 40 U.S.C. § 13k, was one of the provisions apparently designed for these purposes. At least, no special reason was stated for its enactment.

We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes. There is no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way

interfered with the orderly administration of the building or other parts of the grounds. As we have said, the building's perimeter sidewalks are indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here and that § 13k forbids. A total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city. Accordingly, § 13k cannot be justified on this basis.

The United States offers another justification for § 13k that deserves our attention. It is said that the federal courts represent an independent branch of the Government and that their decisionmaking processes are different from those of the other branches. Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups. Neither, the Government urges, should it appear to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court. Hence, we are asked to hold that Congress was quite justified in preventing the conduct in dispute here from occurring on the sidewalks at the edge of the Court grounds.

As was the case with the maintenance of law and order on the Court grounds, we do not discount the importance of this proffered purpose for § 13k. But, again, we are unconvinced that the prohibitions of § 13k that are at issue here sufficiently serve that purpose to sustain its validity insofar as the public sidewalks on the perimeter of the grounds are concerned. Those sidewalks are used by the public like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city. We seriously doubt that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street.

We thus perceive insufficient justification for § 13k's prohibition of carrying signs, banners, or devices on the public sidewalks surrounding the building. We hold that under the First Amendment the section is unconstitutional as applied to those sidewalks.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I would hold 40 U.S.C. § 13k unconstitutional on its face. The statute in no way distinguishes the sidewalks from the rest of the premises, and excising the sidewalks from its purview does not bring it into conformity with the First Amendment. Visitors to this Court do not lose their First Amendment rights at the edge of the sidewalks. As we stated in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), "[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."

I see no reason why the premises of this Court should be exempt from this basic principle. It would be ironic indeed if an exception to the Constitution were to be recognized for the very

institution that has the chief responsibility for protecting constitutional rights. I would apply to the premises of this Court the same principle that this Court has applied to other public places.

Viewed in this light, 40 U.S.C. § 13k is plainly unconstitutional on its face. The statute is not a reasonable regulation of time, place, and manner for it applies at all times, covers the entire premises, and, as interpreted by the Court, proscribes even the handing out of a leaflet and, presumably, the wearing of a campaign button as well.

Nor does the statute merely forbid conduct that is incompatible with the primary activity being carried out in this Court. The statute is not limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice. The statute at issue imposes a blanket prohibition on the "display" of "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." The application of the statute does not depend upon whether the flag, banner, or device in any way concerns a case before this Court. So sweeping a prohibition is scarcely necessary to protect the operations of this Court, and in my view cannot constitutionally be applied either to the Court grounds or to the areas inside the Court building that are open to the public.

I would therefore hold the prohibition unconstitutional on its face. We have repeatedly recognized that a statute which sweeps within its ambit a broad range of expression protected by the First Amendment should be struck down on its face. "The existence of such a statute results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). I would not leave visitors to this Court subject to the continuing threat of imprisonment if they dare to exercise their First Amendment rights once inside the sidewalks.

Note: The next case, *United States v. Kokinda*, 497 U.S. 720 (1990), raises the same issue as in *Grace*: when is a sidewalk not a sidewalk for public forum purposes? While the plurality in *Kokinda* concludes that the sidewalk at issue is not a public forum, the dissent disagrees with that assessment. *Kokinda* is included here even though the sidewalk at issue is treated as a nonforum because it raises the same issue as *Grace*, but reaches a different result.

2. UNITED STATES v. KOKINDA
497 U.S. 720 (1990)

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which CHIEF JUSTICE REHNQUIST and JUSTICES WHITE and SCALIA join.

We are called upon in this case to determine whether a United States Postal Service regulation that prohibits "soliciting alms and contributions" on postal premises violates the First Amendment. We hold the regulation valid as applied.

I
The respondents in this case, Marsha B. Kokinda and Kevin E. Pearl, were volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to

the organization's newspaper, and distribute literature addressing a variety of political issues. The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property. The District Court for the District of Maryland described the layout of the post office as follows:

"The Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose."

During the several hours that respondents were at the post office, postal employees received between 40 and 50 complaints regarding their presence. The Bowie postmaster asked respondents to leave, which they refused to do. Postal inspectors arrested respondents, seizing their table as well as their literature and other belongings. Respondent Kokinda was fined $50 and sentenced to 10 days' imprisonment; respondent Pearl was fined $100 and received a 30-day suspended sentence under that provision.

Respondents appealed their convictions to the District Court, asserting that application of § 232.1(h)(1) violated the First Amendment. The District Court affirmed their convictions, holding that the postal sidewalk was not a public forum and that the Postal Service's ban on solicitation is reasonable. The United States Court of Appeals for the Fourth Circuit reversed.

II

Solicitation is a recognized form of speech protected by the First Amendment. Under our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.

The Government's ownership of property does not automatically open that property to the public. It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage [its] internal operation[s]."

The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or "arbitrary, capricious, or invidious."

"[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. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum."

Respondents contend that although the sidewalk is on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's

entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis.

The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office. The postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk.

The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city. The dissent would designate all sidewalks open to the public as public fora. That, however, is not our settled doctrine. The location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.

Postal entryways may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment. The Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin boards. No Postal Service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but a regulation prohibiting disruption, and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that "the government does not create a public forum by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Even conceding that the forum here has been dedicated to some First Amendment uses, regulation of the reserved nonpublic uses would still require application of the reasonableness test.

Thus, the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." Indeed, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."

III

The Government asserts that it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the Postal Service's business. We agree. "Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a

hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor."

The dissent avoids determining whether the sidewalk is a public forum because it believes the regulation, does not pass muster even under the reasonableness standard applicable to nonpublic fora. In concluding that § 232.1(h) is unreasonable, the dissent relies heavily on the fact that the Service permits other types of potentially disruptive speech on a case-by-case basis. The dissent's criticism seems to be that solicitation is not receiving the same treatment by the Postal Service that other forms of speech receive. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission. The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all. In the end, its approach permits it to sidestep the single issue before us: Is the Government's prohibition of solicitation on postal sidewalks unreasonable?

Whether or not the Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. This description of the disruption and delay caused by solicitation rings of "common-sense," which is sufficient to uphold a regulation under reasonableness review.

Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "nothing suggests the Postal Service intended to discourage one viewpoint and advance another. By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.'"

This regulation passes constitutional muster under the Court's usual test for reasonableness. We conclude that the Postal Service's regulation of solicitation is reasonable as applied.

JUSTICE KENNEDY, concurring in the judgment.

I agree that the postal regulation reviewed here does not violate the First Amendment. Because my analysis differs in essential respects from that in JUSTICE O'CONNOR's opinion, a separate statement of my views is required.

It is not necessary to make a precise determination whether this sidewalk and others like it are public or nonpublic forums; in my view, the postal regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression.

"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.'" The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises.

The Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions. Given the Postal Service's past experience with expressive activity on its property, I cannot reject its judgment that inperson solicitation deserves different treatment from alternative forms of solicitation and expression.

The Postal Service regulation, narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint, is narrowly drawn to serve an important governmental interest, and permits respondents to engage in a broad range of activity to express their views, including the solicitation of financial support. For these reasons, I agree with JUSTICE O'CONNOR that the Postal Service regulation is consistent with the protections of the First Amendment, and concur in the judgment of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join and with whom JUSTICE BLACKMUN joins as to Part I, dissenting.

Today the Court holds that a United States Postal Service regulation prohibiting persons from "soliciting alms and contributions" on postal premises does not violate the First Amendment as applied to members of a political advocacy group who solicited contributions from a sidewalk outside the entrance to a post office. A plurality finds that the sidewalk is not a public forum and that the Postal Service regulation is valid because it is "reasonable." JUSTICE KENNEDY concludes that although the sidewalk might well be a public forum, the regulation is permissible as applied because it is a content-neutral time, place, or manner restriction on protected speech.

Neither of these conclusions is justified. I think it clear that the sidewalk in question is a "public forum" and that the Postal Service regulation does not qualify as a content-neutral time, place, or manner restriction. Moreover, even if I did not regard the sidewalk in question as a public forum, I could not subscribe to the plurality's position that respondents can validly be excluded from the sidewalk, because I believe that the distinction drawn by the postal regulation between solicitation and virtually all other kinds of speech is not a reasonable one. For these reasons, I respectfully dissent.

I

The plurality begins its analysis with the determination that the sidewalk in question is not a "public forum." Our decisions in recent years have identified three categories of forums in which expression might take place on government property: (1) traditional, "quintessential public forums" -- "places which by long tradition or by government fiat have been devoted to assembly and debate," such as "streets and parks"; (2) "limited-purpose" or state created semipublic forums opened "for use by the public as a place for expressive activity," such as university meeting facilities or school board meetings; and (3) nonpublic forums or public property "which is not by tradition or designation a forum for public communication." Ironically, these public forum categories -- originally conceived of as a way of preserving First Amendment rights-- have been used in some of our recent decisions as a means of upholding restrictions on speech. I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand. Indeed, the Court's contemporary use of public forum doctrine has been roundly criticized by commentators.

Today's decision confirms my doubts about the manner in which we have been using public forum analysis. Although the plurality recognizes that public sidewalks are, as a general matter, public forums, the plurality insists, with logic that is both strained and formalistic, that the specific sidewalk at issue is not a public forum. This conclusion is unsupportable. "Streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the governmental agency housed in the building, or focused upon issues unrelated to the government. No doctrinal pigeonholing or multipart test can obscure this evident conclusion.

The plurality maintains that the postal sidewalk is not a traditional public forum because it "was constructed solely to provide for the passage of individuals engaged in postal business" and "leads only from the parking area to the front door of the post office." This reasoning is flawed.

Quintessential examples of a "public forum" are those open spaces -- streets, parks, and sidewalks -- to which the public generally has unconditional access and which "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." Public parks, streets, and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations. As a result, expressive activity is compatible with the normal use of a public forum and can be accommodated simply by applying the communication-neutral rules used to regulate other, non-speech-related conduct

on the premises. For the most part, on streets and sidewalks, including the single-purpose sidewalk at issue here, communication between citizens can be permitted according to the principle that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion."

The wooden distinctions drawn today by the plurality have no basis in our prior cases and, furthermore, are in apparent contradiction to the plurality's admission that "the mere physical characteristics of the property cannot dictate forum analysis." It is irrelevant that the sidewalk at issue may have been constructed only to provide access to the Bowie Post Office. Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. Hence, why the sidewalk was built is not salient.

Nor is it important that the sidewalk runs only between the parking lot and post office entrance. The existence of a public forum does not turn on a particularized factual inquiry into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare.

The architectural idiosyncrasies of the Bowie Post Office are thus not determinative of the question whether the public area around it constitutes a public forum. Rather, that the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum.

Content-based restrictions on speech occurring in either a public forum or in a limited-purpose public forum are invalid unless they are narrowly drawn to serve a compelling interest. Government "may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." I do not think the postal regulation can pass muster under either standard. Although I agree that the Government has an interest in preventing the obstruction of post office entrances and the disruption of postal functions, there is no indication that respondents interfered with postal business in any way.

I agree with the Court of Appeals that the postal regulation is invalid as applied in this case because it "prohibits all solicitation anywhere on postal service property. It sweeps an entire category of expressive activity off a public forum solely in the interest of administrative convenience. It does not attempt to limit nondisruptive solicitation to a time, place, and manner consistent with post office operations; and it does not require that evidence of disruption be shown."

JUSTICE KENNEDY contends that the postal regulation may be upheld as a content-neutral time, place, or manner regulation. But the regulation is not content neutral; indeed, it is tied explicitly to the content of speech. If a person on postal premises says to members of the public, "Please support my political advocacy group," he cannot be punished. If he says,

"Please contribute $10," he is subject to criminal prosecution. His punishment depends on what he says.

II

Even if I did not believe that the sidewalk outside the Bowie Post Office was a public forum, I nevertheless could not agree with the plurality that the postal regulation at issue today is reasonable as applied to respondents. The Postal Service does not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag-burning.

This inconsistent treatment renders the prohibition on solicitation unreasonable. The Postal Service undeniably has a legitimate interest in avoiding disruption of its postal facilities and ensuring that its buildings remain accessible to the public. But the Government interest in preventing disruption of post office business or harassment of postal patrons is addressed by the direct prohibitions on such conduct in existing postal rules and the Service has not explained satisfactorily why these provisions are inadequate to deal with disruption caused by solicitation.

III

Some postal patrons may thank the Court for sparing them the inconvenience of having to encounter solicitors with whose views they do not agree. And postal officials can rest assured in the knowledge that they can silence an entire category of expression without having to apply the existing postal regulations governing disruptive conduct or having to craft more narrow time, place, or manner rules. Perhaps only three groups of people will be saddened by today's decision. The first includes solicitors, who, in a farce of the public forum doctrine, will henceforth be permitted at postal locations to solicit the public only from such inhospitable locations as the busy four-lane highway that runs in front of the Bowie Post Office. The next to be disappointed will be those members of the public who would prefer not to be deprived of the views of solicitors at postal locations. The last group, unfortunately, includes all of us who are conscious of the importance of the First Amendment.

3. FORSYTH COUNTY, GEORGIA v. NATIONALIST MOVEMENT
505 U.S. 123 (1992)

JUSTICE BLACKMUN delivered the opinion of the Court, joined by STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ.

In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First and Fourteenth Amendments are violated by an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.

I

Petitioner Forsyth County is a primarily rural Georgia county approximately 30 miles northeast of Atlanta. It has had a troubled racial history. In 1912, in one month, its entire

African-American population, over 1,000 citizens, was driven systematically from the county in the wake of the rape and murder of a white woman and the lynching of her accused assailant. Seventy-five years later, in 1987, the county population remained 99% white.

Spurred by this history, Hosea Williams, an Atlanta city councilman and civil rights personality, proposed a Forsyth County "March Against Fear and Intimidation" for January 17, 1987. Approximately 90 civil rights demonstrators attempted to parade in Cumming, the county seat. The marchers were met by members of the Forsyth County Defense League (an independent affiliate of respondent, The Nationalist Movement), of the Ku Klux Klan, and other Cumming residents. In all, some 400 counterdemonstrators lined the parade route, shouting racial slurs. Eventually, the counterdemonstrators, dramatically outnumbering police officers, forced the parade to a premature halt by throwing rocks and beer bottles.

Williams planned a return march the following weekend. It developed into the largest civil rights demonstration in the South since the 1960's. On January 24, approximately 20,000 marchers joined civil rights leaders, United States Senators, Presidential candidates, and an Assistant United States Attorney General in a parade and rally. The 1,000 counterdemonstrators on the parade route were contained by more than 3,000 state and local police and National Guardsmen. Although there was sporadic rock throwing and 60 counterdemonstrators were arrested, the parade was not interrupted. The demonstration cost over $670,000 in police protection, of which Forsyth County apparently paid a small portion.

"As a direct result" of these two demonstrations, the Forsyth County Board of Commissioners enacted Ordinance 34. The ordinance recites that it is "to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." Ordinance 34 was amended to provide that every permit applicant "'shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place.'" In addition, the county administrator was empowered to "'adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.'"

In January 1989, respondent The Nationalist Movement proposed to demonstrate in opposition to the federal holiday commemorating the birthday of Martin Luther King, Jr. In Forsyth County, the Movement sought to "conduct a rally and speeches for one and a half to two hours" on the courthouse steps on a Saturday afternoon. The county imposed a $100 fee. The fee did not include any calculation for expenses incurred by law enforcement authorities, but was based on 10 hours of the county administrator's time in issuing the permit. The county administrator testified that the cost of his time was deliberately undervalued and that he did not charge for the clerical support involved in processing the application.

The Movement did not pay the fee and did not hold the rally. Instead, it instituted this action in the United States District Court for the Northern District of Georgia. We granted certiorari to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum.

II

Respondent mounts a facial challenge to the Forsyth County ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable. This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in "the archetype of a traditional public forum" is a prior restraint on speech. Although there is a "heavy presumption" against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.

Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted.

In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. The ordinance can apply to any activity on public property -- from parades, to street corner speeches, to bike races -- and the fee assessed may reflect the county's police and administrative costs. Whether or not, in any given instance, the fee would include any or all of the county's administrative and security expenses is decided by the county administrator.

In this case, according to testimony at the District Court hearing, the administrator based the fee on his own judgment of what would be reasonable. Although the county paid for clerical support and staff as an "expense incident to the administration" of the permit, the administrator testified that he chose in this instance not to include that expense in the fee. The

administrator also attested that he had deliberately kept the fee low by undervaluing the cost of the time he spent processing the application. Even if he had spent more time on the project, he claimed, he would not have charged more. He further testified that, in this instance, he chose not to include any charge for expected security expense.

The administrator also explained that the county had imposed a fee pursuant to a permit on two prior occasions. The year before, the administrator had assessed a fee of $100 for a permit for the Movement. The administrator testified that he charged the same fee the year in question here, although he did not state that the Movement was seeking the same use of county property or that it required the same amount of administrative time to process. The administrator also once charged bike-race organizers $25 to hold a race on county roads, but he did not explain why processing a bike-race permit demanded less administrative time than processing a parade permit or why he had chosen to assess $25 in that instance. At oral argument in this Court, counsel for Forsyth County stated that the administrator had levied a $5 fee on the Girl Scouts for an activity on county property. Finally, the administrator testified that in other cases the county required neither a permit nor a fee for activities in other county facilities or on county land.

Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any "narrowly drawn, reasonable and definite standards," guiding the hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time -- or even whether to charge at all -- is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled discretion. As construed by the county, the ordinance often requires that the fee be based on the content of the speech. The county envisions that the administrator, in appropriate instances, will assess a fee to cover "the cost of necessary and reasonable protection of persons participating in or observing said . . . activity." In order to assess accurately the cost of security for parade participants, the administrator "'must necessarily examine the content of the message that is conveyed,'" estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

Although petitioner agrees that the cost of policing relates to content, it contends that the ordinance is content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification "'has nothing to do with content.'"

The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

CHIEF JUSTICE REHNQUIST, with whom WHITE, SCALIA, and THOMAS, JJ., join, dissenting.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), we confronted a state statute which required payment of a license fee of up to $300 to local governments for the right to parade in the public streets. The Supreme Court of New Hampshire had construed the provision as requiring that the amount of the fee be adjusted based on the size of the parade, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." Under the state court's construction, the fee provision was "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute, saying: "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated."

I believe that the decision in *Cox* squarely controls the disposition of the question presented in this case, and I therefore would explicitly hold that the Constitution does not limit a parade license fee to a nominal amount.

Instead of deciding the question on which we granted certiorari, the Court concludes that the county ordinance is facially unconstitutional because it places too much discretion in the hands of the county administrator and forces parade participants to pay for the cost of controlling those who might oppose their speech. But the lower courts did not pass on these issues. The Court unnecessarily reaches out to interpret the ordinance on its own at this stage, even though there are no lower court factual findings on the scope or administration of the ordinance. Because there are no factual findings, I would not decide at this point whether the ordinance fails for lack of adequate standards to guide discretion or for incorporation of a "heckler's veto," but would remand the case to the lower courts to consider these issues.

B. Designated Public Forums and Nonforums

1. LEHMAN v. CITY OF SHAKER HEIGHTS
418 U.S. 298 (1974)

JUSTICE BLACKMUN announced the judgment of the Court and an opinion joined by BURGER, C.J. and WHITE and REHNQUIST, JJ.

This case presents the question whether a city which operates a public rapid transit system and

sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office.

In 1970, petitioner Harry J. Lehman was a candidate for the office of State Representative to the Ohio General Assembly for District 56. The district includes the city of Shaker Heights. On July 3, 1970, petitioner sought to promote his candidacy by purchasing car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. The general election was scheduled for November 3. Petitioner's proposed copy contained his picture and read:

"HARRY J. LEHMAN IS OLD-FASHIONED! ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT

"State Representative - District 56 [X] Harry J. Lehman."

Advertising space on the city's transit system is managed by respondent Metromedia, Inc., as exclusive agent under contract with the city. The agreement between the city and Metromedia provides:

> "15. . . . The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder."

When petitioner applied for space, he was informed by Metromedia that, although space was then available, the management agreement with the city did not permit political advertising. The system, however, accepted ads from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public-service oriented groups. There was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles.

When petitioner did not succeed in his effort to have his copy accepted, he sought declaratory and injunctive relief in the state courts of Ohio without success. We granted certiorari in order to consider the important First and Fourteenth Amendment question the case presented.

It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication "regardless of the primary purpose for which the area is dedicated."

We disagree. In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), Mr. Justice Brandeis, in speaking for a unanimous Court, recognized that "there is a difference which justifies the classification between display advertising and that in periodicals or newspapers." In *Packer* the Court upheld a Utah statute that made it a misdemeanor to advertise cigarettes on "'any bill board, street car sign, street car, placard,'" but exempted dealers' signs on their places of business and cigarette advertising "'in any newspaper, magazine, or periodical.'" *Id.* at 107. The Court found no equal protection violation. It reasoned that viewers of billboards and streetcar signs had no "choice or volition" to observe such advertising and had the message "thrust upon them by all the arts and devices that skill can produce. . . . The radio can be

turned off, but not so the billboard or street car placard." *Id.* at 110. "The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (DOUGLAS, J., dissenting). In such situations, "[t]he legislature may recognize degrees of evil and adapt its legislation accordingly."

These situations are different from the traditional settings where First Amendment values inalterably prevail. Lord Dunedin, in *M'Ara v. Magistrates of Edinburgh*, 1913. Sess. Cas. 1059, 1073-1074, said: "[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." *Public Utilities Comm'n v. Pollak*, 343 U.S. at 464-65.

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. Here, the city has decided that "[p]urveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers." This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops. Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of

favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

MR. JUSTICE DOUGLAS, concurring in the judgment.

If the streetcar or bus were a forum for communication akin to that of streets or public parks, considerable problems would be presented. But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.

In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

Buses are not recreational vehicles used for Sunday chautauquas as a public park might be used on holidays for such a purpose; they are a practical necessity in our urban centers. I have already stated this view in my dissent in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 469 (1952), involving the challenge by some passengers to the practice of broadcasting radio programs over loudspeakers in buses and streetcars: "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen." There is no difference when the message is visual. In each the viewer or listener is captive.

Since I do not believe that petitioner has any constitutional right to spread his message before this captive audience, I concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICES STEWART, MARSHALL, and POWELL join, dissenting.

In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

The message Lehman sought to convey concerning his candidacy for public office was unquestionably protected by the First Amendment. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The fact that the message is proposed as a paid advertisement does not

diminish the impregnable shelter afforded by the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

Of course, not even the right of political self-expression is completely unfettered. Accordingly, we have repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion.

Focusing upon the propriety of regulating "place," the city of Shaker Heights attempts to justify its ban against political advertising by arguing that the interior advertising space of a transit car is an inappropriate forum for political expression and debate. To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous. For example, "[t]here may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one . . . would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put." The determination of whether a particular type of public property or facility constitutes a "public forum" requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other. Thus, the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted.

Applying these principles, the Court has long recognized the public's right of access to public streets and parks for expressive activity. More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, but denied similar status to the curtilage of a jailhouse, on the ground that jails are built for security and thus need not be opened to the general public, *Adderley v. Florida*, 385 U.S. 39 (1966).

In the circumstances of this case, however, we need not decide whether public transit cars must be made available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum.

The plurality opinion, however, contends that as long as the city limits its advertising space to "innocuous and less controversial commercial and service oriented advertising," no First Amendment forum is created. I find no merit in that position. Certainly, noncommercial public service advertisements convey messages of public concern and are clearly protected by the First Amendment. And while it is possible that commercial advertising may be accorded less First Amendment protection than speech concerning political and social issues, it is "speech" nonetheless, often communicating information and ideas found by many persons to

be controversial. There can be no question that commercial advertisements, when skillfully employed, are powerful vehicles for the exaltation of commercial values. Once such messages have been accepted and displayed, the existence of a forum for communication cannot be gainsaid. To hold otherwise, and thus sanction the city's preference for bland commercialism and noncontroversial public service messages over "uninhibited, robust, and wide-open" debate on public issues, would reverse the traditional priorities of the First Amendment.

Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content. *See, e.g.*, *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96.

That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden.

To insure that subject matter or content is not the sole basis for discrimination among forum users, all selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral "time, place and manner" regulations, narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself. The city has failed to discharge that heavy burden in the present case.

The Court's special vigilance is triggered in this case because of the city's undisputed ban against political advertising in its transit cars. Commercial and public service advertisements are routinely accepted for display, while political messages are absolutely prohibited. Few examples are required to illustrate the scope of the city's policy and practice. For instance, a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate, such as Lehman, would be barred from informing the public about his candidacy, qualifications for office, or position on particular issues. These, and other examples, make perfectly clear that the selective exclusion of political advertising is not the product of evenhanded application of neutral "time, place, and manner" regulations. Rather, the operative - and constitutionally impermissible - distinction is the message on the sign. That conclusion

is not dispelled by any of the city's justifications for selectively excluding political advertising.

The city contends that its ban against political advertising is bottomed upon its solicitous regard for "captive riders" of the rapid transit system, who are "forced to endure the advertising thrust upon [them]." Whatever merit the city's argument might have in other contexts, it has a hollow ring in the present case, where the city has voluntarily opened its rapid transit system as a forum for communication.

The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers.

Moreover, even if it were possible to draw a manageable line between controversial and noncontroversial messages, the city's practice of censorship for the benefit of "captive audiences" still would not be justified. This is not a case where an unwilling or unsuspecting rapid transit rider is powerless to avoid messages he deems unsettling. The advertisements accepted by the city and Metromedia are not broadcast over loudspeakers in the transit cars. Rather, all advertisements accepted for display are in written form. Transit passengers are not forced or compelled to read any of the messages. Should passengers chance to glance at advertisements they find offensive, they can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

The city's remaining justification is equally unpersuasive. The city argues that acceptance of "political advertisements would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City." Clearly, such ephemeral concerns do not provide the city with carte blanche authority to exclude an entire category of speech from a public forum. "The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board." The city has introduced no evidence demonstrating that its rapid transit passengers would naively think otherwise.

Moreover, neutral regulations, which do not distinguish among advertisements on the basis of subject matter, can be narrowly tailored to allay the city's fears. The impression of city endorsement can be dispelled by requiring disclaimers to appear prominently on the face of every advertisement. And while problems of accommodating all potential advertisers may be vexing at times, the appearance of favoritism can be avoided by the evenhanded regulation of time, place, and manner for all advertising, irrespective of subject matter.

2. PERRY EDUCATION ASSN. v. PERRY LOCAL EDUCATORS' ASSN.
460 U.S. 37 (1983)

JUSTICE WHITE delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined.

Perry Education Association is the duly elected exclusive bargaining representative for the teachers of the Metropolitan School District of Perry Township, Ind. A collective-bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mail-boxes in the Perry Township schools. The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival teacher group, violates the First and Fourteenth Amendments.

I

The Metropolitan School District of Perry Township, Ind., operates a public school system of 13 separate schools. Each school building contains a set of mailboxes for the teachers. Interschool delivery by school employees permits messages to be delivered rapidly to teachers in the District. The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages, and individual school building principals have allowed delivery of messages from various private organizations.

Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the School District and apparently had equal access to the interschool mail system. In 1977, PLEA challenged PEA's status as *de facto* bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law.

The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions. Following the election, PEA and the School District negotiated a labor contract in which the School Board gave PEA "access to teachers' mailboxes in which to insert material" and the right to use the interschool mail delivery system to the extent that the School District incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA "acting as the representative of the teachers" and went on to stipulate that these access rights shall not be granted to any other "school employee organization" - a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their school employer." The PEA contract with these provisions was renewed in 1980 and is presently in force.

The exclusive-access policy applies only to use of the mail-boxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA

may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers by word of mouth, telephone, or the United States mail. Moreover, under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge. While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

PLEA and two of its members filed this action against PEA and individual members of the Perry Township School Board. Plaintiffs contended that PEA's preferential access to the internal mail system violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. They sought injunctive and declaratory relief and damages. Upon cross-motions for summary judgment, the District Court entered judgment for the defendants.

The Court of Appeals for the Seventh Circuit reversed. The court acknowledged that PEA had "legal duties to the teachers that PLEA does not have" but reasoned that "[w]ithout an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." PEA now seeks review of this judgment.

III

The primary question presented is whether the First Amendment is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school and on sidewalks outside, *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. "[N]owhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972). The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "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." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly

drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981).

A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

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." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. at 129. In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 129-30.

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum: "We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses." On this point the parties agree. Nor do the parties dispute that, as the District Court observed, the "normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to the teachers." The internal mail system, at least by policy, is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school-connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA,

Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.

Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

PLEA also points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective-bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry School District teachers. PEA and PLEA each represented its own members. Therefore the School District's policy of allowing both organizations to use the school mail facilities simply reflected the fact that both unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the School District's preservation of the facilities for school-related business, and did not constitute creation of a public forum.

Because the school mail system is not a public forum, the School District had no "constitutional obligation per se to let any organization use the school mail boxes." In the Court of Appeals' view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the District's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA

does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 221 (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."

The Court of Appeals accorded little or no weight to PEA's special responsibilities. In its view these responsibilities, while justifying PEA's access, did not justify denying equal access to PLEA. The Court of Appeals would have been correct if a public forum were involved here. But the internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may - without further justification - restrict use to those who participate in the forum's official business.

Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United States mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. The variety and type of alternative modes of access present here compare favorably with those in other nonpublic forum cases where we have upheld restrictions on access. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 827 -28 (1974) (prison inmates may communicate with media by mail and through visitors).

IV

When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction. The judgment of the Court of Appeals is Reversed.

JUSTICE BRENNAN, with whom MARSHALL, POWELL, and STEVENS, JJ., join, dissenting.

The Court today holds that an incumbent teachers' union may negotiate a collective-bargaining agreement with a school board that grants the incumbent access to teachers' mailboxes and to the interschool mail system and denies such access to a rival union. Because the exclusive-access provision in the collective-bargaining agreement amounts to viewpoint discrimination and fails to advance any substantial state interest, I dissent.

I

Based on a finding that the interschool mail system is not a "public forum," the Court states that the respondents have no right of access to the system, and that the School Board is free "to make distinctions in access on the basis of subject matter and speaker identity" if the distinctions are "reasonable in light of the purpose which the forum at issue serves." According to the Court, the petitioner's status as the exclusive bargaining representative provides a reasonable basis for the exclusive-access policy.

The Court fundamentally misperceives the essence of the respondents' claims and misunderstands the thrust of the Court of Appeals' well-reasoned opinion. This case does not involve an "absolute access" claim. It involves an "equal access" claim. As such it does not turn on whether the internal school mail system is a "public forum." In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court. There is another line of cases, closely related to those implicating the prohibition against viewpoint discrimination, that have addressed the First Amendment principle of subject-matter, or content neutrality. Generally, the concept of content neutrality prohibits the government from choosing the subjects that are appropriate for public discussion. The content-neutrality cases frequently refer to the prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship. But unlike the viewpoint-discrimination concept, which is used to strike down government restrictions on speech by particular speakers, the content-neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area. The content-neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination.

We have invoked the prohibition against content discrimination to invalidate government restrictions on access to public forums. We also have relied on this prohibition to strike down restrictions on access to a limited public forum. Finally, we have applied the doctrine of content neutrality to government regulation of protected speech in cases in which no restriction of access to public property was involved.

Admittedly, this Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), in *Greer v. Spock*, 424 U.S. 828 (1976), and in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). All three cases involved an unusual forum, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum. These cases provide some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums. They provide no support, however, for the notion that government, once it has opened up government property for discussion of specific subjects, may discriminate among viewpoints on those topics. Although *Greer*, *Lehman*, and *Jones* permitted content-based restrictions,

none of the cases involved viewpoint discrimination. All of the restrictions were viewpoint-neutral.

Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not. This prohibition is implicit in the *Mosley* line of cases and in those cases in which we have approved content-based restrictions on access to government property that is not a public forum. We have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

Against this background, it is clear that the Court's approach to this case is flawed. By focusing on whether the interschool mail system is a public forum, the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination. This case does not involve a claim of an absolute right of access to the forum to discuss any subject whatever. If it did, public forum analysis might be relevant. This case involves a claim of equal access to discuss a subject that the Board has approved for discussion in the forum. In essence, the respondents are not asserting a right of access at all; they are asserting a right to be free from discrimination. The critical inquiry, therefore, is whether the Board's grant of exclusive access to the petitioner amounts to prohibited viewpoint discrimination.

II

The Court addresses only briefly the respondents' claim that the exclusive-access provision amounts to viewpoint discrimination. In rejecting this claim, the Court starts from the premise that the school mail system is not a public forum and that, as a result, the Board has no obligation to grant access to the respondents. The Court then suggests that there is no indication that the Board intended to discourage one viewpoint and to advance another. In the Court's view, the exclusive-access policy is based on the status of the respective parties rather than on their views. The Court then states that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." According to the Court, "[t]hese distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property."

As noted, whether the school mail system is a public forum or not the Board is prohibited from discriminating among viewpoints on particular subjects. Moreover, whatever the right of public authorities to impose content-based restrictions on access to government property that is a nonpublic forum, once access is granted to one speaker to discuss a certain subject access may not be denied to another speaker based on his viewpoint. Regardless of the nature of the forum, the critical inquiry is whether the Board has engaged in prohibited viewpoint discrimination.

The Court responds to the allegation of viewpoint discrimination by suggesting that there is no indication that the Board intended to discriminate and that the exclusive-access policy is based on the parties' status rather than on their views. In this case, for the reasons discussed below, the intent to discriminate can be inferred from the effect of the policy, which is to deny an effective channel of communication to the respondents, and from other facts in the case. In addition, the petitioner's status has nothing to do with whether viewpoint discrimination in fact has occurred. If anything, the petitioner's status is relevant to the question of whether the exclusive-access policy can be justified, not to whether the Board has discriminated among viewpoints.

Addressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive-access policy discriminates on the basis of viewpoint. The Court of Appeals found that "[t]he access policy adopted by the Perry schools favors a particular viewpoint on labor relations in the Perry schools: the teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [the respondents]." This assessment of the effect of the policy is eminently reasonable. Moreover, certain other factors strongly suggest that the policy discriminates among viewpoints.

On a practical level, the only reason for the petitioner to seek an exclusive-access policy is to deny its rivals access to an effective channel of communication. No other group is explicitly denied access to the mail system. In fact, as the Court points out, many other groups have been granted access to the system. Apparently, access is denied to the respondents because of the likelihood of their expressing points of view different from the petitioner's on a range of subjects. The very argument the petitioner advances in support of the policy, the need to preserve labor peace, also indicates that the access policy is not viewpoint-neutral.

In short, the exclusive-access policy discriminates against the respondents based on their viewpoint. The Board has agreed to amplify the speech of the petitioner, while repressing the speech of the respondents based on the respondents' point of view. This sort of discrimination amounts to censorship and infringes the First Amendment rights of the respondents. In this light, the policy can survive only if the petitioner can justify it.

III

In assessing the validity of the exclusive-access policy, the Court of Appeals subjected it to rigorous scrutiny. The court pursued this course after a determination that "no case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue." The Court of Appeals' analysis is persuasive. In light of the fact that viewpoint discrimination implicates core First Amendment values, the exclusive-access policy can be sustained "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."

The petitioner attempts to justify the exclusive-access provision based on its status as the exclusive bargaining representative for the teachers and on the State's interest in efficient communication between collective-bargaining representatives and the members of the unit. The petitioner's status and the State's interest in efficient communication are important

considerations. They are not sufficient, however, to sustain the exclusive-access policy.

As the Court of Appeals pointed out, the exclusive-access policy is both "overinclusive and underinclusive" as a means of serving the State's interest in the efficient discharge of the petitioner's legal duties to the teachers. The policy is overinclusive because it does not strictly limit the petitioner's use of the mail system to performance of its special legal duties and underinclusive because the Board permits outside organizations with no special duties to the teachers, or to the students, to use the system. The Court of Appeals also suggested that even if the Board had attempted to tailor the policy more carefully by denying outside groups access to the system and by expressly limiting the petitioner's use of the system to messages relating to its official duties, "the fit would still be questionable, for it might be difficult - both in practice and in principle - effectively to separate 'necessary' communications from propaganda." The Court of Appeals was justly concerned with this problem, because the scope of the petitioner's "legal duties" might be difficult, if not impossible, to define with precision.

Putting aside the difficulties with the fit between this policy and the asserted interests, the policy is invalid "because it furthers no discernible state interest." While the Board may have a legitimate interest in granting the petitioner access to the system, it has no legitimate interest in making that access exclusive by denying access to the respondents. As the Court of Appeals stated: "Without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone." In this case, for the reasons discussed below, there is no independent reason for denying access to the respondents.

The petitioner also argues, and the Court agrees, that the exclusive-access policy is justified by the State's interest in preserving labor peace. As the Court of Appeals found, there is no evidence on this record that granting access to the respondents would result in labor instability. In addition, there is no reason to assume that the respondents' messages would be any more likely to cause labor discord when received by members of the majority union than the petitioner's messages would when received by the respondents. Moreover, it is noteworthy that both the petitioner and the respondents had access to the mail system for some time prior to the representation election. There is no indication that this policy resulted in disruption of the school environment.

Although the State's interest in preserving labor peace in the schools in order to prevent disruption is unquestionably substantial, merely articulating the interest is not enough to sustain the exclusive-access policy in this case. There must be some showing that the asserted interest is advanced by the policy. In the absence of such a showing, the exclusive-access policy must fall.

Because the grant to the petitioner of exclusive access to the internal school mail system amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and because the petitioner has failed to show that the policy furthers any substantial state interest, the policy must be invalidated as violative of the First Amendment.

IV

In order to secure the First Amendment's guarantee of freedom of speech and to prevent

distortions of "the market-place of ideas," see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), governments generally are prohibited from discriminating among viewpoints on issues within the realm of protected speech. In this case the Board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive-access policy, the policy must be held to be constitutionally infirm.

3. CORNELIUS v. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
473 U.S. 788 (1985)

JUSTICE O'CONNOR delivered the opinion of the Court, in which BURGER, C.J., and WHITE and REHNQUIST JJ., joined.

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at federal employees.

I
The CFC is an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees. At all times relevant to this litigation, participating organizations confined their fundraising activities to a 30-word statement submitted by them for inclusion in the Campaign literature. Volunteer federal employees distribute to their co-workers literature describing the Campaign and the participants along with pledge cards. Contributions may take the form of either a payroll deduction or a lump-sum payment made to a designated agency or to the general Campaign fund. Undesignated contributions are distributed on the local level by a private umbrella organization to certain participating organizations. Designated funds are paid directly to the specified recipient. Through the CFC, the Government employees contribute in excess of $100 million to charitable organizations each year.

The CFC is a relatively recent development. Prior to 1957, charitable solicitation in the federal workplace occurred on an ad hoc basis. Federal managers received requests from dozens of organizations seeking endorsements and the right to solicit contributions from federal employees at their worksites. Eventually, the increasing number of entities seeking access to federal buildings and the multiplicity of appeals disrupted the work environment and confused employees who were unfamiliar with the groups seeking contributions.

In 1957, President Eisenhower established the forerunner of the Combined Federal Campaign to bring order to the solicitation process and to ensure truly voluntary giving by federal employees. One of the principal goals of the plan was to minimize the disturbance of federal employees while on duty.

Four years after this initial effort, President Kennedy abolished the advisory committee and ordered the Chairman of the Civil Service Commission to oversee fundraising by "national voluntary health and welfare agencies and such other national voluntary agencies as may be

appropriate" in the solicitation of contributions from all federal employees. Only tax-exempt, nonprofit charitable organizations that were supported by contributions from the public and that provided direct health and welfare services to individuals were eligible to participate in the CFC.

Respondents in this case are the NAACP Legal Defense and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights under Law, and the Natural Resources Defense Council. Each of the respondents attempts to influence public policy through one or more of the following means: political activity, advocacy, lobbying, or litigation on behalf of others.

President Reagan took several steps to restore the CFC to what he determined to be its original purpose. In 1982, the President issued Executive Order No. 12353 to replace the 1961 Executive Order which had established the CFC. The new Order retained the original limitation to "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate," and delegated to the Director of the Office of Personnel Management the authority to establish criteria for determining appropriateness. Shortly thereafter, the President amended Executive Order No. 12353 to specify the purposes of the CFC and to identify groups whose participation would be consistent with those purposes. Exec. Order No. 12404 (1984). The Order limited participation to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families," and specifically excluded those "[agencies] that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."

Respondents brought this action challenging their threatened exclusion under the new Executive Order. They argued that the denial of the right to seek designated funds violates their First Amendment right to solicit charitable contributions.

II

The issue presented is whether respondents have a First Amendment right to solicit contributions that was violated by their exclusion from the CFC. To resolve this issue we must first decide whether solicitation in the context of the CFC is speech protected by the First Amendment, for, if it is not, we need go no further. Assuming that such solicitation is protected speech, we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic. Finally, we must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard. Applying this analysis, we find that respondents' solicitation is protected speech occurring in the context of a nonpublic forum and that the Government's reasons for excluding respondents from the CFC appear, at least facially, to satisfy the reasonableness standard. We express no opinion on the question whether petitioner's explanation is merely a pretext for viewpoint discrimination. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Charitable solicitation of funds has been recognized by this Court as a form of protected

speech. Notwithstanding the significant distinctions between inperson solicitation and solicitation in the abbreviated context of the CFC, we find that the latter deserves First Amendment protection. The brief statements in the CFC literature directly advance the speaker's interest in informing readers about its existence and its goals. Moreover, an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views. Although Government restrictions on the length and content of the request are relevant to ascertaining the Government's intent as to the nature of the forum created, they do not negate the finding that the request implicates interests protected by the First Amendment.

The conclusion that the solicitation which occurs in the CFC is protected speech merely begins our inquiry. Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. Recognizing that the Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock*, 424 U.S. 828, 836 (1976), the 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. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."

To determine whether the First Amendment permits the Government to exclude respondents from the CFC, we must first decide whether the forum consists of the federal workplace, as petitioner contends, or the CFC, as respondents maintain. Having defined the relevant forum, we must then determine whether it is public or nonpublic in nature.

We agree with respondents that the relevant forum for our purposes is the CFC. In defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property. For example, *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an "internal mail system" lacks a physical situs. Here, as in *Perry Education Assn.*, respondents seek access to a particular means of communication. Consistent with the approach taken in prior cases, we find that the CFC, rather than the federal

workplace, is the forum.

Having identified the forum as the CFC, we must decide whether it is nonpublic or public in nature. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), we found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. The policy evidenced a clear intent to create a public forum. Additionally, we noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum. Similarly, the Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. In *Perry Education Assn.*, we found that the School District's internal mail system was not a public forum. In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted. Similarly, the evidence in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), revealed that the city intended to limit access to the advertising spaces on city transit buses. In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations and jailhouse grounds do not constitute public fora.

Here the parties agree that neither the CFC nor the federal workplace is a traditional public forum. Respondents argue, however, that the Government created a limited public forum for use by all charitable organizations to solicit funds from federal employees. Petitioner contends, and we agree, that neither its practice nor its policy is consistent with an intent to designate the CFC as a public forum open to all tax-exempt organizations. In 1980, an estimated 850,000 organizations qualified for tax-exempt status. In contrast, only 237 organizations participated in the 1981 CFC of the National Capital Area. The Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. Although the record does not show how many organizations have been denied permission throughout the 24-year history of the CFC, there is no evidence suggesting that the granting of the requisite permission is merely ministerial. Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a

public forum.

Nor does the history of the CFC support a finding that the Government was motivated by an affirmative desire to provide an open forum for charitable solicitation in the federal workplace when it began the Campaign. The historical background indicates that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property. The Government did not create the CFC 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.

In light of the Government policy in creating the CFC and its practice in limiting access, we conclude that the CFC is a nonpublic forum.

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Petitioner maintains that the purpose of the CFC is to provide a means for traditional health and welfare charities to solicit contributions in the federal workplace, while at the same time maximizing private support of social programs that would otherwise have to be supported by Government funds and minimizing costs to the Federal Government by controlling the time that federal employees expend on the Campaign. Petitioner posits that excluding agencies that attempt to influence the outcome of political elections or the determination of public policy is reasonable in light of this purpose. First, petitioner contends that there is likely to be a general consensus among employees that traditional health and welfare charities are worthwhile, as compared with the more diverse views concerning the goals of organizations like respondents. Limiting participation to widely accepted groups is likely to contribute significantly to employees' acceptance of the Campaign and consequently to its ultimate success. In addition, because the CFC is conducted largely through the efforts of federal employees during their working hours, any controversy surrounding the CFC would produce unwelcome disruption. Finally, the President determined that agencies seeking to affect the outcome of elections or the determination of public policy should be denied access to the CFC in order to avoid the reality and the appearance of Government favoritism or entanglement with particular viewpoints. In such circumstances, petitioner contends that the decision to deny access to such groups was reasonable.

In respondents' view, the reasonableness standard is satisfied only when there is some basic incompatibility between the communication at issue and the principal activity occurring on the Government property. Respondents contend that the purpose of the CFC is to permit solicitation by groups that provide health and welfare services. By permitting such solicitation to take place in the federal workplace, respondents maintain, the Government has concluded

that such activity is consistent with the activities usually conducted there. Because respondents are seeking to solicit such contributions and their activities result in direct, tangible benefits to the groups they represent, the Government's attempt to exclude them is unreasonable. Respondents reject petitioner's justifications on the ground that they are unsupported by the record.

Based on the present record, we conclude that respondents may be excluded from the CFC. The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. Even if some incompatibility with general expressive activity were required, the CFC would meet the requirement because it would be administratively unmanageable if access could not be curtailed in a reasonable manner. Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. Rarely will a nonpublic forum provide the only means of contact with a particular audience. Here the speakers have access to alternative channels, including direct mail and in-person solicitation outside the workplace, to solicit contributions from federal employees.

The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances. Here the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum.

On this record, the Government's posited justifications for denying respondents access to the CFC appear to be reasonable in light of the purpose of the CFC. The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination. While we accept the reasonableness of the justifications offered by petitioner for excluding advocacy groups from the CFC, those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view.

Petitioner contends that controversial groups must be eliminated from the CFC to avoid disruption and ensure the success of the Campaign. As noted, we agree that these are facially neutral and valid justifications for exclusion from the nonpublic forum created by the CFC. Nonetheless, the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers. In addition, petitioner maintains that limiting CFC participation to organizations that provide direct health and welfare services to needy persons is necessary to achieve the goals of the CFC as set forth in Executive Order 12404. Although this concern is also sufficient to provide reasonable grounds for excluding certain groups from the CFC, respondents offered some evidence to cast doubt on its genuineness. Organizations that do not provide direct health and welfare services, such

as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee, have been permitted to participate in the CFC. Although there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored, the issue whether the Government excluded respondents because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court. We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

I agree with the Court that the Combined Federal Campaign (CFC) is not a traditional public forum. I also agree with the Court that our precedents indicate that the Government may create a "forum by designation" (or, to use the term our cases have adopted, a "limited public forum") by allowing public property that traditionally has not been available for assembly and debate to be used as a place for expressive activity by certain speakers or about certain subjects. I cannot accept, however, the Court's circular reasoning that the CFC is not a limited public forum because Government intended to limit the forum to a particular class of speakers. Nor can I agree with the Court's conclusion that distinctions the Government makes between speakers in defining the limits of a forum need not be narrowly tailored and necessary to achieve a compelling governmental interest. Finally, I would hold that the exclusion of the several respondents from the CFC was, on its face, viewpoint-based discrimination. Accordingly, I dissent.

The Court recognizes that its decisions regarding the right of a citizen to engage in expressive activity on public property generally have divided public property into three categories -- public forums, limited public forums, and nonpublic forums. The Court also concedes, as it must, that "a public forum created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects" is a limited public forum. It nevertheless goes on to find that the CFC is not a limited public forum precisely because the "Government's consistent policy has been to limit participation in the CFC" to certain speakers. Because the Government intended to exclude some speakers from the CFC, the Court continues, the Government may exclude any speaker from the CFC on any "reasonable" ground, except viewpoint discrimination. In essence, the Court today holds that the First Amendment's guarantee of free speech and assembly, a "fundamental principle of the American government," reduces to this: when the Government acts as the holder of public property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint.

The Court's analysis transforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited-public-forum concept of all its meaning.

Not only does the Court err in labeling the CFC a nonpublic forum without first engaging in a

compatibility inquiry, but it errs as well in reasoning that the CFC is not a limited public forum because the Government permitted only "limited discourse," rather than "intentionally opening" the CFC for "public discourse." That reasoning is at odds with the cases in which the Court has found public property to be a limited public forum. Just as the Government's "consistent policy has been to limit participation in the CFC to 'appropriate' voluntary agencies and to require agencies seeking admission to obtain permission" from the relevant officials, the theater in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), limited the use of its facilities to "clean, healthful entertainment which will make for the upbuilding of a better citizenship" and required productions wishing to use the theater to obtain permission of the relevant officials. Under the Court's reasoning, therefore, the theater in *Southeastern Promotions* would not have been a limited public forum. Similarly, the university meeting rooms in *Widmar v. Vincent*, 454 U.S. 263 (1981), despite the Court's disclaimer, would not have been a limited public forum by the Court's reasoning, because the University had a policy of "selective access" whereby only registered nonreligious student groups, not religious student groups or the public at large, were allowed to meet in the rooms.

Nor does the Court's reasoning find support in those cases where the Court has rejected the claim that a particular property was a limited public forum. In *Perry*, for example, the Court assumed, arguendo, that by allowing groups such as the Cub Scouts to use its mail system, the school might have created a limited public forum for such organizations, even though the school clearly had no intent to open up the mail system for general "public discourse."

The Court's analysis empties the limited-public-forum concept of meaning and collapses the three categories of public forum, limited public forum, and nonpublic forum into two. The Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum.

Even if I were to agree with the Court's determination that the CFC is a nonpublic forum, or even if I thought that the Government's exclusion of respondents from the CFC was necessary and narrowly tailored to serve a compelling governmental interest, I still would disagree with the Court's disposition, because I think the eligibility criteria, which exclude charities that "seek to influence . . . the determination of public policy," is on its face viewpoint based. Petitioner contends that the criteria are viewpoint neutral because they apply equally to all "advocacy" groups regardless of their "political or philosophical leanings." The relevant comparison, however, is not between the individual organizations that make up the group excluded, but between those organizations allowed access to the CFC and those denied such access.

By devoting its resources to a particular activity, a charity expresses a view about the manner in which charitable goals can best be achieved. Charities working toward the same broad goal, such as "improved health," may have a variety of views about the path to that goal. Some of the "health services" charities participating in the 1982 National Capital Area CFC, for example, obviously believe that they can best achieve "improved health care" through medical research; others obviously believe that their resources are better spent on public education; others focus their energies on detection programs; and still others believe the goal is best achieved through direct care for the sick. Those of the respondents concerned with the goal of

improved health, on the other hand, obviously think that the best way to achieve that goal is by changing social policy, creating new rights for various groups in society, or enforcing existing rights through litigation, lobbying, and political activism. That view cannot be communicated through the CFC, according to the Government's eligibility criteria. Instead, Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint based, so I see no reason to remand for a determination of whether the eligibility criteria are a "facade" for viewpoint-based discrimination.

JUSTICE STEVENS, dissenting.

The scholarly debate between JUSTICE O'CONNOR and JUSTICE BLACKMUN concerning the categories of public and quasi-public fora is an appropriate sequel to many of the First Amendment cases decided during the past decade. I am somewhat skeptical about the value of this analytical approach in the actual decisional process. At least in this case, I do not find the precise characterization of the forum particularly helpful in reaching a decision.

Everyone on the Court agrees that the exclusion of "advocacy" groups from the Combined Federal Campaign (CFC) is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups. Moreover, everyone also recognizes that the evidence in the record gives rise to at least an inference that "the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." The problem presented by the case is whether that inference is strong enough to support the entry of a summary judgment in favor of respondents.

My study of the case has persuaded me that the Court of Appeals correctly affirmed the entry of summary judgment in favor of respondents. I am persuaded that each of the three reasons advanced in support of denying advocacy groups a right to participate in a request for designated contributions is wholly without merit. In sum, the reasoning set forth in JUSTICE BLACKMUN's dissenting opinion persuades me that the judgment should be affirmed.

4. MINNESOTA VOTERS ALLIANCE v. MANSKY
138 S. Ct. 1876 (2018)

Chief Justice Roberts delivered the opinion of the Court joined by KENNEDY, THOMAS, GINSBURG, ALITO, KAGAN, and GORSUCH, JJ.

Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

Today, Americans going to their polling places on Election Day expect to wait in a line, briefly interact with an election official, enter a private voting booth, and cast an anonymous ballot. Little about this ritual would have been familiar to a voter in the mid-to-late nineteenth century. For one thing, voters typically deposited privately prepared ballots at the polls instead

of completing official ballots on-site. These pre-made ballots often took the form of "party tickets" — printed slates of candidate selections, often distinctive in appearance, that political parties distributed to their supporters and pressed upon others around the polls. The physical arrangement confronting the voter was also different. The polling place often consisted simply of a "voting window" through which the voter would hand his ballot to an election official situated in a separate room with the ballot box. As a result of this arrangement, "the actual act of voting was usually performed in the open," frequently within view of interested onlookers. The room containing the ballot boxes was "usually quiet and orderly," but "[t]he public space outside the window ... was chaotic." Electioneering of all kinds was permitted.

By the late nineteenth century, States began implementing reforms to address these vulnerabilities and improve the reliability of elections. Between 1888 and 1896, nearly every State adopted the secret ballot. Because voters now needed to mark their state-printed ballots on-site and in secret, voting moved into a sequestered space where the voters could "deliberate and make a decision in . . . privacy." In addition, States enacted "viewpoint-neutral restrictions on election-day speech" in the immediate vicinity of the polls. Today, all 50 States and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day.

Minnesota's such law contains three prohibitions, only one of which is challenged here. The first sentence of §211B.11(1) forbids any person to "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated" to "vote for or refrain from voting for a candidate or ballot question." The second sentence prohibits the distribution of "political badges, political buttons, or other political insignia to be worn at or about the polling place." The third sentence—the "political apparel ban"—states that a "political badge, political button, or other political insignia may not be worn at or about the polling place."

There is no dispute that the political apparel ban applies only within the polling place, and covers articles of clothing and accessories with "political insignia" upon them. Minnesota election judges—temporary government employees working the polls on Election Day—have the authority to decide whether a particular item falls within the ban. If a voter shows up wearing a prohibited item, the election judge is to ask the individual to conceal or remove it. If the individual refuses, the election judge must allow him to vote, while making clear that the incident "will be recorded and referred to appropriate authorities." Violators are subject to an administrative process before the Minnesota Office of Administrative Hearings, which may issue a reprimand or impose a civil penalty. The maximum penalty is a $300 fine.

Petitioner Minnesota Voters Alliance (MVA) is a nonprofit organization that "seeks better government through election reforms." Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other like-minded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups—calling themselves "Election Integrity Watch" (EIW)—planned to have supporters wear buttons to the polls printed with the words "Please I. D. Me," a picture of an eye, and a telephone number

and web address for EIW. (Minnesota law does not require individuals to show identification to vote.) One of the individual plaintiffs also planned to wear a "Tea Party Patriots" shirt.

In response to the lawsuit, officials for Hennepin and Ramsey Counties distributed to election judges an "Election Day Policy," providing guidance on the enforcement of the political apparel ban. The Minnesota Secretary of State also distributed the Policy to election officials. The Policy specified that examples of apparel within the ban "include, but are not limited to":

"• Any item including the name of a political party in Minnesota, such as the Republican, [Democratic-Farmer-Labor], Independence, Green or Libertarian parties.
• Any item including the name of a candidate at any election.
• Any item in support of or opposition to a ballot question at any election.
• Issue oriented material designed to influence or impact voting (including specifically the 'Please I. D. Me' buttons).
• Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)."

As alleged in the plaintiffs' amended complaint and supporting declarations, some voters associated with EIW ran into trouble with the ban on Election Day. One individual was asked to cover up his Tea Party shirt. Another refused to conceal his "Please I. D. Me" button, and an election judge recorded his name and address for possible referral. And petitioner Cilek—who was wearing the same button and a T-shirt with the words "Don't Tread on Me" and the Tea Party Patriots logo—was twice turned away from the polls altogether, then finally permitted to vote after an election judge recorded his information.

Back in court, MVA and the other plaintiffs (now joined by Cilek) argued that the ban was unconstitutional both on its face and as applied to their apparel. MVA, Cilek, and Jeffers (hereinafter MVA) petitioned for review of their facial First Amendment claim only. We granted certiorari.

Minnesota's ban on wearing any "political badge, political button, or other political insignia" plainly restricts a form of expression within the protection of the First Amendment. But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." In a nonpublic forum, on the other hand—a space that "is not by tradition or designation a forum for public communication"—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the

speaker’s view."

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, "no less than a private owner of property," retains the "power to preserve the property under its control for the use to which it is lawfully dedicated." "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Accordingly, our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is "a special enclave, subject to greater restriction." Rules strictly govern who may be present, for what purpose, and for how long.

We therefore evaluate MVA's First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker's political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota's ban on political apparel is "reasonable in light of the purpose served by the forum."

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point is this Court's decision in *Burson*, which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. Under the Tennessee law—much like Minnesota's buffer-zone provision—no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or "display . . . campaign posters, signs or other campaign materials" within the restricted zone.

That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee's determination, supported by overwhelming consensus among the States and "common sense," that a campaign-free zone outside the polls was "necessary" to secure the advantages of the secret ballot and protect the right to vote.

We see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Casting a vote is a weighty civic act, akin to a jury's return of a verdict. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.

To be sure, our decisions have noted the "nondisruptive" nature of expressive apparel in more mundane settings. But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their

government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand. But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs." Under a literal reading of those definitions, a button or T-shirt merely imploring others to "Vote!" could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit "any conceivably 'political' message" or cover "all 'political' speech, broadly construed." Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place."

At the same time, the State argues that the category of "political" apparel is not limited to campaign apparel. After all, the reference to "campaign material" in the first sentence of the statute—describing what one may not "display" in the buffer zone as well as inside the polling place—implies that the distinct term "political" should be understood to cover a broader class of items. As the State's counsel explained to the Court, Minnesota's law "expand[s] the scope of what is prohibited from campaign speech to additional political speech."

We consider a State's "authoritative constructions" in interpreting a state law. But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems.

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy—which it continues to hold out as authoritative guidance regarding implementation of the statute. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating "support of or opposition to a ballot question."

But the next example—"[i]ssue oriented material designed to influence or impact voting"—raises more questions than it answers. What qualifies as an "issue"? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy specifically notes

that the "Please I. D. Me" buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit "electoral choice" to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic.

The next broad category in the Election Day Policy—any item "promoting a group with recognizable political views"—makes matters worse. The State construes the category as limited to groups with "views" about "the issues confronting voters in a given election." The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question. Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue[ ] confronting voters in a given election." For instance, the American Civil Liberties Union, the World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? Take another example: In the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

The State emphasizes that the ban covers only apparel promoting groups whose political positions are sufficiently "well-known." But that requirement, if anything, only increases the potential for erratic application. Well known by whom? The State tells us the lodestar is the "typical observer" of the item. But that measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it.

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election Day Policy, poses riddles that even the State's top lawyers struggle to solve. A shirt declaring "All Lives Matter," we are told, could be "perceived" as political. How about a shirt bearing the name of the National Rifle Association? Definitely out. That said, a shirt displaying a rainbow flag could be worn "unless there was an issue on the ballot" that "related somehow . . . to gay rights." A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the First Amendment? "It would be allowed."

"[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." But the State's difficulties with its restriction go beyond close

calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms. We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.