
NOTES

STRICT SCRUTINY IN THE MIDDLE FORUM

I. INTRODUCTION

It is perhaps no exaggeration that “the story of the First Amendment *is* the story of the public forum doctrine.”¹ Stated in its simplest form, forum analysis requires a court first to categorize a location (or forum) to which a speaker seeks access for the purpose of expressive activity, and then to analyze the government’s restriction on speech against the constitutional standard that governs in that forum.² The preeminent benefit of forum analysis is that it provides an overarching structure in place of what would otherwise be a neverending series of ad hoc tests balancing the government’s control over its own property against an individual’s right to free expression.³ Without a baseline expectation that free expression on public property is appropriate, such balancing tests tend to favor the government.⁴ Indeed, one of the greatest problems within First Amendment jurisprudence is courts’ inability to recognize the long-term value of protecting individual expression when faced with more immediate governmental interests.⁵ Forum analysis not only provides a procedure for analyzing speech problems, but also includes the substantive recognition that not all government interests are of equal value nor should they always override expressive activity. Tying speech rights to the geographic or func-

¹ Steven G. Gey, *Reopening the Public Forum — From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998) (emphasis added).

² Though he proposes a fairly fundamental modification to public forum doctrine, Professor Robert Post provides a good summary of the basic concept:

The object of public forum doctrine . . . is the constitutional clarification and regulation of government authority over particular resources. Public forum cases require courts to decide whether a resource is subject to a kind of authority ‘like’ that . . . involved in the governance of the general public . . . or . . . ‘like’ that characterized by the government’s control over the internal management of its own institutions

Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1782 (1987).

³ A full-scale defense of forum analysis is outside the scope of this Note. For more extensive discussions, see, for example, Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79; and Gary C. Leedes, *Pigeonholes in the Public Forum*, 20 U. RICH. L. REV. 499 (1986).

⁴ See, e.g., *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff’d*, 167 U.S. 43 (1897).

⁵ This tendency can be seen particularly well in early free speech cases, such as *Dennis v. United States*, 341 U.S. 494 (1951); and *Schenck v. United States*, 249 U.S. 47 (1919). For an academic discussion of this phenomenon, see Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741 (2002), which argues, “[W]hen the country feels very safe the Justices . . . can . . . plume themselves on their fearless devotion to freedom of speech But they are likely to change their tune when next the country feels endangered.”

tional characteristics of the forum creates shared expectations about the type of expression that will be allowed, and thus reduces the danger of chilled speech that can arise from ambiguity over what will be permitted.⁶ Similarly, state actors can be confident that by opening up a location for some manner of free expression, they are not therefore losing all control over what is said within a forum for all time.

Despite these benefits, however, ever since the first formal categorization of the three types of fora — the public forum, the middle forum, and the nonpublic forum — were described in *Perry Education Ass'n v. Perry Local Educators' Ass'n*,⁷ courts⁸ and commentators⁹ alike have attacked forum analysis as an excessively semantic and complex judicial invention that supplants a sensible balancing approach with myriad irrelevant categorizations. These critiques are powerful, and in recent years, forum analysis has become a muddled area of First Amendment jurisprudence.¹⁰ This confusion is troubling not merely for courts trying to apply the doctrine, but also for individuals seeking to exercise their right of free expression. As public speech shifts from traditional locations such as streets and parks to harder-to-define realms such as the internet, the need for a flexible and finely tuned doctrine to balance free expression with the government's reasonable need to regulate becomes even more pressing.

This Note argues that, with an important modification to the existing doctrine, forum analysis should continue to occupy a central role in First Amendment analysis because it provides the most coherent means of balancing the government's interest in excluding nongovernmental expressive activity on its property with the individual right of free expression in government settings. The doctrinal modification seeks to remedy one of the greatest failings of forum analysis: the sub-

⁶ See *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (noting in the First Amendment context that “[u]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked’” (omission in original) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964))).

⁷ 460 U.S. 37 (1983); see *id.* at 45–47.

⁸ See, e.g., *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) (“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.”); *Del Gallo v. Parent*, 557 F.3d 58, 69 n.6 (1st Cir. 2009) (“The utility and coherence of the forum analysis doctrine have been the subject of criticism.” (citing, for example, *Int'l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693–94 (1992))); *Nat’l Ass’n of Social Workers v. Harwood*, 69 F.3d 622, 644 & n.25 (1st Cir. 1995) (noting that public forum doctrine is “problematic”).

⁹ See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1266 (1984) (“Unless the Supreme Court transcends its geographical approach to the first amendment and abandons formal public forum analysis, it will continue to hand down decisions that fail to analyze thoughtfully the nature and role of first amendment principles in our society.”).

¹⁰ Gey, *supra* note 1, at 1555 (“The post-*Perry* public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close.”).

stantial confusion that arises from the nebulous middle category of forum. Indeed, even settling upon a term to describe the middle forum generates substantial confusion; it is unclear whether there is a single middle forum category, several subcategories, or whether a forum can be designated one way for one class of speakers and another way for others.¹¹ Part II of this Note outlines the historical development of forum analysis and demonstrates that though earlier jurisprudence seemed to recognize the middle forum as a place the government had opened up to free expression, *Rosenberger v. Rector & Visitors of University of Virginia*¹² signaled a shift toward a more limited concept of the middle forum as a place reserved only for specific *types* of expression. Part III describes the problems that have arisen as a result of the shifting state of the jurisprudence and the evasion tactics that courts use to avoid the confusion of the middle forum entirely. Part IV proposes the modification: using an objective observer test to determine which category of forum the government has created, and then applying strict scrutiny to all restrictions on speech that occur within middle fora. This modification would not only make public forum doctrine significantly simpler and more coherent, but also would reduce courts' reliance on the dubious and highly contested distinctions between viewpoint and content-based discrimination.

Part IV then addresses the most compelling counterargument to this proposal, namely that applying strict scrutiny in the middle category would lead to the government refusing to open middle fora at all for fear of losing all control over the speech that takes place within them. A critical examination of the strict scrutiny standard, however, demonstrates that it can be applied to middle fora in a way that is not "fatal in fact"¹³ to every attempt at government regulation, while still allowing the freedom necessary for uninhibited individual expression. Thus, with the modification this Note proposes and a nuanced understanding of strict scrutiny, forum analysis can be a sensible and effective means of First Amendment analysis that protects speech while still allowing government regulation. Part V concludes.

A brief point on terminology is appropriate. This Note uses the term "middle forum" to refer to the category that falls in between traditional and nonpublic fora and that courts variously refer to as a

¹¹ As discussed below, the middle category of forum has been variously called a "limited public forum," a "designated public forum," a "nontraditional public forum," and a "limited open forum." See *infra* section III.A, pp. 2148–50. Some courts have even combined terms within the middle category, noting that a forum can be "designated for one class of speaker or speech, and still 'limited' with respect to others." *Justice for All v. Faulkner*, 410 F.3d 760, 766 (5th Cir. 2005) (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–81 (1998)).

¹² 515 U.S. 819 (1995).

¹³ Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

“designated” or “limited” public forum. The extent to which courts use different terms, and use them in different and conflicting ways, indicates that the doctrine needs a terminology overhaul as well as the substantive changes this Note proposes.

II. THE HISTORICAL DEVELOPMENT OF PUBLIC FORUM ANALYSIS

A. *The Early History of the Public Forum*

The notion of free and unfettered speech in public is among the most hallowed traditions of democratic societies. Indeed, as Professor Harry Kalven noted in his seminal article on the public forum, “[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. . . . [T]he generosity and empathy with which such facilities are made available is an index of freedom.”¹⁴ The origin of the public forum in the Supreme Court’s jurisprudence comes from Justice Owen Roberts’s dictum in *Hague v. CIO*,¹⁵ in which he observed:

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.¹⁶

Despite its historical inaccuracy,¹⁷ Justice Roberts’s notion of the public forum quickly caught on, and in the years leading up to the Court’s formal definition of the three categories of fora in *Perry*, the Court relied upon *Hague* to analyze government regulation of speech in public places, specifically streets and parks.¹⁸

In the 1970s, the formal contours of public forum doctrine began to emerge. In 1972, the Court first used “public forum” as a legal term of

¹⁴ Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11–12.

¹⁵ 307 U.S. 496 (1939).

¹⁶ *Id.* at 515 (opinion of Roberts, J.).

¹⁷ For a detailed scholarly analysis of the relationship between *Hague* and *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff’d*, 167 U.S. 43 (1897), that suggests public fora were not always open to free debate, see Post, *supra* note 2, at 1721–24. See also Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 236–39. Some have also argued that the “discovery myth” of public forum doctrine is historically inaccurate, in that state courts were dealing with issues of public speech well before *Hague*. See Richard T. Pfohl, Note, *Hague v. CIO and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533, 536 (1993).

¹⁸ See, e.g., *Jamison v. Texas*, 318 U.S. 413 (1943) (invalidating a conviction for passing out handbills on a public street).

art to describe a place where “justifications for selective exclusions . . . must be carefully scrutinized.”¹⁹ Four years later, the Court began to give definition to the other end of the spectrum. In *Greer v. Spock*,²⁰ the Court upheld a military regulation banning political speakers from campaigning at a military base. Looking to the nature of the property at issue, the Court declared, “the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum.”²¹ Thus, it held that simply because some members of the public were allowed to visit the military base, the base itself did not become a public forum.²²

After establishing the two poles of forum doctrine the Court began to sketch out a middle ground. In *Widmar v. Vincent*,²³ student members of a religious club at a university challenged the school’s denial of access to university facilities for the purpose of conducting their meetings. The university, which made the facilities open to other student groups, based its exclusion of the religious organization on a regulation that prohibited the use of university buildings for “religious worship or religious teaching.”²⁴ Recognizing that “[a] university differs in significant respects from public forums such as streets or parks,”²⁵ the Court still found it constitutionally problematic that the group was being excluded from a forum — albeit not a place “immemorially . . . [used for] discussing public questions”²⁶ — to which other similarly situated groups were being given access. Thus, the Court began to recognize a third category of forum, which it called in passing a “limited public forum.”²⁷ Though the university was not required to create the forum in the first place, having done so it had to justify discriminatory content-based exclusions by showing that they were “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.”²⁸

B. *Perry and the Evolution of the Middle Forum*

The three categories that emerged from *Hague*, *Greer*, and *Widmar* were collected and formalized by the Court in *Perry*. At issue in *Perry*

¹⁹ *Police Dep’t v. Mosley*, 408 U.S. 92, 98–99 (1972); see also Sheri M. Danz, Note, *A Nonpublic Forum or a Brutal Bureaucracy? Advocates’ Claims of Access to Welfare Center Waiting Rooms*, 75 N.Y.U. L. REV. 1004, 1020 n.82 (2000) (stating that the Supreme Court first adopted the term “public forum” in *Mosley*).

²⁰ 424 U.S. 828 (1976).

²¹ *Id.* at 838.

²² *Id.*

²³ 454 U.S. 263 (1981).

²⁴ *Id.* at 265.

²⁵ *Id.* at 268 n.5.

²⁶ *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

²⁷ *Widmar*, 454 U.S. at 272.

²⁸ *Id.* at 270.

was an attempt by a teacher's union to gain access to a school district's internal mail system, which the union had been denied on the ground that it was not the exclusive bargaining representative.²⁹ In order to assess the petitioner's First Amendment claim, the Court began by laying out, in a formal and comprehensive manner, the three categories of fora. First, citing *Hague*, the Court recognized traditional or "quintessential" public fora such as streets and parks,³⁰ where content-based exclusions must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."³¹ Second, citing *Widmar*, the Court recognized a limited public forum, namely "public property which the state has opened for use by the public as a place for expressive activity."³² "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."³³ Problematically, when stating this standard, the Court noted in a footnote that "[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects."³⁴ This footnote seemed to describe a situation very different from a forum opened generally for use by the public, yet the Court in *Perry* never elucidated the standard that would govern this category. Finally, the Court described the nonpublic forum category as a place "which is not by tradition or designation a forum for public communication."³⁵ In this category, the state "may reserve the forum for its intended purposes . . . 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."³⁶ The Court found that the internal mail system in *Perry* fell into this third category, and thus held that exclusion of the union did not violate the First Amendment.³⁷

Though forum analysis became a mainstay in the Court's First Amendment jurisprudence post-*Perry*,³⁸ the concept of the middle forum was confused from the very start.³⁹ Practically speaking, there

²⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39–40 (1983).

³⁰ *Id.* at 45.

³¹ *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

³² *Id.*

³³ *Id.* at 46.

³⁴ *Id.* at 46 n.7.

³⁵ *Id.* at 46.

³⁶ *Id.* (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981)).

³⁷ *Id.* at 46, 50–51.

³⁸ This Note only briefly reviews this history for the purpose of elucidating the shifting definition of the middle forum. For a more detailed analysis of the Court's jurisprudence post-*Perry*, see David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143 (1992).

³⁹ *Cf. Post*, *supra* note 2, at 1747 (noting that "collapsing questions of access and of equal access . . . creates tools of analysis that for modern purposes are simply too crude to be of any use").

are two alternatives for what a middle forum could be. First, it could be a space, previously closed, that the government has opened up to the public generally for the purposes of expressive activity. This seems to be what the Court was referring to in the body of the opinion in *Perry* — a space in which free expression is protected by the strict scrutiny standard. Second, the middle forum could be a place that the government has opened up to a selected group of speakers chosen either by their identity or the subject matter upon which they will speak. This, in turn, seems to be the concept referenced in the *Perry* footnote. The implications of which of these concepts should govern the middle forum are substantial: one elevates the middle forum to a status equivalent to the traditional public forum, while the other protects speech no more than in nonpublic fora. In the decade that followed *Perry*, the Court seemed to lean toward the first definition in dicta,⁴⁰ but the cases that engaged in forum analysis avoided directly confronting the problem by ruling that the fora in question were nonpublic.⁴¹

C. *Rosenberger and the Modification of the Middle Forum*

Though *Widmar* should be read as finding that the university facilities at issue were a limited public forum, it was not until *Rosenberger* in 1995 that the Court first formally identified a forum as falling within the middle category.⁴² In *Rosenberger*, a Christian student organization challenged the University of Virginia's decision not to grant it student activities funding for a religious-themed student newspaper because the paper "primarily promot[e]d or manifest[ed] a particular belief(s) in or about a deity or an ultimate reality."⁴³ The Court determined that the student activities fund was the relevant forum and further, that it was a limited public forum.⁴⁴ Justice Kennedy's opinion for the Court found in favor of the student group because he determined that the university's funding decision "does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."⁴⁵ As viewpoint

⁴⁰ See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993).

⁴¹ See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (holding that a publicly owned airport terminal was a nonpublic forum); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that a federal employee charity drive was a nonpublic forum).

⁴² See Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 930 (2000) ("*Rosenberger* marked the first time since [the tripartite structure was announced in *Perry*] . . . that the Court had held government property was a limited public forum.").

⁴³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 885 (1995) (Souter, J., dissenting) (internal quotation mark omitted).

⁴⁴ *Id.* at 829–30 (majority opinion).

⁴⁵ *Id.* at 831.

discrimination — “an egregious form of content discrimination”⁴⁶ — is prohibited in traditional, limited, and nonpublic fora alike, Justice Kennedy had little trouble finding a First Amendment violation.

As Justice Souter has noted, because of *Rosenberger*’s reliance on viewpoint discrimination, the case’s “brief allusion to forum analysis was in no way determinative of the Court’s holding.”⁴⁷ However, despite the relative insignificance of the forum’s categorization in *Rosenberger* itself, Justice Kennedy’s opinion had a tremendous impact on forum analysis jurisprudence going forward because of the standard he found applicable for the middle category of fora. Instead of applying the strict scrutiny standard that courts had supported since *Perry*, Justice Kennedy instead stated that in middle fora “[t]he State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum.’”⁴⁸ In supporting this standard, Justice Kennedy cited discussions of nonpublic fora in both *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*⁴⁹ and *Perry*, thus importing a new and far less speech protective standard into the middle category.⁵⁰

Rosenberger thus fundamentally changed the nature of the middle forum, from the expansive zone for speech described in the body of *Perry*, to the more limited concept alluded to in the *Perry* footnote. Instead of speech restrictions being analyzed under the same standard as that in traditional public fora — strict scrutiny — they were only subject to the reasonableness review that applies to nonpublic fora.

III. THE PROBLEMATIC IMPLICATIONS OF THE MIDDLE FORUM

The transformation of the middle forum, from a place where speech is protected under the strict scrutiny standard to one where the government can make content distinctions that only need be “reasonable,” has had significant ramifications for public forum analysis. This Part maps out the basic problem that has arisen with forum analysis: courts are unclear as to what the middle forum is and are confused about how to analyze speech restrictions within it. This confusion has

⁴⁶ *Id.* at 829.

⁴⁷ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 615 n.10 (1998) (Souter, J., dissenting).

⁴⁸ *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

⁴⁹ 473 U.S. 788.

⁵⁰ See Ronnie J. Fischer, Comment, “*What’s in a Name?: An Attempt To Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora*,” 107 DICK. L. REV. 639, 656 (2003) (noting that because of the Court’s viewpoint discrimination finding in *Rosenberger*, it did not have to apply the rational basis test to the limited public forum it found).

led to a number of evasion tactics, whereby courts use other First Amendment tests to resolve problems within the middle forum.

A. The Unclear Nature of the Middle Forum

The transformation of the middle forum into a place where speech is only protected under a reasonableness standard essentially means that the middle forum functions identically to a nonpublic forum, which is traditionally the forum with the least protection for individual expression. This transformation raises a number of serious doctrinal issues. Most obviously, if the limited public forum is in fact nothing more than a nonpublic forum, there is little sense in having it exist as a distinct category. Post-*Rosenberger*, a number of circuits have applied the reasonableness standard in a limited public forum and conducted precisely the same analysis that would have applied in a nonpublic forum.⁵¹ In *Flint v. Dennison*,⁵² for example, a student challenged a university regulation limiting the amount of money that could be spent campaigning for student government positions, and the Ninth Circuit ruled that this restriction was reasonable in that it furthered legitimate pedagogical goals.⁵³ In addition to using a reasonableness standard while purporting to follow the tripartite structure of *Perry*, the court observed that the state had options in between a designated public forum and a nonpublic forum: “[T]he First Amendment allows the government to open the non-public forum for limited purposes. The ‘limited public forum is a *sub-category of a designated public forum* that refer[s] to a *type of nonpublic forum* that the government has intentionally opened to certain groups or to certain topics.’”⁵⁴ This confusing statement not only identifies designated public fora and limited public fora as two distinct categories, but also situates the limited public forum as a subset of both the middle category (the designated public forum) and the nonpublic forum. Such technicalities make critiques of forum analysis as a “jurisprudence of labels” very appropriate. Further, as both the Supreme Court and lower courts⁵⁵ have often applied

⁵¹ This is not to suggest that speech restrictions can never be found unreasonable. For instance, in *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 972–73 (9th Cir. 2008), the court found that the state’s denial of an application for a “Choose Life” license plate was both viewpoint discriminatory and unreasonable as the application met all of the program’s statutory requirements.

⁵² 488 F.3d 816 (9th Cir. 2007).

⁵³ *Id.* at 820, 833–36.

⁵⁴ *Id.* at 830–31 (second alteration in original) (emphases added) (quoting *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001)).

⁵⁵ See, e.g., *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 383 (4th Cir. 2006) (“In a limited public forum . . . the government may restrict access to ‘certain groups’ or to ‘discussion of certain topics,’ . . . [as long as the restrictions are] both reasonable and viewpoint neutral.” (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001))); *Deeper Life Christian Fellowship, Inc. v. Bd. of Educ.*, 852 F.2d 676, 679–80 (2d

the same reasonableness standard in a “limited public forum” as in a nonpublic forum, there is essentially no justification for the existence of the former.⁵⁶

Perhaps recognizing that applying exactly the same standard would condemn the middle forum to irrelevance, some courts have suggested that there is a pertinent difference between middle and nonpublic fora: for middle public fora, once the state has set “reasonable” boundaries, any exclusion of speakers who fall within them must be justified under strict scrutiny.⁵⁷ This distinction makes little sense. If the government can control speaker access to both middle and nonpublic fora, why should it be limited in the former regarding the distinctions it can make for those who fall within the content boundaries?⁵⁸ Perhaps the answer to this question is that, as has been long recognized by certain Justices, the application of strict scrutiny in concert with reasonableness review makes the former standard meaningless.⁵⁹ Simply by playing with the boundaries of the limited public forum the state can always exclude precisely who it wants (presuming the exclusion is not viewpoint discriminatory), and thus the alleged additional protection afforded by the strict scrutiny standard for those falling “inside” the limited public forum is in fact a nullity.

This problem has been noted since the early days of forum analysis. In his dissent in *Cornelius*, Justice Blackmun assailed the lack of speech protection that resulted from allowing the government’s “intent” alone to define the contours of the limited public forum. Criticizing the majority’s analysis, Justice Blackmun observed:

The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. . . . The very fact

Cir. 1988) (“Under the limited public forum analysis, [restrictions] . . . need only be reasonable and viewpoint-neutral to pass constitutional muster.” (citations omitted)).

⁵⁶ See Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN’S L. REV. 107, 145 (2008) (“If the standard of review that applies for exclusions from both . . . [limited and nonpublic] forums is the same, there would seem to be no reason to distinguish between them.”).

⁵⁷ See, e.g., Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 677 (1998) (“If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”); ACLU v. Mote, 423 F.3d 438, 444 (4th Cir. 2005) (“[A government speech] restriction is subject to strict scrutiny ‘if the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available’” (second alteration and ellipsis in original) (quoting Warren v. Fairfax County, 196 F.3d 186, 193 (4th Cir. 1999))); Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 347 (5th Cir. 2001).

⁵⁸ Cf. Post, *supra* note 2, at 1752 (“If the prerogatives of proprietary control are not respected in the limited public forum, why should they be respected in the nonpublic forum?”).

⁵⁹ See, e.g., United States v. Kokinda, 497 U.S. 720, 751 (1990) (Brennan, J., dissenting) (“[T]here is only a semantic distinction between the two ways in which exclusions from a limited-purpose forum can be characterized, although the two options carry with them different standards of review.”).

that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.⁶⁰

Thus, courts are caught in an impossible situation: either they apply exactly the same reasonableness standard as is used for nonpublic fora, thereby making the middle forum irrelevant, or they try to apply both the reasonableness and strict scrutiny standards, making the middle forum incoherent. As this Note argues below, the notion of a "limited public forum" is confusing and unnecessary and should be eliminated entirely.

Not surprisingly, given the problems detailed above, courts and litigants have been confused as to the bounds of the middle forum,⁶¹ and have tried as much as possible to avoid relying on it in order to reach their conclusions. As courts struggle to determine "what distinction, if any, exists between a 'designated public forum' and a 'limited public forum'"⁶² and what standard applies in either, circuits have split, sometimes even inadvertently creating intracircuit conflicts. For instance, as the First Circuit observed in *Ridley v. Massachusetts Bay Transportation Authority*,⁶³ it has at different times used the phrase "limited public forum" as a synonym both for a designated public forum⁶⁴ and for a nonpublic forum.⁶⁵ Understandably frustrated, the *Ridley* court summarily decided to adopt the usage equating limited public fora with designated public fora and declined to "discuss the issue further."⁶⁶ The same confusion is present in other circuits as well.⁶⁷ Seeking a way out of this morass, some courts have invented new categories such as the "limited designated public forum" and "unlimited designated public forum,"⁶⁸ but such a profusion of terminology is hardly a satisfactory means of clarifying and rationalizing the doctrine.

⁶⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting).

⁶¹ *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 865–66 n.2 (7th Cir. 2006) (noting that the confusion surrounding the middle forum had "infected th[e] litigation" and that both sides had referred to a limited public forum but "were plainly arguing for different levels of scrutiny").

⁶² *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006).

⁶³ 390 F.3d 65 (1st Cir. 2004).

⁶⁴ *Id.* at 76 n.4 (citing *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002); *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997)).

⁶⁵ *Id.* (citing *Fund for Cmty. Progress, Inc. v. Kane*, 943 F.2d 137, 138 (1st Cir. 1991)).

⁶⁶ *Id.*

⁶⁷ *See, e.g.*, *Warren v. Fairfax County*, 196 F.3d 186, 193 (4th Cir. 1999) (indicating that "limited" and "designated" public fora are synonyms); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 128 & n.2 (2d Cir. 1998).

⁶⁸ *See, e.g.*, *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006).

*B. Evasion Tactics and the Unclear Test
for the Middle Forum*

Given the disagreement over what a middle forum is, it is not surprising that courts are similarly confused about what tests to apply to speech restrictions within these fora. An unsatisfactory solution to this problem has been for courts to avoid the issue altogether by relying on non-forum means of resolving cases that fall within the middle forum.⁶⁹ Of the many ways courts do this, two are particularly illuminating.

1. *Viewpoint Discrimination.* — A common means of avoiding the implications of finding that speech falls within the hazy middle forum is for courts to find that exclusion of the speaker from the forum is viewpoint discriminatory. The reason for this is obvious: viewpoint discrimination is the most suspect type of content-based speech restriction, and thus a finding of viewpoint discrimination always precipitates strict scrutiny review, which in turn avoids the uncertainty of determining the correct standard to apply in the middle forum.⁷⁰ In *Child Evangelism Fellowship of Maryland, Inc. (CEF) v. Montgomery County Public Schools*,⁷¹ for example, the plaintiffs sought to include promotional material for their Christian evangelistic club with other flyers the school district sent home with students.⁷² The court, although finding “considerable force”⁷³ to the argument that the “take-home flyer forum would seem to be a limited public forum,”⁷⁴ avoided analyzing the case under the limited public forum standard because it found that the school’s “unfettered discretion to deny access to the . . . forum” provided too great a risk of viewpoint discrimination.⁷⁵

This is hardly an isolated instance. Indeed, between 1998 and 2008, of the fourteen cases in which circuit courts ruled that speech restrictions were unconstitutional within a limited public forum, twelve relied on a finding of viewpoint discrimination.⁷⁶ Of the two cases

⁶⁹ For a brief discussion of three ways in which courts have avoided the middle forum, see McGill, *supra* note 42, at 940–47.

⁷⁰ See *id.* at 943–44 (arguing that at least twice the Supreme Court has found viewpoint discrimination in order to avoid “the paradox of the limited public forum”).

⁷¹ 457 F.3d 376 (4th Cir. 2006).

⁷² *Id.* at 378.

⁷³ *Id.* at 383 (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993)) (internal quotation marks omitted).

⁷⁴ *Id.*

⁷⁵ *Id.* at 386.

⁷⁶ A Westlaw search of the Court of Appeals database for <“limited public forum” /s “reasonable!”> on April 14, 2009 yielded sixty-three cases between 1998 and 2008. Of those, fourteen cases found speech restrictions in a limited public forum unconstitutional. This list includes one case, *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), in which the court found that there was viewpoint discrimination and that the regulation was unreasonable. *Id.* at 972.

that did not base their rulings on viewpoint discrimination, one found that the regulation “smack[ed] of viewpoint discrimination,”⁷⁷ and thus only one case did not base its ruling in any way on the issue of viewpoint.⁷⁸ This overwhelming tendency of courts to find viewpoint discrimination in limited public forum cases strongly suggests that they use it as a means of evading the troubling implications that flow from finding that speech falls within the middle forum.

This evasion tactic is troubling for two reasons. First, viewpoint discrimination is itself a confusing and easily manipulable doctrine, with courts⁷⁹ and commentators⁸⁰ acknowledging that the line between permissible subject-matter discrimination and impermissible viewpoint discrimination is a “difficult one to draw.”⁸¹ Thus, relying on viewpoint discrimination in the middle forum achieves very little. Second, if the middle forum is so devoid of doctrinal usefulness that courts must seek refuge in discussions of viewpoint discrimination, then there is significant benefit to eradicating the category entirely, rather than simply using a conclusory label to mask the real levers of decision.

2. *Government Speech*. — A second means of evading the nebulous standards that apply in the middle forum is for courts to apply a broad understanding of what constitutes government speech. This allows courts to find that instead of the challenged statements being private speech in a middle forum (and thus subject to First Amendment protections), they are the speech of the government itself and are thus exempt from the normal First Amendment protections against content and viewpoint discrimination. The Supreme Court’s recent decision in *Pleasant Grove City, Utah v. Summum*⁸² largely follows this pattern. In *Summum*, a religious group challenged a city’s refusal to place the group’s Seven Aphorisms monument in a public park, despite the city having previously accepted a Ten Commandments monument.⁸³ The Tenth Circuit conducted a forum analysis and found that because a public park was a traditional public forum, any content-based restriction on speech within it had to satisfy strict scrutiny, and the monu-

⁷⁷ Kincaid v. Gibson, 236 F.3d 342, 356 (6th Cir. 2001).

⁷⁸ See Hopper v. City of Pasco, 241 F.3d 1067, 1082 n.17 (9th Cir. 2001) (finding it unnecessary to “reach the question of viewpoint discrimination”).

⁷⁹ See, e.g., Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 970 (9th Cir. 2002) (“We freely admit that the Supreme Court’s concept of viewpoint neutrality in First Amendment jurisprudence has not been easy to understand.”).

⁸⁰ See, e.g., Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 103 (1996) (“The concept of viewpoint neutrality in First Amendment jurisprudence has . . . been confusing in both definition and application, and has been selectively applied in many contexts.”).

⁸¹ Tucker v. Cal. Dep’t. of Educ., 97 F.3d 1204, 1216 (9th Cir. 1996).

⁸² 129 S. Ct. 1125 (2009).

⁸³ *Id.* at 1129–30.

ment's exclusion was unlikely to survive this standard.⁸⁴ A unanimous Supreme Court reversed. Writing for the Court, Justice Alito found that "public forum principles . . . are out of place in the context of this case"⁸⁵ and that the erection of the Ten Commandments monument — even if privately donated — constituted government speech.⁸⁶ Given that "[t]he Free Speech Clause restricts government regulation of private speech . . . [but] does not regulate government speech,"⁸⁷ the Court found that the decision not to accept Summum's monument was not subject to the Free Speech Clause (or by, extension, to forum analysis) and that the city was thus free to choose which monuments to accept.⁸⁸

A similar example is the D.C. Circuit's decision in *People for the Ethical Treatment of Animals, Inc. (PETA) v. Gittens*.⁸⁹ "Party Animals," a District of Columbia–sponsored public art project, provided sculptures of donkeys and elephants to be decorated by artists and displayed throughout the city.⁹⁰ PETA submitted a number of designs that showed elephants being tortured and noted the poor treatment of elephants by circuses.⁹¹ The D.C. Arts Commission rejected these submissions as contrary to the goals of the project, which were to show a "whimsical" side of the city, while "foster[ing] an atmosphere of enjoyment and amusement."⁹² The district court granted a preliminary injunction to require display of the submissions, finding that the exhibit was a limited public forum and that the rejection of PETA's submission was unreasonable.⁹³ The D.C. Circuit, with Judge Randolph writing for the panel, reversed and found that the exclusion of PETA's submission did not implicate the First Amendment (or with it forum analysis) at all because the "the Commission [itself] spoke when it determined which elephant and donkey models to include in the exhibition."⁹⁴ The powerful impact of this government speech rul-

⁸⁴ *Id.* at 1130.

⁸⁵ *Id.* at 1137 (omission in original) (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003)) (internal quotation marks omitted).

⁸⁶ *Id.* at 1134.

⁸⁷ *Id.* at 1131.

⁸⁸ *Id.* at 1138. As Justice Stevens pointed out in his concurrence, which expressed some skepticism toward the "recently minted government speech doctrine," the government is not *entirely* free to say whatever it wants. *Id.* at 1139 (Stevens, J., concurring). Limits external to the Free Speech Clause — such as the Establishment and Equal Protection Clauses — clearly apply. *Id.*

⁸⁹ 414 F.3d 23 (D.C. Cir. 2005); *see also* *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–96 (8th Cir. 2000) (finding announcements noting private organizations' underwriting of public broadcasting to be government speech).

⁹⁰ *PETA*, 414 F.3d at 25.

⁹¹ *Id.* at 26.

⁹² *Id.*

⁹³ *Id.* at 27.

⁹⁴ *Id.* at 28.

ing can be best seen in Judge Randolph's argument that the display of Party Animals on parks and sidewalks made no constitutional difference: the result would have been the same if they had been "placed . . . in one of the District's public buildings."⁹⁵ By analogizing parks to government buildings, Judge Randolph seemed to return to the old jurisprudence of *Davis*, which recognized the government's proprietary interest in tightly controlling expression on public property.

The dangers of supplanting forum analysis with government speech doctrine are twofold. First, government speech, like viewpoint discrimination, is a complex and muddled area of First Amendment jurisprudence — rivaling forum analysis itself for the title of "the most unclear area of the free speech doctrine."⁹⁶ Without reviewing in depth this important First Amendment issue, it suffices to note that the distinctions the Supreme Court has drawn between when the government itself has spoken and when it has merely facilitated private expression are subtle at best, and inconsistent at worst.⁹⁷ This lack of clarity is troubling, particularly given the fundamental First Amendment concern that nebulous rules will chill speech. Second, as demonstrated above, the government has tremendous leeway when courts determine that the government itself is speaking, as the government can essentially be viewpoint discriminatory when choosing "to fund a program dedicated to advanc[ing] certain permissible goals . . . [and thus] necessarily discourag[ing] alternative goals."⁹⁸ This standard is substantially less speech-protective than even a nonpublic forum, in which — despite the lax standard of reasonableness — viewpoint discrimination is not permitted. By expanding the concept of government speech and shrinking the amount of private speech taking place in middle fora, courts not only substitute one confusing area of law for another, but also substantially reduce First Amendment protections in the process.

IV. A RETURN TO STRICT SCRUTINY

The current status of the middle forum is highly unsatisfactory. This Note proposes eradicating the post-*Rosenberger* concept of using the reasonableness standard to assess speech restrictions in the middle

⁹⁵ *Id.* at 29.

⁹⁶ Emily Buchanan Buckles, Comment, *Food Fights in the Courts: The Odd Combination of Agriculture and First Amendment Rights*, 43 HOUS. L. REV. 415, 443 (2006).

⁹⁷ See Saumya Manohar, Comment, *Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech*, 25 YALE L. & POL'Y REV. 229, 233 (2006) (describing the seeming inconsistency between *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), and between *Rosenberger* and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

⁹⁸ *Rust*, 500 U.S. at 194.

forum, and returning in essence to the strict scrutiny standard required by *Perry*. The first section of this Part sketches out how courts could go about determining which locations for speech should be categorized as middle fora in the first place. The second section describes a means of clarifying the test to be applied within middle fora: the middle range of fora found public under the objective observer test should be governed by the same strict scrutiny standard as traditional public fora; middle fora found to be nonpublic should be controlled by the reasonableness standard of other nonpublic fora. The final section addresses the most compelling counterargument to this idea, namely that it could lead to governments refusing to open any middle fora at all out of a fear of losing control over all speech that takes place within them. This Note concludes with a discussion of how a modified notion of strict scrutiny would allow for responsible government regulation while still protecting vital speech interests.

A. *New Notions of the Middle Forum*

Changing the way the middle forum is analyzed is particularly important today because it is the preeminent site for the type of “public” speech that used to take place in parks and on sidewalks. The clearest recognition of this in the Supreme Court has been by Justice Kennedy, who noted in *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee*⁹⁹ the danger of an anachronistic concept of a public forum “tied to a narrow textual command limiting the recognition of new forums.”¹⁰⁰ As “citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse,” viewing only parks and sidewalks as the quintessential sites for public discourse “will lead to a serious curtailment of our expressive activity.”¹⁰¹ Justice Kennedy is of course correct. The notion of a Speakers’ Corner is little more than a historical artifact in a world where most communication takes place inside public buildings, at private events, and — perhaps most important of all — over the internet.¹⁰² Given this, an ill-defined middle forum and an expanded notion of government speech will increase the danger that speech is chilled because individuals are inhibited from expressing controversial ideas in new fora.

One means for courts to categorize fora would be to look to an “objective observer” test, familiar from the Establishment Clause. One approach the Court has frequently used to identify Establishment Clause violations is to ask whether an objective observer would under-

⁹⁹ 505 U.S. 672 (1992).

¹⁰⁰ *Id.* at 697 (Kennedy, J., concurring in the judgment).

¹⁰¹ *Id.* at 697–98.

¹⁰² Gey, *supra* note 1, at 1574–75; McGill, *supra* note 42, at 951–52.

stand the government activity to be endorsing religion.¹⁰³ Justice O'Connor acknowledged that this inquiry encompasses both subjective and objective components: "If the audience is large, as it always is when government 'speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the 'objective' content of the statement, and some portion will inevitably receive the intended message."¹⁰⁴ Using the objective observer test to answer a question that is largely about government intent (whether or not the government intended to endorse religion) can help determine what type of forum the government has created: courts could ask whether an objective observer would have thought the forum (analyzed by the policies under which it was governed) was open to free expression or not. The reliance on an objective observer, rather than the government's own characterization of its property, would prevent the use of post hoc explanations regarding the intended boundaries of the forum to justify the exclusion of individuals who allege that they fall within the forum's boundaries. For example, an objective observer might well determine that while an internal charity drive aimed only at federal employees, such as in *Cornelius*, is a nonpublic forum, a public art display, such as the Party Animals in *Gittens*, represents the private views of the organizations who submitted designs rather than the perspectives of the government itself. This is not to say that an objective observer test will eradicate all confusion around forum classification, but rather that it will prevent the government's *own* characterization of the forum from having so much salience in the analysis.

B. Changing the Standard in the Middle Forum

The confusion that has arisen regarding the middle forum is a result of the conflation of the two *Perry* standards: one analyzing speech restrictions under strict scrutiny, the other assessing restrictions for their reasonableness. Having two standards for the same space is confusing and unnecessary. Instead, in situations in which the government has opened up a nonpublic forum for expressive purposes, courts should analyze any restrictions on speech within that forum under strict scrutiny.¹⁰⁵ Rather than including classifications such as "limited" or "designated," which leads to all the confusion that those terms evoke, the middle category should include only those fora that an objective observer would perceive as open to free expression. If the court finds, however, that the extent of government control is so great that

¹⁰³ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

¹⁰⁴ *Id.*

¹⁰⁵ Others have suggested eradicating the category of "limited public forum," see, e.g., Deutsch, *supra* note 56, at 145–50, though they have not further advocated that all restrictions be analyzed under strict scrutiny, nor examined the implications of this modification.

no objective observer would believe that a forum for individual free expression exists, then the forum should be classified as nonpublic and the reasonableness test applied. In sum, this Note's proposal follows the model proposed in *Perry*: traditional public fora that are limited by history, a middle range of fora in which content-based speech restrictions are assessed under strict scrutiny, and nonpublic fora.

The benefits of universally applying strict scrutiny in the middle range of fora are twofold. First and foremost, having a bright-line test would clarify the doctrine and remove the endemic confusion that hampers courts' attempts to navigate the middle category. Having determined which category a forum falls into, courts would be able to assess speech restrictions under the proper standard rather than evading forum analysis and retreating into other confusing means of resolving cases. Second, if courts used strict scrutiny in middle fora, individual expression would — at least on its face — receive a greater amount of protection.¹⁰⁶ As is evident from Justice Kennedy's discussion in *ISKCON*, as the middle range of fora increasingly becomes the site of public discourse, enhanced scrutiny of government speech regulations is crucial to maintaining a wide-open debate on matters of public concern. Imposing strict scrutiny will not only facilitate clearer legal analysis, but will provide a substantive enhancement to the protection of speech.

C. *Strict Scrutiny As a Test Rather than an Outcome*

With the modification proposed in this Note, forum analysis can become a clear and reliable means of structuring the balancing test between individual expression and government control. This alteration has the great benefit of setting expectations on both sides, and thus reducing the likelihood of speech being chilled by a fear that a court conducting an ad hoc balancing test will conclude that the government's interest outweighs the speaker's. However, despite the benefits of a clarified forum analysis, there is a compelling counterargument to this proposal. If strict scrutiny is in fact such a difficult standard for government regulations to pass, then why would the state ever open middle fora rather than always regulating its property so as to create nonpublic fora and thus have substantial leeway for control? Put another way, if the standard in the middle forum is made more stringent, will government actors be dissuaded from opening middle fora in the first place? The answer to this criticism requires looking at the nature

¹⁰⁶ Though there might be some situations in which this Note's proposal would lead a court to designate a forum nonpublic where previously it might have called it "limited," in practice this will have no impact on the level of protection speech receives because restrictions in *both* limited and nonpublic fora are assessed only for their reasonableness.

of strict scrutiny itself. Certainly if strict scrutiny automatically leads to government regulations being invalidated, then there would be strong reasons for the government to avoid fora that would precipitate this standard of review. However, strict scrutiny, properly viewed, is hardly so monolithic in its application.

A recent survey by Professor Adam Winkler of all published federal court opinions that applied strict scrutiny from 1990 through 2003 found that in thirty percent of the cases surveyed, the law was upheld.¹⁰⁷ Disaggregating cases by “type of right,” Professor Winkler’s study shows that strict scrutiny was strictest in freedom of speech cases, and yet even there the law being challenged survived twenty-two percent of the time.¹⁰⁸ Thus, at least for those cases brought to trial, strict scrutiny is not a preordained result. Rather, it can and should be a discerning level of scrutiny applied by courts when fundamental rights are abridged by the government — such as the freedom of speech in public fora or middle fora opened up to free expression.

There are a number of theoretical justifications that explain this initially surprising empirical result. Among the most interesting is a recent argument by Professor Richard Fallon, who suggests that proportionality review — the “overarching principle of constitutional adjudication” globally, but a fairly novel concept in the U.S. context¹⁰⁹ — has salience in strict scrutiny analyses.¹¹⁰ Under Professor Fallon’s theory, a court reviewing a speech restriction in a middle forum does not automatically strike down a regulation because the government’s interest is not sufficiently compelling. Instead it looks more holistically at whether “a particular, incremental reduction in risk justifies a particular infringement of protected rights in light of other reasonably available, more or less costly and more or less effective, alternatives.”¹¹¹ It is important to recognize that, though the analysis Professor Fallon identifies deviates from the traditional concept of strict scrutiny, this analysis is *not* merely a reasonableness test by another name. Rather, instead of returning to first principles to formulate a judgment regarding reasonableness, this analysis would require a careful weighing of incremental gains and losses that resulted from a speech restriction.

¹⁰⁷ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812–13 (2006).

¹⁰⁸ *Id.* at 815.

¹⁰⁹ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 73 (2008).

¹¹⁰ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

¹¹¹ *Id.* at 1331.

A less radical means of making strict scrutiny more of a real test as opposed to a preordained outcome is to examine the “narrowly tailored” requirement in order to determine how broad a set of alternate regulations must be considered before a court will be satisfied that the regulation at issue is sufficiently tailored to satisfy strict scrutiny.¹¹² Here courts have substantial leeway. Take for example a hypothetical regulation prohibiting speech in a middle forum that incites mass violence.¹¹³ One alternative would be for courts not to examine alternate possibilities at all, and to uphold the regulation presuming it is not “substantially broader than necessary” to achieve the government’s interest.¹¹⁴ A second alternative might require courts to look at the “universe of all possible regulations on speech.”¹¹⁵ Here, a court would survey other potential speech regulations and might well decide that a restriction on speech that advocates violence and provides specific instructions on how to carry it out provides a more narrowly tailored alternative. A third alternative would be for courts to expand the narrow tailoring inquiry to encompass regulations that address both speech and conduct.¹¹⁶ This inquiry would require courts to examine conduct restrictions such as limitations on weapons ownership or, more directly, laws prohibiting mass violence. If a court determined that these alternatives were just as or more likely to achieve the compelling interest, then the regulation would be struck down as not sufficiently narrowly tailored. The choice between these different understandings of narrow tailoring is heavily value-laden, and proposals for how courts should conduct the narrow tailoring analysis abound. However, the point remains that differing but equally valid concepts of narrow tailoring can make strict scrutiny more or less likely to lead to immediate invalidation.¹¹⁷

To be clear, this is not to say that because some government regulations could pass strict scrutiny in middle fora, the protective value of

¹¹² See Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL’Y 259, 266 (2001).

¹¹³ Naturally, any such regulation would have to satisfy the constitutional test for such restrictions under *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹¹⁴ Cf. Bunker & Erickson, *supra* note 112, at 266–67 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), as a case using this means of determining narrow tailoring).

¹¹⁵ *Id.* at 268 (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), as an example of this type of narrow tailoring).

¹¹⁶ *Id.* at 271 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), as a case using this means of narrow tailoring).

¹¹⁷ See *id.* at 278–85 (suggesting four different ways to determine which contrast space to use); see also Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1784–85 (1996). For an interesting argument challenging the application of the strict scrutiny standard to the First Amendment entirely and arguing for a system of “categorical rules and categorical exceptions,” see Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2456 (1996).

strict scrutiny for individual expression will be lost. It is simply to acknowledge that there are some situations — namely those when the government has a compelling interest — when narrowly tailored restrictions are permitted. Even though strict scrutiny leaves the government room to enact genuinely necessary speech restrictions, there is still the fear that the government might be risk averse, and might attempt to clamp down on speech out of a fear of the harm that the speech will cause. The concern over the government's desire to regulate the middle forum cannot be fully answered by pointing to the fact that not all government regulation will be invalidated under strict scrutiny; rather, it reveals the need for an affirmative reason for why the government would *want* to foster speech within the middle forum. A core purpose of the First Amendment provides such a reason.

As famously argued by Professor Alexander Meiklejohn, “[t]he principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage,”¹¹⁸ and “the unlimited guarantee of the freedom of public discussion . . . [protects the speech] of a citizen who is planning for the general welfare.”¹¹⁹ This concept of the First Amendment is very closely tied to fundamental attributes of our liberty and our system of democratic government. Thus, Alexis de Tocqueville observed that a decentralized system of government with common citizens freely participating in the process of self-governance breeds “an all-pervading and restless activity, a superabundant force, and an energy which may . . . produce wonders.”¹²⁰ This is a core benefit of the freedom of speech — it produces and sustains not only the system of government itself, but also the economic and social development that is so integral to American society. These age-old ideas about debate and democracy have special salience in a discussion of middle fora, perhaps most obviously with regard to new technology. As the Supreme Court noted in *Reno v. ACLU*,¹²¹ the internet is a “vast democratic forum[.]”¹²² which allows communication between a “worldwide audience of millions.”¹²³ The internet's ability to fuel the democratic process is seen in everything from candidates' websites and government regulations being posted online, to heated discussions on blogs. Unless it wishes to shed democracy, the state is heavily dependent on this means of discourse

¹¹⁸ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26–27 (1948).

¹¹⁹ *Id.* at 39.

¹²⁰ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (Phillips Bradley ed., Francis Bowen rev., Alfred A. Knopf 1956) (Henry Reeve trans., 1835) (1835).

¹²¹ 521 U.S. 844 (1997).

¹²² *Id.* at 868.

¹²³ *Id.* at 853.

by its citizens, and thus opening and sustaining these locations for speech is strongly within the government's interest.

Indeed, given the importance of free speech, even were elected officials to decide that First Amendment freedoms did not provide any tangible benefits to society, it is very unlikely that the general public — expressing its views through the democratic political process — would accept such a result. Clarifying the standards to be applied within different fora will give citizens the confidence to speak freely on issues of pressing political and social importance without fear of reprisal or suppression. Without these guarantees, both the ability and the desire to use the First Amendment as a tool of self-governance wane and eventually disappear. Thus, combining the government's interest in an informed and engaged populace with the meaningful control that strict scrutiny can provide suggests that this Note's proposal will not likely lead to the closing of a large enough number of fora to offset the significant benefits from the added protection provided by strict scrutiny for speech in the remaining middle fora.

V. CONCLUSION

The jurisprudence surrounding the middle forum is confused and incoherent. Based on an ambiguity in *Perry* and a seeming change of course in *Rosenberger*, the middle forum is currently governed by multiple standards. This confusion leads either to inconsistent forum analysis, or to courts avoiding forum analysis entirely and using similarly confusing means of resolving cases. To eradicate this confusion and bring greater coherence to the doctrine, the middle forum should be governed by strict scrutiny. Because strict scrutiny need not be fatal in fact, applying a heightened standard of review in the middle forum will not lead to all government regulation being struck down, and thus will not dissuade governments from opening such fora to the extent that it would offset the benefits from clarifying the doctrine and increasing protection for speech in these fora. As public debate shifts from traditional fora such as streets and parks, to middle fora like internet discussion boards or combined public-private ventures, clarifying and strengthening the middle forum becomes vital not merely for free speech, but also for the system of democratic governance itself.