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# THE SPECIAL PUBLIC PURPOSE FORUM AND ENDORSEMENT RELATIONSHIPS: NEW EXTENSIONS OF GOVERNMENT SPEECH

by MARY JEAN DOLAN\*

## INTRODUCTION

Government web sites, public art projects, festive light pole banners, and outdoor special events – these new and expanding phenomena energize our communities and enhance the quality of life. All involve a growing, synergistic partnership between the public and private sectors,<sup>1</sup> and all implicate the First Amendment. In some circumstances, government makes selections among private speakers, deciding who will participate or be subsidized, and in others, government projects benefit from essential private financial support.

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1. For a discussion of the many applications of this trend, see Martha Minow, *Partners Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000) (observing phenomenon and analyzing its impact on school reform and hospital funding). Also see *People for the Ethical Treatment of Animals (PETA) v. Giuliani*, 105 F. Supp. 2d 294, 328 (S.D.N.Y. 2000), *aff'd*, 2001 WL 1010004 (2d Cir. Sept. 5, 2001), which involved a public art event in New York:

[T]he CowParade is the product of a public-private partnership entailing investment of significant capital in the venture by a private entity. This form of private involvement in the financing of public functions has become an increasingly pervasive and significant means of underwriting programs and events in which the general public has an important interest and from which the state derives substantial benefits. This is true especially in the context of dwindling public resources available for certain activities for which the government may be reluctant to exercise its powers to tax the entire citizenry.

*Id.* at 328.

Whether screening participants or sponsors, government seeks to select those compatible with project goals and to avoid fostering speech that divides communities, insults particular groups, or grates on public sensibilities. Current judicial analysis of these complex public-private relationships is inadequate in two ways. First, in these proliferating contexts, even though government often has subjective expressive goals, such as “showcasing the city’s culture,” courts impose the “limited public forum” test, which bans values-based choices among potential private speakers. Second, new cases have allowed viewpoint-based decisions when it comes to government’s choice of sponsors for public expressive programs. These cases use the “government speech” approach, but fail to provide a coherent rationale.

The limited public forum test and the government speech approaches are on a collision course. To understand the contradictions illustrated by the two lines of cases requires a brief overview of the two doctrines. Where an applicant is rejected from a government program that involves speech, courts generally begin their analysis of any First Amendment claim by using forum analysis, which looks to the nature of the property at issue. In the “traditional public forum,” primarily the streets and parks, the “strict scrutiny” test applies: no content-based restrictions on speech are allowed unless necessary to serve a compelling state interest and narrowly tailored to that end.<sup>2</sup> When government invites private speakers to use nonpublic property or public funds, however, it is a “limited public forum” and a different rule applies. The “limited public forum” test permits government to set reasonable content limitations on the types of speakers and subject matter allowed, so long as the limits are viewpoint neutral.<sup>3</sup>

While this test appears to give government substantial flexibility to tailor public programs involving private speech, that promise has often proved illusory, in part because the line between content and viewpoint is quite faint.<sup>4</sup> Litigated primarily in the contexts of transit advertising and meeting room allocation, courts have required content limits to be concrete and have rejected attempts to screen out public controversy, hate groups, advocates of discrimination, and

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2. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (establishing the forum analysis approach). Strict scrutiny also applies to content-based distinctions where government opens its property up for speech generally. *Id.*

3. *Id.* at 55. See discussion *infra* Part I.A.

4. See *infra* Part I.B.

religious practices. The only consistently successful method of excluding divisive speech from a limited public forum has been “commercial only” policies, which are relevant only in the advertising setting.

In contrast, the “government speech” approach delivers that flexibility. When government is deemed to be promoting its own message, the viewpoint neutrality requirement (and reasonableness, for that matter) disappears. Two distinct models of government speech involve selection of private speech. *Rust v. Sullivan*<sup>5</sup> established that government may express a particular substantive policy, such as an anti-abortion stance, through private speakers. There, the government did so by funding only those clinics which agreed not to counsel on the abortion option.<sup>6</sup> Under *National Endowment of the Arts v. Finlay*,<sup>7</sup> when government is engaged in a necessarily discretionary selection process, such as allocating federal arts funding on the basis of “artistic merit,” it can incorporate values, such as decency, as part of its evaluations.

This Article focuses first on the contexts that it will label the “special public purpose forums.” These are the projects and programs where government has a subjective expressive purpose that includes particular values and is carried out through selection of private speakers. In these contexts, the government speech paradigm should apply. Instead, in recent cases involving Internet links on a municipal web site,<sup>8</sup> honorary street signs,<sup>9</sup> and sidewalk art,<sup>10</sup> the limited public forum test was applied by rote, despite its uneasy fit with general criteria such as “promoting the city’s tourism and economic welfare” and “appealing to a broad-based audience.” Such standards cannot be applied free of viewpoint. Nominal application of the limited public forum test at best creates an unpredictable legal landscape for policy makers, and often will frustrate legitimate public expressive intent. In only one case has a court explicitly faced the dichotomy.<sup>11</sup> It concluded, in dicta, that if a city funds only those

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5. 500 U.S. 173 (1991).

6. *Id.* at 179.

7. 524 U.S. 569, 572-73 (1998). *See also* Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666 (1998) (involving public broadcasting content selection). *See infra* Part II.A.

8. *See* The Putnam Pit v. City of Cookeville, 221 F.3d 834, 838-39 (6th Cir. 2000).

9. *See* E. Timor Action Network, Inc. v. City of N.Y., 71 F. Supp. 2d 334, 336 (S.D.N.Y. 1999).

10. *See* PETA v. Giuliani, 105 F. Supp. 2d 294, 297 (S.D.N.Y. 2000), *aff’d*, 2001 WL 1010004 (2d Cir. Sept. 5, 2001).

11. *See* Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001) (en banc), *vacated by*

special events that best reflect the city's unique identity, that selection process might be government speech.<sup>12</sup> This approach, as this Article asserts, is the proper one. In the context of special public purpose forums, the Article argues, the government speech paradigm should apply, not the limited public forum test.

The second focus of this Article is what shall be referred to here as the "sponsor acknowledgment" cases. Two appellate courts recently have held that a government's promotion of its corporate sponsors, by public acknowledgment of their contributions, is government speech and does not create a limited public forum entitling others to access.<sup>13</sup> Especially where the acknowledgment includes promotional information about the sponsors, it is hard to distinguish between these cases and the many limited public forum cases involving companies that pay the government to advertise on government property.<sup>14</sup> The courts have not yet articulated any clear distinction between governments' promotion of corporate sponsors and governmental programs of displaying corporate advertisements. The two types of cases result in different outcomes, however, despite the apparent similarities: a revenue-raising purpose and lack of declared expressive goals.<sup>15</sup>

This Article asserts that the crucial distinction between the sponsor acknowledgment cases and situations correctly labeled limited public forums is the appearance of endorsement. Where an affiliation resembles a partnership, so that the public will perceive government approval of a sponsor's message, government should

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122 S. Ct. 340 (2001) (directing the 9th Cir. to reconsider in light of *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)), *remanded in* 275 F.3d 1160 (9<sup>th</sup> Cir. 2000) (remanded to district court for further evidentiary hearings), No. CV-97-00327, slip op. (D. Ariz. Nov. 10, 2003) (unpublished opinion granting summary judgment to plaintiff based on new facts). *Gentala* is further discussed *infra* Part II.B.

12. *Id.*

13. *See Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001) (sign acknowledging city sponsors on city's holiday display was government speech, triggering no obligation to include others), *cert. denied*, 534 U.S. 997 (2001); *KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (public radio station allowed to reject KKK as sponsor), *cert. denied*, 531 U.S. 814 (2000). *See infra* Part II.B.

14. *See infra* Part I.B.1.

15. This theoretical gap is underscored by the "Adopt-a-Highway" cases, where states have been required to permit the Klu Klux Klan to donate labor to a highway cleanup program, and then to erect a state sign acknowledging this contribution. *See, e.g., Cuffley v. Mickes*, 208 F.3d 702, 708-09 (8th Cir. 2000), *cert. denied sub nom. Yarnell v. Cuffley*, 523 U.S. 903 (2001). *See infra* Part III.C. In direct contrast, one of the sponsor cases upheld rejection of the KKK as a public radio show contributor. *See KKK*, 203 F.3d at 1095.

retain control over selection and the government speech analysis should apply.<sup>16</sup>

These recent cases demonstrate the judicial confusion, sometimes acknowledged explicitly,<sup>17</sup> over the considerable intersection between limited public forums and government speech. The scholarship in this area has been directed broadly at the theory of government speech and at critiquing the Supreme Court's cases;<sup>18</sup> there has been no commentary at all on situations this Article refers to as "special public purpose forum" and "sponsor acknowledgment" cases. This Article focuses on applying existing Supreme Court precedent to novel contexts and argues for an extension of the government speech doctrine to encompass both trends. As shown by the concluding examples, doing so will add to the speech market by allowing government new venues to communicate broad policy messages and by enhancing its ability to foster new public-private expressive initiatives.

Part I gives necessary background on the limited public forum test and shows its rigid restrictions on government's structuring of new programs and relationships. Part II sets forth the Supreme Court government speech cases and the recent appellate court applications. Part III argues for expanding government speech, but also fashions a principled approach to containing the impact: requiring government's expression of values to adhere to publicly stated program goals. This Part also explains why application of the Establishment Clause endorsement test is a useful tool here for defining the types of relationships where government may take values into account. Finally, this Article illustrates its conclusions by analyzing the expanding situations of light pole banners, city special events, and

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16. Note that while organized here as two separate issues, there is substantial overlap between special public purpose forum and sponsor acknowledgment analysis. See discussion *infra* Part III.A.

17. See *PETA v. Giuliani*, 105 F. Supp. 2d 294, 297-98 (S.D.N.Y. 2000), *aff'd*, 2001 WL 1010004 (2d Cir. Sept. 5, 2001).

18. See MARK G. YUDOFF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* (1983); Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); David C. Cole, *Beyond Unconstitutional Conditions: Changing Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (Jan. 2000); Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119; Robert C. Post, *Subsidized Speech*, 107 YALE L.J. 151 (1996); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 556 (1980); Mark G. Yudoff, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

government web sites.

## I. THE DEVELOPMENT AND CONTOURS OF THE LIMITED PUBLIC FORUM DOCTRINE

To demonstrate that limited public forum analysis is an insufficient paradigm for special public purpose forums and sponsor acknowledgments, it is first necessary to explain in some detail how the limited public forum doctrine works. This Part will review its foundations and the categories of content limitations seen in the case law to show the surprising narrowness of the approach.

### A. General Background

*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, which originated the forum analysis approach, established the test for government property that "is not by tradition or designation a forum for public communication."<sup>19</sup> Under *Perry* and its progeny, "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."<sup>20</sup>

In *Perry*, the Court upheld a school district's grant of exclusive access to a school mail system to the teachers' bargaining representative, while denying such access to a rival union.<sup>21</sup> This distinction was deemed reasonable in light of the primary purpose of the mail system, official school business, and viewpoint-neutral because it was based on the relative status of the groups, not on their positions on the issues. Also, the Court approved of drawing such lines to keep inter-union squabbling from interfering with labor peace in the schools.<sup>22</sup>

In the other foundation case in this area, *Cornelius v. NAACP Legal Defense Fund*,<sup>23</sup> the Court allowed the federal government to limit participation in the annual federal employee charity drive to direct service charities, while excluding legal defense and political advocacy organizations. The Court held that the stated rationale of

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19. 460 U.S. 37, 46 (1983). See Bezanson & Buss, *supra* note 18, at 1397-99, for a more detailed history of the development of the forum approach.

20. *Perry*, 460 U.S. at 46.

21. *Id.* at 38-39.

22. *Id.* at 49, 52.

23. 473 U.S. 788 (1985).

avoiding disruptive controversy was reasonable in light of the revenue-raising purpose of the program.<sup>24</sup>

*Cornelius* adopted the *Perry* test, but also provided further, frequently cited factors for determining the type of forum created. The Court staid with the assumption that “[p]ermitting limited discourse” does not create a public forum or trigger right to any public access. Rather, the inquiry is whether the government has “intentionally open[ed] a nontraditional forum for public discourse.”<sup>25</sup> Government’s stated intent, however, is not determinative. Instead, courts are to look at the government’s policy and practice, including whether permission is required for access, as well as the nature of the property and its compatibility with expressive activity.<sup>26</sup>

The last two factors give rise to an issue that is currently causing great confusion in the courts: whether there is any difference between a “nonpublic” forum, the term used in *Perry* and *Cornelius*, and a “limited public forum.”<sup>27</sup> Some courts view the “limited public forum” as a subset of the “designated public forum” and find that strict scrutiny thus applies. They reason that there cannot be a “nonpublic” forum if the venue is visible to the public and has expressive activity as its purpose.<sup>28</sup> This Article agrees with the courts that conclude the “limited public forum” is a subset of the “nonpublic” forum, but also asserts that there is no substantive difference between the two schools of thought. The only meaningful difference is between a nonpublic forum and a true designated forum, one equivalent to a traditional public forum, where all content

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24. *Id.* at 806-07.

25. *Id.* at 802-03.

26. *Id.*

27. See *Summum v. Callaghan*, 130 F.2d 906 (10th Cir. 1997) (identifying this issue and concluding that limited public forum is a type of nonpublic forum). See also *DeBoer v. Vill. of Oak Park*, 267 F.3d 558 (7th Cir. 2001) (declining to attempt to “reconcile this confusion over the proper forum terminology” because not necessary to case where found viewpoint discrimination); *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001) (finding that the limited public forum is a subset of the designated public forum, not a type of nonpublic forum); *PETA v. Giuliani*, 105 F. Supp. 2d 294, 309 (S.D.N.Y. 2000), *aff’d*, 2001 WL 1010004 (2d Cir. Sept. 5, 2001) (reviewing the case law on this issue, noting: “[t]o say that the ambiguities described have left this Court benumbed and bewildered is only modestly overstated,” and finding that considering limited public forums as a subset of the nonpublic forum was the better view).

28. See, e.g., *E. Timor Action Network, Inc. v. City of N.Y.*, 71 F. Supp. 2d 334, 344 (S.D.N.Y. 1999). But many cases apply the *Perry/Cornelius* reasonableness test to public places. See *infra* Part I.B.1 (discussing transit advertising space). Many cases also apply it to programs with expression as their purpose. See *infra* Part I.B.5 (discussing special public purpose forums).



distinctions are proscribed unless they pass strict scrutiny. In contrast, even if a forum is considered “designated, but for a limited purpose” (e.g., meeting rooms opened for school-related activities), the government is still entitled to reject speakers who are outside those content limits (i.e., make content-based decisions), just as in a nonpublic forum.<sup>29</sup>

When courts apply the *Perry/Cornelius* reasonableness test, the first question is always whether the government has sufficiently limited access to the property.<sup>30</sup> If so, they next evaluate: (i) the acceptability of the content categories allowed and prohibited, and

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29. *Perry* supports this. Although the school mail system was primarily for teacher-administration communication, some outside organizations, such as the YMCA and Cub Scouts, had been given access. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Nonetheless, because permission was required and not automatically given, this type of “selective access” did “not transform government property into a public forum.” *Id.* at 48. Even if outside groups’ access had created a “‘limited’ public forum,” the Court did not apply heightened scrutiny to rejection of the outside union group, because it was a different type of group.

Nor does *Widmar*, relied on by some courts to show a “designated” forum is different from a “nonpublic” forum, undermine the point. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). Where a university’s policy was to allow all student groups to use its meeting room space, the Court found it had created a “forum generally open for use by student groups,” so that denial of meeting space to the plaintiff student group based on its religious content was subject to strict scrutiny. *Id.* This is no different than the rule in a nonpublic forum, where denying access to a speaker who is within the stated content limitations would be deemed viewpoint discrimination, unconstitutional unless it met strict scrutiny. See *Sumnum*, 130 F.2d at 917.

That the two categories of forum are indistinguishable is supported by a final point: While no case expressly states it, it must be the case that any subject matter or speaker limitations in a “designated” forum must be “reasonable” in the same manner as would be required if the forum was deemed nonpublic. Although there is no judicial test to point to, it cannot be the case that the limits drawn could be arbitrary, e.g., only tall students, or viewpoint discriminatory, e.g., only students with no criticisms of the administration.

30. Note that this Article, following the case law, speaks in terms of whether the government has sufficiently limited the forum, which suggests that the government has the burden of proof on this point. No cases expressly address the burden of proof issue, but it seems apparent that plaintiff’s burden is to show that he or she requested permission or otherwise tried to speak in the forum at issue, and was denied or stopped, while other persons – either those like him or indiscriminately – were allowed to speak. Then the government must try to show a valid basis for doing this. It will never assert that it has intentionally created a designated forum, open to all, but there was a compelling reason to deny plaintiff’s request to speak and denial was the narrowest grounds for accomplishing that. Thus, at least in cases where a limited public forum is the best argument available, the government always will respond with the claim that plaintiff was rejected because he or she was outside the scope of the forum; that the content limitations on the forum were reasonable and valid; and that it was not a matter of viewpoint discrimination, but rather of neutral application of the forum limitations. This sequence is why the cases and this Article read as if the government defendant had the burden of proof.

(ii) whether denial of a particular request for access is in fact based on dislike of the person or viewpoint expressed.<sup>31</sup> While *Perry* and *Cornelius* appear to give government substantial latitude to keep controversy and divisiveness out of its limited forums, subsequent decisions do not bear this out.<sup>32</sup> Instead, most attempted content limitations are struck down as either inherently viewpoint discriminatory or as allowing too much room for consideration of viewpoint.

## **B. The Constitutionality of Various Types of Content Limitations**

Governments have fashioned many types of content limitations to serve their goals for the use of limited public forums, but most have been ruled unconstitutional. As shown below, directly prohibiting groups that discriminate, advocate, or incite violence has been struck down as unconstitutional viewpoint discrimination, as has carving out sectarian religious speech and screening for public controversy. Analyzing these thwarted efforts proves the limited public forum test's incompatibility with the special public purpose forum and sponsorship selection. Its frequently asserted key principles – the requirement of objectivity and the prohibition of value judgments – are unworkable for public projects with broad expressive goals and for partnership criteria. The only consistently successful method of excluding controversial and divisive speech, the “commercial only” policy,<sup>33</sup> cannot serve that purpose outside the advertising forum context, but it illustrates well the contours of the limited public forum, as discussed below.

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31. See *infra* Part I.B.

32. See *infra* cases collected in Part I.B.2 (impermissible to exclude topics of “public controversy” from bus advertising on grounds of protecting riders’ tranquility) and Part I.B.4 (cannot allow one type of educational group, but exclude another based on the likelihood it will be divisive).

33. Sometimes a policy is framed in terms of what is allowed and sometimes as what is prohibited, i.e., “only commercial” or “no political,” but courts review policy and practice from both perspectives. Even where a holding is expressed in terms of one of the categories, both the excluded and the included subjects are inherent in the analysis. No court has looked at or defined what constitutes commercial in this context, but the safest definition would include only advertisements proposing a commercial transaction. See JOHN E. NOWAK, RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.26 (4th ed. 1991) (stating that this is the clearest formulation of the category, but noting that definition is not precise and the case law is complex).

### 1. *Commercial Speech Only Policies.*

Where there is a written policy for, and a consistent practice of, limiting city bus advertising to commercial advertisements, courts follow *Lehman v. City of Shaker Heights*,<sup>34</sup> and the government prevails.<sup>35</sup> In *Lehman*, a fairly brief opinion decided before *Perry*, the court found that based on twenty-six years of consistently enforced limits, such advertising space was not a public forum. It held it was acceptable for the City to reject all political ads “to minimize chances of abuse, the appearance of favoritism, and the risk of imposing on a captive audience,” and rejected the political candidate’s First Amendment claim.<sup>36</sup>

As suggested by *Lehman*, consistency in practice is the single most dispositive consideration of whether a policy is constitutional, and the one essential reason “commercial only” policies survive is that for the most part, they are simple enough to apply consistently. Past practice is so heavily weighted in limited public forum claims that even where there is no clearly established policy, a court will evaluate the forum’s history to determine whether the denial at issue fits the pattern of what speech has been allowed in the past.<sup>37</sup> An extremely consistent practice can even overcome a post-litigation change in the written policy.<sup>38</sup>

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34. 418 U.S. 298 (1974).

35. See, e.g., *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) (expressly relying on *Lehman* to uphold city bus advertisement policy banning all non-commercial ads).

36. *Id.* at 305. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), where the Court struck down a municipal ordinance allowing news racks for newspapers, but not for commercial papers, does not undermine *Lehman* because it involved the public way, where content-based distinctions are almost never permitted. Also, the rationale was a lack of reasonable fit between the goals of the legislation (aesthetics and avoiding litter) and the problems caused by the different types of speech, *id.* at 428, and arguably political ads on public buses have different externalities than do commercial ones.

37. E.g., *DiLoretto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 969 (9th Cir. 1999). The Ninth Circuit upheld a school’s refusal to post a sign listing the Ten Commandments in a baseball field advertising forum, even though its only policy was an ad hoc one to exclude certain subjects as too controversial for the high school context. Because they had never displayed anything but commercial business advertisements, the court inferred a “commercial only” policy and found a nonpublic forum. The Ninth Circuit found the “commercial only” policy reasonable, in light of the special nature of the school context, for the purpose of avoiding the appearance of school sponsorship, making the students a captive audience, and the costs of litigation, which would impinge on educational funds. *Id.* at 968-69.

38. E.g., *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998). The city had a relatively amorphous policy of “no political or religious ads,” pursuant to which it rejected a *Children of the Rosary* (COR) advertisement containing a Bible quote and

Where evaluation of a municipality's practice shows that it actually enforces only a subset of its stated limitations, however, then a court will find that the forum is limited only as to that narrower category, but not as to the broader one.<sup>39</sup> Finally, where a municipality imposes no selective system of controls and has a history of allowing a broad range of speech in its advertising forums, courts will find a designated forum and apply strict scrutiny to invalidate all rejections of proposed speech.<sup>40</sup>

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the phrase, "Choose Life." Subsequently, the city changed the stated policy to "only commercial ads," which more objectively excluded COR's initial advertisement. Because even before the express commercial limitation, only 1% of its advertisements had any other subject matter, the Ninth Circuit found a nonpublic forum. The new restriction then was deemed reasonable in light of the city's interests in maintaining neutrality and preventing a drop in advertising income. *Id.* at 976-77. But Compare *id.* with Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 942, 954 (2000), where the author asserts that government can subvert the limited public forum doctrine by claiming that a challenged speech restriction is a legitimate re-designation of the forum's content limitations, so that instead of being characterized as a rejection of speech within the forum, which is subject to strict scrutiny, a court would ask only whether the new content limitation was reasonable. I disagree with the assertion that courts are so easily fooled. More likely, unless the new policy was supported by actual past practice, as in *Children of the Rosary*, 154 F.3d at 976-77, a court would apply strict scrutiny to any policy change brought on to deflect an unwanted applicant.

39. For example, in *Nat'l Abortion Rts. Fed'n. v. Metropolitan Atlanta Rapid Transit Authority*, 112 F. Supp. 2d 1320 (N.D. Ga. 2000), the transit authority's policy showed an intent to open the bus advertising forum only to non-controversial commercial advertisements, but in actual practice it had accepted advertisements on a wide variety of public interest topics, including AIDs awareness and homosexual rights, and had consistently rejected only expressly political advertisements. The court concluded that "at best, MARTA has created a limited public forum which excludes only political speech," so that its rejection of a pro-choice advertisement was subjected to, and failed, strict scrutiny. *Id.* at 1326. See also *E. Timor Action Network, Inc. v. City of N.Y.*, 71 F. Supp. 2d 334 (S.D.N.Y. 1999) (despite a stated policy of not allowing honorary street signs for political purposes, after reviewing the actual practice of granting applications, the court concluded that New York had successfully limited its forum only with respect to political parties and candidates, so that all denials of other signs of a political nature were subject to strict scrutiny).

40. *E.g.*, *Christ's Bride Ministries v. Southeastern Penn. Transp. Authority (SEPTA)*, 148 F.3d 242 (3d Cir. 1998) (where the advertising policy contained only one real limitation, a ban on libelous or obscene ads, SEPTA retained sole discretion to reject any advertisements, and SEPTA had accepted a broad range of advertisements, including religious messages, advertisement criticizing political candidates, and even advertisements on both sides of the abortion issue, the Third Circuit held that the transit authority had created a designated public forum, so that its removal of an anti-abortion advertisement from a bus violated the First Amendment); *Planned Parenthood v. CTA*, 767 F.2d 1225 (7th Cir. 1985) (where the CTA had maintained "no system of control" and accepted a broad range of advertisements, the Seventh Circuit found it had created a public forum in its bus advertising space, and so could not reject an abortion advertisement, which violated its unproven, and probably unsustainable, policy of rejecting all controversial public issue

Although it is the most objective content limitation, even commercial advertising has blurry boundaries that strain the ideal of consistent application. For example, social interest groups may try to squeeze into a "commercial ads only" forum by selling some related product. In one case, a pro-life group and the ACLU amended their messages by tacking onto their ads the phrase "buy a bumper sticker" and their telephone numbers, but the court rejected the transparent attempt to convert a social interest advertisement into a commercial one.<sup>41</sup> Nor does limiting a forum to commercial ads necessarily keep out all political statements, as illustrated by a case that involved a bus advertisement featuring New York Magazine's logo and the statement: "Possibly the only good thing in New York Rudy hasn't taken credit for."<sup>42</sup>

While these courts were willing and able to draw the line between "commercial" and "political" ostensibly based on the predominant purpose of the advertisement at issue, the issue becomes more complex where the commercial and the political involve the same subject matter. In one case, an airline pilots' union sought to place its message in an airport advertising display that had included airline advertisements. The Seventh Circuit concluded that the policy was not viewpoint-neutral just because all political ads had been rejected.<sup>43</sup> Presumably, the argument would be that "American Airlines mistreats its employees" presents a different viewpoint on the company than does an advertisement's implied message of "American Airlines is a wonderful company." While this is not the general consensus,<sup>44</sup> it does show the fragility of the reliance on

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ads).

41. *Children of the Rosary*, 154 F.3d at 981.

42. *N.Y. Magazine v. Metro. Transp. Authority*, 136 F.3d 123 (2d Cir. 1998) (court deemed ad commercial despite its political commentary). See also *E. Timor Action Network, Inc. v. City of N.Y.*, 71 F. Supp. 2d 334, 339 n.2 (S.D.N.Y. 1999) (involving a prohibition on commercial advertising in honorary street signs, the court noted that the line between culture and commerce is blurred and found that signs for "People Magazine Way" and even "Beauty and the Beast Way" during new Broadway production undermined restriction).

43. *Air Line Pilots Ass'n (ALPA) v. City of Chi.*, 45 F.3d 1144, 1160 (7th Cir. 1995) (involving the City's rejection of ALPA's advertisement supporting pilots in a union-management dispute, for posting in one of the diorama display cases at O'Hare Airport, pursuant to its written policy prohibiting any political advertisements; remanded to determine whether the Airport had succeeded in keeping the forum nonpublic, and suggesting that if the City had accepted airline advertising, it might have to accept airline unions' protests).

44. E.g., *Children Of the Rosary*, 154 F.3d at 981 (noting that allowing ad for health clinic that offers abortions, pursuant to a commercial only policy, while rejecting pro-life

content categories. Using the “same subject” test would gut the limited public forum test, making illusory the ability to fashion content limitations because drawing lines based on topic offers no hope of consistent administration.

While a “commercial ads only” policy does block most speech against public policy, it is an open question whether governments can further exclude a subset of such speech, typically alcohol and tobacco ads, where promoting such products contravenes the administration’s values.<sup>45</sup> Such a prohibition is a reasonable content limitation, at least where it can be argued that stimulating demand for alcohol and tobacco use undermines the forum’s revenue-raising purpose.<sup>46</sup> Where a government spends tax dollars on public health campaigns to reduce consumption and mitigate the associated negative effects, including alcohol-related crime, opening its property to promote the products has a contradictory fiscal impact. Nonetheless, a policy excepting certain kinds of advertisements is a risky strategy for governments because they will likely be subjected to claims of viewpoint discrimination.<sup>47</sup>

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and pro-choice message advertisements, would not violate the First Amendment). Even in *Perry*, the Court held that there was a discernible and valid content distinction between matters of school business, including outside activities for students, and union politics. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48 (1983).

Moreover, the Seventh Circuit in *Air Line Pilots Ass’n*, cited as its support *AIDS Action Committee of Massachusetts v. MBTA*, 42 F.3d 1, 11 (1st Cir. 1994), which made a different point. The First Circuit did find viewpoint discrimination where a transit authority rejected a condom awareness advertisement for sexual overtones, although it had displayed movie advertisements with more sexually explicit graphics. *Id.* There, however, the content limitation itself was a prohibition on sexually explicit materials, so that the case involved only a content limitation inconsistently applied.

45. While some limited public forum cases have referenced such policies, for example, *DiLoretto v. Downey Unified High Sch. Dist.*, 196 F.3d 958 (9th Cir. 1999) (past practice of rejecting alcohol and tavern ads from display in baseball field advertising forum) and *N.Y. Magazine*, 136 F.3d 123 (city bus ad policy prohibited ads promoting tobacco), in no case have they been at issue. Nor would the analysis be governed by the cases invalidating restrictions on such advertisements on private property. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (prohibition on all outside advertising of smokeless tobacco and cigars within 1000 feet of schools and parks); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996) (statute prohibiting alcohol price advertisements).

46. E.g. *Cornelius v. NAACP*, 473 U.S. 788 (1985) (allowing exclusion of subset of charities, advocacy organizations, which the government had determined might decrease donations by sowing dissension).

47. If a prohibition on alcohol or tobacco advertising in a limited public forum was deemed viewpoint discrimination, it would be subject to the strictest scrutiny available for restrictions on commercial advertising. The *Central Hudson* test provides that commercial speech is protected if it is not false or misleading and that any regulation must directly advance a substantial governmental interest and not be more extensive than necessary to

## 2. “No public controversy” Policies.

Every court to consider the issue has struck down government attempts to limit forum content by a “no public controversy” policy. As shown in the “commercial only” section above, to retain limits on a forum requires proof of a consistent practice of permitting only speech that is within the stated content limitations. Because the very nature of “public controversy” is amorphous, made up of the shifting vagaries of public opinion, it lacks the capacity for predictable, uniform enforcement.

In addition, because limited public forums require selective control over access, which generally translates into requiring prior permission to speak, courts also sometimes speak in terms of an unconstitutional prior restraint. To regulate private speech in a traditional or designated public forum requires “narrow, objective and definite” standards to ensure that decisions are not based on content.<sup>48</sup> While perhaps not strictly applicable where content-based decisions are allowed, this rationale is used, without analysis; here it performs a similar function of screening out potential viewpoint discrimination.<sup>49</sup>

Nor is there any drafting tool by which a government can salvage its policy from an inherently subjective standard. As an example,

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serve that interest. *See N.Y. Magazine*, 136 F.3d at 128 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980)).

48. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (evaluating parade ordinance).

49. *See N. Y. Magazine*, 136 F.3d at 131 (court found bus advertising space a designated forum, then reviewed rejection of advertisement as a prior restraint, bearing the presumption of unconstitutionality); *Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) (court found city hall art gallery a designated forum, then struck down restriction on “no controversial art” based on unconstitutionality of “‘censorship by public opinion.’”) (quoting *Texas v. Johnson*, 49 U.S. 397 (1989) (striking down flag-burning ban)); *E. Timor Action Network, Inc. v. City of N.Y.*, 71 F. Supp. 2d 334, 348 (S.D.N.Y. 1999) (holding city’s alleged policy of rejecting any honorary street signs that would generate political controversy an unconstitutional prior restraint, without regard to whether a designated public forum was created).

For similar reasons, courts always will find unconstitutional a policy that provides no standards at all, and so gives administrators completely unfettered discretion. *See Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001) (where written policy for use of town hall meeting rooms contained no limitations on content, it was an unconstitutional prior restraint; problems inherent in such unfettered discretion apparent from commissioner’s viewpoint discriminatory decision to allow religious services unless they included proselytizing); *Int’l Union of Operating Eng’rs, Local 150 v. Orland Park*, 139 F. Supp. 2d 950 (N.D. Ill. 2001) (striking down sign ordinance because of its exemption for “banners on light poles,” which stated that banners must be made available to the Village Board for approval, without giving any standards at all).

Atlanta's transit authority set forth careful written standards that attempted to preemptively define exactly the kind of "public controversy" it would exclude from its bus advertisement forum.<sup>50</sup> The standards excluded matters that are "widely reported" and "arouse strong feelings," and were held unconstitutionally vague and overbroad.<sup>51</sup> Given that result, it is difficult to imagine a successful definition. Furthermore, that a municipality can show evenhanded application of a "no public controversy" standard, by rejecting speech on both sides of a controversial topic such as abortion, does not change the outcome.<sup>52</sup>

### 3. *Excluding Speakers Who Advocate or Incite Discrimination or Violence.*

Probably the biggest concern of governments in starting a project that includes speech is that they will be forced to give access to groups who advocate or incite discrimination, hate, violence, or other notions antithetical to the common good. Use restrictions on groups who discriminate or may incite violence, however, consistently have been struck down on the basis of viewpoint discrimination as well as other constitutional norms.

While discrimination against protected groups is against government policy and the law,<sup>53</sup> excluding groups that discriminate from a limited public forum is not allowed. A recent case involved a school board's termination of the Boy Scouts' use of school meeting rooms, based on the board's dislike of the Scouts' intolerance of homosexuality.<sup>54</sup> The court held that first, the action was based on

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50. See *Nat'l Abortion Rts. Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320 (N.D. Ga. 2000). Atlanta's transit authority's advertising policy provided, in relevant part:

No advertising that supports or opposes any position in regard to a matter of public controversy shall be displayed in the Authority's stations, vehicles or other facilities. For this purpose, a matter is considered to be one of public controversy if it is widely reported by the newspapers, television or radio stations, or other news media in the area served by the Authority, and it reasonably appears from such reports that the subject matter arouses strong feelings in a substantial number of people.

*Id.* at 1324. The court found the policy overbroad because it would bar ads for sports teams, such as the Atlanta Braves, which evoke strong feelings, and vague because terms such as "widely reported" and "reasonably appears" were deemed to put too much discretion in the hands of government officials. *Id.* at 1327.

51. *Id.* at 1324.

52. See *id.* at 1323.

53. See, e.g., 1964 Civil Rights Act, 42 U.S.C. §§ 1971, 1975 (a)-(d), 2000(a) et seq.

54. *Boy Scouts v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001).



viewpoint, and not a reasonable content restriction, and second, that the action violated the Boy Scouts' expressive freedom of association.<sup>55</sup> Similarly, in *Cuffley v. Mickes*, the Eighth Circuit rejected Missouri's attempt to exclude the Ku Klux Klan (the "KKK") from participation in the Adopt-a-Highway Program based on a purported policy of prohibiting discriminatory groups.<sup>56</sup> Under the program, groups that agreed to keep a stretch of highway free of litter would receive public acknowledgment of their participation by a sign posted on that spot. That court held that to require the KKK to alter its message of racial superiority and segregation as a condition of participation would violate its freedom of political association.<sup>57</sup>

*Cuffley* and the other Adopt-a-Highway cases also involved the second category that governments have tried to use to keep hate groups from limited public forums – a prohibition on speakers who incite violence.<sup>58</sup> In rejecting this limitation, courts look to general

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55. *Id.* at 1308 (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)). Although the school had argued that because the Scouts draw members and leaders primarily from the student body and faculty, the school has "a compelling interest in stopping discrimination against those with whom it has a special relationship and duty," the court found that since the decision concerned access to a limited public forum by outside groups during non-school hours, the special deference accorded to the educational function and the school context did not apply. *Id.* at 1310.

56. *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied sub nom.* 534 U.S. 903 (2001). See also *Texas v. KKK*, 58 F.3d 1075 (5th Cir. 1995); *KKK v. Ark. State Highway Dep't.*, 807 F. Supp. 1427 (D. Ark. 1992).

While none of these cases explicitly goes through the process of forum analysis, all apply the reasonableness/viewpoint neutral test, which assumes a limited public forum. Presumably, for safety reasons the shoulder of a highway is not a public forum, and the signs were limited as to category of speaker (only those participating by regularly picking up litter) and as to content (only the name of the organization was allowed).

Only the Eighth Circuit case *Cuffley* involved written regulations stating the content limitations, that no groups which discriminated or incited violence could participate, and those regulations were adopted after receipt of the KKK application and had been applied only to them. The other states gave only ad hoc reasons for the denials. Thus, the only pre-existing, established limitation was that a group had to agree to clean up a section of highway (and, presumably, carry through with that agreement). Because the KKK had requested to participate in a limited public forum and fell within the only general, established restriction, strict scrutiny should have applied. See *Texas v. KKK*, 58 F.3d at 1082 (concurring opinion) (asserting that strict scrutiny was warranted, but that it was satisfied there under the facts). Nonetheless, the cases are helpful in the limited public forum context because they applied the reasonableness/viewpoint neutral test, despite not actually establishing the nature of the forum.

57. *Cuffley*, 208 F.3d at 708.

58. The relationship between the two issues has been noted by scholars who argue that racist speech constitutes a sublimated or muted form of violence against its targets. See, e.g., Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, DUKE L.J. 431 (1990); Mari Matsuda, *Public Response to Racist Speech*:

First Amendment jurisprudence: government cannot prohibit speech based on a fear of protests and violence that reflects a generalized “hecklers’ veto,” but only where there is an imminent threat of violence.<sup>59</sup> While the cases do not analyze whether these principles for protecting freedom of speech on the public way should be applied wholesale to government programs, such content limitations violate the limited public forum doctrine as well. First, where the state seeks to prevent angry crowd demonstrations and counter-protests, arguably it is acting to suppress a viewpoint that it predicts many citizens will dislike. Second, if government tries to ban groups that engage in or advocate violence, that standard would be found vague or subjective, at least if they attempt to do so without specific criteria or concrete evidence.<sup>60</sup>

In the only case permitting fear of violence as a reason for excluding the KKK, the rationale was site-specific and backed by evidence. In *Texas v. KKK*, the Ku Klux Klan had applied to adopt a stretch of highway outside a public housing project that had been desegregated by a federal court order.<sup>61</sup> Because the KKK had opposed the desegregation order so violently that a state court had enjoined them from blocking access to the area, the Fifth Circuit held rejection of the KKK was viewpoint neutral in that it was based on

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*Considering the Victim's Story*, 87 MICH. L.REV. 2320 (1989).

59. *Ark. State Highway Dep't.*, 807 F. Supp. at 1437 (citing *Collin v. Smith*, 578 F.2d 197 (7th Cir. 1978) (village officials could not prohibit the Nazis from marching in Skokie) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (freedom of speech is nevertheless protected against censorship unless shown likely to produce “a clear and present danger” of violence)). Note that this leaves open the possibility of content limitations excluding speech that can be characterized as inciting imminent lawlessness or proposing an illegal transaction, which is helpful because discrimination and hate crimes are against the law in many municipalities. For example, the Chicago Transit Authority's advertising policy states:

3. Commercial advertising that proposes transactions which would constitute unlawful discrimination . . . is not permitted . . .

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6. Advertising that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, including but not limited to unlawful action based on a person's or persons' race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital or parental status, military discharge status, or source of income, is not permitted.

Chicago, Ill., Ordinance 91-169 (Sept. 11, 1991). [copy on file with HASTINGS CONSTITUTIONAL LAW QUARTERLY].

60. See *Cuffley*, 208 F.3d at 709 (holding regulation prohibiting groups engaged in violent or criminal behavior pretextual and invalid because it had never been applied to any other group and its reach was ill-defined).

61. 58 F.3d 1075, 1079 (5th Cir. 1995).

the foreseeable impact of a continuation of the group's documented past conduct.<sup>62</sup>

A related category, depictions of graphic violence and sex, is one type of offensive and degrading speech that government may have some ability to exclude from limited public forums. Several cases suggest that it would be acceptable to bar such content if the material were described quite specifically so that the policy could be applied neutrally.<sup>63</sup> Of course, some could argue that offensiveness is inextricable from what is simply an individual's expression of a viewpoint otherwise permitted in the forum. Nonetheless, the comfort of captive audiences, combined with the inescapable visuals and the low value of such speech, probably accounts for courts' suggestions that such content limits could pass muster.

Finally, municipalities sometimes have used more subtle drafting tools as a proxy for keeping out discrimination and violence, or at

62. *Id.* at 1081. The court further held that the state's denial was a reasonable effort to protect the residents from intimidation, comply with the desegregation order, insure free use of the highway, and protect residential privacy against the imposition of an unwanted message. *But see id.* (concurrence) (finding viewpoint discrimination that survived strict scrutiny because compelling reasons). *Cf. Nat'l Abortion Rts. Fed'n v. Metro. Atlanta Rapid Transit Auth. (MARTA)*, 112 F. Supp. 2d 1320, 1327 (N.D. Ga. 2000) (where MARTA rejected a pro-choice advertisement and asserted an interest in protecting its employees and passengers from potential violence, which could rise to the level of a compelling interest, but NAR showed that the advertisements had run in other cities without incident and MARTA presented no evidence that Atlanta would be different, the action in a designated forum failed strict scrutiny).

63. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) (where the court suggested that a city art gallery could reject overtly sexual art if it did so pursuant to objective standards carefully describing the types of art that would be rejected as violating community standards of decency); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transit Auth.*, 42 F.3d 1, 13 (1st Cir. 1994) (recognizing that MBTA could prohibit certain types of explicitly sexual advertising if it did so by precise standard, applied neutrally). *See also Leslie Jacobs, The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357 (2001) (arguing for validity of such content limitations).

A good example of a very specific and concrete policy explaining what types of advertising are prohibited on city buses can be found in the Chicago Transit Authority's policy, which prohibits, in relevant part:

Advertising that is legally obscene is not permitted. In addition, sexually explicit advertising depicting nudity (male or female genitals, pubic areas, or buttocks with less than a fully opaque covering; female breasts with less than a fully opaque covering or any part of the areolae or nipples; or the covered genitals in a discernibly turgid or otherwise recognizable state) or sexual intercourse or other sexual acts is not permitted.

Advertising that portrays graphic violence, such as through depiction of human or animal bodies, body parts, or fetuses in state of mutilation, dismemberments, disfigurement or decomposition, is not permitted.

Chicago, Ill., Ordinance 91-169 (Sept. 11, 1991). [copy on file with HASTINGS CONSTITUTIONAL LAW QUARTERLY].

least divisiveness. This approach, however, is unlikely to work. In a recent case involving a use policy for village hall meeting rooms that restricted the content to civic matters, the Seventh Circuit held unconstitutional a requirement that a proposed event not be based on or promote the ideas or beliefs of any particular group.<sup>64</sup> For the village to say that a group may only discuss a civic topic if it “allows all points of view to be expressed, even those antithetical to its position on that topic,” is viewpoint discrimination, the court held, because it effectively precludes the expression of individual viewpoints.<sup>65</sup> In addition, the court struck down a companion requirement limiting use to civic activities that “benefits the public as a whole” on the grounds that it was overbroad because it gave village officials unfettered discretion.<sup>66</sup>

#### 4. *Religion - Always Viewpoint Discrimination.*

Recent developments in how religion is dealt with in the limited public forum have obliterated religion as a viable subject matter content limitation, and rendered imperceptible the line between content and viewpoint. While earlier cases had held unconstitutional the exclusion of religious speech from limited public forums, none had involved core religious practices. For example, in *Rosenberger v. Rector & Visitors of University of Virginia*,<sup>67</sup> a university had funded student newspapers, but denied funding to one that published news from an evangelical perspective. Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>68</sup> a school district had denied use of its meeting rooms for a showing of a Christian-based film on parenting, a topic otherwise allowed.<sup>69</sup>

In *Good News Club v. Milford Central School*,<sup>70</sup> the Court held that a school district must allow after-school use of its classrooms to a group that gives school children religious instruction, including Bible

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64. *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 574 (7th Cir. 2001).

65. *Id.* at 571-72. A group otherwise eligible to use the Village Hall for its civic event “cannot be directed by governmental authorities to format their presentation in a way that the government finds suitable.” *Id.* at 572.

66. *Id.* at 573.

67. 515 U.S. 819, 828 (1995).

68. 508 U.S. 384, 387-89 (1993).

69. For a recent application, see *Daily v. N.Y. City Hous. Auth.*, 221 F. Supp. 2d 390, 402-03 (E.D.N.Y. 2002) (denial of resident’s request to use public housing community center for post-9/11 grief counseling/Bible Study, when other similar, secular uses allowed, held unconstitutional viewpoint discrimination).

70. 533 U.S. 98 (2001).

stories, hymns and invitations to accept Jesus Christ.<sup>71</sup> What distinguishes *Good News* from these earlier cases is that the Club's activities went beyond speech on an acceptable forum topic, but from a religious perspective, and into the realm of religious instruction and worship practices. Traditionally, the dividing line between approved neutrality and Establishment Clause violations has been whether the public assets shared with a religiously-affiliated organization have been used for a secular purpose, or for those core religious activities.<sup>72</sup> So, courts and government have significant experience in administering this kind of content limitation. The Supreme Court, however, characterized the Good News Club class as teaching moral development from a religious perspective and held that the Club's rejection was unconstitutional viewpoint discrimination.<sup>73</sup>

The far-reaching implications of *Good News* are illustrated by a recent Seventh Circuit opinion, *DeBoer v. Village of Oak Park*,<sup>74</sup> which held that a village could not exclude a National Day of Prayer service from a meeting room dedicated to civic uses, even though the service was not limited to prayer for government leaders, but had included numerous New Testament readings, Christian hymns, and prayers for the Christian church – all the elements of a Sunday morning church service.<sup>75</sup>

The Seventh Circuit stated that after *Good News*, not only must government allow discussion about civic matters from a religious

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71. *Id.* at 103.

72. See *Mitchell v. Helms*, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (although public assets that convey significant financial benefit - there, the loan of computers and other equipment - now may be given to parochial schools, they still may not be diverted to religious instruction). Compare *id.* with *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002) (upholding school voucher program although tuition subsidies used towards entirety of parochial education, based on distinction between permissible indirect aid, which is a product of individual choice, and unconstitutional direct financial aid to parochial schools).

73. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001). See also *Culbertson v. Oakridge Sch. Dist.*, 258 F.3d 1061, 1064 (9th Cir. 2001) (following *Good News*, school district objecting to a "Good News Club" using its meeting rooms tried to distinguish its situation by asserting that the children involved were younger and the program began closer to the end of the regular school day, but court found unpersuasive given the Supreme Court's holding that the relevant audience for endorsement considerations is the reasonable adult, not the impressionable child; the court did draw the line, however, at teachers' distribution of permission slips during class, which was held unconstitutional endorsement).

74. 267 F.3d 558 (7th Cir. 2001).

75. See *DeBoer v. Vill. Of Oak Park*, 86 F. Supp. 2d 804, 811 (N.D. Ill. 1999), where the district court reviewed the evidence of the actual content of the National Prayer Day event, and reversed his earlier holding requiring access, *rev'g* 53 F. Supp. 2d 982.

perspective, but it must also permit “worship and prayer directed toward the betterment of government and the enlightenment of civic leaders” because they “are methods of expressing a religious viewpoint about civic subject matter.”<sup>76</sup> All that remained was the Village’s “civic purposes” content restriction; it still could deny permission to use the rooms to conduct regular worship services unrelated to a specific civic purpose.<sup>77</sup> The rejection of religion as a permissible content limitation in this context casts doubt on all attempts at broad content categories.<sup>78</sup>

#### 5. *Forums Created for Civic, Cultural and Aesthetic Purposes.*

The content limitations explored to this point have arisen in either the revenue-raising advertisements or the meeting room allocation context, where the purposes of the forums are relatively straightforward. Generally, the focus in these contexts is on keeping out certain types of subject matter, those thought controversial, rather than on what to include.

Where governments open forums for civic, cultural, or aesthetic purposes, however, they have broad, expressive goals. These contexts, which this Article has termed “special public purpose

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76. *DeBoer*, 267 F.3d at 569. “By restricting the plaintiffs from using the means of expression that best reflects their views on how to address civic problems or best provides the reasons (albeit grounded in Christianity and the Bible) as to why they believe their viewpoint to be persuasive, the Village is requiring a ‘sterility of speech’ from the plaintiffs that it does not demand of other groups with regard to this requirement.” *Id.* (quoting phrase from *Good News*, 533 U.S. at 123 (Scalia, J., concurring)). In addition, the court found the distinction between “speech from a religious viewpoint” and “religious prayer, instruction and worship” beyond its competence to administer without undue entanglement. *DeBoer*, 267 F.3d at 570.

77. *Id.* at 570 n.11. This Article expresses no opinion on the advisability or constitutionality under the Establishment Clause of allowing religious worship and instruction in public buildings, but merely raises the concern that requiring such access under the limited public forum doctrine renders the line between content and viewpoint imperceptible.

Note that where a forum is limited to “commercial ads only,” rejection of purely religious speech still would be allowed, as it would not relate to the forum topic. See *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 969 (9th Cir. 1999) (decided prior to *Good News*, where there was a consistent practice limiting ballfield ads to solely commercial ones, it was not viewpoint discrimination to reject a proposed ad listing the Ten Commandments, which did not advertise or even mention a business). An advertisement for the sale of religious goods or services, e.g. a religious bookstore, would be within the forum topics and could not be excluded for Establishment Clause reasons.

78. See *supra*, Part I. Conclusion, for discussion of application of *Good News* to restrictions on political speech.

forums,”<sup>79</sup> are inherently more complex. The courts nonetheless have evaluated such government programs by applying the limited public forum test. Discussing recent cases will show how the special public purpose forum is incompatible with the limited public forum test’s requirements of objectivity and viewpoint neutrality.

Broad policy goals that do not specify a subject matter or speaker category will always be open to charges of viewpoint discrimination. An interesting example is a case involving internet links on a city web page, *The Putnam Pit, Inc. v. City of Cookeville*.<sup>80</sup> The website’s stated purpose was to provide information about city services, attractions and officials, and the city’s policy, arrived at only in response to plaintiff’s request to post a link, was that eligible web sites must “promote the city’s tourism, industry, and economic welfare.”<sup>81</sup> In its original opinion, the Sixth Circuit characterized the web page as a nonpublic forum and opined that such a policy gave too much discretion to city officials. It then remanded the case for a trial on whether the city had discriminated against plaintiff based on his viewpoint.<sup>82</sup>

Just recently, the Sixth Circuit issued a new opinion, *The Putnam Pit v. City of Cookeville* (“*Putnam II*”),<sup>83</sup> upholding a jury verdict for the city on the grounds that because the plaintiff’s website was critical of the city’s government and often described the city in a negative light, it was outside the scope of the forum’s promotional focus, and thus there was no need to address the issue of viewpoint discrimination.<sup>84</sup> While this Article agrees with the result – allowing the government the discretion to select private speech that supports its expressive projects’ goals – stretching the limited public forum test is too tenuous a means. Being for or against a town’s administration is essentially a viewpoint; at a minimum, allowing such positions to serve as a forum’s content limitation is too confusing for courts to administer consistently. Moreover, that approach is outside the scope of *Perry* and *Cornelius*, where the Court relied on the objective, non-

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79. See *supra*, Introduction.

80. 221 F.3d 834 (6th Cir. 2000) (“*Putnam I*”).

81. *Id.* at 845.

82. *Id.* at 846.

83. 2003 WL 22000304, at \*6 (6th Cir. Aug. 20, 2003) (“*Putnam II*”).

84. *Id.* The plaintiff started his website to promote his views of government corruption in Cookeville, including a cover-up of an unsolved murder. In response to the city’s new website policy, he added a page on “Commerce and Tourism.” *Id.* at \*5. He asserted that his website promoted commerce and tourism in the long run by promoting good government; the court focused on his heavy use of satire and ridicule. *Id.* at \*5-6.

ideological definition of forum speaker limits.<sup>85</sup> As shown in Part II, the government speech doctrine is more appropriate for expressive contexts; explicit recognition of this is essential to having predictable constitutional guidelines.

Even where a city attempts an elaborate enumeration of subject matter categories, where the content is amorphous, the application will always be subject to charges of viewpoint discrimination. This is illustrated by *East Timor Action Network v. City of New York*, a case that involved New York's written policy for the temporary renaming of streets.<sup>86</sup> The city allowed honorary signs to promote or commemorate any of the following: a public event of a not-for-profit nature, a cultural event, an event or person of historical significance, an individual who has made a significant contribution to New Yorkers, and a community or public service. The policy also prohibited a street renaming to promote products, commercial entities, and political parties or candidates, and the city claimed that in practice, its policy also excluded all political signs.<sup>87</sup> Even with such detailed categories, however, a city would need to exercise discretion to accomplish its purposes; whether someone has made a "significant contribution" to New York, for example, requires a judgment call. There, the court had no occasion to analyze the acceptability or meaning of the listed categories, however, because the plaintiff's signs were within the written policy criteria and the facts contradicted the city's claim that its actual practice was to exclude all types of political signs.<sup>88</sup>

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85. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (finding exclusion of rival union from school mail system viewpoint neutral because it was based on the group's non-elected status, not its positions on the issues); *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 806 (1985) (approving as viewpoint neutral the bright-line division between direct service charities and advocacy organizations for purposes of inclusion in federal employees charity drive).

86. 71 F. Supp. 2d 334 (S.D.N.Y. 1999). See also *Int'l Union of Operating Eng'rs, Local 150 v. Orland Park*, 139 F. Supp. 2d 950 (N.D. Ill. 2001) (court struck down sign ordinance because of its exemption for "banners on light poles," which stated that banners must be made available to the Village Board for approval, without giving any standards at all).

87. *E. Timor Action Network, Inc. v. City of N.Y.*, 71 F. Supp. 2d 334, 338-39 (S.D.N.Y. 1999).

88. *Id.* at 339-40. In *E. Timor*, the city had refused to post temporary street signs stating "East Timor Way" and "1991 Santa Cruz Massacre" outside the Indonesia consulate in connection with the anniversary of East Timor's annexation, even though on numerous occasions street signs naming a person or event calculated to make a political statement had been placed outside an offending country's embassy (e.g., "Tiananmen Square Corner" outside the Chinese Consulate). Less politically popular, similar requests



Finally, in *PETA v. Giuliani*, a district court upheld rejection of an applicant for a public-private art project based on a broad, subjective standard.<sup>89</sup> It did so, however, professing to apply the limited public forum test, yet explicitly relying on government speech concepts, without exploring the inherent tension between the two. The case has limits as a model because the decision was based on the city's good faith and the unique facts presented – other PETA submissions had been accepted – but its discussion is illustrative.

PETA had submitted two cow designs to participate in “CowParade New York City 2000,” a public art event that was a joint venture between the city and various private entities, and one was rejected. The cows were to be displayed on both public and private property and the city expected financial benefits in the form of increased tourism revenue and 10% of the revenue from sale of CowParade merchandise. Selection of the art was done by a design selection committee comprised of both government and private persons.<sup>90</sup> The committee rejected one of PETA's proposals on the grounds that three of the statements on a cow marked with lines portraying butchers' meat cuts were too graphic and violent for a public art display.<sup>91</sup>

Although the court found this was a limited public forum, based on the selective nature of the application process, the selection criteria specifically upheld by the court were broad, expressive, and necessarily discretionary. The written guidelines prohibited selection of any designs that were indecent, contrary to public morality, religious, political or sexual in nature, or that contained corporate logos or advertisements. In addition, the city and CowParade organizers stated that in order to achieve their “expressive, economic, civic and aesthetic purposes,” they looked at whether the proposed design would fit in with an exhibit intended to be “festive, decorous, whimsical, and appropriate for a broad-based audience of all ages.”<sup>92</sup>

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had been rejected in earlier cases as well (e.g., “Yasser Arafat Way” outside the Israeli Consulate). In light of both the written policy and the actual practice, the court held that the only content limitation on political subject matter was a ban on ads for political parties and candidates.

89. 105 F. Supp. 2d 294, 295 (S.D.N.Y. 2000).

90. *Id.* at 299-300.

91. *Id.* at 301. The objectionable lines involved confrontational statements conveying that cows are still conscious when skinned, castrated and dehorned, and that eating meat causes impotence.

92. *Id.* at 320. The district court in *PETA* reframed the criteria somewhat and expressly upheld as reasonable in this context the “exclusion of political, sexual or religious subjects and terms purposely evocative of controversy,” and restriction of design

The court held that when serving as a patron of culture and the arts or promoting aesthetic or civic values, “the government requires a reasonable zone for exercise of discretion and flexibility which is not always capable of being articulated as precise and universal standards.”<sup>93</sup> The content limitations at issue were necessary to protect the exhibit from degenerating into “a massive public billboard which would display, along with much worthy art and creativity, a multitude of political axes and grinding stones, obscenities and self-advertising.” This would, in turn, decrease expected revenues and impose on captive audiences, who would be forced to encounter a particular exhibit near their homes or place of work on a daily basis for three months.<sup>94</sup>

In reviewing the acceptability of the stated criteria, the court focused on the overall approach, rather than examining each of the words; for example, it chose not to examine what would be the contours of a ban on “political” subjects. Instead, the court reviewed the Committee’s attempt to be inclusive, including the fact that it had accepted PETA’s other design proposal, which arguably also might be considered offensive, and had objected to only three of the twelve panels, which it had suggested PETA modify.<sup>95</sup> Such facts suggested a good faith effort to adhere to the art project’s goals, rather than an attempt to suppress a controversial viewpoint.<sup>96</sup>

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approval to “festive, decorous and celebratory art.” *Id.* at 329-30.

93. *Id.* at 322. The court looked to the standards of *Nat’l. Endowment for the Arts v. Finlay*, 524 U.S. 569 (1998) (upholding discretionary standards, which incorporated a decency factor, in awarding NEA grants), as a “somewhat analogous” example, but reviewed the PETA facts solely as a limited public forum, and not as government speech.

94. *Id.* at 330. *Cf.* *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001) (striking down a restriction on “controversial art” in a public art gallery in city hall, and criticizing post-hoc distinctions made by the city hall curator between “abstracted” and “sexualized” depictions of nudity; while the court opined that community standards of decency could be incorporated into written objective criteria, it did not counsel how this might be done).

95. *Id.* at 326.

96. Compare a more recent case, *PETA v. Gittens*, 215 F. Supp. 2d 120 (D. D.C. 2002). It does little to add to the analysis, except to underscore that courts are labeling public art projects as limited public forums and further, that whatever the standards, when there is blatantly inconsistent application, they will be found unconstitutional. *Gittens* involved the Party Animals, another city sidewalk art display. The materials distributed to potential artists and sponsors said they were seeking “creative and whimsical” animals, and would not “allow direct advertising of any product, service, a company name or social disrespect,” and that there were “restrictions against slogans or inappropriate images.” *Id.* at 123. The suit involved rejection of PETA’s entry of a “sad circus elephant,” with the words “The Circus is Coming.” See: *Shackles Bullhooks Loneliness All Under the “Big Top,”* and accompanying illustrations. *Id.* at 131. The court found this a violation of the First Amendment based on “a pattern of inconsistency in its treatment of similar

This focus on good faith is consistent in all three cases, *Putnam Pit*, *East Timor*, and *PETA*. In each case, the court concentrated on whether the decision at issue showed some animus toward the plaintiff, rather than on the contours of acceptable content limitations in an expressive purpose forum. This does not seem to correspond with the very broad understanding of viewpoint discrimination put forward in *Good News*. The Supreme Court did not ask whether the school district had acted out of dislike for the Club, or whether it had discriminated between different religions in applying its “educational purpose” criterion. Presumably, the municipality in *Putnam* would assert the discretion to decide whether linking to church websites promotes tourism, and New York City would like to decide whether a cow dressed as Cardinal Egan meets its “festive” criterion. Rejecting either of these forms of speech, however, could be seen as viewpoint discrimination against religion under *Good News*. This demonstrates that the absence of bad faith does not work well as the sole touchstone. Thus, these cases do not provide much structure for future decisions.

None of these courts even considered whether the context at issue could be considered government speech; rather, they analyzed whether the government had created a limited or a designated public forum. Only one court, the Ninth Circuit in *Gentala v. City of Tucson*, has analyzed which construct best fits a public-private venture. In *Gentala*, the court was presented with a “Civic Events Fund” created by the City to help develop new public events. The case illustrates that certain partnerships are best regarded as government speech.<sup>97</sup> This Article will discuss in Part II the government speech concept and how far it may be stretched.<sup>98</sup>

### C. Conclusions on Limited Public Forums

What may be done in a limited public forum to satisfy government’s purposes while complying with the First Amendment? The only consistently upheld means to avoid bringing debate over

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noncompliant entrants that is inherently unreasonable.” *Id.* Accepted entries included ones showing the World Trade Center, the Pentagon, and a list of September 11 victims, and one showing civil rights activists, which the court found “cannot credibly be regarded as ‘festive’ or ‘whimsical,’ or calculated to foster an atmosphere of ‘amusement,’ ‘enjoyment,’ or ‘FUN.’” *Id.* at 132. This court did not undertake any complex analysis, did not even distinguish between content limitations and viewpoint discrimination, but merely applied the “reasonableness test” of *Rosenberger* and *Good News*. *Id.* at 131.

97. See *supra* Part II.B.

98. See *Infra*, Part II.

divisive political and social issues into a government program is a “commercial ads only” limit in a revenue-raising forum. Even that category distinction is not sacrosanct; as the Seventh Circuit cautioned, *Lehman* did not determine the reasonableness of a political ads restriction “for all time.”<sup>99</sup> The limited public forum test requires courts to ask whether content limitations are reasonable in light of the purpose of the forum. Given that the reasonableness of prohibiting political ads in *Lehman* depended in part on protecting the “captive audience” of public bus passengers, arguably the result could differ in a forum where the audience is not captive.<sup>100</sup>

Moreover, even if a “no political speech” content limitation was theoretically reasonable in a given forum, after *Good News* it is difficult to predict when “political” would be considered content rather than viewpoint.<sup>101</sup> For example, with regard to meeting rooms open for broad purposes such as “educational,” but closed to “political” speech, government might be required to include the Young Republicans, as well as The World Church of the Creator, a white supremacist organization, on the grounds that they are engaging in educational purposes from a political perspective.<sup>102</sup> While prohibiting the political as opposed to commercial advertisements is a comparatively bright line, applications become murkier as forum purposes expand.

Particularly when one enters the realm of the “special public purpose forum,” “political” looks more like viewpoint and less like content. Consider an honorary street sign policy similar to that described for New York City in *East Timor*, where the city claimed that it had limited the forum’s purpose to the historical and the cultural, while prohibiting the political. It is uncertain whether such

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99. *Air Line Pilots Ass’n v. City of Chi.*, 45 F.3d 1144, 1159 (7th Cir. 1995).

100. *Air Line Pilots Ass’n* involved an airport advertising display, which the court did not attempt to distinguish from the bus ad context, but arguably airport patrons walking through a busy terminal are a relatively less captive audience.

101. Whether “political” remains a content category, rather than a viewpoint, became an issue following *Rosenberger*. Compare Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105-10 (1996) (asserting that after *Rosenberger*, restrictions on political speech are unconstitutional viewpoint discrimination), with Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 320-27 (1997) (arguing that restrictions on political speech should not be treated as viewpoint discrimination).

102. See, e.g., Jay Hughes, *World Church Membership Up, Creator Matt Hale Says*, DAYTON DAILY NEWS, July 3, 2000 (reporting on group’s status two years after member’s shooting spree, quoting Hale as stating that the group’s mission is to “spread the word” about white racial loyalty).

parameters would be held reasonable or enforceable. Compare, for example, a sign commemorating New York's founding date with a sign proclaiming the date the city was stolen from Native Americans. One represents history in the traditional mainstream version, while the other is arguably more political in nature, but it too is history from a different perspective. The nature of the "political" is quickly revealed as more a philosophical question than an easily administered content category.<sup>103</sup> Moreover, the *Putnam II* approach of allowing viewpoint discrimination to masquerade as a content limitation is not a solution with universal appeal.<sup>104</sup>

If broad content categories are so easily classified as unconstitutional viewpoint discrimination, then the only alternative for limiting forums to serve their intended purposes, outside the "commercial only" advertisement forum, would be narrower content limitations. Courts have suggested that excluding the identifiable subcategory of political candidates' and political parties' advertisements is defensible, even where other public service and social interest speech is permitted.<sup>105</sup> Other acceptable subject matter descriptions might include: allowing speech on only local issues and excluding international relations; allowing city-subsidized not-for-profits to market their events and excluding promotions of other events; and allowing speech advertising only for artistic and cultural events with large, established audiences.

These are just a few examples, but they have in common that the subject matter descriptions are concrete and clear, which makes them relatively easy to administer consistently, and perhaps look more like subject matters than do broader categories, such as "political." Despite efforts to be narrow, however, one can imagine charges that even some of these content limitations are viewpoint discriminatory, by excluding the international perspective on local issues, for example, or preferring mainstream over independent art. As discussed above, even an effort to exclude a subset of commercial advertising, alcohol and tobacco ads, may be attacked as viewpoint

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103. See also two more recent cases where courts held that ordinances prohibiting political, religious and social advocacy messages on light poles are inherently viewpoint discriminatory and therefore unconstitutional: *Cimarron Alliance Found. v. Oklahoma City*, 290 F. Supp. 2d 1252 (W.D. Okla. 2002) and *Heartbeat of Ottawa County v. City of Port Clinton*, 207 F. Supp. 2d 699 (N.D. Ohio 2002).

104. See discussion *supra* Part I.B.5.

105. *Nat'l Abortion Fed'n v. Metro. Atl. Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1326 (N.D. Ga. 2000); *E. Timor Action Network v. City of N.Y.*, 71 F. Supp. 2d 334, 346 (S.D. N.Y. 1999).

discrimination.<sup>106</sup> More significantly, if governments' sole alternative for maintaining a valid limited public forum is to adhere to only very narrow subject matter categories to escape claims of viewpoint discrimination, there will be a certain poverty of expression in government projects that are construed as limited public forums.<sup>107</sup>

If government is unable to construct content limitations sufficient to avoid having its property used to send discriminatory, partisan or otherwise inflammatory messages, as a last resort it retains the right to close down the forum and stop all outside speech on that property.<sup>108</sup> This alternative was approved by the Supreme Court in *Members of the City Council of the City of Los Angeles v. Vincent*, which upheld the city's ordinance prohibiting all signs on public property, including street light poles, and it has been relied on in a number of limited public forum cases.<sup>109</sup> The specter of this loss to the

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106. See discussion *supra* Part I.B.1.

107. See, e.g., Bezanson & Buss, *supra* note 18, at 1458-59 (asserting that under current limited public forum law, government unquestionably could avoid controversy by choosing to fund only certain mainstream categories of art, such as symphonies or the ballet, and that this argues for allowing more discretion so as to allow a broader range of artistic subsidies).

108. Note that one last idea for circumventing the problems of the limited public forum, delegating to a private organization the job of establishing forum limitations or controlling the selection process, also is unsuccessful, at least so long as government retains some control or ability to give input. See *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001) (where city commissioned private arts council to administer pilot program for art gallery in city hall, delegating soliciting and pre-screening art, court still held city violated First Amendment where rejection based on city official's finding work offensive); *Nat'l Abortion Fed'n v. MARTA*, 112 F. Supp. 2d 1320 (N.D. Ga. 2000) (where transit authority sold advertising through two companies, and bus shelters also owned by one of them, but it retained "at least some control" over ad selection, summary judgment granted against MARTA).

If a municipality further distanced itself by retaining no role in administration of the forum and no ability to affect its policies – an unlikely scenario – the First Amendment would apply only upon a finding of state action. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)) (while majority held that Amtrak was a government entity, dissent found it a private entity and thus analyzed whether its rejection of a billboard advertisement could be attributed to the government, finding the relationship between Amtrak and the federal government insufficiently symbiotic).

109. 466 U.S. 789 (1984). See *DiLoretto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 970 (9th Cir. 1999) (holding that closing a baseball field ad forum to avoid controversy of displaying Ten Commandments ad was acceptable because "[t]he government has an inherent right to control its property, which includes the right to close a previously open forum."). See also *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45 (D. Me. 2002) (allowed city to temporarily shut down public access channel for neutral reason, despite individual councilmen's complaints about plaintiff's broadcasts; while stating that there might be some circumstances where a temporary closing of a forum could be

speech market supports giving government some discretion to define the parameters of acceptable speech on its property, whether using limited public forum rhetoric or, as seen below, that of government speech.<sup>110</sup>

## II. THE GOVERNMENT SPEECH DOCTRINE

In contrast to government's severely curtailed options for achieving a broad expressive purpose in a limited public forum, "when the State is the speaker," it enjoys broad latitude in selecting content.<sup>111</sup> Where private speech can be characterized as expressing a governmental message, then viewpoint neutrality is not required. This Part first sets forth the Supreme Court's decisions, which primarily have involved government funding decisions, then reviews the few, recent appellate court cases, which apply the government speech concept to various sponsorship contexts.

### A. Supreme Court Cases

The foundation case for the government speech doctrine is *Rust v. Sullivan*.<sup>112</sup> The Court in *Rust* upheld a statutory provision that limited federal funding for family planning services to programs that did not advise on abortion. In so holding, the Court rejected a claim that doing so violated the First Amendment because it discriminated against the pro-choice viewpoint. Without clearly discussing the

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unconstitutional viewpoint discrimination); *Id.* at 51 n.5 (collecting law review articles saying closing forum allowable); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (while generally finding unconstitutional state's reasons for denying KKK's application to participate in Adopt-a-Highway Program, court allowed denial as to highways within the city limits of St. Louis based on a neutral moratorium on the adoption of highways there); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1290 (7th Cir. 1996) (holding that closing a forum to all displays to avoid displaying a religious symbol was not unconstitutional). *But see* *Missouri Knights of the Klu Klux Klan v. Kansas City*, 723 F. Supp. 1347 (W.D. Mo. 1989) (allegation that city shut down local public access channel to prevent KKK from using it stated first amendment claim).

110. Note that most recent articles on limited public forums argue for more restrictions on governments' ability to fashion content-based parameters. *See* McGill, *supra* note 38; Nicole B. Casarez, *Public Forums, Selective Subsidies & Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501 (2000) (no viewpoint distinctions in government subsidy forums); Steven G. Gey, *Reopening the Public Forum - From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998) (no content limitations in nonpublic forums unless excluded speech would significantly interfere with government's noncommunicative activities there). *Cf.* Jacobs, *supra* note 63 (advocating restrictions of graphic sex and violence where captive audiences).

111. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

112. 500 U.S. 173 (1991).

concept of government as speaker, the Court held that “government may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.”<sup>113</sup>

While the *Rust* decision emphasized that the government was simply funding one activity to the exclusion of another,<sup>114</sup> later cases have characterized the decision as “recogniz[ing] that when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes.”<sup>115</sup> In particular, *Rust* established that when government uses private speakers to transmit its own message – there, a pro-life message delivered by doctors and nurses providing government-funded family planning services – the involvement of private speakers does not change the context from government speech to that of a forum for private speech.

By contrast, in *Rosenberger*, the Court held that the government speech doctrine did not apply to the University’s student activities appropriations because, rather than promoting its own favored message, the University was “expend[ing] funds to encourage a diversity of views from private speakers.”<sup>116</sup> What made it clear to the Court that the University was funding private speech, and thus required to be viewpoint neutral, was the administration’s own express disclaimers. The University’s agreement with each student group receiving funds specified that such organizations were not subject to its control and were not its responsibility, and that funding did not indicate University approval; these disclaimers also were required to be included in any dealings with third parties.<sup>117</sup>

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113. *Id.* at 192-93 (citation omitted).

114. *Id.* at 192.

115. *Rosenberger*, 515 U.S. at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). See also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (stating that, although not expressly part of the rationale of *Rust*, the case shows that “viewpoint-based funding decisions can be sustained. . . [where] the government is itself the speaker.”)

116. 515 U.S. at 834. The Court noted that this was not controlled by the school-specific cases, citing to *Hazelwood Sch. District v. Kuhlmeier*, 484 U.S. 260 (1988) (protecting school administrators’ right to exert pedagogical discretion by controlling students’ speech).

117. *Rosenberger*, 515 U.S. at 823-24. See also *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (holding that public university’s collection of a mandatory student activities fee used to fund extracurricular student speech did not violate objecting students’ free speech rights, provided that allocation of funds was viewpoint neutral; Court also stated that funding program was not government speech because: the university was not using its own funds to advance a particular message; administration officials had no control over the speech’s content; and the sole purpose of collecting the fee was to facilitate the exchange of ideas among its students); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that restriction on the use of Legal



The other two major cases involved a different type of government speech. *National Endowment for the Arts v. Finley*,<sup>118</sup> and *Arkansas Educational Television Commission v. Forbes*<sup>119</sup> both involved discretionary “speech selection” judgments by government entities, rather than governmental transmission of a particular substantive policy via private speakers. First, *Forbes* involved a state-owned public television broadcaster which was sued by a political candidate excluded from a televised candidate debate. The Court found that such debates are a very narrow exception to the public broadcaster’s generally substantial editorial discretion, and held that rejection based on a candidate’s objective lack of support was a reasonable limitation in a nonpublic forum.<sup>120</sup>

The opinion’s significance, however, was its statement that “[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”<sup>121</sup> In other words, the speech selection process is itself government speech. That a necessary component of programming decisions is to compile the speech of third parties does not give those persons a right of access to broadcast programs. Viewpoint neutrality could not be accomplished easily, if at all, in this context. It would require repeated intrusion by the courts to determine whether particular viewpoints had received sufficient coverage, with the inevitable result an undesirable infringement on journalistic discretion.<sup>122</sup>

*NEA v. Finley*, without explicitly identifying a government speech activity, also found that viewpoint neutrality was not required in a type of government selection of private speech – there, the decision of which art exhibits to fund.<sup>123</sup> The case involved the validity of a statutory amendment passed in response to public furor over NEA funding of two exhibits: a display of homoerotic

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Services Corporation funds, which subsidize legal services to indigents, that prohibited funding any organizations challenging the welfare laws, was governed by *Rosenberger*, not *Rust*, because the LSC program was designed to facilitate private speech in that lawyers are required to speak on behalf of their clients, a necessarily independent role, while only government attorneys should be paid to defend the welfare statutory scheme).

118. 524 U.S. 569 (1998).

119. 523 U.S. 666 (1998).

120. The candidate debate was made an exception because it is both an intentional forum for political speech and so essential to democracy. *Id.* at 675.

121. *Id.* at 674.

122. *Id.* at 674-76.

123. 524 U.S. 585-86.

photographs by Robert Maplethorpe and Andres Serrano's work, *Piss Christ*. The section provided that the NEA Chairman shall enact regulations and procedures to ensure that "artistic excellence and artistic merit," were the criteria used to judge applications, "taking into considerations general standards of decency and respect for the diverse beliefs and values of the American public."<sup>124</sup>

Justice O'Connor, writing for the Court, distinguished this context from *Rosenberger* on the grounds that in arts funding, the government is making esthetic judgments on artistic excellence, which is "inherently content-based."<sup>125</sup> Without expressly stating so, the Court appeared to hold that since the government already was engaged in a subjective process of art selection, the additional directive to consider other subjective factors – indecency and compatibility with American values – did not make the criteria unconstitutional. In addition, the Court found that the subjective decision-making standards were not unconstitutionally vague because of government's role as patron of the arts. This role did not lend itself to the objective standards that would be required in a criminal statute or regulatory scheme. In essence, under *Finlay*, where a funding program establishes some necessarily discretionary standard, such as "excellence," the government is taking content into account in every funding decision, and doing so does not violate a constitutional requirement of viewpoint neutrality.

The nature of the outside limits to this position, if any, was left unclear. The majority opinion warned against turning such subsidies into a "penalty on disfavored viewpoints," such as by manipulating them to have a "coercive effect,"<sup>126</sup> but it is hard to reconcile these statements with the facts surrounding the addition of an indecency criteria. Justice Scalia's explanation of what would constitute such a "coercive effect," while more clear, is quite narrow. In his view, the only situation where a government subsidy could constitute an "abridgment" of speech, violating the First Amendment, is where the subsidy is the sole source of grant money, so that the threat of rejection would have the effect of suppressing applicants' speech

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124. *Id.* at 576 n.\* (citing 20 U.S.C. § 954(d) (2000)). The NEA Chairman stated that they had implemented the statutory provision by requiring diversity on the selection committee. Justice O'Connor found it unnecessary to determine whether this interpretation was reasonable, finding the significant point to be that there was no absolute prohibition on indecency, it was merely a consideration. 524 U.S. at 580-81.

125. *Id.* at 586.

126. *Id.* at 587.

altogether.<sup>127</sup>

The Court's rationale for the government speech doctrine is that: "[W]hen the government speaks, for example to promote its own policies or advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."<sup>128</sup> This rationale is most persuasive where a clear policy message is at issue, as in the *Rust* anti-abortion policy, and somewhat weaker where the government speech involves speech selection judgments. Patterns of decision-making, including written selection criteria, may be corrected by the political process, but few individual decisions would stir the voters. In the speech selection cases, however, the Court's rationale appears to be more utilitarian. It is based on the notion that there is no practical way of reducing the decision process to clearly articulated, objective standards, so that distinctions based on content and viewpoint are endemic to the contexts. Arguably, the First Amendment interests in fostering more and diverse speech are better served by allowing administration of discretionary standards, unimpeded by court attempts to enforce a ban against viewpoint discrimination on a case-by-case basis.

## B. Recent Appellate Court Cases

The last few years have seen a handful of appellate court cases grappling for the first time with the government speech doctrine. These cases fall into two broad categories. The two cases that specifically found government speech and relied on that doctrine to deny claims of access both involved government talking about its private sponsors, in ways that acknowledged the relationship and directly or indirectly advertised the sponsors.<sup>129</sup> Two other cases

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127. *Id.* at 596 (Scalia, J., concurring). Note that Justice Souter, in the sole dissent, found arts funding analogous to *Rosenberger* because, when acting as a patron, government is acting to promote and foster diverse private speech, and thus is required to be viewpoint neutral. *Id.* at 611-13. He deemed this a new category, as opposed to the role of government-as-speaker, which he appeared to define as only where government has a substantive message to transmit. *Id.* at 613. Compare Heyman, *supra* note 18 (rejecting Justice Scalia's view that government funding does not implicate First Amendment and Justice Souter's position that funding decisions should be subject to the same First Amendment restrictions as regulation of private speech; asserting a middle ground balancing public and private interests, based on theories of distributive justice).

128. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000), quoted in *Legal Servs. Corp. v. Velazquez*, 531 U.S. at 533, 541-42 (2001).

129. *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001); *Knights of*

involved the flip side of sponsorship: government subsidizing and promoting private events for some public purpose. There the question is whether government has its own substantive message or instead has opened a forum for diverse private expression.<sup>130</sup>

The second group of cases also illustrates the conflicted interaction of government speech with the Establishment Clause. Where private religious speech is involved, because government is prohibited from promoting or disfavoring a religious message, the “government speech” label has a different impact. Rather than giving government enhanced ability to state its own position without regard to viewpoint neutrality, the Establishment Clause imposes a stricter requirement of government neutrality than does the limited public forum doctrine.<sup>131</sup>

While it arose in the somewhat specialized context of public broadcasting, *Knights of the Ku Klux Klan v. Curators of the University of Missouri*,<sup>132</sup> is significant because it establishes the ability of government to choose which sponsors it will accept to underwrite government functions and, correspondingly, when it can reject those

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the KKK v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000).

130. See *Gentala v. City of Tucson*, 244 F.3d 1065 (9th Cir. 2001) (en banc), *vacated by* 534 U.S. 946 (2001) (directing the Ninth Circuit to reconsider *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)), *remanded to* 275 F.3d 1160 (9th Cir. 2000) (remanded to district court for further evidentiary hearings), No CV-97-00327 (D.Ariz. Nov. 10, 2003) (unpublished opinion granting summary judgment to plaintiff based on new facts); *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001).

Relatively few cases even discuss government speech. See, e.g., *Livestock Mktg. Assoc. v. U.S. Dep’t. of Agric.*, 335 F.3d 711 (8th Cir. 2003) (holding compelled financial support of government beef promotion not within government speech doctrine); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (court found government speech where high school teachers, with approval of the principle, had created a bulletin board for materials related to Gay and Lesbian Awareness Month, proclaimed by the school board to promote tolerance, which included school district posters and other materials; thus, school was not required to allow Downs, a teacher, to post his own competing bulletin board, which advocated his view of the immorality of homosexuality); *Henderson v. Stalder*, 112 F. Supp. 2d 589 (E.D. La. 2000) (where state asserted its right to take a position promoting certain kinds of social behavior by creating its own “choose life” license plate and a “choose life” fund in the state treasury, court held that, while it could promote its message through legislation and fund appropriation, the creation of more than sixty “specialty” license plates honoring various groups created a limited public forum, which required viewpoint neutrality); *Lash v. City of Union*, 104 F. Supp. 2d 866 (S.D. Ohio 2000) (where plaintiffs claimed city officials violated First Amendment by using tax funds to promote the city’s viewpoint on two election issues, court suggested this was permissible as government speech).

131. See *infra* Conclusion, for further discussion of application of Article assertions to religious speech.

132. 203 F.3d 1085 (8th Cir. 2000).

sponsors that have messages contrary to its principles. The case involved a radio station owned by a state university, which had rejected a KKK request to underwrite the "All Things Considered" program.<sup>133</sup> Federal law requires that public radio stations acknowledge their sponsors and allows a neutral description of the sponsors' product or service, along with identifying slogans and location.<sup>134</sup> While the station's general manager did not routinely evaluate the policies of the thirty or so underwriters per week, she had rejected other groups in the past.<sup>135</sup> The University Chancellor ultimately rejected the KKK's request, citing as anticipated negative consequences: jeopardizing future gifts from African-American donors, decreasing student enrollment, and undermining the Chancellor's efforts to create equality in the community for African-Americans.<sup>136</sup>

The Eighth Circuit found that the radio station's acknowledgment of sponsors was government speech by the university and upheld the university's right to refuse to announce a financial association with the Missouri KKK.<sup>137</sup> The court also noted that even if the government speech doctrine espoused in *Forbes* was limited to matters of journalistic discretion, the decision not to publish "a financial association with the Missouri KKK" was sufficiently editorial to fall within the public broadcasting exception to forum analysis.<sup>138</sup> Even if the radio station was not legally required to acknowledge its underwriters, the Eighth Circuit held, it still should have the right to reject such an association, finding "no support in the case law for the proposition that, where descriptive information about the donor is conveyed to the public, a donor has a First Amendment right to have its cash contribution accepted by the donee."<sup>139</sup> So, although it involved public broadcasting, the case strongly supports government's right to refuse to accept sponsorships from groups with which it disagrees.

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133. *Id.* at 1089.

134. *Id.* at 1088-89.

135. *Id.* at 1089 (noting rejection of underwriting requests from "Ultimate Fighting Championships," a political group called "The American Friends Service Committee," and a "house of ill repute").

136. *Id.* at 1090.

137. *Id.* at 1093-94.

138. *See id.* at 1094-95 & n.11 (relying on *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) and *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)).

139. *Id.* at 1094.

Similarly, *Wells v. City and County of Denver*<sup>140</sup> held that government's acknowledgment of its sponsors was government speech. The City and County of Denver's holiday display, located on the steps of the City and County Building, included a creche and numerous secular Christmas symbols and a large sign, which stated: "Happy Holidays from the Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building," and listed six corporate sponsors.<sup>141</sup> Plaintiffs requested permission to place within the display their own sign, which proclaimed "this season of Winter Solstice," and also made some arguably offensive, anti-religious statements, including "the Christ Child is a Religious Myth," and stated it was "presented by the Freedom From Religion Foundation."<sup>142</sup> After receiving no response, they put up the sign, which the City then removed.<sup>143</sup>

The government asserted that the display was Denver's holiday message to the community, so that it could determine the content. Plaintiffs argued that the plain language of the sign showed it was a message from, and not to, the corporate sponsors. Since private speech had been allowed in the display, they argued that they were entitled to include their own message. The court held that the holiday display, including the Happy Holidays sign, was government

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140. 257 F.3d 1132 (10th Cir. 2001).

141. *Id.* at 1137.

142. *Id.* at 1137. The full text of the sign read:

At this season of  
THE WINTER SOLSTICE  
may reason prevail.  
There are no gods,  
no devils, no angels,  
no heaven or hell.  
There is only  
our natural world.  
THE "CHRIST CHILD" IS A RELIGIOUS MYTH.  
THE CITY OF DENVER SHOULD NOT  
PROMOTE RELIGION.  
"I believe in an America  
where the separation of church and state  
is absolute."

*John F. Kennedy –1960 Presidential campaign.*

PRESENTED BY THE FREEDOM FROM  
RELIGION FOUNDATION

143. *Id.* at 1137-38.

speech because the city had built, paid for, erected and provided security for the sign, and there was no evidence that the corporate sponsors even knew about it.<sup>144</sup> Since the display was Denver's own message, as opposed to any kind of forum, the city was not required to incorporate the messages of any private parties. Under *Wells*, then, display of sponsors' names does not alone transform a given context into one where other private speakers must be welcomed.<sup>145</sup>

The other two recent government speech cases involved the opposite situation: where government subsidizes private expressive projects. In *Gentala v. City of Tucson*, the city had established a "Civic Events Fund," pursuant to which it provided city-owned stage lighting and other special event services using tax funds and city employees, to certain not-for-profit groups through an application process.<sup>146</sup> The city's policy stated that its purpose was to affirmatively support civic events that:

[C]elebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues . . .  
[.] generate broad community appeal and participation[.] instill civic pride in the City, state, or nation[.] contribute to tourism[.]  
or are identified as unique community events.<sup>147</sup>

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144. *Id.* at 1140, 1142.

145. Note that for a court to analyze a government's holiday display on its property as government speech is not new, but the context has been different. The Supreme Court cases in this area have addressed whether the message conveyed by a given display violated, or would violate, the Establishment Clause, not stand alone freedom of speech claims by an excluded speaker. The litmus test has been whether a reasonable observer would view the display as the whole, including the message at issue, as the government speaking and endorsing religion. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 533 (1989). Note that these cases do not use the term "government speech." While the concept is pre-existing, the phrase is being used more frequently.

In *Wells v. City of Denver*, the court did not address the issue of endorsement, presumably because the display itself celebrated the secular holiday, including Santa and the elves, and that is all the reasonable observer would see; he or she would not be deemed privy to a behind-the-scene rejection of the symbols of competing holidays. The dissent, however, made a compelling argument that given Denver's exclusion from its holiday display of plaintiffs' pagan message, and an earlier rejection of a menorah, Denver had acted to advance the Christian religion in violation of the Establishment Clause. 257 F. 3d at 1132, 1157 (10th Cir. 2001). The remainder of the majority opinion focused on whether plaintiffs had any other First Amendment right to put up their own unattended display and held that the content-neutral policy against any unattended displays on city hall steps was a valid time/place/manner restriction that did not violate the Establishment Clause. *Id.* at 1147-50.

146. *Gentala v. City of Tucson*, 244 F.3d 1065, 1068-70 (9th Cir. 2001).

147. *Id.* at 1068.

Among the requirements for organizations receiving Fund support were that they coordinate planning the event with the city's Civic Events Coordinator, and promise to publicize the city's contribution of services in their event advertising.

When the city rejected plaintiffs' application for a National Day of Prayer event because of the event's religious nature, plaintiffs claimed viewpoint discrimination under *Rosenberger*.<sup>148</sup> The city argued that the government speech paradigm applied, so that the city had discretion to implement its qualitative selection criteria to promote its program's goals, citing *Finley*, *Forbes*, and *Rust*. The Ninth Circuit decided on Establishment Clause grounds that the city could not fund such a religious event, but its dicta suggested the new application of government speech which this Article puts forth.<sup>149</sup> Unlike in *Rosenberger*, the court noted, the city is not acting to encourage the interchange of ideas:

[T]he City is concerned with providing for its citizens and tourists events of certain kinds that the City believes enhance Tucson's ambiance as an attractive place to live and visit. Because that is the goal, the City affirmatively identifies itself as the sponsor of funded events, placing its imprimatur on the events in a manner somewhat like the editor of an anthology does, while the university in *Rosenberger* did quite the opposite.<sup>150</sup>

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148. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). See discussion *supra* Part I.B.4.

149. 244 F.3d at 1073.

150. *Id.* at 1073. As noted above, see *supra* note 130, after the Supreme Court remanded to the Ninth Circuit for reconsideration of its holding, which was based on the Establishment Clause, in light of *Good News*, the Ninth Circuit remanded the case to the district court for further evidentiary hearings on the city's actual practices, including the degree of selectivity present. Based on an April 13, 2004 telephone conference with the attorney for the city of Tucson, the case developed as follows. Further discovery produced a letter from the city to Fund grantees stating that they should not claim the city as a partner or sponsor, but only as a contributor, and also pointed out the city's annual sponsorship of a Native American Easter pageant. Given that the Ninth Circuit's opinion that the Fund was more like government speech was based on the city's affirmatively identifying itself as a sponsor, these new facts made a holding of government speech unlikely. On November 10, 2003, the district court issued an unpublished decision for the plaintiff on the summary judgment motions that were argued March 3, 2003, but instructed the parties in a written order dated November 24, 2003, that the opinion has no precedential value. See *Gentala v. City of Tucson*, No. CV-97-00327 (D. Ariz. Nov. 24, 2003) (order). Thus, the court's conclusion, particularly based on these new facts, does not undercut the Ninth Circuit's earlier dicta.



The main factor that supported finding a limited public forum, the court found, was that most applicants received the funding, so the degree of selectivity present in *Forbes* and *Finley* was lacking.<sup>151</sup> To show government speech, a municipality must show that it has actively screened each potential private speaker and allowed only those which the administrators conclude further program goals.<sup>152</sup> The Ninth Circuit's recognition that only the government speech approach permits government discretionary selection, while the limited public forum test precludes it, is a more accurate read of Supreme Court jurisprudence than decisions like *PETA* or *Putnam II*, which conflate the two doctrines.

Compare *Gentala* to *Linnemeir v. Board of Trustees of Purdue University*,<sup>153</sup> a second recent case, where a government provided a venue and other assets and had some role in producing events. There, a state university allowed a theater student to produce in the university theater a performance of the play *Corpus Christi*, which depicts Jesus Christ as a homosexual who has sexual relations with his disciples. The dissent argued that the production was government speech, and thus an unconstitutional endorsement of anti-religious views, because of the university's sponsorship: the play was produced as part of the curriculum, by a theater major for class credit, with university financial support and faculty approval.<sup>154</sup> The majority based its holding on the university's right to control curriculum immune from outside groups' disapproval, but also noted that the theater was open to any school groups and that the administration had made express disclaimers, which suggested a limited public forum.<sup>155</sup> As discussed below, this distinction between government

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151. *Id.* at 1072-73.

152. While this requirement parallels that which makes a public forum limited, rather than designated, there is a difference because, as discussed throughout the Article, "consistent practice" is hard to show when the content limits are subjective. The issue of what "consistency" should be look like in government speech is treated *infra* Part III.B. The selectivity requirement discussed here is one of process, of showing that action has been taken to compare applicants with criteria. *See, e.g., PETA v. Giuliani*, 105 F. Supp. 2d 294, 301-02 (S.D.N.Y. 2000) (court relied in part on the fact that city had also rejected two other, non-PETA proposals as being outside the subjective standards). The proven selectivity requirement holds true for the sponsor acknowledgments as well. *See, e.g., KKK v. Univ. of Mo.*, 203 F.3d 1085, 1089 (8th Cir. 2000) (Eighth Circuit found useful the evidence that radio station earlier had rejected other sponsors, including an adult entertainment venue, as inconsistent with the show's image).

153. 260 F.3d 757 (7th Cir. 2001).

154. *Id.* at 762-65.

155. *Id.* at 759-60. *See* Lindsay Harrison, Note, *The Problem With Posner as Art Critic: Linnemeir v. Board of Trustees of Purdue University Fort Wayne*, 37 HARV. C.R.-C.L. L.

acknowledgment versus disclaimers lies at the heart of government speech analysis.<sup>156</sup>

### III. DISTINGUISHING THE TWO CONSTRUCTS: TOWARD NEW MODELS OF GOVERNMENT SPEECH

This Part presents the case for why the special public purpose forum should be treated as government speech, rather than its current treatment as a limited public forum. It also offers justification for the recent characterization of sponsor acknowledgments as government speech. First, it situates these new contexts within the existing models of analysis. Second, it shows how values-based selection could be balanced with concerns about penalizing disfavored viewpoints, and with little coercive effect. Third, it explains how the Establishment Clause endorsement approach might be applied to the government speech arena, both to explain the sponsor acknowledgment decisions and to shed further light on the special public purpose forum. Finally, this Article evaluates a number of existing municipal trends and shows why the proposed extension of government speech will have a net positive effect on the speech market.

#### A. Locating the New Models in the Existing Government Speech Framework

How specific a policy message must the government have to fit into the *Rust* model? What types of speech selection judgments, other than those in public broadcasting and arts funding, fit into the *Forbes/Finley* model? Both are open questions. As hybrids of the two existing models, the special public purpose forum and the endorsement relationship are likely candidates for a reasoned extension and application of the government speech doctrine.

The special public purpose forum has elements of the *Rust* model because in these programs government communicates through private speakers. The policy messages are more broad and thematic, however, than the straightforward anti-abortion stance in *Rust*. In the case of banners, special events, public art projects and government web sites, a government is communicating its own views on the city's

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REV. 185 (2002) (criticizing rationale of decision because, while finding the university theater a limited public forum would give student artists the right to select their works free of viewpoint discrimination, upholding the university's right to control curriculum opens the door to future restrictions of student and artistic freedom of speech).

156. See *infra* Part III.C. (discussion of why use of disclaimers is not sufficient).

identity and purposes, what will draw tourists and investments, and what image it should present to the larger world.<sup>157</sup> In these contexts, the government has joined forces with the private sector, sharing resources and enhancing creativity, to convey its own broad, subjective message, rather than to foster unlimited private speech. Also, as in *Finley*, these types of criteria are not reducible to objective content limitations, so that program goals are not achievable without allowing discretionary selection.

Endorsement relationships, in particular sponsor acknowledgments, require an additional analytical step because frequently there is no expressive purpose to the program at issue. Rather, government seeks to prevent its underlying identity messages, such as that of promoting tolerance, from being undermined by a forced public proclamation of a government partnership with a group that stands for an antithetical message, such as intolerance. This process also does not lend itself to concrete categories, and certainly not to viewpoint-neutral ones. As discussed below,<sup>158</sup> the appearance of endorsement also has relevance to a finding of government speech in the special public purpose forum, hence this Article's use of the broader term, endorsement relationship.

## B. Disfavored Viewpoints and Coercive Effects

Although the essence of discretionary speech selection is that it is not constrained by viewpoint neutrality, there are some ill-defined outer limits to government's discretion. The Court in *Finley* cautioned that the outcome might be different if government "leverage[d] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints" or "manipulated" a subsidy to have a "coercive effect."<sup>159</sup> The plurality decision gave little guidance on the scope or operation of these restraints, except to say: "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'"<sup>160</sup>

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157. *But see* Bezanson & Buss, *supra* note 18, at 1458-59 (asserting that in *Finley* the government had a thematic message of a preference for decency over indecency, and noting that the particular message of *Rust* is a "higher level" of government speech). The special public purpose forum represents a middle level, in that NEA's "thematic" message was more tied to excluding offensive material, while promotional identity messages have a more affirmative substance.

158. *See infra* Part III.C.2.

159. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. at 569, 587 (1998).

160. *Id.* (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)). Justice O'Connor was able to avoid grappling with the meaning of "penalizing

The *Finley* dicta sounds indistinguishable from the stated rule for limited public forums that content limitations not be “an effort to suppress expression merely because public officials oppose the speaker’s view,”<sup>161</sup> but there must be some difference in the meaning. This Article proposes a two-fold inquiry for interpreting the limits on government speech. First, a government rejection of some disliked message that does not have any relationship to its stated goals and standards for the project should cross the line. Second, a viewpoint distinction in a given program that tends to suppress a disfavored view altogether because the government subsidy is so essential to a significant number of speakers, should also constitute an indefensible coercive effect.<sup>162</sup>

Recalling the original reason for allowing discretionary speech selection highlights the minimal distinction between the two standards. In the limited public forum, abstract content limitations usually are prohibited because they are conducive to viewpoint discrimination; they give the government decision-maker too much leeway to engage in hidden favoritism. That restriction clearly does not apply to government speech, where allowing government decision-makers room for discretionary selections, inserting their points of view, is its essence.<sup>163</sup>

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disfavored viewpoints” by straining to characterize “artistic merit, taking into account decency and American values” as viewpoint-neutral criteria. Justices Scalia, Thomas, and Souter, however, saw clear viewpoint discrimination in the decency criteria and found it disingenuous to pretend otherwise; Justice Souter found it unconstitutional, and the other two found that it was perfectly appropriate in the subsidy context. *Id.* at 586, 592-93, 599-601.

161. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

162. Note that while this Article seeks to interpret *Rust* and *Finley*, most of the government speech commentary has been occupied with criticizing those two cases and formulating alternatives. See, e.g., Redish & Kessler, *supra* note 18 (“negative” subsidies, such as in *Rust*, which are used to induce changes in position are unconstitutional as are subsidies of “judgmental necessity” when they use non-viewpoint neutral categories, such as decency); Post, *supra* note 18 (any speech restrictions on subsidies should be “instrumentally necessary to the attainment of legitimate managerial purposes,” so that *Rust* is unconstitutional, and should not interfere with “domains of public discourse”); Cole, *supra* note 18 (proposing theory of “structural accommodation,” focused on centrality of role of affected institutions to free expression and proscribing consideration of more content than necessary, so that NEA standard unconstitutional).

163. *Compare DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 574 (7th Cir. 2001), a village meeting room case, where the court struck down as overbroad the criterion that the intended use “‘benefit the public as a whole,’ with *PETA v. Guiliano*, 105 F. Supp. 2d 294, 329 (S.D.N.Y. 2000), where the city’s purpose was to produce a festive public art project drawing tourists and citizens, and the comparable standard of “appropriate to a broad-based audience” was upheld. Although the New York CowParade’s criteria also could be used to exclude non-mainstream expression, it visibly related to the program’s expressive

Along with prohibiting standards “conducive” to viewpoint discrimination, the limited public forum approach bars any content limit that expressly rejects a point of view, such as sexism or homophobia. Again, this cannot be the rule for the special public purpose forum because it involves intentionally value-laden messages. Thus, whatever the contours of these principles in the straight speech selection cases, in special public purpose forums the government by definition needs the flexibility to exclude disfavored viewpoints that contradict program goals.

The line should be drawn between decisions grounded in a program’s expressive purposes and those guided by an administration’s desire to suppress a disfavored point of view. The most reliable litmus test would be to evaluate how the government has treated other applicants, those similar in all respects but viewpoint.<sup>164</sup> Some outcome patterns might reflect more than subjective judgments on whether an applicant met program policies, and go too far by demonstrating a clear bias against disfavored groups. To illustrate, consider if the NEA had been challenged by Robert Maplethorpe and he could show that it had given grants for numerous “indecent” works involving photographs of explicit sexual acts by heterosexuals. Such a pattern might make refusal to fund similar art featuring homosexuals look too much like disfavoring unpopular viewpoints and make hollow its assertion of serving its discretionary goal of artistic excellence coupled with decency. Or consider New York City’s rejection from its public art project of cows displaying harsh, confrontational statements about eating meat based on a policy that the displays be “festive.” If it had accepted for display cow sculptures broadcasting similarly graphic and jarring statements, but relating to different subject matters, that might cross

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goals.

Note that this distinction, between holding unconstitutional categories that are conducive to viewpoint discrimination versus only those decisions that actually seek to suppress a viewpoint, is reminiscent of the “divertability” issue in Establishment Clause analysis. When analyzing the constitutionality of public aid to parochial schools, for many years a key factor was whether the aid was divertable, that is, susceptible to being put to a religious use. But recently, in *Mitchell v. Helms*, 530 U.S. 793, 820 (2000), a majority of the Court rejected that principle and determined that the Establishment Clause is violated only where the public assets actually are diverted to religious use.

164. Note that, again parallel to the limited public forum approach, consistency in application is used for two distinct purposes: to determine whether the government speech paradigm applies at all, and if so, whether the rules of operating a government speech program have been followed.

the threshold hinted at in *Finley*.<sup>165</sup>

Whether a given decision is unconstitutional also would depend significantly on the nature of the program's stated goals and standards. As shown above, if avoiding graphic, confrontational art is the standard, then applying it inconsistently within that category appears to penalize disfavored viewpoints. But in many special public purpose forum and endorsement contexts, the government's very point will be to promote its own substantive viewpoint on a controversial issue. For example, a decidedly "green" municipal government could undertake a public art display that included in its criteria that the cows be decorated in accordance with the administration's stand on environmental issues, which might include encouraging vegetarianism. In that case, acceptance of the PETA cow while rejecting other confrontational art as too offensive would be defensible; indeed, a selection committee applying this standard might find PETA's proposal to be merely educational.<sup>166</sup>

A commendable feature of this approach is that government would only be permitted to make viewpoint distinctions where it does so based on an express, publicly-stated policy. As noted above, the special public purpose forum and the endorsement relationship differ from *Rust* in that the private speakers are not simply carrying out a government's uniform, concrete policy, but rather are adding their own voices and perspectives to government's general themes. By requiring that each decision relate visibly to a specific and publicly-known standard, government would be politically accountable for its selection policy.<sup>167</sup> A focus on government's actual pattern of

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165. *Nat'l. Endowment of the Arts v. Finley*, 524 U.S. 569 (1998). This test would not be difficult to apply. Courts look at patterns of decision-making in determining liability in numerous other contexts. *E.g.*, *Monell v. Dep't. of Soc. Serv.*, 436 U.S. 658, 690 (1978) (establishing that government is liable under 42 U.S.C. § 1983 for the acts of its officers and employees when they act pursuant to an official government custom or policy of discrimination); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (statistical data that may show a pattern or practice of employment discrimination may be used to support inference of Title VII violation in an individual case).

166. When the program's express goal is self-promotion by a government's administration, then anti-government viewpoints will not be invited to participate. It seems almost self-evident to characterize this as an example of government speech rather than as a reasonable, viewpoint-neutral content limitation, as did *Putnam II*.

167. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (explaining that political accountability is the rationale for allowing government to express viewpoint-based messages, even through private speakers). Several recent commentators have focused on government clearly identifying the message as its own as a requirement for allowing viewpoint distinctions in government programs. *See Bezanson & Buss, supra* note 18, at 1511; Greene, *supra* note 18, at 49 (naming potential problem of

decision-making would help ensure that it will not have the room to reject disliked speakers or messages surreptitiously, for reasons unrelated to its official expressive purposes for the program at issue.<sup>168</sup>

Turning to the second concern about government speech, its potential “coercive effect,”<sup>169</sup> there are two intertwined issues: whether the program’s criteria or its nature forces private speakers to modify or silence their own views to obtain needed subsidies, and the impact of the program on the relevant speech market. Much scholarly attention already has been devoted to the issue of coercion;<sup>170</sup> the purpose of this section is to give a brief overview of the issues and to show that the special public purpose forum and sponsor acknowledgments involve significantly less coercion than did *Rust* and *Finley*.

The value of allowing viewpoint-based government speech lies in what it adds to the marketplace of ideas: it should complement existing outlets for speech and be one of many voices on any given issue. Government speech looks most appealing and is easiest to defend when it promotes a substantive policy, often with more credibility and impact than any other speaker could effect. An example of the least objectionable type of government speech would be a public health advertisement campaign run by a state health department to educate the public about the importance of safe sex for disease control purposes. Even if the state hired an outside advertising agency to perform the work, that company clearly would

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“ventriloquism”). Cf. Jacobs, *supra* note 63, at 1387 (requires government accountability for subjective categories used in “public sensibilities forums”).

168. In addition, it may be necessary to have some rock bottom limit on the kinds of selection standards that may be used, perhaps those that violate other constitutional or statutory norms, such as by denigrating protected classes. See, e.g., Greene, *supra* note 18, at 37 (identifying two types of viewpoint-based government speech that should always be unconstitutional, that which (1) discriminates in favor of the existing administration and against the opposition, or (2) promotes or criticizes a particular race, religion or gender) (citing in support *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938), as developed in JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75-104 (1980)).

169. The precise language in *Finley* was directed at the suspect nature of ‘manipulat[ing]’ subsidies to have a ‘coercive effect’ and intentionally driving certain ideas from the marketplace. 524 U.S. at 587. This focus on government’s intentions is obscure, however, because unless a government has acted solely to exclude a viewpoint without reference to established criteria, as discussed above, then the relevance of coercion relates to the actual impact of the government’s program.

170. See Greene, *supra* note 18, at 47 (collecting articles finding most government speech unduly coercive; he, however, interprets coercion extremely narrowly to state that even if the NEA was the sole source of grant money, its restrictions would not be coercive); Bezanson & Buss, *supra* note 18, at 1510 (concluding that government speech should not be allowed to transform private speech to reflect government’s viewpoint).

be acting as the state's agent. Funding a group with that particular mission, such as AIDS Action, to conduct the advertisement campaign would not significantly change the analysis because the group would not be changing its message to obtain government support.

The Supreme Court cases approving government speech, however, all involved significant modification of existing private speech, especially in *Rust*, where the federal government transmitted the administration's anti-abortion message through private health practitioners. Because most of the affected private speakers in *Rust* had a pre-existing and more general mission of health care or family planning, government funding likely transformed their message from counseling on the full range of medical options to a severely edited speech. In *Finley*, too, it is likely that performers and artists modified their presentations, or at least their applications to meet the new grant criteria of decency and tradition; although that change is less clear-cut.<sup>171</sup>

Whether giving a financial incentive to modify private speech is inducement or coercion, however, depends on whether the speaker realistically will be able to continue her speech activity without the government grant. If the NEA funds most art in the country, so that losing a subsidy from it would cause all but the most well-endowed or commercially successful artists and artistic institutions to risk failure, then a policy against indecency and for "American values" would become coercive and dominate artistic expression. But if the NEA funds a relatively small percentage of art and is one of many sources of patronage for emerging artists, then government being able to make selections without including all perspectives does not impair artists' freedom of expression.<sup>172</sup>

The pervasiveness of government funding in a given area relates not only to the rights of the speaker, but also to the impact the grant condition has on the affected listeners who make up the relevant

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171. Perhaps the least coercive of the Supreme Court cases would be *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 (1998), because in the public broadcast context, the selection decisions are likely to be idiosyncratic, so that what appealed to one producer or was appropriate for one program might not work with the next. With little predictability as to what views will be rewarded, less change would be expected.

172. See Post, *supra* note 18, at 194 n.208 (noting the uncertainty of actual extent of the art world's dependence on NEA grants, he states that NEA grants constitute 5% of donated funds, which does not include earned income, but also does not measure the leveraging effect of matching grants and increased prestige).



speech market. If all or most community health clinics that do family planning need federal funding to survive, then the impact of a statutory restriction on advising women on abortion severely curtails significant speech and effectively limits exposure to a viewpoint for a large subset of the population. But if a large majority of health care facilities, including those serving low-income patients with fewer options, remain free to give counsel on all medical options; then government promotion of its preferred moral position through some private speakers is less threatening to freedom of speech. The presence or absence of a government monopoly of a speech market indicates whether there is coercion in a broader sense, as in whether the program overall has extinguished disfavored viewpoints.

Special public purpose forums and sponsor acknowledgments are far less likely to have a coercive impact on freedom of speech than did either *Rust* or *Finley*. Broadcasting one's message on a city street light pole or web page, or by virtue of acting as a city sponsor is simply one of many outlets for expression. In addition, most of the venues are new or recent, so there is little in the way of established expectations; these contexts do not resemble those where the government gives monetary incentives to existing private speakers to change their views. Moreover, none of these examples involve funds for ongoing operations, funds that organizations or individuals may become dependent on to continue their expressive activity. The only context that bears some resemblance to NEA funding is government subsidies for privately-produced special events; whether there is any coercive effect would depend on the facts. On the whole, there is little, if any, threat of coercive impact from these proposed extensions of the government speech doctrine.

### C. The Endorsement Relationship

Several courts have suggested, though not held, that there may be certain kinds of relationships between a government and private entities that are so close that the reasonable person would think the government was sending a message of endorsement of those entities, and that this might be a basis for finding government speech. Thus, the government would be allowed to reject those whom it would not choose to endorse.<sup>173</sup> Most judicial analysis of when a given interaction looks like government endorsement of a private speaker's message has involved religious speech and the Establishment Clause.

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173. See *infra* Part III.C.2.

The two contexts are quite different, of course, in that the Establishment Clause imposes an affirmative obligation on government to avoid the appearance of government approval of religious speech.<sup>174</sup> With offensive speech, on the other hand, it is the government that would like avoid the appearance of endorsing offensive speech. Not only is there no constitutional requirement that it do so, but the First Amendment generally requires no discrimination against offensive speech. Nonetheless, the religious speech cases still are helpful because they show what factors into the appearance of endorsement. As discussed below, importing these concepts into the area of government speech is appropriate because it allows government to express broad messages about its principles and to structure programs to reflect its intent in initiating them.

### 1. *Establishment Clause Cases.*

Under the “endorsement test,” the Establishment Clause is violated if a reasonable observer would view a government’s speech or actions, or that of a private party using government property or resources, as a government endorsement of a religious message. The endorsement test originated in a line of cases involving Christmas holiday displays, beginning with the foundation case of *County of Allegheny v. ACLU*.<sup>175</sup> In that case, a city had allowed a private organization to display a creche, standing alone, on the prominent grand staircase of the city-county building.<sup>176</sup> The organization’s status as the only one permitted, together with the display’s placement in a location not otherwise open to private expressive activity, indicated government approval of its fundamentally Christian message.<sup>177</sup>

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174. The Establishment Clause “imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.” *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O’Connor, J., concurring).

175. 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (city’s inclusion of a creche as part of a larger holiday display did not violate Establishment Clause because it conveyed no endorsement of religion).

176. *Allegheny*, 492 U.S. at 579.

177. *Id.* at 599-602. Note that the cases involving religious speech actually involve two separate questions. The first one, whether it looks from the context like government is endorsing the private speech at issue, is relevant beyond religious speech, and is discussed here. The second is whether given speech, either by the government or attributed to the government, is in fact religious in nature. Thus, Supreme Court holiday display cases establish the general rule that where a creche is accompanied by sufficient reindeer, Christmas trees, Santa Clauses and snowmen, then the message sent is secular and

At the other end of the spectrum, for a city to allow private display of a religious symbol in a traditional public forum would not send that unconstitutional message if the display was permitted under content-neutral guidelines. This is particularly true for locations that many others have used for private speech activities that were clearly not endorsed by the state, including political protests.<sup>178</sup> Under those circumstances, in *Capital Square Review & Advisory Board v. Pinette*,<sup>179</sup> the Court held that the First Amendment required Ohio to permit the KKK to display a cross in the statehouse square.<sup>180</sup> While Justice Scalia's plurality opinion broadly opined that private religious speech in a traditional public forum could never violate the Establishment Clause, five justices reaffirmed the endorsement test, so it survived *Capital Square*.<sup>181</sup> Significant to the decision was the government's ability to avoid perceived endorsement by means of a disclaimer that was effective because it was visible to its audience and clearly disassociated the state from the private religious message.<sup>182</sup>

In addition to the number and range of private speakers allowed, other factors include the nature of the particular context and how government structures its program. For example, in *Linnemeir*, the reasonable observer would be familiar with the expectation of academic freedom at a university, and the school generally issued express disclaimers of control over content, which in the case at issue had been well publicized. Conversely, in *Gentala*, that the

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celebratory, not religious, so that sending it does not violate the Establishment Clause. *Lynch*, 465 U.S. at 691-93. See also *Allegheny*, 492 U.S. at 619-20; *Wells v. City and County of Denver*, 257 F.3d 1132, 1137 (10th Cir. 2001) (appearing to follow this rule without discussing it).

178. *Pinette*, 515 U.S. at 757, 770.

179. *Id.*

180. Note that despite the involvement of the KKK, the case was limited to the religious speech issue – whether allowing a cross in the public square would violate the Establishment Clause – and as framed by the parties, ignored the political reasons the state wanted to reject this particular party's symbol. *Id.* at 759-60.

181. The three concurring justices disagreed that there should be any exception to the endorsement test for the public forum context, but thought there was no realistic danger that the community would perceive endorsement of religion in that case. See *id.* at 772-83 (O'Connor, J., concurring); *id.* at 783-98 (Souter, J., concurring). The two dissenting justices also affirmed the endorsement test. See *id.* at 797-816 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

182. See *id.* at 782 (O'Connor, J., concurring) (disclaimer an important factor in endorsement test); *id.* at 793-94 (Souter, J., concurring) (because there it was possible to avoid the appearance of endorsement by an effective disclaimer, the state did not have the right to deny the KKK participation in a traditional public forum); *id.* at 818 (Ginsburg, J., dissenting) (finding that appearance of large cross dominating square was endorsement problem and reserving the question of whether better disclaimer could change that).

government required all events subsidized by the Civic Events Fund to publicly acknowledge the city's joint sponsorship strongly supported a conclusion that the city approved of the content of all such productions.

## 2. *Cases Looking at Endorsement Outside the Religious Speech Context.*

In two situations where government sought to avoid a forced association with the KKK, courts have applied the principles of the Establishment Clause endorsement cases, without directly confronting their applicability or whether the appearance of endorsement results in a finding of government speech.

The Adopt-a-Highway Program cases,<sup>183</sup> where states have most vigorously asserted this argument, involved facts that would not resemble endorsement even if there were a religious message at issue. As discussed above,<sup>184</sup> in the Adopt-a-Highway Program, groups agree to keep a stretch of highway clean, in return for which a sign is posted acknowledging their work. While it includes only the sponsor's name, the sign is arguably intended to, and does, send the message that the state is acknowledging the organization as a good citizen, working for the community good.<sup>185</sup> States have argued that allowing the KKK to assume a function of the state, and then publicizing that role, would look like state endorsement of the KKK's discriminatory message.<sup>186</sup> For that reason, they claim the state should be able to avoid this unwanted attribution and deny the KKK's applications to participate.<sup>187</sup>

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183. *KKK v. Arkansas State Highway Dep't*, 807 F. Supp. 1427, 1436 (D. Ark. 1992); *Cuffley v. Mickes*, 208 F.3d 702, 708-09 (8th Cir. 2000), *cert. denied sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001).

184. See discussion *supra* Part I.B.3.

185. *Arkansas State Highway Dep't*, 807 F. Supp. at 1436.

186. *Id.*; *Cuffley*, 208 F.3d at 708-09.

187. Most recently, in *Cuffley*, 208 F.3d at 708-09, this argument took the form of a convoluted and sketchy state action claim, which the Eighth Circuit rejected. The state, relying on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), had asserted that entering into such a relationship would subject it to liability under the Fourteenth Amendment for the KKK's discrimination. The court held that *Burton* was inapposite, because the highway beautification program was not the kind of relationship that was extensive enough to make private discrimination into state action.

Compare the state action discussion *supra* at note 108, regarding whether a city could delegate forum decision-making to a private entity and thereby avoid the First Amendment issue. Here, the forum access decisions clearly were made by the state, but it argued that the KKK's general policy of discrimination would be attributed to the state by virtue of its participation in the program, and make the state liable for the any discriminatory action by the KKK, even though such actions were completely unrelated to

The one court to address the endorsement argument directly held that simply allowing the KKK to pick up litter and posting a sign stating that it has done so would not show government support of its policies.<sup>188</sup> This was especially likely, the court found, because of the broad range of the hundreds of groups listed on the signs, which included organizations that no one would think the state was purposefully endorsing, such as Baptist churches and the National Organization for the Reform of Marijuana Laws.<sup>189</sup> Because this context is little different from that in *Capital Square*<sup>190</sup> in terms of its neutral application and open access, it fails to shed much light on the question of the test's applicability to disliked speech.

In holding that underwriter acknowledgments are government speech, not that of the sponsors, the *University of Missouri* public broadcasting case came closer to approving of the endorsement argument.<sup>191</sup> In support of its holding, the Eighth Circuit noted that the reasonable listener, hearing the station announce that the KKK was one of its sponsors, likely would perceive that acknowledgment as government speech.<sup>192</sup> The court contrasted these sponsor acknowledgments with a letters-to-the-editor section, such as the one published in the government magazine at issue in *Bryant v. Secretary of the Army*.<sup>193</sup> In *Bryant*, the court rejected a government speech argument because even though the letters sometimes were edited by the government publisher, the reasonable observer would see them as obviously the opinion of the letter writer.<sup>194</sup> Although the Eighth Circuit did not speak in terms of endorsement, it did suggest that the public perception that the speech was coming from the government, rather than from independent individuals, is relevant to a finding of government speech. Categorizing it as government speech in turn allows government to reject those private speakers that are dissonant with its values. No court has been directly confronted with this claim, however.<sup>195</sup>

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the highway program, which is a very far-fetched claim.

188. Arkansas State Highway Dep't, 807 F. Supp. at 1436.

189. *Id.* at 1427.

190. Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). See discussion *supra* Part III.C.1.

191. KKK v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000).

192. *Id.* at 1094 n.9.

193. 862 F. Supp. 574, 580 (D. D.C. 1994).

194. *Id.*

195. In *University of Missouri*, the Eighth Circuit could rely on the editorial discretion in the public broadcasting context, but the Adopt-a-Highway cases did not have the right

### 3. *Why and When Endorsement Matters to Non-Religious Government Speech.*

The most straightforward way of interpreting the *University of Missouri* case is to cite the Eighth Circuit's observation that there is no First Amendment right to have one's money accepted as a contribution to a government enterprise, and thus no corresponding right to make the government publicly thank the individual for that money.<sup>196</sup> That is a facile solution, though, because the transit-advertising forum equally can be described as a situation in which companies give the government money in exchange for name exposure on nonpublic property.

Similarly, the Adopt-a-Highway cases could be portrayed the same way, but there was a different outcome. The courts could have said that there is no First Amendment right to be allowed to clean up a public highway, and thus no corresponding right to force the government to acknowledge an organization's work and publicize its name. Also, in that program, like in *University of Missouri* and *Wells*, the government did the actual speaking.<sup>197</sup> The government determined the content of the signs, put up and maintained them. In fact, in one sense, the situation in *University of Missouri* was more like an advertising forum than the Adopt-a-Highway program because there the sponsors submitted their slogans and a brief self-description to be read as part of the on-air acknowledgment.<sup>198</sup>

The only real difference between the two contexts is that one appeared to be government endorsement of the private party's message, and the other did not. What should be essential to the reasonable observer is both the nature of the affiliation and the government's relationship overall to all the speakers in the program or venue. The relationship between a radio station and its underwriters appears more intimate than that arising from accepting

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facts to find endorsement. One decision, however, found the appearance of endorsement a valid consideration even in administering a type of public forum. *Cf. Piarowski v. Ill. Community Coll. Dist.* 515, 759 F.2d 625 (7th Cir. 1985) (holding that where college art teacher's sexually explicit paintings were relocated from a college art gallery to another part of the school, even if the gallery was a public forum, the school had the right to relocate offensively graphic art to a less visible location. If the display had remained in a prominent location near the main school entrance, especially since the artist was a faculty member and administrator, it might have looked like that school was endorsing the art's message, which it had the right to avoid).

196. 203 F.3d at 1094 n.8.

197. *Id.* at 1094; *Wells v. Denver*, 257 F.3d 1132 (10th Cir. 2001), *cert denied*, 534 U.S. 997 (2001).

198. 203 F.3d at 1088 n.8.

assistance in highway cleanup. Where government enters into some type of close affiliation with the speakers, which suggests a partnership or other type of joint enterprise, the selection will look more like endorsement and, correspondingly it is more likely that a court will find government speech.<sup>199</sup> The fewer the number of sponsors or partners involved in a project, the more comparable to *Allegheny*,<sup>200</sup> and the more likely the appearance of endorsement, while a large number and broad range of speakers, including those whose views government clearly would not choose to endorse, would be similar to *Capital Square* and show little likelihood of unwanted attribution.<sup>201</sup>

The essence of why endorsement matters is that requiring the relationship would force government to say it approves of something when it does not. One way of conceptualizing it is that the government speech at issue in these cases is the administration's implied message of what it values, what it stands for. Where the context does not suggest endorsement, then allowing access to a disapproved-of group does not interfere with the government's implied identity message. Where the government's relationship with the private entities does connote endorsement, however, forcing inclusion alters the message that government sends. This claim – that the law should not force endorsement because that would be akin to changing the government's speech or forcing it to “say” something it does not want to say – is related to questions about the legitimacy of

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199. *Gentala v. Tucson*, 244 F.3d 1065, 1079 (9th Cir. 2001) (en banc) *vacated* by 534 U.S. 946 (2001), *remanded* 275 F.3d 1160 (9th Cir. 2002) (demonstrating well how the factors which show that a government is speaking through its selection of the speech of others are the same as those which suggest government endorsement of the messages of those private speakers. This similarity was brought out because the case involved requested funding for a religious event, so that the court explicitly applied the Establishment Clause's endorsement test. The Ninth Circuit found that the policy and application “make clear that the Civic Events Fund program is meant to endorse some events as ‘Civic Events’ worthy of the City's imprimatur.” The subjective funding criteria, and the role of the mayor and city council in applying those criteria, suggest that “the City has retained a role for itself something like that of impresario, selecting the events that are consistent with the image of Tucson that the City wishes to foster and that therefore merit public subsidy.”).

200. 492 U.S. 533 (1989).

201. See 515 U.S. 753, 757, 770 (1995). It should not, however, be necessary to show, as in the Adopt-a-Highway cases, that previously accepted participants included those the government clearly would not endorse. Such a requirement might lead governments to try to exclude potential speakers for the sole purpose of establishing that the program was government speech, which would be an undesirable effect. Rather, a large number and broad range of participants, in and of itself, should be a factor in determining the likelihood of attribution, along with the degree and character of the relationship.

and rationale for government speech generally.

What is the source of government's right to send an implied message of its values, which should not be interfered with by forced endorsement of a proposed speaker? At first blush, the claim appears to be one of government right to free speech. Under *Hurley v. Irish-American Gay Group of Boston*,<sup>202</sup> the First Amendment protects the right not to say something, as well as to say it. There, parade organizers could not be forced by the application of public accommodation laws to include gay and lesbian groups in their St. Patrick's Day parade because that would convey the message that the parade organizers endorsed a lifestyle with which they vehemently disagreed.<sup>203</sup> But the First Amendment protects individual's free speech rights from infringement by the government; it does not exist to protect the government from free speech claims by would-be speakers.

Instead, the nature of the government's claim is structural. It is a "right" only in contrast to the obligation that government is under with respect to avoiding the appearance of endorsement of religious speech. The claim is based on the reality that governments are elected to promote certain values, often to the exclusion of others. A "family values" administration might not want to accept funding from or collaborate with groups advocating gay rights, while one focused on diversity would be loath to fund or partner with an anti-immigration group. The fear, though, is that allowing government to avoid unwanted attribution would foster divisiveness: "outsiders" will be excluded, while "insiders" will be rewarded by opportunities for self-promotion. As explained in *Southworth*,<sup>204</sup> however, the answer to that concern lies in the democratic process: one term's insiders can be next term's outsiders.

In evaluating the claim that government has a right to send a message about its values without being forced to alter that message by entering into unwanted affiliations, it is important to look back to the prerequisite for creating a limited public forum: government intent to open its property to private speech. Without such intent and action, private speakers generally have no right to use government property or subsidies for speech purposes. Where no forum is created, then there is no First Amendment protected speech rights on

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202. 515 U.S. 557 (1995).

203. *Id.* at 574.

204. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234 (2000); See discussion *supra* Part II.A.



that property, or created by that program. Where the relationship is such that forced inclusion of a speaker or message would look like endorsement and distort government's own message, doing so should not be required in a context where the private speaker does not generally have access, and has not acquired any rights to speak under forum analysis. In choosing sponsors and partners, government does not intend to open a forum for private speech, but rather to obtain assistance to leverage its own ability to act.

A final issue is whether government should simply be required to avoid unwanted attribution by issuing strong, effective disclaimers. Commentators who have rejected the endorsement argument point to government's ability to disavow any unintended message of approval by means of disclaimer or other clarifying speech, or, alternatively, by how it structures the program.<sup>205</sup> One problem with that approach, however, is that in many contexts a disclaimer would not be effective. The cases discussed here where disclaimers were issued involved universities relinquishing control over students' subsidized speech, a situation where observers would expect that students speak on their own behalf, enjoying full academic freedom. In contrast, requiring a disclaimer on every street light pole banner is not practical: it would be either indecipherable or unattractive. An effort to disclaim endorsement of key sponsors would lack credibility. And finally, when government seeks to partner with the private sector, sometimes it wants acknowledgment and public credit for its role as a systematic feature of the program, as in *Gentala*.<sup>206</sup>

In a recent article, Professors Bezanson and Buss analyzed the unwanted attribution argument asserted in *Cuffley v. Mickes* and concluded that avoiding the appearance of endorsement is never a valid basis for allowing government a right not to speak.<sup>207</sup> They argue that where government has no intent to speak, it should not be allowed to make viewpoint distinctions solely to avoid having third parties mistakenly deduce that it approves of the private speaker. Looking to Establishment Clause usage, however, Justice O'Connor has observed that unconstitutional endorsement is not premised on the viewer's mistake; rather, it is "the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and the relationship to the private

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205. See Jacobs, *supra* note 63, at 1398-1400 (2001); Bezanson & Buss, *supra* note 18, at 1482.

206. 244 F.3d 1065.

207. Bezanson & Buss, *supra* note 18, at 1482.

speech at issue, [that] *actually convey* a message of endorsement.”<sup>208</sup> The context is different, of course, in that government is not required to structure its affairs to avoid attribution of disliked, nonreligious messages, but the principle has meaning here too. The appearance of endorsement of the KKK, for example, results not from mistaken attribution, but by virtue of how the state has chosen to structure its program, and the nature of the relationship it sets up with private speakers. Where a government intends to create a close relationship in which the private and the public realm each gets credit and acknowledgment for its contribution to a joint enterprise, the government should not be forced to structure its relationships and programs differently in order to avoid potential, and reasonable, attribution of approval of the participants.

Another major objection to the endorsement approach is its potential limitlessness. They argue that all regulatory action might be included, and give as an example a state claiming the right to refuse a waste permit to a company involved in scandal, because “small-minded” people might associate the government with the views of any of its beneficiaries.<sup>209</sup> The Establishment Clause endorsement test, of course, relies on the understanding of the “reasonable” observer,<sup>210</sup> and the approach put forth here requires a close, and acknowledged, affiliation. In the Adopt-a-Highway cases, it would have been unreasonable to attribute government approval of all the participants, while announcing the underwriters of the public radio show in the *University of Missouri* case suggested government approval of its apparent partners. The types of relationships where the appearance of endorsement would allow government to take its views into account when making its choice of partners are far from limitless. Although the inquiry will be fact-intensive, so is the analysis in the Establishment Clause endorsement cases, with which the judiciary has substantial experience.

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208. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1993) (O'Connor, J., concurring).

209. See Bezanson & Buss, *supra* note 18, at 1479.

210. There is some debate over the sophistication of that reasonable observer, but “reasonable” is the baseline. See *Capital Square*, 515 U.S. at 779-80 (O'Connor, J., concurring) (holding that the reasonable observer “is presumed to possess a certain level of information that all citizens might not share. . . . [and is] “deemed aware of the history and context of the community and forum in which the religious display appears.”). But see *id.* at 799, 800 n.5 (Stevens, J., dissenting) (calling for a test that captures the impact of a visual symbol, there a cross on the square, on the typical passerby).

## D. Application of These Paradigms to Examples

### 1. *Decorative Banners on City Street Light Poles.*

In recent years, many municipalities have joined a growing trend to improve urban appearance by displaying decorative banners on their street light poles.<sup>211</sup> Typically, such banners contain colorful, attractive graphics and a limited number of words. Most commonly, they proclaim the identity of the town or shopping district, celebrate a local institution, or promote a public festivity. In some municipalities, all banners are created, erected, and maintained by the city itself; then there should be no question that they constitute government speech and that the city retains control over all content. In others, though, the policy also is to allow some private speakers use of the light poles to display banners that meet the city's expressive purposes.<sup>212</sup> In those cases, the question arises whether the context is more like a limited public forum or more like government speech and what kinds of programs would be possible under the differing approaches.

Following current case law, a court almost certainly would begin its analysis by looking at whether the city had opened up a limited public forum or created a designated public forum, open to all. Street light poles, particularly their tops which require special equipment to access, are nonpublic property that is not generally open to the public for any purpose, including speech. A court thus would analyze the government's intent in allowing access, as reflected in both the written policy and the actual practice. Cities generally want to accomplish broad objectives such as enhancing the beauty of the street scape, celebrating the diverse, positive features of the city, and appealing to tourists. An effort to provide more specific criteria for the kinds of banners municipalities currently display might reference the city's important institutions, not-for-profit public events, community initiatives, and neighborhoods.

One problem inherent with this traditional approach is that there are almost no descriptive categories that would exclude a banner that undermines the government's expressive purposes or contravenes public policy. For example, "public events in the city" would include two events that took place in the Chicago area: "Freaknic," which

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211. A recent Nexus search collected several hundred articles referencing street light pole banners in both large cities and small towns.

212. See, e.g., CHI., ILL. MUNICIPAL CODE, § 10-8-340 (1996) (allowing donated banners).

caused public chaos and resulted in numerous arrests, and “Hempfest,” which encouraged and resulted in public marijuana use.<sup>213</sup> To say that it would be inappropriate to display banners promoting such events through a government program, of course, in no way undermines the organizers’ First Amendment rights to produce these events in a public forum or to advertise and discuss them through private means.<sup>214</sup> That distinction – between line drawing and suppression – is fundamental. But defining content limitations in a way that avoids such problems, without allowing for administrators’ discretion and thus viewpoint, is an impossible task. No matter how the categories are framed to target only the desired types of displays, someone has to decide whether a given institution is “significant” or “cultural,” for example, and consistency over the years is not achievable.

Such a banner program is another example of the “special public purpose forum,” which should be deemed government speech, so long as all proposals are carefully screened for adherence to program criteria. Cities have expressive purposes when initiating a banner program – to be welcoming, aesthetically pleasing, and promote the government’s vision of the city at its most attractive – and they cannot be reduced to objective content limitations. In addition, the nature of the government property and its prominence suggest city endorsement of the messages placed there. Also, these banners are not amenable to disclaimers, which would either be hard to see or interfere with their decorative quality, so it would be difficult for government to disassociate itself with their stated messages.

One approach that may make banners produced by private speakers look more like government speech would be to include a banner program as part of a city’s overall public relations plan directed at boosting tourism. Alternatively, all privately-sponsored decorative banners could be linked to other forms of government speech. The criterion for inclusion might be that all banners must

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213. See Phat X. Chiem & Andrew Martin, “*Freaknic*” Fest May Be the Last; Answers Demanded After Chaos Erupts, CHI. TRIB., Aug. 4, 1998, at M1 (noting that picnic in park with 4,000 attendees resulted in chaos and twenty-one arrests, including for marijuana possession and a shooting); *Hempfest Attendance is Down; Police Make 3 Arrests*, CHI. TRIB., May 10, 1998, at M10 (noting that after event to support legalization of marijuana was changed from event in the park to a march, it decreased from thousands of participants to hundreds, but still resulted in three arrests for marijuana use).

214. Note that even those traditional public forum rights are not without limits for groups with a track record of law breaking. See *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (holding that Park District could deny permit to Hempfest based on past violations of park regulations).

promote an activity or institution sponsored or subsidized by the city or a related government entity. Bootstrapping a banner program onto various other programs that themselves look more like government speech might improve government's chances of retaining control of content, but would limit the banner program's scope and flexibility.

If private banners are characterized as limited public forums, however, then government will have to limit the permissible content limitations in a very restrictive fashion, such as by permitting only neighborhood chambers of commerce or other retail associations to display banners, while also limiting the subject matter to neighborhood identification, a decorative graphic, and a small sponsor name.<sup>215</sup> Such concrete and narrow parameters would be defensible and easy to enforce.<sup>216</sup>

These ideas, however, simply underscore the deficiency of the limited public forum approach in the context of a special public purpose forum. Applying this approach to a banner program severely restricts its potential because cities cannot achieve the full range of their expressive goals without discretionary speech selection. Characterizing street light pole banners as government speech is good public policy because banner programs are wholly additive speech. They create a new avenue for public expression and, as such, have no coercive impact on prior existing speech.

## *2. City Sponsorship of Special Events and Corporate Sponsorship of City Projects.*

First, it has become fairly common for cities to sponsor or provide some level of support to the special events of private groups in a wide range of scenarios. The more the program targets a certain kind of event with particular city goals in mind, the more likely the subsidies would be deemed government speech. For example, consider a program for city support of neighborhood festivals. It could be structured so that any group seeking to produce one simply fills out an application requesting city services and equipment, which is granted as a matter of course. Doing it this way would create a

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215. Under *Wells*, the mere identification of a sponsor should not alter the nature of the display. 257 F.3d at 1140.

216. Such a policy could even be construed as government speech, on the grounds that the chambers and associations are acting as agents of the city, to transmit its own message of publicizing and encouraging shopping in its city street retail areas. Finding government speech here, however, would not expand a city's expressive outlets, because it would be premised on the limited context.

limited or designated public forum, so that the city would not be able to turn down any group based on their message. Alternatively, the program could be established to achieve city goals, say, hypothetically, “improving community relations by sponsoring events which are supported by established neighborhood groups, highlight the unique characteristics of that neighborhood, and are consistent with city policies on diversity and tolerance.” If each proposal was carefully evaluated, and selection was based on adherence to these standards, the program would look more like government speech. Modifiers such as “unique” and “established” require discretionary speech selection, and such subsidies have a governmental expressive component as well. This characterization would allow the city to retain control over the kinds of events it sponsors, with no damage to First Amendment freedoms.

Second, it has become customary, when cities produce their own special events, to obtain corporate sponsors to help underwrite the costs. In return, such sponsors usually are heavily promoted through signs around the event, mentions in promotional materials and program notes, and sometimes insertion into the name of the event, such as, hypothetically, Sear’s Taste of Milwaukee. Where the city writes, edits and promulgates all such material, under *KKK v. University of Missouri* and *Wells*, it should be considered government speech and trigger no rights of access by other speakers.

The result becomes less certain where the sponsors display their own messages. It is fairly common to allow the larger contributors to use the event grounds for advertising, often by displaying large banners with their logos and slogans. At the next level, where only advertising approved and edited by the city is permitted, it still is likely to be within *KKK v. University of Missouri*. Although that case involved journalistic discretion, the court emphasized that radio staff sometimes edited the sponsor messages.<sup>217</sup>

Choice of sponsors could also be deemed government speech based on the appearance of government endorsement of those selected sponsors. This would depend on whether the city truly was selective in its choice of sponsors or simply accepted all who offered money. Also, if there were a large number of sponsors, especially if the speech included selections that arguably contravened public policy such as alcohol or cigarette ads directed at younger audiences, then event sponsorship would start to resemble the transit-advertising

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217. 203 F.3d at 1094.

context. If participation is too broad, a court might find an “event advertising” public forum. At the other end of the spectrum, where an event is co-produced by the city and a corporation, such a relationship extends beyond the context of acknowledgments of sponsors. There is no First Amendment right to enter into a joint venture with a government entity, even to produce an event with some expressive component.

Even without an endorsement relationship or government control over the content of sponsor messages, if sponsor selection is done pursuant to an inherently discretionary standard it still may come within the *Finlay* speech selection model. For example, if the intended audience of the event were families with young children, sponsorship could be limited to businesses selling goods and services appealing to that demographic. Criteria related to children could screen out some negative associations, while screening in those consistent with attracting families to the city.

Finally, viewing the acknowledgment and promotion of sponsors as government speech will increase, not diminish, speech opportunities. Allowing a city the ability to select its sponsors, and provide them incentives to participate, encourages cities to undertake this sort of expressive event. In contrast, forced affiliation with any entity that offers to give money for an event could result in a net decrease of speech: cities might choose to stop using sponsors, and then have to scale down or discontinue their events.

### 3. *Government Web Sites.*

A final example is the new and growing phenomenon of government web sites. Generally a municipality will start a web site for the purpose of communicating with its residents, as well as potential tourists, businesses, and other users, about the city government, attractions, events, and opportunities. These web sites have expanded in complexity as cities feature news and information from their departments and agencies, and sites are increasingly interactive, allowing citizens to register for programs, make inquiries, and convey opinions.<sup>218</sup> The city web page itself, as a statement from and about the government, clearly is government speech. But two new developments that bring private speech onto the official sites,

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218. See, e.g., New York City web site, at <http://www.nyc.gov>; Official Web Site of the City of Los Angeles, at <http://www.ci.la.ca.us>; City of Chicago web site, at <http://www.ci.chi.il.us>.

Internet links and advertising, raise novel First Amendment issues.<sup>219</sup>

Typically a city's home page will have both internal links, such as to pages for each department and pages for citizens to use for making complaints or obtaining permits, and external links. The most frequent examples of external links are those featuring the tourist attractions of the area, including cultural institutions, shopping and restaurants.<sup>220</sup> The question arises whether allowing any links opens a designated or limited public forum, or whether the links can be characterized as an extension of the web site's government speech, which would give a city more control over selecting the sites given links.

Looking to the first such case, *Putnam Pit*,<sup>221</sup> a court likely would first ask whether the city has created a designated or limited public forum, and then evaluate the policy and categories. For example, under existing limited public forum law it would be unconstitutional viewpoint discrimination for a site with links to entertainment and restaurants to reject a request to include links to "gentleman's clubs" and "Hooters" because the city did not want to promote entities that demean women.

Because one purpose of establishing a city web site is to promote the most appealing features of the city, which also are in harmony with public policy, link selection should be considered government speech. Government has an expressive purpose and the accomplishment of this purpose requires discretionary speech selection. A government website is also a context where the public will perceive government approval of all sites the city has chosen to post on its official web site. While a disclaimer is easily done and would be clearly visible to all viewers, governments would not choose to structure their web sites in a way that relinquishes control over content. If forced to accept web sites that are against public policy, a disclaimer might not be credible without some statement that because of the First Amendment, the city has no control over selection of Internet links.

One factor that undercuts the contention that links are government speech, however, is the loose, uncontrolled nature of the Internet. Once a city establishes a link, it has no control over where

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219. No legal scholarship has addressed these new concepts; to date, attention has been addressed only to the issue of Internet access. See Gey, *supra* note 110 (criticizing attempted government restrictions of Internet content and public access in libraries).

220. See *supra* note 218.

221. 221 F.3d at 842-44.



that link leads or how that site is modified. Because the link will not be to some static message, knowable in advance, government may not have the ability to be consistently selective enough to sustain a finding of government speech. At a minimum, the city would need to undertake a review of its links regularly, which militates against having a large number of links.

One alternative approach that would finesse the possibility of loss of control over link contents would be to authorize connection only to established organizations, such as Chambers of Commerce, Tourism Councils, retail associations, and restaurant guides, so that no selection of individual sites, events, restaurants and so forth is done by the government. Even if deemed a limited public forum, the opportunity and need for viewpoint distinctions when selecting among such groups would be minimal. Doing so is distinguishable from the unsuccessful attempts to avoid implicating the First Amendment by delegating advertising decisions to a private agency.<sup>222</sup> This context does not resemble the transit advertising forums because those forums involve discrete physical spaces, so that there the administrator is parceling out limited spots on government's property. In contrast, the links that councils and chambers choose for their own home pages will not be seen on or have any direct relationship with the government web site. This approach, however, would significantly limit governments' ability to be creative and flexible in the rapidly changing Internet world.

Recognizing Internet link selection for city web sites as government speech benefits the speech market overall because a city will have the opportunity to communicate its own vision of city attractions and policies, without being hijacked by private speakers with contrary messages. And given the infinitely open and extensive communication possible on the Internet, exclusion from a particular governmental unit's web site in no way inhibits a private entity's expressive opportunities, so coercion is not an issue. Finally, providing governments with editorial discretion over link selection by means of the government speech paradigm is preferable to the approach used in *Putnam II*, because discretion is the essence of government speech, while the vast majority of limited public forum cases stress the need for objective content limitations and the test is framed in terms of viewpoint neutrality. Labeling link selection as government speech is the only reliable method of ensuring such

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222. See *supra* note 108.

discretion with any level of predictability.

An additional new development involves bringing Internet advertising to government web pages. Several governments have contracted with an Internet company which takes responsibility for the costs and expertise required to develop and maintain a complex web site in exchange for administering a program allowing banner ads on the government site.<sup>223</sup> A number of other governments have considered or are considering allowing such advertising; while the trend has stalled in light of recent Internet advertising revenue losses, the issue will be recurring.<sup>224</sup>

A court likely would evaluate the advertising portion of a city web site as a designated or limited public forum because it is similar to transit advertising forums. The purpose of opening a web page to advertising is revenue-raising, not expressive. Limiting the forum to commercial advertising likely would be defensible. While the audience is not physically "captive," as in the transit context, it is not possible for citizens to avail themselves of the site's services without exposure to the advertisements, as anyone who has had to wade through countless annoying banner and box advertisements is aware. Further limiting principles, such as only local businesses or only those serving the tourist industry, probably would be upheld because they relate to the broader web site purposes.

Several factors do suggest, however, that advertisement selection is better characterized as government speech. The appearance of government endorsement of its advertisers is similar to that of its Internet links. An official web site conveys the authority and imprimatur of the government, and that perception may be extended to all information posted there, including advertisements. To the extent the advertisers can be painted as sponsors of the official web

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223. See, e.g., EGovNet, at <http://www.egovnet.com> (listing governments).

224. See, e.g., Wilson P. Dizard, III, *Can the Government Make Web Ads Work?*, ICN (Apr. 1, 2002), at [http://www.gen.com/21\\_7/manager/18280-1.html](http://www.gen.com/21_7/manager/18280-1.html) (noting that while Hawaii and govAd terminated their agreement as ad revenue dried up, Maryland has just started their own ad program); Jonathan GS Koppell, *Will Cash-Strapped Government Web Sites Jump on the Beleaguered Banner Bandwagon?*, THE INDUSTRY STANDARD (Feb. 5, 2001), at <http://www.thestandard..cle>. (discussing phenomena generally, and noting governments continuing need for money to support a sophisticated Internet presence); William Welsh, *Virginia Prepares to Open Door to Advertising on its Web Site*, WASHINGTON TECHNOLOGY, (Jan. 22, 2001), at [http://www.washingtontechnology.com/news/15\\_20/state/16203-1.html](http://www.washingtontechnology.com/news/15_20/state/16203-1.html) (discussing Virginia's plan to start web ads, and Iowa's plans to look for web sponsors); Dibya Sarkar, *Mixed Messages*, FCW.COM (Jan. 8, 2001), at <http://www.fcw.com> (analyzing business structure and revenue potential, discussing govAd contracts and Massachusetts' independent efforts to use web site ads).

site, *University of Missouri*<sup>225</sup> would be useful. Given that it posts the ads, at least in some sense the government is the “speaker,” although that argument may be less persuasive with the written word via computer than it was with spoken word on public radio. Again, it would come down to the particular facts: the more it looks like government acknowledging its sponsors, the closer to government speech; the more it resembles transit advertisements, with advertisers controlling the content and presentation, and a broad range of speakers diluting the appearance of endorsement, the more it looks like a public forum.<sup>226</sup> In this context, the physical appearance would matter significantly, in addition to the contractual and practical realities.

There is less of a policy rationale for allowing government to pick and choose among advertisers, as compared with Internet links, however, because doing so is less tied to government’s expressive purposes for its web site. Most likely, to retain any content control, government’s only choices will be to establish and maintain narrow content limitations or, if the results are unacceptable, to abandon the advertisement forum altogether.

## CONCLUSION

As laid out in Part I, where use of its nonpublic property or funds is deemed a limited public forum, government’s stated ability to establish content limitations is largely illusory. It is unable to exclude speech that is divisive or contrary to public policy and general criteria, such as speech that is inclusive or has broad appeal, may be struck down as conducive to viewpoint discrimination. In a limited public forum, government now has few options. It may legislate very specific, narrow criteria designed to avoid controversy, such as granting arts funding only to large established organizations or allowing only neighborhood identifiers on street light pole banners. It may attempt broad expressive goals and risk liability for every policy decision. Or, it may simply close down the forum to all private use.

These options do not fit the growing number of special public

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225. *KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir.), *cert. denied* 531 U.S. 814 (2000).

226. See *Welsh*, *supra* note 224 (noting Iowa’s plans to look for web sponsors). The distinction, per Iowa’s plan, is that “[u]nlike Internet advertising, which typically allows users to click through to the advertiser’s Web site, the sponsorships will limit advertisers to displaying their name in exchange for partially subsidizing the site.” *Id.*

purpose forums or the increasing use of corporate sponsors for government programs. Instead, these contexts are better served by construing them as government speech, which would allow government to determine the content of speech in its programs, even when private speakers elaborate on its general themes.

This approach does raise a general policy concern over its potential limitlessness. This Article has provided some specific means for addressing the Court's cautions against suppressing viewpoints and having a coercive effect. Namely, for special public purpose forums, any rejections under the guise of government speech should be clearly grounded in government's publicly announced expressive purposes for the program. Also, viewpoint-based selections should not be allowed in contexts where government subsidies are essential to private speakers' continued operations. A more global concern is that government can always provide some policy statement manufacturing purported expressive goals for any program where it provides funds or access to private speakers. The answer lies in scrutiny of the context's characteristics. Where the context has little to do with government presenting its views and images to the public, as in meeting room use, or is primarily concerned with revenue-raising, as in advertising forums, it will not merit designation as a special public purpose forum. Sponsor acknowledgment, itself a narrow category, does not create the same fears regarding its boundaries.

Religious speech presents one final conundrum. If a program or context is deemed government speech, including a religious speaker may be seen as unconstitutional endorsement of a religious message.<sup>227</sup> On the other hand, if it is deemed a limited public forum, rejection of religious speech will be held unconstitutional viewpoint discrimination, as in *Rosenberger*. The predicament of government lies in the uncertainty over how a given program or context will be construed by a court. The answer will be necessarily case-by-case. There may be some circumstances where government has discretion to select which private speakers serve the expressive purposes for its program, and yet is including a broad enough spectrum of private

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227. See David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559 (2002) (asserting that the presence of government speech should be the dividing line between acceptable government subsidies of religiously-affiliated organizations and those that violate the Establishment Clause, so that funding a drug treatment program, with its "just say no" message would be unconstitutional, while funding a soup kitchen, which lacks a message component, would be allowed as part of a neutral program).

speech that doing so will not look like government endorsement of a religious message. Consider if a city wanted to highlight community institutions in its banner program. If it included churches along with schools, hospitals and charitable institutions, that would both fit with its policy and not be endorsement. Similarly, if a city website included links to important cultural and architectural sites, inclusion of suitable churches would be acceptable. The analysis is different however, for sponsorship acknowledgments and any other context that depends on endorsement as its rationale. Making sponsorship acknowledgments that contain religious speech would cross that line, and whether religious entities could be sponsors at all probably would depend on how exclusive the group.

The proposed expansions of the government speech doctrine will facilitate new additions to the speech market, and thus will serve First Amendment values, as illustrated by one final example. In the summer of 2002, the Chicago Department of Cultural Affairs produced a city-wide special event entitled "Music Everywhere,"<sup>228</sup> which consisted primarily of selected performers playing music on the streets. It was publicly funded and heavily promoted as a tourist attraction, so the organizers wanted to ensure high quality and diverse musical offerings. Initially, there was some concern over how this would affect existing street performers;<sup>229</sup> they could have argued that the program was a limited public forum for street performers, so that they, too, were entitled to participate and be paid by the city. The established criteria of musical excellence and showcasing the city's diversity allowed for discretionary selection, however. This purely additive speech had no negative impact on freedom of speech. Existing street performers are allowed on the sidewalks as a matter of right, of course, not subject to control as to content or musical skills, but only regulated as to hours, certain prohibited places, and level of noise.<sup>230</sup> Music Everywhere did not displace the private performers, and they may even have benefited by the heightened awareness of street music and the increase in people coming into the downtown area to seek it out.

In sum, increasing governments' ability to fashion their own

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228. Fran Spielman, *Music Will Fill Streets of City This Summer*, CHI. SUN-TIMES, Mar. 23, 2002, at 5; Gary Washburn, *What Can Top Cows? The Sound of Moo-sic*, CHI. TRIB., Mar. 23, 2002, at 1. The event was a sequel to the wildly successful Cows on Parade of 1999, which was emulated by scores of municipalities. See *id.*

229. See Howard Reich, *Street Musicians Get a Cold Shoulder from the City, Unless They Are the Mayor's Own Chosen Minstrels*, CHI. TRIB., Mar. 29, 2002, at C1.

230. See CHI., ILL. MUNICIPAL CODE § 4-268-050 (1992); *id.* § 11-4-1110 (1998).

messages in the expanding context of public-private partnerships will serve only to enhance First Amendment values by increasing opportunities for speech activity, rather than suppressing or threatening the existing free speech rights of individuals. For this reason, special public purpose forums and sponsorship acknowledgments should be considered government speech to allow for discretionary selection, rather than be held to ever-narrowing interpretations of viewpoint discrimination.

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