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No Joy in Mudville for the First Amendment: A Critical Examination of the Public Forum Doctrine in Light of *United Church of Christ v. Gateway*

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NO JOY IN MUDVILLE[1] FOR THE FIRST AMENDMENT: A CRITICAL EXAMINATION OF THE PUBLIC FORUM DOCTRINE IN LIGHT OF *UNITED CHURCH OF CHRIST V. GATEWAY*

INTRODUCTION

Like many American cities, Cleveland, Ohio has a community identity that is entwined with its professional sports teams. Franchises like the Cleveland Indians or the Boston Red Sox are not just dueling corporations competing with each other in the free market. While professional sports teams are lucrative businesses, they also express an idea about a city's public identity.[2] In this respect, expressing ideas about professional sports teams is political speech. Team names and logos have an effect on how the local community characterizes itself.[3]

In Cleveland, the use of the team name the "Indians" and its mascot, Chief Wahoo, continues to outrage those who believe that the name and mascot degrade Native Americans. The Ohio Supreme Court recently described the Chief Wahoo logo as "a red-faced,

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[1] This phrase is borrowed from the famous poem by Ernest Lawrence Thayer, *Casey at the Bat*, S.F. EXAMINER, June 3, 1888, *reprinted in* BASEBALL: A LITERARY ANTHOLOGY 13-15 (Nicholas Dawidoff ed., 2002).

[2] *See, e.g.*, Cleveland Indians Official Website, Jacob's Field History, http://cleveland.indians.mlb.com/NASApp/mlb/cle/ballpark/index.jsp (last visited Mar. 7, 2006) ("There is a passionate connection between the city of Cleveland and the Indians, as they are a study in revival. Both are working, living examples of the power of teamwork, conviction and dedication.").

[3] For example, the professional basketball team, the Baltimore Bullets, changed its name after the team moved to Washington D.C. The name change occurred, in part, due to the fact that Washington D.C. was known for its high homicide rate. *See* Richard Justice, *Bullets Seek New Name; Pollin Says Moniker Is Inappropriate*, WASH. POST, Nov. 10, 1995, at C1. In remarking on how involved the public was in the name changing process, the team owner said, "What really fills my heart is how the community is so involved with my team . . . . They like the names. They don't like them. They were involved enough to be part of it. They wanted to put their two cents in." Richard Justice, *For Bullets, 'Wizards' Casts Magic Spell*, WASH. POST, Feb. 23, 1996, at A1.

hooked-nosed, grinning caricature of a Native American."[4] However, there are many local residents who embrace the team's name and mascot and would be disappointed to see them change.[5] For the last several years, a group of protestors has staged demonstrations at the Indians' home opener. These protests have sparked ongoing legal controversy between the protestors and the owners of Jacobs Field, where the Indians play ball.[6] Jacobs Field is part of a twenty-eight acre area in downtown Cleveland known as Gateway. The private Gateway Redevelopment Corporation owns and operates Gateway, but its long and complex relationship with State, County, and City governments has blurred the distinction between the public and private sector.

Recently, the Sixth Circuit decided a First Amendment controversy involving anti-Wahoo protestors who were prevented from protesting at Gateway.[7] Applying the public forum doctrine[8] to the disputed areas, the Sixth Circuit found that Gateway could not prohibit speech on the sidewalks owned by the Gateway Redevelopment Corporation, but that prohibiting speech in a large urban area known as the Gateway Commons was not unconsitutional under the First Amendment.[9]

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[4] Bellecourt v. City of Cleveland, 820 N.E.2d 309, 311 n.1 (Ohio 2004).

[5] *See* Evelyn Theiss, *Tribe Fans Hail Decision on Mascot*, PLAIN DEALER (Cleveland), July 1, 1993, at 1A.

[6] The most recently decided case, *Bellecourt*, involved a 1998 incident in which five protestors burned an effigy of Chief Wahoo and were arrested for arson. Although the protestors spent the night in jail, they were never formally charged. They subsequently filed a suit charging the police with violating their First Amendment right to speech, likening their arrest to that of arresting one burning the flag. The Ohio Supreme Court decided in favor of the City, saying, "Though we generally agree with this [First Amendment] proposition, we find it inapplicable here because any suppression of speech was incidental to Cleveland's important interest in preventing harm caused by fire." *Bellecourt*, 820 N.E.2d at 312. The two dissenting opinions found the arrests had violated the protestors' First Amendment right to expression. *See id.* at 314-15.

[7] United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, 383 F.3d 449 (6th Cir. 2004).

[8] The public forum doctrine is a judicial device that the Court uses in First Amendment cases to determine under what circumstances government must make public property available for speech.

[9] While the Gateway Redevelopment Corporation, a private entity, owns Gateway, the City's relationship with the Gateway Redevelopment Corporation has raised a question as to whether the Gateway Redevelopment Corporation is a state actor for purposes of the First Amendment. At the District Court level, the Plaintiffs made two arguments supporting a conclusion that Gateway is a state actor. First, they argued that "because . . . its history, mandate and leadership are so tied up with the government—in this case the City and the County—that [Gateway] should be deemed an agency or instrumentality of local, and therefore state government." *Id.* at 454 (second alteration in original). Second, "the relationship between the Gateway Corporation, the City and the County is so deeply symbiotic as to make the Gateway Corporation a state actor." *Id.* This explains the grounds for plaintiffs' First Amendment claim.

This Note addresses the consequences of misapplying the public forum doctrine to First Amendment questions. The Sixth Circuit applied the public forum doctrine in a manner that is antithetical to the underlying values behind the First Amendment. This decision means (1) the public is prevented from access to core political speech and (2) people who want to convey a political message to the public are unduly inhibited from engaging in self-expression and contributing to the democratic process.

There are two major problems with the Sixth Circuit's use of the public forum doctrine in the *Gateway* case. First, the court's use of the traditional approach to the public forum doctrine results in a formalistic outcome that does not adequately protect speech. The court should have examined Gateway's no protest restriction in light of whether the type of expression (here, peaceful demonstration with signs) is compatible with the uses of the property. Using the compatibility approach, the court should have found that Gateway could not restrict the type of speech activity in which the protestors wanted to engage. Second, the court should have found that Gateway's speech restrictions are tantamount to viewpoint discrimination. Gateway's practice of allowing signs endorsing the team name and mascot into the forum while prohibiting messages with a critical viewpoint is unconstitutional viewpoint discrimination. With this decision, the Sixth Circuit embarks down a path that will erode the substantive underpinnings of the First Amendment.

This Note argues that the only way to use the public forum doctrine without betraying the values underlying the First Amendment is by applying a flexible compatibility model that scrupulously guards against viewpoint-based discrimination. If the public forum doctrine is here to stay, courts must employ it in such a way that the First Amendment does not become ancillary to the discussion.

Part I sets the stage by providing the factual backdrop against which the Sixth Circuit's public forum analysis took place. Part II provides the necessary doctrinal background to understand what the Sixth Circuit did (and what it did not do) in the *Gateway* case. This Section generally explains the public forum doctrine, examines the two competing public forum models, and analyzes the requirement of viewpoint neutrality in all forums. Part III argues that by using the traditional approach and not critically examining whether there was viewpoint discrimination, the Sixth Circuit got it wrong.

I. FACTS OF *GATEWAY* CASE

The controversy began in April 2000 when a group of people, including the plaintiff group, United Church of Christ (UCC), planned a peaceful protest at the Cleveland Indians' home opener. The protestors believe that the team's name and mascot are racist and should not be used as symbols of community pride.[10] Not surprisingly, the protestors planned to have their protest outside Jacobs Field, the stadium where the Cleveland Indians play their home games.[11] Jacobs Field, which is part of the Gateway Sports Complex, is owned by the Gateway Economic Development Corporation of Greater Cleveland, Inc., a private company.[12] The Complex also consists of the Quicken Loans Arena (where the Cleveland Cavaliers play), Gateway-owned sidewalks, a Commons area, and a parking area.[13]

This was not the first time the protestors had staged a demonstration outside an Indians game. In the past, the protestors and Gateway had been able to come to mutually acceptable terms regarding where the protestors could demonstrate in certain areas at Gateway.[14] But this time there was no compromise. Gateway would not allow the protestors to demonstrate on the Gateway sidewalks or on the Commons at the home opener.[15] In response, the protestors filed suit in United States District Court asking for an injunction that would allow them to gather and demonstrate at the Gateway Complex.[16]

At first blush, the case looked like it would primarily involve an issue of state action, i.e., was Gateway a government actor, or was Gateway private and, thus, not subject to the First Amendment?[17] But the district court and the Sixth Circuit took a different approach. Assuming that there was state action, the courts applied the public

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[10] *See* Jon Craig, *High Court Rejects Wahoo-Burners' Plea; Justices Say Threat from Burning of Effigy Overrides Protesters' Free-Speech Rights*, COLUMBUS DISPATCH, Dec. 16, 2004, at 10C (describing signs and banners that were displayed at a similar demonstration to protest the "baseball team's continuing use of a grinning caricature of an American Indian as its corporate logo," because "the picture of the red-faced Indian [is considered to be] racist").

[11] *Gateway*, 383 F.3d at 451.

[12] *Id.*

[13] *Id.* (referring to Quicken Loans Arena by its previous name, Gund Arena).

[14] *See* Mark Rollenhagen, *Gateway, Protesters Agree on 2 Sites*, PLAIN DEALER (Cleveland), May 6, 1995, at 2B (outlining the terms of a 1995 settlement agreement in another First Amendment lawsuit between protestors and Gateway).

[15] Gateway prohibits "all persons from using the Gateway Sidewalk or the Commons to solicit, advertise, or protest (save for three exceptions unimportant to our resolution of this case)." *Gateway*, 383 F.3d at 451.

[16] *Id.*

[17] *See supra* note 9.

forum doctrine to the disputed areas.[18] Under this approach, if the regulation was constitutional even with state action, there would be no reason to decide whether or not there was, in fact, state action. Unfortunately, the manner in which the Sixth Circuit used the public forum doctrine diverted attention from the real First Amendment issues that the case implicated and, as a result, core political speech is (and will continue to be) unnecessarily restricted. To understand what the Sixth Circuit did in the Gateway case, a brief discussion of some relevant analytical concepts will be helpful.

II. DOCTRINAL BACKGROUND

The *Gateway* decision hinged on the Sixth Circuit's application of the public forum doctrine. While there are certain universal aspects of the public forum doctrine (described below in Section A), there are two distinct schools of thought on why the public forum doctrine exists and how it should be applied. These two lines of reasoning, known as the traditional approach and the compatability approach (both laid out in Section B), have dramatically different analytical underpinnings. Both approaches to the public forum doctrine are also concerned with viewpoint neutrality. While the public forum doctrine does allow for *content-based* restrictions in specified circumstances, the government is never allowed to impose *viewpoint-based* restrictions (discussed in Section C). The public forum doctrine works as it should only when courts use a compatibility approach that scrupulously guards against viewpoint discrimination.

A. The Public Forum Doctrine: The Three Categories

The public forum doctrine essentially asks the question: "[w]hat places are available for speech?"[19] Stripped to its most basic elements, the doctrine starts with the premise that public property can be divided into three different categories—the classic public forum, the designated public forum, and the nonpublic forum. Each kind of forum is treated differently for purposes of the First Amendment. In a classic public forum, prohibitions on speech will not be upheld unless they pass strict scrutiny, whereas in a nonpublic forum, speech prohibitions need only be reasonable to pass constitutional muster. As a result, whether a restriction on speech is permissible under the First

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[18] *See Gateway*, 383 F.3d at 451-52.

[19] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1082 (2d ed. 2002).

Amendment will depend, in large part, on what type of forum the court decides is being regulated.[20]

Despite wide and long-standing criticism that the public forum doctrine fails to accomplish its objectives,[21] and lacks coherence[22] or constitutional justification,[23] courts' continued use of the public forum in deciding First Amendment cases indicates that it is not going away anytime soon.[24] What prompted courts to begin talking in this public forum language? Before the public forum doctrine, the Supreme Court had engaged in an ad hoc approach to the First Amendment, making exception after exception to the general rule that government could not restrict speech based on content.[25] The public forum doctrine developed as an analytical tool that enabled courts to acknowledge that, under some circumstances, the state may make content-based speech restrictions on government property.[26] The doctrine eliminates the earlier ad hoc approach by creating clear categories, differentiating between areas where the state has a stronger interest in making content-based regulations and areas where the government's interest in restricting speech is weaker.[27]

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[20] This has led two scholars to refer to the public forum doctrine as "the 'geographical' approach to first amendment law." Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984); *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) ("In general outline, [public forum] rules focus tightly 'on the character of the property at issue.'").

[21] *See, e.g.*, Farber & Nowak, *supra* note 20, at 1224 ("Classifying a medium of communication as a public forum may cause legitimate governmental interests to be thoughtlessly brushed aside; classifying it as something other than a public forum may lead courts to ignore the incompatibility of the challenged regulations with first amendment values.").

[22] *See, e.g.*, *id.* at 1223 ("Perhaps there is a defensible distinction between leafletting on the steps of the Supreme Court and on the adjoining sidewalk, or between an educational institution's restrictions on access to unused classrooms and to faculty mailboxes, but the distinctions are more subtle than public forum analysis would indicate.").

[23] *See, e.g.*, Post, *supra* note 20, at 1715 ("The Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories.").

[24] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (using public forum analysis to decide whether public libraries' use of filtering devices for the Internet violated the First Amendment); United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, 383 F.3d 449 (6th Cir. 2004).

[25] *See* Farber & Nowak, *supra* note 20, at 1226-27 (describing the Court's analytical framework for answering First Amendment questions prior to its use of the public forum doctrine).

[26] *See id.* at 1220.

[27] *See id.* at 1221 (arguing that with its decision in *Cohen v. California*, 403 U.S. 15 (1971), the Court's general ad hoc approach to the First Amendment was effectively eliminated in favor of a categorical framework). From an historical perspective, the categorical approach can be viewed as more protective of speech in that the Court's earlier ad hoc approach had been largely deferential to the legislature. In contrast, after *Cohen*, the Court made it clear that for

Although the public forum doctrine claims to derive its legitimacy from earlier roots, the Court did not speak in the public forum vernacular until the 1970s. *Perry Education Association v. Perry Local Educators' Association*[28] provides the most concise definition and test for each forum. Each category is explicated below.

1. The Classic Public Forum[29]

Of the three fora, the Court is most protective of speech in the classic public forum. A classic public forum is one which "by long tradition or by government fiat ha[s] been devoted to assembly and debate."[30] The idea behind the classic public forum derives from Justice Roberts' famous dictum in *Hague v. CIO*,[31] that streets, parks and sidewalks[32] "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[33]

In a classic public forum, "the rights of the State to limit expressive activity are sharply circumscribed."[34] The Court does not allow blanket prohibitions or content-based restrictions on speech in the classic forum unless there is a compelling government interest and the prohibition/regulation is narrowly tailored to achieve that compelling interest.[35] Content neutral time, place, and manner restrictions, however, are only subjected to intermediate scrutiny. In other words, a content neutral restriction in the classic forum will only be upheld if it is "narrowly tailored to serve a significant

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government to restrict speech based on its content, the speech would have to fall into a clearly defined category of unprotected speech.

[28] 460 U.S. 37 (1983).

[29] This forum has also been referred to as the traditional public forum and the quintessential public forum. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (traditional); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quintessential).

[30] *Perry*, 460 U.S. at 45.

[31] 307 U.S. 496 (1939).

[32] While *Hague* originally only referred to streets and parks, the Court later asserted that the *Hague* dictum was also meant to encompass sidewalks. Frisby v. Schultz, 487 U.S. 474, 480 (1988) ("'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum."); United States v. Grace, 461 U.S. 171 (1983) (holding that the public sidewalk surrounding the Supreme Court is a classic public forum). *But see* United States v. Kokinda, 497 U.S. 720 (1990) (holding that a postal sidewalk designed exclusively as a means of ingress and egress to the post office is not a classic public forum).

[33] *Hague*, 307 U.S. at 515.

[34] *Perry*, 460 U.S. at 45.

[35] *Id.*

government interest, and leave[s] open ample alternative channels of communication."[36]

2. *The Designated Public Forum*[37]

A designated public forum is "public property which the State has opened for use by the public as a place for expressive activity."[38] Unlike a classic forum, the government is not required to open such property for speech purposes, but once it does, it must comply with the same standards as it does in the classic public forum.[39] Speech prohibitions and content-based restrictions must be narrowly tailored to serve a compelling governmental interest.[40] Content neutral time, place, and manner restrictions are only allowed if they are narrowly tailored to serve a significant governmental interest and allow for ample alternative channels of communication.[41]

3. *The Nonpublic Forum*

The nonpublic forum represents the least speech-protected category of government property. If an area is deemed a nonpublic forum, then "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[42] In other words, the government may restrict or even prohibit speech in a nonpublic forum so long as the regulation is reasonable and viewpoint neutral.

The underlying rationale behind giving the government greater latitude in the nonpublic forum is the Court's recognition that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[43] The reasonableness standard highly defers to the government. As a result, if the Court finds the regulated area to be a nonpublic forum, the regulation will usually be upheld.[44] A finding of a nonpublic forum is,

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[36] *Id.*

[37] This forum is also referred to as the limited public forum. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 811 (1985).

[38] *Perry*, 460 U.S. at 45.

[39] *Id.* at 45-46.

[40] *Id.* at 46.

[41] *Id.*

[42] *Id.*

[43] *Id.* (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)).

[44] *See, e.g.*, Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S.

therefore, usually fatal to a First Amendment challenge. When the Court finds a nonpublic forum, it is, in essense, writing the government a "blank check" to control expression.[45]

B. Public Forum Doctrine: One Phrase, Two Different Concepts

The phrase "public forum doctrine" is used to describe two very different analytical models: the traditional framework and the compatiblity framework. Both approaches use the three categories described in the preceding section, but the way in which the categories are employed dramatically differs under the two paradigms. As will be seen, the compatiblity model is superior to the traditional model as a tool for analyzing First Amendment questions. While the traditional model unnecessarily imposes formalistic boundaries on the right to expression, the compatibility model creates a delicate balance; it reinforces the values underlying the First Amendment while acknowledging that in extraordinary circumstances other governmental interests trump the right to information and expression.

1. The Traditional Approach: Property-Based Reasoning

The traditional approach can be traced back to the nineteenth century case, *Davis v. Massachusetts*,[46] in which the Supreme Court upheld an ordinance restricting speech on the Boston Common.[47] In *Davis*, the Court's property-based reasoning was that since the government owned the Common, it, like any private owner, could forbid any public use of the Common.[48] The Court went on to assert that the greater right to prohibit *all* public use of the property must include the lesser right to prohibit speech activity on the property.[49] This reasoning expresses the idea that the First Amendment is nothing more than a negative liberty—that while government cannot interfere with one's right to speak,[50] it is not required to affirmatively make its property available for speech activity.

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114 (1981); Greer v. Spock, 424 U.S. 828 (1976).

[45] Post, *supra* note 20, at 1764.

[46] 167 U.S. 43 (1897).

[47] *Id.* at 48.

[48] *Id.*

[49] *Id.*

[50] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

Later, the *Hague* dictum[51] provided a contour to the absolutist approach articulated in *Davis*. Like the *Davis* decision, *Hague's* logic stemmed from property-based reasoning.[52] But rather than find that the government's ownership status gave it the absolute right to exclude, the *Hague* dictum recognized that with respect to streets, parks, and sidewalks, the people had obtained "a kind of First-Amendment easement."[53] As a result of this metaphorical easement, the *Hague* dictum concluded that there was a category of public property (albeit a limited category) in which the government does have an affirmative, if conditional, duty to keep property open for speech purposes. In streets, parks, and sidewalks, therefore, the government does not have unfettered power to restrict speech. And thus, the classic public forum was born.[54]

While there was a brief period when it appeared that the Court was moving away from the traditional approach and towards the compatibiblity approach,[55] *Greer v. Spock*[56] firmly entrenched the traditional approach into the Court's analytical toolbox.[57] *Greer* involved a regulation of speech on Fort Dix, a military base, which was generally open to the public.[58] Spock, a presidential candidate, was prevented from giving a campaign speech, though in the past speakers had been permitted on the base to talk about other subjects.[59]

In analyzing whether the restriction violated the First Amendment, the Court rejected the compatibilty approach. Instead, the *Greer* majority asked whether there was a tradition of military bases serving as locations for speech.[60] Echoing the property-based rationale that had developed from the *Davis* line of cases, the *Greer* majority explained:

> The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and

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[51] *See supra* Part II.A.1.

[52] Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (explaining that the dictum "implict[ly] accept[s] the underlying premise of the [*Davis*] position—that the public forum issue must be defined in terms of the common law property rights of the state").

[53] Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13; *see also* Stone, *supra* note 52, at 238.

[54] The classic public forum is discussed *supra* Part II.A.1.

[55] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); *see also infra* Part II.B.2.

[56] 424 U.S. 828 (1976).

[57] *See* Post, *supra* note 20, at 1739-41.

[58] *Greer*, 424 U.S. at 830.

[59] *Id.* at 831-32.

[60] *Id.* at 838.

> wherever they please."[61] "*The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.*"[62]

Because military bases did not have a history of "serv[ing] as place[s] for free public assembly and communication,"[63] the Court asked only whether the regulation was reasonable.[64] Answering in the affirmative, the Court found that the regulation did not violate the First Amendment.[65] Since the *Greer* decision, the traditional approach has garnered significant support as a method for analyzing First Amendment questions.

Under the traditional approach, the Court has interpreted the designated public forum in such a way as to strip it of any substantive meaning. A designated public forum is "public property which the State has opened for use by the public as a place for expressive activity."[66] Under the traditional approach, where a plaintiff argues that the restricted property is a designated public forum, the Court addresses the argument by looking at the government's subjective intent in opening the property.[67] While this focus on government intent is not an inherent feature of the traditional approach, it has clearly become a part of how the traditional proponents examine designated public forum questions. The underlying premise behind examining government intent is that "[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[68]

The Court has defended the government intent requirement on the grounds of "general access" versus "selective access."[69] On this view, "the government creates a designated public forum when it makes its property generally available to a certain class of speakers."[70] However, where government "does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,' to use it," a designated

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[61] *Id.* at 836 (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

[62] *Id.* (emphasis added) (quoting *Adderley*, 385 U.S. at 47).

[63] *Id.* at 838.

[64] *Id.*

[65] *Id.*

[66] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see also supra* Part II.A.2.

[67] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 850 (1985).

[68] *Id.* at 802.

[69] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679-80 (1998).

[70] *Id.* at 679.

public forum is not created.[71] If the government faces an "all-or-nothing" proposition, it might choose not to open the property up for any speech purposes whatsoever.[72] By restricting the designated public forum label to those instances where the government has allowed general access (as opposed to selective access), the government is encouraged to open up its property for speech to some extent rather than not opening it up to speech at all.[73] While on its face this reasoning might seem pragmatic, the focus on the government's subjective intent results in circular reasoning that, in many cases, gives government unfettered discretion to block expressive activity.

Where a plaintiff argues that a space has been opened up as a designated public forum, the government can simply point to the fact that it has excluded the plaintiff as evidence that it did not intend to open the forum in the way the plaintiff says it should be open. As a result, it becomes virtually meaningless to argue that the space is a designated public forum. In other words, "[t]he very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under [this form of] analysis that fact alone would demonstrate that the forum is not a [designated] public forum."[74]

As a result, under the traditional approach, the designated public forum collapses into the nonpublic forum leaving two dichotomous categories: the highly protected streets/parks/sidewalks category, and the meagerly protected nonpublic forum.[75] Any viewpoint neutral restriction[76] falling outside of the streets/parks/sidewalks category is only subject to a type of rational basis review.[77] Accordingly, in most cases, the traditional approach provides adequate First Amendment protection only to streets, parks, and sidewalks because all other properties are nonpublic fora.[78]

2. Compatibilty Approach: A Balance of Interests

In contrast to the traditional model, the compatibility approach to the public forum doctrine asks "whether the manner of expression is basically incompatible with the normal activity of a particular place at

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[71] *Id.*

[72] *Id.* at 680.

[73] *Id.*

[74] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting).

[75] *See id.* at 821.

[76] The viewpoint neutrality requirement is discussed *infra* Part II.C.

[77] *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).

[78] For an interesting discussion on this point, see Post, *supra* note 20, at 1745-59.

a particular time."[79] Thus, the forum is determined by examining both the method of the proposed expression (e.g., a silent vigil, as opposed to a vocal picket) and the government's interest in placing restrictions on speech in this particular location. Unlike the traditional approach, where the Court looks at the history of the type of property at issue, labels the forum, and then applies the applicable test, the Court, under the compatibility approach, does not determine what forum the property fits under until *after* it balances the First Amendment interest with the government's purported interest. After balancing the interests to arrive at the applicable forum, the model then applies either a strict scrutiny or reasonableness test to determine whether the restriction passes constitutional muster. In this way, the outcome in a given controversy is determined, not by history alone, but by balancing the competing interests at play. Because categories are defined by the nuanced facts before the Court, advocates of this approach see public forum doctrine, not as a rigid test, but as "analytical shorthand"[80] or a "heuristic device"[81] that assists the Court in balancing the government interest with the First Amendment interest.

A good explanation of how the compatibility approach should work is found in Justice Kennedy's concurring opinion in *Lee v. International Society for Krishna Consciousness*:[82]

> If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums . . . and *whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.*[83]

At the heart of Justice Kennedy's conception of the public forum doctrine is the idea that the First Amendment cannot be guided by

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[79] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[80] *Cornelius*, 473 U.S. at 820 (Blackmun, J., dissenting) (interpreting the public forum categories as nothing more than "analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity").

[81] Farber & Nowak, *supra* note 20, at 1234-35 ("[T]he public forum doctrine is a useful heuristic device—a shorthand method of invoking this balance of interest. But when the heuristic device becomes the exclusive method of analysis, only confusion and mistakes can result.").

[82] 505 U.S. 672 (1992).

[83] *Id.* at 699 (1992) (Kennedy, J., concurring) (emphasis added).

historical formalism, but requires a respect for tradition coupled with an understanding of modern reality.[84]

3. The Compatibility Approach vs. The Traditional Approach: And the Winner Is...

One way to assess the strengths and weaknesses of the traditional approach and compatibility approach is to look at them in their broader contexts. These two models are part of a larger debate about how the courts should address constitutional questions. On one side of the debate is the rules-based paradigm,[85] and on the other side is the 'consequential' approach.[86] When placed in this broader context, the traditional approach represents rules-based thinking, while the compatibility model represents consequential thinking.

a. Rules-Based Thinking: A Lens to Examine the Traditional Approach to the Public Forum Doctrine

The rules-based approach, advocated by Justice Scalia, seeks to answer constitutional questions through generalized rules laid down by the Court. The two major arguments in favor of a rules-based model are that this approach promotes predictability and that it constrains judicial subjectivity.[87] If a rule is set forth, people know what to expect, and lower courts will be constrained to decide cases within the parameters of the set forth rule. The question then becomes, how should these rules be established? While Justice Scalia acknowledges that it is "possible to establish general rules, no matter what theory of interpretation or construction one employs,"[88] in order to obtain the advantages of the rule-based approach, he maintains that it is important to rely on a textual interpretation that adheres to an originalist

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[84] *See id.* at 697 ("[T]he policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.").

[85] *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[86] *See generally* Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

[87] Scalia, *supra* note 85, at 1178-81. Justice Scalia also mentions the appearance of equal treatment as an argument in favor of a rules-based model. *Id.* at 1178. He also acknowledges, however, that "perfect justice can only be achieved if courts are unconstrained by such imperfect generalizations." *Id.* at 1177. This concession seems to cut against the notion that people who are subject to general rules will necessarily feel as if they are being treated equally. If a rule is set out that is well-suited to deal with the problem in Case A but applying that same rule creates an injustice in Case B, it is hard to imagine that the losing party in Case B will feel that, under the law, he was treated equally to the parties in Case A.

[88] *Id.* at 1184-85 (emphasis omitted).

theory of construction.[89] Without a textual originalist framework, the rules-based approach appears to be more of a legislative process than it does a judicial one.[90] The rules-based model, therefore, advocates an exclusive focus on language, history, tradition, and precedent.

The traditional approach to the public forum doctrine takes on many of the attributes of the rules-based model. The traditional model narrowly focuses on an historical interpretation of which places have traditionally been available for speech. Relying on the *Hague* dictum, the model only provides a high level of speech protection to the three places (streets, parks, and sidewalks) that were historically protected at the time the *Hague* case was decided. Any place falling outside of these historical spaces gets scant First Amendment protection. Under rules-based reasoning, the traditional approach to the public forum doctrine is desirable in that it creates a clear formula that constrains judicial activism and creates predictable outcomes. But is rule-based reasoning the only method that provides judicial restraint and predictable outcomes? And even if it is, are these the most important values in interpreting constitutional questions?

Justice Breyer argues that the rules-based approach is unsound insomuch as it does not accomplish the goals that its proponents advocate. Because the framers did not indicate the factors that judges should focus on when interpreting the Constitution's "open language," the very idea that there is an objective, originalist theory of construction is misplaced.[91] Because there is no objective method for determining what the framers wanted, this approach is not effective in reining in judicial subjectivity.[92] Justice Breyer points out that

> emphasis upon language, history, tradition, or prior rules . . . may simply channel subjectivity into a choice about: Which history? Which tradition? Which rules? The literalist approach will then produce a decision that is no less subjective but which is far less transparent than a decision that directly addresses consequences in constitutional terms.[93]

Based on this view, the claim that the rules-based model is superior to other models in promoting judicial restraint lacks merit.

Because subjectivity is not eliminated through use of the rules-based approach, Justice Breyer also questions whether its proponents

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[89] *Id.* at 1183-84.
[90] *Id.* at 1185.
[91] Breyer, *supra* note 86, at 269.
[92] *Id.* at 269-70.
[93] *Id.* at 270.

can claim that this model is a paragon of predictability.[94] Depending on the subjective lens through which a judge interprets history, tradition, and rules, the outcome may differ in different cases. Again, the question becomes, "Which history? Which tradition? Which rules?"[95]

The seeming advantages to the traditional approach to the public forum doctrine begin to crack when held up to Justice Breyer's general critique of the rules-based approach. The *Hague* dictum and the *Davis* case that it modified are both based on the notion that the First Amendment is only a negative liberty—that is, that government has no affirmative duty to make its property available for speech.[96] Streets, parks and sidewalks were exceptions carved out of this general principle because of the idea that the people had acquired a "First-Amendment easement" for these spaces.[97] From its very inception, then, the traditional approach to the public forum doctrine has carried subjective assumptions about the meaning of the First Amendment. The argument, therefore, that the traditional model constrains judicial subjectivity is misguided. The model begins from the subjective premise that the First Amendment is, in most cases, a negative liberty.

A competing and equally viable argument is that when the language of the First Amendment is examined in the context of the rest of the Constitution, it "also forms a necessary part of a constitutional system designed to sustain . . . democratic self-government . . . by encouraging the exchange of ideas needed to make sound electoral decisions . . . ."[98] This interpretation supports the view that the First Amendment places an affirmative duty on government to make its property available for expression. This is not to say that one view on the First Amendment is necessarily preferable to the other. The point is that the traditional approach is not as well suited to protect against judicial subjectivity as it might first appear. It is laden with subjective judgments about the proper meaning of the First Amendment.

b. Consequential Thinking: A Lens to View the Compatibility Approach

The "'consequential' approach," advocated by Justice Breyer, examines constitutional questions in terms of value-based outcomes. This requires judges to work towards outcomes that reflect "basic

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[94] *Id.*

[95] *Id.*

[96] *See supra* Part II.A.1.

[97] Kalven, *supra* note 53, at 13; *see also supra* at Part II.A.1.

[98] Breyer, *supra* note 86, at 253.

constitutional purposes"[99] with an eye toward the general constitutional objective of promoting a "participatory democratic self-government."[100] Justice Breyer's approach does not undervalue the importance of history, language, tradition, and precedent—these are still considerations of paramount judicial importance. These factors must be considered by "emphasiz[ing] values underlying specific constitutional phrases, see[ing] the Constitution itself as a single document with certain basic related objectives, and assum[ing] that the latter can inform a judge's understanding of the former."[101] In this way, one of the most important values underlying the Constitution—sustaining participatory democratic self-government—is at the forefront of any constitutional inquiry.[102]

The consequential approach contains mechanisms that act as a check on judicial subjectivity. Because the values that are considered when reaching decisions under this model are the very values underlying the Constitution itself, there is a "limit[ation] on interpretive possibilities."[103] Justice Breyer also points to "[a]n individual judge's need for consistency over time," as another constraint on subjectivity.[104] The need for consistency also acts as a mechanism to maintain predictability. While this approach does not completely eliminate the problems of subjectivity or unpredictability, the rules-based approach is unable to eliminate these problems either. Even if the rules-based approach might be somewhat more effective in acting as a judicial constraint, Justice Breyer argues, "the constitutional price is too high."[105]

The compatibility approach to the public forum doctrine mirrors many of the considerations inherent in the consequential paradigm. Because "the First Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,'"[106] the compatibility approach does not dismiss a place as unworthy of full First Amendment protection unless it determines that there is a demonstrable reason to do so. The implicit question asked during the balancing that takes place under the compatibility approach is, "how will this outcome affect participatory democratic self-government?"

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[99] *Id.* at 246-47.

[100] *Id.* at 248.

[101] *Id.* at 269.

[102] *Id.* at 248.

[103] *Id.* at 270.

[104] *Id.*

[105] *Id.* at 249.

[106] Stone, *supra* note 52, at 233 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

In this way, the compatibility approach addresses First Amendment questions from a consequential, value-based perspective. Because judges are constrained by the values underlying the Constitution and by their need to maintain consistency, the compatibility approach does not inevitably foster judicial subjectivism and unpredictability.

As the preceding discussion illustrates, the seeming advantages of the traditional approach (predictability and judicial restraint) are not as promising as they might first appear. First, the traditional approach contains an inherent degree of judicial subjectivity and unpredictability. Second, to the extent that the traditional approach is able to rein in judges, the compatibility approach also contains checks on subjectivity and predictability. If the traditional approach cannot claim a monopoly on predictability and judicial restraint, the question remains: which approach to the public forum doctrine rests on surer constitutional footing?

c. How Do the Two Approaches Measure Up Against the Values Underlying the First Amendment?

The public forum doctrine is not solely concerned with the First Amendment; it examines First Amendment questions as they relate to competing governmental interests. At the same time, the doctrine arose specifically to address First Amendment questions. A judicially created tool designed to analyze First Amendment questions that does not adequately protect the values underlying the First Amendment is unable to serve the function for that which it was intended. It follows then that the utility of the public forum doctrine must, in large part, be judged against how well it protects the values underlying the First Amendment.

There are three generally accepted theories behind the purpose of the First Amendment: (1) unrestrained expression creates an informed citizenry as well as a more accountable and transparent government, and therefore, free expression is indispensable to a healthy *system of democracy*;[107] (2) there is a *marketplace of ideas* and with full access to ideas and information, the citizenry will arrive at some higher truth;[108] and (3) the ultimate goal of democracy is to sustain a system

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[107] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 15-16, 24-27, 39 (1948). "As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged." *Id.* at 25.

[108] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that under the Constitution, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competi-

composed of self-fulfilled individuals, and without freedom of expression, *self-fulfillment*[109] is impossible.[110]

None of these underlying values are supported or taken into consideration under the logic of the traditional public forum model. By way of illustration, consider Chief Justice Rehnquist's analysis in *Lee v. International Society for Krishna Consciousness*, in which the Court determined whether LaGuardia and Kennedy Airports were public or nonpublic fora.[111] Chief Justice Rehnquist found that the government can restrict expression in airports, not because such expression unduly interferes with the primary function of airports, but simply because "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out' of mind been held in the public trust and used for purposes of expressive activity."[112] As Chief Justice Rehnquist's explanation demonstrates, the traditional approach effectively freezes public forum doctrine to the time of the *Hague* dictum.

Because the traditional approach interprets First Amendment questions in a manner that effectively nullifies the prospect of a designated public forum, all government property fits into two dichotomous categories: the classic forum and the nonpublic forum.[113] Since the classic forum is reserved for a narrow category of locations that meet the "time out of mind test," i.e., streets, parks, and sidewalks, all other government property most likely fits into the nonpublic forum, and

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tion of the market"). This philosophy was developed by Justice Holmes, who was inspired by JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

[109] *See* David J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) ("[T]he significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music, intended to communicate in determinate, complex and subtle ways.").

[110] Of course, one may reject the idea that the First Amendment is primarily concerned with any of these theories but, instead, acts as a mere constraint on government actors. Under this framework, it is easier to defend the traditional approach because the framework does not operate under the assumption that more speech is necessarily better. *See* Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79. Under this constraint theory, the goal of the public forum doctrine is not to "provide[] 'enough' opportunities for citizens to speak." *Id.* at 81. Instead, the doctrine encompasses the more modest goal of "reduc[ing] the systemic opportunitites for public forum regulators to abuse their governmental power." *Id.* As a descriptive matter, this Note agrees that the traditional approach is a product of this constraint theory and is, therefore, not concerned with providing more opportunities for speech. Normatively, however, this Note rejects the constraint theory and is premised on the idea that the First Amendment serves its purpose when government acts on an affirmative duty to keep space open for speech purposes.

[111] Lee v. Int'l Soc'y for Krishna Consciousness Inc., 505 U.S. 672 (1992).

[112] *Id.* at 680 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[113] *See supra* notes 66-78 and accompanying text.

gets minimal First Amendment protection.[114] Why should the First Amendment only have force in streets, parks, and sidewalks? As Justice Kennedy succinctly put it, "The right of speech protected by the [public forum] doctrine . . . comes not from a Supreme Court dictum but from the constitutional recognition that the government cannot impose silence on a free people."[115]

When the value of free expression turns on whether it occurs in a location that was used for expression over half a century ago, important messages and ideas are kept from the public discourse. This, in turn, undermines the health of democracy, distorts the marketplace of ideas, and, for those whose voices are silenced, hinders the ability to achieve self-fulfillment. In many communities, streets, parks, and sidewalks have been usurped by other public locations as areas where members of the public congregate.[116] But despite this phenomenon, the traditional approach's strict reliance on the *Hague* dictum is unable to take these changes into account.

The compatibility approach does a far superior job in bringing just resolutions. Simply put, there is no way to uphold the promises of the First Amendment without critically examining and balancing the competing rights at stake in a given case. By restricting speech on government property only when necessary, we ensure a stronger democracy through our ability to obtain information and arrive at truth. In addition, the American value of self-expression is nourished rather than unduly hampered. The compatibility approach reinforces our democratic principles because it restricts speech only when there is a demonstrable justification for the restriction.[117]

Advocates of the traditional approach and the compatibility approach have widely divergent views about what values the public forum doctrine represents and how it is to be applied. But one principle both sides agree on is that no matter what the forum, the state may not restrict speech on the basis of the viewpoint of the speaker. This is what is known as the viewpoint neutrality requirement.

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[114] *See supra* Part II.B.1.

[115] *Lee*, 505 U.S. at 696 (Kennedy, J., concurring).

[116] *See id.* at 697-98 (explaining that in the United States "where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity").

[117] *See* Post, *supra* note 20, at 1765-67 (explaining that the compatibility approach's "logic begins from the constitutionally congenial premise that the state should not suppress speech unless there is a good reason to do so").

C. Public Forum: The Viewpoint Neutrality Requirement

Governmental viewpoint discrimination is indisputably intolerable under the First Amendment. The Court has been clear that viewpoint discrimination is not to be taken lightly. For example, in *Cornelius v. NAACP Legal Defense and Education Fund*,[118] the Court found that a federal charitable giving program was a nonpublic forum, and the restrictions that prevented the petitioner groups from participating were reasonable.[119] Nonetheless, suspicious that the government's restriction could be a cover-up for viewpoint discrimination, the Court remanded the case for further findings on the viewpoint discrimination question.[120] What is viewpoint discrimination and why is it so offensive to the First Amendment?

Essentially, viewpoint discrimination occurs where the government restricts the expression of one point of view on a subject while allowing expression of an alternative point of view. *Texas v. Johnson*[121] provides a classic example of viewpoint discrimination. In *Johnson*, the defendant was charged under a criminal statute outlawing flag burning.[122] The Court held that the statute was inconsistent with the First Amendment, in part, because the state government was promoting "its own view of the flag by prohibiting expressive conduct relating to it."[123] Where the government outlaws an expression opposing patriotism while allowing the flag to be used to promote patriotism, it is engaging in viewpoint discrimination.

The public forum doctrine developed out of the Court's recognition that, in some instances, government could make content-based restrictions.[124] What is the difference between viewpoint-based restrictions on speech (which are never permissible) and content-based restrictions (which, under the public forum doctrine, are permissible under specified conditions)? One interpretation is that content-based restrictions deal with "the government's ability to choose 'the subjects that are appropriate for public discussion,' whereas viewpoint [based restrictions] relate[] to discrimination 'among viewpoints on those subjects.'"[125] Distinguishing content-based restrictions from viewpoint-based restrictions can be

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[118] 473 U.S. 788 (1985).

[119] *Id.* at 813.

[120] *Id.* at 812-13.

[121] 491 U.S. 397 (1989).

[122] *Id.* at 400.

[123] *Id.* at 415.

[124] *See supra* Part II.A.

[125] Post, *supra* note 20, at 1751 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59, 61 (1983) (Brennan, J., dissenting)).

challenging because, while, on the one hand, the concepts are distinct (subject based vs. viewpoint based), viewpoint-based restrictions are also a subset of content-based restrictions. In *Rosenberger v. Rector & Visitors of the University of Virginia*,[126] the Court discussed the difference between content-based and viewpoint-based restrictions in the context of public forum analysis, and why it finds viewpoint-based restrictions more dangerous than content-based restrictions:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *Viewpoint discrimination is thus an egregious form of content discrimination.* The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.
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> . . . Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, *we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that . . .forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.*[127]

Viewpoint-based restrictions are, thus, a more dangerous category of content-based restrictions.

From the marketplace of ideas perspective[128] and the system of democracy perspective[129] it may be difficult to reconcile the distinction between content-based restrictions and viewpoint-based restrictions. Both types of restrictions keep information out of the marketplace of ideas and inhibit the public's ability to express its democratic will. For example, a restriction that forbids discussion about illegal drugs could be defined as content-based as opposed to viewpoint-based in that the entire subject is off limits for discussion.

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[126] 515 U.S. 819 (1995).

[127] *Id.* at 828-30 (emphasis added) (citations omitted).

[128] *See supra* note 108 and accompanying text.

[129] *See supra* note 107 and accompanying text.

But what is the practical result of such a restriction? Because information and ideas are kept out of the marketplace, the public is inhibited from making reasoned choices about what it believes to be the proper course of action with respect to drug policy. If this is a subject which has an effect on what kind of government leadership the public wants to support, but the public is unexposed to different ideas on the subject, then this significantly undermines the public's ability to express its will through its choice of political representation.

On the other hand, viewpoint-based restrictions are arguably more dangerous in that they distort the marketplace by allowing some viewpoints on a given subject while keeping others out. Viewpoint restrictions give the state the power to regulate in its own self-interest by enabling it to excise views inimicable to a position it wishes to promote. In this way, there is more of a concern that when government restricts speech based on viewpoint, a censorial governmental motive may be afoot.[130]

The Court's position appears to be that content-based restrictions do not distort the marketplace of ideas in the same manner as do viewpoint-based restrictions. Because, with content-based restrictions, an entire subject is off-limits for discussion, one viewpoint on the subject is not able to flourish in the absence of others. While there is a strong argument that the practical effects of content-based restrictions are no less dangerous to First Amendment principles than are viewpoint-based restrictions, the Court clearly finds viewpoint-based restrictions more offensive.[131]

Because of the profound effect viewpoint discrimination has on a democratic society, courts must rule close cases on the side of finding a restriction unconstitutional. This remedial approach errs on the side of curbing speech restrictions. Preventing the government from acting as a censor by closing off different viewpoints is at the heart of the First Amendment. On the other hand, what is lost if the courts unduly hamper government from restricting speech on government property? This may mean that government cannot, in some cases, conduct its business as efficiently as it would prefer. But while "[t]he First

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[130] Professor Post points to language in *Cornelius* indicating that the Court's primary concern was that the restriction might have derived from an improper, censorial motive. In *Cornelius*, "the Court speaks of viewpoint discrimination as regulation 'based on the *desire* to suppress a particular point of view,' or as founded on 'a *bias* against the viewpoint advanced by the excluded speakers,' or as 'impermissibly motivated by a *desire to suppress* a particular point of view.'" Post, *supra* note 20, at 1824 (emphasis added) (quoting Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 812-13 (1985)).

[131] *See Rosenberger*, 515 U.S. at 828-30; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.").

Amendment is often inconvenient . . . [i]nconvenience does not absolve the government of its obligation to tolerate speech."[132] To vigilantly ensure that government does not act as a censor, the courts must scrupulously review speech restrictions for viewpoint discrimination, always erring on the side of protecting speech.

III. PUTTING IT ALL TOGETHER: WHERE DID THE SIXTH CIRCUIT GO WRONG?

Part II has argued that the only way the public forum doctrine can serve the values underlying the First Amendment is by taking a compatibilty approach that scrupulously eschews viewpoint discrimination. The *Gateway* case is, unfortunately, a good illustration of what *not* to do with the public forum doctrine. As a result of this decision, an area of land spanning twenty-eight acres of downtown Cleveland that reaches an audience of "tens of thousands . . . on a regular basis,"[133] is unnecessarily cut off as a place to discuss issues that impact the collective identity of a large metropolitan community. Further, this case sets unsettling precedent for others who wish to express messages on public property not falling under the streets/parks/sidewalks paradigm, but property that is, nonetheless, compatible with speech. By relying on the traditional public forum framework, and by erroneously determining that Gateway's speech restrictions were not enforced in a viewpoint discriminatory manner, the Sixth Circuit has taken a step backward in ensuring that the public will have the opportunity to get the information necessary to function as a healthy democracy.

The *Gateway* case involved a separate First Amendment examination of the Gateway sidewalks and the Commons.[134] The court's analysis of the sidewalks is interesting and subject to criticism,[135] but it is the court's terse treatment of the Commons that reveals the more pressing problems inherent in misapplying the public

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[132] Lee v. Int'l Soc'y for Krishna Consciousness Inc., 505 U.S. 672, 701 (1992) (Kennedy, J., concurring).

[133] United Church of Christ v. Gateway Econ. Dev. Corp., 383 F.3d 449, 451 (6th Cir. 2004).

[134] To remind the reader, the Sixth Circuit assumed state action in this case. Although it is not entirely clear whether Gateway is a private actor or a state actor, the court started its analysis under the assumption that Gateway was a state actor. *See supra* note 9 and accompanying text.

[135] The court found that, under the public forum doctrine, the Gateway sidewalks were a classic public forum. Using the public function doctrine, the court found that even if the Gateway sidewalks were privately owned, Gateway was still subject to the strictures of the First Amendment. The court remanded the case to the District Court to determine whether the speech restriction, as it pertained to the Gateway sidewalks, was a reasonable time, place and manner restriction. *Gateway*, 383 F.3d. at 452-55.

forum doctrine. A separate examination of the court's use of the traditional model and its treatment of the viewpoint discrimination question will elucidate the harms caused by the court's approach.

A. Use of the Traditional Model

The Commons area is "an assortment of plazas, grassy areas, and interior streets within the [Gateway] Complex."[136] The protestors argued that the Commons was a designated public forum.[137] Gateway (standing in the government's shoes) countered that the Commons was a nonpublic forum and that the restrictions on protest were in the interest of efficient traffic flow, safety, and crowd control.[138] The Sixth Circuit's explanation as to how it would address the arguments started out with some promising language. The court explained its use of public forum analysis "as a means of determining when the government's interest in limiting the use of its property to its intended purpose *outweighs* the interest of those wishing to use the property for other purposes."[139] This language appears to embrace a compatibility model; that is, the court seemed concerned with balancing the First Amendment right with the purported government interest of traffic flow, safety, and crowd control. But then, in analyzing the question, the court proceeded to apply a traditional, property-based model.

While no one argued that the Commons fit into the classic streets, parks, and sidewalks category set forth in the *Hague* dictum,[140] there was compelling evidence that peaceful protest was compatible with the uses of the Commons. Gateway allowed other signs and banners into the Commons during the same time periods that it refused to allow the anti-Chief Wahoo signs into the Commons.[141] If Gateway allowed people with signs and banners expressing a message supportive of the team, there is no reason similar signs with different messages would interfere with traffic flow and safety, unless the problem was that it might cause people to be upset by the message.

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[136] *Id.* at 453.

[137] *Id.*

[138] Final Brief of Defendant-Appellee Gateway Econ. Dev. Corp. of Greater Cleveland at 42, *Gateway*, 383 F.3d 449 (No. 01-3434).

[139] *Gateway*, 383 F.3d. at 451-52 (emphasis added) (quoting United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738, 746 (6th Cir. 2004)).

[140] This seems as though it could have been a viable argument given the park-like features of the Commons and the fact that it also encompasses streets that are public thoroughfares. Perhaps UCC chose not to argue this position because it was trying to encourage the court to set precedent in the Sixth Circuit favorable to the compatibility approach. Arguing that the Commons fell into the *Hague* dictum would have encouraged the court to speak in terms of tradition rather than compatibility. Unfortunately, the court chose to talk in terms of tradition all the same.

[141] *Gateway*, 383 F.3d at 453.

This, however, would not be a sufficient reason to ban the protestors' message, because government cannot restrict speech on the basis that some people might be disturbed or offended.[142] Given the fact that similar signs with different messages have not interefered with traffic flow and safety, there was no reason why the protestors' signs would be incompatible with the forum.

Not only did the court ignore the plaintiffs' compatibility arguments, it did not even attempt to make an inquiry into the compatibility question. Instead, the court narrowly focused on Gateway's intent in opening up the Commons. The court determined that the Commons was not a designated public forum because "to the extent that Gateway has allowed non-ticket-holders to access the Commons during gametime, it has done so only for those interested in the actual game being played, and has done so for *the specific purpose* of contributing to the gametime ambience."[143] This focus on Gateway's "specific purpose," or subjective intent, creates circular reasoning that negates the prospects for finding a designated public forum under the traditional model.[144] The Commons, therefore, is a nonpublic forum and is subject to only the most meager of First Amendment protection. Under this approach, once the government has turned away a speaker, it has indicated its intent, and because its intent controls, the First Amendment challenge is doomed to failure.

The use of the traditional approach in this case underscores the approach's inherent deficiency—it does not give a court the ability to take the values underlying the First Amendment into account when analyzing a First Amendment issue. To the extent that the approach can be defended on its ability to rein in judicial subjectivity and unpredictable outcomes,[145] the consitutional price is simply too high.

Had the court applied the compatibility approach, there would have been a serious question as to whether the protestors' message was being unduly restricted from the Commons. Even if it had turned out that the speech was incompatible with the forum and that the restriction on speech was justified, we would at least know that expression was being hampered only because the court believed there was a legitimate reason to do so. With the court's reasoning, all we know is that Gateway does not *intend* to have this expression take

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[142] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[143] *Gateway*, 383 F.3d at 453 (emphasis added).

[144] *See supra* notes 66-78 and accompanying text.

[145] This is a dubious contention. *See supra* Part II.B.3.a-b.

place in the Commons. This tells us nothing about whether it *should be allowed* to restrict this expression in the Commons.

B. Viewpoint Discrimination

The Sixth Circuit's analysis of the viewpoint discrimination question is the most troubling part of the opinion. The protestors argued that Gateway's practice of allowing people with signs supportive of professional sports into the Commons, while at the same time blocking those with signs that were critical of racial caricatures in professional sports was unconstitutional viewpoint discrimination.[146] This seems like a tenable position: one view (supporting the status quo in professional sports) is allowed in, while an opposing view (rallying against the status quo) is kept out.

However, by framing the issue more narrowly, the Sixth Circuit concluded that Gateway was not engaging in viewpoint discrimination. The court reasoned that the threshold requirement for being allowed access to the Commons was to "have an interest in the Indians' performance on the field."[147] The court distinguished the protestors' message by arguing that "in marked contrast, [the protesters] do[] not seek access to the Commons for purpose of fan enjoyment. Rather, [they] wish[] to make a political statement that is merely incidental to the game itself."[148] The court's reasoning continues, "[t]hat Gateway has allowed baseball fans access to the Commons falls far short of suggesting that it has allowed everyone access to the Commons."[149] In other words, according to the court, Gateway has only opened up the forum to talk about the enjoyment of sports. It is permissible to express a message in support of the Indians' opponents (like the New York Yankees), so there is no viewpoint discrimination.

Simply put, this rationale is hard to swallow. Gateway is preventing those who want to make a "political statement" from entering the Commons because they have a view about professional sports that is different from those who support the endeavor. Signs bearing the inscription "Go Tribe"[150] that display depictions of Chief Wahoo are not only endorsements of the team but are, in effect, endorsements of the use of the team name and symbol. Futhermore, it takes a real stretch of the imagination to believe that the name and

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[146] *See* Proof Brief of Plaintiffs-Appellants the United Church of Christ, Reverend Ronald Fujuyoshi, Gary Quarles & Juan Reyna at 35-36, *Gateway*, 383 F.3d 449 (No. 01-3434).

[147] *Gateway*, 383 F.3d at 453.

[148] *Id.*

[149] *Id.*

[150] "Go Tribe" is a familiar slogan used in Cleveland to express support for the Indians.

mascot of the team are "merely incidental to the game itself."[151] The discussion about the name and symbol of the city's team are easily part of the broader discussion about professional sports, which has been allowed into the forum. People who bring Chief Wahoo signs into the Commons are instantiating an endorsement of the mascot as well as the team it represents; the protestors are trying to express the view that they are against the ideology this mascot represents. The fact that Gateway allows viewpoints in support of the team and its mascot while barring critical viewpoints on the same subject is classic viewpoint discrimination.

To the extent that the Sixth Circuit's framing of the viewpoint discrimination issue is tenable, close calls should be decided on the side of the First Amendment. The court's narrow characterization of the relevant topics available for discussion in the Commons has a far different impact than would the remedial approach advocated in this Note. The court's view essentially gives Gateway the ability to engage in censorship on, what the court conceded to be, public property. As a result of this decision, core political speech is kept out of the marketplace of ideas.

CONCLUSION

Public forum analysis allows the courts to deal with a complex issue in a manageable fashion. However, if the courts misapply the doctrine, serious damage can be done to the interests and values protected by the First Amendment. If content-based restrictions are to be tolerated in some circumstances (which is essentially what the public forum doctrine concedes), then the court must not allow speech restrictions on government property unless two conditions are met. First, the court must be able to fully explicate why, after balancing the competing interests, there is a strong and sensible reason to restrict the speech in light of the purported government interest. Second, there must be no question that the government is not favoring one viewpoint over another and engaging in censorship of controversial, political messages.

This Note has argued for a compatibility approach that examines questions of viewpoint discrimination with a fine tooth comb. Unfortunately, with this decision, the Sixth Circuit has steered a course away from protecting the values underlying the First Amendment. The fact that Gateway has allowed signs into the Commons which endorse Chief Wahoo and the name the Indians,

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[151] *Gateway*, 383 F.3d at 453.

while at the same time, turning away those signs taking a different position, demonstrates two critical points. First, carrying signs is compatible with the forum because signs generally do not interefere with traffic flow and safety. Second, the restriction was enforced in a viewpoint discriminatory manner. Even if, applying the compatibility approach, the Sixth Circuit had been able to justify a position that the Commons was a nonpublic forum, the court still should have found that Gateway's practice of excluding the speakers was viewpoint discrimination. Therefore, the court should have found that the restriction was an unconstitutional abridgement of free speech. If the courts are to continue to talk about the First Amendment in terms of public forum, they should support a model that truly protects the values underlying freedom of speech.

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