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## **DEFINING THE RELEVANT FORUM: THE UNITED STATES POSTAL SERVICE CONSTITUTES A SINGLE FORUM FOR COMMUNICATION**

Melissa C. Manke

*Abstract:* The United States Postal Service fulfills a vital public function by enabling people to communicate in an effective and efficient way. The United States Supreme Court has firmly established the use of the mails as a free speech right guaranteed by the First Amendment. Courts apply a three-part forum analysis when analyzing First Amendment challenges to restrictions on the use of the mail system. This analysis requires courts to define the forum to which the plaintiff seeks access, to determine if that forum is public or nonpublic, and to apply the level of scrutiny proper to the type of forum at issue. Courts have thoroughly analyzed the scope of the relevant forum in various situations where plaintiffs have sought access to government-run fora. However, the U.S. Supreme Court has not yet defined the scope of the forum when the use of the mail system is at issue, and lower courts do not agree on the proper application of the first step of forum analysis. This Comment argues that when a plaintiff seeks greater access to the mail system, courts should analogize to other situations to hold that the relevant forum is the mail system as a whole.

During the summer of 2000, Stuart Williams, a homeless resident of Seattle, tried to obtain reliable delivery of his mail from the United States Postal Service (the Postal Service).<sup>1</sup> Just a few weeks earlier, Williams had nearly lost his public assistance benefits when notice of a renewal appointment was sent to the wrong shelter. Most local shelters do not provide mail service for their clients, and the few that do hold only first-class mail for a limited time.<sup>2</sup> Williams asked postal clerks at several Seattle post office branches about his ability to access two postal services: no-fee post office box rental and general delivery service. The postal clerks told him that he was ineligible for a no-fee post office box and that he could receive general delivery mail only at the main post office located in downtown Seattle. This post office is nine miles from the shelter where Williams usually stays, and his arthritis makes it difficult for him to travel long distances. For Williams, the only reliable way he can receive his mail is through delivery to his neighborhood post office branch. Aided by a homeless advocacy group, Williams filed a lawsuit against the U.S. Postal Service in federal district court, challenging the Postal Service's denial of a no-fee post office box and

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1. Hypothetical based on *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004).

2. Opening Brief of Plaintiffs/Appellants at 6, *Currier* (No. 02-35232).

local general delivery service to him.

The U.S. Postal Service provides all Americans with one of the most important means of sending and receiving information,<sup>3</sup> and it therefore holds an important place in the rights protected by the First Amendment.<sup>4</sup> For some Americans, especially the homeless,<sup>5</sup> the mail system is essentially the only reliable way to receive information. Although some postal regulations increase access to the postal system,<sup>6</sup> others have the effect of limiting access.<sup>7</sup> Because use of the Postal Service implicates free speech rights, plaintiffs often raise First Amendment claims when challenging postal regulations that limit access to the mail system.<sup>8</sup>

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3. In 2003, 202.2 billion pieces of mail were sent through the Postal Service. U.S. POSTAL SERV., 2003 COMPREHENSIVE STATEMENT ON POSTAL OPERATIONS 58 (2003).

4. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 126–27 (1981).

5. An accurate count of the homeless population is difficult to obtain. *See* MARTHA R. BURT ET AL., URBAN INSTITUTE, HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE 9 (1999), available at <http://www.hud.gov/offices/cpd/homeless/library/homelessness.pdf>. Analyses of the 1996 National Survey of Homeless Assistance Providers estimate that, on any given day, at least 800,000 people in the United States are homeless, and between 2.3 and 3.5 million are likely to be homeless in a given year. MARTHA A. BURT, WHAT WILL IT TAKE TO END HOMELESSNESS? 1 (2001), available at [http://www.urban.org/UploadedPDF/end\\_homelessness.pdf](http://www.urban.org/UploadedPDF/end_homelessness.pdf).

6. In April 1998, upon finding that “[a]ll Americans are entitled to a free form of mail service,” the Postal Service extended its provision of no-fee post office boxes to customers who live within a quarter-mile of a rural post office but are ineligible for any form of carrier delivery service. Press Release, PR Newswire, *Postmaster General Provides No-Fee Postal Box Service to Some Rural Customers*, Apr. 9, 1998. This expansion, designed to “update postal regulations to become more in line with today’s customer needs,” allowed several hundred thousand additional customers to receive no-fee post office boxes. *Id.*; *see also* U.S. POSTAL SERVICE, ISSUE NO. 54, DOMESTIC MAIL MANUAL D910.5.1(a) (Nov. 4, 1999) (providing for no-fee post office boxes for customers whose physical residences are within delivery boundaries of a post office but who are ineligible for carrier delivery). For the current version of this regulation, *see* U.S. POSTAL SERVICE, MAILING STANDARDS OF THE UNITED STATES POSTAL SERVICE, DOMESTIC MAIL MANUAL 508.4.6.2 (April 14, 2005) [hereinafter DMM]. The Postal Service’s governing regulations are set forth in the Domestic Mail Manual, which was incorporated by reference into the Code of Federal Regulations. 39 C.F.R. § 111.1 (2004). In March 2005, the Domestic Mail Manual was redesigned, and its title was changed to “Mailing Standards of the United States Postal Service, Domestic Mail Manual.” 70 Fed. Reg. 14,534–35 (Mar. 23, 2005). This Comment refers to the document as the “Domestic Mail Manual.”

7. In 2001, the Postal Service changed post office box regulations to require an applicant to provide proof of a permanent, physical address in order to rent a post office box. *See* DMM, *supra* note 6, at 508.4.3.2; *see also* *Currier v. Potter*, 379 F.3d 716, 722 n.1 (9th Cir. 2004) (noting this change). This regulation makes it impossible for the homeless to rent post office boxes, even assuming they can afford the fees.

8. *See, e.g., Currier*, 379 F.3d at 722–23 (challenging Postal Service restrictions on general delivery service and no-fee post office boxes).

When analyzing challenges to a postal regulation on free speech grounds, the United States Supreme Court has applied a three-part forum analysis<sup>9</sup> to assess the regulation's burden on speech.<sup>10</sup> Under this analysis, a court must first define the forum to which the speaker seeks access, then determine the nature of that forum, and finally apply the proper level of scrutiny for that type of forum.<sup>11</sup> However, it is unclear how courts should apply the first step of forum analysis when the challenger seeks greater access to the mail system, rather than physical access to a specific postal facility.<sup>12</sup> When addressing this issue early in the formation of the public forum doctrine,<sup>13</sup> two district courts determined that the proper forum in a Postal Service case is the postal system itself.<sup>14</sup> Another district court did not specify the forum it was analyzing, but stated that the forum was either the postal system or the challenged postal rate.<sup>15</sup> None of these courts affirmatively determined the proper scope of the forum to be analyzed.<sup>16</sup>

This problem was highlighted recently when Carl A. Currier and several other homeless persons in Seattle, aided by the homeless advocacy group Seattle Housing and Resource Effort (SHARE), challenged two postal regulations on First Amendment grounds.<sup>17</sup> In *Currier v. Potter*,<sup>18</sup> the United States Court of Appeals for the Ninth Circuit held that limiting the provision of general delivery to the main post office branch in Seattle and denying homeless clients no-fee post

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9. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–06 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

10. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990) (plurality opinion) (applying three-part forum analysis to postal regulation governing use of postal sidewalk).

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

12. Compare *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985) (defining forum as mail system), with *Currier*, 379 F.3d at 727–28, 731 (defining forum as general delivery service and no-fee post office boxes), and *Greenberg v. Bolger*, 497 F. Supp. 756, 776 (E.D.N.Y. 1980) (defining forum as either mail system or challenged postal rate).

13. The term “public forum” first appeared as a term of art in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 99 (1972). Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1724 & n.41 (1987). The concept rapidly developed into a fundamental principle of First Amendment jurisprudence. *Id.* at 1714.

14. See *Shane*, 658 F. Supp. at 916; *Spencer v. Herdesty*, 571 F. Supp. 444, 453 (S.D. Ohio 1983).

15. See *Bolger*, 497 F. Supp. at 776.

16. See *Shane*, 658 F. Supp. at 916; *Spencer*, 571 F. Supp. at 453; *Bolger*, 497 F. Supp. at 776.

17. See *Currier*, 379 F.3d at 722–23.

18. 379 F.3d 716 (9th Cir. 2004).

office boxes does not violate the First Amendment.<sup>19</sup> The court held that the plaintiffs sought access to two separate fora—the general delivery system and the no-fee post office boxes—and that it must analyze these fora individually.<sup>20</sup> Judge Ronald M. Gould, however, dissented from the majority's application of the first step of forum analysis and argued that the relevant forum was the mail system as a whole.<sup>21</sup>

This Comment argues that when a plaintiff seeks greater access to the mails, or when a postal regulation might deny the plaintiff the right to use the mail system, courts should analogize to other, similar situations to define the relevant forum as the mail system as a whole. Part I of this Comment outlines the history of the Postal Service, from the colonial era through today, and examines its place in the rights guaranteed by the First Amendment. Part II reviews the purposes of First Amendment forum analysis, examines the three-part analysis used to determine whether regulations of speech on government property violate the First Amendment, and highlights the importance of defining the relevant forum. Part III describes the detailed and considered analysis courts have used to define the relevant forum in various situations outside the Postal Service context. Part IV outlines the ways in which courts have defined the relevant forum in First Amendment challenges to postal regulations. Part V argues that, to determine the proper forum in a First Amendment challenge to a postal regulation governing the use of the mails, a court should apply the considered analysis used by courts in other situations and conclude that the proper forum is the postal system itself, rather than any of its components.

## I. THE POSTAL SERVICE PROVIDES A VITAL MEANS OF COMMUNICATION FOR ALL AMERICANS

The mail system has long served as an important means of expression.<sup>22</sup> The postal system helped shape the development of the United States.<sup>23</sup> As the Post Office Department grew, Congress replaced

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19. *Id.* at 730–32.

20. *See id.* at 727–28, 731. The court then held that the fora were nonpublic and that the regulations withstood a reasonableness analysis. *Id.* at 729–31.

21. *Id.* at 735 (Gould, J., concurring in part and dissenting in part). However, Judge Gould concurred in the judgment because he felt the plaintiffs' facial challenge failed. *Id.* at 737–38 (Gould, J., concurring in part and dissenting in part).

22. *See* CARL H. SCHEELE, A SHORT HISTORY OF THE MAIL SERVICE 45–66 (1970) (describing development of United States mail system during colonial and revolutionary periods).

23. *See* *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121–22

it with the U.S. Postal Service and implemented a reorganization that changed the way the system operates, but maintained its public function.<sup>24</sup> The U.S. Supreme Court has recognized the ability to send and receive mail as a right guaranteed by the First Amendment.<sup>25</sup>

A. *The Mail System Has Functioned as an Important Means of Communication Since the Founding of the United States*

The postal system has played a major role in the development of the United States.<sup>26</sup> The Framers of the Constitution expressly provided for the exercise of the postal power by giving Congress the power “[t]o establish Post Offices and post Roads,”<sup>27</sup> and “[t]o make all Laws which shall be necessary and proper”<sup>28</sup> to do so. Congress created the Post Office Department in 1792.<sup>29</sup> As the mail system grew, it not only increased the efficiency of communication throughout the nation, but also led to the development of a transportation system that helped the nation to expand.<sup>30</sup> Throughout the development of the United States, the Post Office was often the most visible symbol of national unity to citizens spread across the country.<sup>31</sup>

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(1981).

24. See *id.* at 122–23.

25. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156–58 (1946).

26. See WAYNE E. FULLER, *THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE* 84 (Daniel J. Boorstin ed., 1972) (“[N]o branch of the national government touched the lives of so many Americans so often, so intimately, and so favorably as the Post Office.”).

27. U.S. CONST. art. I, § 8.

28. *Id.*

29. See FULLER, *supra* note 26, at 42–43. Congress enacted the Postal Reorganization Act, which replaced the Post Office Department with the U.S. Postal Service, in 1970. See JOHN T. TIERNEY, *POSTAL REORGANIZATION: MANAGING THE PUBLIC’S BUSINESS* 22 (1981).

30. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 121–22 (1981) (describing history of postal system and its role in developing United States society); U.S. POSTAL SERVICE, *HISTORY OF THE U.S. POSTAL SERVICE: 1775–1982*, at 2–7 (1983) (describing role of various postal innovations, including railway delivery, free rural delivery, and airmail, in social and economic development of United States).

31. See *Greenburgh*, 453 U.S. at 121–22; FULLER, *supra* note 26, at 81–86 (describing unifying force of Post Office in early nineteenth century); *id.* at 101–08 (describing importance of Post Office in reuniting nation after Civil War).

*B. The Postal Reorganization Act Maintained the Public Nature of the Mail System in the United States Postal Service*

The rapid expansion of the Post Office throughout the nineteenth and twentieth centuries increased its inefficiencies.<sup>32</sup> A reorganization effort culminated in the Postal Reorganization Act of 1970 (PRA),<sup>33</sup> by which Congress intended to remedy these inefficiencies.<sup>34</sup> The PRA replaced the Post Office Department with the U.S. Postal Service, a quasi-independent government-owned corporation.<sup>35</sup> The Postal Service's governing statutes and regulations are set forth in the *Mailing Standards of the United States Postal Service, Domestic Mail Manual*, which has been incorporated by reference into the Code of Federal Regulations.<sup>36</sup>

Despite granting quasi-independent status to the Postal Service, Congress explicitly maintained the public nature of the mail system.<sup>37</sup> The Postal Service must be "operated as a basic and fundamental service provided to the people by the Government of the United States."<sup>38</sup> As such, its basic function is to provide mail services to bind residents of the nation together in personal, educational, and business matters.<sup>39</sup> The Postal Service has a statutory mandate to serve, as nearly as possible, the entire population of the United States.<sup>40</sup>

*C. The First Amendment Guarantees the Ability to Send and Receive Mail Through the Postal Service*

In the mid-twentieth century, the U.S. Supreme Court recognized that use of the mail system is an inextricable part of the freedom of speech guaranteed by the Constitution.<sup>41</sup> In *Hannegan v. Esquire, Inc.*,<sup>42</sup> the

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32. See FULLER, *supra* note 26, at 332–35.

33. Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719.

34. See *id.*; see also TIERNEY, *supra* note 29, at 10–14 (describing initial impetus for postal reorganization); *id.* at 22–23 (describing passage and major provisions of PRA).

35. See 39 U.S.C. § 201 (2000) (establishing Postal Service as "an independent establishment of the executive branch of the Government of the United States"); 39 C.F.R. § 1.1 (2004) (describing establishment and general organization of Postal Service).

36. 39 C.F.R. § 111.1.

37. See H.R. REP. NO. 91-1104, at 9 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3657.

38. 39 U.S.C. § 101(a).

39. *Id.*

40. *Id.* § 403(a) ("The Postal Service shall serve as nearly as practicable the entire population of the United States.").

41. See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946). During the nineteenth and early part of the twentieth centuries, the Supreme Court allowed the Post Office great latitude in determining

Court first recognized that a challenge to the use of the mails implicates “grave constitutional questions,”<sup>43</sup> and then held that Congress cannot extend or withhold the privilege of sending mail arbitrarily.<sup>44</sup> The Court also recognized the protected nature of the ability to send mail in *United States Postal Service v. Council of Greenburgh Civic Ass’ns*.<sup>45</sup> There, the Court recognized that, while the postal power may be broad, Congress cannot use this power to abridge rights guaranteed by the First Amendment.<sup>46</sup>

The right to receive mail is specifically protected by First Amendment right to receive information.<sup>47</sup> In *Lamont v. Postmaster General*,<sup>48</sup> the Supreme Court explicitly recognized the First Amendment right to receive mail.<sup>49</sup> This was the first case in which an intended recipient of speech, rather than a speaker, sought to invalidate a law for violating the recipient’s First Amendment rights.<sup>50</sup> The plaintiff in *Lamont* challenged a statute requiring the addressee of mail designated as “communist

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access to the mail system. *See, e.g., United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 407, 412–13 (1921) (upholding Post Office’s withdrawal of second-class postage classification from publication that printed anti-war articles). However, Justice Holmes argued, even then, that the “United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.” *Id.* at 437 (Holmes, J., dissenting). The Supreme Court has often quoted this statement. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.18 (1983); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965).

42. 327 U.S. 146 (1946).

43. *Id.* at 156.

44. *See id.* at 157–58.

45. 453 U.S. 114 (1981). In *Greenburgh*, the plaintiffs challenged a statute criminalizing the placement of mailable matter in letterboxes without payment of postage. *Id.* at 116–17. Although the Court noted the importance of the mail system to the rights guaranteed by the First Amendment, *id.* at 126, the Court held that the letterboxes themselves were nonpublic fora. *Id.* at 128–29. Therefore, the statute needed to be only content-neutral, which it was. *See id.* at 133–34.

46. *Id.* at 126 (“However broad the postal power conferred by Art. I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech . . . protected by the First Amendment to the Constitution.”).

47. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 306–07 (1965). For a discussion of the evolution of the right to receive information, see Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 176–81 (2003).

48. 381 U.S. 301 (1965).

49. *Id.* at 307.

50. Mart, *supra* note 47, at 177. A decade later, the Court used the First Amendment rights of consumers to receive accurate information as a basis for extending First Amendment protections to commercial speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 763–64 (1976).



political propaganda” to request its delivery in writing.<sup>51</sup> The Court held that requiring an affirmative action to obtain delivery of mail unconstitutionally abridged the addressee’s First Amendment right to receive mail.<sup>52</sup>

In sum, the mail system’s rapid development and influence on modern American society indicate its importance as a means of expression. Although the PRA established the Postal Service as a quasi-independent government operation, Congress explicitly maintained the public nature of the Postal Service and its duty to serve the American public. Moreover, the U.S. Supreme Court has firmly established the ability to send and receive mail as part of free speech rights.

## II. FORUM ANALYSIS DETERMINES IF FIRST AMENDMENT RIGHTS HAVE BEEN VIOLATED

A claim of infringement of First Amendment rights on government-owned property implicates the three-part test of the Supreme Court’s forum analysis doctrine.<sup>53</sup> This analysis recognizes the interest of the government as an owner of property, but balances this interest against the rights granted by the First Amendment.<sup>54</sup> When performing forum analysis, courts must first define the forum to which the speaker seeks access, then determine if that forum is public or nonpublic, and finally apply the level of scrutiny appropriate to the type of forum at issue.<sup>55</sup> Because of the varying levels of deference in the standards of review applicable to the different fora, the definition of the forum can be crucial to the outcome of the analysis.<sup>56</sup>

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51. *Lamont*, 381 U.S. at 302–04.

52. *Id.* at 305, 307. The Court reiterated Justice Holmes’s statement that the United States “may give up the Post Office when it sees fit.” *Id.* at 305 (citing *United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burselson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)). The Court also noted:

Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of the government the promotion of the general welfare.

*Id.* at 305 n.3 (quoting *Pike v. Walker*, 121 F.2d 37, 39 (D.C. App. 1956)).

53. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985).

54. See *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1371 (3d Cir. 1990).

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

56. See *infra* Part II.C.

A. *Courts Use Forum Analysis to Balance the Interests of the Government and the Speaker*

Forum analysis seeks to balance the rights of the government as owner of property with the obligations of the government as protector of civil liberties.<sup>57</sup> The Supreme Court first articulated the three-part test of forum analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n*<sup>58</sup> and *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,<sup>59</sup> although the approach had been developing for some time.<sup>60</sup> Forum analysis accounts for government ownership of many kinds of property, from streets and parks<sup>61</sup> to prisons and military bases.<sup>62</sup> Some expressive activities on some types of government property are incompatible with or disruptive of the governmental activities that occur on that property.<sup>63</sup> Forum analysis addresses this problem by allowing courts to place government property into the proper category and apply the appropriate level of scrutiny to governmental speech restrictions.<sup>64</sup>

B. *First Amendment Forum Analysis Consists of a Three-Part Test*

Courts use a three-part forum analysis to evaluate the constitutionality of speech restrictions on government-owned property.<sup>65</sup> A court first

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57. See *Gregoire*, 907 F.2d at 1371; Edward J. Neveril, Comment, "Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery, 90 NW. U. L. REV. 1185, 1186–87 (1996).

58. 460 U.S. 37 (1983).

59. 473 U.S. 788 (1985).

60. For a thorough description of the development of the public forum doctrine, see Post, *supra* note 13, at 1724–64.

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

62. See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134 (1977) (prisons); *Greer v. Spock*, 424 U.S. 828, 830 (1976) (military bases).

63. See *Cornelius*, 473 U.S. at 799–800.

64. See Neveril, *supra* note 57, at 1189–91. Numerous commentators have criticized the categorical approach of public forum analysis. See, e.g., Post, *supra* note 13, at 1715–16 (describing public forum doctrine as "a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property" and listing critiques of other commentators). But cf. Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 121 (arguing that categorical approach conserves judicial resources by allowing courts to focus on "circumstances in which the risks of abuse and distortion are high and there are thus likely to be important systemic gains from judicial intervention").

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

defines the forum to which the speaker seeks access.<sup>66</sup> Next, the court determines if the forum is a traditional public forum, a limited public forum, or a nonpublic forum.<sup>67</sup> Finally, if the forum is public, the court applies either strict or intermediate scrutiny to the restrictions on speech; if the forum is nonpublic, the court assesses the reasonableness of the speech regulations.<sup>68</sup>

### 1. *First, Courts Determine the Relevant Forum*

A court must first define the forum in which a plaintiff seeks to exercise First Amendment rights.<sup>69</sup> For example, when a protester wishes to display a sign on the sidewalk in front of the Supreme Court, the sidewalk is the relevant forum.<sup>70</sup> However, a forum for expressive activity need not be a physical space.<sup>71</sup> The Supreme Court has applied forum analysis to an internal school mail system and analyzed the mail system itself as the relevant forum, rather than the individual mailboxes or the school buildings.<sup>72</sup> The Court later defined a university's reimbursement program for student publications as a forum, stating that the forum at issue "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."<sup>73</sup> Courts must consider "the access sought by the speaker" and the "particular means of communication" sought, rather than merely the physical space of the forum, when determining the forum to which the plaintiff seeks access.<sup>74</sup>

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66. *Id.* at 800.

67. *Id.* at 802.

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

69. *Cornelius*, 473 U.S. at 800; see also *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 625 (4th Cir. 2002) ("This inquiry is distinct from the question of which type of forum exists.").

70. See *United States v. Grace*, 461 U.S. 171, 179–80 (1983).

71. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

72. *Perry*, 460 U.S. at 46. Although the Court decided *Perry* before it articulated the three-part test of forum analysis in *Cornelius*, 473 U.S. at 800–06, the Court recognized that it was "[t]he school mail facilities at issue here." *Perry*, 460 U.S. at 46.

73. *Rosenberger*, 515 U.S. at 830.

74. *Cornelius*, 473 U.S. at 801. Because the plaintiffs in *Cornelius* sought access only to the particular means of communication provided by the Combined Federal Campaign, a charity drive for federal employees, the relevant forum was the fund itself, rather than the physical federal workplace. *Id.*

## 2. *Second, Courts Determine the Nature of the Forum*

Next, a court must determine whether the forum is public or nonpublic.<sup>75</sup> The Supreme Court has defined three categories of government-owned property: traditional public fora, limited or designated public fora, and nonpublic fora.<sup>76</sup> Traditional public fora are places “which ‘have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”<sup>77</sup> Traditional public fora include streets and parks.<sup>78</sup> The Supreme Court has been reluctant to expand the concept of the traditional public forum beyond these areas.<sup>79</sup> The Court has concluded that if a forum lacks the history of use for expressive purposes found in streets and parks, then that forum is not a traditional public forum.<sup>80</sup>

The second category is limited, or designated, public fora.<sup>81</sup> The government creates this type of forum by opening government property to the public as a place for expressive activity by a certain category of speaker<sup>82</sup> or for discussion of certain subjects.<sup>83</sup> Limited public fora include school board meetings<sup>84</sup> and university meeting facilities.<sup>85</sup> The

75. *Id.* at 802.

76. *Id.* The Court originally included voluntarily opened public fora as the second category, *Perry*, 460 U.S. at 45–46, and only briefly referenced limited public fora. *Id.* at 46 n.7. Later cases distinguished the designated public forum, see *Cornelius*, 473 U.S. at 800, 802, and courts consistently use these terms. See *infra* note 81 and accompanying text.

77. *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

78. *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45; *Hague*, 307 U.S. at 515.

79. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

80. See, e.g., *United States v. Am. Library Ass’n*, 539 U.S. 194, 205–06 (2003) (plurality opinion) (concluding that Internet access in public libraries, as recent technological development, is not traditional public forum); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (concluding that relatively recent appearance of airport terminals precluded them from being categorized as traditional public fora).

81. See *Cornelius*, 473 U.S. at 802. The terms can be used interchangeably. See, e.g., *Am. Library Ass’n*, 539 U.S. at 206 (using both terms in the same paragraph); *Currier v. Potter*, 379 F.3d 716, 728 n.8 (9th Cir. 2004) (noting that the terms can be used interchangeably).

82. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (discussing university facilities opened for use by student groups).

83. See, e.g., *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 175–76, 175 n.8 (1976) (discussing school board meetings opened for discussion of school board business).

84. *Id.*

85. *Widmar*, 454 U.S. at 267; see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 n.7 (1983) (citing *Widmar*, 454 U.S. at 267, and *Madison Joint Sch. Dist.*, 429 U.S. at

government must affirmatively create a limited public forum,<sup>86</sup> once it is created, the government need not indefinitely maintain the open nature of a limited public forum.<sup>87</sup>

All other fora are nonpublic.<sup>88</sup> This category includes government property where “the nature of the property is inconsistent with expressive activity.”<sup>89</sup> Examples of nonpublic fora include prisons and military bases.<sup>90</sup> This category recognizes that, with respect to certain types of property it owns, the government has the right enjoyed by any property owner to reserve the use of the property for its intended purposes.<sup>91</sup>

### 3. *Third, Courts Apply the Level of Scrutiny Proper for the Type of Forum at Issue*

Finally, a court must apply the proper level of scrutiny to the challenged provisions.<sup>92</sup> Regulations of expression in both traditional and limited public fora receive the same levels of scrutiny.<sup>93</sup> Courts apply a standard of strict scrutiny to content-based regulations of expression in public fora.<sup>94</sup> To survive strict scrutiny, such a regulation must be narrowly tailored to serve a compelling governmental interest.<sup>95</sup> Additionally, the government may impose content-neutral time, place, and manner regulations that must withstand an intermediate level of

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175–76, as examples of limited public fora).

86. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

87. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (quoting *Perry*, 460 U.S. at 46).

88. See *Perry*, 460 U.S. at 46. The Court created a residuary category for any public property that is “not by tradition or designation a forum for public communication.” *Id.* The Court later referred to this type of property as a “nonpublic forum.” *Id.* at 49.

89. *Cornelius*, 473 U.S. at 803.

90. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977) (prisons); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (military bases).

91. See *Perry*, 460 U.S. at 46.

92. See *Cornelius*, 473 U.S. at 806 (applying reasonableness analysis to restriction on speech in nonpublic forum).

93. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). However, because the government may, by definition, restrict the use of a limited public forum to the discussion of certain topics, content-based discrimination may be permissible if a speaker wishes to discuss a topic not encompassed by the limited forum. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

94. See *Perry*, 460 U.S. at 45–46.

95. See *id.*

scrutiny.<sup>96</sup> These regulations must be narrowly tailored to serve a significant governmental interest and must leave open ample alternative channels for communication.<sup>97</sup> Regulations of expression in a nonpublic forum, on the other hand, need only be reasonable in light of the purpose that the forum is intended to serve.<sup>98</sup>

### C. *The Definition of the Forum Can Impact the Ultimate Outcome of Forum Analysis*

Determining the type of forum is a contentious part of forum analysis.<sup>99</sup> Because the type of forum at issue controls the level of scrutiny a regulation must withstand, a court's determination of the type of forum can amount to a decision on the constitutionality of the regulation.<sup>100</sup> However, the definition of the relevant forum itself can impact the determination of whether a forum is public or nonpublic.<sup>101</sup> The definition of the forum provides the frame of reference for a court's analysis of the type of forum at issue,<sup>102</sup> and thus influences the court's determination of the type of forum.<sup>103</sup>

In sum, courts use a three-part forum analysis to balance the interests of the government and those who wish to speak on government-owned property. To apply forum analysis, a court must first define the forum to

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

97. *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

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

99. In many forum analysis cases, the parties agree on the definition of the relevant forum, but vociferously disagree on the designation of the forum. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001) ("There is no real dispute in this case that the forum in question is *The Thorobred* [a university yearbook] itself. The parties dispute strenuously, however, the appropriate characterization of *The Thorobred* under forum analysis.").

100. See *Neveril*, *supra* note 57, at 1190–91.

101. See, e.g., *Currier v. Potter*, 379 F.3d 716, 727–29 (9th Cir. 2004) (holding that narrowly defined forum is nonpublic); *id.* at 735 (Gould, J., concurring in part and dissenting in part) (arguing that same forum is public when more broadly defined).

102. Cf. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 625 (4th Cir. 2002) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830–31 (1995)) ("[D]efinition of the forum's scope provides a backdrop for analysis of the 'viewpoint or content' question.").

103. Cf. *United States v. Grace*, 461 U.S. 171, 178–79 (1983). In *Grace*, the Court held that the sidewalks surrounding the Supreme Court grounds constitute a public forum, *id.* at 180, and then struck down a regulation prohibiting certain expressive activity as applied to the sidewalks because it failed strict scrutiny. *Id.* at 183–84. The Court, however, indicated that the entire Supreme Court building and grounds likely constituted a nonpublic forum, and the regulation as applied to the entire grounds would only need to be reasonable and content-neutral. *Id.* at 178.

which the speaker seeks access. Next, the court must determine if the forum is a traditional public forum, a limited public forum, or a nonpublic forum. Finally, the court must apply either strict scrutiny or intermediate scrutiny to regulations of speech in public fora, or a reasonableness analysis to regulations in nonpublic fora. Because the definition of the relevant forum can affect the court's determination of the type of forum at issue, it thus has an impact on the level of judicial scrutiny applied to a regulation of speech.

### III. OUTSIDE THE POSTAL CONTEXT, COURTS HAVE THOROUGHLY ANALYZED THE DEFINITION OF THE RELEVANT FORUM

Courts applying First Amendment forum analysis in various contexts have thoroughly analyzed the first step of the three-part test.<sup>104</sup> When considering First Amendment challenges to government-run programs that allow citizens to communicate a message, courts have defined the relevant forum as the program itself.<sup>105</sup> These courts have done so by keeping the means of communication analytically separate from the forum of communication.<sup>106</sup> Courts also recognize that when a plaintiff challenges restrictions on speech in one component of a government-run program, the restrictions on other components of that program provide the necessary context for an analysis of the challenged restriction.<sup>107</sup> When the components of a forum are substantially similar and serve the same communicative purpose, courts define the forum as the entire communicative area available, rather than the specific space within which an individual communication occurs.<sup>108</sup> However, when one portion of a larger space offers a distinct communicative function, courts limit the definition of the relevant forum to the specific portion to which

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104. See, e.g., *Confederate Veterans*, 288 F.3d at 625 (performing thorough analysis of definition of relevant forum and noting that “[t]his inquiry is distinct from the question of which type of forum exists”).

105. See, e.g., *id.* (defining forum as special license plate program); *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) (defining forum as adopt-a-highway program).

106. See, e.g., *Ku Klux Klan*, 58 F.3d at 1078 (defining forum as adopt-a-highway program that provided sign as means of communication).

107. See *Confederate Veterans*, 288 F.3d at 625.

108. See *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998) (defining forum as all advertising space owned by transportation authority, rather than specific advertising space contemplated by contract).

a speaker seeks access.<sup>109</sup>

A. *When a Challenger Seeks Access to a Government-Run Program that Facilitates Communication, Courts Define the Relevant Forum as the Program Itself*

Governments at various levels operate programs that create fora in which citizens can express themselves.<sup>110</sup> When a challenger seeks access to such a program on First Amendment grounds, courts have defined the relevant forum as the program itself, not the particular point of access to communication.<sup>111</sup> For example, in *Texas v. Knights of the Ku Klux Klan*,<sup>112</sup> the Klan applied to participate in the state-run adopt-a-highway program, and the state sought a declaratory judgment that rejection of the application would not violate the First Amendment.<sup>113</sup> The court defined the relevant forum as the adopt-a-highway program itself, rather than the individual sign the Klan wished to erect or the public highway where they wished to erect it.<sup>114</sup> The court reasoned that, “by participation in the Program, the Klan wishes to . . . get its name on a sign at a particular location.”<sup>115</sup> Although the means of communicating was the sign, the forum in which the communication occurred was the program, and the court carefully kept the two concepts separate.<sup>116</sup>

Similarly, courts recognize that the components of a government-run program provide the necessary context for an analysis of a restriction

109. See *Parkland Republican Club v. City of Parkland*, 268 F. Supp. 2d 1349, 1354–55 (S.D. Fla. 2003) (defining forum as parade within larger festival when festival offered alternative means of communication).

110. See *Confederate Veterans*, 288 F.3d at 619–20 (concluding that, while primary purpose of special license plate program at issue was to raise revenue for state, program also allowed those bearing plates “to express their pride in membership in an organization while facilitating the group’s speech”).

111. See *id.* at 625; *Ku Klux Klan*, 58 F.3d at 1078.

112. 58 F.3d 1075 (5th Cir. 1995).

113. *Id.* at 1077. The Klan sought to adopt a section of highway running directly in front of a recently desegregated housing project. *Id.* A Texas district court had already issued an injunction against the Klan prohibiting its members from intimidating residents, demonstrating at the project entrance, and impeding access to or egress from the project. *Id.*

114. *Id.* at 1078.

115. *Id.* (emphasis added).

116. See *id.* But cf. *Robb v. Hungerbeeler*, 281 F. Supp. 2d 989, 1000 (E.D. Mo. 2003) (declining to decide whether Missouri’s adopt-a-highway program or highway itself was relevant forum in similar case, and determining that neither was public forum), *aff’d*, 370 F.3d 735 (8th Cir. 2004), *cert. denied sub nom. Rahn v. Robb*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 908 (2005).



placed on one component of the program.<sup>117</sup> In *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*,<sup>118</sup> the Sons of Confederate Veterans (SCV) challenged a statute that authorized special license plates for members of their group, but prohibited the plates from incorporating SCV's logo, which includes the confederate flag.<sup>119</sup> This statute was part of a statewide program in which the General Assembly of Virginia specifically authorized special license plates for various groups, each by an individual statute.<sup>120</sup> The court, after first discussing the importance of defining the forum at issue before deciding which type of forum is at issue, determined that the relevant forum was the special license plate program.<sup>121</sup> The court emphasized not only that it was the special plate program to which SCV sought access, but also that the statutes authorizing special plates for other groups provided the proper frame of reference for analyzing the restriction placed on the SCV license plate.<sup>122</sup> Thus the court could not properly analyze the restrictions put on SCV's special plates without considering the restrictions placed generally on participants throughout the program by each individual authorizing statute.<sup>123</sup>

*B. When a Challenger Seeks to Communicate in a Forum with Multiple Similar Components, Courts Define the Relevant Forum as Those Components Collectively*

When First Amendment challenges arise in the context of speakers seeking access to a forum made up of multiple components that provide similar methods of communication, courts define the forum as the aggregate of those components.<sup>124</sup> This type of analysis is consistent

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117. See *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 625 (4th Cir. 2002) (noting that when plaintiff seeks to obtain special license plate authorized by individual statute, statutes authorizing other special license plates provide context for analysis of restriction on plaintiff).

118. 288 F.3d 610 (4th Cir. 2002).

119. *Id.* at 613–14.

120. *Id.* at 614.

121. *Id.* at 625.

122. *Id.*

123. See *id.*

124. See *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998) (defining forum as exterior advertising spaces on city buses); *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998) (defining forum as all advertising space owned by transportation authority); *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1986) (defining forum as advertising space within sports arena).

with the *Cornelius* Court's mandate that, in defining the forum, courts must consider not only the "access sought by the speaker," but also the "particular means of communication" to which the plaintiff seeks access.<sup>125</sup> This issue frequently arises when a speaker seeks access to advertising space on government-owned property.<sup>126</sup> In *Lehman v. City of Shaker Heights*,<sup>127</sup> the first case in which the Supreme Court used the term "public forum" to distinguish between different types of government-owned property,<sup>128</sup> the plurality analyzed the constitutionality of a regulation banning political advertising on a city's public transit system.<sup>129</sup> The Court analyzed the issue with reference to advertising spaces on the city's buses generally, rather than the one particular sign the plaintiff wished to display in one particular space.<sup>130</sup>

The *Cornelius* Court later cited *Lehman* in formulating the standard for defining the relevant forum.<sup>131</sup> Numerous cases decided by lower courts since *Cornelius* have followed the lead set by *Lehman*; for example, in advertising cases, courts have analyzed the relevant forum as advertising space in general, rather than as a particular advertising space.<sup>132</sup> In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*,<sup>133</sup> a group sought to display advertisements in different locations within twenty-five subway stations.<sup>134</sup> The Southeastern Pennsylvania Transportation Authority (SEPTA) maintained advertising space in its stations, as well as in and on its vehicles.<sup>135</sup> The court recognized that the advertising contract

125. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985).

126. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion); *Christ's Bride Ministries*, 148 F.3d at 248.

127. 418 U.S. 298 (1974) (plurality opinion).

128. Barbara S. Gaal, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 123 (1982). The phrase first appeared as a term of art in 1972. See Post, *supra* note 13, at 1724.

129. *Lehman*, 418 U.S. at 300–01.

130. See *id.* at 303–04. A plurality of the Court held that "[t]he city consciously has limited access to its *transit system advertising space* in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304 (emphasis added).

131. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (citing *Lehman*, 418 U.S. at 300).

132. See *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998); *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998); *Hubbard Broad., Inc. v. Metro. Sports Facilities*, 797 F.2d 552, 555 (8th Cir. 1986).

133. 148 F.3d 242 (3d Cir. 1998).

134. *Id.* at 245.

135. *Id.* at 244.

contemplated placing advertisements within the stations and on overhead clocks,<sup>136</sup> but concluded that the forum consisted of SEPTA's advertising space generally.<sup>137</sup> These courts recognized that each individual advertising space fulfills a similar communicative function, and the whole makes up the forum.<sup>138</sup>

C. *When a Challenger Seeks Access to a Unique Communicative Portion of a Larger Setting, Courts Define the Relevant Forum as the Unique Portion*

When speakers seek access to one portion of a larger arena that offers a distinct method of communication, courts limit the relevant forum to that portion.<sup>139</sup> In *Parkland Republican Club v. City of Parkland*,<sup>140</sup> the club challenged the city's denial of permission to enter the club's float in a community parade.<sup>141</sup> The parade was part of the city's "Parkland Days" celebration, which also included several other events.<sup>142</sup> The court determined that the forum at issue was the parade.<sup>143</sup> The club sought access to only the means of communication offered by the parade, namely a float displaying a banner that identified the club, and it was forbidden from participating in the parade only while displaying a

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136. *Id.* at 248.

137. *Id.* The court declined to divide "the larger forum of SEPTA's advertising space" into separate fora of advertising space within subway stations and advertising space on SEPTA vehicles. *Id.* at 248 n.2.

138. *See id.* at 248 & n.2 (defining forum as transportation authority's advertising space in general without distinguishing between advertising space in different locations). *But cf.* *Lebron v. Nat'l R.R. Passenger Corp.*, 69 F.3d 650, 655-56 (2d Cir. 1995), *amended by* 89 F.3d 39 (2d Cir. 1995) (defining relevant forum as specific advertising space sought by speaker because of its "unique size, location, and visibility," fact that plaintiff sought access to this advertising space only, and fact that plaintiff refused to accept any other advertising space owned by defendant in New York City). One commentator critiqued the *Lebron* court for failing to consider the "particular means of communication," as required by *Cornelius*, rather than the location of the communication, and for relying solely on precedent that analyzed advertising space in general as the relevant forum. *See* Jonathan Bloom, *A Funny Thing Happened to the (Non)Public Forum: Lebron v. National Railroad Passenger Corporation*, 62 BROOK. L. REV. 693, 725-27 (1996).

139. *See, e.g., Lebron*, 69 F.3d at 655-56 (defining forum as advertising space which was only space to which plaintiff sought, or would accept, access); *Parkland Republican Club v. City of Parkland*, 268 F. Supp. 2d 1349, 1354-55 (S.D. Fla. 2003) (defining forum as parade that took place within community festival).

140. 268 F. Supp. 2d 1349 (S.D. Fla. 2003).

141. *Id.* at 1351-52.

142. *Id.* at 1355.

143. *Id.*

banner identifying itself as a political organization.<sup>144</sup> The court recognized that the Parkland Republican Club had free access to other portions of Parkland Days, where it could disseminate its message through other means of communication, such as pamphlets and signs.<sup>145</sup>

In sum, courts that have analyzed government-run programs used for communicative purposes have defined the relevant fora as the programs themselves. These courts recognize that the forum of communication is analytically separate from the means of communication, and one component of such programs cannot be analyzed without reference to the other components. Courts analyzing challenges to fora that consist of multiple components that serve similar communicative functions define the forum as the aggregate of these components. However, when the components serve different communicative functions, the relevant forum is the particular component to which the plaintiff seeks access.

#### IV. WHEN REVIEWING MAIL SYSTEM REGULATIONS, COURTS HAVE DEFINED THE FORUM DIFFERENTLY

The Supreme Court has not addressed the mail service as a forum for communication since it articulated the requirements of forum analysis.<sup>146</sup> Prior to the *Cornelius* decision, three district courts addressed the issue and applied the public forum doctrine as it then stood.<sup>147</sup> Two of the district courts defined the mail system in its entirety as the relevant forum,<sup>148</sup> and the other court did not define the forum it analyzed.<sup>149</sup> Since the establishment of the three-part test of forum analysis, only the Ninth Circuit has defined the forum in a challenge to postal regulations.<sup>150</sup> In *Currier v. Potter*, the Ninth Circuit held that the relevant forum was the challenged component,<sup>151</sup> although Judge Gould

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144. *Id.*

145. *Id.*

146. See Elizabeth Gorman, *The First Amendment and the Postal Service's Subscriber Requirement: Constitutional Problems with Denying Equal Access to the Postal System*, 21 U. RICH. L. REV. 541, 550 (1987) (stating that no Supreme Court case has directly addressed issue of whether Postal Service is public forum).

147. See *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985); *Spencer v. Herdesty*, 571 F. Supp. 444, 453 (S.D. Ohio 1983); *Greenberg v. Bolger*, 497 F. Supp. 756, 776 (E.D.N.Y. 1980).

148. See *Shane*, 658 F. Supp. at 916; *Spencer*, 571 F. Supp. at 453.

149. See *Bolger*, 497 F. Supp. at 776.

150. *Currier v. Potter*, 379 F.3d 716, 726–28 (9th Cir. 2004).

151. See *id.* at 727–28.

wrote a strong dissent arguing against this definition of the forum.<sup>152</sup>

A. *Two Courts Defined the Relevant Forum as the Mail System as a Whole*

The Supreme Court decided many of its seminal cases concerning access to the mail system before it had articulated the requirements of forum analysis.<sup>153</sup> Although the Supreme Court has applied the three-part forum analysis to limitations on physical access to postal facilities, it has yet to provide guidance on what constitutes the relevant forum when considering challenges to restrictions on the use of the mail system.<sup>154</sup> Therefore, when lower courts evaluate First Amendment challenges to postal regulations, they have had little guidance on how to determine the scope of the mail system as a forum.

Before the Supreme Court established the three-part test of forum analysis, two district courts analyzed the relevant forum and concluded that the postal system as a whole is the relevant forum when access to the mail system is at issue.<sup>155</sup> In *Shane v. Buck*,<sup>156</sup> the customer of a private mail-forwarding service challenged a postal regulation that required customers of the service to complete a form entitled "Application for Delivery of Mail Through Agent."<sup>157</sup> Although the court applied forum analysis, it glossed over the definition of the

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152. See *id.* at 735 (Gould, J., concurring in part and dissenting in part). Judge Gould dissented from the majority's application of the three-part test of forum analysis generally. See *id.* at 732–38 (Gould, J., concurring in part and dissenting in part).

153. See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305–07 (1965) (striking down postal regulation without reference to public forum doctrine); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156–58 (1946) (overturning Postmaster's order without reference to public forum doctrine). These cases were decided before the Court used the term "public forum." See Post, *supra* note 13, at 1724 & n.41 (stating that Court first used term in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 99 (1972)).

154. Two Supreme Court cases have applied the three-part test of forum analysis in the postal context, but the Court considered only physical access issues, and not the right to use the mail system itself. See *United States v. Kokinda*, 497 U.S. 720, 727–30 (1990) (plurality opinion) (addressing physical access to post office sidewalks); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126–27 (1981) (addressing physical access to individual letterboxes, and noting that Court was "not confronted with a regulation which in any way restricts the appellees' right to use the mails").

155. See *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985); *Spencer v. Herdesty*, 571 F. Supp. 444, 453 (S.D. Ohio 1983).

156. 658 F. Supp. 908 (D. Utah 1985).

157. *Id.* at 909.

forum.<sup>158</sup> Rather than discussing the proper forum to analyze, the court instead began its forum analysis by stating, “[t]he mails have played a crucial role in communication in this country from its earliest days . . . . *The Postal Service* is a ‘massive, government-operated communications facility open to all forms of written expression protected by the First Amendment’, and, as such, is a public forum.”<sup>159</sup> Thus the court seemed to have assumed without any analysis that the postal system as a whole was the proper forum.

Similarly, in *Spencer v. Herdesty*,<sup>160</sup> the court analyzed the postal system as the relevant forum without first explicitly defining it as the relevant forum.<sup>161</sup> In *Spencer*, an association of citizens who advocated for better local government challenged the denial of a special third-class bulk mail rate available to state and national political parties.<sup>162</sup> In granting the plaintiffs a preliminary injunction, the court determined that it was “likely that plaintiffs [would] be able to demonstrate that *the mails* are a public forum, *i.e.*, an institution created by the Government for the purpose of communication.”<sup>163</sup> Again, the court did not explicitly explain the rationale it used to define the relevant forum.

#### *B. One Court Did Not Decide if the Forum Encompassed the Whole System or Only the Challenged Component*

One court faced with a First Amendment challenge to a postal regulation declined to define the relevant forum.<sup>164</sup> In *Greenberg v. Bolger*,<sup>165</sup> minor political parties challenged a postal regulation that denied them a reduced third-class bulk mail rate that was given only to the two major national political parties.<sup>166</sup> The court did not indicate whether the forum at issue was the mail system as a whole or only the challenged provision of the postal regulation. Instead, the court simply stated that, “[t]he mails in general, and the discounted postal rates in

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158. *Id.* at 916.

159. *Id.* (emphasis added) (citations omitted).

160. 571 F. Supp. 444 (S.D. Ohio 1983).

161. *Id.* at 453.

162. *Id.* at 447.

163. *Id.* at 453 (emphasis added). The preliminary injunction was made permanent in *Spencer v. United States Postal Service*, 613 F. Supp. 990, 994 (S.D. Ohio 1985).

164. See *Greenberg v. Bolger*, 497 F. Supp. 756, 776 (E.D.N.Y. 1980).

165. 497 F. Supp. 756 (E.D.N.Y. 1980).

166. *Id.* at 764.

particular, are public facilities designed to promote public communication.”<sup>167</sup> The court proceeded to strike down the challenged regulation on public forum principles, but without indicating the exact forum at issue.<sup>168</sup>

### C. *One Court Defined the Forum as Only the Challenged Component*

The Ninth Circuit has applied the three-part test of forum analysis to conclude that, in a challenge to regulations that limit access to the mail system, the proper forum is the challenged component of the system.<sup>169</sup> In *Currier v. Potter*, a group of homeless persons from Seattle and a homeless advocacy group challenged the constitutionality, under the First Amendment, of the Postal Service’s refusal to provide general delivery service to post office branches other than the main downtown branch, and its denial of no-fee post office boxes to the homeless.<sup>170</sup> In defining the relevant forum, the court stated that “Currier seeks greater access to the general delivery mail system . . . . Thus, the relevant forum is appropriately limited to the general delivery service, not the mail system as a whole.”<sup>171</sup> The court then referenced the *Cornelius* Court’s definition of the forum as the charitable campaign, rather than the federal workplace, and the *Greenburgh* Court’s definition of the forum as the letterbox.<sup>172</sup>

The analysis of the relevant forum in *Currier*, however, did not go unchallenged.<sup>173</sup> In a dissenting opinion, Judge Gould argued that the court erred in defining the relevant forum as the individual components of the mail system.<sup>174</sup> He determined that the plaintiffs challenged the general delivery service and the no-fee post office box regulations, “not

167. *Id.* at 776.

168. *Id.* at 777–78.

169. *Id.* at 727–28.

170. *Id.* at 722–23. The plaintiffs also brought regulatory and statutory challenges to these practices, as well as a challenge under the Fifth Amendment. *Id.* The Ninth Circuit dismissed the regulatory claims for lack of subject matter jurisdiction, *id.* at 726, denied the Fifth Amendment claims on the merits, *id.* at 731–32, and denied the statutory claim as coextensive with the Fifth Amendment claims. *Id.* at 732 n.12.

171. *Id.* at 727–28. The court later performed a similar analysis and reached the same result with respect to the no-fee post office box. *Id.* at 731.

172. *Id.* at 728 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 128 (1981)).

173. *Id.* at 732–38 (Gould, J., concurring in part and dissenting in part).

174. *Id.* at 735 (Gould, J., concurring in part and dissenting in part).

because the homeless plaintiffs want these specific services but because these services are potential means for plaintiffs to exercise their paramount right to receive mail despite their homelessness.”<sup>175</sup> Thus Judge Gould argued that the access sought by the speaker was access to the mail system in general.<sup>176</sup>

In sum, when analyzing the mail system as a forum for expression, courts have disagreed on the definition of the relevant forum. Two district courts have defined the forum as the mail system itself. One district court did not define the forum it was analyzing. Most recently, the Ninth Circuit defined the forum as the challenged components of the mail system, although a dissenting judge in that case argued that the forum should be the mail system as a whole.

## V. COURTS SHOULD DEFINE THE MAIL SYSTEM AS THE RELEVANT FORUM FOR EXPRESSION BY MAIL

When faced with a First Amendment challenge implicating the use of the mail system, courts should seek guidance from opinions that have applied forum analysis to similar situations. The Postal Service is a government-run program that citizens use to express themselves.<sup>177</sup> Accordingly, the forum for communication is the mail system itself, although the means of communication might be one delivery method or another.<sup>178</sup> Courts cannot analyze the sufficiency of access to one part of the mail system without reference to other parts of the system, which requires analysis of the system as a whole.<sup>179</sup> Moreover, the components of the mail system comprise one method of communication, rather than separate methods of communication.<sup>180</sup> Therefore, in the case of *Stuart Williams*, for example, a court should define the forum as the mail system as a whole, rather than as any one of its components.<sup>181</sup>

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175. *Id.* (Gould, J., concurring in part and dissenting in part).

176. *See id.* (Gould, J., concurring in part and dissenting in part).

177. *See supra* Part I.

178. *See infra* Part V.B.

179. *See infra* Part V.B.

180. *See infra* Part V.C.

181. *See infra* Part V.D.



A. *Courts Analyzing the Mail System as a Forum for Communication Have Defined the Relevant Forum with Incomplete or Inaccurate Reasoning*

Because of the lack of guidance in defining the mail system as a forum, courts that face First Amendment challenges to the mail system should look to the analyses used by courts in other situations to define the relevant forum. Early decisions that addressed the question of the mail system as a forum for communication either did not provide a rationale for their definition of the relevant forum or failed to explicitly define the forum.<sup>182</sup> The court in the only recent decision addressing this question, *Currier v. Potter*, defined the relevant forum as the individual components of the mail system by analogizing to the Combined Federal Campaign in *Cornelius* and the letterbox in *Greenburgh*.<sup>183</sup> However, *Greenburgh* is inapposite because the Court in that case began its forum analysis by noting that the regulation at issue, which prevented private citizens from depositing mailable matter into individual letterboxes,<sup>184</sup> did not in any way restrict the right of the citizens to use the mail system.<sup>185</sup> In fact, when the Supreme Court analyzed restrictions on the use of an internal school mail system in *Perry*, it analyzed the “school mail facilities” as a whole as the forum to which the plaintiffs sought access, rather than the individual teachers’ mailboxes.<sup>186</sup> In the *Currier* dissent, Judge Gould argued that the relevant forum should similarly be the federal mail system as a whole.<sup>187</sup> However, Judge Gould did not follow the approach of other courts in similar situations and thoroughly analyze the postal system as a government-run system of communication or as a communicative forum made up of smaller components.<sup>188</sup>

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182. See *supra* Part IV.A–B.

183. The court then referenced the *Cornelius* Court’s definition of the forum as the charitable campaign, rather than the federal workplace, and the *Greenburgh* Court’s definition of the forum as the letterbox. *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 128 (1981)).

184. *Greenburgh*, 453 U.S. at 116–17.

185. *Id.* at 127. In fact, the Postal Service argued that the increased amount of unstamped mail would impede access to the mail system. See *id.* at 118.

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

187. *Currier*, 379 F.3d at 735 (Gould, J., concurring in part and dissenting in part).

188. See *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 625 (4th Cir. 2002); *Christ’s Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998); *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995).

*B. The Mail System Is a Government-Run Program that Facilitates Communication, and Therefore It Is the Relevant Forum When Plaintiffs Seek Access to the Mails*

When citizens seek access to a government-run program for expressive purposes, courts define the program as the forum,<sup>189</sup> similarly, when citizens seek access to the mail system, courts should define the mail system as the relevant forum. The court in *Texas v. Knights of the Ku Klux Klan* recognized that the Klan wanted access to the adopt-a-highway program for communicative purposes, and so the relevant forum was the program itself.<sup>190</sup> The court focused on the fact that the Klan sought to participate in the program as a whole, instead of focusing on the specific sign the Klan wanted to erect.<sup>191</sup> Similarly, when plaintiffs seek access to a special postage rate,<sup>192</sup> they seek greater access to the constitutionally protected ability to send and receive mail.<sup>193</sup> The same holds true when plaintiffs seek greater access to a delivery method, such as general delivery or no-fee post office boxes.<sup>194</sup> Therefore, just as the court in *Ku Klux Klan* kept the means of communication analytically separate from the forum for communication, courts that analyze challenges to regulations of the use of the mails should recognize the distinction between the means of communication (various postage rates) and the forum for communication (the mail system). This is what the *Bolger* court failed to do when it declined to decide if the relevant forum was the mail system or the specific postage rate at issue.<sup>195</sup>

The mail system run by the U.S. Postal Service contains multiple components, and courts cannot properly analyze use of a particular component without reference to the system as a whole. The court in *Sons of Confederate Veterans, Inc.* determined that the special license plate program as a whole provided the necessary context for an analysis of the

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189. See, e.g., *Confederate Veterans*, 288 F.3d at 625 (defining relevant forum as special license plate program); *Ku Klux Klan*, 58 F.3d at 1078 (defining relevant forum as adopt-a-highway program).

190. *Ku Klux Klan*, 58 F.3d at 1078.

191. *Id.* at 1078–79.

192. See *Spencer v. Herdesty*, 571 F. Supp. 444, 447 (S.D. Ohio 1983); *Greenberg v. Bolger*, 497 F. Supp. 756, 764 (E.D.N.Y. 1980).

193. See *Gorman*, *supra* note 146, at 552–53 (describing how requirement that postage be paid to use mails acts as tax that restricts use of mails).

194. See *Currier v. Potter*, 379 F.3d 716, 722–23 (9th Cir. 2004).

195. *Bolger*, 497 F. Supp. at 776.

specific statute at issue.<sup>196</sup> Similarly, a court cannot analyze sufficiency of access to the mail system without referring to other components of the mail system. For example, a court cannot determine if denial of a special postage rate for a particular group violates that group's First Amendment right to use the mails without considering the benefits that rate provides to other groups.<sup>197</sup> Neither could a court properly determine if denial of a particular delivery method to an individual denies that individual the constitutional right to receive mail without considering that individual's ability to receive mail through alternative methods.<sup>198</sup>

C. *Mail Services Are Components of the Mail System that Provide a Single Method of Communication*

The Postal Service provides a means of communication that constitutes a single forum.<sup>199</sup> A court facing a First Amendment challenge to the mail system should analogize to decisions where courts have followed the lead of the *Lehman* plurality and recognized that multiple areas of advertising space constituted a single forum in which the plaintiff wished to communicate.<sup>200</sup> Like the multiple areas of advertising space in *Christ's Bride*, the Postal Service provides multiple rates for sending mail through the system,<sup>201</sup> as well as several ways to receive mail through the system.<sup>202</sup> These components constitute the larger system of communication.<sup>203</sup> A plaintiff who seeks access to a special postage rate seeks greater access to the ability to send mail.<sup>204</sup> The method of communication—delivery of mail to the addressee—is the same no matter the postage rate. Similarly, a plaintiff who seeks the

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196. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 625–26 (4th Cir. 2002).

197. *See Bolger*, 497 F. Supp. at 776 (stating that subsidization of certain political parties' mailings places burden on excluded parties).

198. *See Currier*, 379 F.3d at 735 (Gould, J., concurring in part and dissenting in part).

199. *See Gorman, supra* note 146, at 550 (arguing that “[t]he system of mail transportation and delivery operated by the United States Postal Service can be characterized as a public forum”) (emphasis added).

200. *See supra* Part III.B.

201. *See DMM, supra* note 6, at 100–400 (setting postage rates).

202. *See id.* at 508.3.0–.7.0 (describing postal delivery services).

203. *See Gorman, supra* note 146, at 543 (describing postal system as “a form of property consisting of a complex web of facilities and services”).

204. *See id.* at 552–53 (arguing that requiring payment of postage restricts First Amendment rights of senders of mail, but that this restriction is constitutional when applied in accordance with First Amendment strictures).

ability to receive mail seeks that ability generally, whether it comes through general delivery, a no-fee post office box, or some other method.<sup>205</sup> No matter which method of delivery a plaintiff uses, the method of receiving information remains the same: delivery of mail from a sender by the Postal Service. These components therefore constitute one forum for speech.

*D. The Components of the Mail System Constitute a Single Method of Communication that Should Be Analyzed as a Single Forum*

The services provided by the Postal Service do not constitute unique methods of communication that should be analyzed as separate fora.<sup>206</sup> The court in *Parkland* correctly noted that, while the Parkland Days festival offered multiple fora with multiple methods of communication, the only forum relevant to the club's constitutional challenge was the parade, which was a unique forum that offered the club the unique method of communication it sought.<sup>207</sup> Plaintiffs who seek greater access to mail delivery similarly seek access to only one method of communication, but that method is the same whether the information they receive comes through general delivery or a no-fee post office box. Therefore, unlike the Parkland Days festival, mail services do not comprise unique, separate fora with unique methods of communication; instead, mail services constitute one method of communication within a single forum.

*E. A Court Considering Williams' Challenge to the Postal Regulations Should Define the Forum to Which He Seeks Access as the Mail System as a Whole*

In the case of Stuart Williams, a proper analysis of the relevant forum should lead a court to conclude that he seeks access to the mail system as a whole, not to any specific component,<sup>208</sup> and that the system is either a

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205. See *Currier v. Potter*, 379 F.3d 716, 735 (9th Cir. 2004) (Gould, J., concurring in part and dissenting in part).

206. For example, a letter sent by first class mail, DMM, *supra* note 6, at 333.1.0, communicates the message of the sender to the recipient in the same way a letter sent by standard mail does. *Id.* at 343.1.0.

207. *Parkland Republican Club v. City of Parkland*, 268 F. Supp. 2d 1349, 1355 (S.D. Fla. 2003).

208. See *supra* Part V.B–D. This is the outcome advocated by Judge Gould in *Currier*. See *Currier*, 379 F.3d at 735 (Gould, J., concurring in part and dissenting in part). However, Judge Gould reached this conclusion without performing the type of analysis suggested by this Comment.

traditional or limited public forum.<sup>209</sup> Courts that define the relevant forum as the mail system as a whole are likely to find that the mail system is either a traditional or limited public forum.<sup>210</sup> Moreover, although the Supreme Court has never addressed the issue, one commentator suggests that the Court has implicitly assumed the mail system is a public forum in several cases because the Court applied levels of scrutiny appropriate only to public fora.<sup>211</sup>

Because the mail system as a whole is a public forum, the regulations challenged by Williams, even if content-neutral, must withstand intermediate scrutiny.<sup>212</sup> Williams would like to receive either general delivery service at his neighborhood post office branch or a no-fee post office box. However, he named these two services in his lawsuit simply because they are the only methods of mail delivery he can access as a homeless person without a permanent address.<sup>213</sup> Williams simply wishes to exercise his constitutionally protected right to receive mail.

In sum, courts that have analyzed the mail system as a forum for communication have used minimal or incorrect reasoning to define the forum, or have failed to define the forum at all. Therefore, when considering challenges to postal regulations, courts should analogize to other forum analysis cases where courts have thoroughly analyzed fora similar to the postal system. The postal system is a government-run program that provides one means of communication. Like other

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209. Every analysis considering the mail system as the relevant forum has concluded that it is a public forum. *See* *Shane v. Buck*, 658 F. Supp. 908, 916 (D. Utah 1985); *Spencer v. Herdesty*, 571 F. Supp. 444, 453 (S.D. Ohio 1983); *Greenberg v. Bolger*, 497 F. Supp. 756, 776 (E.D.N.Y. 1980); *see also Currier*, 379 F.3d at 735 & n.1 (Gould, J., concurring in part and dissenting in part) (arguing that mail system as whole is either traditional or limited public forum).

210. The mail system easily fits within the classification of a limited public forum because the government created it for use by the public for expressive activity. *See* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also* *Gorman*, *supra* note 146, at 550–51 (arguing that “there can be little doubt that [the postal system] is a public forum”) (emphasis in original).

211. *Gorman*, *supra* note 146, at 550 (citing generally *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Rowan v. United States Post Office Dep't*, 397 U.S. 727 (1970); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965)). *Gorman* also pointed out that several Supreme Court justices have recognized that the postal system is a public forum. *See id.* at 551 n.43.

212. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

213. *See Currier*, 379 F.3d at 730 n.9 (noting that court rejected plaintiffs' facial challenge, but expressed no opinion on merits of as applied challenge); *id.* at 736–38 (Gould, J., concurring in part and dissenting in part) (describing likely success of as applied challenge to general delivery regulations).

programs with multiple components, courts cannot properly analyze a component of the postal system without referring to the other components of the system. The postal service provides multiple components that constitute one means of communication and, therefore, one forum for communication. If a court considering Williams' challenge to the general delivery and no-fee post office box regulations analogizes to these other situations, it should find that the forum to which Williams seeks access is the mail system as a whole.

## VI. CONCLUSION

The use of the mail system has important implications for all Americans, especially those unfortunate enough to suffer from homelessness. The postal system has grown and evolved with the United States, and it has become firmly established as a part of the right to free speech guaranteed by the First Amendment. When performing First Amendment forum analysis, courts in various situations have used a thorough analysis of the forum at issue to define the relevant forum; these courts have focused on the means of communication and the fact that components of communicative programs cannot be analyzed without reference to the program as a whole. However, it remains unclear how courts will apply the three-part test of First Amendment forum analysis in a challenge to postal regulations governing the use of the mails. The Supreme Court has not addressed the issue, and lower courts do not agree on the proper definition of the forum when addressing challenges to postal regulations. Because the mail system is analogous to other communicative fora, courts considering First Amendment challenges to restrictions on the use of the mails should analogize to similar situations to define the relevant forum as the mail system as a whole.

