

EVERYBODY OUT OF THE POOL: RECOGNIZING A FIRST AMENDMENT CLAIM FOR THE RETALIATORY CLOSURE OF (REAL OR VIRTUAL) PUBLIC FORUMS

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First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. . . . Or, to put the point another way, the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.

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1. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

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INTRODUCTION

In the seismic aftershock of Donald Trump's ascension to the presidency, many hundreds of thousands of protesters overflowed public streets, walkways and parks in cities across the United States to express their dismay with the inauguration of a president they regarded as hostile towards women's rights.² The scenes of outraged marchers, which dominated television screens worldwide in January 2017, were replicated throughout the spring of 2018, as waves of demonstrators again flooded America's streets, impelled by the horror of a mass shooting at South Florida's Marjory Stoneman Douglas High School to demand action on gun violence.³

2. Meghan Keneally, *More Than 1 Million Rally at Women's Marches in US and Around World*, ABCNEWS (Jan. 22, 2017, 8:06 AM), <https://abcnews.go.com/Politics/womens-march-heads-washington-day-trumps-inauguration/story?id=44936042>.

3. Peter Jamison et al., *'Never again!' Students demand action against gun violence in nation's capital*, WASH. POST (Mar. 24, 2018), https://www.washingtonpost.com/local/march-for-our-lives-huge-crowds-gather-for-rally-against-gun-violence-in-nations-capital/2018/03/24/4121b100-2f7d-11e8-b0b0-f706877db618_story.html.

Marches and rallies on public property have always been a uniquely effective way for activists to make themselves heard. From the 1963 “March on Washington for Jobs and Freedom,” at which Martin Luther King Jr. delivered his indelible “I Have a Dream” speech before a National Mall crowd estimated at 250,000 people,⁴ to the “Occupy Wall Street” economic-justice movement of 2011 that ignited in Manhattan’s Zuccotti Park and sparked copycat sit-ins across the globe,⁵ people who feel disenfranchised or under-represented have long depended on access to public property to amplify their message.

Undeniably, government regulators could not single out demonstrators on one side of a divisive political issue for preferred or disfavored treatment. For instance, Congress could not selectively ban pro-Second-Amendment marches or pro-abortion-rights rallies on federal property. That much of the law of the First Amendment is clear. Perhaps surprisingly, not much more is.

In recent years, two federal appellate courts have confronted the question of whether government agencies can cut off all expressive access to a swath of public property, even if the decision is unmistakably intended to prevent a disfavored speaker or viewpoint from being heard.⁶ The cases, one in the Fourth Circuit U.S. Court of Appeals⁷ and one in the sister Ninth Circuit,⁸ have provided little clarity to this murky area of constitutional law. Before long, it will be necessary for the U.S. Supreme Court to weigh in.

Clarifying where the First Amendment protection of speakers using public property begins and ends has become more important than ever, as our understanding of what qualifies as “public property” broadens to include “virtual” as well as real property. While courts are rapidly coming to the consensus that government authorities cannot constitutionally block their critics from access to government-run social media pages,⁹ courts have yet to decide the inevitable next question: Is there a

4. *March on Washington for Jobs and Freedom*, NAT’L PARK SERV., <https://www.nps.gov/articles/march-on-washington.htm> (last updated Aug. 10, 2017).

5. Julia La Roche, *Here’s What They’re Chanting At Occupy Wall Street*, BUS. INSIDER (Oct. 7, 2011, 10:00 AM), <https://www.businessinsider.com/occupy-wall-street-chants-2011-10-07>.

6. See *Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224, 232 (4th Cir. 2013); *Koala v. Khosla*, 931 F.3d 887, 898–99 (9th Cir. 2019).

7. See generally *Sons of Confederate Veterans*, 722 F.3d 224.

8. See generally *Koala*, 931 F.3d 887.

9. See *Robinson v. Hunt Cty.*, 921 F.3d 440, 449 (5th Cir. 2019) (finding that a policy which allows the county sheriff’s office to remove certain comments from their Facebook page can give rise to an actionable First Amendment claim of viewpoint discrimination); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 238 (2d Cir. 2019) (concluding that the president of the United States cannot exclude members of the public from interacting with a Twitter account that he and his White House staff use to make official policy pronouncements).

constitutional violation if a government agency pulls the plug on a Facebook page entirely, to deny people a platform to say unfavorable things about the agency?

Answering that question will require the courts to hack through a dense and befuddling thicket of First Amendment caselaw that has grown up around the management of public expressive use of government property: The “public forum” doctrine.¹⁰ This Article proposes that a speaker who is denied access to public property for expression, because the government attempts to revoke the “forum” status of the property to keep the speaker from being heard, must necessarily have a First Amendment claim. Since the First Amendment prevents government agencies from *narrowing* the use of public property in discriminatory ways,¹¹ it logically follows that the government cannot *abolish* the expressive use of property, either, when the forbidden objective is the same.

This is not an uncontroversial proposition. Supreme Court caselaw dating back to the early days of desegregation can be read to suggest that, if the government denies *everyone* access to property—closing the swimming pool to avoid integrating it—then there is no discrimination and no constitutional violation.¹² Needless to say, this would be quite a terrible line of precedent around which to build the modern law of freedom of expression.¹³ A better model is needed.

In Section II, this Article sets out what is known, and unknown, about the First Amendment standards that govern the expressive use of publicly owned property, both physical and metaphysical, and how those standards are adapting to a world communicating at a pace of 5,700 tweets-per-second.¹⁴ Section III examines the relatively scarce authority addressing the constitutional rights of would-be speakers who challenge the decision to close public property to expression. Section IV turns to

10. See, e.g., Marc Rohr, *First Amendment Fora Revisited: How Many Categories Are There?*, 41 NOVA L. REV. 221, 228 (2017) (“[F]ederal appellate courts have remarkably, but understandably, exhibited considerable confusion regarding the *number* of public forum categories.”); Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 654 (2010) (“It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist.”).

11. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (explaining that, once the state opens a limited public forum to some speakers, it “must respect the lawful boundaries it has itself set. The State may not exclude where its distinction is not ‘reasonable in light of the purpose served by the forum[.]’”).

12. *Palmer v. Thompson*, 403 U.S. 217, 220 (1971).

13. See Randall Kennedy, *Reconsidering Palmer v. Thompson*, 2018 SUP. CT. REV. 179, 179 (2018) (referring to the decision as “a judicial injustice.”).

14. Raffi Krikorian, *New Tweets per second record, and how!*, TWITTER ENGINEERING (Aug. 16, 2013), https://blog.twitter.com/engineering/en_us/a/2013/new-tweets-per-second-record-and-how.html (reporting that Twitter users post, on a typical day, more than 500 million tweets, averaging out to 5,700 tweets per second).

the most recent foray into the law affecting “forum closure,” the Ninth Circuit’s decision in *The Koala v. Khosla*,¹⁵ in which a student-produced magazine specializing in tasteless humor is fighting to regain eligibility for public funding.¹⁶ Section V analyzes how the federal courts have considered the invidious motive behind facially neutral government decisions in contexts outside the management of public property, and concludes that the same standard—that the government cannot accomplish a discriminatory objective by cloaking it in a guise of neutrality—must necessarily apply to a total shutdown of speech on public property.

I. THE FIRST AMENDMENT AND THE PUBLIC FORUM

A. *First Amendment basics*

The Supreme Court has emphasized, time and again, that the First Amendment exists to protect speakers, even those with extreme or distasteful viewpoints, from undue government regulation.¹⁷ As the Justices said in invalidating a statute that criminalized the expressive burning of an American flag: “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.”¹⁸ “Prior restraints” that prevent speech from being heard—for instance, impounding copies of a newsmagazine¹⁹—face a strong presumption of invalidity and almost never survive constitutional scrutiny.²⁰ But it is no more permissible for a government actor to retaliate after-the-fact when the motive is to punish, or deter, constitutionally protected speech.²¹ The Supreme Court has said that retaliation for constitutionally protected activity is akin to, and as offensive as, “an ‘unconstitutional condition’ demanded for the receipt of a government-provided benefit.”²²

15. 931 F.3d 887 (9th Cir. 2019).

16. *Id.* at 892–93.

17. See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt.”); *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (“[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”).

18. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

19. *Near v. Minnesota*, 283 U.S. 697, 704–05 (1931).

20. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (“[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”).

21. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (taking note of “clearly established” doctrine that “the First Amendment bars retaliation for protected speech.”).

22. *Id.* at 588 n.10.

First Amendment scrutiny is triggered whenever government regulatory or punitive action is directed at a speaker's content or viewpoint.²³ A regulation is "content"-based if it singles out particular topics or categories of speech for disfavored treatment,²⁴ while a regulation is "viewpoint"-based if it discriminatorily disfavors one side of a contested issue.²⁵ For example, a prohibition on messages *about* abortion would be content-based, and a prohibition on messages *opposing* abortion would be viewpoint-based.

When a government regulation is deemed to be targeted to the content or viewpoint of a speaker's message, it is presumptively unconstitutional, unless the government can satisfy "strict scrutiny" by demonstrating that the regulation is necessary to accomplish a compelling public purpose and is narrowly tailored to restrict no more speech than necessary to accomplish that purpose.²⁶ On the other hand, when a regulation is "content neutral," it will be upheld as constitutional, even if it produces some incidental and unintended constraints on speakers, unless it is shown to be unreasonable.²⁷ As the Court stated, in rejecting demonstrators' First Amendment challenge to a regulation against sleeping in national parks, restrictions that incidentally burden speech are constitutional so long as they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."²⁸

Finally, one subcategory of speech receives no constitutional protection at all: The government's own speech. When the government is regarded as the speaker (and the "speech" can be indirect and passive, such as hosting a religious monument on public property²⁹), nothing constrains the government from making content-based or viewpoint-based choices.³⁰

23. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015).

24. *See* *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

25. *See* *McGuire v. Reilly*, 386 F.3d 45, 62 (1st Cir. 2004) ("The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another."); *see also* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (describing viewpoint discrimination as "an egregious form of content discrimination.").

26. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

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

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

29. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

30. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

B. *Evolution of the Forum Doctrine*

Over a series of First Amendment cases, dating back to the 1930s, the Supreme Court developed the concept of the “forum” to determine the permissible level of regulation when a speaker seeks to use government property for expression.³¹ As early as 1939, the Court recognized that the government could not criminalize distributing handbills on streets or in parks that “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.”³² Forum doctrine is grounded in the notion that, while all government property belongs to the public, not all government property is equally suitable for expressive use.³³ Consequently, the government’s authority to restrict or ban speech will vary with the character of the space.³⁴ The same level of control that applies within a judge’s chambers will not apply on the courthouse sidewalk.³⁵ The Supreme Court has grounded this doctrine in the distinction between government as regulator of individuals’ behavior (when scrutiny is at its highest and deference at its lowest) versus government as the proprietor of its own property, with an interest in making sure its own speech is heard and understood.³⁶

As in *Hague v. Committee for Industrial Organization*,³⁷ some property is recognized as being traditionally a “public forum” amenable to wide-open public discourse, where speech generally cannot be restricted on the basis of content, such as a park or a street.³⁸ While the Supreme Court has not set forth a categorical test for determining what qualifies as a traditional forum, factors that courts have weighed include the compatibility of the property with public expressive activity and the

31. Frank D. LoMonte, “*The Key Word Is Student*”: Hazelwood Censorship Crashes the Ivy-Covered Gates, 11 FIRST AMEND. L. REV. 305, 311–12 (2013).

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

33. LoMonte, *supra* note 31, at 312.

34. Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 30–31 (2018).

35. See *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (applying First Amendment to vacate convictions of civil-rights protesters who marched, chanted, and carried picket signs outside the courthouse).

36. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (“Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”).

37. 307 U.S. 496 (1939).

38. See *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003).

public's reasonable expectation of being protected when using the space for speech.³⁹

Besides the rather narrow handful of public spaces categorically recognized as traditional public forums, property can also become a forum by way of "designation."⁴⁰ In determining whether a designated public forum exists, courts look to the government's policy and practice to assess whether a discernable intent exists to open the property for expressive purposes; courts also look to the nature of the property and its compatibility with expressive activity.⁴¹ For property to be regarded as a designated forum, there must be evidence of an affirmative decision by the government to commit the property to expressive use, rather than just a passive indifference to occasional expressive use.⁴²

Once a piece of property is declared to be a "forum," by either tradition or designation, any regulation on the content of a speaker's message must satisfy the "strict scrutiny" standard: The government must show that the restriction is necessary to achieve a compelling governmental objective, and that it is narrowly tailored to prohibit no more speech than is necessary to accomplish that objective.⁴³

Regardless of whether property is a forum by tradition or by designation, the government cannot selectively afford preference to certain viewpoints; once the property is made available for one opinion, it must be accessible on equal terms to all. The Supreme Court has recognized that selectively excluding speakers from using public property raises equal protection concerns as well as implicating the First Amendment: "Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone."⁴⁴

39. *Id.* at 1099–1100 (collecting cases and observing that courts have applied "a jumble of overlapping factors[]" in assessing when property is so deeply identified as a place for expression as to qualify as traditional public forum property).

40. See R. George Wright, *Public Fora and the Problem of Too Much Speech*, 106 K.Y. L.J. 409, 416 (2017–18).

41. *Id.* at 416–18 (noting confusion about status and existence of a "non-public forum" category, in which government is acting as a proprietor rather than a regulator, managing its own property).

42. "The government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). *Accord* *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 253 (3d Cir. 1998) ("[A] past practice of permitting some expressive activities or 'limited discourse' does not mandate that the government intended the forum as public.").

43. *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 850–51 (2006) (collecting cases and concluding that strict-scrutiny analysis is almost invariably fatal to a government regulation).

44. *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

Even in a public forum, the government can enforce reasonable regulations on the use of property that are both “content neutral” on their face and are, in practice, applied evenhandedly to all speakers.⁴⁵ A regulation is content neutral if it is “justified without reference to the content of the regulated speech.” A classic example of a constitutionally permissible “time, place, and manner” restriction is a limit on how long members of the public may occupy the podium when addressing a government meeting.⁴⁶ For instance, a three-minute time limit has been upheld as a reasonable content-neutral restriction on speakers addressing a city council hearing.⁴⁷

Property that is neither traditionally open to public discourse, nor held open by government designation, is referred to as a “nonpublic forum.”⁴⁸ In a nonpublic forum, government regulation of speech need be only reasonable and viewpoint neutral.⁴⁹ Even in a nonpublic forum, however, the government cannot engage in viewpoint-based discrimination.⁵⁰

The Supreme Court explicitly adopted a three-tiered “forum” analysis in a 1983 decision involving access to employee mailboxes in the front office of a public school.⁵¹ In that case, *Perry Education*, an upstart labor union bidding to dislodge the incumbent labor organization insisted on a First Amendment right to place recruitment flyers in teachers’ mailboxes, the same access afforded to its competitor.⁵² The Court, however, found that the boxes were not a “forum” open to general expressive use, but rather, were limited by their nature to communications about school business by authorized users.⁵³ Accordingly, non-school organizations had no constitutional right to insist on using the mailboxes, and there was no First Amendment violation in limiting access to a subcategory of official-business speakers.⁵⁴

The Court explained in *Perry Education* that the government could ration the expressive use of property such as school mailboxes to “‘preserve the property under its control for the use to which it is lawfully

45. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that in a public forum, regulations on the time, place and manner of speech will be constitutional if they are content-neutral, narrowly tailored to serve a significant government interest, and leave ample alternatives of communication).

46. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

47. *Id.*

48. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”).

49. *Id.*

50. *Id.*

51. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983).

52. *Id.* at 40–41.

53. *Id.* at 48.

54. *Id.* at 51.

dedicated.”⁵⁵ The Court went on to explain that the ability to discriminate among speakers was necessary for the government to allocate limited mailbox space to “activities compatible with the intended purpose of the property.”⁵⁶

Amplifying the confusion over forum status, courts have recognized what may be a distinct fourth category of property, or a subset of the designated forum, known as a “limited public forum.”⁵⁷ In a limited public forum, the government has greater latitude to exclude speakers, or limit discussion topics, in keeping with the purpose for which the forum was created; in other words, “limited” means that the forum is a forum only for people whose speech falls into the class of speech for which the form was created.⁵⁸ Hence, a school board can enforce restrictions on the relevance of comments made during an open-mic period, limiting speakers to addressing subjects within the board’s jurisdiction.⁵⁹ Content-based restrictions in a limited public forum are considered to be reasonable if they are “consistent with preserving the property for the purpose to which it is dedicated.”⁶⁰

While it is uncertain how much, if at all, a speaker’s rights in a limited forum are superior to those in a non-forum,⁶¹ it seems widely accepted that, when the government enforces content-based restrictions on speech in a limited public forum, it must show that those restrictions are tailored to advance an “important” or “significant” public purpose, while no tailoring is required if the property is not a forum at all.⁶²

C. *Rosenberger and the Metaphysical Forum*

A “forum” typically connotes a physical space, such as the walkways inside an airport terminal,⁶³ or a bandstand in a park,⁶⁴ that speakers and

55. *Id.* at 46 (quoting *U.S. Postal Servi. v. Council of Greenburgh Civic Ass’ns.*, 453 U.S. 114, 129–30 (1981)).

56. *Id.* at 49.

57. See *Widmar v. Vincent*, 454 U.S. 263, 272 (1981) (recognizing university facilities as a limited public forum set aside for use by students); see also *Ne. Pa. Freethought Soc’y v. Cty. of Lackawanna Transit Sys.*, 372 F. Supp. 3d 767, 770 (M.D. Pa. 2018) (“One particular area that has frustrated the courts is how to distinguish between designated and limited public forums.”).

58. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

59. *LoMonte & Calvert*, *supra* note 34, at 44–45.

60. *DiLoreto*, 196 F.3d at 967.

61. “The line between the designated ‘limited’ public forum and the nonpublic forum is maddeningly slippery, and some would even say non-existent, notwithstanding their linguistically opposed labels.” Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1990 (2011):

62. See, e.g., *City of Dayton v. Esrati*, 125 Ohio App. 3d 60 (Ohio App. 1997) (explaining that in a limited public forum, the First Amendment requires that any content-based restrictions must be narrowly tailored to serve a significant government interest, while if the property is a non-forum, restrictions must only be reasonable and viewpoint-neutral).

63. See *Int’l Soc’y. for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

64. See *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989).

performers seek to use as a platform to convey their messages. But the courts have identified intangible (or “metaphysical”) forums, to which all of the same First Amendment standards and principles apply.⁶⁵

In 1995, the Supreme Court confronted the case of a public university that denied a Christian-themed student newspaper, *Wide Awake*, a subsidy to cover its printing and distribution costs.⁶⁶ A student fee committee declared *Wide Awake* ineligible for financial support because of its overtly religious content, relying on a guideline that disqualified “religious activities.”⁶⁷ The student editors sued, but lower courts denied them relief; the Fourth Circuit found that, while the decision was made with reference to content, it was justified by the university’s need to avoid excessive entanglement with religion in contravention of the Establishment Clause.⁶⁸ The Supreme Court reversed.⁶⁹

The Justices decided that student activity fees constitute a limited public forum designed to benefit the students who pay into the fund.⁷⁰ The Court analogized the university’s pool of activity fees to property reserved for a specific purpose, which allowed the university to lawfully set boundaries on which groups could access it.⁷¹ The Court found that a university can exclude discussion of certain content to preserve the forum’s limited nature, but cannot discriminate on the basis of viewpoint when the speaker’s subject matter is “otherwise within the forum’s limitations.”⁷² The Court held that the university violated the student editors’ First Amendment rights because “the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.”⁷³ Thus, under *Rosenberger*, withholding student activity fees from a student publication because of the publication’s editorial bent, where the university does not prohibit discussion of the subject matter, amounts to unconstitutional viewpoint discrimination.⁷⁴

65. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 805–06 (1985) (determining that the Combined Federal Campaign fundraising drive constitutes a forum, but that it is a nonpublic forum because, in setting up a program to enable charities to solicit payroll deductions from federal employees, the government did not intend to create a vehicle for speech, but merely a conduit to channel charities’ solicitations in a more orderly manner); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (defining the relevant forum as a city’s program of selling advertising space aboard public transit buses).

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

67. *Id.* at 827.

68. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 285 (4th Cir. 1994), *rev’d*, 515 U.S. 819 (1995).

69. *Rosenberger*, 515 U.S. at 846.

70. *Id.* at 830.

71. *Id.* at 840.

72. *Id.* at 829–30.

73. *Id.* at 831.

74. *Id.*

The Court returned to the subject of student activity fees and the First Amendment in 2000, when student plaintiffs sought to prevent the University of Wisconsin from subsidizing political or ideological organizations whose views they found unpalatable.⁷⁵ The Justices upheld the constitutionality of the fee system, finding that, so long as fees are dispensed in a viewpoint-neutral way, the fact that some money finds its way into the coffers of organizations with divisive political views is of no consequence.⁷⁶ The Court remanded for further review the question of whether the University's system of allowing students to vote on the activity-fee budget in a campus-wide referendum was, by nature, an invitation to viewpoint discrimination: "[t]o the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires."⁷⁷ Significantly, the takeaway from *Southworth* is that the mere possibility that voters will award or withhold funding on the basis of a speaker's viewpoint is enough to render a budgeting mechanism unconstitutional.

D. *Forums-dot-com: Government-run Social Media Accounts*

The need for clear legal guidance about the government's obligation to justify closing a forum has become exponentially more acute now that vast swaths of online real estate are imbued with forum protection. Once the courts recognized that forum status could apply even when property is intangible—or even when the government uses property owned by others⁷⁸—it was not a stretch to apply the forum doctrine to a Twitter or Facebook account where government officials communicate with the public.

Social media is increasingly the tool of choice for government agencies at all levels, from the White House to the smallest local police department, to share information with a mass audience quickly and without the expense of traditional publishing.⁷⁹ Facebook, the most popular U.S.-based social media network with more than 1.5 billion active daily users worldwide,⁸⁰ is so widely used by public entities that the company has enacted a targeted set of supplemental terms and

75. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000).

76. *Id.* at 233–34.

77. *Id.* at 235.

78. See First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1122 (10th Cir. 2002) (“[F]orum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist.”).

79. John Carlo Bertot et al., *The impact of polices on government social media usage: Issues, challenges, and recommendations*, 29 GOV'T INFO. Q. 30, 31 (2012).

80. *Company Info: Stats*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/company-info/> (last visited Nov. 10, 2019).

conditions specifically applying to pages maintained for the benefit of government agencies.⁸¹

Professor Lyrissa Lidsky is credited with forecasting the difficult First Amendment line-drawing choices that would arise as government agencies began to invite, and take part in, public discourse on social media platforms.⁸² In her 2011 article, *Public Forum 2.0*, Professor Lidsky anticipated the challenges in trying to characterize the forum status of the unique “property” that is a social media page—“property” that exists at the whim of a private host, in which the government has no real “ownership,” but which serves the same function as yesterday’s paper newsletters or cork bulletin boards.⁸³ The article anticipated complications resulting from recognizing government-maintained social media pages as forums—agencies might hesitate to engage on social media at all, for fear of being constitutionally obligated to tolerate disruptive speakers—and found the existing forum doctrine to be ill-suited to the interactive pages of Facebook groups, where government and citizen speech coexist side-by-side.⁸⁴ Since that prophetic article, the need to clarify the legal status of government-run Facebook and Twitter accounts has only intensified, as social media becomes the primary way in which public officials reach their constituents.⁸⁵

In recent years, the forum nature of Twitter and Facebook accounts was squarely at issue in the First Amendment claims brought by speakers who were blocked from posting comments to, or reading, pages maintained by government officials.⁸⁶ The most prominent of these, *Knight First Amendment Institute of Columbia University v. Trump*,⁸⁷

81. See *Government Terms: Amended Terms for Federal, State and Local Governments in the United States*, FACEBOOK, https://www.facebook.com/terms_pages_gov.php (last visited Nov. 10, 2019).

82. See Clay Calvert, *The Government Speech Doctrine in Walker’s Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 WM. & MARY BILL RTS. J. 1239, 1245 (2017).

83. Lidsky, *supra* note 61, at 1980.

84. Lidsky, *supra* note 61, at 2024.

85. See Katie Blevins & Kearston L. Wesner, *Access to Government Officials in the Age of Social Media*, 1 J. CIVIC INFO. 30, 38 (2019) (“Being able to view and respond to policy announcements and statements associated with the officials’ duties is critical to participatory government.”). In a rare foray into online speech, the Supreme Court recognized that social networking sites function as “the modern public square” and that they “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

86. See, e.g., *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019) (President Trump’s blocking Twitter users from his account); *Robinson v. Hunt Cty.*, 921 F.3d 440, 452 (5th Cir. 2019) (Hunt County Sheriff’s Office’s blocking a Facebook user from its account); *Davison v. Randall*, 912 F.3d 666, 676 (4th Cir. 2019) (Loudon County Board of Supervisors Chair’s blocking a Facebook user from her page).

87. 928 F.3d 266 (2d Cir. 2019)

presented especially challenging facts, because the Twitter account at issue, @realDonaldTrump, was created in March 2009, nearly eight years before Trump was elected to public office, and originated as a promotional vehicle for his personal views.⁸⁸ Nevertheless, the Second Circuit U.S. Court of Appeals readily concluded that the account became a designated public forum by virtue of the way it functioned during Trump's presidency beginning in 2017.⁸⁹ The judges noted that publicly salaried White House staff members helped manage the account, and that President Trump used the account to transact official business: "The Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation."⁹⁰

Although the consensus of the courts is not unanimous,⁹¹ the Second Circuit's holding aligns with rulings from Virginia,⁹² Wisconsin⁹³ and Missouri⁹⁴ in concluding that a government-maintained social media page, on which the public is permitted to post comments, constitutes a limited or designated public forum. Because social media pages lack the durability of traditional government property—in a matter of seconds, the accountholder can disable or discontinue a page, delete any or all postings, or change its settings to exclude public interaction—a formerly "designated" forum might be closed, or cease to exist, with a few taps on a touch-screen. Because so many more designated public forums have come into existence as governments migrate to social media for official-business communications, it is more important than ever for government

88. *Id.* at 231.

89. *Id.* at 237.

90. *Id.*

91. *See, e.g., Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011–13 (E.D. Ky. 2018) (declining claim for injunctive relief brought by citizens blocked from Kentucky governor's Facebook page, because Facebook is a privately owned communication channel and the governor, like any user, may decide which messages to read and which to ignore).

92. *See Davison*, 912 F. 3d at 683–85 (affirming district court's determination that Facebook page maintained by chair of county commission for official business communications and made accessible for public interaction became a designated public forum, from which the plaintiff could not be excluded based on his critical views).

93. *See One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 954, 956 (W.D. Wis. 2019) (finding that the First Amendment prohibited state legislators from selectively blocking only liberal critics from reading and responding to their official Twitter posts because the "interactive portions" of those accounts constituted a designated public forum).

94. *See Campbell v. Reisch*, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at *6 (W.D. Mo. Aug. 16, 2019) (following Second Circuit's *Knight* decision and deeming Twitter account controlled by state legislator to be a public forum); *see also Leuthy v. LePage*, No. 1:17-cv-00296-JAW, 2018 WL 4134628, at *16–17 (D. Me. Aug. 29, 2018) (declining to follow Kentucky's *Morgan* ruling and denying governor's motion to dismiss First Amendment claim brought by critics blocked from accessing his official Facebook page).

decision makers to have clear judicial guidance about when a page may be deactivated.

II. A FUNNY THING HAPPENED: WHEN GOVERNMENT CLOSES A FORUM

In a traditional public forum, such as a park or public street, it is well-established that government may not close off all expressive use, unless the property fundamentally changes in character so as to lose what made it a forum in the first place (for instance, a park is sold to a private housing developer).⁹⁵ In a case involving an attempt to declare swaths of public sidewalks outside the U.S. Supreme Court building in Washington, D.C., to be off-limits to protest marches and demonstrations, the Court called it “presumptively impermissible” to destroy a traditional public forum by re-labeling it legislatively, elaborating:

Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.⁹⁶

A designated public forum is not quite so durable, but just how durable remains in question. The Supreme Court has never confronted the issue of when, if ever, a government agency’s decision to close a designated public forum could give rise to a First Amendment claim by a would-be speaker.⁹⁷ Nevertheless, some lower courts have extrapolated from *dicta* in a handful of Supreme Court cases to conclude that no such claim exists.

The starting point is *Perry Education*.⁹⁸ There, the Court included what reads like a throwaway observation in the course of explaining the public forum doctrine, which over time has taken on outsized

95. Jordan E. Pratt, *An Open and Shut Case: Why (and How) the Eleventh Circuit Should Restrain the Government’s Forum Closure Power*, 63 FLA. L. REV. 1487, 1498 (2011). See also *Jacobson v. U.S. Dep’t of Homeland Sec.*, 882 F.3d 878, 884 (9th Cir. 2018) (finding that protesters excluded from roadside near Border Patrol checkpoints were entitled to discovery to test government’s claim that character of roadside had been sufficiently transformed through Border Patrol’s restrictive use to deprive it of traditional public forum status).

96. *United States v. Grace*, 461 U.S. 171, 180 (1983). See also *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003) (applying *Grace*’s presumption against the closure of traditional public forum property, where a city tried to restrict speech in an open-air pedestrian mall that had been fashioned out of public streets, a quintessential public forum).

97. See Timothy Zick, *Property As/And Constitutional Settlement*, 104 NW. U. L. REV. 1361, 1411 (2010) (“The Supreme Court has never addressed a public forum closure.”).

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

significance: “Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”⁹⁹ Since *Perry Education* was not about the closure of a forum at all—the teacher mailboxes were determined to be a nonpublic forum, to which no outside speaker could stake a claim—the passage is entirely *dicta*,¹⁰⁰ yet it has become the wobbly foundation on which a growing body of First Amendment caselaw is built.¹⁰¹ *Perry Education*’s reasoning, in turn, relied on the Supreme Court’s 1968 ruling in *United States v. O’Brien*,¹⁰² in which the Court declined to second-guess Congress’ reason for criminalizing the destruction of a military draft card, finding that the statute was facially neutral and justified by nonspeech concerns.¹⁰³

As discussed in Section V, *infra*, neither *O’Brien* nor *Perry Education* can legitimately be read for the broad proposition that a claim of retaliatory forum closure is unreviewable. Nevertheless, this notion has taken hold in a handful of post-*Perry Education* decisions, depriving speakers of recourse even when the cause-and-effect between their speech and the revocation of forum status is undisputed.

A. *The Fourth Circuit View: Government’s Motive Irrelevant*

1. The *City of Lexington* Case: Closure in Response to Divisive Political Speech

In recent years, a handful of courts have afforded government agencies a free hand to close access to a designated public forum, even in the face of evidence that the closure was motivated by distaste for a particular speaker’s message. The most prominent of these involved the display of banners hung from lampposts in the city of Lexington, Virginia.¹⁰⁴

In January 2011, a Southern heritage organization, the Sons of Confederate Veterans (“SCV”), held a parade through Lexington to commemorate the births of Civil War commanders Robert E. Lee and Thomas J. “Stonewall” Jackson.¹⁰⁵ As part of the commemoration, the

99. *Id.* at 46.

100. *See id.* Indeed, in the *Perry Education* case, the parties *agreed* that the internal mail system could lawfully be closed to all outsiders, *see id.*, so that question was not before the Court at all.

101. *See Pratt, supra* note 95, at 1503 (“[A]n expansive interpretation of the forum closure power recognized in *Perry* is improvident insofar as it might permit the government to close a forum in retaliation against a speaker’s viewpoint.”).

102. 391 U.S. 367 (1968).

103. *Id.* at 375.

104. *Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 226 (4th Cir. 2013).

105. *Id.*

SCV obtained permission from the city to hang its Confederate flag from city light poles, a privilege the city had afforded to other community organizations. In response to negative feedback from community members incensed by the flags' display, Lexington's city council voted to discontinue the practice of making lampposts available for community displays—in effect, closing the forum.¹⁰⁶ Hoping to make its display an annual event, the SCV organization sued, alleging that the closure was viewpoint-motivated.¹⁰⁷

The Fourth Circuit had no difficulty categorizing the city-owned lampposts as a designated public forum, noting that private speakers had been permitted to use the posts for expressive purposes from 1994 until 2011.¹⁰⁸ Nevertheless, the court found no First Amendment violation in the decision to rescind public access.¹⁰⁹

While acknowledging that the decisionmaker's motive is often a factor in deciding whether a facially neutral policy violates the Constitution, the court said First Amendment cases involving the management of public forum property belong in their own category.¹¹⁰ The court held that to require the city to indefinitely continue accepting banners from outside groups could produce the “absurd” result of the city being crowded out from using its own property, to carry its own message, if a speaker insisted on occupying the space:

A government is entitled to close a designated public forum to all speech. . . . [I]t appears that the City experimented with private speakers displaying flags on the City's standards, and that effort turned out to be troublesome. It was entitled, under the controlling principles, to alter that policy.¹¹¹

2. The Underpinnings of *City of Lexington*: How Courts Concluded that Motive is Irrelevant

Like the handful of other forum-closure cases, in which courts have eschewed inquiring into the decision-maker's motivation, the *City of Lexington* case began with the throwaway passage from *Perry Education*, which the Fourth Circuit characterized as “recognizing that government is not required to retain open nature of designated public forum.”¹¹² That is an accurate description of *Perry Education*, so far as it goes—but it

106. *Id.* at 226–27.

107. *Id.* at 227.

108. *Id.* at 230.

109. *Id.* at 232–33.

110. *Id.* at 232.

111. *Id.*

112. *Id.* at 231 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

requires a leap from “not required to retain” to “close for any reason, even a viewpoint-discriminatory reason.” For good measure, the Fourth Circuit relied on *dicta* from a Third Circuit case, *United States v. Bjerke*,¹¹³ which quoted the *Perry Education dicta*.¹¹⁴ Like *Perry Education*, *Bjerke* involved a nonpublic forum not analogous to the Lexington lampposts.¹¹⁵ Each of the other forum-closure cases cited in *City of Lexington* likewise involved a nonpublic forum, and each of them quoted the *dicta* from *Perry Education* for the proposition—also *dicta*—that the government may close a designated forum at will.¹¹⁶ Indeed, each case that is commonly cited for the conclusion that a designated public forum may be closed for even a retaliatory reason says no such thing.

Take the Seventh Circuit’s oft-cited *Grossbaum v. Indianapolis-Marion County Bldg. Authority* case,¹¹⁷ relied on by the district court in the (now-overruled) *Koala* decision,¹¹⁸ discussed in detail *infra* at Sec. IV. In *Grossbaum*, the Seventh Circuit undertook a detailed analysis of the role of the government’s motive when speakers allege retaliation by way of denied access to public property.¹¹⁹ The *Grossbaum* court upheld a municipal policy prohibiting displays in the lobby of a city-owned building—a space that the court deemed to be a nonpublic forum, where regulations need be only reasonable and viewpoint-neutral.¹²⁰ The city banned all displays in response to a successful constitutional challenge to a prior version of the city’s policy, which prohibited only religious displays.¹²¹ The plaintiff in that original suit, who sought to use the lobby for a Jewish holiday display, alleged that the across-the-board ban was

113. 796 F.3d 643 (3d Cir. 1986).

114. *See id.* at 647. The Third Circuit’s citation to *Perry* was a mere passing remark included in boilerplate discussion of the legal standards corresponding to each category of forum property.

115. *See id.* The *Bjerke* case involved regulations on solicitation on the sidewalk outside a U.S. Post Office, which the Third Circuit—following the Supreme Court’s lead in *United States v. Kokinda*, 497 U.S. 720 (1990)—determined to be a nonpublic forum..

116. *See Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (concluding that general delivery mail service is a nonpublic forum and therefore, under a reasonableness standard, the government may freely discontinue offering general mail delivery services to homeless people without permanent addresses); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004) (finding that waiting room in welfare office was nonpublic forum from which solicitors could freely be excluded). The *Turner* case is inapplicable for the additional reason that it involves the selective exclusion of speakers—nonprofit advocacy organizations—from a nonpublic forum, rather than the total closure of a limited public forum.

117. 100 F.3d 1287 (7th Cir. 1996).

118. *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 WL 784183, at *7–9 (S.D. Cal. Feb. 28, 2017), *rev’d and vacated*, 931 F.3d 887 (9th Cir. 2019).

119. 100 F.3d at 1292–96 (considering under what circumstances the motives of government actors are relevant in a constitutional analysis).

120. *Id.* at 1298–99.

121. *Id.* at 1290.

enacted in retaliation for his having sued over the religious-based ban that was held unconstitutional.¹²²

The *Grossbaum* court declined to entertain the retaliation theory.¹²³ The judges drew a categorical distinction between an executive act targeting a specific individual speaker (which can be unlawfully retaliatory), versus a legislative enactment of general applicability (which, in the court's view, cannot).¹²⁴ The court focused on the effect of the rule in question, closing access to the forum entirely, in a way that equally disadvantaged all speakers,¹²⁵ and compared that to the City of Jackson's decision, a generation earlier, to close public swimming pools to avoid desegregating them, upheld by the Supreme Court in *Palmer v. Thompson*.¹²⁶ In the *Koala* case, involving withdrawal of student-fee support for campus publications, the district court summarized *Grossbaum* as supporting the notion that "in a First Amendment Free Speech case motive plays no role in assessing a content-neutral regulation of speech in a limited public forum."¹²⁷ But that is overstated in two respects: First, *Grossbaum*'s discussion of forums other than nonpublic forums is *dicta*, and second, *Grossbaum* limits its rationale to the analysis of a "prospective, generally applicable rule."¹²⁸

As an example of the type of government action that remains amenable to a retaliation challenge, the *Grossbaum* court posited a scenario where, instead of forbidding everyone from posting displays in the lobby, the city "prohibited all lobby displays by groups that had put up displays during the previous December," which would carry the taint of retaliatory targeting.¹²⁹ "[G]overnment officials cannot," the *Grossbaum* court concluded, "escape a retaliation claim simply by dressing up individualized government action to look like a general rule."¹³⁰ In other words, even the case that most strongly suggests that motive is irrelevant when a government agency closes a forum does not end up shutting that door very tightly.

As in the *Grossbaum* opinion, the hoary *Palmer* case lives on in a handful of forum-closure cases, despite its doubtful vitality. *Palmer* provided crucial support for the decision to consider the decisionmaker's retaliatory motive in *Gay Guardian Newspaper v. Ohoospee Regional*

122. *Id.*

123. *Id.* at 1296.

124. *Id.* at 1295.

125. *See id.* at 1298.

126. 403 U.S. 217, 224–26 (1971), *cited in Grossbaum*, 100 F.3d at 1293.

127. *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 WL 784183, at *7 (S.D. Cal. Feb. 28, 2017), *rev'd and vacated*, 931 F.3d 887 (9th Cir. 2019).

128. *Grossbaum*, 100 F.3d at 1295.

129. *Id.*

130. *Id.*

Library.¹³¹ In that case, a public library in rural South Georgia removed a table from the lobby, where publishers had been afforded the opportunity to leave free publications for the public, specifically in response to patron complaints about one of the news publications, *The Gay Guardian*.¹³² The district judge declined to recognize the newspaper's First Amendment claim.¹³³ The court relied, in part, on the reasoning of the *Palmer* pool-closing case to conclude that the motive for closing a forum is irrelevant "[a]bsent any evidence that a facially neutral closure (or partial closure) policy bears the *effect* (in contrast to intent) of singling out an 'unwanted' speaker[.]"¹³⁴

Though it is less than two decades old, the *Gay Guardian* decision looks timeworn under the bright light of contemporary scrutiny. In inflammatory language, scarcely at home in a judicial opinion, the court invokes the bogeyman of the North American Man/Boy Love Association, or NAMBLA, to suggest that if newspapers catering to gay audiences are allowed into libraries, twelve-year-olds will soon be gleefully biking home with literature advocating pedophilia.¹³⁵ The opinion goes on to speculate that the library's liability insurance premiums might rise because of the concerns that "violent 'straights' could lurk about waiting to 'straighten out' patrons who browse free copies of *The Gay Guardian*," a speculatively slender justification on which to hang a First Amendment ruling.¹³⁶

The *Gay Guardian* ruling quotes extensively from—but misses the heart of—a Maine district court's ruling dismissing the First Amendment claims of two would-be broadcasters denied access to the airwaves when their city council temporarily shut down the public-access station.¹³⁷ There, the court afforded the city discretion to temporarily close the channel—a designated public forum—while consulting with counsel to formulate new standards for the channel in response to an earlier First Amendment lawsuit.¹³⁸ But, crucially, the court indicated that proof of viewpoint-based retaliation against specific speakers would make it a different case: "Certainly if [the city] were to shut down the public access channel temporarily so as to stifle discussion of a particular current controversy, with plans to reopen the channel later after the controversy had subsided, or so as to stifle the particular speech of this plaintiff, that shutdown would be speaker and viewpoint censorship and would violate

131. 235 F. Supp. 2d 1362 (S.D. Ga. 2002).

132. *Id.* at 1363–64.

133. *Id.* at 1379.

134. *Id.* at 1375–76 (emphasis in original).

135. *See id.* at 1371.

136. *Id.* at 1375.

137. *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 50–53 (D. Me. 2002).

138. *Id.* at 53.

the First Amendment under any analysis.”¹³⁹ That, of course, was exactly the case in *Gay Guardian*, where everyone agreed that excluding the gay-themed content of the newspaper was the library’s purpose in closing the forum.¹⁴⁰

More to the point legally, *Gay Guardian* is not really a “public forum closing” case. The court, after equivocating about the status of the lobby and the literature table, concluded that the lobby area fell into a never-before-recognized “hybrid” category between a limited public forum and a nonpublic forum, in which the government gets greater latitude than in a case involving an actual forum.¹⁴¹ Nor is *Gay Guardian* a case about the irrelevance of motive. The court’s discussion is, indeed, about *nothing but* motive.¹⁴² The judge extensively discusses, and at times fancifully speculates about, all of the reasons a public library might not want to continue offering an all-comers literature table.¹⁴³ *Gay Guardian*, in the end, turns out to be about the reasonableness of the decisionmaker’s plausible non-retaliatory motive, and about the accessibility of alternative means of communication—not about the irrelevance of motive.¹⁴⁴

Besides these frequently cited cases, a handful of other rulings suggest (though do not squarely hold) that the motive for discontinuing a designated public forum is beyond the purview of courts to review.¹⁴⁵ In a dispute over allowing the public to display religious imagery in the Georgia Capitol rotunda, the 11th Circuit suggested that, if the State of Georgia feared being held liable for an Establishment Clause violation, the State could instead close the rotunda to all speakers.¹⁴⁶ Similarly, the First Circuit, in a nonpublic forum case involving access to advertising spaces on city buses, stated in *dicta* that, even if the advertising program had operated as a designated public forum, the city would have been free

139. *Id.* at 51, 53 (“It is true that a city should not be able to shut down a park or a bandshell temporarily so as to avoid a particular speech or a particular concert—that is not a viewpoint neutral measure and violates the First Amendment. But a city should be able to close a public park for six months—because of sewage problems or crime or erosion—without worrying whether the shutdown is narrow enough to avoid undue impact on people who want to speak in the park and whether there are ample alternative channels for them.”). Notably, the *Rhames* court also relied in part on the reasoning of the *Palmer* pool-closing case, which the judge described as furnishing an “interesting analogy.” *Id.* at 50 n.4.

140. *Gay Guardian*, 235 F. Supp. 2d at 1365.

141. *Id.* at 1370.

142. *Id.* at 1369–70.

143. *Id.* at 1369–71.

144. *See id.* at 1376, 1378 (concluding that avoiding entanglement in controversy is a legitimate motive for eliminating a designated forum, and that the plaintiff had alternative means of getting out his message, including through publicity in other media outlets).

145. *See, e.g.,* Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383, 1394 (11th Cir. 1993); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004); DiLoreto v. Down Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999).

146. *Miller*, 5 F.3d at 1394.

to close it at any time.¹⁴⁷ And, in a dispute over a school district's refusal to accept an advertisement on the outfield wall of a baseball stadium depicting the Ten Commandments, the Ninth Circuit suggested that completely discontinuing advertising would be a "constitutionally permissible solution" to avoid being accused of selectively discriminating against religious speakers.¹⁴⁸

But even these cases do not forswear inquiry into the government's motive for enacting a regulation. In *Miller*, for instance, the court weighed the state's proffered justification—avoiding an Establishment Clause claim by viewers who believed tolerating a display of religious speech lent an impermissible state endorsement to the speech—and found it inadequate to justify a content-based restriction on speech.¹⁴⁹

B. *The Better View: Retaliatory Closure Unconstitutional*

Only a small handful of cases have resulted in an outright ruling that the government may not close a designated public forum if the motivation is to silence a disagreeable speaker.¹⁵⁰ The most explicit of these is *ACT-UP v. Walp*,¹⁵¹ a First Amendment challenge to the Pennsylvania state legislature's decision to shut off public access to the visitors' gallery at the House of Representatives chamber.¹⁵² The move indisputably was motivated to prevent a particular disfavored group, AIDS-awareness activists, who had been demonstrating outside the Capitol, from gaining access to the gallery during the governor's address to the legislature, fearing that the activists would disrupt the speech.¹⁵³ Determining that the gallery was a limited public forum, the district court found the closure was unconstitutional: "Here, the government admits that the closing of the gallery, though closed to everyone, was aimed at preventing the ACT-UP members access. This is a content-based restriction, and thus any time, place, and manner limits used to carry out the restriction are invalid."¹⁵⁴

Similarly, a district court in Missouri found that a Ku Klux Klan chapter in Kansas City could challenge the city's decision to delete a public-access television channel specifically to allow the cable franchise-holder to avoid airing a Klan-produced talk show that it would otherwise

147. *Ridley*, 390 F.3d at 77.

148. *DiLoreto*, 196 F.3d at 970.

149. 5 F.3d at 1394–95.

150. See *ACT-UP v. Walp*, 755 F. Supp. 1281, 1289 (M.D. Pa. 1991); *Mo. Knights of the Ku Klux Klan v. Kan. City*, 723 F. Supp. 1347, 1353 (W.D. Mo. 1989).

151. 755 F. Supp. 1281 (M.D. Pa. 1991).

152. *Id.* at 1284.

153. *Id.*

154. *Id.* at 1289 (citation omitted).

be obligated to carry.¹⁵⁵ The court found the decision legally indistinguishable from a decision to selectively exclude an unwanted speaker based on content or viewpoint, and applied a similarly skeptical review:

[T]he Constitution forbids a state to enforce exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Whether the exclusion is accomplished by individual censorship or elimination of the forum is inconsequential; the result is the same. A state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment.¹⁵⁶

While no circuit court has squarely addressed the issue, the First Circuit has indicated, in *dicta*, that a First Amendment claim can lie where a government agency closes a formerly public forum to shut down disfavored speech: “Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the messages being communicated in it.”¹⁵⁷ But in that case, challenging a public university’s purportedly retaliatory decision to stop subsidizing student legal services, the court declined to find that a legal-aid clinic represents a “forum” for expression.¹⁵⁸ Rather, the court treated the case as a matter of “subsidized speech,” and held that the government had a freer hand to discontinue financially supporting speech than it does to close a forum.¹⁵⁹

More commonly, courts have inquired into the decisionmaker’s motive when a traditional, rather than designated, public forum is closed to speech. For example, a district court in Michigan looked beyond the facial neutrality of the decision to the government’s invidious purpose in a case brought by anti-abortion protesters who were denied access to their former protest zone near an abortion clinic.¹⁶⁰ The court found that the protesters could mount a First Amendment challenge to the city’s

155. *Mo. Knights of the Ku Klux Klan v. Kan. City*, 723 F. Supp. 1347, 1350 (W.D. Mo. 1989).

156. *Id.* at 1352 (citations omitted).

157. *Student Gov’t Ass’n v. Bd. Of Trustees of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989).

158. *Id.* at 477.

159. *See id.* at 480. The *UMass* decision predated the Supreme Court’s 1995 declaration in *Rosenberger* that student activity fees constitute a limited public forum, and the First Circuit did not analyze the fee system in that way. The plaintiff’s claim was that the legal-services organization, not the fee system, represented the closed forum. After *Rosenberger*, the continued vitality of the *UMass* case is doubtful.

160. *Thomason v. Jernigan*, 770 F. Supp. 1195, 1196 (E.D. Mich. 1991).

decision to deed away ownership of a formerly public walkway with the express purpose of depriving the protesters of a right to use the property.¹⁶¹ The city relied on the *Palmer* pool-closing case to argue that its closure of the forum was unreviewable,¹⁶² but the court was unpersuaded.¹⁶³ While the city's conveyance of the property was facially content-neutral, and no future demonstrator could claim a First Amendment entitlement to use the now-private area, the court found that the decision was in fact content-based because only anti-abortion activists used the space and only they would be affected by its loss.¹⁶⁴ Although cases involving traditional public forums may be distinguishable because there is clear Supreme Court precedent disfavoring the closure of traditional public forums, it is worth noting that the Supreme Court has said the same First Amendment standards apply to public forums whether they attain that status by tradition or by designation.¹⁶⁵

III. AN UNFUNNY THING HAPPENED: THE *KOALA* CASE

Advocating for the First Amendment rights of silenced speakers, at times, requires adeptness at nose-holding. Breakthroughs in the law of free expression owe their existence to pornographers,¹⁶⁶ Klansmen,¹⁶⁷ anti-gay religious extremists,¹⁶⁸ and purveyors of graphic dog-fighting videos.¹⁶⁹ Alongside the aforementioned cases, the editorial content of the long-running UC-San Diego shock-humor magazine, *The Koala*, may seem like tame stuff.

The Koala is a publication that intentionally sets out to push boundaries of taste, judgment, maturity, and decency.¹⁷⁰ In that objective,

161. *Id.* at 1201.

162. *Id.* at 1200.

163. *Id.* at 1200–01.

164. *Id.* at 1201.

165. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998).

166. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that a public figure may not recover for the tort of intentional infliction of emotional distress by reason of publication of a parody portraying respondent engaged in a drunken incestuous rendezvous with his mother in an outhouse).

167. See *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (holding a Virginia Statute, which establishes as prima facie evidence of a felony offense cross-burning with the intent to intimidate a person or group of persons, violates the First Amendment).

168. See *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (finding the First Amendment protected Westboro Baptist parishioners, who traveled to picket the funeral of a Marine Lance Corporal, from tort liability).

169. See *United States v. Stevens*, 559 U.S. 460, 481–82 (2010) (holding a statute which made it a crime to knowingly create, sell, or possess a depiction of animal cruelty was overbroad under the First Amendment).

170. See *New UCSD racial incident sparks rage, confrontation*, SAN DIEGO UNION-TRIB. (Feb. 20, 2010, 12:35AM), <https://www.sandiegouniontribune.com/sdut-new-ucsd-racial-incident-sparks-rage-confrontation-2010feb20-htmlstory.html>.

it succeeds rousinglly. The magazine and its since-shuttered, closed-circuit affiliate, *Koala TV*, were denounced in 2010 for outlandish racial stereotyping in promoting a “ghetto-themed” fraternity party (the “Compton Cookout”).¹⁷¹ In 2014, the magazine provided “coverage” of a fictional “Sexual Assault Olympics” competition among fraternities: “Whichever frat has the most points at the end of the year wins the ‘Golden Roofie’ trophy and a six-month supply of morning-after pills.”¹⁷²

Following the 2010 outcry, the president of UCSD’s student government association shut down the television station and froze funding for all student media organizations, acknowledging that the actions were a direct response to *The Koala*’s print and broadcast content.¹⁷³ Several weeks later, the student government association vacated the freeze, and *The Koala* resumed receiving its student activity fee subsidy.¹⁷⁴

The 2010 uproar over *The Koala*’s outlandish content was the backdrop for the events of 2015, which finally provoked UCSD administrators to find a way to cut off the magazine’s (relatively small) subsidy from student fees.¹⁷⁵ In its November 2015 issue, *The Koala* crudely satirized the nationwide trend of recognizing “safe spaces” on college campuses where people from traditionally marginalized and disempowered communities can express themselves without fear of judgment from their peers.¹⁷⁶ In *The Koala*’s parody version of events, the university announced the creation of a “dangerous space” where people could come to be bombarded with racial, religious and gender-based epithets, each of which the magazine supplied in graphic detail.¹⁷⁷ UCSD administrators decided this went a step too far. Two days after *The Koala* hit the news racks, the president’s office issued a statement sternly denouncing the issue’s “offensive and hurtful language.”¹⁷⁸

That same evening, UCSD’s student Senate, known as Associated Students, held its regularly scheduled business meeting, where the vice chancellor for student affairs read the statement upbraiding *The Koala* to the assemblage.¹⁷⁹ At that meeting, and following the vice chancellor’s

171. *Id.*

172. *UCSD Frats Compete in the “Sexual Assault Olympics,”* 96 THE KOALA 1, at 9, <https://thekoala.org/wp-content/uploads/2015/11/2015-FA-1.pdf>.

173. Kerry L. Monroe, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J. L. REFORM 985, 986 (2011).

174. *Id.*

175. *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2016 WL 6441470, at *2 (S.D. Cal. Nov. 1, 2016) [hereinafter *Koala I*].

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

presentation, the Senate introduced and passed a previously un-discussed regulation, “the Media Act,” declaring that no student organization could receive student activity fees to subsidize a print publication.¹⁸⁰ In a form of collateral damage, four student publications besides *The Koala* also lost funding, including a journal showcasing undergraduate student research and a student-produced fashion magazine.¹⁸¹

A. District Court Rulings

The Koala’s First Amendment case made its first appearance in federal district court in November 2016, with the plaintiffs seeking a preliminary injunction restraining the university from giving effect to the Senate’s media-funding policy.¹⁸² The magazine’s case did not go well. U.S. District Judge Jeffrey T. Miller first determined that the student editors’ claims were precluded by the 11th Amendment to the extent that they sought an order from a federal court compelling a state agency to fund a discretionary program.¹⁸³ Getting to the core First Amendment issue, the judge then turned to defining the scope of the limited public forum at issue, and concluded that the forum was properly understood as “Associated Students’ funding of student print publications.”¹⁸⁴ The court cited the Supreme Court’s *Cornelius* for the proposition that the scope of the form depends on what the speaker is claiming a right to use.¹⁸⁵ With that understanding, the court determined that discontinuing financial support for all print publications was both content-neutral and viewpoint-neutral, because it disadvantaged all publications equally.¹⁸⁶ But the court did not, at that juncture, categorize what the university did as the closure of a forum,¹⁸⁷ an issue that would arise later.¹⁸⁸ Finding that *The Koala* was unlikely to succeed on the merits of a First Amendment claim, the court denied relief.¹⁸⁹

180. *Id.*

181. See *The UCSD Guardian View on A.S. Defunding: Student Media or Nah*, THE UCSD GUARDIAN (Nov. 24, 2015), <http://ucsdguardian.org/2015/11/24/the-ucsd-guardian-view-on-a-s-defunding-student-media-or-nah/>.

182. *Koala I*, 2016 WL 6441470, at *1.

183. *Id.* at *3–4.

184. *Id.* at *5.

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

186. *Id.* at *6 (relying by distinction on the Supreme Court’s *Rosenberger*, where the court found that a subset of religious-themed publications were singled out for selective disqualification from eligibility for student activity fees).

187. *Id.* at *5–6.

188. See *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 WL 784183, at *5 (S.D. Cal. Feb. 28, 2017), *rev’d and vacated*, 931 F.3d 887 (9th Cir. 2019) [hereinafter *Koala II*].

189. *Koala I*, 2016 WL 6441470, at *6.

The court gave no weight to *The Koala*'s introduction of unfavorable comments about the magazine made by Senate members and university administrators accompanying the November 18 vote, which in the plaintiff's view tainted the vote with retaliatory animus: "Plaintiff fails to cite legal authorities where the motivation, and not the conduct, of some government actors . . . is determinative of First Amendment issues in [the] context of a limited public forum."¹⁹⁰ The court did not cite any countervailing authority, but instead, pointed to the continued ability of "a computer-literate student body" to obtain access to the magazine's online edition, which was not subsidized by the UCSD printing grant.¹⁹¹

A few months later, the case was back before Judge Miller on its merits.¹⁹² In that decision ("*Koala II*"), the court dealt squarely with the issue that *Koala I* only hinted at: If funding for student publications is the forum, can a university close that forum at will, even if the closure is motivated by distaste for one particular publication's content?¹⁹³ The court decided that the answer is "yes."¹⁹⁴ Distinguishing the more selective, content-based exclusion in *Rosenberger*, the court concluded "there is no doubt that the elimination of funding for all print publications is viewpoint neutral."¹⁹⁵ Once again quoting the dicta in *Perry*, the U.S. District Court for the Southern District of California relied on the Ninth Circuit's *Currier v. Potter* for the proposition that "in the case of a designated public forum, the government may close the forum whenever it wants."¹⁹⁶ The court went on to discount *The Koala* editors' evidence of an invidious motive by Senate decisionmakers targeting *The Koala* on the basis of viewpoint, finding no proof of a causal connection between UCSD officials' viewpoint-based criticism of the magazine and the senators' votes.¹⁹⁷

The opinion describes the Media Act as "a content neutral policy of general applicability affecting all [student organizations] seeking media publication funds."¹⁹⁸ While that is one way to look at it—a way that makes the act fit within the scope of what *O'Brien* suggests is unreviewable—it is not the only way. It is also possible to look at the decision as selectively denying a handful of student organizations the ability to compete for student activity fees for the sole reason that they

190. *Id.*

191. *Id.* at *6 n.2.

192. See generally *Koala II*, 2017 WL 784183.

193. *Id.* at *4.

194. *Id.* at *7.

195. *Id.* at *5.

196. *Id.* (citing *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004)).

197. *Id.* at *6–7. The Court also notes "the precise definition [of the forum] is less determinative than whether the Media Act is viewpoint neutral and reasonable in light of the purpose of the forum." *Id.* at *4 n.3.

198. *Id.* at *8.

plan to use the money to publish their views. Did the university really close a forum, or did it selectively exclude a subclass of speakers from a forum? This uncertainty set the stage for appellate review.

B. *The Ninth Circuit Ruling*

The *Koala* case reached the Ninth Circuit against a backdrop of ambiguous First Amendment precedent. The Ninth Circuit has given contradictory indications about the relevance of motivation in public-forum cases.¹⁹⁹ The *Currier* case,²⁰⁰ relied on by the district court, indicated in *dicta* that the government may freely close a designated forum at any time²⁰¹—an assertion that the Ninth Circuit subsequently cited in a failed First Amendment challenge to a California ordinance restricting banners across public streets.²⁰² But other Ninth Circuit cases point in the opposite direction. In *Gerritsen v. City of Los Angeles*,²⁰³ the court found that a plaintiff could challenge what he believed to be the retaliatory enactment of a city prohibition on hand billing in the portion of the public park where he had been handing out flyers critical of the Mexican government.²⁰⁴ And in *United States v. Griefen*,²⁰⁵ the court—while rejecting a First Amendment challenge to a regulation closing off portions of a national forest that anti-logging activists had been using for protests—recognized that, in other contexts, the government’s reason for closing a forum could be decisive:

Our holding does not imply that an order that closes a public forum is sacrosanct. Should it appear that the true purpose of such an order was to silence disfavored speech or speakers, or that the order was not narrowly tailored to the realities of the situation, or that it did not leave open alternative avenues

199. See *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004); *United States v. Griefen*, 200 F.3d 1256, 1265 (9th Cir. 2000); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 580 (9th Cir. 1993).

200. *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004).

201. *Id.* at 728.

202. See *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006) (relying on *Currier* for the proposition “that the government may close a designated public forum ‘whenever it wants’”). There, too, the discussion was *dicta*. The plaintiffs were challenging a version of the city ordinance that selectively excluded certain speakers from hanging banners across city streets, not a subsequent forum-closing ordinance that excluded all speakers—a decision that mooted the challenge to the earlier, superseded ordinance. See generally *id.* at 1029–32.

203. 994 F.2d 570 (9th Cir. 1993) (Because a park is a traditional public forum, the *Gerritsen* case is of only persuasive value as to designated forums.).

204. *Id.* at 580.

205. 200 F.3d 1256 (9th Cir. 2000).

for communication, the federal courts are capable of taking prompt and measurably appropriate action.²⁰⁶

In the *Koala* case, the Ninth Circuit could have straightened out this confusing tangle of non-binding hints—but avoided conclusively doing so.

The court reinstated several of *The Koala*'s First Amendment claims, finding that the district court acted too precipitously in declining to consider whether enactment of the Media Act was a viewpoint-motivated attempt to silence or punish the editors' speech.²⁰⁷ Apart from the forum question, the court found that the magazine stated an actionable claim under the First Amendment's press clause, because government subsidies were alleged to have been conditioned on the publication's viewpoint.²⁰⁸

Turning to the forum issue, the judges acknowledged Ninth Circuit precedent asserting that government may close a designated or limited forum "whenever it chooses."²⁰⁹ But the *Koala* court avoided deciding the central issue raised by the speakers—whether inquiry into the decisionmaker's motive is foreclosed even when there is evidence that the closure was viewpoint-motivated retaliation—because the court found that the trial judge erred in identifying the boundaries of the forum as "funding for print publications."²¹⁰ The Ninth Circuit found that the student activity fee could not be carved up by legal fiction into subcategories so that a discriminatory selective exclusion from a forum is transformed into the—seemingly unreviewable—closure of a forum.²¹¹ Having concluded that the case was not a "forum closure" case at all, the court had no occasion to decide whether the *Perry* dicta precludes considering the government's reason for discontinuing a designated or limited forum.²¹²

The court concluded that *The Koala* could proceed on a First Amendment retaliation claim, having satisfied all of the elements of a prima facie case: The magazine engaged in constitutionally protected speech, the government responded by denying the magazine eligibility to compete for student activity fees, the magazine suffered a detriment in

206. *Id.* at 1265.

207. *Koala v. Khosla*, 931 F.3d 887, 906 (9th Cir. 2019).

208. *See id.* at 898 ("[T]he First Amendment will not tolerate the administration of subsidy programs with a censorious purpose."); *see also id.* at 899 ("[W]here a complaint alleges that the state singled out the press by withholding a subsidy in response to disfavored speech, the complaint alleges a viable Free Press Clause cause of action.").

209. *See id.* at 900 (citing *Seattle Midcast Awareness Campaign v. King Cty.*, 781 F.3d 489, 496 (9th Cir. 2015)) ("The principal difference between traditional and designated public forums is that the government may close a designated public forum whenever it chooses, but it may not close a traditional public forum to expressive activity altogether.").

210. *Id.* at 903.

211. *Id.* at 904–05.

212. *Id.* at 905.

being forced to discontinue printing, and the enactment of the Media Act was causally connected to the content of the November 2015 magazine.²¹³

The *Koala* case brings into clear focus why speakers excluded from a purportedly closed forum must have constitutional recourse. Because the metes-and-bounds of a forum are so malleable, government agencies can—as UC-San Diego attempted to do—cloak the selective exclusion of a class of speakers in the guise of a “closure.”

IV. *KOALA*, BEARABLE: RETALIATORY FORUM CLOSURE MERITS CONSTITUTIONAL SCRUTINY

Speakers who lack the money and prominence to reach a mass audience through traditional publishing or advertising depend on access to public property to convey their message. As courts have long noted, political protests can be more attention-getting when held in proximity to the place where disputed decisions are being made.²¹⁴ At the University of Virginia, throngs of students, employees, and alumni packed the Charlottesville campus in a 2012 rally to express outrage at the ouster of President Teresa Sullivan, who was reinstated after weeks of outcry.²¹⁵ In Wisconsin, demonstrators opposed to Gov. Scott Walker’s education spending cuts flooded the grounds of the state Capitol in 2011 by the tens of thousands, attracting national headlines.²¹⁶ In these and many other instances, access to public property amplified the effectiveness of political protest. At times, speech can only realistically occur on one occasion in one location—consider, for instance, the case of a Mississippi high-school student prevented from attending the senior prom, a once-in-a-lifetime event, because she intended to bring a female date.²¹⁷ In such instances, the loss of access to a forum can prevent a message from ever being heard. The ability to use public property for expression facilitates spontaneity, enabling speakers to react quickly to developing issues,

213. *Id.* at 906.

214. *NAACP v. City of Richmond*, 743 F.2d 1346, 1350 (9th Cir. 1984) (“[P]rotests frequently occur in response to topical events, and their effectiveness may depend both on their immediacy and the forum where they take place.”); *see also* *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006) (“The ability to communicate a particular message in a particular location can significantly contribute to the effectiveness of that communication.”).

215. Andrew Rice, *Anatomy of a Campus Coup*, N.Y. TIMES MAG. (Sept. 11, 2012), <https://www.nytimes.com/2012/09/16/magazine/teresa-sullivan-uva-ouster.html>.

216. Lila Shapiro, *Wisconsin Protests: State Police Pursue Democratic Lawmakers Boycotting Vote*, HUFFINGTON POST (Feb. 17, 2011, 2:54 PM), https://www.huffpost.com/entry/wisconsin-protests-scott-walker-police_n_824697.

217. *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010).

which is one reason the Supreme Court disfavors open-ended permitting systems that allow the government to delay speech.²¹⁸

The value of access to government conduits for communication came into sharp focus in August 2011 with a series of demonstrations inside the stations of San Francisco's Bay Area Rapid Transit ("BART") system. When city authorities learned of the planned protests, they shut down wireless internet services inside the transit stations in hopes of making it more difficult for organizers to communicate.²¹⁹ Although the shutdown was not litigated in court, it drew condemnation from First Amendment scholars and commentators, reflecting the public's sense of ownership in government-provided Wi-Fi service as a contemporary archetype of the virtual public forum.²²⁰

There is no legally binding obligation for the government to offer free Wi-Fi service on public property. One might say that the government is free to "close that forum" at will—if, for instance, the service becomes too expensive to maintain, is too easily exploited by hackers, or is unnecessary as smartphone owners increasingly rely on their own wireless data plans rather than public networks. But when BART authorities shut down Wi-Fi with the express purpose of interfering with a political protest, the decision was widely regarded as impermissibly motivated and unconstitutional.²²¹ If First Amendment law does not provide for judicial scrutiny of government decisions intended to suppress political dissent, one might ask what else the First Amendment could be meant for.

218. See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002) (characterizing a city ordinance requiring a permit to distribute pamphlets door-to-door as "offensive . . . to the very notion of a free society").

219. Erika J. Pitzel, *Bay Area Rapid Transit Actions of August 11, 2011: How Emerging Digital Technologies Intersect with First Amendment Rights*, 29 GA. ST. U. L. REV. 783, 786 (2013).

220. See Brandon Wiebe, *BART's Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship*, 47 U.S.F. L. REV. 195, 215–16 (2012) (arguing that, because it was motivated by intent to silence protests, BART's decision was a content-based restriction in the designated public forum of wireless internet service and unlikely to survive strict scrutiny if challenged).

221. See Justin Silverman, *BART Phone Blackout: Did the S.F. Transit Agency Violate Free Speech Protections?*, SUFFOLK MEDIA L. (Aug. 27, 2011), <https://suffolkmcls.wordpress.com/2011/08/27/bart-phone-blackout-did-the-s-f-transit-agency-violate-free-speech-protections/> (contending that BART's interruption of wifi service was constitutionally infirm, whether regarded as a content-motivated restraint in the public forum of a transit station or a public wifi network, or whether it is analyzed as a prior restraint on speech).

A. *Why the Government's Purpose Matters*

1. Courts Regularly Consider the Decision Maker's Motive in a Constitutional Analysis

The notion that courts must refrain from second-guessing the motive behind the decision to close a forum runs counter to decades' worth of established First Amendment case law. Motive is relevant not only to the outcome of countless First Amendment cases; it often is decisive.

Motive comes into play at several points of a First Amendment analysis. The reasons offered by the government for a speech-restrictive decision are properly scrutinized when a speaker alleges that the stated justifications are pretextual, and that the real justification was to punish a disfavored speaker or prevent that speaker from being heard. Facial neutrality does not save a regulation on a limited forum from violating the First Amendment when the policy is, in fact, designed to discriminate based on viewpoint.²²² The Eighth Circuit summed it up succinctly, in a case where landowners claimed that a government agency threatened to condemn and acquire their farmland in retaliation for a lawsuit: "An act taken in retaliation for the exercise of a constitutionally protected right is actionable . . . even if the act, when taken for a different reason, would have been proper."²²³ Even in *Cornelius*, a case involving a lesser-protected nonpublic forum, the Supreme Court remanded the case to determine whether the government had engaged in unconstitutional viewpoint discrimination in enacting restrictions on access to a federal charity fundraising platform.²²⁴ And outside the forum context, the government's reason for restricting speech often is material; for instance, the government may not restrict speech to spare the ears of audience members who complain of being offended: "Indeed, if it is the speaker's

222. See *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 812 (1985) (finding that viewpoint-neutral regulations "that [are] in fact based on the desire to suppress a particular point of view[]" will not pass constitutional muster); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (pointing out that regulations that are "an effort to suppress expression merely because public officials oppose the speaker's view[]" are not viewpoint-neutral); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 971 (9th Cir. 2002) (holding that "[i]f the evidence reflects that [viewpoint] is the motivation or intent of the government in enacting [a] regulation, the regulation is viewpoint discriminatory"), *abrogated by Amalgamated Transit Union Local 1015 v. Spokane Transit Auth.*, 929 F.3d 643 (9th Cir. 2019); *Eagle Point Educ. Ass'n v. Jackson Sch. Dist. No. 9*, No. 1:12-cv-00846-CL, 2015 WL 4170188, at *8 (D. Or. 2015) (holding a school district policy disallowing protest on school property in the wake of a teacher labor dispute violative of the First Amendment because, though the policy was facially neutral, the record and timing indicated that the policy was established for viewpoint-discriminatory reasons).

223. *Harrison v. Springdale Water Com'n*, 780 F.2d 1422, 1428 (8th Cir. 1986) (quoting *Matzker v. Herr*, 748 F.2d 1142, 1150–51 (7th Cir. 1984)).

224. *Cornelius*, 473 U.S. at 789.

opinion that gives offense, that consequence is a reason for according it constitutional protection.”²²⁵

Inquiry into motive is indispensable in First Amendment cases, because ill-motivated government actors can readily dress up a targeted act of punishment in the guise of a facially neutral enactment. Take the case of Iowa’s Tinker family—anti-war protesters who, at the height of the Vietnam conflict, sought to express their support for a Christmastime cease-fire by wearing black armbands to school in a silent act of symbolic speech.²²⁶ When the school district became aware of the planned protest, school board members hastily enacted what appeared, on the surface, to be a content-neutral regulation against all types of armbands, justifying the prohibition as necessary to minimize distractions.²²⁷ The ban could have been upheld as incidentally burdening speech, since it applied equally to all armbands, even those worn purely for ornamental purposes conveying no particular message. Nevertheless, the Supreme Court did not hesitate to consider the cause-and-effect context that motivated the school board to act, noting that other comparably distracting items of apparel were left unregulated.²²⁸ Because the school’s self-evident motive was not to minimize distracting behavior but to chill the expression of core political speech—opposition to the Vietnam War—the prohibition was invalid.²²⁹

Even when there is no overt suspicion of viewpoint-based retaliation against particular speakers, the government’s rationale is still weighed and tested to determine whether a speech-restrictive policy is sufficiently tailored to address the wrong that the government claims to be targeting.²³⁰ In *Grace*, a case involving attempts to restrict protest activity on the sidewalk facing the U.S. Supreme Court building, the Court scrutinized the government’s proffered justifications—maintaining order and decorum, and avoiding the appearance that the Court was influenced by public pressure—and found the justifications inadequate to sustain a ban on protest marches.²³¹ Even without evidence that particular speakers were targeted for their viewpoints, the government’s motive came into play, weighing the relative strength of the justification against the amount of speech sacrificed.²³² Because the sufficiency of the government’s justification is central to resolving many First Amendment cases, it is fallacious to suggest that courts cannot or should not inquire into motive.

225. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

226. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

227. *Id.* at 508.

228. *Id.* at 510–11.

229. *Id.* at 514.

230. *United States v. Grace*, 461 U.S. 171, 183–84 (1983).

231. *Id.*

232. *Id.* at 183.

In nearly every area of law in which discrimination is at issue, the courts have recognized that facial neutrality is not necessarily dispositive.²³³ The law of retaliation recognizes that even a relatively benign act can become a constitutional violation when it is motivated by an intent to chill constitutionally protected activity and would cause a person of reasonable fortitude to refrain from further protected activity.²³⁴ Assessing whether an act is unlawfully retaliatory regularly requires scrutinizing the reason given for the act, to determine whether it is genuine or pretextual.²³⁵ In holding that decision maker motive is inconsequential in cases of forum closure, the district court in *Koala* confused something that may be difficult to prove—illicit motivation—for something that would not matter if proven.²³⁶ Now-Justice Kagan made the point adroitly in her article examining the role of motive in First Amendment cases: “[T]he impracticality of this inquiry need not force courts to abandon the goal of invalidating improperly motivated legislation If courts cannot determine motive directly, by exploring what went into the legislative process, perhaps they can determine motive obliquely, by looking at what came out of it.”²³⁷

Similarly, the decision maker’s motivation can be conclusive where a regulation is defended on the basis that its primary target is the non-expressive elements of conduct and that its impact on speech is only

233. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding that in free exercise clause cases, “[f]acial neutrality is not determinative[.]” and “action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (finding that in employment discrimination cases, “[a] willingness to inflict collateral damage by harming some, or even all, individuals from a favored group in order to successfully harm members of a disfavored class does not cleanse the taint of discrimination; it simply underscores the depth of the defendant’s animus.” (citing *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 231 (1964))); *United States v. Goodwin*, 219 F. App’x 709, 712 (9th Cir. 2007) (noting that in cases dealing with discriminatory use of peremptory jury challenges, race-neutral bases for peremptory challenges may still be pretextual, and thus discriminatory).

234. *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (holding that all one needs to establish a claim of retaliation is: (1) engagement in constitutionally protected activity; (2) official actions that would chill an ordinary person from continuing the protected activity; and (3) that engagement in protected activity substantially motivated the official action).

235. See, e.g., *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir. 2002) (“An act taken in retaliation for the exercise of a constitutionally protected right is actionable even if the action would have been proper if taken for a different reason.” (citing *Bloch v. Ribar*, 156 F.3d 673, 681–82 (6th Cir. 1998))); *Richardson v. Pratcher*, 48 F. Supp. 3d 651, 669 (S.D.N.Y. 2014) (holding that, in First Amendment cases, “it is never objectively reasonable to act with retaliatory intent[.]”).

236. See *Koala v. Khosla*, 931 F.3d 887, 899, 906 (9th Cir. 2019).

237. Kagan, *supra* note 1, at 440–41.

incidental. As the Supreme Court said in *Ward v. Rock Against Racism*:²³⁸ “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government’s purpose is the controlling consideration.”²³⁹

The Supreme Court’s recent resolution of a First Amendment challenge to Colorado’s prohibition on discrimination against gays and lesbians, exemplifies how courts must inquire into the decision maker’s motive to determine whether animus to a religious group, or to religiosity in general, was behind the enactment.²⁴⁰ In *Masterpiece Cakeshop*, the Court’s invalidation of a regulation prohibiting retail establishments from denying service based on the customer’s sexual orientation, turned entirely on evidence of the decision maker’s motivation.²⁴¹ Although the Colorado Civil Rights Commission’s regulation did not overtly reference religion, the Court determined that hostility toward religion motivated the Commission’s decision, meaning it was not the product of a fair and neutral process.²⁴² The Court held that the “historical background” to a government decision is relevant to determining whether an agency acted with neutrality or bias toward religion, including “the specific series of events leading to the enactment or official policy in question” and “contemporaneous statements made by members of the decision-making body.”²⁴³ The Court relied on its 1993 resolution of a constitutional challenge to a series of city ordinances restricting the ritual killing of animals, which practitioners of the Santeria faith used in religious rites.²⁴⁴ As in *Masterpiece Cakeshop*, the Court found the city’s motivation there to be a decisive factor: “[T]he laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation’s essential commitment to religious freedom.”²⁴⁵

In striking down part of an Idaho statute restricting newsgathering in and around agricultural operations, the Ninth Circuit considered the legislature’s motivation into determining whether the law could survive strict scrutiny.²⁴⁶ Proponents defended the law as an anti-trespassing measure to protect the security of property that only incidentally

238. 491 U.S. 781 (1989).

239. *Id.* at 791.

240. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

241. *Id.* at 1728–30.

242. *Id.* at 1729–30.

243. *Id.* at 1731 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)).

244. *Church of Lukumi Babalu Aye*, 508 U.S. at 535–36.

245. *Id.* at 524.

246. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1198 (9th Cir. 2018).

burdened speech, but the appeals court was unconvinced.²⁴⁷ Observing that the statute's legislative history indicated intent to suppress information-gathering by journalists and animal-rights activists, the court held:

The record reflects that the statute was partly motivated to protect members of the agricultural industry from persecution in the court of public opinion, and journalists who use exposés to publicly crucify a company. ... [W]e do not ignore that a vocal number of supporters were less concerned with the protection of property than they were about protecting a target group from critical speech[.]²⁴⁸

Beyond the First Amendment, courts regularly consider motive in assessing whether a statute is constitutional. In Equal Protection Clause analysis, for example, courts often must inquire into the motives of policymakers, and even facially neutral enactments will be invalidated if their purpose was to impose a disadvantage on a protected class.²⁴⁹ The Dormant Commerce Clause has been invoked to invalidate state statutes enacted with the purpose of imposing competitive disadvantages on out-of-state business entities.²⁵⁰ Similarly, cases under the Establishment Clause or the Bill of Attainder Clause, may require courts to inquire into the subjective intentions of legislators for possible illicit motives.²⁵¹ One of the primary purposes of the Fourteenth Amendment was to strike down discriminatorily motivated state legislation directed against racial minorities.²⁵² In adjudicating a challenge to Ohio's election laws, for example, the Supreme Court stated, "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law"²⁵³

247. *Id.* at 1192.

248. *Id.* at 1198.

249. *See, e.g.,* *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (reasoning voting district violates Constitution if race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (explaining prosecutor's peremptory challenges are unconstitutional if based solely on purposeful racial discrimination); *see also* *Washington v. Davis*, 426 U.S. 229, 238-39 (1976) (explaining that facially neutral statutes that have a disparate impact on protected minorities are unconstitutional if there is proof of a legislative purpose to discriminate).

250. *City of Phila. v. New Jersey*, 437 U.S. 617, 627-28 (1978).

251. *See, e.g.,* *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (reasoning legislature's "actual purpose" to promote religion invalidates statute); *United States v. Lovett*, 328 U.S. 303, 313-14 (1946) (reasoning circumstances of bill's passage showed that its purpose was to punish particular individuals).

252. *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964).

253. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

2. Supreme Court Precedent Does Not Foreclose Considering Motive

The notion that courts may not scrutinize the motives of government decisionmakers is rooted in caselaw that has either been discredited by time, overruled, or misunderstood.

The Supreme Court's infamous civil-rights-era decision in *Palmer v. Thompson*, finding no Equal Protection Clause violation when the city of Jackson, Mississippi, closed a public swimming pool rather than admit black patrons, is sometimes cited for the proposition that courts should review constitutional challenges to legislative acts without regard for what motivated the legislators.²⁵⁴ In *Palmer*, Justice Hugo Black wrote for a 5–4 majority that evidence of racial animus on the part of Jackson city council members was irrelevant, because the ordinance had the effect of treating all would-be patrons of the pool equally: “[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”²⁵⁵ In a nod to practicality, Black noted the likely “futility” of invalidating an ordinance that “would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.”²⁵⁶ In a vigorous dissent, Justice Byron White enumerated a long list of instances in which the Court has looked beyond the facial neutrality of a challenged decision and invalidated the decision because of its invidious purpose, such as a refusal to sell real estate—a lawful act except where the refusal is motivated by the prospective buyer’s race.²⁵⁷ “Official conduct is no more immune to characterization based on its motivation than is private conduct,” wrote White, “and we have so held many times.”²⁵⁸ In a separate dissent, Justice William O. Douglas added, “I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing *apartheid* or because it finds life in a multi-racial community difficult or unpleasant.”²⁵⁹

Whether *Palmer* remains good law at all is doubtful. As one district court observed, in a case alleging that a county’s system of appointing voter registrars discriminated against Spanish-speaking candidates, “[t]he Supreme Court has never expressly overturned *Palmer*, but it has all but done so. Time and again over the past two decades, the Court has held that facially neutral laws may run afoul of the Equal Protection Clause if

254. 403 U.S. 217 (1971).

255. *Id.* at 224.

256. *Id.* at 225.

257. *Id.* at 241 (White, J., dissenting).

258. *Id.* at 242 (White, J., dissenting).

259. *Id.* at 239 (Douglas, J., dissenting) (emphasis in original).

they are enacted or enforced with a discriminatory intent.”²⁶⁰ The Supreme Court itself said, just five years after deciding *Palmer*: “To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary,”²⁶¹ raising the question of how much of *Palmer* is left standing at all.

Moreover, as an equal protection case, the *Palmer* case does not translate to the First Amendment context, because the plaintiff’s burdens are fundamentally different. An equal protection claim requires proof that the plaintiff received less-advantageous treatment than a similarly situated person in a different demographic category, and that there is no rational basis for the disparate treatment.²⁶² A *prima facie* First Amendment case does not require identifying a comparator who received preferential treatment; it is enough for plaintiffs to show that they suffered a deprivation at the hands of a state actor causally connected to protected speech.²⁶³

The *Palmer* majority relied on an aggressive reading of the Court’s landmark 1968 decision in *O’Brien*, upholding the conviction of a Vietnam War protester who burned his draft card in violation of a federal prohibition.²⁶⁴ In *O’Brien*, the Court found that the statute making destruction of a draft card a federal offense did not violate the First Amendment.²⁶⁵ The Court found that the statute could be justified by the government’s interest in assuring the integrity of draft cards, despite its “incidental” impact on expression.²⁶⁶ To reach that result, the Court coined what has become known as the *O’Brien* test for a regulation that regulates mixed speech and nonspeech conduct:

260. See *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989) (citing *Washington v. Davis*, 426 U.S. 229, 244 n.11 (1976), for the proposition that “[t]o the extent that *Palmer* suggests a generally applicable proposition that legislative purposes is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary.”).

261. *Washington*, 426 U.S. at 244 n.11.

262. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006).

263. See *Smith v. Cty. of Suffolk*, 776 F.3d 114, 118 (2d Cir. 2015) (explaining that, to survive summary judgment on a First Amendment retaliation claim, a public employee must show that “[1] he has engaged in protected First Amendment activity, [2] he suffered an adverse employment action, and [3] there was a causal connection between the protected activity and the adverse employment action.” (citing *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007))).

264. See *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971) (citing *O’Brien* and concluding that laws should not be voided based on the perceived motives of their drafters, because “it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment”).

265. *United States v. O’Brien*, 391 U.S. 367, 369–72 (1968).

266. *Id.* at 376, 382.

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁶⁷

The Court declined to inquire into the defendant's contention that the statute was invalid because Congress passed it specifically to suppress expressions of political dissent, declaring: "[U]nder settled principles the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional. It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."²⁶⁸ The Court cited primarily practical considerations for reaching this conclusion: First, that it is too difficult to discern from a handful of legislators' comments what might have motivated the rest of them, and second, that invalidating an ill-motivated statute is futile, because legislators will simply reenact the law with a better sounding justification.²⁶⁹ It is from this pronouncement that subsequent courts have made the jump to conclude that the motive for discontinuing a designated forum is of no legal relevance.

Given its broad wording, *O'Brien* understandably has been interpreted as foreclosing inquiry into congressional motive for a challenged legislative enactment.²⁷⁰ But the operative—and limiting—phrase is "a statute that is, under well-settled criteria, constitutional on its face . . ."²⁷¹ Properly understood, *O'Brien* stands merely for the unremarkable principle that judges do not strike down statutes for being unwise. That is, in the absence of a legislative objective that is itself illegal, courts do not question whether legislators pursued that objective for bad reasons. *O'Brien* is factually distinguishable from more typical First Amendment forum-speech cases for the simple reason that the restriction or closure of a forum will always be about expression, but the regulation in *O'Brien* said nothing about expression at all; it was just as illegal to throw away a draft card to make space in an overstuffed wallet as it was to burn the card during a demonstration.²⁷²

267. *Id.* at 377.

268. *Id.* at 383.

269. *Id.* at 384.

270. *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1292–93 (7th Cir. 1996).

271. *O'Brien*, 391 U.S. at 384.

272. *Id.* at 377.

Subsequent Supreme Court rulings have cabined the *O'Brien* doctrine considerably.²⁷³ Either explicitly or implicitly, courts do consider the purpose behind even facially neutral enactments, including in the First Amendment context. For instance, in *R.A.V. v. City of St. Paul*,²⁷⁴ the Court invalidated an ordinance criminalizing displays of symbols that aroused anger or resentment based on race, gender or other protected characteristics, an attempt to outlaw cross-burning and similar displays of racial hate speech.²⁷⁵ The majority's opinion repeatedly comes back to the question of motive, insisting that the First Amendment forbids the government from proscribing speech because of hostility to its message.²⁷⁶

In a thoughtful and well-reasoned examination of the forum doctrine, a federal district court explained, in the case of a city's attempt to block the Ku Klux Klan from taking advantage of an open-access cable TV channel, there is a decisive difference between the decisionmaker's "motive" and the decisionmaker's "purpose."²⁷⁷ While *O'Brien* may foreclose inquiry into *motive*, the court explained, it leaves untouched the Court's long tradition of considering legislative purpose.²⁷⁸ To illustrate, using the facts of the *Missouri Knights KKK* case, the city's "purpose" in voting to allow the local cable TV franchisor to pull the plug on its public-access station was to keep the Klan from airing its message.²⁷⁹ The city council's "motive" for that decision could have been any number of things: It could have been fear of a violent reaction by those incited by (or provoked into opposition to) the Klan's message; it could have been a politically motivated attempt to cater to black voters; it could have been personal animosity toward the local Klan leader, and so on. If this understanding is correct, then there is no inconsistency between, on one hand, the *O'Brien* admonition against peering into the hard-to-read thoughts of the decisionmakers, and on the other hand, the long line of other cases in which the reason for enacting a policy either validated or vitiated it.

If the *Koala* case is viewed by way of the analytical distinction recognized by the court in the *Missouri Knights KKK* case; the

273. See Kagan, *supra* note 1, at 427–28 ("Despite the proscription in *O'Brien*, the Court sometimes has probed the government's reasons for restricting expression; too, the Court has articulated several statements of First Amendment principle that sound in terms of motivation.").

274. 505 U.S. 377 (1992).

275. *Id.* at 391.

276. See Kagan, *supra* note 1, at 421–22 (positing that *R.A.V.* is a case about the government's viewpoint-suppressive motive, and citing several passages in which the Court alludes to motive).

277. *Mo. Knights of the Ku Klux Klan v. Kansas City*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989).

278. *Id.*

279. *Id.* at 1439–50.

government's "purpose" in closing the forum was, indisputably, is to find a way to cut off financial support for *The Koala* without singling out one publication for a selective exclusion that would be reviewed for viewpoint bias. That purpose is itself invidious under the First Amendment. The government's "motive" for wanting to deprive *The Koala* of financial support might be to respond to offended critics in the community, or to improve the university's image for recruitment purposes, but—following *O'Brien's* caution as it is properly understood—that "motive" does not matter. What matters is that there was a constitutionally infirm *purpose*, as that term was understood in *Missouri Knights*—an objective to deny a speaker a platform, based on an offensive viewpoint.

The oft-replicated passage in *Perry Education*, widely interpreted as giving government agencies license to close a forum for any reason, might be best understood by analogy to the law of at-will employment.²⁸⁰ While it is widely understood that an employer may terminate an at-will employee for any reason or even for no reason at all, "no reason" still does not mean an impermissible retaliatory reason.²⁸¹ At-will employees are regularly permitted to bring First Amendment claims, even for the loss of jobs in which they had no legally cognizable expectation of continued employment.

In a recent gloss on anti-retaliation law, the Supreme Court held that a government employer can be liable for unlawful retaliation even where there is no act of legally protected expression at all, if the victim was punished for what the decision maker mistakenly believed was said.²⁸² In that case—brought by a demoted police officer, whose non-expressive act of ferrying a campaign yard sign to a relative's home was mistaken for a statement of support for the candidate—the Court found that motive was, in fact, everything: "[T]he government's reason for demoting [the officer] is what counts here. When an employer demotes an employee out

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

281. The Supreme Court recognized this principle in *Waters v. Churchill*, 511 U.S. 661 (1994), a case involving a public hospital's decision to fire an employee for speech deemed to be disruptive to the workplace. While the Court found that the employee presented no valid First Amendment claim because her speech was unprotected, the Court went on to state that, under different circumstances, a public employee would have "the right not to be dismissed (even from an at-will government job) in retaliation for her expression of views on a matter of public concern." *Id.* at 692. See also *Williams v. City of Burns*, 465 S.W. 3d 96, 108–09 (Tenn. 2015) (explaining "[u]nder that doctrine, employment for an indefinite period of time may be terminated by either the employer or the employee at any time, for any reason, or for no reason at all . . . This traditional rule, however, is not absolute; some restrictions have been imposed on the right of the employer to discharge an employee. Tennessee has recognized a common-law claim for retaliatory discharge where an employee is discharged in contravention of public policy.") (citations omitted).

282. *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016).

of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment . . .)”²⁸³ What mattered was that the government acted with a wrongfully speech-punitive motivation, chilling other would-be speakers from expressing constitutionally protected political views.²⁸⁴

Now that the Supreme Court has said in *Heffernan* that a decision not punishing any actual speech (as the officer was not in fact speaking) is actionable because it was wrongfully motivated by an intent to punish speech, it would be topsy-turvy to suggest that a decision motivated to punish speech by way of closing a forum is non-actionable because it restricts *too much* speech. If *Heffernan* teaches anything, it is that the First Amendment provides recourse against being targeted for speech-motivated punishment, even if the aim is imprecise.

B. *Why Motive Must Matter*

1. Access to Government Property for Expression is Essential for People with Marginalized or Contrarian Viewpoints

First Amendment doctrine has long recognized that inexpensive, do-it-yourself modes of expression must be zealously protected, precisely because they are accessible to less powerful speakers with non-majoritarian views.²⁸⁵ This is particularly so with government property. As Professor David Cole has persuasively argued, government has a constitutional obligation to protect the independence even of speakers whose message depends on publicly funded conduits to reach its audience: “[T]he mere fact that the government is paying for the expression should not free it from the neutrality dictates of the [F]irst [A]mendment.”²⁸⁶

283. *Id.* at 1418.

284. *See id.* at 1419 (“The discharge of one tells the others that they engage in protected activity at their peril.”).

285. *See* *Horina v. City of Granite City*, 538 F.3d 624, 631 (7th Cir. 2008) (observing that “handbilling is both a method of communication that has a long and venerable history that predates the birth of this nation” and citing the Supreme Court’s observation in *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) that handbills have served as “historic weapons in the defense of liberty[]”). *See also* *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (disapproving a city’s prohibition on signs in the yards and windows of homes: “Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”).

286. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 737 (1992).

Where there is a selective exclusion from a forum, courts inquire whether the speaker has reasonable alternative channels to be heard.²⁸⁷ The same concern—that government should not unduly deny access to speakers who lack adequate outlets to reach the public—applies with equal, if not greater, force to the closure of a forum. As the Supreme Court said in *Rosenberger*, responding to the university’s contention that the refusal to subsidize religious publications applied to more than just the plaintiff’s newspaper: “[E]xclusion of several views on [a] problem is just as offensive to the First Amendment as exclusion of only one.”²⁸⁸ To the excluded speaker, it makes no practical difference whether the forum has been narrowed, or entirely closed. And it makes no practical sense, in the latter instance, to forego inquiring whether reasonable alternative means of expression exist.

If it becomes established First Amendment doctrine that a government agency may discontinue operating a forum even for a viewpoint retaliatory reason, there would be no constitutional impediment to the agency serving notice on speakers. Potentially, if speech crosses the line of what government deems acceptable, the plug will be pulled and no further speech will be allowed. The chilling effect of making forum property so fragile—and letting speakers know that the ice on which they are skating may give way at any time—is self-evident.

2. College Media has Unique Civic and Educational Value, and is Uniquely Vulnerable to Government Suppression and Reprisal by Way of Manipulating Forum Property

It is unsurprising that the “virtual forum” doctrine was first recognized in the context of a public university, because the Supreme Court has regularly been called on to referee free speech clashes on college campuses. Public universities are recognized as places where the unfettered exchange of viewpoints—no matter how extreme or unpopular—is not just tolerable, but central to the institutions’ purpose and function.²⁸⁹ Courts have delivered a virtually unbroken string of rulings

287. See Wright, *supra* note 40, at 425 (explaining that, when content-neutral restrictions on speech in a public forum are challenged, “courts often inquire into whether there remain adequate alternative channels for speakers to convey their messages”). See also *Satawa v. Macomb Cty. Rd. Comm’n*, 689 F.3d 506, 524 (6th Cir. 2012) (applying strict scrutiny in a case alleging that a Michigan county selectively excluded a religious speaker from a highway media park that was accessible to foot traffic by others).

288. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

289. See *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’”). See also *Rosenberger*, 515 U.S. at 836 (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

affirming the critical importance of First Amendment protections for college students.²⁹⁰

It is equally unsurprising that the *Rosenberger* “virtual forum” case involves institutional meddling into the editorial content of student-produced publications. Freedom of the press controversies are a regular occurrence on college campuses,²⁹¹ and the entire community has a vested interest in making sure college journalists can freely share information about their institutions, even when it is unflattering. College journalists are increasingly the only journalists regularly informing the public about the activities of higher-education institutions, as professional news outlets fall victim to economic distress.²⁹²

Student news organizations perform an invaluable oversight function holding their campuses accountable to the public. At Kent State University, investigative reporting by student journalists brought to light the checkered business career of a major donor who had been disciplined for violating federal securities laws resulting from his participation in a Ponzi scheme, a revelation that led the university to backpedal on plans

290. See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 253 (3d Cir. 2010) (invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008) (striking down overbroad anti-harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 585 (S.D. Tex. 2003) (declaring university policy regulating “potentially disruptive” events unconstitutional).

291. See, e.g., *OSU Student All. v. Ray*, 699 F.3d 1053, 1065 (9th Cir. 2012) (holding that university officials could be held liable for discriminatorily confiscating only the newsracks belonging to an upstart alternative campus newspaper and not other publications); *Husain v. Springer*, 494 F.3d 108, 131 (2d Cir. 2007) (finding that college president violated student editors’ First Amendment rights by postponing campus election in response to their editorial endorsement); *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 121 (5th Cir. 1992) (concluding that university’s regulations unduly restrained students from distributing publications containing advertising except under narrowly limited circumstances); *Schiff v. Williams*, 519 F.2d 257, 260–61 (5th Cir. 1975) (ruling that public university cannot replace newspaper editors absent conduct substantially disruptive to institutional operations, and mere disagreement with editorial content decisions does not rise to that level of justification); *Bazaar v. Fortune*, 489 F.2d 225, 227 (5th Cir. 1973) (finding that “earthy” language in student-authored short stories was not a sufficient justification for a university to refuse to distribute a student-produced magazine); *Joyner v. Whiting*, 477 F.2d 456, 458 (4th Cir. 1973) (concluding that historically black college could not withdraw financial support from student newspaper as punishment for harshly worded articles challenging the admission of increasing numbers of non-black students).

292. See, e.g., William Anderson, *Student Journalists Are Our Future—We Should Start Treating Them Like It*, THE NATION (July 11, 2017), <https://www.thenation.com/article/student-journalists-are-our-future-we-shouldstart-treating-them-like-it/> (“[S]tudent journalists are uniquely positioned to fill the hole created by the decline of local news.”); Jennifer Conlin, *Local News, Off College Presses*, N.Y. TIMES (Apr. 13, 2014), <https://www.nytimes.com/2014/04/14/business/media/turning-to-collegejournalists-for-the-news-in-town-michigan.html> (detailing how college newspapers have filled the void of shuttered local news agencies).

to name an athletic facility after the donor.²⁹³ At Texas A&M University, student journalists with *The Battalion* used public records to expose the extent of university foundation investments in companies associated with the Sudanese genocide, a matter of undeniable public interest and concern.²⁹⁴ Without financially viable student journalistic publications, stories of this kind will not come to light.

Left without oversight, the administrators of colleges and universities will, at times, overreach their rightful authority and punish speakers merely because they provoke controversy or challenge campus policies.²⁹⁵ As far back as 1934, Louisiana State University expelled seven college journalists who published a letter-to-the-editor harshly critical of the state's legendarily powerful U.S. senator, Huey P. Long.²⁹⁶ Generations later, administrators at Wichita State University threatened their student newspaper with a crippling reduction in financial support following a string of hard-hitting investigative reports exposing administrative malfeasance, including a scheme to disguise stagnating enrollment by padding the 'rolls with "students" taking free, one-half -, credit online courses.²⁹⁷

In a 2016 report, a coalition of academic-freedom organizations led by the American Association of University Professors documented an escalating pattern of harassment and hostility toward journalists on college campuses by image-sensitive administrators.²⁹⁸ The report detailed how student news organizations have experienced both direct censorship and indirect censorship pressure by way of threats to their faculty advisors' jobs, the retaliatory freeze-out of access, and withdrawal of financial support.²⁹⁹ Recently, the former student editor of Liberty

293. Dan Reimold, *Investigative Reporting on Campus*, C. MEDIA REV. (Feb. 13, 2012), <http://cmreview.org/investigative-reporting-on-campus>.

294. Spencer Davis, *A Dark Spot on Texas A&M's Investments*, THE BATTALION (Nov. 10, 2015), http://www.thebatt.com/news/a-dark-spot-on-texas-a-m-sinvestments/article_33a57b34-8777-11e5-b098-43d234042495.html.

295. See *Gerlich v. Leath*, 861 F.3d 697, 707 (8th Cir. 2017) (holding Iowa State University violated university newspaper's First Amendment rights by engaging in viewpoint discrimination).

296. Nicole Comparto, Note, *Combating Institutional Censorship of College Journalists: The Need for a 'Tailored Public Forum' Category to Best Protect Subsidized Student Newspapers*, 71 U. MIAMI L. REV. 528, 530 (2017). See also Andrea Gallo, *Reveille Rebels: Reveille Seven's clash with Huey P. Long leaves lasting legacy*, THE DAILY REVEILLE (Oct. 23, 2013), https://www.lsureveille.com/news/reveille-rebels-reveille-seven-s-clash-with-huey-p-long/article_b7ff10aa-3c3a-11e3-b424-001a4bcf6878.html.

297. Suzanne Perez Tobias, *Proposed cut to Wichita State student newspaper – is it payback for critical coverage?*, THE WICHITA EAGLE (Feb. 27, 2018), <https://www.kansas.com/news/local/education/article202497094.html>.

298. American Association of University Professors et al., *Threats to the Independence of Student Media* 4, 6, 7 (Dec. 2016), https://www.aaup.org/file/StudentMediaReport_0.pdf.

299. *Id.* at 1, 4, 6, 7.

University's student newspaper recounted being forced to apologize for truthfully reporting on campus crime, and to submit his stories to be sanitized by administrators, who now completely control all editorial decisions.³⁰⁰

A 2015 report in *The Atlantic* described "a string of student-newspaper controversies that have erupted in the past year," highlighted by the sudden firing of the faculty journalism advisor at Butler University, after she was accused of tipping off the newspaper to an impending announcement of campus-wide budget cuts.³⁰¹ Many of these controversies involved students facing official retaliation for public-service journalism. *The Atlantic* featured the case of the student newspaper at the University of Memphis, which faced funding cuts after it published an opinion piece criticizing the university for its lack of response in the wake of a rape on campus.³⁰² As these cases exemplify, student journalistic publications will be vulnerable to content-based pressure from administrators if colleges are permitted—in the guise of "forum closure"—to rescind life-sustaining financial support.

A recent survey of student editors of flagship newspapers at public, four-year colleges revealed that more than 60% of these publications faced at least one instance of administrative censorship during a one year period.³⁰³ More than one fifth of student editors of newspapers that receive at least some college or departmental funding reported experiencing threats of funding cuts during a one year period.³⁰⁴

College news organizations also are not immune to the realities of declining advertising and circulation that have buffeted the professional news media, and in recent years, many have been forced to reduce or eliminate printing, move into less expensive quarters, and take other drastic austerity measures.³⁰⁵ Unlike their professional counterparts,

300. Will E. Young, *Inside Liberty University's 'culture of fear,'* WASH. POST, July 24, 2019; See also Diane McFarlin & Frank LoMonte, *We Must Save Independent Student Newsrooms*, INSIDE HIGHER ED (Sept. 11, 2019), <https://www.insidehighered.com/views/2019/09/11/colleges-should-support-independent-perspective-student-newspapers-offer-opinion> ("Student journalists regularly report being frozen out from access to information, threatened with retaliation for candid reporting that exposes institutional shortcomings or demonized by the very people responsible for educating them.").

301. David R. Wheeler, *The Plot Against Student Newspapers?*, THE ATLANTIC (Sept. 30, 2015), <https://www.theatlantic.com/education/archive/2015/09/the-plot-against-studentnews-papers/408106/>.

302. *Id.*

303. Lindsie D. Trego, Mapping the Landscape of College Press Censorship: A Quantitative Analysis of Administrative Pressures on College Newspapers 53 (Apr. 11, 2018) (unpublished M.A. thesis, University of North Carolina), <https://doi.org/10.17615/e6b1-wj92>.

304. *Id.* at 57.

305. See Jennifer Preston, *Black and White and in the Red*, N.Y. TIMES (Oct. 31, 2013), <https://www.nytimes.com/2013/11/03/education/edlife/student-newspapers-scurry-to-make-ends>

which do not accept government funding, student journalistic publications are uniquely vulnerable to retaliation from the people they cover, because few can afford to operate on earned advertising revenue alone. Only 15.4% of newspapers with online editions are able to fully support the operating costs of their online editions with online advertising revenue.³⁰⁶ Surveys show that most news publications receive student activity fees (53.5%) and/or general college funds (31.6%).³⁰⁷ At most student news publications, institutional funding accounts for more than half the annual operating budget.³⁰⁸ This dependency leaves many student publications especially vulnerable to official censorship. For example, *The University Daily Kansan* at the University of Kansas faced a \$45,000 annual budget reduction after it printed an editorial criticizing the student senate's election process.³⁰⁹ Funding was restored in a negotiated resolution, but only after newspaper editors were forced to file a First Amendment suit against the university president.³¹⁰

Because students at public colleges and universities rely on access to campus property to engage in speech of social and political value, it is important to enforce meaningful First Amendment curbs on the retaliatory withdrawal of access. If campus property, whether physical or financial, may be freely closed to speech at the whim of state authorities without judicial oversight, the public's access to candid information about the operations of powerful educational institutions will be at risk.

3. Refusing to Consider Motive Reduces Absurd and Self-Defeating Results

If the government comes within one inch of closing a forum, that decision receives rigorous scrutiny. For instance, if the government enacted conditions on the use of forum property that excluded all but one potential speaker, that policy of selective exclusion would be reviewed under strict scrutiny, and would almost certainly flunk. If the government closed a piece of property to expression except for a 15-minute window

-meet.html (describing how once-thriving college publications have tapped into reserve funds, launched donation campaigns, and taken other desperation measures to meet operating expenses).

306. Lillian Lodge Kopenhaver, *Research Spotlight: Still in Growth Mode*, C. MEDIA REV. (Sept. 6, 2012), <http://cmreview.org/research-spotlight-still-in-growth-mode/>.

307. *Id.*

308. *See id.* (finding that 38.6% of college newspapers receive at least half their annual budgets from student activities fees, while 21.2% receive at least half their annual budgets from general college funds).

309. Madeline Will, *Editors of the Daily Kansan filed First Amendment suit against university administrators for funding reduction*, STUDENT PRESS L. CTR. (Feb. 5, 2016), <http://www.splc.org/article/2016/02/daily-kansan-lawsuit>.

310. Evelyn Andrews, *Lawsuit over student newspaper funding at University of Kansas voluntarily dismissed*, STUDENT PRESS L. CTR. (July 7, 2016), <http://www.splc.org/article/2016/07/lawsuit-over-student-newspaper-funding-at-kansas-university-voluntarily-dismissed>.

at 2 a.m. every alternate Wednesday, that *near*-closure would have to be proven reasonable and content-neutral; such an extreme measure would almost surely fail the test of reasonableness.³¹¹ But take away that 15 minutes of availability, and—in the view of some courts—the decision becomes unreviewable.³¹²

In his partial concurrence in a 1996 case involving federal attempts to regulate the content of cable television programming, Justice Anthony Kennedy recognized the danger of allowing a government agency to evade rigorous scrutiny of selectively excluding speakers from a limited public forum by labeling the decision as a change in the forum's limits: "If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation."³¹³ Even the *Grossbaum* case, widely cited as a license to disregard the government's retaliatory motive, admits of some exceptions: "[G]overnment officials cannot escape a retaliation claim by simply dressing up individualized government action to look like a general rule."³¹⁴

If the judiciary abdicates all oversight over the forum designation (or non-designation) of public property, then forum status could be opportunistically switched on and off at will. Suppose that, upon receiving an application from the Sons of Confederate Veterans to use municipal light poles for a Confederate Memorial Day observance, the City of Lexington responded by discontinuing the light pole program—closing the forum—and then, the day after Confederate Memorial Day, resumed the program. Nakedly viewpoint-motivated exclusions cannot be insulated from judicial review by affixing the cosmetic label of "forum closure."³¹⁵ Indeed, if agencies may freely close a forum at any time for any reason, there would be nothing to stop an ill-motivated actor from thwarting a court order to admit a wrongfully excluded speaker by declaring that the forum no longer exists, thus undermining the judiciary's ability to meaningfully oversee viewpoint discrimination on public property.³¹⁶

311. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 829 (1995).

312. *See, e.g., Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 232 (4th Cir. 2013).

313. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 801 (1996) (Kennedy, J., concurring in part and dissenting in part).

314. *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1295 (1996).

315. *See* Stephen R. Elzinga, *Retaliatory Forum Closure*, 54 ARIZ. L. REV. 497, 533 (2012) ("Without a remedy for retaliatory forum closure, the government can open a forum and keep it open as long as no disfavored speakers make use of the forum. Then, when a disfavored speaker begins to use the forum, the government can close the forum.").

316. This is the scenario anticipated by the Supreme Court in an equal-protection case involving disputed public property. *See generally* *Evans v. Abney*, 396 U.S. 435, 445–46 (1970)

It makes little practical sense to erect a categorical wall between cases of “selective exclusion of speakers from a forum” versus “total closure of a forum,” because it will not always be clear which of the two has happened. Take the case of immigrant-rights protesters who were excluded from demonstrating on an Arizona roadside adjacent to a U.S. Border Patrol checkpoint.³¹⁷ The government contended that the character of the property had changed so drastically that it transformed into a nonpublic forum.³¹⁸ But the demonstrators argued that other people—including, on at least one occasion, a counter-demonstrator—had been allowed to use the area.³¹⁹ In other words, rather than a forum closure, they argued that the facts showed a targeted exclusion of disfavored speakers, which indisputably is reviewable under the First Amendment.³²⁰ Because a forum is rarely made *irrevocably* inaccessible for speech—the Border Patrol could open the roadside or close it on a moment’s notice, depending on who wanted to use it—the concept of “closure” is a malleable and transitory one. The roadside may in fact have been “closed”—until someone who supported the Border Patrol showed up wanting to demonstrate there. It will not always be clear whether a forum has ceased to exist or has simply been made inaccessible to people with a particular viewpoint.³²¹ While in the Border Patrol case there was some evidence of counter-demonstration activity, that will not always be true on forum property, as people who advocate for change in policies are much more likely to engage in protest activity than people who support the status quo. For instance, labor unions are much more likely to picket outside a factory than are the factory’s managers, so a city ordinance declaring sidewalks to be off-limits for picketing (facially, a forum closure) is far more likely to affect labor than management (functionally, a selective viewpoint-based exclusion from a forum).

In other First Amendment contexts, the fact that a retaliatory government act affects more than just the speaker who alleges retaliation

(finding no constitutional violation in a municipality’s decision to dissolve a city park in compliance with the racially discriminatory preferences of a testator, whose will rescinded his gift of land for a city park if the city was compelled to open the park to black visitors, and distinguishing the case from the hypothetical scenario of a city that “closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated,” which would more clearly present a Fourteenth Amendment issue).

317. *Jacobson v. U.S. Dep’t of Homeland Sec.*, 882 F.3d 878, 880–81 (9th Cir. 2018).

318. *Id.* at 882–83.

319. *Id.* at 881.

320. *Id.*

321. See Elzinga, *supra* note 315, at 500–01 (collecting cases in which a particular speaker has motivated an agency to close access to a forum, and observing: “Although such forum closures ostensibly affect all speakers equally, the mask of neutrality merely conceals underlying viewpoint discrimination.”).

does not deprive the speaker of a claim.³²² Take, for example, a participant in a protest rally (“Doe”), who directs insulting language at a police officer alleging that police use force wantonly against minorities—speech that the Constitution indisputably protects. If the angered officer responds by throwing Doe and 20 of her listeners into the police van and citing them for disorderly conduct, Doe is not denied First Amendment redress just because non-speakers suffered the same harm, so long as she can prove causation.

The prudential concern recognized in *O’Brien* and cases following it—that motive is simply too difficult to discern—may apply in a subset of forum-closure cases, but not in every case.³²³ A decision might be made by 300 members of a legislature whose motive is indecipherable—or it might be made by a single executive whose motive is readily detected (take, for example, the decision by a county sheriff to deactivate the agency’s Facebook page after his critics begin using the page to criticize his job performance). Indeed, the cause-and-effect between an unwanted speaker and the closure of a forum is at times undisputed, as in the *Gay Guardian* case³²⁴ (or, more recently, the *Koala* case).³²⁵ Even where it is not conceded, the government’s intent to target a single speaker with a disagreeable viewpoint may manifest from the circumstances of the forum and its use. For instance, in the Ninth Circuit’s *Jacobson* case, the only people using the roadside for expression were people opposed to the Border Patrol, so the purportedly neutral closure of the protest venue was plainly motivated to foreclose future anti-government speech.³²⁶ The fact that motive sometimes cannot be ascertained is a problem of proof, the burden of which can be assigned to the First Amendment plaintiff, and not a reason to categorically forego making the inquiry.

Finally, it makes no sense to declare that the decision to close a designated public forum is unreviewable, because that puts designated forum property on footing inferior to that of nonpublic forum property. Even in a nonpublic forum, any government decision—including the decision whether to close the property to expression—is reviewable for reasonableness.³²⁷ If there is no First Amendment redress for the decision

322. See, e.g., *Vodak v. City of Chicago*, No. 03 C 2463, 2006 WL 1037151 (Apr. 17, 2006) (allowing antiwar demonstrators who were arrested by Chicago police to proceed with a First Amendment class-action claim even though some of those arrested were not speaking or engaging in expressive conduct but were mere spectators).

323. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968).

324. See *Gay Guardian Newspaper v. Ohoopie Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1379 (S.D. Ga. 2002).

325. See *Koala v. Khosla*, 931 F.3d 887, 905–06 (9th Cir. 2019).

326. *Jacobson v. U.S. Dep’t of Homeland Sec.*, 882 F.3d 878, 880–82, 884 (9th Cir. 2018).

327. See, e.g., *Currier v. Potter*, 379 F.3d 716, 730 (9th Cir. 2004) (applying reasonableness standard to U.S. Postal Service’s decision to discontinue providing the homeless with free general-delivery mailboxes, which the court’s majority treated as a nonpublic forum case).

to eliminate a designated public forum, then a speaker's rights arguably are better protected on non-forum property, upending decades of established constitutional precedent.

Dating back to the civil rights era, government agencies have conveyed away ownership of public property specifically to deprive the property of its "governmental" character with the intent to pretermitt constitutional claims.³²⁸ As Professor Zick describes in his detailed examination of the history of "circumvention-by-disposition," courts have regularly been called upon to intercede when government agencies seek to achieve indirectly, through disposition of property, what would be illegal if done on government property, such as operating racially segregated schools.³²⁹ He concludes, harking back to the Supreme Court's now-discredited case about the City of Jackson's swimming pools:

As *Palmer* starkly demonstrated, holding that the mere fact of disposition immediately extinguishes any constitutional concerns would grant governments the authority to turn the Constitution on or off at will. . . . While governments may not have any constitutional obligation to provide schools, streets, and parks in the first place, once they do so, they must manage and dispose of such properties in a manner that complies with constitutional obligations and respects constitutional guarantees. Although the point has sometimes been obscured or misunderstood by courts and public officials, the dispositions themselves are state actions subject to constitutional limitations.³³⁰

By the same logic, where property is merely recharacterized rather than sold or donated, courts likewise should not abdicate their authority to look behind even the most transparent evasion tactics by declaring the closure of a forum categorically off-limits to review.

C. *Getting the Koala Down From the Tree: A Way Forward*

If the judiciary's primary concern is that discerning the motive for closing a public forum is too difficult, comfortable and well-tested analytical frameworks already exist to dispose of cases in which proof of motive is elusive. The burden could be assigned to the excluded speaker to establish a *prima facie* case of invidious motive, through something more than inchoate suspicion and conclusory allegations. If the speaker

328. Zick, *supra* note 97, at 1362–63.

329. Zick, *supra* note 97, at 1365, 1375–76. For example, he cites the Fifth Circuit's decision in *Wright v. Baker Cty. Bd. of Educ.*, 501 F.2d 131 (5th Cir. 1974), in which a sham transfer of a school building to enable private proprietors to thwart court-ordered integration by operating an all-white academy was overturned.

330. Zick, *supra* note 97, at 1416.

cannot come forward with such evidence, then the case can be summarily dismissed.

The Supreme Court has already recognized a burden-shifting analysis in the analogous context of retaliatory employment actions where the employee's speech is at issue.³³¹ In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*,³³² the Court drew a roadmap for courts to follow in adjudicating "mixed-motive" claims where speech is a factor, but not the only factor, cited in adverse action taken against a public employee (in that case, a fired Ohio schoolteacher).³³³ Under *Mt. Healthy*, the employee/plaintiff carries the initial burden to come forward with evidence of engaging in constitutionally protected expression that was a "substantial factor" motivating the adverse action.³³⁴ The burden then shifts to the employer to show by a preponderance of the evidence that the same decision would have been made anyway, even in the absence of the protected expression.³³⁵ *Mt. Healthy* provides a safety valve to insulate agencies against unfounded claims, because truly unfounded cases will stumble at the first step of the analysis and be subject to expedited dismissal.³³⁶

A *Mt. Healthy*-type analysis would not be especially burdensome on government in the case of a purportedly retaliatory forum closure.³³⁷ As is recognized even with traditional public forums,³³⁸ the government should always be able to close a limited or designated forum if the nature of the property fundamentally changes, such as a college tearing down a formerly accessible bulletin board to make way for constructing a new parking garage. If the risk of constitutional scrutiny for censoring, or excluding citizen speakers, is too great for government agencies to undertake, there are technological workarounds; for instance, a Facebook page can be designed from its inception to be a one-way bulletin board for government announcements, not a comment board opened up for two-way public interaction, without offending the First Amendment.³³⁹

331. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

332. 429 U.S. 274 (1977).

333. *Id.* at 286–87.

334. *Id.* at 287.

335. *Id.* Although the Court's brief opinion in *Mt. Healthy* does not cite it, the test appears to be a variation of the burden-shifting analysis recognized by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973), which applies in more traditional employment discrimination cases where speech is not at issue.

336. *LoMonte & Calvert*, *supra* note 34, at 61.

337. See Elzinga, *supra* note 315, at 521 (advocating for application of a *Mt. Healthy* analysis to the full or partial closure of any forum, even a nonpublic one).

338. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) (observing that government "always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use").

339. Lidsky, *supra* note 61, at 2024.

Applying the *Mt. Healthy* framework to a claim of retaliatory forum closure, it would be the speaker's initial burden to identify constitutionally protected speech that was a motivating factor in the government agency's decision to revoke forum designation. That burden would readily be satisfied by the weighty circumstantial evidence in the *Koala* case, in which the UCSD Senate had not discussed rescinding financial support for print publications until, days earlier, the magazine's November 2015 edition provoked outcry on campus, including a statement from university administrators read at the Senate meeting.³⁴⁰ But the university could escape First Amendment liability by coming forward with contrary evidence, if it exists, that the Media Policy was already in the works before the November 2015 magazine and that the Senate had non-retaliatory reasons for getting out of the business of underwriting media publications. While *Mt. Healthy* would provide a mechanism for a plaintiff like *The Koala* to get before a jury, where substantial cause-and-effect evidence exists, the framework would also weed out cases in which evidence of retaliation is thin or nonexistent (for instance, a Facebook user who is disappointed that his local sheriff's office has discontinued the agency's page, but did not post anything provoking an adverse response from the agency). The *O'Brien* concern—that discerning the motive of a large legislative body is too difficult³⁴¹—can be fully accounted for as part of the plaintiff's initial burden. If the plaintiff has nothing but stray comments from a few among multitudes of legislators, that evidence will be insufficient to raise the causal inference, and the case will be summarily dismissed.

Understandably, courts may hesitate to recognize a cause of action for closure of even the smallest of forums, such as a state university taking down a bulletin board, or a small-town police department deactivating its Facebook page. But even a forum of minimal importance is already susceptible to constitutional challenges—for instance, if a university administrator rips a flyer off a bulletin board, or a police official deletes a post from a Facebook page.³⁴² It seems improbable that a person who genuinely suffered no retaliation would be so deeply invested in the continued existence of a bulletin board as to undertake constitutional litigation, and even in that unlikely event, the institution should readily be able to demonstrate a content-neutral alternative motivation.³⁴³

340. *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2016 WL 6441470, at *3–4 (S.D. Cal. Nov. 1, 2016).

341. *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968).

342. See, e.g., *Robinson v. Hunt County*, 921 F.3d 440 (5th Cir. 2019) (finding that critic of Texas sheriff's department stated an actionable First Amendment claim after employees of the sheriff's office removed her critical posts and banned her from making future posts).

343. For instance, aesthetic considerations and concern for visual clutter have been deemed to be reasonable, content-neutral reasons for making news publishers remove or modify their newsracks on government property in such cases as *Globe Newspaper Co. v. Beacon Hill*

D. *An Alternate Approach: Financial Subsidies “De-forum-ized”*

Courts have long struggled with the proper First Amendment analysis when the “public property” that a speaker intends to use is government financial support. The simple response may be: Stop struggling.

While in *Rosenberger* and *Southworth* the Supreme Court treated public subsidies (in those cases, student activities fees allocated through public universities) as designated public forums,³⁴⁴ other subsidy cases have eschewed the forum construct. In *National Endowment for Arts v. Finley*,³⁴⁵ the Supreme Court wriggled out of the constraints of forum doctrine to uphold content-based legislation requiring the NEA to consider “general standards of decency” in awarding grants to artists.³⁴⁶ The Justices distinguished the student fee cases on the basis that the NEA, unlike college fee boards, selectively awarded grants in a competitive process based on evaluating the artistic merit of the applicant’s work.³⁴⁷ Because the NEA’s award process was already inherently content-based, the Court ruled, the NEA funding system could not be regarded as a forum held open for speakers’ indiscriminate use.³⁴⁸ This distinction is somewhat contrived and unpersuasive. Nothing in the *Southworth* or *Rosenberger* cases indicates that fees were awarded indiscriminately without regard for the applicants’ merits. Unlike student fees—which support a wide variety of activities, not at all expressive³⁴⁹—every one of the NEA’s grantees was engaged in expression, and indeed, facilitating their expression was the purpose of the grant program.³⁵⁰ Moreover, the Court’s distinction perversely makes censorship self-validating: by *Finley*’s dubious logic, if the University of Virginia could have shown a longstanding practice of selectively denying financial support to publications based on their religious content, then the university could have prevailed in *Rosenberger*.

Architectural Comm’n, 100 F.3d 175, 186 (1st Cir. 1996) and *Gold Coast Publ’ns, Inc. v. Corrigan*, 42 F.3d 1336, 1345 (11th Cir. 1994). See also Elzinga, *supra* note 315, at 524–25 (enumerating non-content-based justifications that could furnish the basis for restricting or closing a forum, including overcrowding, construction, safety).

344. See generally *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

345. 524 U.S. 569 (1998).

346. *Id.* at 576.

347. *Id.* at 586.

348. *Id.*

349. See Erica Goldberg, *Must Universities ‘Subsidize’ Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 365 (2011) (pointing out that “[s]ome portion of a university’s student activities fees usually covers expenses unrelated to student organizations, like intramural sports, student health services, and costs related to infrastructure.”).

350. *Finley*, 524 U.S. at 573.

Perhaps Justice David Souter, the lone dissenter in *Finley*, had the better of the analysis when he rejected the majority's attempts to steer around *Rosenberger* and instead recharacterized *Rosenberger* as a case about viewpoint discrimination rather than a case about forum doctrine:

Leaving aside the proper application of forum analysis to the NEA and its projects, I cannot agree that the holding of *Rosenberger* turned on characterizing its metaphorical forum as public in some degree. Like this case, *Rosenberger* involved viewpoint discrimination, and we have made it clear that such discrimination is impermissible in all forums, even nonpublic ones, . . . where, by definition, the government has not made public property generally available to facilitate private speech[.] . . . Accordingly, *Rosenberger*'s brief allusion to forum analysis was in no way determinative of the Court's holding.³⁵¹

In dissent, Souter said aloud what the 8-1 majority only hinted at: That long established First Amendment doctrine already accounts for cases in which government funding is withheld on the basis of content or viewpoint without the need to construct a mythical forum.

If *Finley* represents a "trial separation" of financial support from the forum doctrine, the Court's subsequent 2013 decision in *Agency for International Development v. Alliance for Open Society International, Inc.*,³⁵² involving grants from the U.S. Agency for International Development, represents the divorce.³⁵³

In that case, the Justices eschewed forum analysis entirely, not even mentioning the concept, as they struck down conditions imposed on federal grantees that unduly constrained speech.³⁵⁴ Specifically, the Court found that AID, which administers federal foreign-aid programs, overreached in requiring that grantees conducting AIDS awareness outreach in Africa to promise to advocate against prostitution, even if (as the plaintiff/applicant contended) that advocacy position might compromise their effectiveness in working with people engaged in prostitution.³⁵⁵

Rather than treat the AIDS grant program as any type of forum, the Court applied an "unconstitutional conditions" analysis, under which federal funding may not be withheld as a tool to compel an applicant to

351. *Id.* at 615 n.10 (Souter, J., dissenting).

352. 570 U.S. 205 (2013).

353. *See id.* at 210.

354. *Id.* at 221.

355. *Id.* at 208.

espouse governmentally approved beliefs.³⁵⁶ The Court distinguished between grant programs by which the government contracts with private individuals to carry out mutually shared objectives—for instance, selectively funding only healthcare agencies that offer alternatives to abortion, which is permissible³⁵⁷—versus grant programs that coerce recipients to change their positions, which is not permissible. Because opposing prostitution was not operationally necessary to the purpose of the grant program, the funding condition unconstitutionally compelled grantees to parrot the government's speech.

With little effort, the *USAID* method of analysis can neatly fit with a *Koala*-type scenario. While the refusal to offer financial support to student publications could be viewed as the closure of a forum, it could also be viewed as an unconstitutionally coercive condition—that is, had the *Koala* written favorably about “safe spaces” on college campuses rather than unfavorably, it would have remained eligible to compete for grants.³⁵⁸ The Supreme Court has already made just this observation, finding no analytical distinction between a rule that conditions receipt of a government benefit on speech versus a rule that punishes someone for that same speech.³⁵⁹

The First Circuit Court of Appeals decoupled public financial support from forum analysis in considering a First Amendment case challenging a state university's decision to discontinue financial support for a student legal-aid clinic.³⁶⁰ The plaintiffs alleged that the closure came in retaliation for litigation against the university brought by students using the clinic's services, thus implicating the First Amendment.³⁶¹ But the court treated the decision as the withdrawal of a subsidy for speech, rather than as the closure of a forum for speech, and found no constitutional violation.³⁶² Although the First Circuit's application of the “subsidized speech” principle was arguably overly deferential to the government, the court recognized that, in different factual contexts, the retaliatory

356. *Id.* at 212. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428 (1989) (explaining evolution of doctrine constraining Congress' ability to use funding to coerce recipients to adopt federal priorities).

357. *See Rust v. Sullivan*, 500 U.S. 173, 178 (1991).

358. Outside the funding context, the Court has recognized that government may not use coercive means to compel speakers to espouse the views favored by the government. *See generally* *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that schools cannot compel students to stand and recite Pledge of Allegiance when doing so contravenes their religious beliefs).

359. *See Crawford-El v. Britton*, 523 U.S. 574, 588 n.10, 592 (1998) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

360. *See Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 478 (1st Cir. 1989).

361. *Id.* at 475.

362. *Id.* at 482.

withdrawal of government subsidies to punish speech can give rise to First Amendment liability.³⁶³

Indeed, the Ninth Circuit's disposition of the motion to dismiss in *Koala v. Khosla* already hints at abandoning the "forum closure" construct in favor of a more practical approach.³⁶⁴ Apart from forum doctrine, the panel's opinion finds that the magazine's editors can challenge the withdrawal of financial support as they could challenge the viewpoint-discriminatory denial of any other government benefit.³⁶⁵ Citing the Supreme Court's *Finley* decision, the court concluded that "the government may not 'leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints[.]'"³⁶⁶

To dispense with the forum analysis where the "forum" is a grant program would simplify the analysis and, in all probability, lead to outcomes equally or more speech-protective by way of a straighter path. Rather than quibble over the imaginary boundaries of a forum that no one can see, courts could simply proceed to the decisive First Amendment question: Is this funding condition based on the content of speech, and if so, can that content-based distinction be justified on the basis that the government has contracted with a willing speaker to carry out a shared priority?

If we recognize that retaliation is just retaliation—and not "the retaliatory closure of a forum"—then it is a small step to recognizing that the denial of financial support is just the denial of financial support, and not "the retaliatory closure of a metaphysical forum." Sometimes, William of Ockham's admonition turns out to be right: The solution requiring the fewest assumptions really does fit best.³⁶⁷

CONCLUSION

If a designated public forum is to have any significance, it must have durability. A "public forum" ceases to have meaning if governments can flip the "off" switch at will whenever a disfavored speaker shows up bearing an unpopular message. Judges may choose to apply the construct of "forum closure"—or as this Article suggests, may simplify the analysis by merely applying boilerplate First Amendment principles against

363. *Id.* at 481 (demonstrating how the court failed to explain why the line of cases expressly prohibiting retaliation did not apply to the facts at hand.). *But see* Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998) (explaining how the Justices observed that a claim could still lie if, in applying the grantmaking criteria, the NEA retaliated against speakers based on viewpoint.).

364. *See generally* *Koala v. Khosla*, 931 F.3d 887 (9th Cir. 2019).

365. *See id.* at 898–99.

366. *Id.* at 898 (quoting *Finley*, 524 U.S. at 587).

367. *See* Richard H. Helmholz, *Ockham's Razor in American Law*, 21 TUL. EUR. & CIV. L.F. 109, 110–11 (2006) (explaining how judges have applied a philosophical principle coined by 14th century philosopher, sometimes simplified as "complicated explanations of observed phenomena should not ordinarily be accepted without proof of their necessity").

retaliation and message-based funding conditions. But, in no event should the judiciary abdicate oversight of government decisions intended to deny unwanted speakers a platform. If we recognize—and we should—that it is a wrongful act of discrimination to close the swimming pool when people of color show up wanting to use it, then we should equally recognize “draining the free-speech pool” as an actionable wrong.