Nova Law Review

Volume 33, Issue 2 2009 Article 2

The Ongoing Mystery of the Limited Public Forum

Marc Rohr∗

Copyright ©2009 by the authors. Nova Law Review is produced by The Berkeley Electronic Press (bepress). https://nsuworks.nova.edu/nlr
# The Ongoing Mystery of the Limited Public Forum

## Marc Rohr*

### I. Introduction

300

### II. Ambiguity and Lack of Clarity at the Supreme Court Level

303

A. The Early Cases: Decisions Without Rules .................. 303
B. The Trouble with Perry ........................................ 304
C. The Ambiguity of Cornelius .................................... 312
D. Kokinda Keeps the Mystery Alive ............................. 316
E. ISKCON and Rosenberger: Misleading Statements Emerge ........................................ 318
F. Forbes to the Doctrinal Rescue? ............................... 320
G. Good News Club: A Big Step Backward ..................... 325
H. Synthesizing the Supreme Court's Limited Public Forum Jurisprudence .................. 326
   1. The Court's Pronouncements .............................. 326
   2. The Court's Rulings ......................................... 327

### III. How Have the Federal Courts of Appeals Understood "The Middle Category?"

331

A. Competing Understandings of the Terminology ............ 332
B. "Middle Category" Decisions ................................. 335
   1. Rulings .................................................. 335
   2. "General" or "Selective" Access? ......................... 338
      a. Use of the Forbes "Permission" Factor ............. 338
      b. Is "Standardless Discretion" Relevant? ............ 346

### IV. Can a Meaningful "Limited Public Forum" Category Exist?

349

A. Rationalizing the Public Forum Doctrine .................. 349
B. Does the "Permission" Factor Make Sense? ................ 351
C. Can the "Limited Public Forum" Be Salvaged? ............. 352

### V. Prayer for Relief

354

---

A designated public forum is a non-public forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain subjects. ... Despite this direction from the Supreme Court, our Circuit's analysis of what constitutes a "designated public forum, like

---

our sister Circuits,” is far from lucid. Substantial confusion exists regarding what distinction, if any, exists between a “designated public forum” and a “limited public forum.”

I. INTRODUCTION

More than twenty-five years after the United States Supreme Court, in Perry Education Ass'n v. Perry Local Educators' Ass'n, 2 purported to define and elucidate the components of its “public forum” doctrine, the meaning—and legal significance—of the “limited public forum” concept remains startlingly unclear. Confessions of uncertainty by courts as to the meaning of this term—and its relationship to its doctrinal siblings, the “designated” public forum and the “non-public forum”—are, in fact, surprisingly common in reported judicial decisions. 3 At the same time, the body of rules created by the Supreme Court governing access by citizens to governmentally controlled properties and channels of communication for the purpose of expression has been subjected to much criticism, usually and primarily on the ground that these rules, in their entirety, are unduly restrictive of freedom of expression. 4 Often such criticism has been accompanied by thoughtful sug-

1. Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006). The court’s definition of a designated public forum is itself reflective of the confusion of which the court speaks.
3. See, e.g., Christian Legal Soc’ y v. Walker, 453 F.3d 853, 865 n.2 (7th Cir. 2006); Justice for All v. Faulkner, 410 F.3d 760, 765 n.6 (5th Cir. 2005) (“Although the Supreme Court and the circuits have clarified the functional difference between the designated and limited forums, the precise taxonomic designation of the latter remains elusive.”); Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003); Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (“The designated public forum has been the source of much confusion. . . . ‘The contours of the terms “designated public forum” and “limited public forum” have not always been clear.’”) (quoting Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 n.4 (9th Cir. 1999)); Summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997).
gestions of alternative approaches that would be more protective of speech. But, to paraphrase Marc Antony, I come to decipher the “public forum” doctrine, not to denigrate it.

The purpose of this Article is not to argue that the “public forum” doctrine is too speech-restrictive, but rather to simply try to make a contribution toward clarifying the meaning of the mysterious and perplexing “limited public forum.” I do criticize the Court, however, for allowing the confusion surrounding this concept to fester and persist. And, in trying to make sense of what the Supreme Court has said and done with respect to this concept, and thus to arrive at a workable understanding thereof, I will briefly consider whether any such understanding makes sense within the larger context of facilitating freedom of expression. But my focus will remain primarily a pragmatic one, accepting the broad outlines of what the Supreme Court has done, under the heading of the “public forum” doctrine, with the relatively modest goal of trying to eliminate (or at least minimize) needless confusion in the application of these rules.

The importance of this legal doctrine can hardly be doubted. It is commonplace for citizens to seek to engage in communicative activities on (or via) governmentally controlled properties (or channels of communication) other than those that have traditionally been available for expression, and case law reflects that they have done so with regard to a wide variety of such “non-traditional fora”—ranging from government office waiting rooms, to college campus lawns, to national cemeteries, to name just a few examples. In each such instance, when the government actor in charge of the forum


5. Farber & Nowak, supra note 4, at 1239–45; Fischer, supra note 4, at 670–73; Gey, supra note 4, at 1566–76; Post, supra note 4, at 1765–84; Massey, supra note 4, at 334–51; McGill, supra note 4, at 953–57.

6. WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2.

7. E.g., Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 137 (2d Cir. 2004).

8. E.g., Gilles v. Blanchard, 477 F.3d 466, 467 (7th Cir. 2007).

9. E.g., Griffin v. Sec’y of Veterans Affairs, 288 F.3d 1309, 1314 (Fed. Cir. 2002).
denies access, and the speaker cares enough to bring suit, a decision must be made, under governing legal principles, as to the nature of the forum: Is it "closed," so that access may presumptively be denied, or has it been "opened," so that access must presumptively be granted? The government actor may place the forum "off limits" to expressive activity, in which case the property (or channel) in question will be deemed a "non-public forum." If, on the other hand, the government actor has opened, for expressive activity, a property (or channel) that need not have been so opened, we then have a "forum by designation" or "designated public forum." The government actor is not completely free, even in the non-public forum, to deny access for expressive activity, but the level of judicial review that will be employed in such cases is relatively low and deferential to the government, at least in theory. In the designated public forum, on the other hand, a more rigorous level of judicial review is (theoretically) employed. So the label matters.

The "mystery" of my title is really twofold, as reflected in the two major questions to be pursued in this Article: First, how does the concept of the "limited public forum" fit into this scheme? To put it another way, what is the legal significance of that label? Second, how do we know when we have a limited public forum, as opposed to a non-public forum? To put that question another way, what criteria (if any) may dependably guide us in deciding whether a limited public forum has been created? A subsidiary question here, of potential significance, is: How do we decide for whom such a forum has been opened?

Part II of this Article will explain how pertinent United States Supreme Court opinions have given rise to, and perpetuated, the mystery of the limited public forum, and extract the clues the Court has provided to the solution of this mystery. Part III will summarize the treatment of the limited public forum concept by federal appellate courts in recent years, highlighting the extent to which some of those courts have been misled by what the United States Supreme Court has said and done. Finally, Part IV will consider the workability of an approach guided by what appears to be the proper understanding of the United States Supreme Court's collective teachings concerning the limited public forum.

10. Because we are dealing, by definition, with public—and not private—property, the term is something of a misnomer. It would be more accurate to speak, in such a case, of a "public non-forum," but we appear to be stuck, at this point, with "non-public forum."
II. AMBIGUITY AND LACK OF CLARITY AT THE SUPREME COURT LEVEL

A. The Early Cases: Decisions Without Rules

The history of the public forum doctrine at the United States Supreme Court level—and the philosophical underpinnings thereof—have been described quite satisfactorily elsewhere. Suffice to say, here, that a theme that made its first appearance in a United States Supreme Court opinion in 1966, namely that “[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,” soon led to fairly clear implications that limitations on expressive activity in a governmentally controlled property that was not a “public forum” would be subjected to a significantly lower level of judicial scrutiny than would otherwise be the case. No explicit statement was made, in the cases of the 1970s, regarding the level of scrutiny to be employed in such a case, but clearly the Court, once it declared that a government property was not a “public forum,” was not going to adhere to the emerging rule that discrimination against speech on the basis of content would be subjected to strict judicial scrutiny. Conversely, the Court was quite hospitable to the claims of speakers in settings which were characterized as “open” or “public” fora. Not until 1983, in the Perry decision, did the Court attempt to impose structure and clarity upon this body of case law involving access by speakers to non-traditional governmentally controlled fora.

11. See Day, The End of the Public Forum Doctrine, supra note 4, at 147–59; BeVier, supra note 4, at 82–100; Dienes, supra note 4, at 111–17; Post, supra note 4, at 1718–58; Werhan, supra note 4, at 343–404.
B. The Trouble with Perry

Justice White's majority opinion in *Perry* represented a major step forward doctrinally, but nonetheless fell well short of achieving optimum clarity in its explication of governing rules. Justice White set forth, in this opinion, the tripartite breakdown of governmental "fora" in language that continues to be quoted regularly. The first category, he stated, consists of "places which by long tradition or by government fiat have been devoted to assembly and debate," embracing (at least) "streets and parks." "In these quintessential public forums," he went on to say, restrictions on expression would be evaluated pursuant to the tests usually employed to gauge the constitutionality of content-based or content-neutral regulations of speech. "A second category," he continued, "consists of public property which the State has opened for use by the public as a place for expressive activity." (Immediately a clear, if ultimately insignificant, semantic contradiction arose: How can a place devoted to expression "by government fiat"—ostensibly in the first category of forum—not fall into this second category?) This second category is important because, Justice White instructed us, the First Amendment "forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." At this point a key point was made in a footnote: "[a] public forum may be created for a limited purpose such as use by certain groups... or for the discussion of certain subjects." A significant caveat was added: "[a]lthough 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" (thus introducing the term "traditional public forum" to describe the first category in this taxonomy).

Finally, he addressed the third category, described simply as "[p]ublic property which is not by tradition or designation a forum for public communication." In such locations, it was revealed for the very first time,

18. Other critical evaluations of *Perry* have been offered by Farber & Nowak, *supra* note 4, at 1255–57; Gey, *supra* note 4, at 1548–50, 1578–80; Post, *supra* note 4, at 1750–56.
20. *Id.* at 45.
21. *Id.*
22. *Id.*
23. The terminology has been criticized by Professor Post as well. Post, *supra* note 4, at 1758 ("The reference to 'government fiat' is ill-considered.").
25. *Id.* at 46 n.7.
26. *Id.* at 46.
27. *Id.*
“the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”\textsuperscript{28} Oddly, it was not until later in his opinion that Justice White gave this third type of governmental property a name, and he did so only in passing, while adding important content to its definition: “[i]mplicit in the concept of the non-public forum,” he wrote, “is the right to make distinctions in access on the basis of subject matter and speaker identity.”\textsuperscript{29} Distinctions of this kind, he continued, “are inherent and inescapable in the process of limiting a non-public forum to activities compatible with the intended purpose of the property.”\textsuperscript{30}

Thus, the following important precepts had now been established: First, that streets and parks (and later, sidewalks)\textsuperscript{31} were “traditional” public fora, subject to the usual principles of First Amendment analysis;\textsuperscript{32} second, that government actors might, as a matter of discretion, create “designated” public fora, which would be subject to those same First Amendment rules, at least as long as they retained their status as fora opened for expressive activities; and third, that even with respect to those governmentally owned properties which the government was entitled to make “off limits” for expressive activity, there were limits on the government’s power to do so.\textsuperscript{33} The last proposition was surely the most surprising, and the most welcome from the

\textsuperscript{28} Id.
\textsuperscript{29} Perry, 450 U.S. at 49.
\textsuperscript{30} Id.
\textsuperscript{32} The “traditional public forum” category may be a “closed” class, in the sense that only streets, sidewalks, and parks—the kinds of government property which, generally, have been available for expressive activity—can fall within the category. As Justice Kennedy stated in Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 678 (1998), “[t]he Court has rejected the view that traditional public forum status extends beyond its historic confines,” citing International Society for Krishna Consciousness, Inc. v. Lee (ISKCON), 505 U.S. 672, 680–81 (1992). It is thus the least troublesome of the “forum” categories, yet questions do arise as to its application to unconventional sidewalks. See United States v. Kokinda, 497 U.S. 720, 727 (1990); Frisby v. Schultz, 487 U.S. 474, 497 (1988) (Stevens, J., dissenting); Grace, 461 U.S. at 179–80. Lower courts have extended the category so as to encompass arguably comparable governmental properties. See, e.g., ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1103 (9th Cir. 2003) (publicly-owned pedestrian mall); Pouillon v. City of Owosso, 206 F.3d 711, 717 (6th Cir. 2000) (city hall steps); Warren v. Fairfax County, 196 F.3d 186, 189 (4th Cir. 1999) (outdoor area in front of county government center). The United States Supreme Court has recently granted certiorari in a case raising the question of whether a particular municipal park is a traditional public forum. Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007), \textit{cert. granted}, 128 S. Ct. 1737 (Mar. 31, 2008). See \textit{generally} Neveril, \textsuperscript{supra} note 4. See also Saphire, \textsuperscript{supra} note 4, at 745–50.
\textsuperscript{33} See Perry, 460 U.S. at 45–46.
standpoint of maximizing freedom of speech; no prior United States Supreme Court decision had spoken of, much less relied upon, the concept of viewpoint discrimination, which was now declared to be intolerable even in a “non-public forum.” 34 And while earlier “non-public forum” decisions at the United States Supreme Court level had typically offered ad hoc justifications for the exclusions at issue, 35 it was now clear, for the first time, that some level of justification—satisfying a test of “reasonableness” 36 —was in fact required. 37 In all of these respects, the opinion in Perry was quite helpful.

But with respect to the concept of the “limited” public forum, the opinion was distinctly unhelpful. First, as with the term “non-public forum,” Justice White used the term “limited public forum” only in passing, never defining it despite the fact that this opinion was the occasion for his grand elaboration of the three-part “forum” categorization scheme; readers of the opinion were thus left to infer that the “limited” public forum was the aforementioned forum “created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.” 38

Second, and most inexcusably, the legal significance of the label was never made explicit in Justice White’s opinion. He stated that the designated public forum would be treated as if it were a traditional public forum, but said nothing, in general terms, as to how the constitutionality of an exclusion of a particular speaker from a designated public forum limited for “use by certain groups” would be assessed. He did, however, provide some pretty good clues to the solution of this mystery. The most helpful clue emerged from his response to the argument made by the excluded teachers’ union, Perry Local Educators’ Association (PLEA), that the mailbox system had “become a ‘limited public forum’ from which it may not be excluded because of the periodic use of the system by private non-school connected

34. See id. at 46. The dissenters in Perry, of course, believed that the school district’s exclusion of the rival teachers’ union from the interschool mail system did indeed amount to viewpoint discrimination. Id. at 56 (Brennan, J., dissenting). But the majority disagreed. Id. at 49 n.9 (majority opinion).


36. While this requirement of “reasonableness” has at times been lightly equated with the familiar “rational basis” level of scrutiny. See, e.g., Dienes, supra note 4, at 117; Massey, supra note 4, at 313, lower court decisions appear to refute this unsupported conclusion. See infra note 276 and accompanying text. See also ISKCON, 505 U.S. at 690–92 (O’Connor, J., concurring) (finding a ban on leafletting in a non-public forum unreasonable, and maintaining that “we have required some explanation as to why certain speech is inconsistent with the intended use of the forum.”).

37. Perry, 460 U.S. at 46.

38. Id. at 46 n.7 (citation omitted).
PLEA’s core grievance, of course, was that its access to the school mail system was terminated subsequent to the certification of its rival, Perry Education Association (PEA), as the exclusive bargaining representative for the teachers in the school district; PEA, of course retained access to the mailboxes. But, in addition, the school district did “allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities.” Had the mail system thus become a limited public forum, as PLEA contended? No, replied Justice White, adding: “This type of selective access does not transform government property into a public forum.” He went on to add the following paragraph, which is the major clue to which I have referred:

Moreover, even if we assume that by granting access to the Cub Scouts, YMCA’s, and parochial schools, the [s]chool [d]istrict has created a “limited” public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys’ club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

The implications of this dictum seem clear: In a limited public forum, we must first identify the speakers to whom the forum has been opened—the favored class of speakers, if you will—and then ask whether the speaker who seeks access to the forum—the challenger—is an “entity of similar character” to those to whom the forum has been opened. In other words, we must ask whether the challenger falls within the favored class of speakers. If the answer is “yes,” then that challenger enjoys a “right of access” to the forum. To put it another way, a limited public forum would be “open” to speakers who fall into the same class as those to whom the forum has already been opened. But as to a speaker who does not fall into the favored class, what then? The answer to this question would appear to be provided by the way the Court treated PLEA’s attempt to gain access to the school mail system: Justice White asserted that “the school mail system” (vis-a-vis PLEA, in any

39. Id. at 47.
40. Id. at 40–41.
41. Id. at 47.
42. Perry, 460 U.S. at 47.
43. Id. at 48.
44. See id.
event) was “not a public forum,” and fell within the “third category” (later equated, implicitly, with the term “non-public forum”) of the new taxonomy.45 So it would appear, from the totality of the Perry decision, that a limited public forum will be treated as either a traditional public forum or a non-public forum, depending on whether the challenger does or does not fall within the favored class of speakers.46

The other clue, in Perry, that supports this conclusion—and, in particular, the conclusion that a limited public forum will be treated as a traditional public forum if the challenger falls within the favored class of speakers—is the citation of Widmar v. Vincent47 as an example of a public forum “created for a limited purpose such as use by certain groups.”48 Widmar, of course, involved a state university that “routinely provide[d] University facilities for the meetings of registered [student] organizations,”49 but subsequently decided that it would violate the Establishment Clause if it were to continue to make those facilities available to a religious student organization.50 The student organization sued, and prevailed.51 Justice Powell’s pre-Perry reasoning regarding the public forum issue, on behalf of the Court’s majority, was as follows:

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. . . .

. . . With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.

Here [the University of Missouri] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the

45. Id. at 46, 48.
46. This understanding is essentially shared by Professor Buchanan and Professor Werhan. See Buchanan, supra note 4, at 960, 965; Werhan, supra note 4, at 406 n.346; see also Fischer, supra note 4, at 671–72; McGill, supra note 4, at 942.
48. Perry, 460 U.S. at 46 n.7.
49. Widmar, 454 U.S. at 265.
50. Id. at 265 & n.3.
51. Id. at 267.
University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. 52

Again, *Widmar* was cited in *Perry*, as an example of a case involving a limited public forum (despite the incongruous reference by Justice Powell here, to "a forum generally open to the public"); the university facilities were made available, for expressive purposes, only for student organizations. 53 The excluded speaker was a student organization. 54 The Court in *Widmar* appears to have decided that the excluded speaker fell into the class of speakers to whom the forum had been opened. 55 That finding, along with the recognition that the exclusion was based on the content of the speech in question, led to the application of strict scrutiny—exactly as it would have had the restriction been applied in a traditional public forum. 56 If, on the other hand, a non-student organization (the local chapter of the American Civil Liberties Union, for example) had sought access to the university's facilities and been rebuffed, those same university facilities would presumably have been treated as a non-public forum with respect to this speaker that did not fall within the favored class.

Assuming that I am correct about *Perry*’s implicit instructions concerning restrictions on speech within a limited public forum, another perplexing question arises: Why was not the teachers' mailbox system in *Perry* deemed to be a limited public forum? By saying that the mail system fell "within this third category" (non-public forum) and that it was "not a public forum," 57 Justice White pretty clearly declined to deem it a limited public forum. But why was not it, given the fact that it appeared to have been opened to some, but not all speakers? Granted, calling it a limited public forum would presumably not have changed the result in this case (since Justice White regarded the forum as closed to the challenger), but the question remains important for the sake of understanding, generally, when we have a limited public forum (thereby necessitating the subsidiary inquiry as to whether the challenger is within the favored class of speakers) and when we have a non-public forum (in which case no such inquiry is required).

52. *Id.* at 267–70 (citations and footnotes omitted).
54. *See id.* at 269–70.
55. *Id.* at 269–70.
56. *Id.*
The same question may be asked with regard to the earlier United States Supreme Court decisions which were predicated on the absence of “public forum” status, all of which involved fora that had been opened to some speakers, but not to the challengers: *Lehman v. City of Shaker Heights*\(^5\)\(^8\) (in which the transit system “car cards” were available to most advertisements, but not to political campaign ads);\(^5\)\(^9\) *Greer v. Spock*\(^6\)\(^0\) (in which some speakers and entertainers, but not political speakers, had been given access to the military base);\(^6\)\(^1\) and, *Jones v. North Carolina Prisoners’ Labor Union, Inc.*\(^6\)\(^2\) (in which some speakers had been allowed to address the prisoners, but the prisoners’ union could not).\(^6\)\(^3\) When no speaker has been given access to the forum (as in *Adderley v. Florida*)\(^6\)\(^4\) the non-public forum label is easily applied. But, when is a property properly deemed to be a non-public forum when it has been opened to some (but not all) speakers? *Lehman, Greer,* and *Jones* can be rationally viewed, in retrospect, as examples of limited public fora, along with *Widmar,* yet Justice White cited *Greer* and *Lehman,* in *Perry* in support of his pointed assertion that “selective access does not transform government property into a public forum.”\(^6\)\(^5\) Moreover, as noted earlier, Justice White also stated that “[i]mplicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity.”\(^6\)\(^6\) But, why is a forum in which such subject-matter distinctions have been made not a limited public forum? What distinguishes *Widmar,* the quintessential limited public forum case, from these others?

Justice White sheds little light in *Perry* on this key question, as he spent most of his time (regarding the classification of the forum) making the obvious point that the school mail system was “not held open to the general public.”\(^6\)\(^7\) Even after having said that, and while purporting to explain why the mailboxes did not amount to a “limited public forum,” he simply reiterated that “there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public.”\(^6\)\(^8\)

\(^{59.}\) Id. at 304.
\(^{60.}\) 424 U.S. 828 (1976).
\(^{61.}\) Id. at 838 n.10.
\(^{63.}\) Id. at 121, 134.
\(^{66.}\) Id. at 49.
\(^{67.}\) Id. at 47.
\(^{68.}\) Id.
No, of course there was not, but, again, why was not the system a limited public forum? In this regard, his next sentence may have had more significance than was apparent at the time: “Permission to use the system to communicate with teachers must be secured from the individual building principal.” 69 (We will return to that point later on.) 70 It was at that point that he made his statement that “selective access does not transform government property into a public forum” 71 (even a limited public forum, apparently) which was followed by his suggestion that, even if it were a limited public forum, that would create a right of access “only to other entities of similar character.” 72

The mysterious matter of when we have a limited public forum is perhaps all the more significant when one considers how rarely one is likely to encounter a designated public forum that is not limited—i.e., “public property which the [S]tate has opened for use by the public as a place for expressive activity.” 73 The reader will no doubt recognize this language as the description of Justice White’s second category of forum, a description which was followed by three citations: Widmar, City of Madison Joint School District v. Wisconsin Public Employment Relations Commission, 74 and Southeastern Promotions, Ltd. v. Conrad. 75 In fact, none of those cases involved a forum that was opened to the general public for expressive activity on an unlimited basis. Indeed, Widmar and City of Madison are the cases which Justice White cited in the footnote in which he added that a public forum might be created on a limited basis, either for use “by certain groups” (citing Widmar) “or for the discussion of certain subjects” (citing City of Madison, which involved speech at school board meetings, limited to “school board business”). 76 As for Conrad, it involved access to a municipally owned theater, which, by its very nature, certainly could not have been opened to all speech by all speakers. 77 So, Perry left careful students of First Amendment law wondering, not only when a limited public forum might have been created, but when the entire category of designated public fora might be encountered as well. 78

69. Id.
70. See infra text accompanying notes 127–33.
71. Perry, 460 U.S. at 47.
72. Id. at 48.
73. Id. at 45 (emphasis added).
74. 429 U.S. 167 (1976).
75. 420 U.S. 546 (1975).
76. Perry, 460 U.S. at 46 n.7.
77. See Conrad, 420 U.S. at 546.
78. A case which Justice White did not cite, but might have, as presenting an example of a designated public forum not limited by subject matter or speaker identity is Heffron v. Int’l
A final point with regard to *Perry* speaks to another perplexing aspect of the limited public forum inquiry: If the Court had deemed the school mail system to be a limited public forum, and if that meant (as it would appear to) that the system would thus be open to "entities of a similar character" to those speakers presently granted access thereto, why would PLEA, the rival teachers' union, not be an "entity of a similar character?" Could it not be credibly argued that the system had been opened to teachers' unions, of which PLEA was one? (Indeed, it had previously been opened to both teachers' unions.)

Pretty clearly, the majority viewed the mail system as being open not to teachers' unions generally, but only to the union that had been certified as "the exclusive bargaining representative" of the local teachers (along with the Cub Scouts and others, of course). That is not an irrational conclusion by any means, but it does serve to illustrate the inescapable corollary that, even if a limited public forum has been created, the fate of the challenger will depend upon how the court characterizes the class of speakers to whom the forum has been opened. In *Widmar*, by way of contrast, the Court appeared to view the forum as having been opened to student organizations, which included the religious challenger. Why, it may sensibly be asked, did the Court not view the forum as opened only to non-religious student organizations, in which case the challenger would not have fallen within the favored class of speakers?

C. *The Ambiguity of Cornelius*

Justice O'Connor's majority opinion in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, written in 1985, is notable primarily for its elaboration upon *Perry*'s minimal pronouncements regarding the designated-public-forum concept. It was another case, like *Perry*, in which the Court might have found that a limited public forum had been created, but instead

---

*See for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981), in which Justice White himself wrote the majority opinion upholding a time, place, and manner regulation applicable to a state fairgrounds—a forum which presumably need not have been opened for expression, but was.

80. *Id.* at 55.
82. *For a nuanced analysis of Widmar*, see *Post*, supra note 4, at 1749.
83. 473 U.S. 788 (1985). Although the majority in this case consisted of only four Justices, with three Justices dissenting and two not participating, the O'Connor opinion is consistently treated as the opinion of the Court. *See, e.g.*, *Flint v. Dennison*, 488 F.3d 816, 826 (9th Cir. 2007); *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005).
deemed the intangible "forum" ("a charity drive aimed at federal employees")\(^\text{85}\) to be a non-public forum.\(^\text{86}\) The oft-quoted general explanation offered by Justice O'Connor included the following language:

In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.\ldots

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.\ldots

\ldots We will not find that a public forum has been created in the face of clear evidence of a contrary intent \ldots nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.\ldots In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.\(^\text{87}\)

The key consideration, it is now clear, is the intention of the relevant government actor. But how is a court to determine whether that government actor (a) intended to create a public forum open to a limited class of speakers, on the one hand, or (b) intended to maintain a closed, "non-public" forum, even while "permitting limited discourse," on the other? The very fact that a speaker has been excluded from the forum may be seen as evidence of intent not to create a public forum, and the government actor can be expected, in any conflict that leads to litigation, to take the position that it had no intention of opening a public forum. If the fact that some speech has been permitted in the forum does not necessarily count against the government, what will? Citations to prior decisions were sprinkled throughout O'Connor's discussion, with cases like\(^\text{Widmar}\) offered as examples of situations in which the government actor did have the intent to create a public forum.

\(^{85}\) Id. at 790.
\(^{86}\) Id. at 806.
\(^{87}\) Id. at 802-04 (citations omitted).
forum, and cases like Lehman offered as examples of cases in which the government actor did not have such intent. But did any of that suffice to provide the necessary guidance?

As to "the nature of the property and its compatibility with expressive activity," furthermore, could that possibly point toward a finding of intent to create an open forum? A finding of incompatibility would understandably support the conclusion that the government actor did not intend to create a public forum (as in Adderley and Greer, the cases cited in support of that proposition by O'Connor), but why would the fact that the challenger's speech is compatible with the nature of the forum tell us anything about the intentions of the relevant government actor? And what exactly is meant by this notion of "compatibility?" Was Lehman's political campaign advertisement incompatible with the "car cards" to which he was denied access? Were PLEA's mailings incompatible with the school mailbox system in Perry? Would it have been incompatible with the Combined Federal Campaign (the charity drive in Cornelius) to have included the NAACP Legal Defense and Educational Fund? The answers to these questions, unless we are to understand "compatibility" to mean the absence of any persuasive reason for excluding the speaker from the forum, would appear to be "no." Yet the arguable compatibility of speaker and forum appeared to count for nothing in each of these cases.

Cornelius is also notable because of the powerful dissenting opinion of Justice Blackmun, joined by Justice Brennan, that the decision inspired. Blackmun issued a fundamental critique of the Court's public forum doctrine, but, for the purposes of those of us who seek merely to understand, and not to criticize, the most striking aspect of Blackmun's opinion is his ultimate description of how, in his view, the doctrine works:

The Court's analysis empties the limited public forum concept of meaning and collapses the three categories of public forum, limited public forum, and non-public forum into two. The Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum no speaker challenging denial of access
will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum. 92

Was he correct in this assessment of the state of affairs to which the Court's public-forum jurisprudence had led? Or was he missing something—and, if so, what? Interestingly, Justice O'Connor, in her majority opinion, said not a word about Blackmun's dissent—no "Justice Blackmun overlooks" or "Justice Blackmun misunderstands." Why? Why not reassure her readers that all is not as bleak as the dissenters suggest? Why not explain, to Justice Blackmun and the rest of us, that it really is still possible for a court to properly conclude that a government actor intended to create a limited public forum, and suggest how such a conclusion might be reached? One can only wonder how she, and the Justices who joined her in the majority, reacted to Blackmun's assertions. Did they simply feel that the majority opinion was clear enough, and that Blackmun's view of the matter was misguided? 93 Or did they perhaps believe, in their heart of hearts, that, as a practical matter, he probably had it right, and that limited public fora were, like other endangered species, theoretically extant but not likely to be seen very often?

92. Id. at 825 (Blackmun, J., dissenting) (citation omitted). Seven years later, in the ISKCON decision, Justice Kennedy, in a concurring opinion joined by Justices Blackmun, Stevens, and Souter, quickly echoed Blackmun's concerns, in a single sentence regarding "the so-called 'designated' forum. The requirements for such a designation," he wrote, "are so stringent that I cannot be certain whether the category has any content left at all." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee (ISKCON), 505 U.S. 672, 697 (1992) (Kennedy, J., concurring). Consider also the words of Professor Post, commenting on Cornelius:

[T]he focus on intent had the virtue of candor, for it tactfully withdrew the concept of the limited public forum as a meaningful category of constitutional analysis. . . .

Cornelius shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum. If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case.

Post, supra note 4, at 1756–57 (footnote omitted); see also Timothy Zick, Speech and Spatial Tactics, 84 Tex. L. Rev. 581, 615 n.230 (2006) (characterizing the limited public forum as "a doctrinally incoherent concept").

93. Professor Post's critique of Cornelius, quoted in part at supra note 92, continued:

There is only one way out of this vicious circle, and it is not very satisfactory. It would require the Court to distinguish between the intent to include the class of speakers or subjects of which the plaintiff is the representative, and the intent to exclude the plaintiff. One problem with this distinction is that it is precious and in practice unworkable.

Post, supra note 4, at 1757. (But is it unworkable?)
D. Kokinda Keeps the Mystery Alive

Justice O'Connor's plurality opinion in United States v. Kokinda\textsuperscript{94} attained instant notoriety by virtue of its surprising refusal to treat a "postal sidewalk" as a traditional public forum, but that, of course, is not the focus of this article.\textsuperscript{95} But, even if one accepts the plurality's resolution of that precise question, why was this particular post office sidewalk not a limited public forum? Here is O'Connor's response to that argument:

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. . . . No Postal Service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but a regulation prohibiting disruption, and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that "[t]he government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802 (emphasis added). Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under Perry, regulation of the reserved non-public uses would still require application of the reasonableness test.\textsuperscript{96}

A number of questions are raised by this analysis. First and foremost is the question of why a government property on which citizens "have been permitted to leaflet, speak and picket" was not a limited public forum.\textsuperscript{97} (The meaning of the word "permitted" may or may not have relevance here. Did O'Connor mean to suggest that those speakers sought, and were granted, permission to leaflet, speak, and picket? Or were their leafleting, speaking, and picketing merely tolerated by those in authority? Again, the distinction may or may not be significant.) The challengers, who had engaged in the solicitation of political contributions on the postal sidewalk, were convicted of violating a federal regulation that prohibited "'[s]oliciting alms and contributions, campaigning for election to any public office, . . . and displaying

\textsuperscript{94} 497 U.S. 720 (1990).
\textsuperscript{96} Kokinda, 497 U.S. at 730 (O'Connor, J., plurality) (citations omitted).
\textsuperscript{97} See id.
or distributing commercial advertising on postal premises." 98 Since only certain kinds of speech were expressly prohibited on these premises, is it not fair to conclude that, by implication, all other forms of speech were allowed at this location—especially when other forms of speech were, in fact, allowed at this location? The dissenters thought so. 99 As for the members of the plurality (given O'Conner's focus on the absence of any regulation opening the premises for speech), one wonders whether anything short of an express written proclamation would have sufficed to make this property a limited public forum.

Particularly intriguing, and thus worth restating, is the last sentence in the above-quoted passage: "Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under Perry, regulation of the reserved non-public uses would still require application of the reasonableness test." 100 Note first the somewhat odd terminology that Justice O'Connor used; while appearing to consider (for just one brief moment) what the outcome would be if the postal sidewalk were a limited public forum, she chose to use the words "and thus is not a purely non-public forum," rather than the more obvious (and less troublesome) phrase, "and thus is a limited public forum." How exactly are we supposed to understand the phrase "not a purely non-public forum?" Are there degrees of non-public-forum-hood, some being more "pure" than others? (Forgive me, but the word usage cries out for such an irreverent response.) Alternatively, had the limited public forum concept come to be viewed with such distaste that the term could not be used even when it was the obvious term to use? Note further the inelegant, and tortured, use of language later in the sentence—namely, her reference to "the reserved non-public uses." 101 Was she perhaps intending to refer to speech to which a limited public forum had not been opened?

Strange semantic choices notwithstanding, that sentence can be seen as helpfully reinforcing the rule, implicit in Perry, that, in a limited public forum, expression which does not fall within the class of speech to which the forum has been opened may be regulated to the same extent as it could be in a non-public forum. That is to say, O'Connor can be understood to have said

98. Id. at 724.
99. Id. at 750 (Brennan, J., dissenting). Noting the limited restrictions of expression contained in the regulation, Justice Brennan concluded: "The Government thus invites labor picketing, soapbox oratory, distributing literature, holding political rallies, playing music, circulating petitions, or any other form of speech not specifically mentioned in the regulation." Id.
100. Kokinda, 497 U.S. at 730 (O'Connor, J., plurality).
101. Id.
that, even if the postal sidewalk were a limited public forum, it had not been opened up for solicitation of monetary donations, and thus the prohibition of such solicitation need only be reasonable (and, of course, not discriminate on the basis of viewpoint). The only difficulty with this interpretation is that the sentence is too unclear to allow us to proclaim its meaning with any confidence.

E. **ISKCON and Rosenberger: Misleading Statements Emerge**

The 1992 case typically referred to as *ISKCON—International Society for Krishna Consciousness, Inc. v. Lee*\(^\text{102}\)—was not one that allowed for any serious argument that the forum in question (a publicly-operated airport terminal) was a limited public forum. It is included here only because Chief Justice Rehnquist, in his cursory review of the forum categories in his majority opinion, said this:

The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public. Regulation of such property is subject to the same limitations as that governing a traditional public forum.\(^\text{103}\)

But, of course, regulation of speech in a *limited* public forum will *not* necessarily be evaluated as if the property were a traditional public forum. This imprecise statement, which had no bearing on the decision, might have had the effect of over-valuing speech in a limited public forum, but in fact there is no reason to think that the statement has had any effect at all on relevant case law.

Regrettably, that cannot be said of Justice Kennedy’s unhelpful pronouncements in *Rosenberger v. Rector & Visitors of the University of Virginia*,\(^\text{104}\) decided in 1995. It should be understood, at the outset, that, because the free-speech issue in this case was resolved by the majority purely on the basis of its (questionable) finding of viewpoint discrimination, it was completely unnecessary to categorize the forum—a public university fund, characterized by Kennedy as “a forum more in a metaphysical than in a spatial or geographic sense.”\(^\text{105}\) And, in fact, while Kennedy may have appeared to

---

103. *Id.* at 678 (citation omitted).
105. *Id.* at 830.
conclude that the fund was a limited public forum (as some courts\footnote{106} and commentators\footnote{107} have asserted) nowhere in his opinion did he clearly and unequivocally do so (although doing so would have been correct). Rather, he sprinkled a couple of general statements that made reference to the limited public forum concept into a confused paragraph whose primary thrust was that viewpoint discrimination will not be tolerated.\footnote{108} Here, offered in its entirety (aside from citations) because of the influence it has had on lower courts, is that regrettable paragraph, which followed a paragraph which spoke only about content and viewpoint discrimination (and said not a word about public fora):

These principles provide the framework forbidding the State \[from\] exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district’s provision of school facilities for private uses, we declared that “there is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.” The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum,” nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.\footnote{109}

The careful reader will, I trust, join me in observing that, while it may appear that Justice Kennedy categorized the forum in question as a limited public forum, by making reference to the concept two or three times in the

\footnote{106} E.g., Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345 n.10 (5th Cir. 2001); Summum v. Callaghan, 130 F.3d 906, 915 (10th Cir. 1997); Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997).

\footnote{107} McGill, \textit{supra} note 4, at 929; see also Gey, \textit{supra} note 4, at 1563, 1565.


\footnote{109} Id. at 829–30 (citations omitted).
course of this discussion, he really never explicitly did so. What matters more, however, is that he intertwined these references to the limited public forum with indirect references to the non-public forum concept, and with the general prohibition of viewpoint discrimination. Why? What was the need for this discussion, when all that needed to be said was that viewpoint discrimination is unacceptable, regardless of the nature of the forum? In mid-paragraph, he actually included a statement that might have been helpful (if elaborated upon) in clarifying the law of the limited public forum: "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set."110 But that statement, too, was unnecessary, in this case, given his finding of viewpoint discrimination. Unfortunately, what many lower courts have extracted from this discussion is the combination of that sentence with the sentence that follows, leading to the (mis)understanding that what he said was this: In a limited public forum, exclusion of a speaker must be reasonable and must not discriminate on the basis of viewpoint. That statement is true, of course, because unreasonableness or viewpoint discrimination will invalidate a restriction even in a non-public forum, so of course it will invalidate a restriction in any forum. But Kennedy's combination of sentences has led many lower courts to the misguided conclusion that he asserted that these are the only grounds for invalidating a prohibition of speech in a limited public forum.111 But he did not say that, in so many words, and, if he had, one would have to wonder why the limited public forum was suddenly being equated, for all intents and purposes, with the non-public forum.

F. Forbes to the Doctrinal Rescue?

Somewhat ironically, Justice Kennedy's majority opinion in Arkansas Educational Television Commission v. Forbes,112 decided three years after Rosenberger, is arguably the United States Supreme Court's majority opinion that provides the most guidance with respect to distinguishing between a limited public forum and a non-public forum. (I say that this is somewhat ironic because it is also arguably the least satisfying of the United States Supreme Court's public-forum decisions, in terms of its result).113 Ralph

110. Id.
113. But see the discussion of Forbes in Schauer, culminating in this suggestion:
Forbes, an independent candidate for Congress in Arkansas, sought to participate in a televised debate to which only the Democratic and Republican candidates had been invited by the debate's organizer, AETC, described as "an Arkansas state agency owning and operating a network of five noncommercial television stations." The organizers of the event denied Forbes' request, because they had "decided to limit participation in the debates to the major party candidates or any other candidate who had strong popular support"—a class of speakers which, in the view of the organizers, did not include Forbes. Was the debate a limited public forum? A panel of the Court of Appeals for the Eighth Circuit thought so, and Judge Arnold's explanation is notable for its forcefulness:

We can say without reservation, . . . that the forum in this case, the debate, is a limited public forum. Just as the university in Widmar created a limited public forum by opening its facilities to registered student groups for expressive speech, AETN, by staging the debate, opened its facilities to a particular group—candidates running for the Third District Congressional seat . . . .

The debate was surely a place opened by the government for a limited class of speakers. What was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? The latter answer, which essentially is the position espoused by defendants, is not supportable either as a matter of law or logic. Surely government cannot, simply by its own ipse dixit, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation. It must be emphasized that we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment, and that exclusion of one such speaker has the effect of a prior restraint—it keeps his views from the public on the occasion in question.

But a majority of the Supreme Court held that the state agency could limit the class of favored speakers in the way in which AETC had limited

Although the doctrinal structure of the majority opinion in Forbes is focused on public forum doctrine . . . in the end it is the institutional character of public broadcasting as broadcasting, heightened here by the involvement of broadcasting professionals in the very decision under attack, that appears to have determined the outcome of the case.

Schauer, supra note 4, at 91.
114. Forbes, 523 U.S. at 669.
115. Id. at 670.
116. See id. at 670–71.
Writing for the majority, Justice Kennedy ultimately deemed the debate to be a non-public forum.\textsuperscript{119}

Kennedy began his "forum" discussion in the usual fashion, briefly describing each of the three categories of forum and correlating the categories with the applicable constitutional tests.\textsuperscript{120} In the process of doing so, he made this very helpful statement regarding "designated" public fora: "[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."\textsuperscript{121} This statement—which really pertains to the concept of a limited public forum (the term I wish Kennedy had used)—was a most welcome reinforcement of the rule implied by \textit{Perry}'s suggestion that "entities of similar character" would enjoy a right of access to a limited forum.\textsuperscript{122} But even this helpful dictum was flawed, because, by referring only to "strict scrutiny," it ignored the possibility that a distinction among speakers might not be content-based.\textsuperscript{123}

Moving to the third category of fora, Kennedy made this intriguing statement: "[o]ther government properties are either non-public fora or not fora at all."\textsuperscript{124} "Not fora at all?" What did that mean? Did not the tripartite regime set forth in \textit{Perry} represent the entire universe of governmentally owned properties and channels of communication? Perhaps he had in mind the kind of case in which the inherent need for the exercise of governmental discretion—as in public broadcasting, generally,\textsuperscript{125} or the selection of books by a public library\textsuperscript{126}—is deemed to render any "forum" analysis inapplicable.

\begin{thebibliography}{9}
\bibitem{Forbes} \textit{Forbes}, 523 U.S. at 669.
\bibitem{Id} \textit{Id.} at 680. Surprisingly, the three dissenters did not adopt the position taken by the court of appeals. \textit{See id.} at 690 (Stevens, J., dissenting). Said Justice Stevens, writing for himself and Justices Souter and Ginsburg: "The dispositive issue in this case . . . is not whether AETC created a designated public forum or a non-public forum, . . . but whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate." \textit{Id.}
\bibitem{Id2} \textit{Id.} at 677–78 (majority opinion).
\bibitem{Forbes2} \textit{Forbes}, 523 U.S. at 677.
\bibitem{See} \textit{See supra} text accompanying notes 39–46.
\bibitem{Kennedy} Kennedy, of all Justices, must have known that, since, in \textit{ISKCON}, he concurred in the judgment on the grounds that the airport terminal was a public forum, but the ban on solicitation was a reasonable (content-neutral) time, place and manner regulation. \textit{See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee (ISKCON)}, 505 U.S. 672, 683 (1992) (Kennedy, J., concurring).
\bibitem{Forbes3} \textit{Forbes}, 523 U.S. at 677.
\bibitem{Id3} \textit{Id.} at 675.
\bibitem{See2} \textit{See the plurality opinion of Chief Justice Rehnquist in United States v. American Library Ass'n}, finding forum analysis incompatible "with the discretion that public libraries
But why did Kennedy overturn the conclusion of the Court of Appeals that the debate in *Forbes* was a limited public forum? In fact, he never even used that term, addressing instead the question of whether the debate was a "designated" public forum, and finding that it was not.\(^\text{127}\) In the process, he set forth a relatively extensive explanation of the governing criteria, which deserves quotation at some length:

To create a forum of this type, the government must intend to make the property "generally available," to a class of speakers. . . . A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers. . . . The basis for the holding in *Perry* was explained by the Court in *Cornelius*: "In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted."

And in *Cornelius* itself, the Court held the Combined Federal Campaign (CFC) charity drive was not a designated public forum because "[t]he Government’s consistent policy had been to . . . require agencies seeking admission to obtain permission from federal and local Campaign officials."

These cases illustrate the distinction between "general access," which indicates the property is a designated public forum, and "selective access," which indicates the property is a non-public forum. . . . [T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it.\(^\text{128}\)

Kennedy then applied those considerations to the case at hand, as follows:

Here, the debate did not have an open-microphone format. . . . AETC did not make its debate generally available to candidates for Arkansas' Third Congressional District seat. Instead, just as the Federal Government in *Cornelius* reserved eligibility for participation in the CFC program to certain classes of voluntary agencies,

---

\(^{127}\) *Forbes*, 523 U.S. at 678.

\(^{128}\) *Id.* at 678–79 (citations omitted).
AETC reserved eligibility for participation in the debate to candidates for Third Congressional District seat . . . . At that point, just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the CFC, AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." Thus the debate was a non-public forum.129

At long last, we had been given some concrete guidelines. But, are they sufficiently concrete? The key distinction, it seems, is that between "general access for a class of speakers," on the one hand, and "selective access for individual speakers," on the other. But it has never been clear how to distinguish "general" from "selective" access, words that were not new to this opinion. Here, however, there was the added contrast between access "for a class of speakers" and access "for individual speakers." But how helpful is that? If we focus on the application of these principles to this very case, it seems fair to say that the "selective access" which Justice Kennedy found here was extended to a "class" of speakers (congressional candidates), and not to randomly-selected individuals. Indeed, Kennedy stated, in that part of his discussion, that the government in *Cornelius* "reserved eligibility for participation in the CFC program to certain classes of voluntary agencies."130 So, the "selective access" that defeats a finding of a limited public forum may, it seems, be either "random" access or access that is extended only to persons or groups that fall into a defined class of speakers. In the former instance, in which disparate speakers have been allowed access on a sporadic basis, we would apparently lack the crucial evidence of a governmental intent to open the property to a "general class" of speakers. In the latter instance, it is apparently a second step that really counts toward a finding of "selective access"—the selection of speakers, by the relevant government actor, within a defined class. Given this second understanding of "selective access," the ability to distinguish it from "general access for a class of speakers" remains elusive.

Potentially more helpful, however, is the fact of Justice Kennedy's repeated references, in this mini-tutorial, to the concept of "permission." The need to obtain "permission" on an individualized basis, as a condition of access to the forum at issue, he explained, is a key characteristic of a non-public forum, even in situations that look like "general access" cases, and

---

129. *Id.* at 680.
130. *Id.* at 680 (emphasis added).

https://nsuworks.nova.edu/nlr/vol33/iss2/2
explains why Perry and Cornelius (in which such permission was required) did not involve limited public fora. Widmar, in contrast, was viewed as involving a situation (again, the availability of university facilities to registered student organizations) in which individualized permission was not required; the property was "generally available" to all members of the favored class of speakers. The last sentence of his statement of general principles, quoted above, can thus be seen as capturing the essence of his message: "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." As the quoted statements make clear, this "permission" factor had been highlighted in Cornelius, over a decade earlier, but Kennedy's dissertation in Forbes put the spotlight on this variable in a much more emphatic way.

Two major questions immediately come to mind with regard to this suggested key to the limited public forum puzzle: First, is it workable, and second, does it make sense? We will return to those questions shortly.

G. Good News Club: A Big Step Backward

Whatever contribution to clarity may have been made by Forbes was needlessly and regrettably undercut by Justice Thomas' pronouncements in the 2001 case of Good News Club v. Milford Central School. The Good News Club sought access, on an "after hours" basis, to public school facilities that had been opened to use by other outside organizations for various expressive purposes. The forum in question appeared to be a limited public forum, the parties agreed on that characterization, and Justice Thomas, writing for the Court majority, was willing to assume that this was the proper category. But, as in Rosenberger, the category of forum was unimportant, given the majority's (questionable) finding of viewpoint discrimination. Here, however, is what Thomas said next, concerning the applicable constitutional test:

133. See Forbes, 523 U.S. at 679--80.
135. Id. at 102--03.
136. Id. at 106.
137. See id. at 107.
When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving its forum for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum." \(^{138}\)

The first three assertions in that paragraph are unexceptional, and clearly accurate. The last sentence is not inaccurate, because those limitations apply regardless of the nature of the forum, but the problem, as in *Rosenberger*, \(^{139}\) is the immediate juxtaposition of (a) statements describing the nature of a limited public forum with (b) the two-part test governing the constitutionality of restrictions on speech in a non-public forum. The reader—unless he knows enough to recognize the incongruity between this presentation and earlier pronouncements concerning these matters—may be justified in concluding that the Court had just stated unambiguously that an exclusion of any speaker from a limited public forum would be subject only to that two-part test. Understandably, but regrettably, that is how some lower federal courts have understood Thomas' statement of governing legal doctrine. \(^{140}\)

H. Synthesizing the Supreme Court's Limited Public Forum Jurisprudence

1. The Court's Pronouncements

While the Justices have, over the years, made frequent use of the term "limited public forum," the Court has never defined, or adequately explained the meaning of, that concept. The closest the Court has come to defining the term was its initial indication, in *Perry*, that a public forum might "be created for a limited purpose" \(^{141}\)—a statement made in a footnote which sprang from Justice White's discussion of the second public forum category, a category that now dependably bears the label "designated public forum." Can there be any reasonable doubt, then, that the limited public forum is a sub-category of the designated public forum category? The further discussion of the limited

\(^{138}\) *Id.* at 106–07 (citations omitted).

\(^{139}\) *See supra* text accompanying notes 104–11.


\(^{141}\) *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983).
public forum concept in *Perry*,\(^{142}\) furthermore, augmented both by 1) the reaffirmation of *Perry*’s implications in *ISKCON*\(^{143}\) and *Forbes*\(^{144}\) and 2) the constant citation (and description) of *Widmar* with approval, make clear enough how a court is to evaluate limitations on speech in a limited public forum: The court should first determine the class of speakers to whom the forum has been opened, and then decide whether the excluded speaker falls within that favored class; if the speaker falls within the favored class, the forum should be treated as if it were a traditional public forum, but if the speaker falls outside of the favored class, then the forum should be treated as if it were a non-public forum. Occasional inconsistent, ill-considered passages (in the Court’s *Rosenberger*\(^{145}\) and *Good News Club*\(^{146}\) opinions), which suggest that the limited public forum is, in every case, to be treated as if it were a non-public forum, should be viewed as just that—ill-considered, and inconsistent with the more logical and coherent statements made in *Perry* and *Forbes*—and, accordingly, ignored.\(^{147}\)

With regard to the challenging task of deciding *when* a limited (or designated) public forum has been created, two majority opinions are dominant: The seminal opinion by Justice O’Connor in *Cornelius*, making clear that the government’s *intent* is the key,\(^{148}\) and Justice Kennedy’s opinion in *Forbes*, with its emphasis on a speaker’s need to obtain permission as the major variable distinguishing “selective” access from “general” access.\(^{149}\)

2. The Court’s Rulings

With regard to the proper understanding and treatment of the limited public forum, there are few specimens to consider, since the Court has not found any governmental property to be a limited (or designated) public fo-

\(^{142}\) See *id.* at 46–47.


\(^{144}\) See *supra* text accompanying notes 121–22.

\(^{145}\) See *supra* text accompanying note 109.

\(^{146}\) See *supra* text accompanying note 138.

\(^{147}\) It should be noted, however, that a further note of uncertainty regarding these matters was sounded by Justice Breyer, in *dictum*, in a plurality opinion in 1996, in which he declined to apply the public forum doctrine to an unconventional setting (“leased access” cable television channels). Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 749 (1996). Writing for four Justices, in clear reference to the concept of the limited public forum, he stated, somewhat cryptically: “Our cases have not yet determined, however, that [the G]overnment’s decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny.” *Id.* at 750.

\(^{148}\) See *supra* text accompanying notes 87–89.

\(^{149}\) See *supra* text accompanying notes 128–31.
rum since the pre-Perry decision in *Widmar*, which, while it pre-dated the Court’s crystallization of its governing categories and rules, still stands as the preeminent example of a limited public forum.\textsuperscript{150} We can draw little guidance from what the Court has actually done, then, with regard to the limited (or designated) public forum.

We can, however, inquire as to whether the Court’s pre-Forbes rulings support the primacy of “permission” as the key variable explaining when we have merely “selective,” as opposed to “general,” access to a forum which has been opened to at least some speakers. (The distinction would rather clearly seem to be irrelevant in cases, like *ISKCON*\textsuperscript{151} and *United States Postal Service v. Council of Greenburgh Civic Ass’n*,\textsuperscript{152} in which there is no evidence that the property has been opened to anyone for expressive purposes). Bearing in mind that an earlier opinion may understandably fail to shed light on the existence or non-existence of a factor whose significance was far from clear at the time the opinion was written, and recognizing that some prior rulings may simply not conform to a mode of analysis that did not emerge until years later, we are nonetheless compelled to observe that the pattern of prior decisions is not consistent with regard to Kennedy’s thesis in *Lehman* (involving rapid transit system advertising spaces)\textsuperscript{153} and *Greer* (involving political campaigning on a military base)\textsuperscript{154} do appear to take their places comfortably alongside *Perry* and *Cornelius* as cases involving situations in which a prospective speaker needed to obtain permission from a controlling governmental authority as a condition of access to the property in question. In *Kokinda*, as was observed earlier, citizens had “been permitted to leaflet, speak and picket” on the postal sidewalk,\textsuperscript{155} but it is unclear wheth-

\textsuperscript{150} The other case cited in *Perry* as an example of a “limited” forum, 460 U.S. 37, 46 n.7 (1983), *City of Madison Joint School District v. Wisconsin Public Employment Relations Commission*, 429 U.S. 167 (1976), in which a school board meeting was generally open to members of the public for comments, spoke neither of forum categories nor of any level of judicial review. In his majority opinion for a unanimous Court (which ruled in favor of the excluded speaker), Chief Justice Burger said merely that “[w]here the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers.” *Id.* at 175. The *Heffron* decision of 1981, as noted earlier, is perhaps the only true example, at the Supreme Court level, of a designated public forum not limited as to subject matter or speaker identity. *See Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654–55 (1981). But the decision teaches us nothing, with respect to the problems at hand, since the government actor in that case made no attempt to exclude the speakers from the forum.

\textsuperscript{151} 505 U.S. 672 (1992).

\textsuperscript{152} 453 U.S. 114 (1981).


er the word "permitted" denoted (a) that those speakers had been required to ask and receive permission, or (b) that the presence of those speakers had merely been tolerated.

But of the three cases cited in Perry as examples of designated public fora, only one—City of Madison—seems to fall into the "open to all speakers, no permission required" category (keeping in mind that the forum was a school board meeting, so that only speech related to "school board business" was permitted).156 Widmar, in contrast (and notwithstanding its treatment by Justice Kennedy in Forbes), does not seem to have involved a "no permission required" situation, as this sentence from Justice Powell's majority opinion reveals: "From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities."157

(Each of these rare exemplars of the limited public forum concept, it should be noted, differs from the more typical such case in that, in each, the government actor in direct control of the forum was not actually motivated by a desire to exclude the challenger for any reason relating to the effect of the speech on the forum.) In City of Madison, the speaker who was supposed to be barred from the forum—by a state labor-relations statute—had actually been permitted to speak by the school board at its meeting; litigation ensued only after a third party, after the fact, challenged the legitimacy of the school board’s action.158 In Widmar, university officials sought to bar the religious student group from using the school’s facilities for expressive purposes, but only because those university officials feared that continuing to grant access to the religious group would violate the Establishment Clause;159 the Su-

156. See Perry Educ. Ass’n v. Perry Local Educator’s Ass’n, 460 U.S. 37, 46 n.7 (1983) (citing City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n, 429 U.S. 167 (1976)). In Minnesota State Board. for Community Colleges v. Knight, 465 U.S. 271 (1984), Justice O’Connor distinguished City of Madison, stating that the school board meetings “at issue there were ‘opened [as] a forum for direct citizen involvement,’ . . . and ‘public participation [was] permitted.’” Id. at 281. The First Amendment was violated, she went on to say, “when the meetings were suddenly closed to one segment of the public even though they otherwise remained open for participation by the public at large.” Id.

157. Widmar v. Vincent, 454 U.S. 263, 265 (1981). See also Chess v. Widmar, 635 F.2d 1310, 1313 (8th Cir. 1980). The other pertinent Supreme Court case involving a state university, Rosenberger (in which Justice Kennedy may have appeared to find that the fund in question was a limited public forum, but actually made no such explicit finding), was also a setting in which an application was required. Rosenberger v. Rector & Vistors of Univ. of Va., 515 U.S. 819, 823 (1995). Permission was required as well in Good News Club, a case in which the parties stipulated that the school premises constituted a limited public forum. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

158. City of Madison, 429 U.S. at 172.

159. Widmar, 454 U.S. at 265 n.3.
The third decision put forth in *Perry* as an example of a designated public forum, *Conrad*, not only involved a governmentally-controlled property (a municipally operated theater) whose use was made available only through an application process, but appears to be completely out of sync with later decisions. A majority of the Court, speaking through Justice Blackmun, found fault with a municipal board’s rejection of an application to stage a controversial musical stage play at the theater in question. Key to the decision was Blackmun’s preliminary conclusion that the theater in question was a “public forum designed for and dedicated to expressive activities.” But surely this was not a governmental forum that had been opened to any and all members of a particular class of speakers, with no discretion reserved to the officials in charge of the property.

Other decisions simply do not fit as comfortably into either the “permission required” or “no permission required” paradigms. *Hazelwood School District v. Kuhlmeier*, for example, which extended the public forum doctrine to the public school setting, involved a claim by student staff members of a high school newspaper that their First Amendment rights had been violated when certain student-authored articles were removed from the newspaper prior to its publication. Justice White, for the majority, found, in effect, that the newspaper was a non-public forum. The newspaper had arguably been opened to written expression by a particular class of speakers—namely, student members of the newspaper’s staff—and it did not appear that a formal system was in place pursuant to which “permission” needed to be obtained before an article could be published. But the key to the decision was the undeniable maintenance of ultimate control over the contents of the newspaper by the journalism teacher and the school principal. *Forbes* itself, ironically, involved no requirement that permission be

160. *Id.* at 273–75.
162. *Id.* at 562.
163. *Id.* at 555.
165. *Id.* at 262.
166. *Id.* at 270.
167. *Id.* at 268–70.
168. *See id.* at 269. Pervasive governmental control of the forum can be seen as explaining the result in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977), as well. A lower court decision placing primary emphasis on “whether the government has exercised a sufficient degree of control over the forum” is *Pocatello Education Ass’n v. Heideman*, 504 F.3d 1053, 1066 (9th Cir. 2007).
granted as a condition of access to the forum in question, a one-time televised candidates' debate. Access was allowed, instead, on an "invitation-only" basis.169

We may conclude, then, that most, but not all, of the Court's precedents support Justice Kennedy's attempt to explain them in Forbes. Based primarily on Forbes itself, and to a lesser extent Hazelwood, we might also conclude, for the sake of achieving greater descriptive accuracy, that what has mattered, almost always, in the cases in which a denial of access to a forum has been upheld by the Supreme Court, is the presence of a governmental "gatekeeper" of sorts—meaning, a government actor who, either through a process of inviting certain speakers, requiring speakers to obtain permission to speak (and granting it only sometimes), or otherwise exercising ongoing control over the expressive enterprise, made it quite clear that the government did not mean to open the forum to all speakers falling within a particular class. We will return to the question of whether this "gatekeeper" concept provides a workable and sensible basis for distinguishing between designated and limited public fora, on the one hand, and non-public fora, on the other.

III. HOW HAVE THE FEDERAL COURTS OF APPEALS UNDERSTOOD "THE MIDDLE CATEGORY?"

Our understanding of "the middle category"170 of governmental forum—focusing primarily on the limited public forum but, of necessity, embracing as well the designated public forum—may be enhanced by a consideration of how federal appellate courts (who have had many more opportunities than has the Supreme Court to address these issues) have dealt with it. What do these courts understand to be meant by the phrase "limited public forum?"171 What legal consequences flow from that label? Have lower courts found designated and limited public fora, and, if so, to what extent have they been guided by Justice Kennedy's opinion in Forbes in reaching such results?

170. The term is commonly used to embrace the designated and limited public forum concepts. See, e.g., Justice for All v. Faulkner, 410 F.3d 760, 765 (5th Cir. 2005).
171. For a fairly comprehensive review—with a somewhat different focus—of lower court case law in this area, as of 2002, see Fischer, supra note 4, at 657–70. See also Mary Jean Dolan, The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech, 31 HASTINGS CONST. L.Q. 71, 80–100 (2004).
A. Competing Understandings of the Terminology

The federal courts of appeals remain strikingly divided with respect to their understanding of what it means to pin the label "limited public forum" upon a governmentally controlled property or channel of communication. At the risk of over-simplification, these courts can essentially be placed into one of two groups: Those who, like your humble author, are guided by the implications of *Perry* and *Forbes*, and those who have been influenced primarily by the misleading statements made in the *Rosenberger* and *Good News Club* decisions.

In the first group are, most dependably, the Second and Fourth Circuit Courts of Appeals. The Second Circuit’s understanding, dating back more than twenty years, was perhaps best expressed in the following passage from a fairly recent decision:

A subset of the designated public forum, the “limited” public forum, exists “where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.” . . . In limited public fora, strict scrutiny is accorded only to restrictions on speech that falls within the designated category for which the forum has been opened. . . . As to expressive uses not falling within the limited category for which the forum has been opened, restrictions need only be viewpoint neutral and reasonable.

The Second Circuit has, moreover, actually utilized this approach.

The Court of Appeals for the Fourth Circuit, while employing uniquely creative (but dispensable) terminology, appears rather clearly to be in agreement with the Second Circuit, as this (necessarily) lengthy excerpt from a fairly recent Fourth Circuit decision reveals:

---

172. Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986).

173. Hotel Employees & Rest. Employees Union v. City of N.Y. Dep’t of Parks & Recreation, 311 F.3d 534, 545–46 (2d Cir. 2002) (citations omitted); accord Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 143 (2d Cir. 2004); Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 229 (2d Cir. 1996); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). But see Amidon v. Student Ass’n of State Univ. of N.Y. at Albany, 508 F.3d 94, 100 (2d Cir. 2007); Husain v. Springer, 494 F.3d 108, 121 (2d Cir. 2007); Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626 (2d Cir. 2005); Gen. Media Commc’n v. Cohen, 131 F.3d 273, 278 n.6 (2d Cir. 1997).

174. Travis, 927 F.2d at 693 (“Travis’s program was the same type as a previously permitted use. Even if the forum was limited, Travis, being within the category for which use had been permitted, could not be denied access absent a sufficient constitutional justification.”).
When a particular forum is classified as a designated/limited public forum, "[t]wo levels of First Amendment analysis" apply: the "internal standard" and the "external standard." The "internal standard" applies to situations where "the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available." In this situation, the government's "action is subject to strict scrutiny." In other words, "as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum." On the other hand, the "external standard" "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened." We explained that "once a limited forum has been created, entities of a 'similar character' to those allowed access may not be excluded." The government's designation of the class for the "external standard" is "subject only to the standards applicable to restrictions on speakers in a non-public forum," namely that "the selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum."\(^{175}\)

And, as in the Second Circuit, this approach has actually been used by the Fourth Circuit.\(^{176}\)

The Third, Eighth, and Federal Circuit Courts of Appeals appear to be in agreement.\(^{177}\) In addition, panels of the Sixth\(^{178}\) and Eleventh\(^{179}\) Circuits,


176. Goulart, 345 F.3d at 251 ("[T]o determine which standard to apply to the Board's exclusion of the plaintiffs in this case, we must determine whether homeschoolers as a group are an entity of a 'similar character' to those groups permitted to use the community centers.")

177. See Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1311 (Fed. Cir. 2008) (en banc); Bowman v. White, 444 F.3d 967, 976 (8th Cir. 2006); Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1321 (Fed. Cir. 2002); U.S. v. Goldin, 311 F.3d 191, 196 (3d Cir. 2002); Christ's Bride Ministries, Inc. v. Se. PA Transp. Auth., 148 F.3d 242, 255 (3d Cir. 1998). But see Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 526 (3d Cir. 2004). Note, however (as reflective of the persistent confusion in the use of public forum terminology), that the court in Preminger stated that a "designated" public forum "is an area dedicated by the government for a certain class of speakers." Preminger, 517 F.3d at 1311.

178. Kincaid v. Gibson, 236 F.3d 342, 354 (6th Cir. 2001). This decision can also be understood as having, alternatively, viewed the restriction as content-based and employed strict scrutiny. Id. at 355. See also Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 843 (6th Cir. 2000).

179. Rowe v. City of Cocoa, Fla., 358 F.3d 800, 802–03 (11th Cir. 2004); Crowder v. Hous. Auth. of Atlanta, 990 F.2d 586, 591 (11th Cir. 1993).
albeit with far less explication of general doctrinal understanding, have applied time, place and manner analyses to content-neutral restrictions on speech in limited public fora.

In contrast, a number of other federal appellate courts, taking seriously the misleading discussions in *Rosenberger*\(^{180}\) and *Good News Club*\(^{181}\) treat the limited public forum designation as if it were synonymous with “non-public forum”\(^{182}\)—sometimes even while stating that the “limited public forum is a sub-category of a designated public forum!”\(^{183}\) A panel of the Court of Appeals for the First Circuit even referred to “a non-public forum (sometimes called a limited public forum).”\(^{184}\)

Recognizing that lower court judges must defer to the United States Supreme Court when it comes to constitutional pronouncements (at least when they are clear and consistent), one may nonetheless wonder how any reasonable jurist could believe that, in a scheme apparently comprising four categories, two of them—one labeled “limited” and one labeled “non”—are to be treated as exactly the same. What meaning is assigned to the word “limited” if that equation is made? While some of us are inclined to perceive the phrase “limited public forum” in a “positive” way, connoting a place that has been opened to expression, but on a limited basis (a glass half full, if you will) it appears to be possible to think of “limited” as having a primarily “negative” connotation, tending to denote that the property is presumptively “closed” to expression (i.e., a glass half empty). Thus, one panel of the Fifth Circuit Court of Appeals stated that “a given forum may be designated for

---

181. *See supra* text accompanying note 138.
182. *See, e.g.*, Curnin v. Town of Egremont, 510 F.3d 24, 28 (1st Cir. 2007); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004) (“We adopt the usage equating limited public forum with non-public forum and do not discuss the issue further.”); Hopper v. City of Pasco, 241 F.3d 1067, 1075 n.8 (9th Cir. 2001) (“This categorization admittedly leads to the strange semantic result that a limited public forum is not actually a public forum.”); Summit v. Callaghan, 130 F.3d 906, 916 n.14 (10th Cir. 2007) (“We use the term ‘limited public forum’ here to denote a particular species of non-public forum . . . .”). Even one commentator has asserted that “the ‘limited public forum’ is a subset of the ‘non-public’ forum.” *Dolan*, *supra* note 171, at 77. Similar confusion pervades the discussion in Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1370–71 & n.117 (2001). The Ninth Circuit, in particular, has been persistent in taking this approach. Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 969 (9th Cir. 2008); Flint v. Dennison, 488 F.3d 816, 831 (9th Cir. 2007); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 908 n.8 (9th Cir. 2007); Cogswell v. City of Seattle, 347 F.3d 809, 814 (9th Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004); Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1049 (9th Cir. 2003).
183. *Hopper*, 241 F.3d at 1074.
184. *Ridley*, 390 F.3d at 76.
one class of speaker or speech, and still ‘limited’ with respect to others.”185 But a panel of the Tenth Circuit, using terminology that threatens to complicate matters to an intolerable degree, stated that “a designated public forum for a limited purpose and a limited public forum are not interchangeable terms,”186 thus giving no meaning to the latter phrase.

B. “Middle Category” Decisions

1. Rulings

The United States Supreme Court, of course, has not found a governmental property to be a limited (or even a designated) public forum since Widmar in 1981. Dissenting in Cornelius in 1985, Justice Blackmun complained that, given the approach set forth therein, the Court had made “it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum.”187 His core reasoning, shared by critics of the Court’s public forum doctrine, is worth restating:

If the Government does not create a limited public forum unless it intends to provide an “open forum” for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum.188

Was Justice Blackmun right? Has it proven to be virtually impossible to persuade a court that a governmental property or channel of communication is a designated or limited public forum? The good (and perhaps surprising) news, for partisans of freedom of expression, is that it has not.189 A

185. Justice for All v. Faulkner, 410 F.3d 760, 766 (5th Cir. 2005). The Fifth Circuit has given hints of agreement with the understanding of “limited public forum” shared by the Second and Fourth Circuits, but has stopped short of taking such an approach unambiguously. Id. at 769; Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 347 (5th Cir. 2001). The two opinions cited in this note project, more than anything else, a sense of uncertainty concerning the terminology. Id. at 345–46; Faulkner, 410 F.3d at 765 n.6.

186. Callaghan, 130 F.3d at 916 n.14.


188. Id. (internal citation omitted). See supra text accompanying note 92.

189. The discussion of cases that follows is not intended to be exhaustive, and is based primarily on a consideration of federal appellate decisions rendered subsequent to the Supreme Court’s 1998 decision in Forbes. Note, too, that cases discussed herein in which the
number of recent holdings of federal appellate courts indicate that designated and limited public fora do exist.

The public university setting has yielded the most persuasive examples of unlimited designated fora. At least two appellate courts have held the outdoor open areas of such campuses to be designated public fora, but since, in one of those cases, the areas in question appear to have been opened only to members of the university community, the court probably should have found a limited, as opposed to an unlimited, public forum (since the challenger was a student group, the distinction would not have affected the subsequent analysis). In each of these cases, the open nature of the forum was presumptively important, as the court, in each case, went on to find that a content-neutral restriction failed intermediate scrutiny. Another court properly found that a bulletin board on a state university campus, open to use by the general public, was a designated public forum.

*Lehman* notwithstanding, at least three federal appellate courts have found public-transit system advertising spaces—on the exterior panels of buses or in subway and railroad stations—to be designated public fora. The forum, in each case, might well have been deemed a limited, as opposed to an unlimited forum because, in each, the forum was open only to advertising (admittedly broadly defined) and in one of the cases, the governing policy excluded several categories of ads. (The persuasiveness of these courts’ reasoning will be considered in the next section). The court went on to rule in favor of the challenger, on the merits of its First Amendment claim, in each of the three cases; in two of the three, the court found that a content-based exclusion would not withstand strict scrutiny, but found as well in

---

190. Bowman v. White, 444 F.3d 967, 979 (8th Cir. 2006); Justice for All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005).

191. *See Faulkner*, 410 F.3d at 768.

192. *Id.* at 772; *Bowman*, 444 F.3d at 981–82.

193. Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001), *cert. denied*, 534 U.S. 858 (2001). Because the Court went on to find that the removal of the plaintiff’s handbills amounted to viewpoint discrimination, the finding of a designated public forum turned out to be unnecessary to the resolution of the case. *Id.*


196. *United Food*, 163 F.3d at 353.

197. *Id.* at 355; *Christ’s Bride Ministries*, 148 F.3d at 255.
the alternative, that the exclusion was not even reasonable, thus rendering
the forum categorization non-dispositive.

Another court held that when city officials extended a general invitation
to artists to display their works in the hallways of city hall, they created a
designated public forum. (The persuasiveness of this holding will also be
considered in the next section). Again, the court probably should have found
(at most) that a limited public forum had been created, since the forum had
been opened only to works of art (which, however defined, would surely
leave out some other forms of expression); but again, the distinction was
unimportant here because the plaintiffs were indisputably artists. The court
went on to rule that the content-based exclusion of the plaintiffs’ works
failed to satisfy strict scrutiny.

Appellate courts have also discerned the existence of limited public fora
in the truest and most meaningful sense. An easy example, given the United
States Supreme Court’s decision in City of Madison, is a case in which a city
council meeting, at which city residents or taxpayers were permitted to
speak, was deemed to be a limited public forum. (The court then upheld
what it saw—questionably—as a content-neutral restriction on comments by
nonresidents). Another good example is a city’s “voters’ pamphlet,”
which was limited to “‘statements by a candidate . . . about the candidate
himself or herself,’” thus obviously limited by both content and speaker
identity. (But while the court correctly deemed the pamphlet to be a li-
mitcd public forum, it incorrectly subjected the content-based limitation to
only the reasonableness level of review, and upheld it). Yet another good
example is a case involving access to the outdoor areas of a public university
campus, held to be a limited public forum open to members of the university
community but not to outsiders (including the plaintiffs).

In addition, at least one appellate court found meeting rooms in a coun-
ty community center to be limited public fora, but held that the challengers

198. Christ’s Bride Ministries, 148 F.3d at 255; United Food, 163 F.3d at 358.
199. Hopper v. City of Pasco, 241 F.3d 1067, 1081 (9th Cir. 2001).
200. Id.
201. Rowe, 358 F.3d at 802.
202. Id. at 803.
203. Cogswell v. City of Seattle, 347 F.3d 809, 811–12 (9th Cir. 2003) (quoting WASH.
REV. CODE § 29.81A.030(3) (2003)).
204. Id. at 814.
205. Id. at 814, 818.
206. ACLU v. Mote, 423 F.3d 438, 444 (4th Cir. 2005).
207. Goulart v. Meadows, 345 F.3d 239, 251 (4th Cir. 2003). Another court made the
credible determination that a meeting room in a public library was a limited public forum, but
treated the limited public fora as equivalent to non-public fora, and upheld the exclusion of the
(two families seeking to use the facilities for "homeschooling") did not constitute "an entity of a 'similar character' to those groups permitted to use the community centers."\(^{208}\) Another court held that a state's specialty license plate program was a limited public forum open "to only nonprofit organizations with community driven purposes" that complied with certain additional requirements.\(^{209}\) A far less obvious example of a limited public forum, finally, is a university yearbook, which was deemed to have been opened to the yearbook's student editors (including the plaintiffs herein).\(^{210}\) The court went on to find that the challenged government action—confiscation and ban on distribution of the yearbook, based in part on its content—failed every level of judicial review, including reasonableness.\(^{211}\)

### 2. "General" or "Selective" Access?

#### a. Use of the Forbes "Permission" Factor

In the post-Forbes federal appellate cases in which the forum had been opened to some, but not all, speakers, thereby necessitating a ruling as to whether "general" or merely "selective" access had been granted, the "permission" factor identified by Justice Kennedy in Forbes has not been consistently utilized. Some courts have (reasonably) deemed fora to be "non-public," despite the fact that some speakers had been granted access thereto, with no explicit consideration of the fact that speakers needed permission as a condition of access,\(^{212}\) while other courts have ignored the existence of

---

208. *Goulart*, 345 F.3d at 251.
210. *Kincaid v. Gibson*, 236 F.3d 342, 353 (6th Cir. 2001). *See also* *Husain v. Springer*, 494 F.3d 108, 125 (2d Cir. 2007) (reaching the same conclusion with respect to a college student newspaper).
211. *Kincaid*, 236 F.3d at 354–56.
permit requirements in finding that designated fora had been created. But other courts have given great weight to the permission factor, sensibly finding only selective access—and, accordingly, non-public fora—when permission was required as a condition of access.

A number of other courts, meanwhile, have addressed the permission factor in ways that both (a) suggest the possibility of some judicial resistance to its influence, and (b) raise questions as to its meaning and utility.

One such case is Goulart v. Meadows, in which two “homeschooling mothers” sought to use space at a county community center “for meetings of a geography club and a fiber arts club.” A written Community Center Use Policy governed access to the county’s community centers, and required written applications for use of any such center to be submitted to a “Recreation Coordinator,” who had “‘the right to refuse or revoke any application not in accordance with’” the Use Policy. That policy, as modified, did “not permit homeschool instructors to use the community centers to offer homeschool educational classes intended to satisfy state educational requirements.” The uses for which access was sought in this case were deemed by the Recreation Coordinator to run afoul of that restriction. So, had the county afforded “general” or merely “selective” access to these community centers? Was it not clear that permission was required, as a condition of such access, thus pointing to the conclusion that access was “selective?” The court thought otherwise, as the following key paragraph reveals:

We are not persuaded that the community centers at issue in this case are non-public fora. First, the Recreation Coordinators at the

213. E.g., Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 970 (9th Cir. 2008); Bowman v. White, 444 F.3d 967, 976–80 (8th Cir. 2006); Justice for All v. Faulkner, 410 F.3d 760, 767–69 (5th Cir. 2005). See also Amandola v. Town of Babylon, 251 F.3d 339, 344 (2d Cir. 2001).

214. E.g., Perry v. McDonald, 280 F.3d 159, 167–69 (2d Cir. 2001); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843–44 (6th Cir. 2000). See also Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 145–47 (2d Cir. 2004). Note, too, that courts that inappropriately equate the concepts of “non-public forum” and “limited public forum” have at times given weight to a permission requirement in finding the existence of a “limited” public forum, but treated that “limited” public forum as if it were a non-public forum. E.g., Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 908–10 (9th Cir. 2007); Hills v. Scottsdale Unified Sch. Dist., No. 48, 329 F.3d 1044, 1049–50 (9th Cir. 2003). See also Campbell v. St. Tammany Parish Sch. Bd., 231 F.3d 937, 941–42 (5th Cir. 2000).

215. 345 F.3d 239 (4th Cir. 2003).
216. Id. at 241.
217. Id. at 242.
218. Id. at 244.
219. Id. at 244–45.
community centers make only ministerial judgments because they are allowed to deny an application only if it is "not in accordance with the provisions outlined in the [Use Policy]." In other words, if a proposed user falls within the confines of the Use Policy, the application will be granted. Here, permission to use the community centers is not "selective," but is "granted as a matter of course" to all individuals or groups who fall within the Use Policy. In addition, Calvert County has intentionally made the community centers generally available to certain types of expressive activity. For example, the community centers are open to a wide variety of instructional activities . . . . We classify the community centers as designated or limited public fora and will analyze the restrictions here accordingly.220

The challengers were nonetheless unsuccessful, because the court went on to find, sensibly, that they did not fall within the category of speakers to whom the forum had been opened.221 But, given the fact that a formal application for use of community center facilities was required, and that such an application could be (and was, in this case) rejected, was the court's intermediate conclusion in this case—that the community center was a designated public forum, to which access had been granted on a general basis222—consistent with what Justice Kennedy said in Forbes? His assertion, again, was this: "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,' to use it."223 Does that not describe the situation in Goulart, or are we to correctly understand that there is no real permission requirement when "permission" is "'granted as a matter of course'" (to some speakers, at least) by the rules that govern the forum?

Two decisions involving access to public transit systems show even less commitment to the Forbes permission factor as a potentially dispositive criterion. In the first, Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority (CBM),224 the transportation authority, SEPTA, allowed paid advertising in its rail and subway stations, but rejected an anti-abortion advertisement submitted by the challenger, CBM.225

220. Goulart, 345 F.3d at 250–51 (citations omitted).
221. Id. at 255.
222. Id. at 251.
224. 148 F.3d 242 (3d Cir. 1998).
225. Id. at 244.
SEPTA’s written policy governing such advertising included the following language:

All advertising displays . . . shall be of an appropriate character and quality, and the appearance of all displays shall be acceptable to SEPTA. No libelous, slanderous, or obscene advertising may be accepted. . . . All advertising determined by . . . SEPTA, in its sole discretion, as objectionable . . . must not be utilized on any SEPTA vehicle or facility. SEPTA shall have the right to immediately remove any advertising material which has already been applied, in the event that . . . SEPTA deems material objectionable for any reason . . . 226

Despite this evidence that SEPTA retained tight control over the forum, the United States Court of Appeals rejected SEPTA’s argument that no designated public forum had been created.227 In doing so, Judge Roth made the following striking assertions:

[T]he fact that SEPTA has reserved for itself the right to reject ads for any reason at all does not signify, in and of itself alone, that no public forum has been created. In a prior decision, we warned that “standards for inclusion and exclusion” in a limited public forum “must be unambiguous and definite” if the “concept of a designated open forum is to retain any vitality whatever.” . . . [T]he fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum.228

Looking at SEPTA’s past practice, the court found that SEPTA had “accepted a broad range of advertisements for display,”229 including two advertisements pertaining to the subject of abortion.230 Judge Roth was thus led to this result:

We conclude then, based on SEPTA’s written policies, which specifically provide for the exclusion of only a very narrow category of ads, based on SEPTA’s goals of generating revenues through the sale of ad space, and based on SEPTA’s practice of

226. Id. at 250–51.
227. Id. at 252.
228. Id. at 251 (citation omitted).
229. Christ’s Bride Ministries, 148 F.3d at 251.
230. See id.
permitting virtually unlimited access to the forum, that SEPTA created a designated public forum.\textsuperscript{231}

SEPTA’s argument based on its “‘tight control’ over the forum,” and the fact that its permission was required, was explicitly rejected, largely because “at least 99% of all ads [were] posted without objection by SEPTA,”\textsuperscript{232} and those few ads to which SEPTA had previously objected (resulting in their modification) were objectionable for reasons unrelated to the content of CBM’s proposed advertisement.\textsuperscript{233} Strict scrutiny was thus called for, but the court went on to hold that the rejection of CBM’s advertisement could not even withstand the test of reasonableness.\textsuperscript{234}

The second of these public-transit cases is \textit{United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Authority.}\textsuperscript{235} The transit authority, SORTA, allowed paid advertising on its buses, and had accepted an ad from the union, UFCW, but rejected a second such advertisement submitted by UFCW.\textsuperscript{236} SORTA’s advertising policy, according to Judge Moore, “specifically excludes ‘[a]dvertising of controversial public issues that may adversely affect SORTA’s ability to attract and maintain ridership,’ and requires that all ads ‘be aesthetically pleasing and enhance the environment for SORTA’s riders and customers and SORTA’s standing in the community.’”\textsuperscript{237}

UCFW’s second advertisement, which essentially conveyed a pro-union message, was rejected by SORTA’s general manager—“who must approve every wrap-around bus advertisement”—because he deemed it “aesthetically unpleasant and controversial.”\textsuperscript{238} The union sued, the District Court entered a preliminary injunction in its favor, and the Court of Appeals affirmed.\textsuperscript{239}

In his opinion for the court, Judge Moore quoted the key pronouncements from Justice Kennedy’s \textit{Forbes} opinion, but then proceeded, in essence, to decline to be governed by them, saying this:

Discerning whether the government permits general access to public property or limits access to a select few does not end our inquiry, however, for we must also assess the nature of the forum

\textsuperscript{231} \textit{Id.} at 252.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{See id.}
\textsuperscript{234} \textit{Christ’s Bride Ministries}, 148 F.3d at 255–57.
\textsuperscript{235} 163 F.3d 341 (6th Cir. 1998).
\textsuperscript{236} \textit{Id.} at 346–47.
\textsuperscript{237} \textit{Id.} at 346 (citation omitted).
\textsuperscript{238} \textit{Id.} at 347.
\textsuperscript{239} \textit{Id.} at 347, 364.
and whether the excluded speech is compatible with the forum’s multiple purposes. The government’s decision to limit access to the property is not dispositive in answering whether or not the government created a designated public forum. Rather, we must also examine the relationship between the reasons for any restriction on access and the forum’s purpose. A contrary rule that focused solely on whether a speaker must obtain permission to access government property “would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.”

While the court’s solicitude for freedom of expression is admirable, it is difficult to reconcile this language with the thrust of Forbes. Pursuant to a proper understanding of the concept of the limited public forum, moreover, a government actor is permitted to limit access to a designated public forum on the basis of the content of speech. Judge Moore continued his lengthy explication of these matters by positing that “the courts will infer an intent on the part of the government to create a public forum where the government’s justification for the exclusion of certain expressive conduct is unrelated to the forum’s purpose, even when speakers must obtain permission to use the forum.” But it is hard to understand why the government’s justification must be related, somehow, to “the forum’s purpose,” when the Supreme Court has stated repeatedly that the key to the classification of a forum is the government actor’s intent. That perceived requirement, however, played a major role in leading the court to the conclusion that a designated public forum had been created here, as the court—looking past SORTA’s written policy to focus instead on its practices—found “no established causal link” between SORTA’s stated goals “and its broad-based discretion to exclude advertisements that are too controversial or not aesthetically pleasing.” The court was willing to “assume that those seeking access to SORTA’s advertising space must first obtain permission from SORTA, and that this permission is not granted as a matter of course,” and yet still managed to conclude “that in accepting a wide array of political and public-issue speech, SORTA has demonstrated its intent to designate its advertising space a public fo-

240. United Food, 163 F.3d at 350–51 (citations omitted).
242. United Food, 163 F.3d at 351.
243. See id. at 350.
244. Id. at 354.
245. Id. at 353.
As in the *Christ’s Bride Ministries* case, the court went on to find that the transit authority’s action could survive neither strict scrutiny nor the reasonableness test. Judge Wellford, concurring, agreed that the rejection of the union’s advertisement was unreasonable, but did not agree with the conclusion that SORTA had created a designated public forum.

A variation on this theme, finally, is the situation in which it appears that no formal permission is required, but a question remains as to whether or not the government actor has retained sufficient control over access to the forum to compel the conclusion that the forum is non-public. Such a case is *Hopper v. City of Pasco*, in which the plaintiffs were two “artists whose works were excluded from public display at the Pasco City Hall Gallery in Pasco, Washington, because city officials deemed their art too ‘controversial.’” Local artists were invited to display their works in the public hallways of a new city hall. While a notice inviting such submissions included the statement that “all works will be screened for content and professional presentation,” the Court of Appeals described the situation as follows:

> [T]he arts program was run without any pre-screening process, and the city provided no further definition or guidance as to what kind of work would be considered inappropriate. There was no selection process to monitor quality, content, or controversy. As a result, the Arts Council rejected no artwork during the entire length of the program . . . . Nor did the city review works prior to their placement in the gallery.

But the city manager “assumed the Arts Council, [which actually administered the program] would screen for content,” and the city manager’s assistant “testified that he expected and trusted [the director of the Arts Council] to make sure that no ‘offensive or politically-motivated art’ would be shown.” As it turned out, one plaintiff’s sculptures were removed from the display, and the other plaintiff’s prints were never displayed—despite having been submitted for display—in both cases because of their potentially offen-

---

246. *Id.* at 355.
248. *Id.* at 364–65 (Wellford, J., concurring).
249. 241 F.3d 1067 (9th Cir. 2001).
250. *Id.* at 1069–70.
251. *Id.* at 1070.
252. *Id.* at 1071.
253. *Id.* at 1071–72.
254. *Hopper*, 241 F.3d at 1072.
sive content.²⁵⁵ Had the city created a designated public forum? Despite the written notice indicating that works would be “screened for content,” and despite the undeniable fact that an artist’s work would not actually be exhibited unless the Arts Council chose to display it, the Court (saying nothing explicitly about “permission”) held that a designated public forum had indeed been created, explaining its conclusion as follows:

It is undisputed that Pasco opened its display space to expressive activity by retaining the Arts Council to manage a gallery with exhibitions by local artists. This evinces an intent to create a designated public forum . . . . The city’s so-called policy of non-controversy became no policy at all because it was not consistently enforced and because it lacked any definite standards. Prior to the exclusion of the works at issue here, the city neither pre-screened submitted works, nor exercised its asserted right to exclude works. . . . Given the undisputed facts in the record concerning the selection and screening process for art to be displayed at City Hall (or rather, the lack thereof), we conclude that the city retained no substantive control over the content of the arts program.²⁵⁶

“Having effectively opened its doors to all comers,” the Court went on to say, the city “has failed to exercise the clear and consistent control over the exhibits in city hall” required to establish a non-public forum.²⁵⁷ The Court went on to find that the city could not satisfy the requisite strict judicial scrutiny.²⁵⁸ A dissenting judge, viewing summary judgment in favor of the challengers as inappropriate, did not believe that the record clearly established that a designated public forum had been created.²⁵⁹

At the lower-court level, then, it seems fair to conclude that Forbes has not, through its emphasis on whether “permission” is needed, provided the kind of bright-line test that it might have appeared to provide. Cases of the kind which I have just described raise serious questions, moreover, as to whether “permission” is an unambiguous, and therefore, workable, concept. Is “permission” required, so that access to the forum should be viewed as “selective” rather than “general,” in every instance in which, due to physically limited resources (because, for example, there are a limited number of buses or rooms in community centers available at any particular time) it is necessary to employ a procedure whereby a speaker must make application

²⁵⁵. Id. at 1073.
²⁵⁶. Id. at 1078.
²⁵⁷. Id. at 1080.
²⁵⁸. Id. at 1081–82.
²⁵⁹. Hopper, 241 F.3d at 1083–92 (Gould, J., dissenting).
for access to the forum at issue? If so, should the fact that permission is technically required lead to a “selective access” conclusion even if permission is always (or virtually always) granted? Should it matter, furthermore, why access might be denied by the governmental gatekeeper, or does it suffice that the system in place contemplates that access may sometimes be denied?

b. Is “Standardless Discretion” Relevant?

As the preceding discussion reveals, courts have at times been influenced in determining whether a designated public forum has been created, by the perception that the relevant government actor has effectively been given unlimited discretion to grant or deny access to the forum in question; the existence of standardless discretion has, in those cases, been held against the government. Thus, in the CBM case, the court reiterated the assertion of an earlier Third Circuit panel that “standards for inclusion and exclusion’ in a limited public forum ‘must be unambiguous and definite’ if the ‘concept of a designated [public] forum is to retain any vitality whatever’,” and went on, in the process of reaching the conclusion that a designated public forum had been created, to observe that “[t]here is no policy, written or unwritten, pursuant to which CBM’s ads were removed.” In the United Food & Commercial Workers case, the court employed some of the language from the CBM opinion to make the same point more explicitly. “If the ‘concept of a designated open forum is to retain any vitality whatever,’ we will hold that the government did not create a public forum only when its standards for inclusion and exclusion are clear and are designed to prevent interference with the forum’s designated purpose.”

In the Hopper case as well, the court quoted the heart of the statement about standards made in the CBM opinion, adding, somewhat cryptically in the midst of its discussion of the forum issue, that “[c]ourts have also been reluctant to accept policies based on subjective or overly general criteria.” The theme was echoed in the court’s later statement that “[t]he city’s so-called policy of non-controversy [with regard to the display of art at city hall] became no policy at all because it was not consistently enforced and because

261. Id. at 254.
263. Id.
264. Hopper v. City of Pasco, 241 F.3d 1067, 1077 (9th Cir. 2001).
it lacked any definite standards.  

\[265\] Still later in its discussion of the forum issue, the court said this:

[D]espite its stated policy of avoiding “controversial art,” Pasco never established criteria by which to assess whether or not a work would fall within the policy. Instead, application . . . was left entirely to the discretion of city administrators. 

The potential for abuse of such unbounded discretion is heightened by the inherently subjective nature of the standard itself. A ban on “controversial art” may all too easily lend itself to viewpoint discrimination, a practice forbidden even in limited public fora.  

The court’s conclusion, with respect to the classification of the forum, was, again, that “[h]aving effectively opened its doors to all comers, subject only [to] a standardless standard,” the city had failed in its attempt to persuade the court that the art exhibit was a non-public forum.  

The existence of standardless discretion thus clearly seemed to bother the court and bolster its conclusion that a designated public forum had been created. 

But the question must be asked: Why must the gatekeeper of a governmental forum be limited by definite standards, in the exercise of discretion regarding access to that forum, in order for the forum to be deemed non-public? Indeed, what does the issue of standardless discretion have to do with the ostensibly governing criterion of the government’s intent to create, or not to create, an open forum? Forbes itself appears to contradict such reasoning, as reflected in the complaint of Justice Stevens, in his dissenting opinion, that “the Court barely mentions the standardless character of the decision to exclude Forbes from the debate.”  

It bears mentioning that the issue of standardless discretion has come into play in yet another way in some lower-court decisions involving public forum determinations—namely, as a basis for finding forbidden viewpoint discrimination. The link between standardless discretion and the potential

---

265. Id. at 1078.
266. Id. at 1079.
267. Id. at 1080. What the court actually said at this point was that “Pasco has failed to exercise the clear and consistent control over the exhibits in city hall that our cases require to maintain a limited public forum.” Id. But it must be understood that, in the Ninth Circuit, the “limited” public forum has been consistently equated with the “non-public” forum. See supra text accompanying notes 180–84.
for impermissible viewpoint discrimination is well-established, as Justice Brennan's majority opinion in *City of Lakewood v. Plain Dealer Publishing Co.* makes clear:

> [T]he absence of express standards makes it difficult to distinguish ... between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

The danger of content and viewpoint censorship, he went on to say, "is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." According to some federal appellate courts, standardless discretion does not simply create a danger of viewpoint discrimination, but, in essence, amounts to such discrimination, serving as a basis for invalidating a regulatory scheme even in a non-public forum. Thus, in the words of one court, "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." But it is the exercise of viewpoint discrimination—as opposed to simply the potential therefore—that, according to the Supreme Court, will invalidate a denial of access to a non-public forum. As one court has observed, moreover, "[a]ll of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum." Thus, while judicial wariness of standardless discretion even in non-public fora is commendable, the willingness of some courts to equate such discre-

270. *Id.* at 758.
271. *Id.* at 763.
272. Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1069 (4th Cir. 2006); Summum v. City of Ogden, 297 F.3d 995, 1007–09 (10th Cir. 2002); Amandola v. Town of Babylon, 251 F.3d 339, 344 (2d Cir. 2001). *See also* DeBoer v. Vill. of Oak Park, 267 F.3d 558, 572–74 (7th Cir. 2001).
274. Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1321 (Fed. Cir. 2002).
tion with viewpoint discrimination must be regarded as highly questionable under prevailing legal doctrine.

IV. CAN A MEANINGFUL "LIMITED PUBLIC FORUM" CATEGORY EXIST?

While lower courts have discerned the existence of designated and limited public fora more frequently than pessimistic readers of pertinent Supreme Court opinions would ever have expected, the questionable nature of some of these rulings, combined with the intrinsic challenge of finding a limited forum to be open to a challenger while faithfully employing a "government intent" standard, cannot help but leave one wondering, still, whether a meaningful and workable "limited public forum" concept can be envisioned. In asking this question, one may benefit by briefly considering, first, whether the overall public forum doctrine makes sense, and, next, whether the "permission" factor highlighted in Forbes offers a persuasive basis for distinguishing between closed and open fora.

A. Rationalizing the Public Forum Doctrine

Arguably, the public forum doctrine, overall, does make sense. As an overall body of rules, its primary effect is to presumptively make many governmentally-controlled properties and channels of communication "off limits" to expressive activities by ordinary citizens. In each such case, the government, as the proprietor of property not traditionally or primarily dedicated to speech or assembly, has made the judgment that such expressive activity is not compatible with the intended use of the property. While judicial deference to the government's judgment in this regard is not inevitable, a significant degree thereof is arguably defensible. Meanwhile, traditional public fora, as well as private property and privately-controlled channels of communication, remain presumptively accessible to speakers. We are accustomed to "place" limitations on speakers (subject, of course, to intermediate judicial scrutiny, because the restrictions are content-neutral), but the public forum doctrine is special in that it allows even content-based distinctions to be made, in a non-public forum, on the basis of "place" considerations. Even those critics who have urged the Court to employ an approach that approximates a "compatibility" analysis in such cases, however, would countenance content discrimination that could not withstand strict scrutiny.

275. See the discussion of warranted judicial deference to governmental exercise of "managerial authority" in Post, supra note 4, at 1809–24.

276. See, e.g., Post, supra note 4, at 1765–66. Similarly, Professor Gey has argued for the use of what he calls an "interference" analysis that asks "whether expressive activity would
The governmental property thus made “off limits” to speech is, moreover, made only presumptively unavailable to speakers, as meaningful judicial review is employed even with respect to non-public fora, in which restrictions must satisfy a requirement of “reasonableness.” To a surprising extent, lower courts have put teeth into this seemingly deferential standard, not infrequently striking down denials of access to non-public fora as unreasonable. 277 More importantly, the doctrine in fact encompasses significant limitations on discrimination; viewpoint discrimination is forbidden in all settings, 278 and content discrimination is presumptively impermissible not only in traditional public fora, but also in any non-traditional forum which a government actor has decided to treat as if it were a traditional public forum. 279 Under the proper understanding of the limited public forum concept, moreover, content discrimination is presumptively intolerable within the class of speakers to whom the forum has been opened. Thus, the doctrine, in its entirety, can be seen as balancing deference toward the government as proprietor with an insistence that, at some point, discrimination among speakers is unacceptable. 280 Of course, the nondiscrimination principle is undermined, in

tend to interfere in a significant way with the government’s own activities in [a] forum.” Gey, supra note 4, at 1576. Professors Farber and Nowak, meanwhile, argued for a “focused balancing” approach. Farber & Nowak, supra note 4, at 1239–45.


278. Findings of viewpoint discrimination by lower courts are also not uncommon. See, e.g., Ariz. Life Coal., Inc., 515 F.3d at 972; Husain v. Springer, 494 F.3d 108, 127 (2d Cir. 2007) (note the court’s confusion regarding the governing rules, at 124–25). See also Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 89 (1st Cir. 2004); Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 527–30 (3d Cir. 2004); Giebel v. Sylvestor, 244 F.3d 1182, 1188 (9th Cir. 2001); see also cases cited supra notes 272 & 273.

279. “The role of categorical analysis in public forum jurisprudence is to generalize about the kinds of places where denials of access tend systematically to trigger well-founded concerns about deliberate governmental abuse and distortion.” BeVier, supra note 4, at 121.

280. Professor BeVier has argued that the designated public forum concept serves the objective of preventing viewpoint discrimination:

The designated public forum category serves this purpose by calling on government to justify selective exclusions from property that it has deliberately opened to expressive activity. When the government itself intentionally designates public property as a forum, it announces its own judgment that speech is compatible with the property’s other uses. Thus, a policy of selective exclusion would be presumptively suspect as the product, not of a legitimate concern with disruption, but of an illicit concern with the speaker’s viewpoint.

BeVier, supra note 4, at 109.
large part, by the fact that the government is not required to maintain the openness of a designated public forum, and may limit access to the forum by speech content or speaker identity.

B. Does the “Permission” Factor Make Sense?

The Court’s recognition of a “permission” requirement as the hallmark of “selective access,” thereby indicating that a forum is “non-public” rather than “designated” (or “limited”), surely fits nicely into a regime that is devoted, above all else, to effectuating the intent of the relevant government actor. The existence of a “gatekeeper,” who grants access to some but denies it to others, can be seen as a clear indication of an intent to keep a forum closed. But when the gatekeeper allows some to enter, one could just as easily conclude that the forum is “limited,” meaning that it is open to some and closed to others. A “permission” requirement, in other words, is not inescapably an indicator of an intent to maintain a closed forum. One may yet be grateful to Justice Kennedy for his identification of a relatively concrete criterion by which courts are to be guided, in what would otherwise be a largely unstructured process of divining governmental intent. At the same time, it must be recognized that this is a criterion that can only have the effect of reducing the number of instances in which an “open” forum will be found to exist—particularly if every situation in which access to a forum is granted pursuant to a formal application process (as was true even in Widmar itself!) is viewed as one in which “permission” is required, regardless of how often access is denied.

In Forbes, Kennedy defended the Court’s “distinction between general and selective access [as one that] furthers First Amendment interests.” By not equating selective access with a governmental intent to open a forum, he explained, “we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all.” The logic of that suggestion is clear, in the abstract, but is it likely to prove accurate, in reality? Is it not more likely that governmental entities, advised by counsel that they will enjoy more latitude with respect to “forum” determinations if they implement meaningful “permission” requirements so as to grant only “selective” access, will do just

281. Indeed, one commentator has argued, not unreasonably, “that within the parameters of a limited public forum, it is impossible to differentiate between an impermissible content-based . . . restriction on speech and a valid subject-matter-based or speaker-based re-designation of the forum.” McGill, supra note 4, at 939.


283. Id.
that? Would not a city that wished to invite local artists to submit their works for display at city hall, for example (as in the *Hopper* case, discussed above), likely employ a regime pursuant to which every submission would be screened on the basis of content?

C. *Can the “Limited Public Forum” Be Salvaged?*

The difficulties attending the concept of the limited public forum, even when that concept is properly understood, are clear. While Justice Blackmun’s complaint that the category had effectively been eliminated may have been overstated, the fact remains that instances of governmental fora opened to certain categories of speaker, in which the excluded speaker is seen as falling within the class to whom the forum was intended to be opened, are likely to be rare. Even when a court is prepared to conclude that “general access” to a forum has been extended to a class of speakers, that decision will likely lead to a second difficult determination as to whom it has been opened—i.e., how shall the favored class be defined? In *Widmar*, the Court found that the university classrooms had been made available to registered student organizations, but why did the Court not conclude that the facilities had been opened only to non-religious student organizations? In *Forbes*, the Court found that the televised debate had been opened to serious Congressional candidates, but why did the Court not conclude that it had been opened to all Congressional candidates?

The challenge of defining the forum is nicely illustrated by an exchange between Justices Breyer and Kennedy, in dictum, in a 1996 decision, *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*. Writing for a plurality of four Justices, Breyer had occasion to offer the following comment:

---

284. *See supra* text accompanying notes 248–58.

285. *See PETA, Inc. v. Gittens*, 414 F.3d 23, 28–31 (D.C. Cir. 2005), in which the exercise of tight governmental control over the selection of sculptures to be featured in a public art project—and the rejection of one of plaintiff’s designs—was upheld as an exercise of “government speech;” forum analysis was deemed wholly inapplicable in this context. A similar ruling, in the context of specialty license plate programs, is *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). *But compare* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 963–68 (9th Cir. 2008), and Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004). *See also* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000). For a discussion of the relationship of “government speech” to forum analysis, see generally Dolan, *supra* note 171.

[It is plain from this Court’s cases that a public forum “may be created for a limited purpose.” Our cases have not yet determined, however, that [the] [G]overnment’s decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)? The answer is not obvious.]

Justice Kennedy (joined by Justice Ginsburg), in a separate opinion, responded to Breyer as follows:

I do not foreclose the possibility that the Government could create a forum limited to certain topics or to serving the special needs of certain speakers or audiences without its actions being subject to strict scrutiny. This possibility seems to trouble the plurality, which wonders if a local government must “show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz).” . . . This is not the correct analogy. [Our case is] more akin to the Government’s creation of a band shell in which all types of music might be performed except for rap music.

Were a case to arise, then, in which a governmental band shell was made available only to musicians playing classical music, and a challenge was brought by an excluded jazz musician, how should the forum (assuming the challenger could even surmount the hurdle of persuading the court that it was a limited as opposed to a non-public forum) be described? Would it be open to all musicians, or open only to classical musicians? If the latter, then the “open” character of the forum would be of no avail to the excluded jazzman.

Perhaps the key to salvaging a meaningful limited-public-forum category is to employ two distinctions, in those cases in which the forum has clearly been opened to some speakers: a distinction between speaker identity and speech content, and a distinction between a government actor’s “primary” and “secondary” intentions. The first of these distinctions is predicated on the fact that, while the limited public forum was initially defined as one “created for a limited purpose such as use by [different] groups . . . or for the discussion of certain subjects,” there is a difference between discrimina-

287. Id. at 749–50 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 n.7 (1983)) (citations omitted).
288. Id. at 802 (Kennedy, J., concurring in part and dissenting in part).
289. Perry, 460 U.S. at 46 n.7 (1983).
tion on the basis of speaker identity and discrimination based on the content of speech. Coupling that distinction with a determination of "primary" and "secondary" intentions, while far from a fully comfortable approach, may just be the only way to escape from the intrinsic tautology of dividing the open or closed nature of a forum based on an assessment of governmental intent.

The suggested approach would work as follows: When a court is persuaded that the primary intention of the relevant government actor is to make a forum available to a particular category of speakers, defined without reference to the content of their speech, and that a secondary intention is to block access to a member of the favored category based upon the content of his speech, the forum should be deemed a limited public forum and the content-based restriction should be subjected to strict scrutiny. Thus, 

\[\text{Widmar}\]

may be understood as implicitly based upon the understanding that the university's primary intention was to make its facilities available to student organizations, to which was added a less important, secondary intention to bar student organizations engaging in religious speech; the distinction based on speaker identity (student organizations versus the rest of the world) reflected the university's dominant intention. In contrast, \n
\[\text{Lehman}\] and \n
\[\text{Greer}\], to take just two additional examples from Supreme Court cases, were each situations in which the primary intention of the relevant government actor was to bar speech of a certain content (political campaign advertising and political campaign speech, respectively), regardless of speaker identity. Compare \n
\[\text{Perry}\], in which the school district's primary intention was to discriminate based on speaker identity (in favor of the certified bargaining representative) rather than speech content, but the excluded speaker did not fall within the favored class of speakers. Focusing on these distinctions may, just possibly, provide a principled basis for requiring access by speakers to limited public fora.

V. PRAYER FOR RELIEF

More than ten years have passed since the Supreme Court last decided—in \n
\[\text{Forbes}\]—whether a governmentally controlled channel of communication was or was not an open forum for expression. The Court has, in that span of time, declined on several occasions to hear cases that would provide it with the opportunity to do so again,\[290\] despite the undeniable existence of

\[290. \text{See, e.g., Cogswell v. City of Seattle, 347 F.3d 809 (9th Cir. 2003), cert. denied, 541 U.S. 1043 (2004); Hills v. Scottsdale Unified Sch. Dist. No. 8, 329 F.3d 1044 (9th Cir. 2003), cert. denied, 540 U.S. 1149 (2004); Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001), cert. denied, 534 U.S. 858 (2001); Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001), cert. denied, 534 U.S. 951 (2001); DiLoreto v. Downey Unified School Dist. Bd. of Educ., 196]

https://nsuworks.nova.edu/nlr/vol33/iss2/2
conflict within the federal courts of appeals concerning the proper understanding and treatment of the “middle category” of governmental fora. Meanwhile, the mystery of the legal significance of that middle category—and, in particular, the limited public forum—persists, along with the steady flow of cases which require, for their resolution, a decision as to whether or not the forum in question has been opened for expressive purposes. The uncertainty surrounding this body of First Amendment doctrine cries out for resolution.

Therefore, your humble author beseeches the Court to grant certiorari, soon, in a case that will afford it the opportunity to clarify the following points: When does a limited public forum exist? What is the legal significance of that designation? If, as Forbes suggests, the need for speakers to obtain “permission” as a condition of access to a forum is the key to the distinction between “general access” (in which the case the forum is a “designated” public forum of some kind) and “selective access” (in which case the forum is “non-public,” or closed), what does it mean to say that “permission” is required? What is the relevance (if any), for this analysis, of a grant of standardless discretion to the relevant government actor? If, finally, the existence of a limited public forum is ever to support a claim of access by a speaker who has been excluded by the relevant government actor, how is a court to decide—once it decides that the forum has been opened to some speakers—how to identify the class of speakers to whom it has been opened? To the extent that these questions can be answered in a way that maximizes opportunities for expression in governmentally-controlled fora, the clarification of doctrine prayed for herein will be even more welcome. But, above all, give us clarity, please.


291. The persistent denial of certiorari in cases of this kind is particularly striking in light of the fact that Chief Justice Roberts (speaking in May 2007) reportedly offered, as one explanation for the Court’s smaller docket in recent years, “fewer conflicts among the circuits.” Marcia Coyle, Justices’ Homestretch Packed, 29 Nat’l L.J., June 4, 2007 at 17.