Public Forum Doctrine in the Age of the Information Superhighway--Where Are the Public Forums on the Information Superhighway

David J. Goldstone

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol46/iss2/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Articles

The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)

by

DAVID J. GOLDSTONE*

Table of Contents

Introduction .................................................... 337
I. The Developing Information Superhighway: Potential for Societal Transformation and Complex Constitutional Issues ................................................... 339
   A. The Electronic Village Will Generate a Variety of Speech Protected by the First Amendment .......... 339
   B. Potential for Overreaching by Network Regulators . 344
   C. Specific Examples of Network Regulation .......... 346
      (1) A Sketch of the Landscape of the NII .......... 346
      (2) A Political Conference and a “Cronies” Conference ........................................ 347
      (3) A Health Care Conference ....................... 348
II. Should the Networks that Compose the NII Be Considered Public Forums? ........................................ 349
   A. The Constitutional Absence of State Action ...... 350

* Law Clerk to the Honorable Herbert P. Wilkins, Massachusetts Supreme Judicial Court. B.S., M.S. Massachusetts Institute of Technology, 1991; J.D. Harvard Law School, 1994. Internet address: “stone@ai.mit.edu”. The author will be an associate with the law firm of Wiley, Rein & Fielding in Washington, D.C., in the fall of 1995, with a primary interest in communications law. The author would like to thank Steven Bercu, Charles Croog, Tom Finholt, Larry Kolodney, Mark Nadel, and Bruce Olcott for their helpful comments. The author would also like to give special thanks to Laurence Tribe for his guidance and support and to Richard Fallon and Seth Kreimer for inspiration.
(1) Could a Private Network Perform a Public Function? 351
(2) Could a Private Network Become Inseparable from Government? 354

B. The Limited Use of the Public Forum Doctrine 357

C. Networks that Compose the NII Will Probably Not Be Considered Public Forums 367

III. Which Parts of the Networks that Compose the NII Should Be Considered Public Forums? 368

A. Theories Justifying the Public Forum Doctrine 369
(1) Professor Saphire and Formal Values 370
(2) Professor Post: Distinguishing Governance from Management 371
(3) Professor Berger: Functional Attributes of a Public Forum 372
(4) Dean Farber: “Public Choice” Theory and the First Amendment 373
(5) David Yassky: Dualist Democracy and the First Amendment 375

B. A Simplistic Public Forum Doctrine on the NII: Who Wants It? 379
(1) The Health Care Conference: A True Public Forum on the NII 379
(2) A Nonpublic Forum on the NII: An Example 381
(3) The NII as Forums: More like a City than like an Airport Terminal or a Park 382

C. Selective Application of Public Forum Values Within the NII 383
(1) Finding Landmarks on the NII for Public Forum Analysis 383
(2) The Constitutional Relevance of Public Forum Landmarks on the NII 391
   a. Topic Dedication 393
   b. Forum Membership 398
   c. Forum Costs 399
   d. Forum Closure 401

Conclusion 402
Introduction

Imagine you had a device that combined a telephone, a TV, a camcorder, and a personal computer. No matter where you went or what time it was, your child could see you and talk to you, you could watch a replay of your team's last game, you could browse the latest additions to the library, . . . you could live in many places without foregoing opportunities for useful and fulfilling employment, by "telecommuting" to your office through an electronic highway instead of by automobile, bus or train; . . . you could obtain government information directly or through local organizations like libraries, apply for and receive government benefits electronically, and get in touch with government officials easily . . . .

The excerpt above suggests some of the potential uses of the coming Information Superhighway, officially called the National Information Infrastructure (NII). The NII—a symbol of the information revolution—has the potential to change everyday life dramatically in the next century. This novel domain, with its emphasis on communication, will surely present new questions of law, particularly in the area of constitutional law related to freedom of speech.

Because the NII exists today only in the imagination, its precise landscape is uncertain and its full scope is impossible to describe. This Article suggests a thoughtful way to apply one First Amendment doctrine—the public forum doctrine—within this new world. Rather than drawing an analogy to a traditional public forum, like a park, 2 or to a nonpublic forum, like an airport terminal, 3 this Article argues that the NII should be conceptualized on a broader scale as an entity, like a city, that includes an abundance of both public forums and nonpublic forums. This Article suggests an analytical framework for identifying the public forums on the NII and outlines their constitutional significance.

Part I describes the possibilities for the NII in more detail, including potential uses, problems, and constitutional issues. Part I also provides a few concrete examples that are referenced throughout the Article, including a political conference, a "Cronies" conference, and a health care conference. 4 Part II follows the approach of several

4. See infra Part I(C).
commentators by applying the public forum doctrine to the networks that will compose the NII. Like those commentators, this Article concludes that the public forum doctrine is not well suited to networks.

Part III employs a more nuanced approach in analyzing the NII. Rather than trying to analogize the network to either a traditional public forum or a nonpublic forum, Part III views the NII within a more expansive setting in which both public forums and nonpublic forums can coexist. Considering the theoretical justifications for the special position of the public forum, Part III attempts to locate the landmarks on the Information Superhighway that might be appropriate for public forum analysis. A variety of differing justifications for the public forum doctrine are discussed at length in this regard, including Professor Richard Saphire's emphasis on formal values, Professor Robert Post's distinction between governance and management, and Professor Curtis Berger's articulation of the functional attributes of a public forum. These viewpoints are supplemented by novel perspectives from modern First Amendment theory, such as Dean Daniel Farber's exploration of public choice and David Yassky's application of Professor Bruce Ackerman's "dualist democracy" theory.

One proposal is to focus on nonprofit, government-owned electronic forums that have unrestricted access to message recipients and viewpoint-neutral access to a reasonably large number of message senders. This proposal finds support in all of the theoretical analyses discussed. In fact, to the extent that those analyses respond differently to the notion of locating public forums on the NII, they can be organized along lines suggested by Professor Louis Seidman's description of the dilemmas of modern constitutional debate.

---


6. See infra Part II(C); see e.g., Lively, supra note 5, at 1095-97 (describing barriers to understandings of interactive media as a public forum).

7. See infra Part III(A)(1).
8. See infra Part III(A)(2).
10. See infra Part III(A)(4).
11. See infra Part III(A)(5).
12. See infra Part III(C)(1).
13. See infra notes 262-268. See also infra Part III(B)(1) and (2).
14. See infra notes 270-274 and accompanying text.
landmarks by focusing on four issues that will surely be raised: topic dedication, forum membership, forum costs, and forum closure.15

The full scope of the NII is impossible to foretell, and an attempt to undertake a conclusive constitutional analysis at this point would be premature. Yet, given the potential impact of the NII on society, constitutional protection will be critical from its inception.16 The scope of the protection to be granted to NII participants presents a particular challenge given the judicial tendency to rely upon tradition in constitutional interpretation. By offering thoughtful suggestions for the direction of future discussions, this Article begins the analysis, but does not complete it.

I. The Developing Information Superhighway: Potential for Societal Transformation and Complex Constitutional Issues

Recognizing the emergence of the computer network as a powerful medium for expression, commentators have considered whether private expression on such networks is protected by the First Amendment and, in particular, by the public forum doctrine.17 With the development of the NII, those analyses must be reexamined in light of the new circumstances. This Part of the Article explores some of the First Amendment values implicated by the development of the NII and sketches both general possibilities for and specific examples of network regulation that might impair those values.

A. The Electronic Village Will Generate a Variety of Speech Protected by the First Amendment

The NII has received a tremendous amount of coverage in the media recently.18 Much of the enthusiasm focuses on the improve-

---

15. See infra Part III(C)(2).

Precisely because government intervention must keep a universalist orientation, some limit on that intervention is necessary. . . . Pervasive, universalist government intervention would allow no space for particularist choice. Thus, the ideal of a "public" government necessarily entails its opposite: a "private" sphere, protected from public intervention, within which people are free to form individualized relationships that cannot be justified under the requirements of impersonal beneficence.

17. See Naughton, supra note 5; Taviss, supra note 5.
ments that enhanced networks can bring to everyday life. Perhaps the most easily understood benefit of the NII is its ability to overcome many of the limitations of distance. For example, although a person may not be able to visit a site, she may be able to exploit the tremendous information-gathering power of a computer at that site.

Many businesses are already exploiting this technology. First, networking can facilitate human interactions for group projects and can be critical for people to "cut across conventional organizational boundaries of geography and work unit." Second, computer scien-

In the computer-age equivalent of the Gold Rush, thousands of people are signing up each month for access to the worldwide web of computer networks and electronic information services—known as cyberspace—where strangers can chat, mail can be exchanged, groceries can be ordered and home banking can be done, to name only a few possibilities. See also David Bollier, The Information Superhighway: Roadmap for Renewed Public Purpose, Tikkun, July/Aug. 1993, at 20; Robert Wright, The New Democrat from Cyberspace, The New Republic, May 24, 1993, at 18.

19. See, e.g., Peter H. Lewis, The Computer Always Beeps Twice, N.Y. Times, Apr. 28, 1994, at C1 (describing mail as taking five seconds to reach the Galapagos Islands via computer networks rather than months when sent by paper mail).


Authors have also considered the beneficial effects of increased computer networks on a wide range of topics from health care to entertainment that will not be addressed here. See, e.g., Information Infrastructure Task Force, supra note 1, at 3, 5.

The analyses discussed in this Article have been performed in the absence of the NII, with existing computer networks in mind. It seems likely that developments associated with the NII will at least accelerate the changes that networking already brings.

21. In work patterns, increased use of computer networks might facilitate at least three kinds of changes: in access to information, interactions with colleagues, and work locale. All are related to networking's central ability to change the meaning of distances; information, colleagues, and the effects of one's work can seem closer.

Most lawyers are already aware of the potential for information retrieval over networks; LEXIS, through MeadNet®, and Westlaw, through WestNet®, give lawyers the informational facilities of an entire law library at their desks. Other information services, such as NEXIS® and Dialogue®, abound; they continue to grow and to be accessible through networks. See William Glaberson, Earthquake Coverage, with Electronic Extras, N.Y. Times, Feb. 7, 1994, at D6 (describing a newspaper available in electronic form in the aftermath of an earthquake that made newspaper distribution difficult). There may already be so much information available on networks that development of tools to access the information efficiently may be critical. See John Markoff, A Free and Simple Computer Link, N.Y. Times, Dec. 8, 1993, at D1 (describing new software program that helps people find their way around the Internet as "the first 'killer app' of network computing—an applications program so different and so obviously useful that it can create a new industry from scratch"); cf. Mark S. Nadel, Editorial Freedom: Editors, Retailers, and Access to the Mass Media, 9 Hastings Comm. & Ent. L.J. 213, 223-25 (1987) (describing the need for editors to assist consumers in selecting information).

tists have developed special-purpose systems, called "groupware," to facilitate group work; one commentator notes that "groupware is being positioned as the distinctive breakthrough product for the next great industry trend, networking." A third work-related benefit of increased networking is called telecommuting or telework, which enables people to work outside the office over a network. The alternative work site could be the person's home, an office closer to home, or a temporary location, such as a hotel or a train. For employees, working at home makes juggling work and child care easier, and working from hotels increases productivity while on trips. For employers, alternative work sites reduce overhead costs.

In addition, the NII will be able to enhance an "uninhibited, robust, and wide-open" debate on public issues by improving our ability to become informed about public issues and to discuss those issues actively. Direct political action may include using networks to con-

---


24. See, e.g., Calvin Sims, Quake Provides Glimpse of Future of Commuting, N.Y. Times, Jan. 26, 1994, at A12 (describing people responding to earthquake-related disruptions by working at home and at satellite offices via computers and video conferencing systems).


26. Id. at 324-27. Cf. Information Infrastructure Task Force, supra note 1, at 3 (suggesting that with development of the NII, "people could live almost anywhere they wanted, without foregoing opportunities for useful and fulfilling employment, by 'telecommuting' to their offices through an electronic highway").


28. One important part of speech within the political process is becoming informed about the issues. As one commentator notes, "In an electronically facilitated 'information society,... providing wide access to pertinent economic and political information... is... easier because the new technologies of electronic and computer print and video systems allow almost anyone living anywhere to have access to and retrieve information." Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age 278 (1984). This commentator calls for a "Civic Videotex Service" that "would offer a standard, nationwide, interactive and free videotext service that would provide viewers with regular news, discussions of issues, and technical, political, and economic data." Id. at 279.

Another important part of speech within the political process is discussion of the issues actively. Many commentators see networking as a means of creating "electronic town meetings," "in which citizens can hear and contribute to the community discussion of issues." F. Christopher Arterton, Teledemocracy Reconsidered, in Computers in the Human Context 438, 438 (Tom Forester ed., 1989); see John Holusha, Virginia's Electronic Village, N.Y. Times, Jan. 16, 1994, § 3, at 9 (describing town network that provided minutes to town council sessions, various meeting schedules, communication with local...
tact representatives and, more radically, for electronic polling or electronic voting. The NII can also be used as a high-tech educational tool to inform people on many topics, including the political debate.

One characteristic that distinguishes the NII from some existing networks, such as cable TV networks (as currently implemented), is

government officials, and possibly referendums as a "literal application of the 'electronic town meeting' concept").

By carrying on debates over a computer network, people can interact despite geographical barriers and can make use of other computer technologies, such as word processors, to facilitate their expression and analyses. For example, in many computer applications, it is common to respond to a complex argument by taking advantage of the "cut and paste" features of word processors in order to include lengthy quotations from the argument in the response. See, e.g., DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 236 (1994) (noting that "follow-up" articles "may include some or all (preferably some, only what's necessary) of the article(s) you're following up").


30. Id. at 566-68; see ARTERTON, supra note 28, at 440; BARBER, supra note 28, at 289-90 (noting that home voting would make the process more convenient and more private, but arguing that voting should be done in public places); Richard L. Berke, 'Hey Prez!': Computers Offer New Line to Clinton, N.Y. TIMES, Apr. 5, 1993, at A1, A14 (describing systems available to obtain information including presidential speeches and photos from the government over computer networks, to give opinions to the government over the telephone network, and to send computer messages to the White House (a system that receives hundreds of computer messages a day)). Cf. Lewis, supra note 18, at D6 (describing one computer network's poll receiving more than 5,000 comments within an hour of President Clinton's State of the Union address).

31. Cf. Richard D. Parker, "Here, the People Rule": A Constitutional Populist Manifesto, 27 VA. L. REV. 531, 576 n.76 (1993) ("After a decade or two in which expenditure on our public schools has vastly increased and the capacity of the schools to deliver the most basic education has collapsed, why don't we see that that presents one of the fundamental constitutional issues of our time?").

Access to additional information is certainly helpful to the educational process, especially for sophisticated students able to take advantage of the electronic databases discussed above. The groupware technology discussed supra note 12 would also be helpful in an educational context.

Moreover, specialized long-distance learning projects have been developed and are now commonplace. See, e.g., Isabelle Bruder, Redefining Science: Technology and the New Science Literacy, ELECTRONIC LEARNING, Mar. 1993, at 20, 21; Mark Ivey, Long-Distance Learning Gets an 'A' at Last, BUS. WK., May 9, 1988, at 108, 109-10. One government report recently suggested that the development of networks could lead to the availability to all students of the "best schools, teachers, and courses... without regard to geography, distance, resources, or disability." INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 3. See also Tracy Grant, Getting a Leg Up on Learning, BOSTON GLOBE, Jan. 7, 1994 (describing Boston students using computers to contact students in Costa Rica, Switzerland, and Canada); Josh Hyatt, Bonds Formed from a Distance; Students Use Computers to Talk with Disabled Patients, Break Down Barriers, BOSTON GLOBE, Nov. 26, 1993, (Metro/Region), at 1.
its potential for individual expression. This characteristic allows the NII to further this important First Amendment goal. The expression furthered by the NII can best be appreciated in the context of the wide variety of social structures that develop through computer networks. Although self-expression will be affected by the technological characteristics of the NII, it should not be removed from constitutional purview.

32. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 9:

[T]he NII will be of maximum value to users if it is sufficiently "open" and interactive so that users can develop new services and applications or exchange information among themselves, without waiting for services to be offered by the firms that operate the NII. In this way, users will develop new "electronic communities" and share knowledge and experiences that can improve the way that they learn, work, play, and participate in the American democracy.

For purposes of this Article, a network is an entity that provides facilities for multiple people to communicate with one another directly; the defining characteristic of such a network is the ability for "ordinary people" to use the network actively to communicate with more than one other person simultaneously. Examples include telephone networks with conferencing capabilities, Internet and Prodigy®, but not cable television networks or the mails. Communication with more than one person is critical because only with at least three people can a debate have an audience and deserve the label "public." Compare discussion infra Part I(C)(2) with text accompanying notes 111-115.

33. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion . . . .").

34. Through common interest groups, people can become introduced to and carry on discussions with others whom they have never met, and perhaps could not meet, for geographical reasons. See generally HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (1993). For example, one article describes a common interest group devoted to discussing movie reviews with 500 members, most of whom, presumably, had never met. Finholt & Sproull, supra note 22, at 52.

By lessening the effects of distance, networking can facilitate continuing friendships despite geographical separations. See Douglas M. Pravda & Andrew L. Wright, University Moves Onto Infohighway: Students, Faculty, Administrators Log-On in Unprecedented Numbers, HARV. CRIMSON, Apr. 5, 1994, at 1, 3 (noting that one college student "has set up and run an electronic bulletin board that allows 30 members of his high school class . . . to keep in touch"); Lewis, supra note 19, at C1 (describing one person who sends an estimated 25 messages a week over the computer network compared to one paper letter a month; that person noted, "Were it not for E-mail, there are some people with whom I would not communicate."); Pair Weds Via Computer Link, S.F. EXAMINER, Nov. 14, 1993, at A12 (describing a wedding on-line by a couple that met on-line).

Cf. Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 n.22 (1981) ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.").

35. Networks can influence the experience of communication. For example, after a series of experiments, one team of social science researchers noted:
Whether as textual messages, audio-visual programming, or in some other form, the information exchanged over the NII's networks will usually constitute protected speech for First Amendment purposes. The communicative nature of the information exchanged, not only as a means for debate on public issues but also as a means of self-expression, supports such constitutional protection.

B. Potential for Overreaching by Network Regulators

This new technology's potentially critical role in society also holds great potential for abuse. Stories about people who send messages with misleading identification over networks are widespread. A government or a network owner has a legitimate interest in regulating speech on networks. However, such regulations immediately raise First Amendment concerns. For example, a regulation requiring accurate identification of messages could be seen as analo-

Using a network induced the participants to talk more frankly and more equally. Instead of one or two people doing most of the talking, as happens in many face-to-face groups, everyone had a more equal say. Furthermore, networked groups generated more proposals for action than did traditional ones. Lee Sproull & Sara Kiesler, Computers, Networks, and Work, in Social Issues in Computing, supra note 23, at 335, 338. Those researchers also noted that consensus building was more difficult and people tended to express extreme opinions more openly over the network than in face-to-face interactions. Id. at 338-39.


36. One noteworthy example involved a false news release, distributed under the guise of an Associated Press release, that claimed that the Microsoft Corporation had agreed to acquire the Roman Catholic Church. The false information was read on Rush Limbaugh's national television program. Peter H. Lewis, Computer Jokes and Threats Ignite Debate on Anonymity, N.Y. Times, Dec. 31, 1994, at 1. As another example, one student at Harvard, posing as another student, made sexual advances toward a third student. Douglas M. Pravda & Andrew L. Wright, Fake E-Mail, Other Abuses Plague 'Net: College Struggles to Regulate Ethics on Electronic Frontier, HARV. CRIMSON, Apr. 6, 1994, at 1; see also Lindsy Van Gelder, The Strange Case of the Electronic Lover, in Computerization and Controversy: Value Conflicts and Social Choices 364 (Charles Dunlop & Rob Kling eds., 1991) (describing the case of a male psychologist pretending to be severely disfigured female mute); Finholt & Sproull, supra note 22, at 60-61 (describing an April Fool's prank suggesting the corporation that employed the users of the computer network had sold their division).

gous to a ban on anonymous pamphleteering, which "falls with much greater force upon individuals and groups who fear majoritarian disapproval and reprisal—upon dissidents and upon the unpopular—than upon those with widely approved messages to deliver; thus the [Supreme] Court has again demanded more than minimal justification for bans of this type."^{38}

Regulations on computer networks may be divided into two categories: those imposed by the operator of a particular network upon its users and those imposed by the government upon the use of all networks within its jurisdiction.^{39} Constitutionally, the latter category may seem more relevant because such action would seem more likely to cross any "state action" hurdle^{40} and, by application throughout a jurisdiction, would likely minimize alternative channels of communication. However, as a practical matter, restrictions by network operators seem likely to be more prolific, more invasive to people using the network, and more effectively enforced than general government regulations. This is true because network operators will interact with the people using the network more directly than the government will. For example, one commercial network, Prodigy, banned "public" messages that complained about rate increases and eventually banished the people who attempted to organize a boycott of its advertisers.^{41} Therefore, regulation by the network operators will be the focus of this Article.^{42}


39. I do not attempt here to define the reach of "jurisdiction" in cyberspace. I merely note that I anticipate "jurisdiction" will have some meaning in cyberspace.


41. Naughton, supra note 5, at 409-10.

42. Of course, one can imagine general government regulations that raise interesting issues in a variety of contexts. The misidentification examples cited supra in note 36 suggested a requirement of accurate identification. Likewise, the government may try to institute regulations directed at minimizing electronic harassment. Such regulations already exist regarding telephone usage. See Mark S. Nadel, Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy, 4 Yale J. on Reg. 99, 106-07 (1986). Just as reasonable regulations aimed at limiting harassment in a residential area have been upheld, Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding residential anti-picketing ordinance), anti-harassment regulations could probably pass scrutiny in the electronic context as well. Other prohibitions, such as regulations prohibiting electronic "chain letters," could raise other issues, such as the definition of "chain letter" in a medium in which forwarding
C. Specific Examples of Network Regulation

Specific examples may be helpful to illustrate the implications of the constitutional analysis that this Article will undertake. This Section describes three hypothetical forums—a political conference, a Cronies conference, and a health care conference—which will be referenced throughout the rest of the Article. This Section will also describe some of the options that may be available in creating other conferences.

(1) A Sketch of the Landscape of the NII

The critical difference between the NII and the cable television networks, for purposes of this Article, is the ability on the NII for individuals to communicate actively. For purposes of discussion, these acts of communication will be described in units called "messages." It is assumed that there will be message-delivery systems and that these systems will operate as partnerships between shared networks and individual resources. Messages could be in a variety of formats: text, video, audio, or multi-media. Messages could be sent to a single person, to a group of people, or to computers. Messages could be intended for either immediate reception—like words spoken over the telephone—or for reception at the convenience of the recipient—like mail that is actually received only when the recipient opens it.

In order to facilitate a message-delivery system, it seems likely that each person will be assigned an address within the network, much like a telephone number. When sending a message, a person would specify the address of the recipient. A message-delivery system would

---

messages is a common practice. See DERN, supra note 28, at 154 (noting that the capability to forward messages constitutes part of the "basic set of functions" for electronic mail). Such general government regulations are not the focus of this Article.

43. Many names have been given to the various kinds of high-tech forums, including bulletin board, conference, distribution list, multi-user dungeon, mailing list, and newsgroup. For purposes of this Article, all high-tech forums that allow multiple people to send messages to a number of people who, likewise, respond to the same group will be called conferences. This reflexive quality is critical to ensure that the participants in fact have the opportunity to "confer."

44. For the definition of network used in this Article, see supra note 32.

45. By analogy, placing a telephone call involves a partnership between an individual's telephone, which may have a feature allowing recall of specific telephone numbers, and the telephone network, which connects sites.

46. For example, under a "pay-per-view" scheme, a person might send a message to a computer owned by a cable company in order to request a movie.

47. The former kind of message is called "synchronous"; the latter kind of message is called "asynchronous."
also have a facility to send the same message to multiple recipients when multiple addresses are specified.

(2) A Political Conference and a "Cronies" Conference

Sending messages to the same group of addresses could be a frequent task if a set of people has a common interest. Therefore, a message-delivery system would probably have a facility by which people could be collected under one address into a "message group." For example, imagine a person named Wendy has a large set of friends in the same political party to whom she plans to send frequent descriptions of political developments. She expects that they will find these notices interesting. Rather than remembering all of her friends who are interested in her political messages, Wendy could collect their addresses into a message group called "Politics," and the message-delivery system would allow her to refer to that message group with a special address. To distribute her political messages to her Politics message group, Wendy would send them to that special address.

A message-delivery system could provide a variety of options for use of message groups. One possibility would be to open the message group to multiple senders. Perhaps Wendy's friend Bob would also like to send messages to the Politics message group; upon Wendy's request, the message-delivery system would be able to make the message group available to Bob, or to any other set that Wendy specified. For example, Wendy might choose to make the Politics message group "open to senders," meaning that anyone interested in sending a message to the message group would be permitted to do so, whether she knew them or not. Because Wendy's Politics message group is composed of her friends and members of her political party, she may want to limit the messages sent to her Politics mailing group to those she thinks relevant. A message-delivery system may allow her to act as "moderator" of the group and screen messages for appropriateness before they are sent.

The options described above can have a substantial impact upon the character of a mailing group. Other options are also available. One option is to change the way in which people receive messages from the conference. For example, Wendy might renounce control of the message group and permit any person to become a recipient at his or her request and to receive conference messages from that moment on. In fact, the messages could be saved in a public archive, available to any person interested, at any time after archiving was started.

48. For electronic mail, these message groups are usually called mailing lists. See DERN, supra note 28, at 481-95 (describing electronic mailing lists as "[o]ne of the most powerful outgrowths of electronic mail").

49. Other options are also available. One option is to change the way in which people receive messages from the conference. For example, Wendy might renounce control of the message group and permit any person to become a recipient at his or her request and to receive conference messages from that moment on. In fact, the messages could be saved in a public archive, available to any person interested, at any time after archiving was started.
people to send messages to the message group provides an opportunity for debate among them, carried on in front of the other members of the group (assuming they are members of the group themselves and receive each others' messages). Under this scenario, the message group is transformed into a conference because multiple people are contributing and receiving messages. The debates can be described as occurring "in" the conference.50

First Amendment issues raised by access to or participation in the conference may be sharpened if the message-delivery system supporting the conference is supplied or subsidized by the government. Other hypothetical conferences may raise First Amendment concerns even more directly. For example, a city mayor may want to use government systems to facilitate a conference to discuss pertinent issues with the city cabinet, leaders of the mayor's party, and a few city leaders, but not members of an opposition party. The mayor might call this a Cronies conference.

(3) A Health Care Conference

Having surveyed the landscape for describing messages, one can appreciate the role that electronic conferences might play in encouraging public debate. For example, imagine that a government system

See, e.g., DERN, supra note 28, at 495 ("If you want to keep an archive of the messages [sent to a conference], you may need additional disk space."). Thus, people would be able to view messages sent to the conference before they were even aware that the conference existed.

Another option is to limit messages to either synchronous or asynchronous messages. One example of a system that operates synchronously is the Internet Relay Chat system, widely available on the Internet. See id. at 510-11 ("During the Persian Gulf War in 1991, for example, I 'listened' briefly, as dozens of users from all over the world, from Germany to Finland, Israel and Australia, made comments and discussed events, with an occasional pause as certain users had to put on gas masks."). One advantage of limiting messages to synchronous distribution is that it provides for much speedier interactions; however, the membership in such conferences would be highly variable, thus diminishing the sense of community that might be found in asynchronous conferences.

50. On the Internet, it is common to refer to discussions that use such conferences as taking place "in the conference." See, e.g., DERN, supra note 28, at 494 ("The name of the [conference] is 'storytellers' and that's where the primary discussion takes place."). Actually, there may be no physical place that corresponds to an actual location for the discussion because the messages might simply be distributed to all recipients of the conference, viewed, and deleted. The "location" of the debate would likewise be distributed among all the recipients. Thus, it probably is sensible to refer to the location where the various attributes of the conference (such as the participants) are specified as the "virtual location" of the conference. However, because attributes might be distributed over several locations (e.g., the recipients of one conference could be defined as multiple sets of recipients of other conferences), pinpointing even a "virtual location" could prove tricky. See infra note 247 and accompanying text.
has been set aside to permit private citizens to create their own con-
ferences free of charge. Imagine further that one such conference—
open to all message senders and recipients who wish to join, and
archived for future reference—becomes especially well known for its
thoughtful and illuminating discussions on a particular policy issue
such as health care. In fact, suppose this conference becomes so well
known that the President joins. If the discussion includes scathing
criticism of the President's plans, the President might become un-
happy and suggest that this conference be moderated or removed out-
right. After all, the President might argue, the government should
be able to control how its property—here, its messaging system—is
used.

The question presented by this Article is whether the public fo-
rum doctrine should provide any protection to the "uninhibited, ro-
 bust, and wide-open" debate occurring on networks and conferences
like the ones described here.

II. Should the Networks that Compose the NII Be
Considered Public Forums?

In Part I, this Article described a variety of situations in which the
NII might play a significant role. In addressing issues raised in those
kinds of situations, other commentators have queried whether net-
works should be considered public forums and whether the First
Amendment should thus afford protection to the people sending

GLOBE, Sept. 15, 1993 (describing how to reach Senator Kennedy's office via electronic
mail and noting that his office puts all of his public remarks and press releases out on the
network immediately); Lewis, Cyberspace, Overcrowding, supra note 18, at D5 (describing
the sending of electronic mail to politicians); Peter Lewis, Gore Preaches, and Practices, the
Techno-Gospel, N.Y. TIMES, Jan. 17, 1994, at D1 (noting that White House officials occa-
sionally participate in the White House Forum on the Compuserve network, describing
President Clinton receiving electronic mail and responding off-line, and giving Vice Presi-
dent Gore's electronic mail address).

52. Of course, other reactions are also plausible. The President might be bored and
tune out. Another possibility is that the President would be enthralled by the rich debate,
but irritated by occasional (or frequent) comments irrelevant to health care; the President
might want the creator of the conference to moderate the discussion in a "content-neutral"
 fashion that limited the discussion to "real" health care issues. Alternatively, the President
might decide to set up a "presidential" conference open to all; perhaps it would be specifi-
cally dedicated to health care issues and moderated by an administration official in a "con-
tent-neutral" fashion to guard against irrelevant commentary. See discussion infra Part
III(C)(2)(a).


54. For the definition of network used in this Article, see supra note 32.
messages over those networks. This Part of the Article will reexamine these analyses in light of the developments that the NII will bring.

The First Amendment plays a critical role in promoting rich discourse and exchange of ideas. Not only does speech occupy a special place in the Bill of Rights, it also has a critical function in a democracy. Yet, private network operators may attempt to limit speech by availing themselves of two constitutional doctrines that provide protection from judicial scrutiny: the state action doctrine and the public forum doctrine.

A. The Constitutional Absence of State Action

As currently envisioned, private carriers will primarily own and operate the Information Superhighway, much as current information systems and networks operate through use of federally-regulated privately-owned telephone lines. Under constitutional doctrines, the guarantees of the First Amendment, when they apply at all, generally limit only state action. Therefore, it would seem difficult to invoke First Amendment protections against actions like Prodigy's refusal to allow a person to use its network. Nonetheless, the Supreme Court has on rare occasions allowed litigants to invoke the protections of the Constitution against private actors. A litigant must make one of two arguments: the public function argument—that the private entity has taken on a public function; or the entanglement argument—that the government is so entangled with the private entity as to make the two

55. See sources cited supra note 5.
56. See infra note 152.
57. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105 (1980) (asserting that the rights usually associated with the First Amendment, "whether or not they are explicitly mentioned, must nonetheless be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process").
58. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 6; see also Wright, supra note 18, at 20.
59. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) ("The core issue presented in this case is not whether petitioners were discharged because of their speech . . . , but whether the school's action in discharging them can fairly be seen as state action."); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (no state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) ("[P]rivate action is immune from the restrictions of the Fourteenth Amendment . . . .") (utility not a state actor); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973) (plurality opinion) ("That 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons.").
60. See supra note 41 and accompanying text.
inseparable for purposes of constitutional analysis. However, the Court has severely limited the reach of both of these exceptions.

(1) Could a Private Network Perform a Public Function?

In the seminal case applying the First Amendment to a private actor that had taken on a public function, *Marsh v. Alabama*, a Jehova's Witness was prosecuted for criminal trespass for distributing literature on the streets of a "company town" without a license. In overturning the conviction and creating a right of access to the land, the Court held that the ownership of the town put the company into a position equivalent to that of the State: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."

This "public function exception" has been severely limited by more recent cases. For example, the Supreme Court has held that privately-owned shopping malls open to the general public—a prime contemporary example of private property owners who invite the public onto their land and provide many seemingly public functions, such as sidewalks, streets, and parking—are not subject to constitutional restrictions placed on the state. In *Hudgens v. NLRB* and *Lloyd*

---


64. Id. at 503-04.

65. Id. at 507; see also Evans v. Newton, 382 U.S. 296, 299, 302 (1966) (noting that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations" and concluding that "the public character of the park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law").
Corp. v. Tanner, the Court rejected the claimed First Amendment right of individuals to picket at privately-owned shopping malls, stating that “[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use,” and concluded that “the constitutional guarantee of free expression has no part to play” in such cases. The Court distinguished and narrowed Marsh by noting that Marsh involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise of that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State.

Although the services provided in Lloyd and Hudgens—sidewalks, streets, and parking areas—are traditional municipal functions, other services that have critical public components can be provided by networks. Networks already are used to provide electronic libraries, distribute SEC filings, collect taxes, cover town council meetings, provide outlets for public debate, and take polls.

Poll taking may have special significance in determining public function status. For example, in Smith v. Allwright, the Supreme Court held that the exclusion of blacks from the Texas Democratic Party violated the Fifteenth Amendment even though the party was a “voluntary” organization. The Court reasoned that “the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party’s action the action of the State.” Because the polls taken over networks are not yet part of the formal political process, it seems un-

69. Id. at 521.
70. Id. at 519 (quoting Lloyd, 407 U.S. at 569).
71. See, e.g., Steven L. Winter, Fast Food and False Friends in the Shopping Mall of Ideas, 64 U. COLO. L. REV. 965, 973 (1993) (“As we gather here in the final decade of the twentieth century, the postindustrial processes of bureaucratization, consumerization, commercialization, and mass media saturation threaten substantially to transform our experience of the market. The Athenian agora is now the local shopping mall.”); RAY OLDENBURG, THE GREAT GOOD PLACE 119 (1989) (“But, facades aside, the shopping mall is a sterile place when compared to prewar small towns and their main streets.”).
72. See sources cited supra notes 21-30.
74. Id. at 660; see also Terry v. Adams, 345 U.S. 461 (1953) (holding that exclusion of black citizens from association of voters constituted violation of the Fifteenth Amendment).
likely that networks would be seen as having taken on a public function based on their facility to provide this service. Although other network services, such as tax filings, SEC filings, and provision of library resources, do undertake traditionally municipal functions, a network provider still might not reach the standard of Hudgens as "performing the full spectrum of municipal powers and [standing] in the shoes of the State." 75

The development of the NII may inspire federal and state governments to make better use of network technology. It is already anticipated that the NII will be used to provide access to government information and an "electronic government" that will deliver benefits electronically for programs such as federal retirement, social security, unemployment insurance, AFDC, and food stamps. 76 Certainly the NII could be used for voting or for primaries, 77 or for "electronic town meetings," 78 which are critical to democracy. These functions are just as critical as the public primaries described in Allwright. If such services are provided, a court may limit its scrutiny of the private actor to the specific public function at issue, like the voting functions, without applying First Amendment doctrines to the actor generally. Indeed, given the more recent cases, such as Hudgens, in order to reach the level of scrutiny applied in Marsh for limitations on speech not directly related to the political process, the network may have to assume a wider variety of attributes. Without a radical reordering of contemporary understanding of certain state attributes, such as police services, 79 it seems unlikely that the operators of the NII will be


76. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 17; see also id. at 11 ("Thomas Jefferson said that information is the currency of democracy. . . . Improvement of the nation's information infrastructure provides a tremendous opportunity to improve the delivery of government information to the taxpayers who paid for its collection . . . ."); JOHN STUART MILL, THREE ESSAYS: ON LIBERTY 139 (Oxford Univ. Press 1975) (1859):

I believe that the practical principle in which safety resides, the ideal to be kept in view, the standard by which to test all arrangements intended for overcoming the difficulty, may be conveyed in these words: the greatest dissemination of power consistent with efficiency; but the greatest possible centralization of information, and diffusion of it from the centre.

77. See sources cited supra note 30.

78. See, e.g., sources cited supra note 28.

79. Cf. Marsh v. Alabama, 326 U.S. 501, 502 (1946) ("A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman.").
characterized as standing in the shoes of the state unless they are actually part of the state.  

(2) Could a Private Network Become Inseparable from Government?

A litigant who advances the "entanglement argument" also faces substantial obstacles in seeking constitutional protection for expression on private electronic networks open to the public. The archetypal entanglement case, Burton v. Wilmington Parking Authority, analyzed whether the Fourteenth Amendment applied to a private restaurant that leased space in a government-owned parking garage and refused service to William Burton because he was black. Although the discrimination rule was formally and independently made by the private restaurant, the Court found that the connection between the Parking Authority and the restaurant exceeded the threshold for state action. The Court based its decision on a variety of factors including indirect governmental profit and the sharing of governmental power, property, and prestige.

Later entanglement doctrine cases paralleled the public function doctrine cases in that the Court required a high threshold before finding enough entanglement to impute state action to a private actor. For example, in Rendell-Baker v. Kohn, teachers at a private school claimed that their discharge had contravened their First Amendment rights of free speech. The school specialized in dealing with students with special needs and, therefore, received student referrals from the public schools. The school also received substantial state funding

80. But see infra text accompanying notes 101-106.
82. Id. at 716-17.
83. Id. at 724-25. The court noted:
   It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.
84. 457 U.S. 830 (1982).
85. Id. at 837.
86. Id. at 832.
and was regulated by state officials. Nonetheless, noting that "the school’s fiscal relationship with the State is not different from that of many contractors performing services for the government," the Court concluded that the school had developed "[n]o symbiotic relationship such as existed in Burton." Likewise, in considering whether the actions of a broadcast licensee were subject to constitutional scrutiny, a plurality of the Court held that because the licensee performed a journalistic role and the Federal Communications Commission had not fostered the licensee’s challenged policies, "it cannot be said that the Government is a ‘partner’ to the action of the broadcast licensee . . . . nor is it engaged in a ‘symbiotic relationship’ with the licensee, profiting from the invidious discrimination of its proxy."

Unless the government becomes intimately identified with a particular information service, it seems unlikely that a court would find sufficient entanglement with a speech-restricting private network to constitute state action. As discussed above, a court would probably not find that operating a private information system fits the public function paradigm sufficiently to attribute the operator’s actions to the state. Therefore, it seems unlikely under current First Amendment jurisprudence that a court would find a private network operator that restricts speech to be a state actor.

87. Id. at 832-33.
88. Id. at 843. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.").
89. Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 119 (1973). The Court noted that "[t]he First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts." Id. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (holding that recipient of state liquor license not a “state actor” for purposes of the Fourteenth Amendment).
90. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 720, 725 (1961) (noting that “the Authority located at appropriate places [on the building] official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags” and concluding that “[b]y its inaction, . . . the State . . . has elected to place its power, property and prestige behind the admitted discrimination”). But cf. San Francisco Arts & Athletics, Inc., 483 U.S. at 545 n.27 (noting that although the Olympic Committee “performs the ‘distinctive, traditional governmental function’ of representing this Nation to the world community,” . . . absent the additional element of governmental control, this representational function can hardly be called traditionally governmental” (alteration in the original) (citation omitted) (quoting Brennan, J., dissenting)).
91. See Taviss, supra note 5, at 783.
92. See supra notes 63-80 and accompanying text.
93. See Taviss, supra note 5, at 770-73.
However, with the development of the NII, a court might find sufficient government entanglement so that some actions by network operators may constitute state action. After all, the NII will not be merely a bigger network. Rather, it has been described in government literature as a system in which "government has an essential role to play." Moreover, "the government has a duty to ensure that all Americans have access to the resources of the Information Age" and "government will ensure that users can transfer information across networks easily and efficiently." If the government takes these duties seriously, it may be determined to be intimately entangled with the operation of the network.

In addition, the vast majority of Americans who are unsophisticated in high-technology issues may already be acutely aware of the label "National Information Infrastructure" and perceive the networks as governmental in nature. Accoutrements from which governmental control may be inferred, like the flags flying over the parking garage in Burton v. Wilmington Parking Authority, are an appropriate part of the judicial inquiry.

On the other hand, the government apparently does not plan to operate the networks. In fact, government literature emphasizes that "[t]he private sector will lead the deployment of the NII" and "the private sector role in NII development will predominate." In view of the overwhelming entanglement, including substantial funding and regulation, evidenced in cases like Rendell-Baker v. Kohn, in which state action was not found, it seems unlikely that state action would be found here. Moreover, once commercial network providers begin to advertise more vigorously, it seems unlikely that the identification of the NII with the federal government will even approach the

94. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 6.
95. Id.
97. Cf. Exec. Order No. 12,864, 58 Fed. Reg. 48,773 (1993) (creating United States Advisory Council on the National Information Infrastructure to "advise the Secretary [of Commerce] on a national strategy for promoting the development of a National Information Infrastructure" and stating that an issue for the Council to address is "the appropriate roles of the private and public sectors in developing the National Information Infrastructure").
98. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 6 (contrasting recent investments by U.S. companies of more than fifty billion dollars annually in telecommunications infrastructure with the one to two billion dollars annually targeted for government spending).
identification that the United States Olympic Committee has with the nation, which was also held insufficient for constitutional purposes.100

The Court has recently signaled, under a confluence of justifications, a renewed willingness to attribute state action to a private actor. In Edmonson v. Leesville Concrete Co.,101 the Court held that a civil litigant’s race-based exclusion of jurors by means of peremptory challenges violated the Fourteenth Amendment.102 First, the Court found that a private party was sufficiently entangled with the state because the extensive government procedures that created the jury system and the direct participation of the judge combined to place the prestige as well as the legal framework behind the actor.103 Second, the Court held that the private party was performing a traditionally public function given the jury’s critical role in protecting litigants and ensuring legitimacy of law and because, as a delegate of the state, a private litigant’s actions may fairly be attributed to the state.104 Finally, the Court noted that because the purported racial discrimination occurred in a courthouse, it offended the administration of justice and “mar[red] the integrity of the judicial system.”105

The networks that compose the NII are not expected to play a central role in this nation’s legal system. However, if the NII has a pervasive impact on society106 and especially if it serves a variety of traditional public functions, the networks of the NII—substantially enabled by public regulations—may become important enough that unscrutinized action, especially exclusionary action based on race or gender, would be intolerable.

B. The Limited Use of the Public Forum Doctrine

Even if a network were operated by the government or if a network operator were held to be a state actor in regulating speech on its

100. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542-45 (1987). The Court held that the “fact that Congress granted it a corporate charter does not render the USOC a Government agent. . . . Nor is the fact that Congress has granted the USOC exclusive use of the word ‘Olympic’ dispositive. . . . [I]ntent on the part of Congress to help the USOC obtain funding does not change the analysis.” Id. at 543-44 (citation omitted).
104. Id. at 624-26.
105. Id. at 628.
106. See generally discussion supra Part I(A).
network, the level of First Amendment scrutiny of some decisions by the operator—even those directed at restricting speech—might be quite low. Content-based government regulation of speech directed at communications by people on their own property receives strict scrutiny.\textsuperscript{107} However, there is a strong tradition that the government usually carries a much lower, if any, burden for speech restrictions on much of its own property.\textsuperscript{108} Dean Mark Yudof states that the First Amendment does not require heightened scrutiny of actions taken by the Government Printing Office, government-sponsored newspapers (e.g., \textit{STARS AND STRIPES}), and public broadcasting stations. A view requiring such heightened scrutiny, he adds, not only “flies in the face of existing institutional arrangements,” but also “rests on assumptions about the illegitimacy of government expression in a democracy” and “ignores the need for even democratic governments to communicate effectively in order to advance public policies.”\textsuperscript{109} Similarly, there is no question that it is permissible for the government, arbitrarily and based on viewpoint, to restrict the access of those who wish to speak at places like the White House.\textsuperscript{110}

Of course, not all public property is like the White House. When the government has dedicated its property to a use traditionally associated with open debate, or when the government has dedicated its property specifically for the purpose of public debate, the Supreme Court has continually labeled that property a “public forum” and ap-

\textsuperscript{107} See, e.g., Tribe, \textit{supra} note 38, at 791-92:

If a government regulation is aimed at the communicative impact of an act, ... [it should be] unconstitutional unless government shows that the message being suppressed poses a “clear and present danger,” constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.


\textsuperscript{109} \textsc{Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America} 240-41 (1983). The Court recently confirmed Yudof’s point in dictum: “When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” Rust v. Sullivan, 500 U.S. 173, 194 (1991) (dictum).

\textsuperscript{110} Cf. Zemel v. Rusk, 381 U.S. 1, 17 (1965) (dictum) ("[T]he prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right."); Fred Barnes, \textit{Washington Diarist: How Special}, \textsc{New Republic}, Mar. 21, 1994, at 42 (describing the overnight stay at the White House as “the ultimate perk a president can bestow").
plied heightened scrutiny to governmental regulation of speech in that forum. Although this public forum doctrine should be tailor-made for the envisioned high-tech Hyde Park, the Court has developed a resistance to establishing novel kinds of locales (i.e., beyond parks, streets, and sidewalks) as public forums.

In one line of cases, the Court developed a three-tiered classification scheme for judicial review of state regulation of speech on public property that is used as a forum for opinions. The description found in *Perry Education Ass’n v. Perry Local Educators’ Ass’n* is the one most commonly cited perhaps because it seems to provide the clearest articulation of the doctrine. In *Perry* the Court noted that “[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.” The Court then articulated its tripartite scheme, which includes traditional public forums, limited public forums, and nonpublic forums:

[1. Traditional public forums:] In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. . . . In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

111. The most famous formulation was stated by Justice Roberts: Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (plurality opinion). *See United States v. Grace*, 461 U.S. 171, 177 (1983) ("It is also true that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' In such places, the government’s ability to permissibly restrict expressive conduct is very limited . . . .") (citations omitted).

112. *See infra* notes 125-133 and accompanying text.


114. *Id.* at 44.
[2. Limited public forums:] A second category consists of public property which the State has opened for use by the public as a place for expressive activity. 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. [Footnote 7: A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.] Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

[3. Nonpublic forums:] Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "[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." Public forum categorization, as described in Perry, requires two inquiries: whether there is a long tradition of public debate at the property and, if not, whether the State has opened the property for use by the public as a place for expressive activity.

In undertaking the first inquiry, the Supreme Court has been reluctant to find the requisite long tradition of public debate in anything but the most traditional public forums. For example, in holding residential streets to be public forums, Justice O'Connor described public streets and sidewalks as "traditional public fora" and stated that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." However, two years later, Justice O'Connor undertook a more particular inquiry in considering the status of publicly-owned sidewalks at post offices. She held that the
postal sidewalk in the case did not have the thoroughfare “characteristics of public sidewalks traditionally open to expressive activity,” but led “only from the parking area to the front door of the post office.” Moreover, the Court has not demonstrated a willingness to find a traditional public forum by analogy. In holding that airport terminals—which might have been reasonably analogized to rail stations, bus stations, and wharves—are not traditional public forums, the Court stated that “the relevant unit for our inquiry is an airport, not ‘transportation nodes’ generally.”

The recent widespread availability of multi-user networks, like airports, would seem to preclude a finding of traditional public forum status even for a government-owned network. An analogy of a network to a public park, street, or sidewalk may not prove persuasive in this context. Even the development of the NII, with its vaunted

---


> [I]t is evident that the public spaces of the Port Authority's airports are public forums... [T]he public spaces in the airports are broad, public thoroughfares full of people and lined with stores and other commercial activities. An airport corridor is of course not a street, but that is not the proper inquiry. The question is one of physical similarities, sufficient to suggest that the airport corridor should be a public forum for the same reasons that streets and sidewalks have been treated as public forums by the people who use them.

> ... [W]hile most people who come to the Port Authority's airports do so for a reason related to air travel, either because they are passengers or because they are picking up or dropping off passengers, this does not distinguish an airport from streets or sidewalks, which most people use for travel... .

> Third, and perhaps most important, it is apparent from the record, and from the recent history of airports, that when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports.

International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711, 2719 (1992) (Kennedy, J., concurring) (citation omitted); see also Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (“The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”).

120. “[G]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having ‘immemorially... time out of mind’ been held in the public trust and used for purposes of expressive activity.” International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) ( omission in original) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality opinion)).

121. The Supreme Court has stated that “[e]ach medium of expression... must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.” Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975). One lower court has noted that “the public forum doctrine is focused on messages rather than on media, and it assumes that speech which is excluded from government-owned property by virtue of a determination that that property is not a public forum can be effectively, if
capability for speech, could not imbue a network with enough tradition to be held a traditional public forum.\textsuperscript{122}

In distinguishing between the "limited public forum" and the "nonpublic forum," the relevant inquiry required by \textit{Perry} is whether the system is one "which the State has opened for use by the public as a place for expressive activity."\textsuperscript{123} For example, the Court in \textit{Perry} noted that there was "no indication in the record that the school mailboxes and interschool delivery system [at issue there were] open for use by the general public." Thus, the Court concluded that the system was not a public forum.\textsuperscript{124}

\begin{flushright}
not as effectively, communicated elsewhere." Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1339 n.4 (D.C. Cir. 1985).

One analogy might compare electronic networks with other kinds of networks. For example, in \textit{Perry}, the parties agreed that the low-tech network at issue, the school district's interschool mail system, was "not a traditional public forum." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Likewise, the Court has held that a charity drive network is a nonpublic forum. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). However, such an analogy would miss the special capabilities of electronic networks, which result from a multiplicity of channels operating at high speed over long distances and at low cost. \textit{See} discussion supra Part I(A).

Other analogies have also been made. \textit{See} Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 509 (D.C. Cir. 1986) ("Teletext, whatever its similarities to print media, uses broadcast frequencies, and that . . . would seem to be that."); Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991):


122. However, universal access restrictions on the NII, \textit{see} infra note 143 and accompanying text, might be thought of as "government fiat." \textit{Cf. supra} notes 115-116 and accompanying text.

123. \textit{Perry}, 460 U.S. at 45.

124. \textit{Id.} at 47. In fact, the Court noted that "[i]f by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA [the union requesting mail system access] could justifiably argue a public forum has been created." \textit{Id. But cf.} Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that
More recent cases have focused on purposeful action by the government in creating the designated public forum. The current doctrine, most recently exemplified by the Court in *International Society for Krishna Consciousness, Inc. v. Lee*, requires a clearly articulated government intent as a necessary prerequisite for the designation of nontraditional public forums. In *Lee* the Court upheld a ban on solicitation in three airports owned by the Port Authority of New York and New Jersey, holding that the regulation was reasonable and the forums were not public. The Court stated:

> [T]he government does not create a public forum by inaction. Nor is a public forum created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." The decision to create a public forum must instead be made "by intentionally opening a nontraditional forum for public discourse."

The search to discover the relevant governmental intent in *Lee* was driven by three factors: the commercial nature of airports, the subjective beliefs of the governmental management expressed at trial, and the manner of operation of the terminals. In *Hazelwood School District v. Kuhlmeier*, the Court emphasized that the evidence of intent to create a public forum must be demonstrably clear. In that case, the Court overturned a Court of Appeals determination that a high school newspaper was a public forum by relying on the school board's policy statements, curriculum guide, and course of conduct. The Court signaled that a high standard of clarity would be required before it would find that a public forum was intended.

---

125. 112 S. Ct. 2701, 2705-06 (1992) (outlining the *Perry* framework).
126.  Id. at 2708.
127.  Id. at 2706 (quoting *Greer*, 424 U.S. at 836 and *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).
128.  Id. at 2707. The Court also asserted that it was trying to determine whether "a [rather than the] principle purpose was 'promoting the free exchange of ideas.'" *Id.* (emphasis added) (quoting *Cornelius*, 473 U.S. at 800). However, the Court's analysis actually searched for "the [not a] purpose of the terminals;" whether the terminals had been "dedicated" to expression; and the managers' "focus." *Id.* (emphasis added).
130.  Id. at 270.
131.  Id. at 268-70.
Commentators have noted with dismay the circular or self-justifying nature of the search for "the governmental purpose." Since the governmental purpose must be clear in order to find a designated public forum, it appears that very few network forums will be able to satisfy the analysis. Even if a private actor were treated as a state actor for public forum purposes, the primary purpose of the forum would be seen as commercial. If the network operator were actually the government, it would be surprising to find a governmental action with a purpose as clear, and yet as amorphous, as promoting the free exchange of ideas. For example, the goals of the Clinton Administration's NII Initiative are listed in nine parts, three of which could, arguably, provide evidence of a clear purpose to promote the free exchange of ideas. Thus, under current doctrines, it is unlikely that a

---

133. See, e.g., David S. Day, The End of the Public Forum Doctrine, 78 Iowa L. Rev. 143, 187 (1992) ("[U]nder the modern forum doctrine, the Court will commonly defer to the speech-hostile tendencies of the government officials."). Day concludes: "As one of the constitutional bulwarks against censorial action by governmental officials, free speech doctrine cannot hinge on the 'intent' of the very officials it was designed to constrain. Free speech interests—if they are to actually be free—cannot be hostage to the government's intent." Id. at 203. See also Gary E. Newberry, Note, Constitutional Law: International Society for Krishna Consciousness, Inc. v. Lee: Is the Public Forum a Closed Category?, 46 Okla. L. Rev. 155, 172 (1993):

The analysis . . . in effect, grants the government sole power to classify a forum . . . . Most government property has a purpose other than the accommodation of First Amendment expressive activities . . . . It is difficult to conceive how constitutional significance can be attached to the fact that airports involve travel by airplane, and that streets involve travel by automobile . . . . Few public forums would remain for the exercise of First Amendment expression if a forum's purpose determined its status. Because streets and parks are not constructed with the primary purpose of facilitating speech, under the [Lee] analysis even the quintessential public forums would seem to lack the requirements necessary to constitute a public forum. (footnotes omitted)

The author concludes that "[t]he Court's analysis makes it clear that few, if any, types of property will be granted public forum status in the future." Id. at 174. See also Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 46 (1986) ("The most troubling thing about this three-category formulation is that censorship can become self-justifying in the second and third categories.").

134. The nine goals and principles are to: (1) promote private sector investment; (2) extend the "universal service" concept to ensure that information resources are available to all at affordable prices; (3) act as a catalyst to promote technological innovation and new applications; (4) promote seamless, interactive, user-driven operation of the NII; (5) ensure information security and network reliability; (6) improve the management of the radio frequency spectrum; (7) protect intellectual property rights; (8) coordinate with other levels of government and with other nations; and (9) provide access to government information and improve government procurement. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 6-7. The goals that could be used as evidence for the proposition
network owned by or imputed to the government or the NII would be held to be a designated public forum.

Scrutiny of government regulation of a nonpublic forum is usually quite low. The Court has held that "the State may reserve the [non-public] 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." It should be expected that this viewpoint-neutral reasonableness standard would be applied to government-owned networks or the NII.

In Lee the Court's decision indicated that in a nonpublic forum, the reasonableness requirement would have some bite. After all, the decision of the Court of Appeals to strike down a restriction on leafletting, as contrasted with solicitation, was affirmed. Justice O'Connor's concurrence was the only opinion that addressed the constitutional distinction between leafletting and solicitation in this non-public forum with approval:

While the difficulties posed by solicitation in a nonpublic forum are sufficiently obvious that its regulation may ring of common-sense, the same is not necessarily true of leafletting. To the contrary, we have expressly noted that leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, one need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand. . . . With the possible exception of avoiding litter, it is difficult to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multi-purpose forum such as those at issue here.

that the principal purpose of the government is to promote the free exchange of ideas are (2), (4), and (9).

135. See G. Sidney Buchanan, The Case of the Vanishing Public Forum, 1991 U. ILL. L. REV. 949, 967 (noting that government victory in United States v. Kokinda, 497 U.S. 720 (1990), was "almost inevitable" once the forum at issue, a postal sidewalk, was classified as nonpublic).

136. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); accord Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").


This kind of distinction indicates that some nontrivial reasonableness scrutiny is applied even in a forum found to be nonpublic.

Even more recently, the Court has indicated that it takes the viewpoint-neutrality requirement seriously as well. The issue was raised by a school's decision to deny use of its facilities to show a church's film series even though the facilities had been previously used for other allegedly religious purposes. The Court held that the school's denial unconstitutionally applied a rule that the school premises not be used for religious purposes.139 The Court reasoned that "[t]he film involved here no doubt dealt with a subject otherwise permissible . . . and its exhibition was denied solely because the film dealt with the subject from a religious standpoint."140 Thus, even if the government-owned networks were held to be nonpublic forums, government managerial authority may be restricted in actions taken over those networks that exhibit a bias toward a particular point of view.141

140. Id. at 2144, 2147. In an opinion with some relatively light moments, see id. at 2148 n.7 (discussing Justice Scalia's late-night horror film anecdote), Justice White seemed especially titillated that a lecture series (entitled "Psychology and the Unknown" and sponsored by a "New Age religious group") given with permission on school district property was governed by the same rules. Id. at 2146-47 n.5.
141. Id. at 2147.
142. Cf. Buchanan, supra note 135, at 951 n.14 (preferring the label "nontraditional public forum" to "nonpublic forum"). On the other hand, such protections may be subsumed by a fact-intensive scrutiny. Justice O'Connor began her analysis by noting that "[t]he reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." Lee, 112 S. Ct. 2711, 2712 (1992) (concurrency) (quoting Cornelius v. NAACP Legal Defense of Educ. Fund, Inc., 473 U.S. 788, 809 (1985)). In that vein, she analogized the airport regulations to those upheld in another nonpublic forum case, Greer v. Spock, 424 U.S. 828 (1976), and she specifically noted that the forum there, certain parts of a military base opened to the public, "sustained the kind of extensive, nonforum-related activity found in the . . . airports." Lee, 112 S. Ct. at 2714 (O'Connor, J., concurring). She contrasted the selective ban in Greer, which permitted prohibition of only those materials constituting "a clear danger," id. (quoting Greer, 424 U.S. at 840) with the indiscriminate one in Lee, which "effects an absolute prohibition and is not supported by any independent justification outside of the problems caused by solicitation." Id.
C. Networks that Compose the NII Will Probably Not Be Considered Public Forums

As discussed, private network operators will probably not be considered state actors, and even if they are, the networks will be considered nonpublic forums. Thus, the level of First Amendment scrutiny applied to regulatory decisions made by those operators, if any, will be quite low.

The vague promise of universal access\(^{143}\) may provide a politically-based guarantee of free speech rights on the NII. A government regulation ensuring universal access, which could effectively require public access to private property, would probably not be problematic under current constitutional doctrine. Challenges to such a regulation could be based on the network operators’ First Amendment speech rights and their Fifth Amendment property rights, that is, they could argue that required public access is a “taking” without just compensation. Such a regulation, like imposition of common carrier status upon telecommunications providers, would probably not violate the operators’ First Amendment rights.\(^{144}\) Similarly, like imposition of public access upon a shopping mall, such a regulation would probably not violate the network operators’ Fifth Amendment rights because universal access would probably not be seen as a “taking.”\(^{145}\) Although the First Amendment does not require protection of individual speech rights on private networks, it would not seem to prohibit the government from stepping in and granting some protection.

---

143. INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 3.

144. See, e.g., Angela J. Campbell, Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies, 70 N.C. L. REV. 1071 (1992). Campbell explains:

- Requiring a telephone company to operate on a common-carrier basis probably does not violate its First Amendment rights. The Supreme Court has found in case after case that licensing broadcast stations does not violate the First Amendment. If anything, the basis for licensing common carriers may be more compelling than for licensing broadcasters. Id. at 1145 (footnote omitted).

145. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) ("[H]ere, appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'").
 Protecting First Amendment values is often seen as one of the essential anti-majoritarian duties of the Court. The apparently minimal protection of speech on networks seems strikingly inadequate as technology rapidly changes. Should presidential censorship of the health care conference described above—especially one using a government-owned system—really be immune from serious First Amendment scrutiny? The apparent abdication of the public forum doctrine in this lively context is striking and disconcerting. While the state-action bar seems reasonably necessary in order to separate public action from private, the failings of the public forum doctrine may stem from technological myopia. The next Part of this Article probes both the public forum doctrine and the particular structures that a network can support. The Article then develops and justifies a more nuanced approach that addresses public forum values within a fuller understanding of the NII.

III. Which Parts of the Networks that Compose the NII Should Be Considered Public Forums?

As discussed, the current public forum doctrine presents an impediment to protection of expressive activity on the NII's networks—even on government-owned networks. This Part will probe the various justifications for the public forum doctrine while developing a more complex view of the NII. By focusing more closely on the theories that motivate the public forum doctrine and the particular structures provided on the NII, this Part argues that the public forum doctrine can be used to protect expressive activity in some government-owned or government-controlled parts of the NII.

Attempts to classify networks as either traditional public forums or nonpublic forums should be rejected. Rather than trying to analogize a network to a park or an airport terminal, a network can be more appropriately analogized to a complex new city within which public and nonpublic forums can both exist. This approach is buttressed by the analyses of a number of thoughtful commentators. The task is to find the public forums on the NII. Therefore, this Part of the Article suggests a basic set of easily identifiable criteria for designated public forums on the NII: those government-owned or government-

147. See supra Section I(C)(3).
148. See Seidman, supra note 16, at 1047 ("Judicial enforcement of constitutional rights can best be understood as our society's imperfect effort to deal with the boundary problem, particularly in the public/private context.").
controlled forums that are non-profit with unlimited access to recipients and viewpoint-neutral access to a large number of senders. Finally, this Part attempts to address some of the issues, such as forum topics, membership, costs, and closure, that will surely be raised in future controversies.

A. Theories Justifying the Public Forum Doctrine

Many commentators have expressed discomfort with the provisions of the public forum doctrine, primarily for its circularity and vacuity or inflexibility. Nonetheless, despite exaggerated reports of its demise, the doctrine has not yet been overruled, and the Court has not suggested an inclination to do so. In considering the application of this doctrine to new technology—especially when, at first glance, the application seems uncomfortably ill-suited—it is helpful to reexamine the underpinnings of the special role of the public forum.

The First Amendment has served as a repository for a broad collection of personal rights protecting social values related to free speech. The literature on these principles is vast and familiar.

149. See, e.g., Tribe, supra note 38, § 12-24, at 987 (calling the public forum doctrine “quite manipulable and problematic” and noting that “many recent cases illustrate the bluriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification”).

150. See, e.g., Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 93 (1987) (“Existing doctrine, with its myopic focus on formalistic labels, serves only to distract attention from the real stakes in these disputes.”).

151. Day, supra note 133, at 202 n.416 (“At this point, the modern forum doctrine is basically a methodology to find that a particular location is a ‘non-forum.’”); Newberry, supra note 133, at 174 (concluding that “few, if any, types of property will be granted public forum status in the future”).

152. See, e.g., Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. . . .

. . . . To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Tribe, supra note 38, at 785-1061. Professor Tribe argues that “[n]o adequate conception of so basic an element of our fundamental law [as free speech] . . . can be developed in purely instrumental or ‘purposive’ terms.” Id. § 12-1, at 785. Cf. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the
Within this broad conception of values protected by the First Amendment, the public forum, and especially the traditional public forum, can be said to hold a "special position." Certainly, public forums can be critical to effective assembly because a right to assemble requires locations for assembly. Public forums enhance communication because they are "natural locations for those seeking to reach potential listeners." The magnetic effect of public forums upon communication can improve opportunities for expression, as well as for attainment of truth and assurances of participatory self-government. Their openness can encourage diverse points of view.

(1) Professor Saphire and Formal Values

Professor Richard Saphire has defended the very formalism that so many critics of the public forum doctrine attack as "both its underlying justification and its primary appeal." Professor Saphire describes the doctrine as a "clearly discernible, easily [articulable], and potentially objective framework for judicial analysis." He argues that the doctrine serves the values often associated with the "rule-of-law virtues," including the relative stability essential for a coherently administrable legal system, the relative certainty and predictability needed for fair administration of laws, and the attempt at objectivity that undergirds the legitimacy of law.

Professor Saphire admits that a more flexible approach—such as the one employed in Grayned v. City of Rockford that asks "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"—may offer better protection for expressive freedom than the Perry frame...

---

155. BARBER, supra note 28, at 267-68 ("Without talk, there can be no democracy. Whether in a marketplace, a public square (like the ancient Greek agora), a country store, a barber shop, a school board, or a town meeting, democracy must have its local talk shop, its neighborhood parliament.").
157. Id. at 756 (describing the public forum doctrine in its "idealized form").
158. Id. at 754-55.
159. 408 U.S. 104 (1972).
160. Id. at 116.
work, but he insists on making a broader comparison.\textsuperscript{161} He suggests that the concerns of commentators who criticize the public forum doctrine for its manipulability may not be satisfied by an even more flexible approach.\textsuperscript{162} More pointedly, Professor Saphire notes that the critics who prefer a more flexible test may not be advancing the free speech causes they trumpet because “[t]here seems little basis for confidence that the Court, especially the Rehnquist Court, would be any more likely to invalidate regulations of speech were the public forum doctrine discarded.”\textsuperscript{163}

Other scholars have developed more theoretical justifications for the public forum doctrine. Professors Post and Berger have developed functional analyses of the motivations behind the public forum doctrine, while Dean Farber and Mr. Yassky have developed views of the public forum within larger constitutional theories. These scholars are surveyed below.

(2) \textit{Professor Post: Distinguishing Governance from Management}

Professor Robert Post, in his influential article on public forums, has argued that the public forum decisions can be theoretically justified on more general principles.\textsuperscript{164} He summarizes those principles by distinguishing the strict limitations on the government in its “governmental” capacity from the greater deference given to government acting in a “managerial” role.\textsuperscript{165} Professor Post argues that the

\textsuperscript{161} Saphire, \textit{supra} note 156, at 756 n.69, 757.
\textsuperscript{162} \textit{Id.} at 758 n.77 (referring, as an example, to \textit{Tribe, supra} note 38, § 12-24, at 992-93). Interestingly, some scholars look wistfully at the structure and certainty of the public forum categories as a model for making the doctrine less flexible in other areas. \textit{See, e.g.,} David Cole, \textit{Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech,} 67 N.Y.U. L. Rev. 675, 722-23 (“Like the ‘spheres of neutrality’ approach I have proposed, the Court’s context-specific public forum inquiry accommodates the competing values and dangers associated with government-supported speech by designating institutional spheres of neutrality in a non-neutral world.”); David Goldberger, \textit{A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America’s Public Forums,} 62 Tex. L. Rev. 403, 431 (“Application of the public forum approach to pecuniary requirements would have important advantages other than that of simplicity. The approach would be more likely than the \textit{Cox} approach to generate decisions consistent with first amendment policies.”) (describing \textit{Cox} approach to charges for use of the public forum as upholding “charges that are designed to recoup governmental costs, except when those charges are prohibitive”).
\textsuperscript{163} Saphire, \textit{supra} note 156, at 758.
\textsuperscript{165} Professor Post states:

When the state acts to govern the speech of the general public, it is subject to the restrictions of what we would ordinarily think of as the “usual” principles of first
government acts in its sovereign (i.e., highly scrutinized) role when it regulates speech in traditional public forums because it is governing the speech of the general public, whereas in nonpublic forums, the government acts as a manager motivated by its "legitimate organizational goals."  

Perhaps more general principles reign in these public forum cases, but they nonetheless highlight a narrowly tailored category deserving of careful study. Professor Post admits that public forum cases have identifiable characteristics, a primary one being that "members of the general public seek to use a resource over which the government claims managerial control."167 In fact, in distinguishing between public and nonpublic forums, Professor Post concludes that even a test of traditional access is "probative of underlying social practices that are themselves determinative of the authority ceded to the government in the regulation of speech."168 He adds that the "public forum doctrine has much to teach us about the nature and limits of our democracy."169 Thus, while pointing out that public forums are governed by general principles of law usually reserved for private entities, Professor Post concedes that it is the designation of a government-controlled forum as "public" (and subjected to governance rather than management principles) that occupies a special place in jurisprudence.

(3) Professor Berger: Functional Attributes of a Public Forum

Professor Curtis Berger has tried to articulate the special characteristics of a marketplace, his prototype public forum, as contrasted with the characteristics of a private home.170 He notes that the marketplace is characterized by the following elements: lower expectation of privacy, no expectation of quiet, entry from multiple points, restricted freedom of association, privilege of entry at no cost, lack of territoriality for non-merchants, and reduced expectation of security.171 By contrast, Professor Berger introduces a different set of char-
acteristics that denote a home private: expectation of privacy, expectation of quiet, limited physical access, freedom of association, right of exclusion, exclusivity of possession, and expectation of security. In fact, Professor Berger claims that these assumptions remain valid regardless of ownership by the occupant. Professor Berger notes that “[p]olitical discourse naturally complements the medley of ongoing activity within the marketplace” and suggests defining “the modern public forum not in terms of ownership but rather as a gathering place, which joins those who wish to deliver a political message to those who—at the least—do not think it strange to find the forum to be the delivery point.”

Professor Berger is motivated not by an interest in clarifying the public forum doctrine, but by a desire to expand the reach of PruneYard Shopping Center v. Robins. Nonetheless, his functional analysis of the special qualities of the public forum can still prove helpful in analyzing the public forum doctrine.

(4) Dean Farber: "Public Choice" Theory and the First Amendment

Recent analyses, founded in modern constitutional theories, can help buttress these functional descriptions of the special position of the public forum. For example, Dean Daniel Farber, a proponent of

172. Id. at 652-54.
173. Id. at 654. Berger states that “[l]imits on state power are even more pronounced when the state, itself, is the landlord, as in the case of a public housing authority.” Id.
174. Id. at 656.
175. 447 U.S. 74 (1980). For an example of the article’s thrust, consider the following excerpt:

For speech to flourish, expressionists need settings where they can meet their audiences—today’s dispersed and motorized citizenry—cheaply and efficiently. Thus, when presented with evidence that vast urban galleria and suburban multiactivity malls have displaced downtown sidewalks and strip retail stores opening to the sidewalk, a common-law court should stand ready to declare these malls, and other forum-like private lands, to be appropriate, indeed vital, complements to more traditional public space.

Berger, supra note 170, at 663 (footnotes omitted); see also New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 1994 WL 708997, at *20 (N.J. Dec. 20, 1994) (“[W]here private ownership of property that is the functional counterpart of the downtown business district has effectively manipulated significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it.”).
"public choice" theory, has applied the theory to the First Amendment.

By applying an economic argument to the political process, Dean Farber notes that "information is especially vulnerable in the political process precisely because it has the attributes of a public good." Dean Farber describes one market defect as the "uniquely reproducible" nature of information. He explains that because information can be reproduced so cheaply, many information consumers will not compensate the original producer, and, therefore, the market will under-produce information. Consequently, those producers will not lobby as effectively as other producers of consumer goods, and "the political system is likely to overregulate information." Thus, Dean Farber concludes that First Amendment doctrine can be explained as an attempt to better capture the social value of information as a public good.

Dean Farber argues that the more information resembles a public good, the more First Amendment protection it has received. For example, political speech "most strongly exhibits the qualities of a public good" because political participation suffers from inherent free rider problems. Coupled with the potential conflict of interest felt by politicians who consider suppressing speech, the "double" public good quality of political speech provides ample justification for the protection afforded by the courts. On the other hand, speech in which benefits accrue more directly to the listener and, thus, more closely resembles a consumer good, like pornography and most commercial speech, will receive less First Amendment protection.

Under this analysis, speech in the public forum deserves special protection as well. Dean Farber describes the public forum doctrine...

178. Id. at 556.
179. Id. at 559.
180. Id. at 559-60.
181. Id. at 560-61.
182. Id. at 555.
183. Id. at 562-63.
184. Id. at 562-64.
185. Id. at 565-66 ("Most of the benefit of product advertising is captured by the producer itself in the form of increased sales. Consequently, we would not expect severe underproduction of commercial speech.") (footnotes omitted).
in the context of a set of doctrinal protections (understood here as subsidies) for speech, including the public official doctrine, announced in *New York Times Co. v. Sullivan*,\(^{186}\) and a suggested narrow construction rule, contrary to the one used in *Rust v. Sullivan*,\(^{187}\) for funding restrictions on speech.\(^{188}\) Dean Farber describes the use of the public forum as subsidizing speakers by "giving speakers free use of certain government facilities" and the role of public forum doctrine as "prevent[ing] the government from discriminating in providing this subsidy."\(^{189}\) In Dean Farber's analysis, "speakers should be able to use government property as long as they do not impose an undue cost on the government."\(^{190}\) Even though alternate channels may be open in our country, public forums remain important to Dean Farber because they "are often the only place where less affluent groups and individuals can effectively express their message."\(^{191}\)

(5) *David Yassky: Dualist Democracy and the First Amendment*

In another analysis, David Yassky has applied Professor Bruce Ackerman's "dualist democracy" theory\(^{192}\) to the First Amendment.\(^{193}\) Under Professor Ackerman's theory, democracy is carried on at two levels: ordinary politics and "higher lawmaking."\(^{194}\) Ordinary elections occupy a limited role in American political life. They specifically do not give American politicians a mandate to overturn special "higher lawmaking" decisions of the people.\(^{195}\) "Higher lawmaking" occurs infrequently and under special conditions, but it earns the enhanced legitimacy that protects its considered judgments against

\(^{186}\) 376 U.S. 254, 279-80 (1964).


\(^{188}\) Farber, *supra* note 177, at 568-74.

\(^{189}\) Id. at 574 ("Otherwise, [unpopular] speakers would have to incur the cost of obtaining a forum for their speech.").

\(^{190}\) Id. at 574. Farber notes that this approach has so far been rejected by the Court. *Id.* See Post, *supra* note 164, at 1765 & n.213 ("What has truly bewildered most commentators about modern public forum doctrine is that the Court has continually repudiated the test focusing on [whether the speech activities would be incompatible with the use to which the premises are dedicated] despite what commentators view as its obvious superiority."); cf. Saphire, *supra* note 156, at 763 ("But if the public forum doctrine has provided a reasonably stable framework for achieving a reasonably tolerable accommodation of first amendment and non-first amendment values—and I think a plausible argument can be made that it has—the Court's continued adherence to it may not be unwarranted.").

\(^{191}\) Farber, *supra* note 177, at 574 n.86.


\(^{194}\) ACKERMAN, *supra* note 192, at 6.

\(^{195}\) Id. at 6.
ordinary politics. Professor Ackerman locates these periods of higher lawmaking at three points in America's constitutional history: the Founding, the post-Civil War amendments, and the New Deal.

In reviewing the history of the First Amendment in light of Ackerman's theory, Yassky argues that

[while today's First Amendment stands for something very different from what the Founders envisioned, the change was produced not by an increasing societal belief in the value of free speech, but by two watershed transformations in American government—the Civil War and the New Deal—that remade the entire constitutional framework.]

Coincidentally, Yassky's examples highlight early developments in the public forum doctrine. For example, he highlights the early case that most clearly rejected the public forum doctrine, *Davis v. Massachusetts*. Yassky argues that in upholding an ordinance that banned addresses on public grounds (there, the Boston Common), the *Davis* decision actually fell neatly at the intersection of the "two themes of post-Civil War liberty jurisprudence—inviolable property rights and devalued speech rights." With the advent of the New Deal, Yassky argues, the Court balanced the broadened powers of the government by "invigorat[ing] the Bill of Rights' non-economic guarantees of personal freedom—most energetically, the speech and press clauses of the First Amendment." To symbolize this "complete reversal of values," Yassky draws on two of the cases already highlighted in this Article: *Hague v. CIO*, the conceptual starting point for public forum analysis, and *Marsh v. Alabama*, an early decision that found state action on private property. Thus, for Yassky, the public forum doctrine that developed between *Davis* and *Hague* is one symbol of the intervening period of "higher lawmaking." After discussing what he calls the other marker of the new era, *United States v. Carolene Products Co.*, and its famous footnote, Yassky asserts "that the Court's focus on free speech is a direct consequence of the

196. Id.
197. Id. at 40 (describing the "shape of the constitutional past").
198. Yassky, supra note 193, at 1701.
199. 167 U.S. 43, 47-48 (1897). Cf. Post, supra note 164, at 1764 (noting that "no one on the modern Court has explicitly defended the extreme perspective associated with the major premise of the *Davis* syllogism").
200. Yassky, supra note 193, at 1729.
201. Id. at 1730.
202. 307 U.S. 496 (1939) (plurality opinion); see supra note 111.
203. 326 U.S. 501 (1946); see supra notes 63-65 and accompanying text.
204. Yassky, supra note 193, at 1731-34.
205. 304 U.S. 144, 152 n.4 (1938).
New Deal repudiation of property rights as an avenue for fulfilling constitutional commitments to individual liberty.\textsuperscript{206}

Yassky does not merely dwell on the past. He describes the current post-New Deal task of the Court as much more difficult than the ones faced previously:

For the first time, the constitutional liberty guarantee depends not on a ready-made body of doctrine—the common law—but on rights developed and articulated by the federal courts themselves. The courts have had to fill in, more or less from scratch, the blanks in the general constitutional command to protect political liberties. . . . To determine the constitutionality of a statute, it is no longer sufficient simply to decide whether the state or the federal government is the appropriate decision-maker in a particular policy area (the Federalist-era calculus), nor to compare the statute with long-established common law rights (the post-Civil War calculus). Instead, to vindicate the Constitution’s commitment to individual liberty, the courts have been required actively to elaborate a comprehensive set of judicially-enforced guarantees.\textsuperscript{207}

He argues that in its current elaboration the Court has “create[d] a libertarian sphere modeled on [the Court’s] earlier instantiation of constitutional liberty principles.”\textsuperscript{208} Yassky further notes that

[s]imply owning property does not give rise to a First Amendment right to deny its use to others, even when the use is for others’ speech. For a First Amendment right to obtain, the property must be characterized as a speech resource. . . . Just as \textit{Lochner} did for property, \textit{Pacific Gas} [475 U.S. 1 (1986) (plurality opinion of Powell, J.)] and \textit{PruneYard} [447 U.S. 74 (1980)] enshrine private orderings of speech resources. These private orderings are assumed to be legitimate and beyond the reach of state intervention.\textsuperscript{209}

Yassky goes on to develop these ideas in the context of \textit{Buckley v. Valeo}\textsuperscript{210} and concludes that the Court’s underlying premise “is that there is a ‘natural’ political process which, if left untouched, cannot be deficient.”\textsuperscript{211}

Although Yassky does not address the current public forum doctrine, one could apply this method of trying to actively develop a comprehensive set of judicially enforced guarantees to protect political
liberties. Where Yassky noted that "[e]nhanced judicial attention to the political process [is] necessary to counter the threat of administrative tyranny," Yassky might find administrative tyranny present in governmental control over those places where a member of the general public might not expect such controls, like a park or a street.

For locations with less firm traditions, Yassky might try to characterize certain property as a speech resource owned by the government. Presumably in this area, like in PruneYard, the critical determinant would be the characterization of the property by the government. The political process would be presumed to operate properly, and the Court would allow that process to characterize the property. Perhaps the Court would recognize that allowing the governmental entity to characterize the property for a specific case would encourage distortions and abuse. As such, a court might attempt to find more "objective" methods of governmental characterization, like documented "intent." Although this formulation of the public forum doctrine is not particularly expansive, it certainly represents a step from the view of total proprietary control underlying Davis.

Many First Amendment values are particularly well-served by protecting speech in public forums. This view remains true under a variety of theories, from traditionally styled ones (for example, Professor Saphire's defense of formalism, Professor Post's reformulation of the public forum doctrine as the distinction between governance and management, or Professor Berger's functional analysis of the pub-

212. Id. at 1736.
214. Moreover, in his final pages, Yassky boldly encourages the development of a new jurisprudence of the First Amendment: "In a political environment dominated by moneyed interests, genuinely pluralistic debate requires the government to go beyond laissez-faire. Rather than seeking to prohibit government intervention, First Amendment jurisprudence should acknowledge the pervasiveness of government 'action' and forthrightly address the real moral issues at stake." Yassky, supra note 193, at 1752. Considering the work of the critical legal studies movement and Professor Catherine MacKinnon, Yassky finds a parallel in the legal realist movement and suggests that
215. [t]he contemporary attraction of indeterminacy may similarly be driven by a growing realization among legal scholars that the Court's assumptions about the fairness of the political process and the legitimacy of political resource distributions are unfounded. As it becomes clear that particular legal regimes benefit some and harm others, the essence of the legal craft may itself seem tainted.

Yassky, supra note 193, at 1754 & n.201 (footnote omitted). Undoubtedly, upon a judicial willingness to take note of inequities in political resource distributions, the public forum doctrine could take on even greater significance because public forums are so frequently the only place where the less affluent can convey their messages.
lic forum) to more holistic approaches (for example, Dean Farber's public choice theory or Ackerman's dual democracy theory as interpreted by Yassky). Certainly, not all government property is appropriate as a public forum, and different theories suggest a varied scope for the doctrine. Nevertheless, the resilient value of the public forum concept, though sometimes criticized as wooden in doctrinal form or manipulable in application, should inspire a court to find some means to make use of it on the NII. A more theoretical or functional analysis may be especially appropriate in applying law to new technology when the reliable signposts of tradition are absent.

B. A Simplistic Public Forum Doctrine on the NII: Who Wants It?

Having articulated theories of the underlying functional and theoretical justifications for the public forum doctrine, this Section explores whether a simplistic application of the doctrine to networks that compose the NII, as attempted in Part II, would animate those justifications. This Section concludes that while some forums on the NII should appropriately be treated as public, others should be treated as nonpublic. Taken as a whole, the NII should not be seen as a public or a nonpublic forum, but as a more complex entity, like a city, that contains both public and nonpublic forums within it.

(1) The Health Care Conference: A True Public Forum on the NII

Recall the health care conference described earlier: it was organized on a government system on which resources were offered at no charge to the public and it was open to all and dedicated to a discussion of health care issues. Although the President may wish that critics in this conference were of a different mind (or at least less articulate), this forum seems like a prime example of one that should be fully protected by the public forum doctrine. After all, if the President were to attempt to censor the conference, under the straightforward doctrine, state action restricting speech would be present. Even under the most restrictive test for non-traditional public forum status—the intent test—there should be ample evidence that the government intended to open up its property for use as a public forum for health care issues.

Under the various functional and theoretical justifications as well, this conference ought to be considered a public forum. Under Profes-

215. See discussion supra Part I(C)(3).
216. See discussion supra Part II(A).
217. See discussion supra Part II(B).
sor Post's methodology, the President is acting in a governance capacity by trying to influence the will of the people outside the governmental organization, rather than by managing internal affairs. Professor Berger would categorize this as a public forum because messages in this conference are not sent with an expectation of privacy, anyone may enter at no cost, and territory is not reserved for anyone. Under Dean Farber's analysis, speech so broadly directed as in this debate is likely to be undervalued since its value is so diffuse. Further, since this might be an example of the political process undervaluing such speech, it underscores the important role of the public forum doctrine in protecting the voice of the "little people" against the political enterprise. Finally, Yassky's historical view of the expanding role of the administrative state would highlight the importance of this state-created forum for public discussion—which by its very size and domination may have diminished the importance of other forums and made protection of speech here that much more critical.

This scenario may seem farfetched to those inexperienced on the Internet. However, Internet discussion groups are often prime examples of debates that are uninhibited, robust, and wide-open, and they frequently take place on computers owned by the government or state universities. Moreover, governments from Massachusetts to Washington, D.C. have expressed interest in using the electronic forum as a substratum for political debate. The electronic public forum is coming soon, and the public forum doctrine should be used to protect it.

218. See supra notes 164-169 and accompanying text. Post, supra note 164, at 1828, remarks:
If members of the public are performing what we would characterize as specifically organizational roles, the prohibition against viewpoint discrimination is not triggered. The prohibition will bite, on the other hand, if . . . institutional resources are made available for speech that is not seen as intrinsic to an internal institutional function.

219. See supra notes 170-175 and accompanying text, especially Berger, supra note 170, at 655. Factors such as quiet or security would seem inapposite in this context, although some people refer to heated discussions as "noisy" or "flaming." Sproull & Kiesler, supra note 35, at 339.

220. See supra notes 176-191 and accompanying text, especially Farber, supra note 177, at 564, 574.

221. See supra notes 192-214 and accompanying text, especially Yassky, supra note 193, at 1736 (discussing, inter alia, "the threat of administrative tyranny").

222. See sources cited supra note 51.

223. What about messages sent to this forum that do not have to do with health care directly, such as a message discussing the impact of the budget deficit on health care? Could a moderator delete those, consistent with public forum use? For now, I would suggest that a moderator should be allowed some discretion in deleting irrelevant messages,
(2) A Nonpublic Forum on the NII: An Example

Every exchange of messages on the NII cannot be considered to take place within a public forum. Such a presumption would fit poorly into the public forum doctrine, and an example will illustrate the practical and the theoretical difficulties of holding such a position.

Recall the Cronies conference example: A city mayor maintains a conference on one of the city systems of his cabinet members, trusted advisees, and a few city business leaders from the mayor's party. All messages in the conference are sent with the approval of the mayor's office. Imagine that a city business leader, not from the mayor's party, requests membership in the conference and is rejected by the mayor.

This scenario would not seem to implicate either the public forum doctrine or its underlying values. On a doctrinal level, state action may be involved in refusing membership, but the forum has never been designated as public and was never intended to be considered public by the mayor. This scenario loosely parallels the paper mail system found to be a nonpublic forum in *Perry*.

Moreover, treating every government-controlled conference as though it were a designated public forum would do violence to the analysis of the public forum on both a functional and a theoretical level. Professor Post's analysis of the distinction between governance and management would apply directly: the role of the mayor here is to manage and receive advice from trusted advisors, not to barrage them with messages from all comers or share their messages with the public. In considering Professor Berger's factors, messages from the mayor on this restricted conference would normally entail an expectation of privacy and focused entry primarily by the mayor. The conference would also involve relatively direct associations and communications tailored to those associations. Thus, personal messages

---

224. See discussion supra Part II(B).
225. See discussion supra Part I(C)(2).
226. See discussion supra Part II(A).
227. See discussion supra Part I(C)(2).
229. See supra notes 164-169 and accompanying text; Post, *supra* note 164, at 1782 ("When acting with managerial authority, a government institution may to a significant degree control speech as necessary to attain its legitimate organizational goals, as these goals are understood by a court."); *cf* United States v. Nixon, 418 U.S. 683, 705 (1974) (upholding confidentiality for communications among high government officials).
are more "home-like" than "marketplace-like."  Dean Farber probably would argue that messages from the mayor and messages sent to this tightly knit conference have a relatively direct impact upon the recipients and that the third party's right to speak is less in need of protection by the First Amendment than if it were generating general public messages. Finally, Yassky might argue that this small-scale operation is not an example of the administrative state's special capacity for tyranny; rather, he would probably expect a court to view the political process as working and the resulting ordering of speech as "natural."

Thus, the notion of the NII as a public forum in all its aspects is contrary not only to existing doctrine but also to the values informing that doctrine, at least in the context of the Cronies conference. Basically, this analysis confirms the result of Part II: Not only will networks on the NII not be considered public forums, but there is no justification for treating them as public forums generally.

(3) The NII as Forums: More like a City than like an Airport Terminal or a Park

Taken as a whole, the relationship between the NII and the public forum doctrine is complex. In some situations, structures on the NII seem worthy of full public forum protection. In others, public forum intervention would do violence to the doctrinal principles as currently understood. This analysis derives its complexity from the underlying subject matter. In fact, the NII encompasses too much variety to discuss coherently whether the entire NII, or even its physical networks, should be considered a public forum. The opening of the NII is not like the opening of a new park. It is much more vast and complicated,

---

230. See supra notes 170-175 and accompanying text, especially Berger, supra note 170, at 653-54 ("right to exclude").

231. See supra notes 176-191 and accompanying text, especially Farber, supra note 177, at 565 (arguing that because "[m]ost of the benefit of product advertising is captured by the producer itself[,] . . . we would not expect severe underproduction of commercial speech").

232. See supra notes 192-214 and accompanying text, especially Yassky, supra note 193, at 1736, 1742 ("[T]he post-New Deal Court took up the challenge of countering the danger to liberty posed by the administrative state," but "[o]nly when disparities in political power can be traced to state 'intervention' is further, remedial intervention constitutional."). To the extent that Yassky's intuitions about some future Court questioning "the fairness of the political process and the legitimacy of political resource distributions," Yassky, supra note 193, at 1754, such questioning would result in only limited free speech rights in particular circumstances for the third party in the suggested scenarios, rather than the more general right that would be found in a public forum.
like the opening of a new city or university. Thus, an analysis that breaks down this great development into smaller units will be helpful.

C. Selective Application of Public Forum Values Within the NII

This Section of the Article begins the analysis of breaking down the NII into smaller, more constitutionally relevant units, and suggests the constitutional relevance of those units within the framework of the public forum doctrine.

This Section suggests, as a basic definition, that a forum on the NII should be treated as a public forum if the following criteria are met: (1) it is owned or controlled by the government; (2) it is not operated at a profit; (3) it has unrestricted access for recipients of forum messages; and (4) it affords viewpoint-neutral access to a reasonably large number of senders. Classifying a forum, though important, merely identifies the proper light by which restrictions on that forum should be examined. Therefore, this Section addresses four specific issues that surely will arise for forums on the NII: topic dedication, forum membership, forum cost, and forum closure.

(1) Finding Landmarks on the NII for Public Forum Analysis

The specific examples of forums on the NII suggested above involved clear cases of governmental control. In order to simplify the First Amendment analysis and to focus on those areas in which regulation is likely to be most prolific, invasive, and effectively enforced, this Article has tried to focus on state-controlled areas and the regulation of those areas by the state as owner or controller.

This Section focuses on conferences as a primary model for electronic communication, with an expectation that the principles developed may help shed light on the appropriate treatment of other modes

---

233. Perhaps the language here is too strong. Even a park is complex, including fields, playgrounds, equipment sheds, etc. While parks are usually taken as the model traditional public forum, it seems unlikely that if pressed the Court would hold an equipment shed to be a public forum merely because it was found in a park. The issue of delineating exactly how far public forum status extends has not been specifically addressed. See, e.g., Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981) (finding a classroom to be a limited public forum but noting that “[w]e have not held, for example, that . . . a university must grant free access to all of its grounds or buildings.”); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects.") (citations omitted). In the case of this vast new technology with its transformative potential, though, such delineation will be critical.

234. See discussion supra Sections III(B)(1), III(B)(2).

235. See discussion supra Section I(B).
of discussion. Focusing on the conferences rather than on the entire network is sensible because the participants experience the discussions within the former context. The participants in Wendy's Politics conference may well be unaware of the existence of the mayor's Cronies conference, and vice versa.\textsuperscript{236} The Supreme Court addressed the issue of identifying the relevant forum for public forum analysis in \textit{Cornelius v. NAACP Legal Defense & Education Fund}.\textsuperscript{237} In deciding whether one legal defense fund should have access to a federal charity drive, the Court could have chosen to define the relevant forum as the federal workplace or as the network that implemented the charity drive.\textsuperscript{238} Writing for the plurality, Justice O'Connor stated:

Forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of government property.\textsuperscript{239}

Thus, the plurality held that because access was sought only to the charity drive, the relevant forum for that case was only the charity drive, not the entire workplace.\textsuperscript{240}

The Court has taken this tailored approach in other public forum cases as well, such as defining the forum to be the school newspaper rather than the public school;\textsuperscript{241} the school mail network rather than the public school;\textsuperscript{242} the university meeting facilities rather than the entire state university;\textsuperscript{243} and the advertising spaces on city-owned buses rather than entire buses.\textsuperscript{244} Therefore, a court should take a tailored approach to high-tech forums as well and select particular conferences for analysis rather than the entire network—especially

\textsuperscript{236} See discussion \textit{supra} Section I(C)(2).

\textsuperscript{237} 473 U.S. 788 (1985) (plurality opinion).

\textsuperscript{238} \textit{Id.} at 800.

\textsuperscript{239} \textit{Id.} at 801 (citation omitted).

\textsuperscript{240} \textit{Id.} at 801.


\textsuperscript{242} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983).

\textsuperscript{243} Widmar v. Vincent, 454 U.S. 263, 267-68 & n.5 (1981) ("We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.").

\textsuperscript{244} See \textit{Lehman v. City of Shaker Heights}, 418 U.S. 298, 303 (1974).
since the initial access to the networks of the NII seems well protected by political considerations.245

A first inquiry should be what it means for a forum to be designated "government-owned." After all, the speech in the case of a conference would consist of messages; the actual messages could be dispersed among the recipients and stored on their own systems rather than on the government's. Undue emphasis on the end location of the messages themselves would be misleading.246 Such an emphasis would divert attention from the forum-like aspects of the conference because each of those messages alone would not seem to constitute a public forum. Rather, it is the set of messages over time, reliably sent to all recipients who choose to take part in the dialogue, that creates the forum-like aspects to the conference. Thus, the critical element is the mechanism that implements the conference itself, that is, the control over the senders, the recipients and the collateral information about the conference. The mechanism for implementing the conference typically will have a physical location,247 as well as an identifiable group of people who may exercise control over it. Both location and powers of control could be used in electronic property law to determine ownership. In the absence of contract, location of the conference may be the simplest indicator of property.248

Discussion here will begin with the clearest case of electronic forums that should be seen as government property: those that are both stored on government machines and managed by government officials.249 Once a conference or other forum is identified as government property, the next critical inquiry, assuming it would not be classified

245. See Information Infrastructure Task Force, supra note 1, at 3 (describing second of nine principles as extending the "universal service" concept "to ensure that information resources are available to all at affordable prices").

246. See e.g., supra note 50.

247. Some recipients of conferences are on other conferences on other computers. Thus, a "master" conference could be located on a government computer, and a "subordinate" conference could be located on a private computer or vice versa. Other mailing list technologies, exemplified by Usenet or Hypertext systems, would raise other complex issues of virtual location.

248. Still, thorny issues abound. Consider a mailing list located on a private computer that can be controlled by any member of a committee, among whom are two government officials, sitting in their government roles. Should the presence of potential control by the two governmental committee members make the mailing list government property? What if the other members of the committee drop out, leaving only the governmental members controlling this mailing list?

249. For conferences on government systems controlled by private parties, see infra notes 275-280 and accompanying text.
as a traditional public forum,\textsuperscript{250} entails determining its status as a designated public forum or a nonpublic forum. This inquiry usually focuses on "governmental intent."\textsuperscript{251} Especially in this context, that simple definition seems either too narrow or too broad. If intent means "intent to create a public forum," the definition suffers from subjective circularity;\textsuperscript{252} if intent means "intent to transmit information to the public," then the definition is probably too broad because a major use of the entire NII will be transmitting information to the public and it seems inappropriate to make every governmental use subject to the scrutiny reserved for public forums. Moreover, subjective government intent may not be well documented for every conference. Therefore, a course of conduct analysis may be critical to the designation of public forum status.

Factors can be identified that suggest an "objective intent." In fact, Professor Saphire has noted that objective factors play a critical role in the Court's public forum jurisprudence.\textsuperscript{253} Factors could include the groups of people permitted to participate in the forum as senders or recipients (participation factors), and the monetary cost of participation. Even assuming that the participation was free, neither of the participation factors could independently indicate the requisite clear intent to create a "public forum." For example, if anyone could send messages to one forum, that access alone should not trigger public forum status because a limited recipient pool could indicate something more prosaic than a public forum, like a questionnaire or tax filing.\textsuperscript{254} Likewise, if recipient status were unregulated, that openness alone should not trigger public forum status because a limited sender pool could indicate a different kind of function, such as a press release mechanism or other informational mechanism.\textsuperscript{255}

\textsuperscript{250}. See supra notes 120-122 and accompanying text.
\textsuperscript{251}. See discussion supra Section II(B), especially notes 125-133 and accompanying text.
\textsuperscript{252}. See supra note 133 and accompanying text.
\textsuperscript{253}. Saphire, supra note 156, at 763-64:

[T]he integrity of the public forum doctrine depends, in large part, on its capacity to provide a reasonably clear guide to first amendment decisionmakers, including judges, public officials and citizens. At a minimum, this requires reasonable clarity in the articulation of criteria for classifying various fora and the standards of review applicable in each type of forum. These criteria and standards should be amenable to reasonably consistent application.
\textsuperscript{254}. Peter H. Lewis, IRS Tries On-Line Tax Filing, N.Y. TIMES, Feb. 19, 1994, at 37; see also sources cited supra note 30.
\textsuperscript{255}. Peter H. Lewis, Internet Users Get Access To S.E.C. Filings Fee-Free, N.Y. TIMES, Jan. 17, 1994, at D2; see also Farrell, supra note 51 (describing Senator Kennedy's use of the Internet to post press releases and public remarks).
Should open enrollment for both senders and recipients be required for a finding of a public forum? Both kinds of open enrollment seem constitutionally required in order to find a designated public forum—though such openness was not sufficient in some cases. On the NII, however, such provisions should be sufficient as participation factors. If open enrollment on a free conference were granted to both senders and recipients, it is hard to imagine what purpose would be served other than the provision of a public forum—at least without specific designation to the contrary. Moreover, the physical public forums are naturally limited to a finite number of participants whereas electronic forums are potentially available to tremendous numbers of participants. An electronic forum that allows all participants to speak simultaneously will only create confusion. Therefore, open enrollment to unlimited senders should not be required for a finding of a public forum, especially if the limitation imposed on enrollment for senders appears viewpoint-neutral (e.g., limited to a specific (large) number of speakers). Such a limitation would only explicitly mirror the implicit limitations of physical public forums.

With regard to cost, the inquiry should be limited to determining whether the conference is a commercial enterprise, like the inquiry regarding the airport terminals in *Lee*. Because licensing fees are commonplace even for some traditional public forums, the existence of fees in and of themselves should not conclusively brand a forum nonpublic. Rather, the Court in *Lee* pointed to the user fees as primary funding sources for the terminals and the legally regulated profit to which the terminals were entitled as indicia of commerciality. Likewise, a conference on the NII that is government-subsidized or not operated to make a profit should not be deemed commercial for purposes of determining the public forum status to be applied.


257. The NII's promise of "universal access," when implemented, will probably be critical to a judicial finding of true "open enrollment." INFORMATION INFRASTRUCTURE TASK FORCE, supra note 1, at 3.


261. Although a conference could be treated as a designated public forum while charging fees, this would not mean any fee structure rendering the forum noncommercial would
In summary, one tentative basic definition of a public forum on the NII is a forum that: (1) is owned or controlled by the government; (2) is operated in a non-profit manner; (3) provides unrestricted access for message recipients, and (4) has viewpoint-neutral access to a reasonably large number of message senders. Such a scheme would certainly meet Professor Saphire's measure of the "reasonable clarity" necessary to insure the public forum doctrine's "integrity" and "reasonably consistent application."262

Can such a rigid scheme respond to deeper understandings about the public forum? Despite the oft-expressed skepticism about the significance of the public/private distinction,263 analyses of the views of the four commentators (besides Professor Saphire) who have illuminated the earlier discussion of the role of the public forum may be helpful.

Professor Post would see the important element of such a forum to be its openness to people outside the government.264 Professor Berger would point to similarities such a forum is likely to share with a marketplace: allowing anyone to read messages means senders have no privacy; allowing anyone to join is analogous to having many entryways, and invites many messages (i.e., much noise).265 Dean Farber would particularly stress the open nature of the audience and suspect that people sending messages at the low charges of a nonprofit to such a broad audience cannot be adequately compensated by the market.266 Given the viewpoint-neutral admission, Yassky might find a critical political "process by which citizens exercise control over the comport with designated public forum restrictions. For example, a conference that charged a small licensing fee could be considered noncommercial and a designated public forum, but differences in that licensing fee based on party affiliation would surely violate public forum standards. See discussion infra Section III(C)(2)(c).

262. Saphire, supra note 156, at 763-64.
263. See, e.g., Kennedy, supra note 65, at 1357 (1982) ("[O]ne simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything.").
264. See supra notes 164-169 and accompanying text, especially Post, supra note 164, at 1833 ("When the state acts to govern the speech of the general public, . . . the first amendment imposes rather stringent restrictions . . . .").
265. See supra notes 170-175 and accompanying text, especially Berger, supra note 170, at 655. A forum with no entry fee would also parallel the idealized Bergerian marketplace.
266. See supra notes 176-191 and accompanying text, especially Farber, supra note 177, at 563 ("To the extent that voters seek information about foreign affairs, . . . they can often obtain it without paying the original producer.").
state." If faced with legislation restricting this process, the Court might apply "more exacting judicial scrutiny." Admittedly, such rigid criteria seem to lack the flexibility courts have found in separating the public and private spheres for constitutional purposes. As Professor Seidman noted, "Instead of offering reconciliation, constitutional law allows us to live with contradiction by establishing a shifting, uncertain, and contested boundary between distinct public and private spheres within which conflicting values can be separately nurtured." Professor Seidman describes three dilemmas that characterize modern constitutional debate: universalist vs. particularist values; government intervention vs. libertarianism; and openness vs. secrecy.

In fact, the views of the commentators studied in this Article can be naturally associated with the three subsidiary distinctions that Professor Seidman makes concerning the meanings of "public" and "private." Professor Post's analysis can be seen as a response to Professor Seidman's first distinction, the one between universalism and particularism. Yassky responds to some of the issues raised by Professor Seidman's distinction between interventionism and libertarianism.

267. Yassky, supra note 193, at 1737.
268. Id. at 1737; see also supra notes 192-214 and accompanying text.
269. Seidman, supra note 16, at 1007. See also Seidman, supra note 16, at 1047:
Judicial enforcement of constitutional rights can best be understood as our society's imperfect effort to deal with the boundary problem, particularly in the public/private context. Courts are suited to play a mediating role between public and private spheres because they are the most private of our public institutions.

... [T]o the extent that judicial review matters, it matters because of institutional arrangements that encourage judges to be in touch with both universalist and particularist values.

270. Seidman, supra note 16, at 1007.
271. Id. at 1019-23 (discussing the tensions in the distinction and, inter alia, defining universalism as "an insistence that we treat all members of an expansively bounded community with equal concern and respect") (id. at 1019); cf. Post, supra note 164, at 1782 (noting, in reformulating public forum doctrine, that "[w]hen the state acts to govern the speech of the general public, it is subject to the restrictions of what we would ordinarily think of as the 'usual' principles of first amendment adjudication").

272. See Seidman, supra note 16, at 1023-26:
Precisely because government intervention must keep a universalist orientation, some limit on that intervention is necessary. The ideal of a "public" government necessarily entails its opposite: a "private" sphere, protected from public intervention, within which people are free to form individualized relationships that cannot be justified under the requirements of impersonal beneficence.
Cf. Yassky, supra note 193, at 1736 ("Indeed, the unabashed activism of the post-New Deal federal government made a sphere of individual liberty all the more important. Instead of abandoning the liberty principle of the Bill of Rights, the post-New Deal Court took up the challenge of countering the danger to liberty posed by the administrative state.").
Professor Berger seems to echo parts of Professor Seidman's discussion of the distinction of openness and privacy. To the extent that these three categories represent three different traditions—or at least three interlocking traditions—it seems unlikely that they, along with Dean Farber's view, would line up to produce a set of rigid objective criteria of the kind suggested in this Article in order to provide a definition of an electronic "public" forum. When the courts choose criteria, evidence of multiple threads will likely be present. Yet, Professor Saphire's analysis suggests that in setting the proper scope for the public forum, there may be good reason for the courts to prefer formal values to Professor Seidman's shifting, uncertain, and contested boundaries.

Now consider the more complex case of electronic forums stored on government property but not controlled by government officials. The health care conference example above seems prototypical. Here, the mere act of opening up government systems for the creation of conferences would not be directly inviting people to send messages to those forums since the forums do not actually exist until private individuals create them by use of the government's facility. Thus, the conferences created are not necessarily public forums. In the Politics conference example, if Wendy used a government system to

273. See Seidman, supra note 16, at 1026-29 ("Thus, businesses that open themselves to the public are sometimes treated as government entities subject to universalist constraints for constitutional purposes, [citing, inter alia, Marsh v. Alabama, 326 U.S. 501, 506 (1946)] and individuals who act in public ways are said to 'waive' their Fourth Amendment rights and 'reasonable expectation of privacy.'"). Cf. Berger, supra note 170, at 663: [When presented with evidence that vast urban galleria and suburban multiactivity malls have displaced downtown sidewalks and strip retail stores opening to the sidewalk, a common-law court should stand ready to declare these malls, and other forum-like private lands, to be appropriate, indeed vital, complements to more traditional public space.

274. See, e.g., supra notes 156-162 and 253 and accompanying text.

275. See discussion supra Section I(C)(3).

276. The facility on the government-owned system that people could use to create their own conferences would itself seem to qualify as a limited public forum as long as it satisfies requirements analogous to those for the conferences themselves: the facility is not commercial; it is available to conference creators on a content-neutral basis; it can create conferences available on a viewpoint-neutral basis to a large number of senders; and it can create conferences available on an unlimited basis to recipients. If the conference creation facility were so classified, there could be interesting constitutional effects on treatment of privately controlled government-provided public conferences. For example, the First Amendment might restrict the government in its regulation of these forums. See discussion infra Section III(C)(2)(a). Another result of this classification is that the list of forums created by this facility could constitutionally be made publicly available. See discussion infra Section III(C)(2)(b).

277. See discussion supra Section I(C)(2).
create a list of her friends, even if the government were providing the service for free, it probably would not violate the First Amendment for her to select which friends she wants included as speakers or recipients based on viewpoint. Such action would be no different from a state university student group selecting which speakers it chooses to invite to campus,278 a sorority selecting which women may attend its events on state university property, or a demonstration in a street that included speakers from a particular political perspective. In each of these instances, the government is providing the property and the private individuals are providing the speech on a restricted basis. However, if a person used the government system to create a forum like the one in the health care conference example that fit into the criteria discussed for government controlled forums—a noncommercial entity with unlimited availability to recipients and viewpoint-neutral availability to senders—then, under the analysis above, he or she has probably created a privately controlled public forum.279 In light of the role of the government in enabling the NII, if the forum took on government functions, and especially if the individual used the forum in a discriminatory way, a court reviewing her actions may be willing to treat him or her as a state actor for constitutional purposes.280

(2) The Constitutional Relevance of Public Forum Landmarks on the NII

In light of this involved attempt to sketch a taxonomy of electronic forums, it would be helpful to describe the importance of categorizing a forum as public or nonpublic in an electronic context. A few issues seem apparent, even from this vantage point and can be arranged into four groups: topic dedication, forum membership, forum costs, and forum closure. Note that while the discussion here will attempt to address these issues primarily for public forums, it seems


clear that some lesser constitutional protections for reasonable speech would still be present in nonpublic forums.  

**Topic Dedication.** The first set of issues involves creation of conferences dedicated to particular expressive purposes—as most conferences are. The government itself may want to create electronic public forums dedicated to specific issues, such as health care. If such forum creation were permissible, should it be permissible to censor the received messages in order that they actually discussed health care, and not foreign policy, for example? If so, could the government have dedicated the public forum not to debate about health care, but to positive comments about health care and then censor out negative comments? What changes in topic would be permissible? In short, what could it mean, functionally, for a conference to be dedicated to a particular topic?

Would anything change if these public forums were controlled not by the government, but by a private entity? Conferences are frequently dedicated to a discussion of particular activities that the participants enjoy. Could the government constitutionally allow creation of such public forums on a general basis, but prohibit ones devoted to particular topics, e.g., smoking, sex, or racial hatred?

**Forum Membership.** Other issues are raised by forum membership—the critical criteria that should trigger public forum status. Constitutionally, to whom should the membership in an electronic conference be available? What changes in membership structure to the conference would be constitutionally permissible? What provisions would be necessary for people who no longer wanted to receive material sent to the conference?

**Forum Costs.** What prices may permissibly be charged for use of the forum?

**Forum Closure.** Finally, under what conditions should the government or the operator of the conference be permitted to close a conference assuming that it is a public forum?

This set of questions is intended to illustrate some of the complexities involved in the creation of public forums on the NII and to start the process of making appropriate distinctions on an unfamiliar terrain. Unfortunately for these purposes, much of the existing literature discussing content-neutral restrictions emphasizes issues of physi-

---

281. See Lee v. International Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2701, 2709 (1992) (per curiam) (upholding right to leaflet in airport deemed nonpublic forum); see also discussion supra notes 137-142 and accompanying text.
cal terrain or the inappropriateness of the existing judicial inquiry.

a. Topic Dedication

Topic dedication is essential for the effective functioning of conferences. Many conferences do not require any regulation beyond an appropriate name, social conventions, and perhaps an explicit identity statement in order to be dedicated to a particular topic. Other conferences, especially ones with large numbers of senders or a history of controversy, make use of a moderator. Of course, topic dedication would appear to be a direct content-based restriction. The Court has noted that "[a] major criterion for a valid time, place and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.'" Professor Stone has noted that the Court generally invalidates content-based restrictions as unconstitutional, although he admits that some of these restrictions have been upheld.

Yet, in Perry, the Court noted that "[a] public forum may be created for . . . the discussion of certain subjects." Although Professor


283. Stone, supra note 150, at 88-99 (describing public forum doctrine as having a "myopic focus on formalistic labels" and noting that tradition has played "too central a role" in the formulation of public forum doctrine).

284. Finholt & Sproull, supra note 21, at 56-57. But cf. Peter H. Lewis, An Ad (Gasp!) in Cyberspace; Lawyer's Message Violates 'Netiquette', N.Y. Times, Apr. 19, 1994, at D1 (describing a lawyer sending an advertisement to more than 5,000 conferences, each dedicated to a specific topic, without selecting conferences with appropriate topics).

285. For example, the author is aware of two conferences for jokes on the Internet. One is unmoderated and is used for a wide variety of jokes. The other is for funny jokes, and the humor is evaluated at the moderator's discretion.

286. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981) (citation omitted) (also noting that time, place, and manner restrictions must be "justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information") (citations omitted).

287. Stone, supra note 150, at 48 & n.6 (citing as exceptions a case involving advertising on public transportation, a case involving zoning of sexually explicit speech, and three cases representing "special contexts": prisons, military bases, and party affiliation requirements for public employment).

Post viewed this limited public forum as a "doomed concept," even he recognized the ability, within the Constitution, for government to limit speech in order to facilitate symbolic interaction, such as in court-rooms and universities.\textsuperscript{289} He notes that even at town meetings, moderators may constitutionally impose agendas and rules of order and decorum.\textsuperscript{290}

The Supreme Court has held, specifically in the context of town meetings, that although "the participation in public discussion of public business cannot be confined to one category of interested individuals[,]... public bodies may confine their meetings to specified subject matter . . . ."\textsuperscript{291} One student commentator has noted that, despite expressive activities" and holding that rejection of an application for a play production in the theaters could be justified only if the decision were accompanied by appropriate procedural safeguards).

\textsuperscript{289} Post, \textit{supra} note 164, at 1756, 1799.

\textsuperscript{290} Id. at 1799. Despite Post's insistence on two categories of scrutiny of government action—governance and management—the case of town meetings seems to me as one that falls in between the categories he associates with governance (subject to "usual" First Amendment principles) and management (subject to drastically reduced scrutiny). Both a blistering attack on a government plan and an irrelevant comment should be excludable from a town meeting under scrutiny associated with "management" functions, but neither should be excludable under scrutiny associated with "governance" functions. Yet, in a town meeting called to debate the plan, the former could not be excluded on the basis of its content while the latter could be excluded.

The town meeting captures the complex position of the designated or limited public forum. However, Post seems intent on denying its complexity. For example, in a recent article, Post misreads \textit{White} v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990). Post states that "\textit{White} reaches the correct but seemingly paradoxical conclusion that a town meeting is not a 'public forum' for First Amendment purposes." Robert Post, \textit{Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse}, 64 U. COLO. L. REV. 1109, 1114 n.22 (1993). Actually, the court in \textit{White} stated: "Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city. It is doubtless partly for this reason that such meetings, once opened, have been regarded as public forums, albeit limited ones." 900 F.2d at 1425 (citing \textit{Madison Sch. Dist.}, 429 U.S. 167, 175 (1976)); Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory, 656 F.2d 917, 922 (4th Cir. 1981) ("[O]nce a [city council] meeting has been opened to the public, First and Fourteenth Amendment protection does extend to an association whose exclusion from speaking is predicated solely on the basis of its status as an organization of employees.") (quoting Henrico Professional Firefighters Ass'n, Local 1568 v. Board of Supervisors, 649 F.2d 237, 246 (4th Cir. 1981)). Although the court in \textit{White} did uphold the denial of relief for the citizen who was not permitted to speak, as an appellate court, it was facing only a facial overbreadth challenge to an ordinance that allowed restrictions of speakers "only when their speech disrupts, disturbs or otherwise impedes the orderly conduct of the... meeting." 900 F.2d at 1426. "So limited," the court concluded, it "cannot say that the ordinance on its face is substantially and fatally overbroad." \textit{Id.} Allowing such maintenance of order is hardly a judicial conclusion that a town meeting is not a limited public forum.

\textsuperscript{291} \textit{Madison Sch. Dist.}, 429 U.S. at 175 & n.8.
Hazelwood School District v. Kuhlmeier, a strong argument could be made that university newspapers usually establish a designated public forum, subject to the editorial control of the editors. Likewise, if the government runs a bookstore or a library, it does not have to accept any book that is donated, and it may organize the books it owns according to their subject matter. As Dean Yudof has stated, "[W]here the government's mission is to communicate and the scarcity of resources and the nature of the enterprise make editorial selectivity inevitable, the state need not tolerate or acquiesce in use of the forum that substantially destroys the communication or editorial processes." Topic dedication in government-controlled electronic public forums, without more (assuming speaker-neutral and viewpoint-neutral moderation) should not violate the First Amendment.

If a topic within a public forum were itself viewpoint based, such as a conference dedicated to "messages describing arguments in favor of the President's health care plan," a closer First Amendment issue might be addressed. If a message arguing against the President's health care plan were to be rejected, a court would not be able to say, as the Court in Rust v. Sullivan did, that "the Government has not

---

292. 484 U.S. 260, 267-70 (1988) (holding that a public high school newspaper was not a public forum when the paper was produced as a part of a journalism class and the teacher had final authority over almost every aspect of the newspaper).


294. Steven Bercu, a colleague and former Editor-in-Chief of the Harvard Journal of Law and Technology, suggested this helpful example. See Board of Educ. v. Pico, 457 U.S. 853, 870, 872 (1982) (plurality opinion) (holding that a public school board "rightly possesses significant discretion to determine the content of their school libraries" although "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."" (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))).

295. YUDOF, supra note 109, at 241.

296. The Court's recent decision in Rust v. Sullivan, 500 U.S. 173, 193-94 (1991) (upholding the conditioning of Title X funds on prohibition of counseling, referral, and information provision regarding abortion as a method of family planning) buttresses this point. The Court held:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 193.
discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." The activity funded is itself defined by viewpoint. *Rust* did not indicate that viewpoint funding would necessarily violate the First Amendment. To the contrary, the Court noted that it was permissible for the government to make a value judgment and to implement that judgment by allocating public funds. The Court's decision indicated that the First Amendment would be violated if the government were to "'discriminate invidiously in its subsidies in such a way as to ‘aim at the suppression of dangerous ideas.’" Under *Rust*, such a suppression would probably not arise from dedication of a single public conference to a viewpoint-based topic; however, suppression might be found in the deletion of a particular viewpoint from a public conference or removal of access from all public conferences if a single message person did not comport with the explicitly enunciated viewpoint of a particular conference.

Perhaps a First Amendment prohibition would arise upon modification of the forum topic. For example, a conference dedicated to open debate about health care should not be modified by the government to debate other topics, such as foreign policy. Such a metamorphosis should be held to violate even the minimal "reasonable in light of the purposes of the forum" test used for nonpublic forums.

297. *Id.*

298. *Id.* at 192-93.


300. See *Board of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion) ("[W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’").

301. Cf. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (striking down restriction from “editorializing” placed on a grant because the recipient “is not able to segregate its activities according to the source of its funding”).

302. Consider the "Fanny Hill" incident: Disk space was made available on a computer owned by a state university and connected to the Internet. The disk space was made available in order that people who used the Internet could place "electronic books" without restriction of any sort (other than the disk space) onto the disk for distribution to other people. Upon a third party's objection to one such book, it was removed from the disk, and a policy was introduced making all installations subject to the approval of the system administrator. Such belated and potentially arbitrary modifications to the restrictions on designated public forums should be understood presumptively to violate the First Amendment. See David L. Wilson, *On the Internet*, *Chronicle Higher Educ.*, Jan. 19, 1994, at A25 ("An electronic version of a ribald 18th-century novel has been removed from a computer connected to the Internet, prompting a spirited debate about censoring computerized material.").
because the purpose of the forum was (by stipulation) to discuss health care.\textsuperscript{303}

Although delegation of the moderating function to certain private individuals may be prohibited by the First Amendment,\textsuperscript{304} the public forum doctrine is more likely to limit the government’s discretion in regulating moderators.\textsuperscript{305} If the facility used to create conferences is itself considered a limited public forum,\textsuperscript{306} government action to limit either the topics or the kinds of privately moderated conferences generated within that facility should be subject to the scrutiny appropriate for limited public forums. For example, the government should not be allowed to deny a request by Wendy to use such a facility to create her Politics conference as a video-conference rather than as a teleconference on the basis that she is of the wrong political party.\textsuperscript{307} (By contrast, if Wendy’s request were made for a nonforum facility, such as the conference-generating facility operated by the mayor’s office, it should not raise any constitutional problem for the mayor to deny her request, even based on her political affiliation.)

The licensing of such electronic public forums must not be open to subjective criteria because the Court has held that unbridled discretion can too easily lead to viewpoint suppression.\textsuperscript{308} Other less impor-

\textsuperscript{303} See International Soc’y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705-06 (1992) (stating reasonableness test); Lee v. International Soc’y for Krishna Consciousness, 112 S. Ct. 2709 (1992) (per curiam) (affirming appellate court holding that ban on dissemination of literature in airport terminal as unreasonable); see also discussion supra notes 137-142 (reasonableness test has some bite in forums, as contrasted with non-forums).


\textsuperscript{305} See Widmar v. Vincent, 454 U.S. 263, 276-77 (1981) (requiring state university to allow a student religious group to continue using school meeting facilities); Southeastern Promotions v. Conrad, 420 U.S. 546, 552-58 (1975) (holding that rejection of application to use a municipal theater for a production of “Hair” amounted to a prior restraint in violation of the First Amendment).

\textsuperscript{306} See supra note 276.

\textsuperscript{307} More difficult issues might be raised by attempted government regulations of topics in which government has a recognized interest in regulating, such as smoking, sex, or profanity and obscenity. See, e.g., Sable Communications v. FCC, 492 U.S. 115, 117 (1989) (affirming lower court ruling on constitutionality of Communications Act as applied to obscene interstate commercial telephone messages); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (upholding FCC order regulating indecent, but not obscene radio broadcast); Banzhaf v. FCC, 405 F.2d 1082, 1085 (D.C. Cir. 1968) (affirming FCC ruling requiring radio and TV stations carrying cigarette advertising to present anti-smoking programming), cert. denied, 396 U.S. 842 (1969).

tant issues controlling the government's discretion in licensing the creation of electronic public forums include whether the regulations are "'narrowly tailored to serve a significant government interest'" and "whether they leave open adequate 'alternative channels for communication of the information.'"309

Once licensed, the person controlling the forum might be treated as a state actor. This determination would subject some of her decisions to constitutional scrutiny, especially if the forum were somehow used as part of a government system310 and her decisions discriminated on the basis of race or gender.311

b. Forum Membership

Some issues about membership in conferences can be clarified by reference to Professor Berger's enumeration of public forum attributes. Although the restrictions on membership should control the classification of the forum, other issues remain. For example, in considering whether a membership list should be publicly available, one could draw an analogy to Professor Berger's distinction between a low expectation of privacy in the marketplace as compared to higher expectations of privacy within the home.312 Likewise, one might argue that expectations of privacy are lower in a conference within a public forum. In a public conference, a person may, for example, have no constitutional right to be anonymous.313 Likewise, an electronic con-


309. Lee, supra note 307, at 758 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Professor Lee notes that "measuring the substantiality of the government's interest is not a critical part of the Court's time, place, and manner methodology. The court rarely tells legislatures or Congress that their concerns are insubstantial; therefore, the balance will usually be struck in favor of governmental interests." Id. at 782-83 (footnote omitted). As for alternative channels of communication, it would be too speculative, even for this author in the context of this Article, to suggest what alternative channels of the Information Superhighway would be sufficient to uphold a restriction. See id. at 801 & n.275.

310. See sources cited supra notes 28-30 and accompanying text.


312. Berger, supra note 170, at 653, 655.

313. Note that providing the membership of the forum can be limited to providing electronic addresses, a step that is not identical to providing identities. Knowing another person's electronic address can be more useful than knowing his or her name, because then he or she can be contacted; however, because addresses can be manipulated to obscure the true identity of the individual contacted, an address without an identity can be useless for
ference itself, if created with a public conference-generating facility that is subject to some public forum limitations, may not be kept secret consistent with public forum principles.

As with paper mailing lists, people who no longer want to receive material should be able to remove themselves from the conference. At least, a law requiring a removal option should be upheld.\textsuperscript{314} Although this result can be justified without reference to the public forum, the idea has special weight in the public forum context where attendance is usually envisioned as voluntary and nonbinding.\textsuperscript{315}

As with changes to topic dedication, a court applying the public forum doctrine should view changes in membership restrictions of an electronic public forum suspiciously. Changes that convert an electronic designated public forum into a nonpublic forum should fail even the lowest scrutiny—requiring a regulation be "reasonable in light of the purposes of the forum"\textsuperscript{316}—because converting a public forum into a nonpublic forum, without more, is directly contrary to the original purposes of the forum.

c. Forum Costs

The issues relating to the appropriateness of costs for the use of traditional public forums have been comprehensively set forth by commentators.\textsuperscript{317} Professor Goldberger has summarized the Supreme Court cases in a simple proposition: "[T]he state may recoup the actual costs of governmental services that are generated by the use of public property for speech activities, as long as the charge is not so great as to appear to the judiciary to be oppressive or completely preclusive of speech."\textsuperscript{318}

other purposes. Such concerns are not merely hypothetical. \textit{See} Eben Shapiro, \textit{Tobacco Firm Seeks Antismoking Network's Records}, WALL ST. J., Mar. 30, 1994, at B1 ("Lawyers for the American Tobacco Co. file subpoena for access to membership list of a computer network used by Advocacy Institute, an antismoking group . . . .") (abstract).

For further discussion of identification requirement provisions in the non-electronic context, see sources cited \textit{supra} note 38.

314. \textit{See} Rowan v. United States Post Office Dep't, 397 U.S. 728, 736-38 (1970) (upholding law which provided that addressees who received in the mail "a pandering advertisement" they deemed offensive could obtain the removal of their names from the advertiser's mailing list and stop all future mailings; "a mailer's right to communicate must stop at the mail box of an unreceptive addressee").


317. \textit{See} Neisser, \textit{supra} note 259; Goldberger, \textit{supra} note 162.

There will be many costs associated with electronic forums, including the costs of transmitting the messages from senders, managing the messages, storing messages, and forwarding messages to recipients. The state is permitted to recoup its costs for these activities through user fees, like the price of postage for mail, licensing and application fees, and facility rental fees.

Although traditional public forums are not usually subject to such user fees, the Court has held that arenas with user fees can, nonetheless, be limited public forums. If government-controlled electronic forums were classified as limited public forums, it would be permissible to charge user fees for messages sent, similar to postal fees for paper mail, and messages received, similar to admission charges at theaters.

However, in privately controlled public forums, the inherent flexibility of the electronic medium means that choices in defining the functionality of the forum can profoundly affect the allocation of costs among the various parties to the forum. For example, a forum that automatically forwards every message sent to it could reasonably be structured to impose the forwarding costs on the message senders. The message senders would be in the best position to evaluate whether it was worth sending the message by considering how many people receive messages sent to the conference. On the other hand, a forum that archives messages for open perusal might naturally impose the costs of transmitting those messages on the recipients because they could regulate the number of messages they wish to receive. By imposing costs on either the sender or the recipient, a government

---

319. See Neisser, supra note 259, at 329-30.
320. Id. at 347-49 ("Application and license fees are the only charges that courts routinely have approved, even after the development of modern first amendment jurisprudence.").
321. Id. at 344-47 ("Rental charges for public auditoriums and pavilions are classic user fees, and are almost certainly consistent with the first amendment.").
323. Cf. Berger, supra note 170, at 655 (noting that the idealized public market has "no entry fee, dress code, or identification requirement"); Anthony J. Rose, Note, The Beggar’s Free Speech Claim, 65 IND. L.J. 191, 228 (1989) (concluding that begging in the public forum “deserves the greatest judicial protection.”).
324. See supra notes 275-280 and accompanying text.
325. See Neisser, supra note 259, at 338-39, 342-43 (suggesting an attention to less restrictive alternatives in order to minimize police service fees and safety and health equipment fees).
provider may be ignoring alternatives that are less burdensome upon the purses of those using the electronic public forum.

Criminal or civil liability may also be imposed upon people who send messages or those who control the conferences. Professor Neisser has noted that liability for the negligent acts of forum participants is "a perfectly logical-sounding candidate for required insurance, by analogy to mandatory driver's insurance." The constitutionally permissible scope of required insurance for message liability will depend on the now-uncertain scope of that liability. A requirement of inordinately expensive insurance imposed on either those who use or those who control public forums on the NII could impermissibly conflict with public forum principles.

d. Forum Closure

The issue of forum closure is critical for governmental operation of electronic public forums. For example, a government may no longer be interested in subsidizing an unmoderated debate on health care. Although this Article has suggested that the government should not be permitted to convert a public forum into a nonpublic one, there should be no question that the government may close the forum. As the Court noted in Perry, "Although a State is not required to indefinitely retain the open character of the [designated


327. Neisser, supra note 259, at 305. But Neisser notes that "it is extremely unclear what liability municipalities fear," and concludes that "[i]t is most questionable, therefore, whether any requirement for insurance or indemnification of municipal liability is rationally justified." Id. at 307. He also notes that "insurance concepts . . . collide with first amendment principles." Id. at 308. For example, "[m]andatory liability insurance for special events . . . creates a regulatory distinction based precisely on a particular form of constitutionally protected activity—public association—typical of those with dissident perspectives. It therefore must fall as a most insidious and unusual form of content discrimination." Id. at 311.

328. See discussion supra Section III(C)(2)(a).

non-traditional public forum] facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Thus, if the State wishes to create an electronic nonpublic forum with an active membership, it should find some other means than creating an electronic public forum with lively discussion and then modifying the forum to be nonpublic.

Conclusion

The NII will soon be with us. It will be a complicated place. Although the First Amendment can play an important role in the NII by protecting free speech and in separating the private sphere from the public, existing constitutional doctrines cannot necessarily be mechanically transported.

This Article has attempted to sketch thoughtful ways in which the public forum doctrine might be applied within the NII. Even with the assumptions this Article made, analysis of simple hypothetical cases became quite complicated. Consequently, this Article concludes that the public forum doctrine can have continued vitality within the NII, but only if it is applied in a nuanced fashion.

This Article has argued that some landmarks on the Information Superhighway should have constitutional significance and has suggested particular landmarks with constitutional significance: government-owned or government-controlled forums that are operated on a nonprofit basis and have unrestricted access to message recipients and viewpoint-neutral access to a reasonably large number of message senders. This Article has also discussed the possible constitutional relevance of those landmarks by focusing on four sets of issues that will surely be raised: topic dedication, forum membership, forum costs, and forum closure.

Actual cases not yet imagined will surely provide more thorns. Bewildered by both high technology and complex hypotheticals, one might feel limited by context and be tempted to try to avoid the subject altogether. But as Professor Seidman stated, "[W]e must either act or fail to act, and either course requires justification. So in order to live our lives, there is no escape from telling ourselves that we are able to transcend context so as to make decisions about the kind of future we want to have." Perhaps this Article will provide a helpful, if rough, traveler's aid in that process.