THE DEATH OF THE PUBLIC FORUM IN CYBERSPACE

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I. INTRODUCTION

Throughout the past decade, the Internet has been conceptualized as a forum for free expression with near limitless potential for individuals to express themselves and to access the expression of others. Indeed, some Internet law scholars have claimed that the Internet will enable us to realize, for the first time in our nation's history, the free speech values embod-

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ied in the First Amendment. Other Internet law scholars have claimed that the Internet should be conceptualized as one grand "public forum"—First Amendment parlance for a place in which the right to free speech receives its strongest protection. These scholars claim that the Internet's architecture and structure facilitate freedom of expression and that, to advance the cause of freedom of expression, the United States government should simply get out of the way and hand over the regulation of Internet speech to private regulators.[1]

During the Clinton Administration, the United States government essentially acceded to these calls for privatization, undertook measures to turn over many aspects of the Internet to private entities, and convinced Congress to do the same. With the government's withdrawal from management of the Internet, private entities assumed control. The end result is that the vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities such as Internet service providers (ISPs) like America Online (AOL) and Yahoo!, Internet access providers like employers and universities, content providers like washingtonpost.com and nytimes.com, and pipeline providers like Comcast and Verizon. In contrast to real space (which enjoys a mixture of privately- and publicly-owned places in which speech occurs) and in contrast to media channels such as broadcast and cable television (which enjoy publicly-subsidized and public forums), speech in cyberspace occurs almost exclusively within privately-owned places. The public/private balance that characterizes real space and renders the First Amendment meaningful within it is all but absent in cyberspace.

Private regulation of speech on the Internet has grown pervasive, and is substantially unchecked by the Constitution's protections for free speech, which generally apply only to state actors' regulations of speech. At an earlier stage of the Supreme Court's First Amendment jurisprudence, such private speech regulation might have been subject to the dictates of the First Amendment under the state action doctrine.[2] The Supreme Court, however, has substantially limited the application of the state action doctrine in past decades, and courts have been unwilling to extend this doctrine to treat private regulators of Internet speech as state actors for purposes of subjecting such regulation to First Amendment scrutiny.

Given the judicial contraction of the state action doctrine, ISPs and other private regulators of Internet speech will likely continue to be exempt from First Amendment scrutiny. The result of such privatization is

1. *See infra* Part III.A.
2. *See infra* Part II.A.

that the vast majority of Internet speech regulation is conducted by private parties who are not subject to the First Amendment's protections for free speech. Those private entities have sole discretion over whether and how speech is regulated in such privately-owned places. Some scholars applaud this result and contend that free speech values are best advanced by facilitating a proliferation of private speech decisions without intervention or control by the government.[3] According to this conception of the First Amendment, the sole function of this constitutional guarantee is the negative one of checking the government's restrictions of speech.

This negative conception of the First Amendment, however, fails to account for the important affirmative role that the government has played, and should continue to play, in facilitating freedom of speech and correcting imperfections in the market for free expression. In particular, this negative conception fails to account for the important role the government plays in providing public forums for expression and protecting speech from censorship within such forums. Under the Supreme Court's public forum doctrine, the government has the affirmative obligation to dedicate public property, of the kind traditionally well-suited to the expression and exchange of ideas, to the public's use for free speech purposes. Indeed, it is only within such public forums that free speech rights are accorded their most robust protection. Government regulations of speech within such public forums are subject to the most exacting First Amendment scrutiny, and, accordingly, individuals enjoy their strongest free speech rights within such forums.

The required existence of public forums ameliorates the inequalities that disparities in private property ownership would otherwise impose on individuals' free speech rights. To exercise their free speech rights meaningfully, individuals need forums from which to express themselves. Yet many individuals do not own property, much less property from which they can effectively express themselves on matters of importance within our democratic system. The requirement that the government maintain public forums compels the government to provide such individuals with forums from which to exercise their First Amendment rights. Public forums, at least in real space, therefore subsidize the speech of those who otherwise would not be able to express themselves effectively.

On the Internet, however, essentially no places exist to serve as "public forums" because the places within which expression occurs are overwhelmingly privately owned. As a result, the government's affirmative role of advancing free speech by providing speakers with meaningful fo-

3. *See infra* Part III.A.

rums from which to express themselves free of censorship is non-existent on the Internet.

The absence of public forums in cyberspace augurs the absence of meaningful protection for free speech under the First Amendment. In real space, the existence of government-owned property as a forum for speech available to all comers provides an important guarantee for such speech. In contrast, as increasingly more speech takes place in cyberspace, the affirmative constitutional protections for free speech that exist in real space are in danger of being sacrificed. In particular, the government's abdication of control over Internet speech regulation may well result in the loss of protection for speech that is insufficiently protected within an unregulated market for speech (viz., unpopular and poorly-subsidized speech).

Congress and the courts have declined to take the steps necessary to update First Amendment jurisprudence to account for modern communications media and the radical shift in the public/private balance within such media. The Supreme Court recently declined to accord public forum status (and therefore declined to extend meaningful First Amendment protection) to even the comparatively minor portion of public "property" on the Internet. In *United States v. American Library Ass'n*,[4] the Court held that public libraries' provision of Internet access via publicly-owned computers did not constitute a public forum and therefore that restrictions on speech in that context were not subject to meaningful First Amendment scrutiny. As a result of this and similar developments, the important functions served by the First Amendment in general and by the public forum doctrine in particular are in danger of being seriously eroded in cyberspace. Despite the common perception among members of the public and Internet law scholars that the Internet is a forum for free expression of unprecedented scope and importance, in fact there are essentially no places on the Internet where speech is constitutionally protected against censorship.

In Part II of this Article, I describe the scope and extent of private ownership of the Internet and private regulation of Internet forums for speech. Having been encouraged by Congress to assume the mantle of Internet speech regulation, private entities have imposed substantial controls on Internet speech. Courts, following the Supreme Court's contraction of the state action doctrine, have likewise declined to subject private Internet speech regulation to First Amendment scrutiny.

In Part III, I analyze the important role served by public forums within our system of democratic self-government. I set forth two competing conceptions of the First Amendment, the first of which is consistent with the

4. 539 U.S. 194 (2003) (plurality) [hereinafter *Am. Library Ass'n II*].

privatization of the Internet and the second of which informs the public forum doctrine. Under the first conception, the First Amendment is conceptualized purely as a restraint on government restrictions on speech and has no role in scrutinizing private regulation of speech. Under the second conception, the First Amendment imposes obligations on the government and other regulators of speech to provide meaningful opportunities for expression free of censorship. This conception finds its clearest expression in the public forum doctrine, under which courts impose the affirmative obligation on the government to dedicate certain publicly-held property for the use and benefit of individuals seeking to exercise their free speech rights. I explore the speech facilitating roles served by public forums in real space, and examine what the absence of public forums means for cyberspace.

In Part IV, I analyze *United States v. American Library Ass'n*. After analyzing this and other cases declining to meaningfully apply First Amendment scrutiny to the government's restrictions of speech within Internet forums, I set forth in Part V several ways in which courts and legislatures should act to reintroduce the values of the public forum into cyberspace.

II. PRIVATE REGULATION OF SPEECH ON THE INTERNET

A. The Early Years: The Internet's Promise as an Unprecedented Forum for Free Expression

Over the past decade, the Internet has been conceptualized as a forum for free expression of unprecedented scope and importance. Once Congress lifted limitations on the permissible uses of the Internet, the Internet opened up as a forum for expression of all kinds,[5] and speakers and publishers from all walks of life and from every corner of the world flocked to the Internet.[6] As one court explained, "It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."[7]

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5. In 1992, Congress granted authority for commercial uses of NSFNET, which was to become an Internet backbone. Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,742 (June 10, 1998), *available at* http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm.

6. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

7. *Id.* at 881.

Several features constitutive of today's Internet[8] render it a uniquely powerful vehicle for speakers and publishers to express themselves to worldwide audiences at very low cost.[9] For the (very low) cost of establishing a website, an individual can express herself in the context of a whole host of media—text, images, audio, video—to a virtually unlimited array of listeners. The barriers to entry that exist in other mediums of expressions, such as traditional print publication and broadcast media, are drastically reduced in the context of the Internet. In contrast to traditional broadcast media, where the ability to express oneself widely is constrained by substantial licensing requirements and associated fees, the Internet is not shackled by spectrum scarcity, nor by the onerous licensing requirements or fees necessitated by a limited broadcast spectrum. As a result, the Internet, to a much greater extent than traditional methods of expression, has the potential to facilitate a true marketplace of ideas, one that is not dominated by the few wealthy speakers who are able to express themselves effectively via traditional media.[10]

Because of the Internet's unprecedented speech-facilitating characteristics, early commentators contended that the Internet should be conceptualized as one grand public forum.[11] Consistent with the speech utopian rhetoric of early court decisions like the district court opinion in *ACLU v. Reno*, commentators viewed the Internet as constituting an important new forum for public discourse. Perhaps because it was not precisely clear to what extent the government would involve itself in the ownership and control of the Internet, early commentators believed that the "National Information Infrastructure" would preserve an important place for genuine public forums in cyberspace. As government ownership and control of the

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8. This is not to say that the *inherent* nature of the Internet presumes such features. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (arguing against an essentialist conception of the Internet's "nature").

9. *See Reno*, 929 F. Supp. at 877.

10. Indeed, because of the Internet's combination of such speech-friendly features,

> [i]ndividual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen.

Id. at 880.

11. *See, e.g.*, David Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 HASTINGS L.J. 335 (1995).

Internet has substantially receded, however, the role of public forums in cyberspace has substantially differed from these commentators' predictions.

B. Private Regulation of Internet Speech Forums

Despite the Internet's potential as a forum for expression of unprecedented scope and importance, today private actors wield the vast majority of power over Internet speech—power unchecked by the First Amendment. While it is often presumed that speech on the Internet will be "uninhibited, robust, and wide-open,"[12] the private entities that own and control the forums for Internet speech enjoy and often exercise the unfettered power to impose substantial restrictions on such speech.

The extent of such private speech restrictions is staggering. Each of the major ISPs establishes and enforces Terms of Service by which it prohibits the expression of certain types of speech that fall within the protection of the First Amendment. AOL, for example, specifies in its Terms of Service that AOL and its agents "have the right at their sole discretion to remove any content that, in America Online's judgment . . . [is] harmful, objectionable, or inaccurate."[13] AOL explains in its Community Guidelines that "like any city, we take pride in—and are protective of—our community."[14] Unlike any other city, however, AOL enjoys the unfettered discretion to censor constitutionally-protected speech in its discussion forums and other online spaces, including "vulgar language" (which, it warns, is "no more appropriate online than [it] would be at Thanksgiving dinner"), "crude conversations about sex," and "discussions about . . . illegal drug abuse that imply it is acceptable."[15] AOL members may hope to escape from these speech-restrictive Terms of Service by leaving AOL-sponsored forums and expressing themselves elsewhere on the Internet. AOL, however, informs its members that "as an AOL member, you are required to follow our [Terms of Service] no matter where you are on the Internet," and warns that it may terminate the accounts of users who violate its Terms of Service by engaging in AOL-prohibited speech anywhere on the Internet.[16]

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12. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

13. America Online, Agreement to Rules of User Conduct, *at* http://www.aol.com/copyright/rules.html (last visited Apr. 25, 2005).

14. America Online, Community Guidelines, *at* http://legal.web.aol.com/aol/aolpol/comguide.html (last visited Apr. 25, 2004).

15. *Id.*

16. *Id.*

Internet users seeking stronger protection for their expression might turn to an ISP other than AOL. They will find, however, similar restrictions on speech imposed by many other major ISPs. Yahoo!'s Terms of Service, for example, prohibit users from making available content that is, inter alia, "objectionable," and specify that Yahoo! may pre-screen and remove any such "objectionable" content.[17] Similarly, Comcast prohibits users from disseminating material that "a reasonable person could deem to be objectionable, embarrassing, . . . or otherwise inappropriate, regardless of whether this material or its dissemination is unlawful."[18] And Comcast, by its Terms of Service, "reserves the right . . . to refuse to transmit or post and to remove or block any information or materials . . . that it, in its sole discretion, deems to be . . . inappropriate, regardless of whether this material or its dissemination is unlawful."[19]

Colleges and universities, both private and public, serve as Internet access providers for millions of students across the United States. Many of these have established and enforced "acceptable use policies" that substantially restrict First Amendment protected speech. To list just a representative sample: Colby College restricts speech that may cause "a loss of self-esteem" within the individual to whom it is addressed;[20] Brown University prohibits speech that produces "feelings of impotence, anger, or disenfranchisement," whether "intentional or unintentional";[21] while Bowdoin College restricts jokes and stories that are "experienced by others as harassing."[22]

The amount of communication via e-mail has far surpassed the amount of communication via "snail" mail. While the U.S. Postal Service is subject to the dictates of the First Amendment when performing its duties, the private entities that are predominantly responsible for relaying billions of e-mails per day are not, thus these entities are free to monitor and censor

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17. Yahoo!, Terms of Service, *at* http://docs.yahoo.com/info/terms (last visited Apr. 25, 2005).

18. Comcast Cable Communications, LLC, Comcast High-Speed Internet Acceptable Use Policy, *at* http://www.comcast.net/terms/use.jsp (last visited Apr. 25, 2005).

19. *Id.*

20. Found. for Individual Rights in Educ., *Colby College*, Speechcodes.org, *at* http://www.speechcodes.org/schools.php?id=659 (last visited Apr. 25, 2005). *See generally* Found. for Individual Rights, *at* http://www.speechcodes.org (last visited Apr. 25, 2005) (detailing speech-restrictive acceptable use policies for private and public universities throughout the United States).

21. Found. for Individual Rights in Educ., *Brown University*, Speechcodes.org, *at* http://www.speechcodes.org/schools.php?id=2483 (last visited Apr. 25, 2005).

22. Found. for Individual Rights in Educ., *Bowdoin College*, Speechcodes.org, *at* http://www.speechcodes.org/schools.php?id=2481 (last visited Apr. 25, 2005).

the content of the e-mails that they are responsible for delivering. Private employers, which serve as Internet access providers for millions of employees across the United States, routinely monitor and restrict e-mail (and Internet use generally), with approximately 50-60% of employers monitoring e-mail.[23] In short, the vast majority of Internet access and service providers, which are privately owned, assert and exercise substantial control over the expression that flows through their Internet places.

In the remainder of this Section, I set forth a few representative scenarios that elucidate the nature and extent of such private regulations of Internet speech. These examples demonstrate the ways in which private entities, including Internet providers like Google, AOL, and Yahoo!, have broadly exercised the power to regulate and censor speech on the Internet wholly exempt from First Amendment scrutiny.

Google is the largest and most popular Internet search engine, providing access to billions of websites and serving as the first place most people turn to find information on the Internet. In addition to providing links to webpages as results for search terms, Google also provides "sponsored links," which are advertisements keyed to search terms entered by web surfers. Because of Google's dominant position in the search engine market, the ability to secure a sponsored link is a valuable medium of expression on the Internet. Indeed, for many less well-known advocacy groups and causes whose sites do not otherwise enjoy substantial web traffic, sponsored links serve as an important means of drawing attention to the sites' content. Google, however, has been wielding its power as a private speech regulator to censor a considerable amount of valuable expression, including political speech that would fall within the core of the First Amendment's protection. Adhering to its policy of refusing to accept sponsored links that "advocate against any individual, group, or organization,"[24] Google has refused to host a range of politically-charged, religious, and critical social commentary in the form of advertisements themselves, as well as the websites to which these advertisements link. Google has also required prospective advertisers to alter the content within their sponsored links—as well as within their websites—as a condition for Google's hosting such content. Furthermore, Google's speech regulations

23. *See* AMA RESEARCH, 2004 WORKPLACE E-MAIL AND INSTANT MESSAGING SURVEY SUMMARY, *at* http://www.amanet.org/research/pdfs/im_2004_summary.pdf.

24. Google, Google Ad Sense Program Policies, *at* http://www.google.com/adsense/policies (last updated Mar. 8, 2005).

and restrictions apply not only on Google's site but also on other websites that run the sponsored links, including AOL, Ask Jeeves, and EarthLink.[25]

A few instances of such censorship illuminate the extent of Google's power as a private regulator of speech. In August 2004, W. Frederick Zimmerman, who maintains a political website called the Zimmerblog, sought to advertise his book *Basic Documents About the Detainees at Guantanamo and Abu Ghraib*, which contained, inter alia, the full text of the *Hamdi v. Bush*, *Rumsfeld v. Padilla*, and *Rasul v. Bush* opinions, as well as various applicable Geneva Convention documents. Google suspended Zimmerman's account once it became aware of the material Zimmerman was advertising via this sponsored link, informing Zimmerman that "Google policy does not permit the advertisement of websites that contain 'sensitive issues.'"[26] In a similar incident in June 2004, John Perr, author of the PERRspectives website, which contains "left-of-center" political commentary, sought to advertise his website via a Google Sponsored Link, with advertisements entitled "The Liberal Resource: Analysis, Commentary, and Satire" and "Complete Liberal Resource Center." The linked-to website contained an article written by Perr that was critical of President George W. Bush and which characterized the president, inter alia, as "secretive, paranoid, and vengeance-filled."[27] Once Google became aware of this language within Perr's article, a Google representative informed Perr that Google was removing his sponsored link because it linked to a website that contained text critical of Bush and therefore "advocates against an individual, group, or organization," in violation of Google's policy.[28]

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25. *See* Verne Kopytoff, *Google's Ad Rules Complex, Controversial*, S.F. CHRON., Aug. 9, 2004, at F1.

26. W. Frederick Zimmerman, *Guantanamo/Abu Ghraib Ads Banned by Google*, Nimble Books, *at* http://www.wfzimmerman.com/index.php?page=3 (last visited Mar. 16, 2005).

27. Jon Perr, *Google's Gag Order: An Internet Giant Threatens Free Speech*, PERRspectives, June 20, 2004, *at* http://www.perrspectives.com/articles/art_gagorder01.htm.

28. *Id.* In another example, when *Unknown News* sought to advertise anti-Iraq-war bumper stickers on Google's Sponsored Links with an ad headlined "Who Would Jesus Bomb?," Google censored the ad, claiming that the ad was in violation of its policy against "sites that promote hate, violence, racial intolerance, or advocate against any individual, group, or organization." Unknown News, *Google Refuses Our Ad*, *at* http://www.unknownnews.net/google.html (last visited Apr. 25, 2005). When Unknown News responded to Google's censorship decision by explaining that it merely "advocate[s] against killing thousands of Iraqis," Google explained that it would reinstate the ad only if the website was edited "to show both sides of the argument" over attacking Iraq. *Id.* The ad was reinstated only after multiple appeals to Google. *Id.* Similar instances of

It is not only political or socially-charged speech that runs the risk of censorship by Google; religious speech also appears to be a target. For example, while Google generally permits sponsored links for abortion services, it prohibits all sponsored links for abortion services that make any reference to religion.[29] Google also singles out for special treatment links sponsored by the Church of Scientology and requires that particular language appear in any link sponsored by this church.[30] No other religion is subject to the requirement that particular language be contained within its advertisements. In short, Google enjoys and exercises substantial censorial control over the content of sponsored links (as well as the content of websites linked to by such sponsored links) that appear on Google's search page.

AOL is by far the largest ISP in the world, with over twenty-four million subscribers in the United States.[31] Indeed, AOL is responsible for hosting the exchange of more messages on a daily basis than the United States Post Office.[32] It is also the largest single forum for individuals to express themselves online, offering thousands of discussion forums on a

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Google wielding its policy to censor speech abound. Amy Harmon, *Is a Do-Gooder Company a Good Thing?*, N.Y. TIMES, May 2, 2004, at 12 (rejection by Google of a sponsored link by an owner of a T-shirt shop in Los Angeles unless the owner removed from his site all T-shirts with slogans critical of President Bush); Kopytoff, *supra* note 25, at F1 (rejection by Google of a sponsored link by an individual who sought to advertise playing cards that featured fifty-four reasons to defeat President Bush because the ad was "advocating against" the president); Michael Liedtke, *Google Bans Environmental Groups' Ads*, Boston.com, Feb. 12, 2004 (allowance by Google for Oceana, a nonprofit environmental group, to run an ad criticizing Royal Caribbean Cruise Line's environmental policies under the headline "Help us protect the world's oceans," quickly followed by rejection from Google because of its policy prohibiting advertisements criticizing groups or companies), *at* http://www.boston.com/business/technology/articles/2004/02/12/google_bans_environmental_groups_ads; Katherine C. Reilly, *Google's 'Haphazard' Ad Policy*, NATION, Aug. 12, 2004 (refusal by Google to host an advertisement by *The Nation*, which was headlined "Bush Lies," because of Google's policy against ads that advocate against any individual), *available at* http://www.thenation.com/doc.mhtml%3Fi=20040830&s=reilly; *Google Censorship*, MediaRights, *at* http://www.mediarights.org/news/announcement.php?ann_id=04489 (last visited Apr. 25, 2005) (censorship by Google of an advertisement by The Cat's Dream, an independent filmmaker seeking to advertise its controversial documentary *XXI Century*, which contained the text "American Voices Against Bush," because of Google's policy against ads that advocate against individuals).

29. Kopytoff, *supra* note 25, at F1.

30. *Id.*

31. *See* Alex Goldman, Top 22 U.S. ISPs by Subscriber: Q4 2004, ISP-Planet, Mar. 25, 2005, *at* http://www.isp-planet.com/research/rankings/usa.html.

32. *See* Andy Kessler, Wired: Stop the U.S. Mail, Jan. 25, 2005, *at* http://andykessler.com/wired_stop_the_us_mail.html.

wide variety of topics. Within these discussion groups, AOL's twenty million plus subscribers can express their views on topics of concern to them and engage in online debates with other interested individuals.

One of the discussion forums hosted by AOL is the "Irish Heritage" discussion group for individuals interested in Irish history and politics.[33] In 1998, AOL's discussion forum "monitors" grew concerned about the heated nature of the discussions within this forum and apparently felt that some of the contributions were getting out of hand.[34] AOL determined that several exchanges on the Irish Heritage discussion group were in violation of AOL's terms of service, which do not allow members to "harass, threaten, embarrass, or do anything else to another member that is unwanted." Accordingly, AOL shut down the discussion group for a "cooling off" period, and in the process removed all traces of the earlier heated postings, contrary to AOL's regular practice of preserving past discussions in its archives.[35] After a seventeen-day cooling off period, AOL reopened the discussion group, while encouraging members to make this forum "a more amiable place" and announcing that members who committed three or more violations would face suspension or termination of their accounts.[36]

AOL's speech restrictions do not stop with the Irish Heritage discussion group. As discussed above, AOL has long imposed rigorous regulations on the vast amount of speech that it hosts in AOL-owned places, prohibiting speech that advocates the illegal use of drugs, speech that uses "crude" or "inappropriate" terminology in connection with sex, and the like.[37] AOL's censorial actions within its discussion groups are now well-known. Accordingly, the "unprecedented forum for free expression" that is the Internet in actuality is largely dominated by AOL's forums for expression, wherein the regulation of speech is subject to AOL's Terms of Service.

AOL is, of course, a private company, and the servers on which it hosts its discussion forums are its private property. Because it is a private

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33. *See* Amy Harmon, *Worries About Big Brother at America Online*, N.Y. TIMES, Jan. 31, 1999, at 1.

34. *Id.*

35. *Id.*

36. AOL has also wielded more targeted tools to prevent certain individuals from engaging in heated discussion with one another. For example, two AOL subscribers were instructed by AOL never to speak to one another in AOL space again, or else face suspension or termination of their accounts. *Id.*

37. *See* Dawn Nunziato, *Exit, Voice, and Values on the Net*, 15 BERKELEY TECH. L.J. 753, 756-57 (2000).

entity, the determinations that it makes regarding the types of expression allowed within its property are not subject to scrutiny under the First Amendment. AOL enjoys complete discretion to allow or disallow whatever speech it likes on the vast number of discussion forums and websites that it hosts, and to enforce its speech restrictions by removing unwanted speech and prohibiting unwanted speakers from partaking in its discussion forums. Accordingly, for the great majority of Internet speakers, it is not the First Amendment, but AOL's (or other ISPs') terms of service, that determine the contours of protection accorded to their Internet expression.

The popular ISP Yahoo! recently fought and won a highly publicized international battle on behalf of free speech and First Amendment values, only to turn around and exercise its prerogative as a private speech regulator to censor the same constitutionally protected speech that it fought to protect. In *La Ligue Contre le Racisme et l'Antisémitisme v. Yahoo! Inc.*,[38] several French organizations committed to combating anti-Semitism brought suit in French court against Yahoo!.[39] Plaintiffs alleged that Yahoo!'s auction site was hosting auctions of materials such as *The Protocols of the Elders of Zion*, *Mein Kampf*, and other Nazi materials and memorabilia, the display of which within France violated French law. The French lawsuit, which involved novel issues of international jurisdiction and choice of law, ultimately resulted in a French court order compelling Yahoo! to cease making available the specified anti-Semitic content to French citizens (which essentially required Yahoo! to cease making this content available on the Internet at all).[40]

Yahoo! was concerned that the French court would be able to enforce this order against it within the United States. To forestall the enforcement of the French court's order within the United States, Yahoo! filed suit in U.S. district court against the French organizations. The company claimed that enforcement of the French court judgment in the United States would violate the First Amendment.[41] The U.S. district court agreed, holding that principles of international comity that would generally favor enforcing international courts' judgment against United States entities were out-

38. T.G.I. Paris, May 22, 2000, Gaz. Pal. 2000, somm. jurispr. 1307. An English translation is available Yahoo! Case Tribunal De Grande Instance De Paris May 22, 2000, JURISCOM.NET, *at* http://juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (last visited May 12, 2005).

39. *Id.*

40. *Id.*

41. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 169 F. Supp. 2d 1181, 1186, 1194 (N.D. Cal. 2001).

weighed by the First Amendment values at play in this case.[42] Because the First Amendment protected Yahoo!'s dissemination of anti-Semitic speech, the enforcement of the French court order enjoining such dissemination would violate the First Amendment.[43]

Yet in a surprising turn of events, shortly after securing this unprecedented victory for the dissemination of First Amendment protected speech over the Internet, Yahoo! chose to exercise its prerogative as a private regulator of Internet speech to prohibit the dissemination of the Nazi-related content at issue in the case.[44] Other Internet search engines and service providers also refuse to host Nazi-related and other controversial content, even though such speech is protected by the First Amendment against government censorship.[45]

C. Congress's Encouragement of Private Internet Speech Regulation

One might suppose that the censorship of Internet speech described above would cause concern among those charged with protecting our First Amendment freedoms. Surprisingly, however, neither Congress nor the courts have looked critically upon speech restrictions imposed by private Internet actors. Rather, courts have rejected challenges to private Internet actors' speech restrictions on the grounds that such actors are not state actors, nor the functional equivalent of state actors, under applicable First Amendment doctrine.[46] Further, Congress, far from looking critically upon such "private" speech restrictions, has affirmatively encouraged Internet actors to exercise discretion to restrict First Amendment protected expression.

In passing the Communications Decency Act of 1996 (CDA),[47] Congress sought to remedy perceived ills caused by certain types of offensive Internet expression (primarily sexually-themed expression). Congress set out to remedy these speech harms by using two different approaches. First,

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42. *Id.* at 1193.

43. *Id.* However, a Ninth Circuit panel overturned the district court's decision because the district court improperly asserted personal jurisdiction over the French parties. 379 F.3d 1120 (9th Cir. 2004). The Ninth Circuit has granted en banc review of the case. 399 F.3d 1010 (9th Cir. 2005).

44. *See* Lori Enos, *Yahoo! To Ban Nazi-Related Auctions*, E-COMMERCE TIMES, Jan. 3, 2001, *available at* http://www.ecommencetimes.com/story/6432.html.

45. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 866 (2001).

46. *See infra* Part II.D.2.

47. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 223 (2000)).

the CDA prohibited the transmission of certain types of sexually-themed expression anywhere on the Internet.[48] These provisions were insufficiently attentive to the First Amendment rights of individuals, and were readily struck down by the Supreme Court.[49] Second, and far more successfully, Congress encouraged private Internet actors to do what it could not do itself—restrict harmful, offensive, and otherwise undesirable speech, the expression of which would nonetheless be protected by the First Amendment (if restricted by a state actor). In Section 230 of the CDA,[50] Congress sought to encourage the proliferation of a free market in Internet speech; a market in forums for expression that would be largely unfettered by government intervention and defined predominantly by private actors' speech choices. Accordingly, Section 230 provides that:

> The Congress finds [that] the Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity, [and] the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation . . . .
>
> . . . .
>
> It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.[51]

Recognizing the importance of the Internet as a forum for expression, Congress sought in this section of the CDA to advance the goal of free expression by minimizing the government's role in regulating Internet expression, while at the same time handing over the reins of regulating Internet expression to private actors. In lieu of creating an affirmative role for Congress in protecting free speech on the Internet, Congress chose to defer to private actors to regulate speech as they saw fit, to let a "free market" in expression and in the regulation of expression reign on the Internet. Congress sought to encourage ISPs and other owners of Internet speech forums to restrict expression, and access to expression, that the providers found undesirable. Accordingly, Section 230(c)(2) of the CDA provides:

> No provider . . . of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to

48. *Id.*
49. *See* Reno v. ACLU, 521 U.S. 844 (1997).
50. 47 U.S.C. § 230 (2000).
51. *Id.*

> restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, *or otherwise objectionable, whether or not such material is constitutionally protected*.[52]

Through Section 230, the Government excised itself from the role of affirmatively protecting free expression on the Internet, and passed the mantle of speech regulation over to private entities.[53]

Accordingly, one significant result of the government's privatization of the Internet is the concomitant privatization of regulation of Internet expression. What follows from such privatization is that today there are essentially no places on the Internet where free speech is constitutionally protected. Rather, such Internet speech is only protected, if at all, by the grace of the private entities who control the private spaces in which such speech is hosted. Far from the speech utopian theorists' predictions that the Internet would constitute a public forum in which constitutional protections for free expression were at their apex, today's Internet is constituted by an amalgam of private forums within which constitutional protection for free expression is non-existent. Furthermore, Congress apparently wanted it that way.

D. Private Speech Regulation and the First Amendment

Like Congress, courts have consistently protected the right of private entities to regulate Internet speech unchecked by the First Amendment. In accordance with the Supreme Court's recent First Amendment jurisprudence, courts have refused to apply any First Amendment scrutiny to private Internet actors' restrictions of constitutionally-protected speech.

For the first century and a half of constitutional interpretation, courts consistently applied the First Amendment only to speech restrictions imposed by government actors. In *Marsh v. Alabama*,[54] however, the Supreme Court began to discard formalistic distinctions between public and private regulations of speech and to carefully scrutinize the speech restrictions imposed by entities that wielded government-like power over individuals' speech. In *Marsh*, the Court inaugurated the "company town" doctrine, in which it treated a private corporation that performed certain "traditional government functions" as the equivalent of a state actor for

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52. *Id.* § 230(c)(2) (emphasis added). Section 230(c) also provides immunity for ISPs from liability for defamatory content posted by their subscribers. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

53. The government also passed on to private entities the task of managing and regulating the Internet's infrastructure. *See* text accompanying notes 105-06.

54. 326 U.S. 501 (1946).

First Amendment purposes. This doctrine was applied and extended through the 1960s, but was curtailed in several decisions in the 1970s.[55] Consistent with this trend of declining to treat private speech regulators as state actors for First Amendment purposes, courts have declined to subject private Internet actors' speech restrictions to any scrutiny whatsoever under the First Amendment.

1. Private Regulation of Speech in Real Space

Marsh v. Alabama involved speech regulations imposed by a "company town," a phenomenon of the Deep South in the early Twentieth Century, in which economically ailing regions encouraged capital investments by allowing corporations to build and operate towns.[56] Though privately maintained, such towns "had all the characteristics of any other American town," including streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and schools.[57] The town of Chickasaw, Alabama, was one such company town, with "nothing to distinguish [it] from any other town and shopping center, except the fact that the title to the property belong[ed] to a private corporation."[58] The streets and sidewalks of the town, which under the public forum doctrine would be considered public forums where individuals would enjoy their strongest free speech rights, were privately owned and regulated.

Grace Marsh, a Jehovah's Witness, sought to distribute religious literature and express her religious views from a sidewalk in Chickasaw. A town official warned her that she could not distribute literature on the town's sidewalks or streets—or anywhere else in the town—without a permit, and that no permit would be issued to her. Marsh was asked to leave the sidewalk and the town, but she refused to do so. She was subsequently arrested and charged with violating state trespass law.[59]

Marsh claimed that the application of the state trespass law under these circumstances would unconstitutionally abridge her First Amendment rights.[60] The Supreme Court agreed, holding that the town's private status did not insulate its regulations of speech from First Amendment scrutiny. In extending the First Amendment's protections to private regulations of speech, the Court emphasized the fact that the streets, sidewalks, and other

55. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
56. 326 U.S. at 502.
57. *Id.*
58. *Id.* at 503.
59. *Id.* at 503-04.
60. *Id.* at 504.

places within the town that would be categorized as public forums if owned by the state, were "accessible to and freely used by the public in general," and generally served the same functions as such places serve when publicly owned.[61] The Court looked beyond the formalistic public/private distinction and held that, despite the fact that such places were privately owned, they were "built and operated primarily to benefit the public" and "their operation is essentially a public function."[62] Because such property was open to the public and because the public had an interest in keeping the channels of communication open and uncensored to enable the public to make well-informed decisions as members of a self-governing democracy, even private restrictions on speech within such forums were subject to scrutiny.[63] *Marsh* therefore places primacy on the government's affirmative obligations under the First Amendment to establish and protect the pre-conditions of democratic self-government.[64] As the Court explained, to participate in democratic self-government, individuals must have access to uncensored information and open channels of communication. For the purposes of advancing this goal, it does not matter whether the restrictions on speech are imposed by private property owners or by the government as a property owner. Rather, the dispositive inquiry is whether the speech regulation interferes with the channels of communication essential for individuals to participate meaningfully in democratic self-government.

The *Marsh* Court's rejection of the public/private distinction was carried forward in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[65] *Logan Valley* involved the picketing of Weis Market, a non-union supermarket located within a privately-owned shopping center on privately-owned property adjacent to the shopping center. The shopping center had no publicly-owned sidewalks or streets adjacent to the targeted supermarket, and so the picketers' only effective option was to stage their picket on private property adjacent to the supermarket.[66] Members of the Amalgamated Food Employees Union picketed Weis by carrying (truthful) signs stating that the supermarket was non-union and that its employees did not receive union wages or benefits.[67] The picket was

61. *Id.* at 501.
62. *Id.* at 506.
63. *Id.*
64. *See* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).
65. 391 U.S. 308 (1968).
66. *Id.* at 310-16.
67. *Id.* at 311.

staged in the privately-owned areas where the supermarket's customers would pick up their groceries and the adjacent portion of the parking lot.[68] The picketers selected this location so as to effectively convey their message to Weis managers, employees, and customers. In response to the picketing, the owners of the supermarket and of the shopping center instituted an action to enjoin the picketing. The lower courts granted an injunction prohibiting such expression, finding that the picketing constituted a trespass on private property not privileged by the First Amendment.[69]

The Supreme Court reversed. The Court first compared the features and characteristics of the places where the picketing occurred to the place where the expressive activity involved in *Marsh* occurred, and found them to be functionally similar for purposes of the First Amendment inquiry.[70] The Court explained, "[w]e see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business-district should be limited . . . ."[71] Because the Logan Valley shopping center enjoyed the same features as the sidewalks in *Marsh* and public forums like sidewalks and streets, regulations of speech on such private property was subject to First Amendment scrutiny.[72]

Because the picketers sought to exercise their free speech rights "in a manner and for a purpose generally consonant with the use to which the [private property at issue was] actually put," the Court held that the First Amendment precluded the private property owners from enjoining such expression.[73] As in the *Marsh* decision, the Court in *Logan Valley* looked to the functional characteristics of the property at issue, instead of to the formalistic distinction between public and private ownership of such property, in determining whether and how to protect free speech values within such property. In so doing, the Court properly looked to the characteristics of the property on which the speech regulation occurred, the functional similarities between such private forums and public forums, the openness of the property to the public, and the suitability of such property for expressive purposes, instead of simply to whether the property was held privately or publicly.

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68. *Id.*

69. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 590, 227 A.2d 874, 878 (Pa. 1967).

70. *Logan Valley*, 391 U.S. at 319.

71. *Id.*

72. *Id.*

73. *Id.* at 319-20.

Marsh and *Logan Valley* represent the high water mark of the Court's treatment of private speech regulators as state actors for First Amendment purposes. Shortly after the *Logan Valley* decision, the Supreme Court scaled back its protection of free speech against private speech regulation in *Lloyd Corp. v. Tanner*.[74] *Lloyd* involved individuals' efforts to distribute leaflets and other materials to protest the Vietnam War within the privately-owned property of Lloyd Center, a large shopping mall complex.[75] Lloyd Center encompassed approximately fifty acres and contained sixty establishments, including offices of doctors, dentists, lawyers, bankers, travel agents, and persons offering a variety of other services.[76] The private entities who acquired Lloyd Center purchased the land from the city of Portland, which vacated acres of public streets and other public land to make room for the shopping mall complex. Given the extent of goods and services available at the shopping center complex, as well as its central location, "for many Portland citizens, Lloyd Center [would] so completely satisfy their wants that they would have no reason to go elsewhere for goods or services."[77] Indeed, as a testament to the Center's potential for reaching broad general audiences, presidential candidates from both major parties selected the Lloyd Center as the forum from which to reach the broadest audience of Portland residents.[78] Recognizing the Center's potential for reaching a broad cross-section of Portland citizens, several anti-war protestors sought to distribute anti-war materials from within the mall's walkways.[79] The owners of the complex instructed their security guards to warn the protestors that they would be arrested unless they ceased their expressive activities on the mall's private property.[80] The protestors brought suit against the mall owners, claiming that the First Amendment privileged their expressive activities.

The Supreme Court held that the protestors did not enjoy the First Amendment right to express themselves on the mall's private property. The Court distinguished *Logan Valley* by explaining that the picketers in *Logan Valley* were expressing themselves on a subject matter that was directly related to the shopping center's operations—the non-union nature of the Weis supermarket—in circumstances in which there were "no other reasonable opportunities for the picketers to convey their message to their

74. 407 U.S. 551 (1972).
75. *Id.* at 553.
76. *Id.*
77. *Id.* at 580 (Marshall, J., dissenting); *see id.* at 575-81 (Marshall, J., dissenting).
78. *Id.* at 555.
79. *Id.* at 556.
80. *Id.*

intended audience were available."[81] In contrast, the Court explained, the protestors in *Lloyd* were not protesting on a matter related to the shopping center's operations,[82] and the protestors had reasonable alternative opportunities to convey their message to their intended audiences, such as by distributing their literature on the public streets and sidewalks adjacent to Lloyd Center.[83]

Notwithstanding the Court's attempts to distinguish these earlier cases meaningfully, it is difficult to explain the Court's movement from *Logan Valley* to *Lloyd* as anything other than a deliberate doctrinal shift to insulate private speech regulation from First Amendment scrutiny. The Court's subsequent First Amendment state action cases, including *Hudgens v. National Labor Relations Board*,[84] more definitively narrowed the exceptions left open by *Lloyd* to all but preclude First Amendment protection for speech subject to regulation by private actors.

2. Private Regulation of Speech in Cyberspace

Individuals whose speech has been restricted by private Internet actors have sought to extend the state action doctrine as articulated in *Marsh* and *Logan Valley* (and subsequently honed in *Lloyd*) to private Internet actors, and have attempted to subject such online speech regulations to First Amendment scrutiny. These lawsuits involve challenges to Internet actors' refusal to deliver e-mails, removal of content posted on websites, and termination of individuals' accounts as a penalty for speech infractions.

Several of these cases involve Cyber Promotions, Inc., a company specializing in the dissemination of unsolicited e-mail. In *Cyber Promotions, Inc. v. America Online, Inc.*,[85] Cyber Promotions sought an injunction to prevent AOL from blocking messages it was attempting to send to AOL e-mail addresses. Cyber Promotions argued that AOL had opened its network to the public and devoted a portion of its property to public use by providing Internet e-mail services and acting as the sole conduit to its members' Internet e-mail boxes.[86] Cyber Promotions concluded that AOL had thereby effectively established a public forum in which its speech regulations were subject to First Amendment scrutiny.[87]

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81. *Id.* at 563.
82. *Id.* at 563-64.
83. *Id.* at 566-67.
84. 424 U.S. 507, 518 (1976) (explaining that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case").
85. 948 F. Supp. 436 (E.D. Pa. 1996).
86. *Id.* at 450.
87. *Id.*

In analyzing whether AOL was a state actor for purposes of the First Amendment, the district court adopted a three-factor state action analysis gleaned from earlier Supreme Court cases, which required it to consider (1) whether AOL assumed a "traditional public function" in undertaking to perform the conduct at issue; (2) whether an elaborate financial or regulatory nexus existed between AOL's challenged conduct and the state; and/or (3) whether a symbiotic relationship existed between AOL and the state.[88] As to whether AOL "has exercised powers that are traditionally the exclusive prerogative of the state," the court answered in the negative, resting its analysis in part on the (simplistic) observation that the provision of access to the Internet through an e-mail system did not constitute the exercise of a public service traditionally exercised by the state.[89]

Regarding the "exclusive public function" prong of the state action test, the court once again readily concluded that AOL's provisions of e-mail service to its subscribers did not constitute a traditional exclusive public function.[90] In contrast with the private property owner in *Marsh*, in which "the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State,"[91] AOL exercised no powers that were the exclusive prerogative of the State. Cyber Promotions contested this point, citing *Logan Valley* and *Lloyd* and arguing that AOL's provision of Internet e-mail service constituted an exclusive public function because there were no alternative avenues of communication available to Cyber Promotions to disseminate its message to AOL members via e-mail.[92] The court rejected this argument, finding that Cyber Promotions had other means available to reach AOL members, including U.S. mail, telemarketing, television, cable, newspapers, magazines, and leafleting.[93] The *Cyber Promotions* court thus essentially concluded that the only alternative avenues of expression for Cyber Promotions to reach its desired audience of AOL members would be non-Internet channels.

The Supreme Court has recently clarified that (at least when the government is regulating) the relevant constitutional inquiry is whether the speech regulation at issue leaves open alternative avenues of expression within the speaker's chosen medium of expression. This issue was confronted by the Court in the *Reno v. ACLU* decision,[94] in which the Court

88. *Id.* at 447 n.2.
89. *Id.* at 451.
90. *Id.* at 452.
91. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).
92. *Cyber Promotions*, 948 F. Supp. at 451-52.
93. *Id.*
94. 521 U.S. 844 (1997).

reviewed the constitutionality of a statute prohibiting "indecent" and "patently offensive" communications on the Internet.[95] Part of the government's argument for the statute's constitutionality was that, even though the statute proscribed certain types of speech on the Internet, there were ample real space avenues of communication available for speakers. The Supreme Court rejected this argument, explaining that it would foreclose an entire medium of communication from constitutional protection.[96] To assess properly whether alternative avenues of expression exist for purposes of determining whether to subject private speech regulation to First Amendment scrutiny, courts should look to whether there are adequate alternative avenues of communication within the Internet medium itself for the speaker to communicate her message. If the speech regulation at issue fails to leave open such avenues on the Internet, the regulation—whether imposed by public or private hands—should be held to fail First Amendment scrutiny.[97]

In short, the Supreme Court's First Amendment jurisprudence makes clear that the relevant inquiry into "adequate alternative means of expression" turns on whether such alternative means exist within the speaker's chosen medium of expression. To conduct the inquiry otherwise would be tantamount to foreclosing an entire medium of expression to the speaker. Because the *Cyber Promotions* court looked to non-Internet media to con-

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95. *See, e.g.*, Dawn C. Nunziato, *Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech*, 79 CHI.-KENT L. REV. 121 (2004).

96. *Reno*, 521 U.S. at 879-80.

97. Several Supreme Court Justices reiterated this interpretation of the alternative avenues of communication analysis in their ruling on the constitutionality of the CDA's successor statute, the Child Online Protection Act. Pub. L. No. 105-277, § 1401, 112 Stat. 2681-736 (1998). In *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the Supreme Court considered the constitutionality of a statute criminalizing the dissemination of expression over the Internet that is obscene for minors, where obscenity was measured by reference to "local community standard." Because community standards on such matters may vary from one locality to another, in order to avoid liability under the statute, Internet speakers would be required either to tailor their expression to the most puritanical community's standards, or else abandon the Internet (with its heightened speech restrictions) as a vehicle for expression. *Ashcroft*, 535 U.S. at 593 (Kennedy, J., concurring). In defending this statute, the government once again argued that, despite these restrictions, the statute left individuals with ample alternative avenues of expression under *Logan Valley* and *Lloyd* because speakers of such potentially restricted expression could turn to non-Internet mediums to express themselves. Justice Kennedy, joined in his concurrence by Justices Souter and Ginsburg, once again rejected this argument, stating that "it is no answer to say that the speaker should take the simple step of utilizing a different medium," and explaining that "our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression." *Ashcroft*, 535 U.S. at 596 (Kennedy, J., concurring).

clude that alternative avenues of expression existed for Cyber Promotions to reach its intended audience, its analysis was flawed.

The application of the state action doctrine to subject private Internet speech regulation to First Amendment scrutiny has been rejected in other contexts as well. In *Intel Corp. v. Hamidi*, Kenneth Hamidi, a disgruntled former employee of Intel, sent a series of e-mails critical of Intel's employment practices to several thousand Intel employees using their Intel e-mail addresses.[98] Intel, not wanting its employees to receive critical information about it, asserted its private property rights in its e-mail servers, and claimed that Hamidi, by sending such e-mails, was trespassing upon its personal property.[99] Among his other defenses, Hamidi asserted a First Amendment defense, claiming that he had a free speech right to send such an e-mail and that Intel's maintenance of an e-mail system connected to the Internet subjected Intel's speech regulations to First Amendment scrutiny.

The lower court rejected Hamidi's First Amendment defense to Intel's trespass to chattels claim, holding that Intel's e-mail servers were its private property and that "Intel is as much entitled to control its e-mail system as it is to guard its factories and hallways."[100] Although Hamidi ultimately prevailed on property law grounds,[101] the First Amendment issues in this case merit closer inspection.[102] In particular, the analysis of Hamidi's First Amendment claims by the Justices of the California Supreme Court reveal some common misperceptions regarding channels of communication that are available for individuals to express themselves on the Internet. Judge Mosk in his dissenting opinion, for example, took pains to criticize Hamidi's First Amendment defense on the grounds that Hamidi's expression occurred on a "private, proprietary intranet," and not within "the public commons of the Internet."[103] Mosk further explained, "Hamidi is not communicating in the equivalent of a town square or a . . . mailing through the United States Postal Service [but is rather] crossing from the public Internet into a private intranet."[104]

Justice Mosk's analysis embodies a common misperception about the existence of public spaces and forums on the Internet—that there exists

98. 71 P.3d 296, 301 (Cal. 2003).
99. *Id.* at 301-02.
100. Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244, 257 (Ct. App. 2001).
101. *Hamidi*, 71 P.3d at 296.
102. *See, e.g.*, Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003).
103. *Hamidi*, 71 P.3d at 326 (Mosk, J., dissenting).
104. *Id.* (Mosk, J., dissenting).

some sort of "public commons on the Internet" and indeed that the functional "equivalent of a town square" exists somewhere on the Internet. If Hamidi had gone there to express his message, Mosk suggests, his speech would have been protected by the First Amendment. The problem, however, is that there is no there there. Given the government's retreat from ownership and control of the Internet's infrastructure and the component spaces of the Internet, and given the overwhelming private ownership of expressive forums on the Internet, no such "public commons" or "town square" equivalents exist. Virtually all speech on the Internet is subject to the same type of private regulation as Intel's "private, proprietary intranet." In the same way that Intel's speech regulations on its servers are immune from First Amendment scrutiny, so too are other regulations of speech at the hands of private entities.

In addition to ceding control over the forums for speech to private entities, the U.S. government has ceded control over certain gateways for expression to private entities. As I explore at greater length elsewhere,[105] the government in 1998 ceded control over the Internet domain name system[106] to a nominally private entity, the Internet Corporation for Assigned Names and Numbers (ICANN). Domain names are the names that uniquely correspond to Internet protocol addresses assigned to computers to enable them to be connected to the Internet. Management of the domain name system translates into management of the gateways of communication via the Internet.

Prior to transferring control of the domain name system to ICANN, the United States vested a private corporation, Network Solutions, Inc. (NSI), with exclusive control over the registration of domain names. NSI, in turn, exercised this control by refusing to register certain domain names that it deemed inappropriate.[107] Its refusal to register certain domain names was challenged in several instances by the entities seeking to use such domain names. In one such case, an brought suit challenging NSI's refusal to register certain domain names containing sexually-themed words protected by

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105. Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187 (2003).

106. *See id.* at 192.

107. According to its policy in effect at the time, Network Solutions claimed that it

> has a right founded in the First Amendment to the Constitution to refuse to register, and thereby publish, on the Internet registry of domain names words that it deems to be inappropriate [because under the First Amendment] no corporation can be compelled to engage in publication which the corporation finds to be inappropriate.

See Island Online, Inc. v. Network Solutions, Inc., 119 F.Supp. 2d 289, 291 (E.D.N.Y. 2000).

the First Amendment. The disappointed domain name registrant, Island Online, claimed that NSI was a state actor and that NSI's refusal to register constitutionally-protected terms as domain names violated the First Amendment.[108] The court rejected Island Online's First Amendment claims, holding, inter alia, that the function of registering domain names did not constitute an "exclusive public function" and therefore the performance of this function did not render NSI a state actor. Relying once again on the fact that Internet-related functions are not in any sense "traditional" public functions, the court explained:

> Although the [U.S. government] was an instrumental agent in the Internet's origins, the Internet is by no stretch of the imagination a traditional and exclusive public function. For most of its history, its growth and development have been nurtured by and realized through private action. Moreover, registration of Internet domain names, the focal point of this case, has never been a public function at all.[109]

The court accordingly rejected Island Online's argument that NSI's conduct satisfied the exclusive public function test—or any of the other tests—for establishing that NSI's speech-restrictive actions constituted state action. It therefore concluded that NSI's content-based domain name registration policy was "purely private conduct" that was immune from scrutiny under the First Amendment.

The court in *National A-1 Advertising Inc. v. Network Solutions, Inc.* further analyzed whether NSI's speech-restrictive decisions were subject to First Amendment scrutiny.[110] In that case, NSI once again refused to register as domain names certain sexually-oriented (but First Amendment-protected) terms. The court first considered and rejected the argument that NSI was a state actor because it was performing a traditional state function by registering Internet domain names. Undertaking a more sophisticated analysis than the *Island Online* court, this court observed that although the "tradition" of serving as a registrar of domain names was not a long one, it was indeed one that had been performed and overseen by the government since the Internet's inception.[111] The court stated, however, that mere performance of a public function by itself was insufficient to qualify an entity as a state actor; rather, it must be further shown that the function is one

108. *See id.* at 296.
109. *Id.* at 306.
110. 121 F. Supp. 2d 156 (D.N.H. 2000).
111. *Id.* at 167.

that is exclusively reserved by the state.[112] This test, the court explained, is designed to "flush out a state's attempt to evade its responsibilities by delegating them to private entities."[113] The court held that NSI failed this portion of the test for establishing state action. The court went on to hold that NSI did not satisfy the second prong of the state action test because the government did not exercise coercive power or provide encouragement such that the actions at issue (that is, the refusal to register the desired domain names) could be deemed to be the conduct of the government.[114] Finally, the court concluded that NSI failed the third prong of the state action test because the relationship between the government and NSI could not properly be viewed as "symbiotic."[115] Notwithstanding the existence of a cooperative agreement between the government and NSI regarding NSI's role as a domain name registrar, the court found that the government was not fairly considered a "joint participant" in the challenged conduct.

NSI defended its conduct in the above cases not only on the grounds that it was a private actor and that its speech-restrictive decisions were therefore immune from First Amendment scrutiny, but also on the grounds that as a private actor it enjoyed the right not to sponsor (or be compelled to express) speech with which it disagreed.[116] Indeed, private Internet entities like NSI have increasingly wielded the First Amendment not only as a shield to insulate themselves from First Amendment liability for their speech regulations, but also as a sword to claim First Amendment protection as speakers and publishers for their exercise of "editorial" discretion. Invoking a line of cases beginning with *Miami Herald v. Tornillo*,[117] in which the Supreme Court upheld a newspaper's right not to be compelled to publish right-of-reply speech that was not of its choosing, private Internet actors like NSI have asserted that their content-based decisions are in furtherance of their First Amendment rights as speakers and publishers.[118]

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112. *Id.* at 167-68.

113. *Id.* (quoting Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 84 F.3d 487, 494 (1996)).

114. *Id.* at 168.

115. *Id.* at 169.

116. *Id.* at 166.

117. 418 U.S. 241 (1974).

118. *See, e.g.*, Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (holding unconstitutional a county's requirement that cable television systems offering high-speed Internet service must allow competitors equal access to their broadband systems because it deprives cable operators of editorial discretion over their programming and forces cable operators to alter their content to conform to an agenda they do not set).

In *Island Online*, NSI claimed that it "has a right founded in the First Amendment of the Constitution to refuse to register, and thereby publish, . . . words that it deems to be inappropriate [because under the First Amendment] no corporation can be compelled to engage in publication which the corporation finds to be inappropriate."[119]

This First Amendment argument has been wielded in contexts far afield from its original domain of protecting speakers and publishers from being compelled to adopt speech with which they disagree. For example, Internet pipeline providers have successfully asserted this First Amendment argument to fend off governmental attempts to provide competitors with equal access to their pipelines. In *Comcast Cablevision of Broward County, Inc. v. Broward County*, Comcast challenged the county's "equal access" regulation, which required cable television systems offering high-speed Internet service to allow competitors equal access to their broadband systems.[120] Comcast successfully argued that, like publishers and speakers, it enjoyed editorial discretion over its programming and that the government requirement of equal (or "forced") access would violate its First Amendment rights to host only the content of its choosing.[121] Accordingly, the First Amendment has not only insulated private speech regulators from First Amendment scrutiny; it has also affirmatively protected their "editorial" decisions regarding which content to publish within their Internet places.

In sum, courts have resoundingly concluded that private entities' regulation of speech on the Internet does not constitute state action and that such private speech regulation is wholly immune from First Amendment scrutiny. Consistent with Congress's intent (as embodied in Section 230 of the Communications Decency Act) to turn the reins of Internet speech regulation over to private entities, private Internet actors have been allowed to wield substantial control over Internet expression, wholly unchecked by the First Amendment.

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119. *See* Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp. 2d 289, 296 (E.D.N.Y. 2000).

120. 124 F. Supp. 2d at 685.

121. *Id.* at 693-94.

III. PUBLIC OWNERSHIP OF SPEECH FORUMS AND THE PUBLIC FORUM DOCTRINE

A. Negative Versus Affirmative Conceptions of the First Amendment

The Internet indeed provides an unprecedented forum—or more accurately, an amalgam of forums—for expression. The overwhelming majority of these forums, however, are private, and accordingly, decisions regarding speech regulation are wholly immune from First Amendment scrutiny. Moreover, as will be discussed in Part V, even the comparatively insignificant publicly-owned forums for Internet speech have not been held to the stringent First Amendment standards applicable to speech regulations within genuine public forums.

According to one theory of Internet speech—the Net libertarian school that informed the privatization of the Internet in the first place—it is this very privatization of speech forums that best advances free speech values on the Internet. Net libertarians, such as Professor Richard Epstein,[122] claim that the primary purpose of the First Amendment is to insulate private individuals' speech decisions from government interference. Accordingly, such theorists claim that a free market for speech and for regulations of speech fully and completely serves the goals of freedom of expression, absent any government involvement to protect speech. Under this Net libertarian view, if there are low barriers to entry in the speech market, then the speech-protective goals of the First Amendment will be perfectly advanced by the aggregation of private forums and private speech decisions within these forums.[123] Affirmative government involvement in the market for speech in general—and in creating and maintaining public forums for speech in particular—will be unnecessary.

A competing school of thought conceptualizes the First Amendment as encompassing an affirmative, speech-protective role for the government, beyond the negative role of strictly scrutinizing governmental regulation of speech. According to this affirmative conception, the free speech values embodied in the First Amendment cannot be advanced solely by allowing private property owners free rein to determine what speech to permit and what speech to restrict within their property. As Cass Sunstein contends, a well-functioning system of free expression "is not intended to aggregate existing private preferences," but rather must incorporate certain collective values, values that will not necessarily be realized in an unregulated mar-

122. *See, e.g.*, Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003).
123. *See, e.g.*, *id.*

ket for speech.[124] Sunstein explains that a free market for free speech could generate a range of serious problems. If the allocation of speech rights was decided through an ordinary pricing system, such a system would fail to incorporate certain speech-regarding values, and would ensure that dissident and other disfavored or unpopular speech would be foreclosed.[125] The affirmative conception of the First Amendment requires the government's involvement in the market for free speech to establish conditions allowing each citizen to exercise meaningfully his or her right to freedom of expression, a right that is integral to our system of democratic self-government. In the words of Professor Laurence Tribe, another advocate of the affirmative conception of the First Amendment, "it is not enough for the government to refrain from invading certain areas of liberty. The State may, even at some cost to the public fisc, be required to provide at least a minimally adequate opportunity for the exercise of certain freedoms."[126]

B. The Public Forum Doctrine

1. Development of the Doctrine

This affirmative conception of the First Amendment finds its clearest judicial expression in the development of the public forum doctrine,[127] under which courts impose on the government the affirmative obligation to dedicate certain publicly-held property for the use and benefit of individuals seeking to exercise their free speech rights. Prior to *Hague v. CIO*,[128] in which the Supreme Court first adopted the public forum doctrine, the government as a property owner enjoyed the same unfettered discretion as private property owners to regulate speech on its property. The Supreme Court articulated this position in *Davis v. Massachusetts*.[129] *Davis* involved a First Amendment challenge to government-imposed speech regulations on the (publicly-owned) Boston Common. The Court rejected this constitutional challenge and held that "there was no right in the plaintiff

124. CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18 (1993).

125. *Id.* at 57-58.

126. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 964 (2d ed. 1988).

127. *See, e.g.*, Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 52 (1986) ("Until fairly recently it was assumed that the purpose of the first amendment was the negative one of preventing undue interference with private markets in ideas rather than the positive one of promoting the effective functioning of such markets. The 'public forum' doctrine, however, requires the government in some cases to make public facilities available for persons wanting to express themselves.").

128. 307 U.S. 496 (1939) (plurality).

129. 167 U.S. 43 (1897).

. . . to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe."[130] Accordingly, prior to the Supreme Court's adoption of the public forum doctrine, the government as private property owner enjoyed unfettered discretion to restrict speech on its property, free from any First Amendment scrutiny.

In *Hague v. CIO*, the Supreme Court rejected the approach articulated in *Davis* and held that the government did not enjoy the same unfettered discretion as a private property owner to regulate speech on its property.[131] Rather, the Court imposed on the government the requirement that it accord the widest possible latitude to speech within property that constituted a "public forum" such as public parks, sidewalks, and streets.[132] These public forums are the places in which individuals are guaranteed not just the right but the meaningful opportunity to express themselves. Accordingly, under the public forum doctrine, the government serves as the guarantor of citizens' free speech rights.

Not all government-owned property enjoys public forum status. Property such as offices within government-owned office buildings, state prisons, and the like are not held open by the government for members of the public for expressive purposes.[133] But, within government-owned property that is deemed a "public forum," all speakers are permitted to express themselves on whatever viewpoints and whatever subjects they choose (as long as those subjects fall within the general parameters of speech for which the forum was designated).[134] It is within these public forums that speakers enjoy the fullest and broadest First Amendment protection. Thus, within public forums, the government must permit all manner of speech within the scope of the First Amendment's protection, regardless of the speakers' viewpoint or the content of such speech.[135]

Government restrictions on speech within such forums are also subject to the strictest judicial scrutiny. Accordingly, the ability to express oneself within a public forum—where regulation of the viewpoint or content of

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130. *Id.* at 47.

131. 307 U.S. at 514-16.

132. *Id.*

133. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

134. As I explain later, within a designated public forum devoted to particular subjects, however, the government may impose restrictions limiting expression to the particular subject matter(s) for which the forum is designated. *See* text accompanying notes 167-70.

135. *See Perry*, 460 U.S. at 45.

speech is substantially prohibited[136]—is among the most important components of the First Amendment's protection for free speech. As Stephen Gey explains:

> The public forum doctrine . . . derives from the most basic mythological image of free speech: an agitated but eloquent speaker standing on a soap box at Speakers' Corner, railing against injustices committed by the government, whose agents are powerless to keep the audience from hearing the speaker's damning word. . . . .
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> . . . [T]he essential reality grasped by the public forum doctrine remains as valid today as it was when thousands of Socialists packed into Union Square in the early days of [the twentieth] century to hang on every word of great progressive orators such as Eugene Debs. The larger reality behind the myth of the debate on the public street-corner is that every culture must have venues in which citizens can confront each other's ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized into factions that not only cannot come to agreement about the Common Good, but also will not even know enough about other subcultures within the society to engage effectively in the deal-making and horse-trading that is the key to every modern manifestation of democratic government.[137]

Thus, while private property owners enjoy unfettered discretion to regulate or censor speech on any grounds whatsoever, under the public forum doc-

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136. *Id.*

137. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538-39 (1998). The availability of centrally-located forums in which individuals can express themselves and where members of the general public are—willingly or unwillingly—exposed to such expression has been central to freedom of expression, and to democratic self-government, from time immemorial. The Supreme Court emphasized in *Hague* that

> [S]treets and parks . . . 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.

307 U.S. 496, 515 (1939) (Roberts, J., plurality). Because of the important function that places such as streets and parks have served in facilitating the exchange of ideas and expression in democracies, the public forum doctrine imposes upon the government the obligation to preserve such places for free expression and communication.

trine, government actors are substantially restrained in their ability to regulate speech within their "property" when that property constitutes a public forum.

In sum, in its foundational public forum decisions, the Supreme Court made clear that streets, sidewalks, parks, and similar places that are open to the public and conducive to open and free expression are to be dedicated to the public as forums for individuals to exercise their free speech rights. In real space, the requirement imposed upon the government to preserve such places for free and open expression serves as a critical safeguard of First Amendment rights. Absent the public forum doctrine, individuals would be restricted to expressing themselves on their own private property or on property owned by others only if they could convince these other property owners to permit such speech on their property.

The existence of public forums ameliorates the effect of economic disparities in property ownership upon individuals' right to free speech. Along these lines, the Supreme Court has demonstrated special solicitude in its public forum jurisprudence for the free speech rights of poorly-financed speakers and causes.[138] The public forum doctrine imposes upon the government the obligation to facilitate and subsidize the speech of poorly-financed speakers, by granting them an effective forum from which to express themselves.[139]

Given that property in real space generally consists of a mix of public and private forums, and given that most places in the United States contain centrally-located public forums like public streets and parks, in real space all speakers—however poorly financed or unpopular their cause—are guaranteed an effective, centrally-located forum from which to express their views and to reach a broad general audience. Accordingly, the mandate that the government dedicate such centrally-located public places to the public for free speech purposes provides a crucial safety valve for free expression. By granting poorly-financed and unpropertied speakers access to centrally located public property, public forums enable individuals to express themselves effectively to broad audiences.

The required existence of public forums advances free speech interests in another important manner. By granting speakers access to interstitial public forums—such as streets and sidewalks located adjacent to private

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138. *See* Molly S. Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. (forthcoming 2005).

139. Professor Jack Balkin has elucidated the subsidization function of the public forum doctrine. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 400.

property—public forums enable individuals effectively to target specific private property owners. Interstitial public forums serve a different purpose than centrally-located public forums like parks. Interstitial public forums enable individuals to target specific private property owners by providing a forum from which individuals can address the precise targets of their speech.[140] For example, individuals who wish to criticize a company's employment practices are ensured the right under the public forum doctrine to protest on the public streets and sidewalks adjacent to that company's headquarters. Absent such interstitial public forums, individuals could not effectively criticize private property owners because the targeted entities would refuse to allow speech critical of them on or near their property. Given the characteristics of our real space landscape, individuals accessing private property must generally pass through interstitial public forums and along the way may be subject to hearing speech that they might otherwise choose to avoid. The existence of interstitial public forums requires listeners to be confronted with expression that they might otherwise choose to avoid and prevents individuals from exercising perfect control over which expression will reach them.[141] If an individual chooses to shop at a non-union grocery store, and desires to insulate herself from criticisms of the store's employment practices, for example, the existence of interstitial public forums requires that the individual be confronted with such speech nonetheless.[142]

In short, public forums (and public ownership of property, the prerequisite for public forums) serve important roles in facilitating freedom of expression in real space. The existence of publicly-owned property and the scrutiny imposed on regulations of speech within such property are critical to the protection of First Amendment rights.

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140. *See generally* Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 151-52 (1998) (discussing the difference between "general access" and "specific access" public forums and advocating the creation of "sidewalks in cyberspace" so as to "enable ordinary citizens to engage one another as they move between the places where they conduct their affairs").

141. Professor Cass Sunstein, for one, has criticized the use of the Internet to tailor and control all the information an individual receives. *See* CASS SUNSTEIN, REPUBLIC.COM 3 (2001) (explaining that, with the advent of advanced Internet search and filtering capabilities, one will "need not come across topics and views that one has not sought out . . . and will be able to see exactly what one wants to see, no more and no less").

142. *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

2. Categorization of Forums

Although the justifications for public forums and the role public forums play in our democratic system are compelling and straightforward, the development of the public forum doctrine has become quite complex in recent years. Since the inception of this doctrine, the Supreme Court has rendered the doctrine intricate, complex, and rather convoluted. While this Article primarily analyzes the roles that so-called traditional public forums like streets, sidewalks, and parks serve within our system of democratic self-government, a brief foray into the Court's complex, trifurcated analysis of government-owned forums may prove helpful. This case law breaks out forums into the following three categories: (1) traditional public forums; (2) designated public forums; and (3) non-public forums.

"Traditional" public forums consist of streets, sidewalks, parks, and other places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[143] "Designated public forums" consist of public property that has not "immemorially" been used as a forum for expression, but which the government has explicitly opened and designated as a place for expressive activity by the public.[144] The government may choose, for example, to open up property within a public school,[145] university meeting facilities[146] or municipal theaters,[147] as forums for expression generally or for expression on certain designated subjects. Within a limited-purpose designated public forum, once the government has defined the subject matter limitations of the forum, regulation of such property is subject to the same limitations as those governing a traditional public forum.[148] Thus, both within traditional public forums and designated public forums, individuals enjoy their most robust rights of free expression. Government restrictions on speech within such public forums are subject to the most stringent scrutiny under the First Amendment such that no speech restrictions will be upheld unless they serve compelling government interests and are the least restrictive means of restricting such speech.

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143. Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., plurality).

144. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

145. City of Madison Joint Sch. Dist. v. Wisc. Employment Relations Comm'n, 429 U.S. 167 (1976).

146. Widmar v. Vincent, 454 U.S. 263 (1981).

147. S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

148. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

The third category of publicly-owned forums is non-public forums: places like military bases, jail grounds, and federal workplaces, that the government owns but which it has not opened up for expressive activity on the part of the public.[149] Furthermore, the Supreme Court has made clear that, to constitute a public forum, the place in which speech occurs need not be an actual physical place. Rather, public forums may also include virtual forums, like funding and solicitation schemes,[150] the airwaves,[151] and cable television.[152]

The classification of a forum into one type of forum or another is all but dispositive of the First Amendment challenge. If a forum is deemed to fall within the traditional or designated public forum category, courts will apply strict scrutiny to content-based regulations of speech within the forum and will almost certainly strike down such regulations. Regulations of speech within a non-public forum, on the other hand, are subject to reduced scrutiny and will most likely withstand constitutional challenge. How courts classify speech forums on the Internet thus becomes a critical factor in the extension of First Amendment protections to speech in cyberspace.

IV. COURTS' REFUSAL TO SUBJECT PUBLIC INTERNET ACTORS TO STRINGENT FIRST AMENDMENT STANDARDS

Public forums embody the government's guarantee that citizens will enjoy meaningful free speech rights. Yet, as we have also seen, the vast majority of speech forums in cyberspace are privately owned and privately regulated, with the consequence that virtually no public forums exist, and speech regulations within private forums are immune from First Amendment scrutiny. A small fraction of Internet forums for speech, however, are government-owned. One might suppose that such publicly-owned Internet spaces would be deemed public forums: places where individuals could enjoy their free speech rights most fully and the constitutional guarantee of free expression could be rendered meaningful.

In several recent challenges to speech regulations imposed by government within public Internet spaces, however, courts—including the Su-

149. *Perry* , 460 U.S. at 46.

150. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

151. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

152. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

preme Court—have concluded that such spaces are not public forums and that therefore governmental regulation of speech within these forums are immune from meaningful First Amendment scrutiny. Most notably, in *United States v. American Library Ass'n*,[153] the Supreme Court held that Internet access provided by public libraries did not constitute a public forum, and that speech restrictions imposed within such forums were therefore immune from meaningful First Amendment scrutiny.

In *American Library Ass'n*, plaintiffs challenged the constitutionality of the Children's Internet Protection Act (CIPA), which required that all public libraries that provide Internet access to their patrons must impose software filters upon such access, or else forgo substantial federal funding.[154] CIPA makes the use of software filters by public libraries and schools a condition on their receipt of two kinds of federal subsidies: grants under the Library Services and Technology Act (LSTA)[155] and "E-rate" discounts for Internet access and support under the Telecommunications Act.[156] To receive LSTA funds or E-rate discounts, CIPA essentially requires public libraries and schools to certify that they are using "technology protection measures" that prevent patrons from accessing visual depictions that are "obscene," "child pornography," or in the case of minors, "harmful to minors."[157] While CIPA's scheme allows library officials under certain circumstances to disable software filters for certain patrons engaged in bona fide research or other lawful purposes, the disabling of such filters on computers used by minors is prohibited if the library or school receives E-rate discounts.[158] In challenging CIPA's constitutional-

153. 539 U.S. 194 (2003) (plurality).

154. *Id.*

155. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d. 401 (E.D. Pa.) (three-judge court) [hereinafter *Am. Library Ass'n I*], *rev'd*, 539 U.S. 194 (2003) (plurality).

156. *See id.* at 408.

157. *Id.* at 407.

158. Thus, in order to receive E-rate discounts, libraries and schools must certify that, during any use of Internet-accessible computers by minors (those 16 and under), *id.* at 406, filtering technology is being used to block access to material that is obscene, child pornography, or deemed "harmful to minors." While the terms "obscene" and "child pornography" are given their (constitutionally acceptable) standard meaning, CIPA defines material that is "harmful to minors" as

> any picture, image, graphic image file, or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals;

ity, the American Library Association claimed that the required software filters imposed unconstitutional restrictions on their patrons' access to protected speech.

To understand the speech restrictions at issue in CIPA, it is important to understand the mechanics of software filtering.[159] Software filtering programs generally operate by comparing website addresses that a user wishes to access against a "blacklist." A typical filtering software program operates by examining various parts of an Internet address, or URL, against this internal blacklist to see if the URL is forbidden.[160] Prohibited sites may also be compared against separate exception lists or "whitelists." Some types of filtering software can be set so that everything not prohibited is permitted (blacklist only) or only that which is explicitly allowed is permitted (whitelist only). The software can also be designed to operate via some combination of blacklists and whitelists, with one list overriding another.[161]

The default blacklists and whitelists used by filtering software programs are created by those who design such software and constitute a substantial portion of the programs' value to consumers. As such, these lists are typically protected as trade secrets. Although the library may choose to configure the filtering software to filter out certain pre-defined categories of websites (such as "Adult/Sexually Explicit"), the library has no way of knowing the criteria used by the software developers to select which websites fall into this category, nor which websites will actually be found to fall within this category. Thus, a library implementing a filtering software program has no way of knowing which websites will actually be rendered inaccessible by the filtering software program.

> and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

Pub. L. No. 106-554 § 1721(c), 114 Stat. 2763A-335 (2000) (codified at 47 U.S.C. § 254(h)(7)(G) (2000)). With respect to adults' use of Internet-accessible computers, CIPA provides that a library official is permitted to "disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose." 47 U.S.C. § 254(h)(5)(D). However, CIPA's amendments to the E-rate program do not permit libraries or schools to disable filters to enable bona fide research or other lawful use for minors. 47 U.S.C. § 254(h)(5)(A). CIPA's amendments to the Library Services and Technology Act (LSTA) condition funding under the LSTA upon parallel restrictions. 47 U.S.C. § 254(h)(5)(F).

159. My discussion of software filtering follows closely that provided by filtering experts Seth Finkelstein and Lee Tien in their extremely lucid article. Seth Finkelstein & Lee Tien, *Blacklisting Bytes*, *in* FILTERS & FREEDOM 2.0 (Electronic Privacy Info. Ctr. eds., 2001).

160. *Id.* at 67.

161. *Id.* at 67-68.

The constitutional challenge to CIPA was first heard by a special three-judge panel, which struck down the statute after a thorough analysis of the application of the public forum doctrine to the circumstances presented by this case. The court explained that under the public forum doctrine, "the extent to which the First Amendment permits the government to restrict speech on its own property depends on the character of the forum the government has created."[162] The threshold determination was whether libraries' provision of Internet access constituted a traditional public forum, a designated public forum of some type, or a non-public forum.[163] Because the category of traditional public forums appears to be limited to streets, sidewalks, public parks, and other such public places that have "immemorially been held in trust for the use of the public" for expressive purposes,[164] the court concluded that libraries' provision of Internet access did not fall within this category.

The court was then required to determine whether libraries' provision of Internet access constituted a "designated public forum," in which case the speech restrictions would be subject to strict First Amendment scrutiny, or a non-public forum, in which case strict scrutiny would not apply. The court distinguished libraries' provision of Internet access from other types of non-public forums (including military bases, jail grounds, and the federal workplace)[165] and found that the purpose of a public library's provision of Internet access is "for use by the public . . . for expressive activity, namely, the dissemination and receipt by the public of a wide range of information."[166] Accordingly, the court concluded that the government's provision of Internet access in a public library constituted a designated public forum.[167]

The court next considered the level of First Amendment scrutiny that was applicable to the speech regulations CIPA imposed within this designated public forum. It explained that if a very narrow range of speech was facilitated in the first place within the designated limited-purpose public forum at issue, then the government's restrictions of speech within such a forum would be accorded substantial deference.[168] As the Supreme Court

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162. *Am. Library Ass'n I*, 201 F. Supp. 2d at 454.

163. *See supra* Part III.B.2.

164. *Am. Library Ass'n I*, 201 F. Supp. at 454-55.

165. *Id.* at 457.

166. *Id.*

167. *See also* Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998) (holding that government's provision of Internet access in a public library constitutes a designated public forum).

168. *Am. Library Ass'n I*, 201 F. Supp. 2d at 458.

explained by way of example on the related subject of government-subsidized speech, "[w]hen Congress established the National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to encourage competing lines of political philosophy such as communism and fascism."[169] Rather, only speech that was within the scope for which the forum was designated was permitted within that forum, and speech that fell outside of this designated range could be constitutionally excluded by the government. Conversely, the broader the range of speech the government facilitates within a designated public forum, the less deference the First Amendment accords to the government's content-based restrictions on the speech within that forum. Thus, "where the government creates a designated public forum to facilitate private speech representing a diverse range of viewpoints, the government's decision selectively to single out particular viewpoints for exclusion is subject to strict scrutiny."[170] The court concluded that libraries' provision of Internet access fell within the latter category of designated public forums—that is, those in which a broad range of expression was permitted and, concomitantly, those in which the government's speech regulations are subject to strict First Amendment scrutiny.

Adverting to the Supreme Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*,[171] the district court in *American Library Ass'n* explained:

> [T]he more widely the state opens a forum for members of the public to speak on a variety of subjects and viewpoints, the more vulnerable is the state's decision selectively to exclude certain speech on the basis of its disfavored content, as such exclusions distort the marketplace of ideas that the state has created in establishing the forum.
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> . . . [W]here the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored. . . .
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> . . . [T]o the extent that the government creates a public forum expressly designed to facilitate the dissemination of private speech, opens the forum to any member of the public to speak on virtually any topic, and then selectively targets certain speech for exclusion based on its content, the government is singling out

169. *Id.* (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)).
170. *Id.* at 460.
171. 515 U.S. 819 (1995).

> speech in a manner that . . . [is subject to] heightened First Amendment scrutiny. . . .[172]

Applying the *Rosenberger* Court's analysis, the court explained that libraries' provision of Internet access to their patrons, unlike their provision of print materials, enables their patrons to receive speech on a "virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable."[173] Because the libraries' provision of Internet access enables patrons to receive speech on a broad and diverse range of topics, the restrictions on sexually-themed expression imposed by mandatory software filters were subject to strict First Amendment scrutiny. Accordingly, the court found that the use of filtering software mandated by CIPA erroneously blocked a huge amount of speech that is protected by the First Amendment,[174] estimating the number of web pages erroneously blocked to be "at least tens of thousands."[175] The court observed that the government's expert himself found that popular filtering software packages overblock at rates between 6% and 15%,[176] that such programs inevitably overblock harmless Internet content, which adults and minors have a First Amendment right to access, and underblock obscene and child pornographic content, which neither adults nor minors have a First Amendment right to access.[177] The court also found that the provisions of CIPA permitting libraries to unblock wrongfully blocked sites upon the request of an adult[178] (or in some cases a minor)[179] who is engaged in "bona fide research or other lawful purpose[s]" were insufficient to render the statute constitutional.[180] The court concluded that, "[g]iven the substantial amount

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172. *Am. Library Ass'n I*, 201 F. Supp. 2d at 461.

173. *Id.* at 462.

174. *See id.* at 406.

175. *Id.* at 449; *see id.* at 475 (finding that filtering software programs "block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography").

176. *Id.* at 475-76. That is to say, the expert concluded that between 6% and 15% of blocked web pages contained no content that met even the software's own definitions of sexually-themed content, let alone the constitutional definitions of obscenity or child pornography. *Id.*

177. *Id.* at 475.

178. *Id.* at 484.

179. *Id.* at 485.

180. *Id.*; *see* 47 U.S.C. § 254(h)(6)(D) (2000). In addition to the constitutional infirmities inherent in refusing to permit libraries to unblock wrongly blocked sites for minors, the court found that many adult patrons were "reluctant or unwilling to ask librari-

of constitutionally protected speech blocked by the filters studied," CIPA failed strict scrutiny because it was not narrowly tailored to advance its compelling government interests.[181]

The Supreme Court reversed, holding that the restrictions CIPA required were not unconstitutional, primarily based on the Court's conclusion that these speech restrictions were not imposed within a public forum.[182] Chief Justice Rehnquist, who authored a plurality opinion in which Justices O'Connor, Scalia, and Thomas joined, held that the provision of Internet access in public libraries did not constitute a public forum and that strict scrutiny was therefore not the proper level of scrutiny for analyzing CIPA's constitutionality.[183] Rehnquist first explained that Internet access in public libraries did not constitute a "traditional public forum" within the constitutional meaning of that term because "this resource—which did not exist until quite recently—has not immemorially been held in trust for the use of the public [or], time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions."[184]

Rehnquist then explained that Internet access in public libraries did not constitute a "designated public forum," a forum with respect to which "the government [has made] an affirmative choice to open up its property for

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ans to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic." *Am. Library Ass'n I*, 201 F. Supp. 2d at 427. Because libraries were not required under CIPA's scheme to permit Internet users to make anonymous unblocking requests, the vast majority of patrons confronted with wrongfully blocked sites apparently decline to request the unblocking of such sites. *See Am. Library Ass'n I*, 201 F. Supp. 2d at 427. Furthermore, the court found that even where unblocking requests were submitted and acted upon, the unblocking process took too long—between twenty-four hours and one week. *Am. Library Ass'n I*, 201 F. Supp. 2d at 487. The court concluded that:

> The content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed.

Am. Library Ass'n I, 201 F. Supp. 2d at 489.

181. *Am. Library Ass'n I*, 201 F. Supp. 2d at 476.

182. *Am. Library Ass'n II*, 539 U.S. 194, 205 (2003) (plurality).

183. *See id.* at 216-18 (Rehnquist, C.J., plurality). On this point, Rehnquist explained that "[w]e require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies." *Id.* at 207 n.3 (Rehnquist, C.J., plurality).

184. *Id.* at 205 (Rehnquist, C.J., plurality) (internal quotation marks omitted) (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992)).

use as a public forum."[185] The Chief Justice found, with little elaboration, that "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, [but] . . . to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[186] He observed further that "even if appellees had proffered more persuasive evidence that public libraries intended to create a forum for speech by connecting to the Internet, we would hesitate to import the public forum doctrine . . . wholesale into the context of the Internet."[187] Having concluded that libraries' provision of Internet access did not constitute a public forum, Rehnquist analyzed CIPA's constitutionality under a framework of reduced scrutiny, and merely inquired into whether libraries' use of filtering software was "reasonable," which he readily found that it was.[188]

Despite the fact that the libraries themselves contended that they had provided Internet access to their patrons to facilitate communication and exchange on a "virtually unlimited number of topics," Rehnquist declined to extend public forum status (either traditional or designated) to the Internet forum at issue and accordingly declined to extend meaningful scrutiny to the government's content-based exclusions from that forum effected by the statutorily mandated filters. The Court's refusal to accord public forum status to libraries' provision of Internet access establishes a dangerous, speech-restrictive precedent for the Internet. In this rare instance of public ownership and control over Internet speech forums, in which the public entity acknowledges that it created the forum to facilitate the exchange of ideas and communication among members of the public on a virtually unlimited number of topics, the Court nonetheless held that no public forum was involved and that speech restrictions within the forum were therefore immune from meaningful First Amendment scrutiny. If no pub-

185. *Id.* at 206 (Rehnquist, C.J., plurality).

186. *Id.* (Rehnquist, C.J., plurality).

187. *Id.* at 207 n.3 (Rehnquist, C.J., plurality) (internal quotation marks omitted).

188. *Id.* at 208 (Rehnquist, C.J., plurality) ("[I]t is entirely reasonable for public libraries to . . . exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality."). This holding, in turn, was the predicate for the Supreme Court's ultimate holding that CIPA was a valid exercise of Congress's spending power and imposed no unconstitutional conditions upon libraries: "Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries." *Id.* at 214 (Rehnquist, C.J., plurality).

lic forum for expression is found in these circumstances, it is unlikely that a public forum will ever be recognized in the context of the Internet.

The *American Library Ass'n* decision is not the first (and likely will not be the last) to refuse to extend meaningful First Amendment scrutiny to speech restrictions imposed by the government on government-owned computers. Several other cases involving government ownership of Internet-accessible computers have declined to subject speech restrictions within such forums to strict judicial scrutiny. The case of *Urofsky v. Gilmore* also involved government censorship of First Amendment protected speech on government-owned computers.[189] The challenged speech restrictions originated in 1998 when the Commonwealth of Virginia grew concerned about the use of public computers by its employees to access sexually-themed expression on the Internet. In an attempt to remedy this perceived problem, the legislature enacted the "Restrictions on State Employee Access to Information Infrastructure Act."[190] Several Virginia public college and university professors challenged the constitutionality of the Act,[191] which restricted the ability of hundreds of thousands of Virginia public employees to access sexually explicit (but constitutionally protected) content on computers that were owned or leased by the State. Under the statute, public employees were prohibited from accessing (without securing advanced written agency approval) sexually explicit content on the Internet, where "sexually explicit" was defined quite broadly to include, inter alia, "any . . . visual representation . . . depicting . . . a lewd exhibition of nudity."[192]

In ruling on the professors' First Amendment challenge, the district court held that the statute unconstitutionally restricted "the ability of more than 101,000 public employees at all levels of state government to read, research, and discuss sexually explicit topics within their areas of expertise, [including] inquiry and debate by academics in the fields of art, literature, medicine, psychology, anthropology, and law."[193] The statute further restricted the rights of members of the public to receive and benefit from the speech of state employees on matters within their expertise.

Because the Act restricted public employees' free speech rights, the court was required by First Amendment precedent to conduct its analysis under the special test crafted by the Supreme Court for evaluating the First

189. 216 F.3d 401 (4th Cir. 2000) (en banc).

190. Urofsky v. Allen, 995 F. Supp. 634, 635 (E.D. Va. 1998), *rev'd sub nom.* Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc).

191. *Id.*

192. *Id.* at 635.

193. *Id.* at 638.

Amendment rights of public employees.[194] Because the government enjoys greater latitude to restrict the speech of its employees versus speech of members of the public generally, this test applies deferential scrutiny to restrictions of public employees' work-related expression. Under this test, set forth in the *Connick*[195] and *Pickering*[196] cases, courts must first consider whether the speech at issue is that of the employee as a private citizen speaking on a matter of public concern. If so, then the court must consider whether the employee's interest in her First Amendment expression outweighs her employer's interest in regulating such speech for the appropriate operation of the workplace. If, however, the court determines that the speech at issue is not that of an employee qua private citizen speaking on a matter of public concern, then the state, as employer, may regulate the speech without infringing any First Amendment protection.[197]

Applying this test, the district court held that the speech of Virginia state employees on sexually explicit topics includes speech on matters of public concern that is entitled to the fullest First Amendment protection under the required *Connick*/*Pickering* analysis. The court then held that the Act's restrictions were not properly tailored to address the harm that the government allegedly aimed to protect, and therefore that the Act was fatally over- and under-inclusive.[198]

The Fourth Circuit disagreed. Sitting en banc, the Fourth Circuit concluded, with little discussion, that the restricted speech at issue did not touch upon a matter of public concern and that the state, as employer, could therefore regulate it without infringing any First Amendment protection.[199] The Fourth Circuit held that the statute "does not affect speech by [the professors] in their capacity as private citizens speaking on matters of public concern [and that therefore] it does not infringe the First Amendment rights of state employees."[200] In short, even though the state-imposed restrictions on the Internet expression at issue in *Urofsky* applied to state-owned property, and even though we would expect that the First Amendment would have a meaningful role to play in holding in check such government restrictions on speech, the Fourth Circuit applied reduced scrutiny to the challenged speech restrictions.

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194. *Id.* at 636.
195. Connick v. Myers, 461 U.S. 138 (1983).
196. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
197. *Urofsky*, 995 F. Supp. at 638.
198. *Id.* at 638-41.
199. Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (en banc).
200. *Id.* at 409.

Because private Internet actors—who have the power to regulate and suppress a vast amount of Internet speech—are not subject to any First Amendment scrutiny (much less the stringent scrutiny imposed under the public forum doctrine), and because after *American Library Ass'n*, even public owners of Internet speech forums will likely not be held to meaningful First Amendment scrutiny under the public forum doctrine, restrictions of Internet speech are essentially no longer constitutionally prohibited. Thus, the important functions served by the First Amendment generally—and by the public forum doctrine in particular—are in danger of being seriously eroded in cyberspace.

V. RESTORING THE VALUES OF THE PUBLIC FORUM WITHIN CYBERSPACE

The evisceration of meaningful First Amendment protection for Internet speech and the absence of public forums in cyberspace have important consequences. First, individuals who seek to express unpopular views will find it increasingly difficult to do so, absent general public forums within which viewpoint discrimination is constitutionally prohibited. Second, individuals who seek to criticize others will find it more difficult to do so, absent the functional equivalent of interstitial public forums on the Internet.

A. Restoring the Values of the General Public Forum Within Cyberspace

In real space, general public forums provide effective forums for individuals who wish to reach broad general audiences but who otherwise would be unable to compete within the marketplace for speech. Such speakers' inability (absent the government's intervention via the public forum doctrine) may arise from their lack of financial means or from the unpopularity of their message. Because the government, under the public forum doctrine, has an obligation to open up certain of its property for the use and benefit of all speakers, without regard to the content or viewpoint of their message, such speakers are guaranteed an opportunity to express their message effectively in real space.

Some might contend that no such subsidization of unpopular or poorly-financed speech is called for in cyberspace. Certainly, as discussed above, it is less expensive to express oneself through an Internet discussion forum, website, blog, or e-mail message than it is to engage in such expression in real space. And in the past, the Internet has generally been a hospitable forum for a broad range of expression. Yet, as private Internet actors become less hospitable to unpopular speech in their Internet places

and modify their terms of use to prohibit communication on unpopular (but First Amendment protected) subjects, it will become more difficult for individuals to secure the same type of speech protection in cyberspace that they enjoy in real space. Similarly, as public Internet actors—like public libraries throughout the United States—become less hospitable to unpopular speech within the Internet forums they control, the obstacles confronted by speakers of unpopular messages on the Internet will become formidable. To remedy this problem, we need to introduce spaces in which individuals' free speech is constitutionally protected instead of leaving the protection of free speech at the mercy of private speech regulators. Doing so will require either the courts or the legislature to act.

Several aspects of First Amendment doctrine must be reconceptualized in order for courts to introduce public forum values into cyberspace. First, courts need to reconceptualize the "traditional government function" component of the state action doctrine. Second, courts need to reconceptualize their analysis of "traditional public forums" within public forum jurisprudence. Because current tests require "traditional" actions and places in order for First Amendment scrutiny to apply to speech regulations, Internet-related actions and places *ipso facto* will be found to fall outside the protection of these doctrines. No action undertaken by a private entity regulating Internet speech will ever be deemed the performance of a "traditional state action" sufficient to subject such regulation to First Amendment scrutiny under the state action doctrine as it is currently conceived. No expressive forum on the Internet will ever be deemed a "traditional" public forum—one that has "immemorially" and "time out of mind" been held in trust for the use of the public for expressive purposes—under the public forum doctrine as it is currently conceived. As a result, speech in such forums will not enjoy the full measure of protection under the First Amendment. Courts should therefore rework the "traditionality" component of these First Amendment doctrines to incorporate a functional analysis of the places in which speech, and speech regulations, occur.

1. Reconceptualizing the "Traditionality" Component

Courts, notably the Supreme Court in *American Library Ass'n*, have interpreted the public forum analysis too parsimoniously and have placed undue emphasis on whether the forum at issue is a traditional one that has "immemorially" or "time out of mind" been used for purposes of assembly, communication of thoughts between citizens, and discussion of public questions.[201] This emphasis on traditionality and history led Chief Justice

201. *See Am. Library Ass'n II*, 539 U.S. 194, 204-05 (2003) (plurality).

Rehnquist to conclude in *American Library Ass'n* that libraries' provision of Internet access did not constitute a public forum because "this resource . . . did not exist until quite recently."[202]

Courts should reject such a simplistic analysis of public forums, which forecloses by its very terms the recognition of an Internet forum as a public forum for First Amendment purposes. Instead, courts should undertake a functional analysis to determine whether such places are currently widely used for purposes of "communication of thoughts between citizens, and discussing public questions"[203] and serve the same speech-facilitating purposes served in real space by public sidewalks and parks. The lower court's three-judge panel in *American Library Ass'n* is instructive in setting forth a reinterpretation of this aspect of the public forum analysis:

> Regulation of speech in streets, sidewalks, and parks is subject to the highest scrutiny not simply by virtue of history and tradition, but also because the speech-facilitating character of sidewalks and parks makes them distinctly deserving of First Amendment protection. Many of these same speech-promoting features of the traditional public forum appear in public libraries' provision of Internet access.
>
> . . . Just as important as the openness of a forum to listeners is its openness to speakers. Parks and sidewalks are paradigmatic loci of First Amendment values in large part because they permit speakers to communicate with a wide audience at low cost. . . . Similarly, given the existence of message boards and free Web hosting services, a speaker can, via the Internet, address the public, including patrons of public libraries, for little more than the cost of Internet access. . . .
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> . . . .
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> . . . A faithful translation of First Amendment values from the context of traditional public fora such as sidewalks and parks to the distinctly non-traditional public forum of Internet access in public libraries requires that content-based restrictions on Internet access in public libraries be subject to the same exacting standards of First Amendment scrutiny as content-based restrictions on speech in traditional public fora such as sidewalks, town squares, and parks.[204]

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202. *Id.* at 205 (Rehnquist, C.J., plurality).

203. *Id.* (Rehnquist, C.J., plurality).

204. *Am. Library Ass'n I*, 201 F. Supp. 2d 401, 466-70 (E.D. Pa. 2002) (three-judge panel), *rev'd*, 539 U.S. 194 (2003) (plurality).

In translating the values underlying the public forum doctrine from real space to cyberspace, courts should follow the careful analysis of the three-judge panel in *American Library Ass'n* and look to the speech-facilitating functions served by Internet forums.

Furthermore, the original justification for treating only historical and traditional public forums as public forums is no longer persuasive. In 1939, the Supreme Court initially justified its creation of the public forum doctrine in *Hague* by adverting to the property law doctrine of prescriptive easements (akin to the doctrine of adverse possession), through which trespassers can acquire the right to use another's property if they have so used the property continuously for an extended period of time. Because the *Hague* Court was seeking a justification for removing from the government its plenary rights as a property owner, the Court relied on well-established property law doctrine as a justification for so doing.[205] The Court explained that since citizens have used streets, sidewalks, and public parks "time out of mind" for expressive purposes, they have in effect secured an easement by prescription to continue to do so. While the prescriptive easement justification, and its reliance on long-term historic use of public property by private citizens, may have been important in ushering in the public forum doctrine, subsequent courts and theorists have abandoned the prescriptive easements justification underlying this prong of the public forum analysis.[206] And, as the three-judge panel in *American Library Ass'n* explained, it is more conceptually coherent to look to the present purpose and function of the subject forum within our system of democratic self-government, rather than the historical uses of such a forum, in determining the level of scrutiny to apply to restrictions of speech within it.

It might be countered that the "traditional public forum" prong of the public forum analysis need not be translated to account for new mediums of expression because, after all, there is a second prong—the "designated public forum" prong—of the public forum analysis. Even if a forum is not deemed a "traditional public forum," it can still be deemed a "designated public forum" and thereby secure full First Amendment protection as a

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205. Interestingly, however, individuals generally cannot acquire rights via prescription with respect to government-owned property. *See, e.g.*, JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 221 (3d ed. 2002).

206. *Cf.* Harry Kalven, *The Concept of a Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1; Geoffrey Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (criticizing the Court's focus on historical uses of places like parks and streets, "instead of forthrightly recognizing that access to public property for speech purposes is essential to effective exercise of First Amendment rights").

public forum. The designated public forum prong of the analysis, however, is similarly fraught with conceptual difficulties. To be deemed a designated public forum, the government must have made "an affirmative choice to open up its property for use as a public forum."[207] However, the relevant government decision maker knows that once it makes such an affirmative choice, any regulations that it imposes upon speech within that forum will be subject to strict—and likely fatal—scrutiny. Certainly, in every case in which plaintiffs challenge such regulations and claim that such regulations are subject to strict scrutiny because they are imposed within a designated public forum, the government will defend by claiming that it has not made the requisite affirmative choice to designate the forum as a public forum. Accordingly, the "traditional public forum" prong of the public forum analysis remains an important one that should be updated and translated to enable the First Amendment to protect speech within new communications mediums.

2. Following the Lead of State Courts

If the Supreme Court persists in its parsimonious interpretation of the state action doctrine and declines to subject private actors' speech regulations to scrutiny under the First Amendment, state courts should interpret their state constitutions' free speech clauses to extend to private speech regulations. Precedential support for speech-protective interpretations of state constitutions exists in contexts similar to those presented by widespread private regulation of Internet speech. In *Robins v. Pruneyard Shopping Center*,[208] the California Supreme Court interpreted the free speech protections in the California Constitution to apply to regulations imposed by private entities. In *Pruneyard*, several California high school students sought to protest a United Nations' resolution opposing "Zionism" by distributing leaflets in a large privately-owned shopping mall located in California.[209] The case arose subsequent to *Lloyd Corp. v. Tanner*, in which the United States Supreme Court held that students protesting the Vietnam War had no First Amendment right to do so within the confines of a privately-owned shopping center.[210] While recognizing that the First Amendment, per the Supreme Court's decision in *Lloyd*, did not grant the high school activists the right to so protest, the California Supreme Court held that the California Constitution's free speech clause granted the pro-

207. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

208. 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980).

209. *Id.* at 342.

210. 407 U.S. 551 (1972).

testors this right—notwithstanding the fact that their protest took place on private property.[211] In weighing the shopping center's right to exclude individuals from its property against the free speech rights of the protestors, the California Court interpreted its state constitution to hold that the protestors' free speech rights outweighed the mall's private property rights.[212]

The shopping mall challenged the California Supreme Court's decision in the United States Supreme Court, claiming that the ruling deprived it of its property without just compensation in violation of the Fifth and Fourteenth Amendments.[213] The Supreme Court rejected this challenge, holding that California enjoyed the power to interpret its state constitution's free speech provisions more broadly than the First Amendment (and that so doing did not constitute a taking of property without just compensation). The Court explained, "[o]ur reasoning in *Lloyd* does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[214] The United States Supreme Court also rejected the shopping mall's arguments that the state court's holding violated the mall's First Amendment rights by forcing it to use its property as a forum for the speech of others with which it disagrees. The Court explained, first, that the protestors' speech was unlikely to be identified with the shopping mall, and that, in any case, the shopping mall could simply post a notice disclaiming any sponsorship of the protestors' speech.[215]

The California Supreme Court further championed the primacy of free speech rights over property rights in its recent decision in *Intel Corp. v. Hamidi*.[216] While not explicitly relying on Hamidi's free speech rights, the California Supreme Court declined to construe Intel's property rights so broadly as to include the right to prohibit Hamidi from sending e-mails via Intel's e-mail server. The court recognized that extending property rights so broadly would hamper open Internet communication and impose costs on society, and implicitly privileged the right to free expression over private property rights in this context.

In short, states are free to define their citizens' free speech rights under their state constitutions to incorporate individuals' right to express themselves on private property, even if their First Amendment rights do not

211. *Id.* at 346.
212. *Id.*
213. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
214. *Id.* at 81.
215. *Id.* at 86-88.
216. 79 P.3d 296 (Cal. 2003).

extend so far. And such an extension of free speech rights does not violate the property or free speech rights of the owner of the property on which such speech occurs. Following California's lead, states should interpret their own constitutions' free speech clauses to grant individuals the right to express themselves in privately-owned forums for expression that are the functional equivalent of traditional public forums.[217]

States, through their courts or legislatures, should also explicitly define public forums to include Internet forums that are generally open to the public for free speech purposes, even where such forums are privately owned. Once again, California is illustrative. Concerned with what it found to be a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech,"[218] the California legislature enacted a statute aimed at deterring SLAPP suits—"strategic lawsuits against public participation."[219] This statute grants individuals the right to speak and petition freely within "public forums"—whether such forums are publicly or privately owned—free from harassing and meritless lawsuits aimed at chilling such speech. In particular, California's anti-SLAPP statute grants individuals the right to "dismiss at an early stage non-meritorious litigation meant to chill the valid exercise of constitutional rights of freedom of speech and petition in connection with a public issue."[220] The statute defines an "act in furtherance of a person's right of petition or free speech" to include "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."[221] In interpreting this language, a California court of appeal recently found that privately-owned Internet

217. Several other states have followed California's lead in extending free speech rights to private property in real space. *See, e.g.*, Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass. 1983) (finding that the state constitution's free speech guarantee extends to political speech within private shopping centers); N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994) (holding that the state constitution's guarantee extends to political and "societal" speech within private shopping centers); Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108 (Wash. 1981) (finding that the state constitution's free speech guarantee extends to political speech within private shopping centers).

218. Bidbay.com, Inc. v. Spry, No. B160126, 2003 Cal. App. Unpub. LEXIS 2057 (Ct. App. Mar. 4, 2003).

219. CAL. CODE CIV. PROC. § 425.16 (Supp. 2004). In passing this legislation, California joined a number of other states that have also passed anti-SLAPP laws. *See* California Anti-SLAPP Project, *available at* http://www.casp.net/menstate.html (last visited Aug. 2, 2004) (listing states that have passed and are considering passage of anti-SLAPP legislation).

220. CAL. CODE CIV. PROC. § 425.16.

221. *Id.* § 425.16(e)(3).

chat rooms and message boards constitute public forums where they are "open to the public or to a large segment of the interested community."[222] California's anti-SLAPP statute thereby grants individuals the right to speak freely on matters of public importance in Internet forums, whether publicly or privately owned, free from reprisals in the form of meritless lawsuits.

States should further grant individuals the right to speak freely on matters of public importance within Internet forums, free from reprisal in the form of lawsuits designed to chill the exercise of their free speech rights or in the form of self-help censorship efforts by Internet actors. With the technological tools available to Internet actors to censor speech with the click of a mouse, technological measures restricting speech present an even greater harm to speakers than lawsuits designed to chill their speech. States should define public forums to include privately-owned Internet forums for expression that are open to the public and should protect individuals' right to express themselves on matters of public interest, broadly construed, within such forums.

In short, the Supreme Court should meaningfully translate First Amendment values for twenty-first century communications media by reconceptualizing the "traditionality" requirements in First Amendment doctrine. Courts should analyze the current function of the forum at issue within our system of democratic self-government, rather than the historic uses of such forums. If the Supreme Court persists in its unwillingness to translate First Amendment values to render the right to free expression meaningful in the new technological age, then states should interpret their own constitutions' free speech clauses—or, in the alternative, enact legislation—to provide individuals with meaningful rights to express themselves on the Internet.

B. Restoring the Values of the Interstitial Public Forum Within Cyberspace

The existence of interstitial public forums in real space provides speakers with forums from which to target effectively their speech toward adjacently-located, privately-owned establishments. Such forums enhance the ability of speakers to target their speech effectively toward their desired audience. Because real space is generally characterized by the intermingling of publicly and privately-owned property, public property adjacent to private property can be used as a launching point from which to

222. *Bidbay.com*, 2003 Cal. App. Unpub. LEXIS 2057, at *14-*15.

target private entities, through expression such as picketing, boycotting, and general protesting.

In translating this function of public forums into the Internet realm, we must first consider the appropriate cyberspace analogue to the real space characteristic of adjacency.[223] In real space, interstitial public forums are valuable because, as a result of their physical proximity to privately-owned property, they are particularly well-suited forums from which to target privately owned property. Because such physical proximity or adjacency has no direct correlate in the Internet realm, we must look to other features that enable individuals effectively to target their speech at private entities.

One important way in which protestors target the objects of their criticism in cyberspace is by the use of search terms within Internet search engines. Internet speakers who desire to criticize an entity can utilize search terms to capture the attention of Internet users generally seeking information about such entities. Just as a real space protestor might protest on the sidewalk adjacent to General Motors (GM) to launch a targeted attack on GM and to reach individuals seeking out GM in real space, so too a cyberspace protestor might choose to launch a targeted attack on GM by utilzing a user's search for GM to reach individuals seeking out GM in cyberspace. The cyberprotestor may do this in several ways: by using "General Motors" (or other General Motors trademarks) as one of the metatags for her critical website; by using a GM-related mark as a keyword in her advertisement criticizing GM; or by using GM as part of the domain name associated with her critical website.

In recent years, powerful business owners have wielded trademark law in their efforts to silence critics who have made use of the business owners' trademarks to reach audiences seeking information on such business owners. Although the case law in this area is not uniform, it is clear that trademark owners have been far more successful in shutting down such cyberprotestors than they have been in silencing those who launch protests against them from adjacent interstitial public forms in real space. First, trademark owners have successfully wielded trademark law to prohibit critics from using their trademarks as keywords or metatags to drive interested searchers toward information critical of the trademark owners.[224] Under the recently-enshrined doctrine of "initial interest confusion,"

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223. *See* Zatz, *supra* note 140, at 185-86.

224. *See, e.g.*, J.K. Harris & Co. v. Kassel, 62 U.S.P.Q.2d (BNA) 1926 (N.D. Cal 2002) (holding that direct competitor's use of plaintiff business's trade name in its metatags leading to website with unfavorable information about plaintiff constituted actionable initial interest confusion).

courts have held that even where individuals seeking out information about a business are not confused by such critical sites, the sites nonetheless infringe the marks of the business owner.[225] Second, trademark owners have successfully wielded trademark law[226] (as well as the Uniform Dispute Resolution Policy promulgated by ICANN[227]) to prohibit critics from using their trademarks as part of domain names for their critical websites.

To translate the values of interstitial public forums into the Internet context, courts should limit trademark owners' relief to circumstances in which defendants' websites result in actual confusion. Courts should also recognize and protect protestors' First Amendment right to use others' marks in critical, non-confusing contexts on the Internet. Indeed, surmounting the public-private distinction to protect critics' First Amendment rights is not as formidable a hurdle as in the context of general public forums. Although it might be supposed that critics have no First Amendment right to use others' marks (which are the private intellectual property of these entities) to advance their criticisms, courts have in fact long recognized such a right. The case of *L.L. Bean, Inc. v. Drake Publishers*[228] is illustrative. In that case, L.L. Bean sought to wield infringement and dilution causes of action to silence expressive speech incorporating its trademark. High Society, a commercial, adult-oriented magazine, published an article parodying the popular L.L. Bean sportswear catalog, under the title "L.L. Beam's Back-to-School-Sex-Catalog." The article included variations on L.L. Bean's trademarks and featured pictures of nude models in sexually explicit positions using products similar to those offered in L.L. Bean catalogs and described the products in a "crudely humorous fashion."[229] L.L. Bean, not amused, sued the publisher of High Society for trademark infringement and dilution. The district court, while rejecting

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225. *Id.* at 1929.

226. *See, e.g.*, PETA v. Doughney, 263 F.3d 359 (4th Cir. 2001) (holding that defendant's website, peta.org, which parodied People for the Ethical Treatment of Animals (PETA), infringed PETA's trademark).

227. *See* Burlington Coat Factory Warehouse Corp. v. Smartsoft, L.L.C., WIPO Case No. D2001-1792 (WIPO Arbitration & Mediation Ctr. Mar. 1, 2000) (concluding that the use of domain names burlingtonmurderfactory.com, burlingtonkillfactory.com, burlingtondeathfactory.com, burlingtonblood-factory.com, and burlingtonholocaust.com for website critical of Burlington Coat Factory was in violation of ICANN's Uniform Domain Name Dispute Resolution Policy and thus could be enjoined), *available at* http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1792.html. *See generally* Nunziato, *supra* note 105 (criticizing policy's effect on critical expression).

228. 811 F.2d 26 (1st Cir. 1987).

229. *Id.* at 27.

L.L. Bean's infringement cause of action due to lack of confusion, sustained L.L. Bean's cause of action for trademark dilution, finding that High Society's parodic use of the L.L. Bean mark within this context diluted the mark's distinctive qualities.[230] The court enjoined publication of the article.[231]

High Society appealed, claiming that the district court's order enjoining publication of the article violated its right to freedom of expression and asserting that it enjoyed a First Amendment right to use the Bean trademark for expressive purposes. The First Circuit agreed, holding that although this case involved a suit between two private entities, the lower court's interpretation of the state anti-dilution law to enjoin defendant's speech constituted state action restricting expression in violation of the First Amendment.[232]

In the Internet context of metatags, key words, and domain names, courts should follow the rationale of the L.L. Bean court and protect critics' First Amendment right to use the trademarks of another in a non-confusing manner to direct targeted criticism at the owner of such marks. Critical websites or advertisements that incorporate their target's trademarks as metatags or keywords or as part of their domain names should be immune from trademark liability.

In translating the speech-protective functions of interstitial public forums from real space to cyberspace, courts (and arbitrators) should grant broad protection to critical speech on the Internet, even where such critical speech incorporates the property of the entity subject to criticism and even where such critical speech occurs in expressive forums owned and regulated by private actors. Because actual, publicly-owned interstitial public forums do not exist in cyberspace, the functions served by such forums—namely, the facilitation of effective criticism and protest of "adjacent" private property owners—must be protected by courts by according wide berth to the use of others' intellectual property in cyberspace for purposes of criticism.

VI. CONCLUSION

Contrary to the widely-held perception of the Internet as one great public forum for individuals to express themselves, the Internet has become transformed by privatization into a collection of largely privately-owned and privately-regulated places. Because the relevant "property"

230. *Id.*
231. *Id.*
232. *Id.* at 33.

that makes up the Internet is overwhelmingly privately owned, the restrictions on speech imposed by the property owners within such places have been held to be outside the purview of the First Amendment. With the Supreme Court's contraction of the state action doctrine in recent years, private regulations of speech within expressive Internet forums have become essentially immune from scrutiny under the First Amendment. Furthermore, even government restrictions on speech within expressive Internet forums have become immune from meaningful First Amendment scrutiny.

In this Article, I have argued that the death of public places in cyberspace brings with it the erosion of important First Amendment values. Most importantly, the death of public places in cyberspace heralds the death of public forums in cyberspace—the most important vehicle for the protection of free speech in real space. With the death of public forums in cyberspace, long-standing constitutional protections for speech are in danger of being seriously eroded in cyberspace. Courts and legislatures must act to remedy this problem and faithfully translate First Amendment values to render the values meaningful in the new technological age.