

PURPOSE AND EFFECTS: VIEWPOINT-DISCRIMINATORY CLOSURE OF A DESIGNATED PUBLIC FORUM

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In early 2010, amidst a series of racially charged incidents on campus, the student government president at the University of California at San Diego revoked funding to all student media organizations in response to controversial speech on the student-run television station. It is well established that once the government has opened a forum, including a “metaphysical” forum constituted by government funding for private speech, it may not discriminate based on the viewpoints expressed within that forum. However, it has not been clearly established whether the government may close such a forum for a viewpoint-discriminatory purpose. This Note argues that courts should hold viewpoint-discriminatory closures unconstitutional because: (1) government action motivated by the desire to silence a particular viewpoint is inconsistent with core principles underlying the First Amendment, and (2) even facially neutral actions motivated by illicit purposes tend to have unconstitutional discriminatory effects.

INTRODUCTION

In February 2010, the University of California at San Diego (“UCSD”) was engulfed in controversy surrounding a ghetto-themed student party called the “Compton Cookout,” which was thrown to mock Black History month.¹ Not only were many UCSD students and faculty offended by the party’s theme, civil rights leaders and state and local political leaders spoke out against the party as well.² During the week following the party, an editor of *The Koala*,³ a controversial UCSD student “humor” newspaper, broadcast a

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1. Larry Gordon, *College “Ghetto” Party is Criticized*, L.A. TIMES, Feb. 18, 2010, at A41, available at 2010 WLNR 3384037.

2. *Id.*; U.C. San Diego Freezes Funds for 33 Media Groups, Dissolves Student TV, Threatens to Punish Students for Protected Speech, FIRE (Feb. 23, 2010), <http://thefire.org/article/11597.html>.

3. THE KOALA ONLINE, <http://www.thekoala.org> (last visited Jan. 28, 2011).

defense of the party on UCSD's Student Run Television ("SRTV").⁴ In the broadcast, the editor used the phrase "ungrateful n****ers," further fueling racial tensions on campus.⁵

In reaction to the broadcast, UCSD student government president Ustav Gupta took immediate action to shut down SRTV, explaining that "[w]e will only open [SRTV] again when we can be sure that such hateful content can never be aired again on our student funded TV station."⁶ Mr. Gupta also unilaterally froze funding for the other thirty-two UCSD student media organizations,⁷ including fashion magazines, online academic journals, and various newspapers.⁸ These media organizations were all funded by student fees collected by the university, and funding was allocated by a student council headed by Mr. Gupta.⁹ In halting funding for these organizations, Mr. Gupta stated that he was compelled to act because *The Koala* editor's expression was "fracturing . . . the student body on an issue."¹⁰ Approximately three weeks later, the council voted to end the moratorium on funding for student media, and made no changes to the current policy governing student media.¹¹

Although UCSD's funding freeze was not a permanent end to funding student media organizations,¹² Mr. Gupta's actions raise an important question: may a government actor shut down a designated public forum for a viewpoint-discriminatory purpose? The Supreme Court has never decided this question, and the few lower courts that have done so have answered in different ways. This

4. Daniel Reimold, *Racial Slur Leads to Student Media Funding Freeze at UCSD*, COLL. MEDIA MATTERS (Feb. 24, 2010), <http://collegemediainmatters.com/2010/02/24/racial-slur-leads-to-student-media-funding-freeze-at-ucsd/>.

5. *Id.*

6. *U.C. San Diego Freezes Funds*, *supra* note 2.

7. *Id.*

8. Student Organization Media Final Allocations—Spring 2010, ASSOCIATED STUDENTS (Apr. 15, 2010), <http://as.ucsd.edu/finance/docs/FinalAllocMediawi10.04-15-10-16-22-28.pdf>.

9. Angela Chen, *Funds Restored to Student Press*, THE UCSD GUARDIAN (Mar. 11, 2010), <http://www.ucsdguardian.org/news/funds-restored-to-student-press/>.

10. *U.C. San Diego Freezes Funds*, *supra* note 2; *see also* UCSD TV Show Mocking Blacks Sparks Freeze, CBS 8 (Feb. 23, 2010), <http://www.cbs8.com/Global/story.asp?S=12030737>.

11. *Victory for Freedom of the Press: UC San Diego Ends Unconstitutional Funding Freeze*, FIRE (Mar. 11, 2010), <http://www.thefire.org/article/11648.html>.

12. The temporary nature of the funding freeze at UCSD should not bear on its constitutionality. *See, e.g.,* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (noting that the temporary nature of a prior restraint does not reduce the severity of the constitutional injury); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring) ("[E]very moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.").

Note argues that closing a designated public forum for a viewpoint-discriminatory purpose is unconstitutional.

Part I examines the case law surrounding public forums and viewpoint discrimination and surveys federal court decisions discussing the circumstances under which the government may close a designated public forum. Part II argues that courts should hold unconstitutional government closure of these forums for viewpoint-discriminatory purposes. First, Part II.A reasons that the illicit purpose of viewpoint discrimination alone renders such closures unconstitutional because this restriction of speech is inconsistent with core principles underlying the First Amendment. Part II.B argues that the propensity for discriminatory purposes to cause discriminatory effects provides an additional basis for finding viewpoint-discriminatory closures unconstitutional. This section also discusses the inadequacy of using an effects-based standard or looking to the facial neutrality of a closure to determine the closure's effects. Finally, Part III addresses concerns raised by some scholars and judges regarding the relevance, in the First Amendment context, of government purpose to an action's constitutionality, demonstrating that the Supreme Court has repeatedly shown its willingness and competence to hold unconstitutional government actions motivated by discriminatory purposes.

I. THE LAW SURROUNDING CLOSURE OF A DESIGNATED PUBLIC FORUM

Over the last seventy years, federal courts have developed an extensive body of case law concerning the permissibility, under the First Amendment, of regulating speech in public spaces. When government-owned property is held open for private expression, it is termed a "public forum," and the government must adhere to particular principles of neutrality in regulating expression within the forum. While *content* restrictions are constitutionally permissible in certain public forums, the government must refrain from discriminating against speakers or speech based on the *viewpoints* expressed within all public forums. However, the Supreme Court has not yet addressed the issue of whether government actors must adhere to this principle of viewpoint neutrality when they completely close a public forum to private expression. The lower courts that have addressed the question are split in their responses.

A. An Overview of Public Forum Doctrine

In *Hague v. CIO*, the U.S. Supreme Court first recognized the existence of quintessential public forums, those public spaces 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.”¹³ The most common examples are parks and streets. Within a traditional public forum, the government may impose only reasonable, content-neutral time, place, and manner restrictions on speech.¹⁴ For example, a reasonable time restriction would be closing a city street to demonstrations during rush hour, if the presence of a demonstration would place an intolerable burden on traffic.¹⁵ The city could not, however, close the street to all demonstrations all the time.¹⁶ The latter restriction would not be neutral with regard to the content of speech in the forum, since a particular type of speech, demonstrations, would be targeted.

In addition to traditional public forums, the government may open its other properties for expressive use by part or all of the public, thereby creating “designated public for[ums]” subject to the same limitations on speech regulation as in traditional public forums.¹⁷ For example, a school may designate a particular bulletin board as available for postings by any member of the public, creating a designated public forum in that space.

A designated public forum is considered a “limited public forum” when it is established for a particular purpose.¹⁸ In a limited public forum, restrictions on use by certain speakers or for discussion of certain subjects are permitted in furtherance of that purpose.¹⁹ For example, a school bulletin board may be limited to postings related to a particular academic subject taught at the school, say history. In that case, the bulletin board would be considered not just a designated public forum, but specifically a limited public forum. While content restrictions may be imposed

13. 307 U.S. 496, 515 (1939).

14. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

15. *Id.* at 115–16 (citing *Cox v. Louisiana*, 379 U.S. 536, 554 (1965)).

16. *See id.* at 116 (“Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment.”).

17. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (recognizing that designated public forums come in both limited and unlimited varieties).

18. *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006) (“[The] limited public forum is a subset of the designated public forum.” (quoting *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004))).

19. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

on access to a limited public forum, viewpoint discrimination, considered an especially egregious form of content discrimination, is never permitted in any type of public forum.²⁰ Thus the school in the bulletin board scenario could not deny use of the bulletin board to those who wish to post historical information about the Civil War from a pro-secessionist perspective, while allowing its use to those who post similar information from a pro-Union perspective.

The principles governing regulation of speech in limited public forums are not limited to physical forums, but have also been applied where the forum exists “more in a metaphysical than in a spatial or geographic sense.”²¹ In *Rosenberger v. Rector and Visitors of the University of Virginia*, a variety of student extracurricular activities related to the university’s educational purpose were funded by student fees paid into the university student activities fund.²² The Court analogized the student activities fund to a limited public forum, holding that the university’s refusal to pay for the publication of a student newspaper because of its religious editorial perspective is impermissible viewpoint discrimination.²³

In *Board of Regents of the University of Wisconsin System v. Southworth*, the Court again applied forum analysis principles by analogy to a public university student activities fund.²⁴ In *Southworth*, the Court held that the First Amendment permitted the university to charge its students a mandatory activity fee to fund various expressive activities.²⁵ However, in regard to a referendum process through which the student body apparently voted on whether particular student organizations received funding, the Court indicated that the government cannot constitutionally subject access to a designated public forum to a vote if doing so substitutes majority determinations for viewpoint neutrality.²⁶

20. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995). As an example of the distinction between a content-based restriction and a viewpoint-based restriction, the Court distinguished religion as a subject matter (content) from a religious perspective on other subject matters, such as child-rearing (viewpoint). *Id.* at 830–31.

21. *Id.* at 830.

22. *Id.* at 823–24.

23. *Id.* at 830–31.

24. 529 U.S. 217, 229–30 (2000). The *Southworth* Court did not discuss whether the student activities fund was analogous to an “unlimited” designated public forum or to a limited public forum. However, that distinction is irrelevant to the analysis, since viewpoint neutrality is required in all public forums. See *infra* Part II.B.

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

26. *Id.* at 235.

B. Viewpoint Neutrality

Under the First Amendment, the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”²⁷ This principle arises “from the most basic values underlying the First Amendment,” including “the right to think, believe, and speak freely, the fostering of intellectual and spiritual growth, and the free exchange of ideas necessary to a properly functioning democracy.”²⁸ Nearly seventy years ago, in *West Virginia State Board of Education v. Barnette*, Justice Jackson proclaimed, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²⁹ Later Supreme Court decisions reinforced this sentiment, condemning regulations “aimed at the suppression of dangerous ideas,”³⁰ “proscribing speech . . . because of disapproval of the ideas expressed,”³¹ or “driv[ing] certain ideas or viewpoints from the marketplace.”³²

The government discriminates based on viewpoint when it regulates speech based upon agreement or disagreement with the particular position on an issue the speaker wishes to express.³³ Viewpoint-discriminatory regulation carries a heavy presumption of unconstitutionality. The Court has typically described viewpoint discrimination as flatly prohibited, rather than calling for a height-

27. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

28. Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100 (1996-1997) (citing, among others, “C. EDWIN BAKER, FREE SPEECH AND HUMAN LIBERTY (1989) (positing that the First Amendment’s primary purpose is advancement of human liberty); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (‘[Free expression] carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge . . .’); . . . LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-22, at 785-89 (1978) (‘[T]he Constitution’s most majestic guarantee’ (free speech) cannot be understood ‘in purely instrumental or purposive terms.’); . . . Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 676-94 (1991) (defining First Amendment values to include pursuit of truth, proper functioning of a democracy, fulfillment of human potential, self-expression, tolerance, and encouragement of dissent)”).

29. 319 U.S. 624, 642 (1943).

30. *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

31. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

32. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

33. See, e.g., *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 176 (1976).

ened level of scrutiny.³⁴ As the Fourth Circuit stated, “[t]he ban on viewpoint discrimination is a constant.”³⁵ However, courts addressing the issue of whether a regulation is viewpoint-discriminatory have most often considered cases in which a regulation explicitly favored one side or another.³⁶ The outcome is less certain when the government enacts a regulation that is neutral on its face (i.e., does not explicitly target a specific viewpoint) but which was nevertheless enacted for a viewpoint-discriminatory purpose (i.e., is implicitly aimed at silencing a particular viewpoint).

C. Closing a Designated Public Forum

The Supreme Court has never decided the issue of when the government may close a designated public forum altogether. In particular, it has never addressed whether a state actor may close a forum to everyone in order to silence a certain viewpoint. The few lower federal courts that have addressed the issue have responded in various ways. Some courts have held or otherwise stated that the government may not close a designated or traditional public forum for a viewpoint-discriminatory purpose. Others have stated or implied that a government actor may close a public forum regardless of its purpose for doing so.

34. See, e.g., *R.A.V.*, 505 U.S. at 391 (“The First Amendment *does not permit* St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.” (emphasis added)); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he first amendment *forbids* the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” (emphasis added)); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that the government *has no power* to restrict expression because of its message, its ideas, its subject matter, or its content.” (emphasis added)).

35. *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006). But note that there are certain pockets of contemporary First Amendment jurisprudence in which regulation that could be characterized as viewpoint-discriminatory is permitted. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”).

36. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 76 (2003) (“Only if the language of the law itself reflects the viewpoint-or content-discriminatory reasons underlying its enactment does the Court apply heightened scrutiny.”).

1. Supreme Court Dicta on Closing Public Forums

In two cases, the Court has noted in dicta that the government has the authority to close a traditional and designated public forum, but the Court has never specifically discussed the circumstances under which the government may do so. In *Perry Education Association v. Perry Local Educators' Association*, the Court stated that “[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”³⁷ In *International Society for Krishna Consciousness v. Lee*, Justice Kennedy stated in his concurrence that, “[i]n some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.”³⁸ However, in neither *Perry* nor *Lee* did the Court proclaim that the government may close public forums “whenever it wants,” despite the willingness of some lower courts to infer such authority.³⁹ While, in a temporal sense, the government is “not required to indefinitely” maintain a forum and “always retains authority” to close the forum, it does not necessarily follow that the government may do so whatever its motivation.

2. Cases Supporting the Proposition That the Government May Not Close a Designated Public Forum for a Viewpoint-Discriminatory Purpose

Three panels of federal judges, from two U.S. Circuit Courts of Appeal, have stated in dicta that the government may not close a designated or traditional public forum for a viewpoint-discriminatory or content-discriminatory purpose. Note that, since viewpoint discrimination is a form of content discrimination,⁴⁰ a finding that content-discriminatory closure of a designated public forum is unconstitutional necessarily indicates that viewpoint-discriminatory closure is also unconstitutional.⁴¹

37. 460 U.S. 37, 46 (1983).

38. 505 U.S. 672, 699 (1992) (Kennedy, J., concurring).

39. *See, e.g., Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004).

40. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (“Viewpoint discrimination is . . . an egregious form of content discrimination.”).

41. However, a finding that content-discriminatory closure of a designated public forum is *constitutional* would not necessarily mean that a viewpoint-discriminatory closure is similarly constitutional. A court may uphold a content-discriminatory closure by reasoning that since the government may impose a *content* restriction on a designated public forum (thereby converting it into a limited public forum, a type of designated public forum, as

In *Ridley v. Massachusetts Bay Transportation Authority*, a non-profit corporation and a church brought suit against a public transportation authority when it refused to display the plaintiffs' advertisements.⁴² The First Circuit found that the transportation authority's advertising program was not a designated public forum, but stated that, even if the defendant had previously intended "to maintain a designated public forum, it would be free to decide *in good faith* to close the forum at any time."⁴³ Similarly, in *United States v. Griefen*, the Ninth Circuit stated that "[i]f a closure of a public forum is for a valid rather than a disguised impermissible purpose, the potential for self-imposed or government censorship . . . does not exist;"⁴⁴ closing a portion of national forest to allow for road construction was not an impermissible purpose.⁴⁵

Citing *Griefen*, the Ninth Circuit upheld the closure of parts of downtown Seattle in *Menotti v. City of Seattle* after finding no impermissible motive.⁴⁶ The *Menotti* Court found that the city's purpose in issuing an emergency order prohibiting access to portions of downtown during an international trade conference was restoration and maintenance of civic order.⁴⁷ The court held that this purpose was content and viewpoint neutral.⁴⁸ While the court's inquiry into purpose may have been less than searching or its conception of viewpoint-neutrality unduly limited,⁴⁹ the court nonetheless explicitly recognized that reasons for closing a public forum must be viewpoint-neutral.

In addition to these three circuit court cases, several federal district courts have indicated that there are limits on the government's ability to close public forums. *ACT-Up v. Walp*, decided by the U.S. District Court for the Middle District of Pennsylvania, is the only published decision as of this writing in which a court has actually held unconstitutional the closure of a designated public forum due to the government's content-discriminatory purpose.⁵⁰

discussed in Part I.A), it may instead close the forum for a content-based reason. *See, e.g., infra* Part I.C.3, (discussing cases relying on similar reasoning). But the same court might hold that a *viewpoint*-discriminatory closure is unconstitutional because the government may never impose a viewpoint restriction on any public forum. *See infra* Part II.B.

42. 390 F.3d 65 (1st Cir. 2004).

43. *Id.* at 77.

44. 200 F.3d 1256, 1262 (9th Cir. 2000).

45. *Id.* at 1260–62.

46. 409 F.3d 1113 (9th Cir. 2005).

47. *Id.* at 1129.

48. *Id.* at 1128–30.

49. This has proven to be a controversial decision. *See, e.g.,* Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587 (2007).

50. 755 F. Supp. 1281 (M.D. Pa. 1991).

Together with all visitors, the plaintiff, an AIDS-awareness organization, was denied access to the gallery of the Pennsylvania House of Representatives during the governor's State of the Commonwealth address.⁵¹ Given the State's admission that it had closed the gallery specifically to prevent the plaintiff access,⁵² the court applied strict scrutiny to hold the forum closure an impermissible content-based restriction.⁵³

More recently, in the highly publicized *McMillen v. Itawamba County School District*, the U.S. District Court for the Northern District of Mississippi cited *ACT-Up* in finding a substantial likelihood of a First Amendment violation.⁵⁴ After denying an openly gay student's requests to wear a tuxedo and bring a same-sex date to her high school prom—and receiving a demand letter from the American Civil Liberties Union—the school cancelled the prom.⁵⁵ The court recognized that the student “intended to communicate a message by wearing a tuxedo and to express her identity through attending prom with a same-sex date,” and found that the motive behind the school's cancellation of prom was to deny the student the chance to communicate that message at the school-sponsored event.⁵⁶ The court held that the student's First Amendment rights had therefore been violated.⁵⁷ Although the court did not expressly categorize the prom as a designated public forum, the court's reliance on *ACT-Up* and the substantially similar facts make *McMillen* relevant to the discussion of impermissibly closing public forums.

Two other district courts have stated in dicta that closing public forums with viewpoint-discriminatory purpose is impermissible. First, in *Rhames v. City of Biddeford*, a provider of programming for public access television sued a municipality, claiming that a temporary shutdown violated his First Amendment rights.⁵⁸ The U.S. District Court for the District of Maine deemed it unnecessary to decide whether to apply public forum doctrine, but stated that if it were to apply the doctrine, it would treat the public-access station as a designated public forum.⁵⁹ The court went on to state that the

51. *Id.* at 1284. The gallery was deemed a limited public forum. *Id.* at 1287–89. As noted in Part I.A, *supra*, a limited public forum is a type of designated public forum. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

52. *ACT-Up v. Walp*, 755 F. Supp. 1281, 1289 (M.D. Pa. 1991).

53. *Id.*

54. *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (order denying preliminary injunction).

55. *Id.* at 701–02.

56. *Id.* at 705.

57. *Id.*

58. 204 F. Supp. 2d 45 (D. Me. 2002).

59. *Id.* at 52.

government could not temporarily or permanently shut down a designated public forum for viewpoint-discriminatory reasons.⁶⁰ Deciding that the plaintiff had not shown any likelihood of proving viewpoint-discriminatory motive, the court denied the plaintiff's request for a temporary restraining order.⁶¹

Second, in *Initiative and Referendum Institute v. United States Postal Service*, the U.S. District Court for the District of Columbia granted summary judgment for the postal service, holding that even if post office property was a public forum, a regulation preventing groups from gathering petition signatures on postal service property was a reasonable time, place, or manner restriction.⁶² However, in an earlier decision between the parties, the court noted the impermissibility of closing a public forum for a discriminatory purpose: "The government may close a public forum that it has created by designation . . . so long as the reasons for closure are not content-based."⁶³

Finally, employing reasoning quite distinct from the other cases discussed in this section, the U.S. District Court for the Eastern District of Michigan has indicated that, while government purpose *alone* should not determine the permissibility of an action, impermissible effects resulting from an action motivated by an illicit purpose could render the action unconstitutional.⁶⁴ In *Thomason v. Jernigan*, the City of Ann Arbor vacated the public right of way in and around the cul-de-sac in front of a Planned Parenthood clinic.⁶⁵ Recognizing that it "should not engage in a search for the motives of legislators, but for an inevitable unconstitutional effect resulting from their actions," the court held that Ann Arbor's closure of the traditional public forum was an unconstitutional content-based regulation; anti-abortion protests were the "conduct

60. *Id.* at 53 ("It is true that a city should not be able to shut down a park or a bandshell temporarily so as to avoid a particular speech or a particular concert—that is not a viewpoint neutral measure and violates the First Amendment.")

61. *Id.* at 53–54. *See also id.* at 51 ("Certainly if Biddeford were to shut down the public access channel temporarily so as to stifle discussion of a particular current controversy, with plans to reopen the channel later after the controversy had subsided, or so as to stifle the particular speech of this plaintiff, that shutdown would be speaker and viewpoint censorship and would violate the First Amendment under any analysis.")

62. 297 F. Supp. 2d 143 (D.D.C. 2003). The D.C. Circuit reversed this grant of summary judgment for the Postal Service but did not address the issue of whether the regulation was a viewpoint-discriminatory closure of a public forum. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005).

63. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65, 73 (D.D.C. 2000).

64. *Thomason v. Jernigan*, 770 F. Supp. 1195, 1200 (E.D. Mich. 1991).

65. *Id.* at 1196.

and traffic problems” targeted by the city.⁶⁶ *Thomason* thus supports the proposition that content-or viewpoint-discriminatory closure of public forums is unconstitutional, at least to the extent the plaintiff can demonstrate an unconstitutional discriminatory effect.

3. Cases Supporting the Proposition That the Government May Close a Designated Public Forum for a Viewpoint-Discriminatory Purpose

Other federal courts have indicated that the government may close a designated public forum for a viewpoint-discriminatory purpose. Perhaps the best known of these cases are two in which a municipality or state closed a forum in order to prevent groups from putting up religious displays. In each case, the court held that refusing the display within the forum when it was open was unconstitutional, but nonetheless stated that the government may constitutionally shut down a public forum to prevent religious displays.

In *Chabad-Lubavitch of Georgia v. Miller*, Georgia denied the plaintiff permission to display a Chanukah menorah in the rotunda of the state capitol.⁶⁷ The State claimed that the First Amendment Establishment Clause required denying the request.⁶⁸ However, the Eleventh Circuit held that allowing the plaintiffs to display a menorah in the rotunda would not violate the Establishment Clause.⁶⁹ Furthermore, the court held that the State’s exclusion of the display was an impermissible content-based restriction on a designated public forum.⁷⁰ Nonetheless, the court noted that the State, fearing an Establishment Clause violation, could avoid the perception that it was endorsing religion by closing the forum altogether.⁷¹ Since refusal of the display was characterized as a content-based, rather than viewpoint-based, restriction *Miller* does not necessarily support the proposition that a designated public forum may be closed for a *viewpoint*-discriminatory reason. It is conceivable that the court could have held that viewpoint discrimination, as a more egregious form of content discrimination, is not a permissible reason for closing a public forum.⁷² However, given

66. *Id.* at 1200–01.

67. 5 F.3d 1383 (11th Cir. 1993).

68. *Id.* at 1385.

69. *Id.* at 1393.

70. *Id.* at 1394–95.

71. *Id.* at 1394.

72. *See supra* note 41.

the fine and sometimes blurry distinction between content- and viewpoint-discrimination, and the courts' propensity to view discrimination against religious speech as viewpoint discrimination,⁷³ *Miller* likely supports the constitutionality of viewpoint-discriminatory closures of public forums.

In *Grossbaum v. Indianapolis-Marion County Building Authority* ("*Grossbaum II*"), the defendant building authority revised one of its rules to prohibit all private displays in the lobby of the city-county building.⁷⁴ The Seventh Circuit held in a previous appeal that the building authority's prohibition of a menorah display "because of its religious perspective" violated the Free Speech Clause of the First Amendment.⁷⁵ Following that decision, the authority issued a new policy prohibiting all private displays, rather than prohibiting only religious ones.⁷⁶ In the second appeal, the Seventh Circuit held that the decision to close the forum was content-neutral, therefore viewpoint-neutral, and constitutionally permissible.⁷⁷ Although this particular forum was considered "nonpublic," the court went on to question whether motive was a germane inquiry even in decisions to close public forums,⁷⁸ indicating that a regulation that was facially neutral and had "some semblance of general applicability" would be considered content-neutral.⁷⁹

73. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993).

74. 100 F.3d 1287 (7th Cir. 1996).

75. *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1290 (7th Cir. 1996) (*Grossbaum II*) (citing *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995) (*Grossbaum I*)).

76. *Id.* at 1290–91.

77. *Id.* at 1299. The plaintiff had conceded for the purposes of its preliminary injunction motion that the lobby was a nonpublic forum. *Id.* at 1297.

78. *Id.* at 1298–99. For this argument, the Seventh Circuit relied on Justice Souter's concurring opinion in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 783–95 (1995) (Souter, J., concurring). See *Grossbaum II*, 100 F.3d at 1298–99. In that opinion, Justice Souter wrote that a State "could ban all unattended private displays in [the forum] if it so desired." *Capitol Square*, 515 U.S. at 783 (Souter, J., concurring). The Seventh Circuit's reliance on Justice Souter's concurring opinion, however, was misguided. First, Justice Souter did not clearly argue that the State could ban all private displays in direct retaliation against a particular group's expressive message. Second, even if Justice Souter did imply that such a retaliatory ban would be constitutionally permissible, it is not clear that "[e]ight members of the Court joined behind [this] proposition." *Grossbaum II*, 100 F.3d at 1298–99. Justice Scalia, writing for the majority in *Capitol Square* and cited by Justice Souter for support, merely noted that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum . . ." *Capitol Square*, 515 U.S. at 761 (citation omitted). Justice Scalia said nothing about closing a public forum to all unattended private displays in order to silence particular speakers.

79. *Grossbaum II*, 100 F.3d at 1298 n.10.

In a third case in this line, *DiLoreto v. Down Unified School District Board of Education*, the Ninth Circuit cited both *Miller* and *Grossbaum II* for the proposition that the government is free to close a limited public forum regardless of the circumstances.⁸⁰ In *DiLoreto*, the court held that a school board's refusal to accept for display on the fence of a baseball field an "advertisement" depicting the Ten Commandments, for fear of violating the Establishment Clause, was simply the result of a reasonable content restriction on a limited public forum.⁸¹ The court further held that the school board was not prohibited from closing the forum in response to the plaintiff's advertisement.⁸² The court's brief discussion of the closure indicates that it did not find inquiry into the government's purpose to be relevant where a forum is completely shut down.⁸³

There are two other more recent cases in which courts have addressed this issue. In *Santa Monica Food Not Bombs v. City of Santa Monica*, the Ninth Circuit dismissed as moot a challenge to an ordinance through which a city closed a designated public forum by limiting street banners to those put up by the city itself.⁸⁴ The plaintiff in *Santa Monica Food Not Bombs* had challenged a previous version of the city ordinance, which provided exceptions for some, but not all, private speech.⁸⁵ Little is known about the plaintiff's initial suit and the subsequent factual history. However, reading between the lines, it appears that the city revised the ordinance after that suit to close the forum to all private speech, in order to avoid having to let all viewpoints be represented in the forum.⁸⁶ The court cited Ninth Circuit precedent stating that the government may close a designated public forum "whenever it wants," and held that since the ordinance had been amended to complete-

80. 196 F.3d 958, 970 (9th Cir. 1999).

81. *Id.* at 969.

82. *Id.* at 970.

83. *Id.* ("Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion Accordingly, the fact that the District chose to close the forum rather than post Mr. DiLoreto's advertisement and risk further disruption or litigation does not constitute viewpoint discrimination.").

84. 450 F.3d 1022 (9th Cir. 2006).

85. *Id.* at 1031–32.

86. *Id.* ("As Food Not Bombs recognizes, the February 24, 2004 amendments to the street banner ordinance render the original challenge to that ordinance—premised on the distinctions drawn by providing exceptions for some private speech but not others—no longer viable. By precluding all private parties from putting up street banners and limiting such "bannering" to the City itself, the Council has now closed the designated public forum in which appellants sought to exercise their rights.").

ly close the designated public forum, the challenge was no longer viable.⁸⁷

That same year, the U.S. District Court for the District of Columbia decided *American Civil Liberties Union v. Mineta*.⁸⁸ In *Mineta*, the court held that the Washington Metropolitan Area Transit Authority (WMATA) could constitutionally close a designated public forum in order to refuse advertisements advocating legalization of marijuana, a restriction the court recognized as viewpoint-discriminatory.⁸⁹ The court specifically stated that viewpoint restrictions within a designated public forum are impermissible, but altogether closing the forum with a viewpoint-discriminatory purpose is permissible.⁹⁰

* * * * *

As this overview illustrates, the case law regarding the circumstances under which a designated public forum may be closed is conflicting and largely undeveloped. Some courts hold, or simply assume, that the government must act in good faith when closing a forum. Others find that the government's purpose is irrelevant and that closing a public forum is always permissible. Part II undertakes to resolve this doctrinal uncertainty. It concludes that closing a public forum for viewpoint-discriminatory reasons should always be impermissible.

II. PURPOSE AND EFFECTS

There are three principal ways in which government action might violate the Constitution.⁹¹ First, the government might

87. *Id.* (citing *Currier v. Potter*, 379 F.3d 716, 728 (2004)). In *Currier*, in dicta unrelated to the disposition of the case, the Ninth Circuit stated that the government could close designated public forums "whenever it wants," erroneously relying on *Perry Education Association v. Perry Local Educator's Association*. *Currier*, 379 F.3d at 728. See discussion of *Perry* in Part I.C.1, *infra*.

88. 319 F. Supp. 2d 69 (D.D.C. 2004).

89. *Id.* at 83.

90. *Id.* at 83 n.4 ("The question at issue here, however, is not whether WMATA can constitutionally prefer one viewpoint over another—the presumption is that it cannot—but whether WMATA can close itself as a designated public forum and thus constitutionally refuse to accept the advertisements in question by eliminating entire categories of advertisements. The answer is that it can."); see also *id.* at 82 ("So long as a designated public forum remains open, it is bound by the same standards as apply in a traditional public forum, but 'a State is not required to indefinitely retain the open character of the facility.'" (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983))).

91. See Michael N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 21 (2001); see also Charles Fried, *Types*, 14 CONST. COMMENT.

engage in *impermissible conduct* by taking an action specifically prohibited by the Constitution.⁹² For example, a state might deny criminal defendants the full benefits of a jury trial in violation of the Sixth Amendment.⁹³ Second, government action might result in *impermissible effects*.⁹⁴ For example, a municipal law might violate the Establishment Clause if it has the primary effect of promoting or inhibiting religion.⁹⁵ Finally, the government might act in furtherance of an *impermissible purpose*.⁹⁶ There are examples from many areas of constitutional doctrine that illustrate this point. Facially neutral statutes that have a disparate impact on a protected class provoke heightened scrutiny under equal-protection law only if they are adopted for the purpose of discriminating against the class.⁹⁷ A protectionist purpose is presumptively unconstitutional under the dormant Commerce Clause.⁹⁸ A woman's right to abort a nonviable fetus is violated by state action undertaken for the purpose of placing a substantial obstacle in her way.⁹⁹

A question remains regarding *why* we care about purpose in First Amendment free speech doctrine. We might care about purpose in and of itself. Under this theory, concern about purpose stems from our expectation that the government adopt a neutral attitude towards its citizens.¹⁰⁰ We might instead (or additionally) care about purpose because of "the predictable tendency of improperly motivated actions to have certain untoward effects."¹⁰¹ The sections that follow explore these theories, arguing that (1) viewpoint-discriminatory closure of a designated public forum is always unconstitutional because government restriction of speech motivated by an illicit purpose is inconsistent with core principles underlying the First Amendment, and (2) our interest in avoiding the unconstitutional effects of a regulation enacted with a view-

55 (1997); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 SUP. CT. REV. 95, 103 (1971). Of course, individual judges and academics differ with regard to how much significance they give to each type of violation. Some may argue that a particular type is irrelevant or cannot alone amount to a constitutional violation. Berman, *supra* at 22–29.

92. Berman, *supra* note 91, at 27–29.

93. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004).

94. Berman, *supra* note 91, at 22–23.

95. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

96. Berman, *supra* note 91, at 23–27.

97. *Washington v. Davis*, 426 U.S. 229 (1976).

98. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981); *City of Phila. v. New Jersey*, 437 U.S. 617, 627–28 (1978).

99. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

100. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 (1996).

101. *Id.*

point-discriminatory motive requires that courts inquire into government purpose even where a regulation, such as the closure of a forum, is facially neutral.

A. Illicit Purpose as a Constitutional Violation in and of Itself

The First Amendment's Free Speech Clause serves "the principle that the government must treat all persons with equal respect and concern."¹⁰² As Professor Geoffrey Stone asserts, "the concept of improper governmental motivation consists chiefly of the precept that the government may not restrict expression simply because it disagrees with the speaker's views."¹⁰³ According to Stone,

[A]ny effort of government to restrict speech because it contains a "false" or "bad" idea is inconsistent with the three basic first amendment assumptions: in the long run, the best test of truth is "the power of the thought to get itself accepted in the competition of the market"; in a self-governing system, the people, not the government, "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments"; and, in our constitutional system, the protection of free expression is designed to enhance personal growth, self-realization, and the development of individual autonomy.¹⁰⁴

Viewpoint-discriminatory closure of a designated public forum, no less than viewpoint discrimination within such a forum, undermines these core First Amendment principles. A government actor shutting down the marketplace of ideas (or a venue within the marketplace) to prevent disfavored speech demonstrates at least as much disrespect for the autonomy and capacity of the people to determine the merits of the disfavored idea as he would in excluding only that idea from the marketplace. If we, as a people, truly

102. *Id.* at 511.

103. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983).

104. *Id.* at 228. For additional arguments supporting the view that the Court has considered and should consider actions motivated by illicit purposes unconstitutional, see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

value the concept of viewpoint neutrality,¹⁰⁵ government actors seeking to prohibit ideas with which they disagree cannot be permitted to circumvent the proscription against viewpoint discrimination by making their speech prohibitions sweep more broadly. Therefore, courts, which already recognize the unconstitutionality of viewpoint discrimination within designated public forums, must not permit government actors to close such forums in order to prevent the dissemination of “bad” ideas.

B. Unconstitutional Effects Arising from Discriminatory Purposes

Beyond our concern about the neutral attitude we expect the government to adopt towards its citizens, we care about purpose in First Amendment free speech doctrine because when the government enacts even a facially neutral law with a bad purpose, there tend to be discriminatory effects. Courts may not always be able to discern these effects, particularly the large-scale effects, without inquiring into purpose.

1. The Effects of Closing a Designated Public Forum for a Viewpoint-Discriminatory Purpose

The closure of a public forum will typically be a facially neutral action. More often than not, the government will not close a forum by explicitly disfavoring a particular viewpoint. The closure of a public forum will also be generally applicable. That is, it will apply to all who are eligible to speak in the forum. Nonetheless, closing a forum with a discriminatory purpose can have numerous adverse effects on individual speakers, as well as a detrimental impact on the interchange of ideas within the wider community.

a. Widespread Effects

When a designated public forum is closed for a viewpoint-discriminatory purpose, all speakers participating in the forum lose their expressive opportunity. But the impact, over time and across forums, will be substantially greater on those expressing the disfavored viewpoints that motivated the forum closure. Forums in which only favored viewpoints are expressed will tend to remain

105. See *supra* Part I.B for a discussion of the widespread and long-standing recognition of viewpoint neutrality as reflective of the basic values underlying the First Amendment.

open, while forums in which disfavored viewpoints surface or predominate will be closed at a disproportionate rate. The net result of these closures will be felt not only by speakers possessing disfavored viewpoints, but by all of us, as our “marketplace of ideas” loses its diversity and richness.

It has long been recognized that the First Amendment, beyond protecting speakers, protects the rights of listeners as well. The Court has referred to a First Amendment right “to receive information and ideas,” and has acknowledged that freedom of speech “necessarily protects the right to receive.”¹⁰⁶ Furthermore, the Court and academics alike agree on the importance of the First Amendment’s protection of “unfettered interchange of ideas” to the democratic process.¹⁰⁷ The systematic disadvantaging of particular viewpoints is a clear violation of these principles.

Furthermore, discriminating against a viewpoint by closing a designated public forum has even broader effects than would a viewpoint-based restriction within a forum. While a viewpoint-based restriction silences disfavored speakers within a public forum, closing a public forum silences *everyone* within that forum. If the First Amendment is concerned with fostering the free exchange of ideas, it is difficult to see how closing a forum altogether is constitutionally preferable to restricting viewpoints within it. Both forms of action have the systematic effects described above and the effects on the individual speaker described below.

b. Effects on the Speaker

Beyond the effects that may be felt by society as a whole, closing a designated public forum for a viewpoint-discriminatory purpose has particularly keen effects on the speaker whose viewpoint is the target of discrimination. Under First Amendment law, the government may not retaliate against an individual for exercising her constitutional rights.¹⁰⁸ When a speaker voices her viewpoint in a

106. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976).

107. *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

108. *See Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 675 (1996) (“The First Amendment’s guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern.” (citation omitted)); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977) (“A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct.”); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (“[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”).

designated public forum, and as a result, the government revokes her right to speak there, the government has retaliated against her. This is equally true whether the government closes the forum or revokes her access to the forum.¹⁰⁹ While, conceptually, analysis of a retaliation claim must be framed in part as a purpose inquiry (i.e., the government retaliates against someone when it acts with the purpose to discriminate against the views she expressed), the effects on the individual speaker are clear:¹¹⁰ As long as a speaker participating in a forum expresses only viewpoints favored by the government, she retains access to the forum; when she expresses a viewpoint disfavored by the government, she loses access. From this individual's perspective, the effect is the same when the forum is closed as when the government imposes a viewpoint restriction on the forum, something that is clearly constitutionally prohibited.¹¹¹

The fact that the government could have closed the designated public forum at any time is irrelevant. In *Mt. Healthy City School District Board of Education v. Doyle*, for example, an untenured teacher, who "could have been discharged for no reason whatsoever," could still "establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."¹¹² This principle is not limited to employment situations. In *Board of County Commissioners v. Umbehr*, the Court held that the termination or nonrenewal of a pre-existing commercial relationship in retaliation for the exercise of protected speech, even where the government is entitled to terminate the relationship for no reason at all, would violate the First Amendment.¹¹³ The *Umbehr* Court recognized that "the threat of the loss [of a government benefit] in retaliation for speech may chill [a recipient from speaking] on matters of public concern"¹¹⁴ This concern is strongly implicated in the context of a designated public forum, where a participant's speech may be chilled for fear of losing the benefit of the forum.

109. Consider a familiar example from the elementary school context. A teacher may keep the entire class in from recess to punish bad behavior by a few. The generally applicable nature of this action does not lessen its impact as punishment of the misbehaving children. In fact, it may enhance it.

110. See *infra* Part II.B.2 for a discussion of using purpose-based inquiries to determine effects.

111. See, e.g., *Rosenberger v. Regents & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995).

112. 429 U.S. at 283–84.

113. 518 U.S. 668, 668, 674, 685 (1996).

114. *Id.* at 674.

2. Looking to Purpose to Determine the Effects of Viewpoint-Discriminatory Closures

Although viewpoint-discriminatory closure of a designated public forum causes unconstitutional effects, those effects may be difficult to ascertain without looking to purpose because judges are not well positioned to evaluate when such effects, particularly large-scale societal effects, have occurred. Similarly, evaluating the facial neutrality of a closure is an inadequate measure of the unconstitutional effects the closure is likely to have: the same concerns regarding chilling speech and “driv[ing] certain ideas or viewpoints from the marketplace”¹¹⁵ that underlie the constitutional prohibition against viewpoint discrimination apply equally whether a government action is facially discriminatory or facially neutral. In fact, the Supreme Court has demonstrated that it is sufficiently concerned with potential viewpoint-discriminatory effects arising from facially neutral regulations that it has invalidated facially neutral regulations that give government actors even the *opportunity* to act with a viewpoint-discriminatory purpose.¹¹⁶ Therefore, courts should look to the government’s purpose in closing a designated public forum in order to determine whether unconstitutional viewpoint-discriminatory effects are likely to arise.

a. The Inadequacy of Effects-Based Standards

In order to prevent the effects of systematically disadvantaging certain viewpoints, courts must consider the government’s motivation in closing a designated public forum.¹¹⁷ It is not feasible to require courts to consider only the closure’s effects in determining unconstitutionality. As recognized by now-Justice Elena Kagan, “[t]he problem with an effects-based standard is one of judicial administration. The questions it forces judges to ask about what ideas are over- or underrepresented, about who has talked too much or too little, about when ‘drowning out’ has occurred, are not subject to unbiased, reliable evaluation.”¹¹⁸ And courts are ill-equipped to

115. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

116. *See infra* Part II.B.c.

117. Kagan, *supra* note 100, at 507 (“The reason to think about reasons has to do with the likelihood that the consideration of certain reasons will systematically and predictably lead to actions that have adverse consequences.”).

118. *Id.* at 508–09.

compare existing viewpoint diversity with what viewpoint diversity may have existed but for a viewpoint-discriminatory forum closure.

The difficulty of discerning discriminatory effects using only an effects-based standard is compounded by the potential cumulative discriminatory effects resulting from multiple forum closures targeting similar viewpoints. Consider that a court would typically hear a case concerning the constitutionality of only a single closure at a time; determining the societal impact of a single closure from among the multitude would be nearly impossible. By contrast, a court taking purpose into consideration when deciding the constitutionality of a forum closure needs to look to the purpose motivating only that particular closure in determining whether viewpoint-discriminatory effects have occurred or are likely to occur.

Furthermore, assuming courts are able to determine discriminatory effects, exclusively employing an effects-based standard would require courts to wait until discriminatory effects have manifested themselves before declaring a forum closure unconstitutional. This is particularly problematic given the potentially widespread effects of forum closures.¹¹⁹ Many viewpoints may be lost for long periods before this becomes evident to a court, and the marketplace of ideas may never fully recover the diversity of thought it would have had but for the viewpoint-discriminatory forum closure. Therefore, rather than confining judicial inquiry to the effects of a forum closure, courts faced with closures of designated public forums need a tool for effectively predicting whether a particular viewpoint is in danger of being systematically disadvantaged. Considering the government's purpose in closing a forum can aid a court in preventing unconstitutional effects from occurring from the moment the government acts with a discriminatory purpose.

*b. The Inadequacy of Evaluating Facial Neutrality in
Determining Unconstitutional Effects*

Closures of designated public forums will frequently be facially neutral actions, even when motivated by viewpoint-discriminatory purposes.¹²⁰ Unlike viewpoint regulations within forums, which must explicitly indicate what viewpoint cannot be expressed in or-

119. For a discussion of these widespread effects, see *supra* Part II.B.1.a.

120. As the events at UCSD demonstrate, however, government closure of public forums will not always be facially neutral. See *supra* Introduction.

der to be followed,¹²¹ forum closures can be accomplished without explanation. But just as effects-based standards inadequately safeguard against discriminatory effects, facial neutrality is an ineffective predictor of discriminatory effects.¹²² This can be illustrated by an example concerning access restrictions on a designated public forum.

When the government is not required to provide a benefit, either providing or not providing the benefit may be constitutional at any given point in time.¹²³ For example, a State may, constitutionally, allow public access to the rotunda of the state capitol only when the state's budget allows for security guards to staff it.¹²⁴ However, allowing access to the rotunda may also be unconstitutional at any point in time if the access results from a facially unconstitutional regulation, such as one directing that the rotunda "will be open to the public at times when conservative viewpoints predominate and closed at times when liberal viewpoints predominate."¹²⁵ Thus, either a facially constitutional or a facially unconstitutional policy could have the same effect: a rotunda open or closed to public access at any point in time.

However, laws are not unconstitutional "because of their effects during any given time slice," but "because of their predicted effects over an indefinite period of time."¹²⁶ Thus, while denying public access to the rotunda for budgetary reasons might exclude liberals at a particular point in time, that action does not have an unconstitutional effect. There is no reason to believe that, in the long run, liberal viewpoints would be disadvantaged more than conservative viewpoints when the government denies public access for budgetary

121. See, e.g., *Rosenberger v. Regents & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (striking down government action that treated differently a publication written from a religious perspective than other student publications).

122. See Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENT. 287, 300-02 (1994) (using a set of examples inspired by the facts underlying *Palmer v. Thompson*, 403 U.S. 217 (1971), to explain why that case was wrongly decided).

123. See *id.*

124. See, e.g., *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983) (referring to designated public forums, the court explained that "a State is not required to indefinitely retain the open character of the facility").

125. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("Regulation of [a designated public forum] is subject to the same limitations as that governing a traditional public forum."); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (stating that "reasonable 'time, place, and manner' " restrictions may be placed on a traditional public forum) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941)); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

126. Alexander, *supra* note 122, at 302.

reasons; the denial is wholly unrelated to the viewpoint of speech expressed. But if the government passes its facially neutral access regulation with the *purpose* of disadvantaging liberal viewpoints, we can predict that in the long run, liberal viewpoints will be disproportionately disadvantaged.¹²⁷ Thus, facial neutrality alone cannot determine whether a regulation is neutral—and therefore constitutional—in practice. In fact, government actors may be careful to make regulations facially neutral specifically to mask their illicit purposes, while still achieving their unconstitutional desired effects.¹²⁸ Rather, what predicts the unconstitutional effects of a regulation is the *purpose* behind its enactment. Courts must inquire into that purpose in order to adequately prevent unconstitutional effects.

c. The Court's Willingness to Hold Unconstitutional Facially Neutral Regulations Before the Regulations Manifest Viewpoint-Discriminatory Effects

The idea that a facially neutral regulation can be found unconstitutional if it fails to protect viewpoint neutrality finds support in three Supreme Court cases involving regulations giving discretion to majorities or individual decision-makers to determine who may speak in a particular forum. In these cases, the Court demonstrated that it is concerned enough about potential discriminatory effects arising from facially neutral regulations that it invalidated these regulations because they gave government actors the mere opportunity to act with a discriminatory purpose.

Southworth, discussed in Part I.A, *supra*, involved a referendum process through which a student body voted on whether to fund or defund particular student organizations.¹²⁹ The Court found that to the extent the referendum substituted majority determinations for viewpoint neutrality, this process would fail to provide adequate protection for the viewpoint neutrality principle.¹³⁰ In *Forsyth County*

127. *Id.* (“Legislative motivation is what provides the assumption that all law will persist over an indefinite period of time, so that its predicted effects over an indefinite period become relevant. Because government’s choice of an allocation of optional benefits is not frozen by the Constitution and can always be changed, there is no basis other than motive for assuming durability over time.”).

128. See Chen, *supra* note 36, at 34 (“[T]he Court’s free speech jurisprudence has been driven almost blindly by its emphasis on overt discrimination. . . . [T]his has resulted in a First Amendment jurisprudence that does not adequately restrain sophisticated, covert forms of speech discrimination.”).

129. 529 U.S. 217, 235–36 (2000).

130. *Id.* at 235.

v. Nationalist Movement, the Court struck down an ordinance permitting a government administrator to adjust assembly-permit or parade-permit fees to reflect the estimated cost of maintaining public order at the particular event.¹³¹ The Court recognized that this type of discretion “has the potential for becoming a means of suppressing a particular point of view.”¹³² Similarly, in *City of Lakewood v. Plain Dealer Publishing Co.*, the Court struck down an ordinance giving a mayor authority to grant or deny applications for permits, recognizing that it gave the mayor “substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.”¹³³

The Court in *Southworth*, *Forsyth County*, and *Lakewood* recognized that viewpoint discrimination might occur even where a government body regulates without facially discriminating on the basis of viewpoint. In the policies at issue in these cases, the discrimination would probably occur at a later time, one step removed from the issuance of the regulation.¹³⁴ For example, under the *Southworth* policy, actual discrimination would have occurred once the student body had voted to defund an organization on the basis of the viewpoint it expressed.¹³⁵ Nonetheless, it was the facially neutral regulation itself that the Court struck down, emphasizing its dedication to proactively protecting viewpoint neutrality. This was true even where there was no indication or suspicion that the regulation was passed to further a discriminatory purpose.¹³⁶

In each of these cases, the Court sought to prevent future actions motivated by discriminatory purposes—as well as the discriminatory effects of those actions—from resulting from facially neutral regulations. Where the closure of a designated public forum is involved, and the danger of viewpoint discrimination is more imminent (rather than following from a potential discriminatory action one step removed from the facially neutral

131. 505 U.S. 123, 123 (1992).

132. *Id.* at 130–31 (citation omitted).

133. 486 U.S. 750, 759 (1988).

134. Of course, it is also possible that the government would issue such a regulation with the purpose of discriminating, in which case we would have a situation even more similar to the topic at hand.

135. Another distinction between the policies at issue in *Southworth*, et al. and closure of a public forum for a viewpoint-discriminatory purpose is that under the policy at issue in *Southworth*, any viewpoint-discriminatory action taken by the student body would itself probably not be generally applicable (i.e., it would likely defund a student group because of disagreement with its message, not defund all student groups because of its disagreement with one group’s message). However, as discussed in Part II.B.1.b, *supra*, closing a public forum for a viewpoint-discriminatory purpose has unconstitutional effects despite being a generally applicable action.

136. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

regulation), courts must be at least as vigilant: closures of designated public forums for viewpoint-discriminatory reasons must be held unconstitutional.

III. PURPOSE INQUIRY AND ITS CRITICS

There are those who question courts' willingness and competence to inquire into government purpose. For example, Professor Alan Chen claims that the Supreme Court "has repeatedly rejected direct judicial inquiries into legislative motive, even where there is substantial evidence that a facially neutral law might have been adopted for speech-restrictive reasons."¹³⁷ And Justice Antonin Scalia argues that courts should not consider lawmakers' motives in the First Amendment context, noting the difficulty of determining a singular purpose of a collective legislative body.¹³⁸

Additionally, in *Palmer v. Thompson*, a well-known Fourteenth Amendment equal protection case with facts analogous to closing a designated public forum,¹³⁹ the Supreme Court expressed concern with the "futility" of striking down a law due to the government's bad purpose when the law could be enacted again later when the legislature re-passed it for different reasons.¹⁴⁰ The Court had expressed similar reasoning in the First Amendment free speech context three years earlier in *United States v. O'Brien*.¹⁴¹ This Part addresses these concerns. Section A discusses the Supreme Court's increasing willingness to inquire into government purpose in First Amendment cases and how it has done so through the use of doctrinal tests. Section B responds to claims of futility, demonstrating that in the years since *Palmer* the Court has rejected this view, and

137. Chen, *supra* note 36, at 76.

138. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 557–60 (1993) (Scalia, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

139. 403 U.S. 217 (1971). In *Palmer*, the city of Jackson, Mississippi, chose to close its swimming pools rather than desegregate them in response to a lower court judgment holding that state-enforced segregation was a violation of the Thirteenth and Fourteenth Amendments. *Id.* at 218–19. The Court held that closing the pools did not deny the African-American plaintiffs equal protection, noting that the Constitution does not impose an affirmative duty on a state to begin to operate or to continue to operate swimming pools. *Id.* at 219–21.

140. *Id.* at 225. Note, however, that the *Palmer* Court did not acknowledge an impermissible motivation for the city's actions; it found that there was substantial evidence that the pools could not be operated safely and economically on an integrated basis. *Id.* at 224–25. Thus, while some cite *Palmer* in arguing for the futility of purpose inquiry, *Palmer* does not provide precedent for upholding an action where it has been clearly established that the government has acted with a purpose to discriminate.

141. 391 U.S. 367, 383–84 (1968).

has instead recognized that a government action that would otherwise be permissible can nonetheless be unconstitutional when it has been enacted to further an impermissible purpose.

*A. The Willingness and Competence of Courts
to Inquire Into Purpose*

Contrary to the protestations of commentators like Professor Chen,¹⁴² and despite the fact that the doctrine tends to focus on overt forms of speech discrimination, First Amendment free speech doctrine can be viewed as a tool for revealing impermissible government purposes. According to Professor Stone, a shift in constitutional jurisprudence occurred under the Burger Court toward an increasing emphasis on the government's motivation as a paramount constitutional concern.¹⁴³

By the mid-1990s, now-Justice Kagan asserted that the discovery of improper governmental motives had become the primary object of First Amendment law over the past several decades.¹⁴⁴ According to Justice Kagan, the Court constructs and uses objective tests, such as strict scrutiny analysis, to serve as proxies for direct inquiry into motive.¹⁴⁵ She argues that such rules, principles, and categories are necessary to courts only because of the difficulty in directly determining government purpose in most situations.¹⁴⁶ As a primary example, Justice Kagan considered *R.A.V. v. City of St. Paul*, a case in which the Supreme Court struck down a city ordinance that, as it had been construed by the state supreme court, criminalized fighting words based on race, color, creed, religion, or gender.¹⁴⁷ The Court held that the city could not take this action because it violated the principle of content neutrality; while a city may ban all fighting words, it may not ban only fighting words that address a particular subject or express a particular viewpoint.¹⁴⁸ According to Justice Kagan:

142. Chen, *supra* note 36.

143. Stone, *supra* note 103, at 227.

144. Kagan, *supra* note 100, at 414.

145. *Id.* at 414, 443–505. See also JON HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980) (“[F]unctionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of ‘flushing out’ unconstitutional motivation . . .”).

146. Kagan, *supra* note 100, at 415.

147. *Id.* at 416 (citing *In re R.A.V.*, 464 N.W.2d 507, 510–11 (Minn. 1991)). The statute at issue in *R.A.V.* declared it a misdemeanor for any person to “place[] on public or private property a symbol . . . [w]hich one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” St. Paul, Minn., Legis. Code § 292.02 (1990).

148. 505 U.S. 377, 386 (1992).

The *R.A.V.* Court made this concern about illegitimate, censorial motives unusually evident in its opinion, all but proclaiming that sources, not consequences, forced the decision. The First Amendment, the majority stated, “prevents government from proscribing speech . . . because of disapproval of the ideas expressed.” And again: “The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.” The Court maintained that the structure of the ordinance—the subject-matter distinctions apparent on its face, the viewpoint distinctions apparent in operation—suggested illicit motive¹⁴⁹
.....

Justice Kagan notes that while such a thorough discussion of governmental motive is unusual in First Amendment cases, *R.A.V.* reveals how a desire to punish impermissible purpose may explain and animate the Court’s elaboration of doctrine, even where the motive inquiry remains hidden behind tests and categories.¹⁵⁰

More recently, Professor Jed Rubenfeld has argued that, under “settled principles,” an impermissible legislative motive can render an otherwise valid law unconstitutional.¹⁵¹ Professor Rubenfeld argues that despite the fact that the Court in *United States v. O’Brien*¹⁵² emphatically dismissed motive as irrelevant, the *O’Brien* test itself is centrally concerned with purpose:¹⁵³

[I]n deciding that Congress’s “interest” in prohibiting draft-card destruction was “limited to the noncommunicative aspect of [the] conduct,” the *O’Brien* Court distinguished a prior case on the ground that the prior case involved a “statute . . . aimed at suppressing communication.” Aim is of course a synonym of purpose. If the ultimate question, then, as the Court’s own language suggests, is whether the statute in question was “aimed” at punishing dissent, then the real function of the *O’Brien* test is nothing other than ascertaining the law’s purpose.¹⁵⁴

As these scholars have argued, the Supreme Court’s creation of objective rules, categories, and principles to “smoke out” illicit pur-

149. Kagan, *supra* note 100, at 421.

150. *Id.* at 423.

151. Rubenfeld, *supra* note 104, at 775.

152. 391 U.S. 367 (1968).

153. Rubenfeld, *supra* note 104, at 775–76.

154. *Id.* at 776.

pose where direct purpose inquiry would prove difficult demonstrates the Court's willingness to consider the government's motivation a paramount constitutional concern. The use of these tests expands courts' competence to determine when the government has acted in furtherance of an illicit purpose. Thus, even where a government actor has not made her motivation clear, courts can employ doctrinal tests to strike down actions that functionally distinguish between speakers based upon their viewpoints or subject matter.

B. The "Futility" of Striking Down Actions Due to Illicit Purpose

Some academics, as well as the Supreme Court in *Palmer*, have expressed concern regarding the "futility" of striking down government action due to the actor's bad purpose.¹⁵⁵ These critics argue that it is futile to prohibit the government from taking an action for one reason when the same action could later be taken again for a different reason.¹⁵⁶ But in the years since *Palmer*, the Court has not adopted this reasoning, instead recognizing that a government action that would otherwise be permissible can nonetheless be unconstitutional when it has been enacted to further an impermissible purpose.

For instance, in *McCreary County v. ACLU of Kentucky*, the Court struck down a display of historical documents, including the Ten Commandments, because the history of the evolving display showed that the County's predominant purpose in erecting the display was not secular.¹⁵⁷ Thus, rather than bemoan the futility of striking down legislation passed with an impermissible purpose, the Court relied on the history of religious motive to invalidate a display that might have been found constitutional had it been erected for a secular purpose.¹⁵⁸

The Court's disregard of the futility argument in First Amendment free speech jurisprudence is supported by *Umbehr* and *Doyle*,

155. *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); see, e.g., John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214–15 (1970).

156. *Palmer*, 403 U.S. at 225; Ely, *supra* note 155, at 1214–15.

157. 545 U.S. 844 at 873–74 (2005) ("In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed . . . we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day . . .").

158. *Id.* at 874 (noting that the Court did not have "occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history").

the government retaliation cases discussed in Part II.B.1.b, *supra*.¹⁵⁹ In *Umbehr* and *Doyle*, the Court held that even where the government was not obligated to maintain an employment or commercial relationship with an individual, it could not terminate the relationship if it did so in reaction to that individual's exercise of constitutionally protected freedoms.¹⁶⁰ The Court did *not*, as proponents of the "futility" argument would advocate it might, uphold termination of the relationships by reasoning that it was futile to prohibit the terminations since the defendant government actors could terminate the relationships later for another, permissible reason. Indeed, it is likely that had the defendants attempted a second time to terminate the relationships without convincingly establishing a new, legitimate purpose for doing so, the Court would have again prohibited the terminations. Just as the *McCreary* Court was not convinced by the government's efforts to disguise its religiously motivated purpose in subsequent versions of its Ten Commandments display, it is unlikely that the Court would be satisfied by pretextual subsequent terminations by the *Umbehr* and *Doyle* defendants.

Furthermore, it is questionable whether, even under modern Fourteenth Amendment equal protection doctrine, *Palmer* remains good law.¹⁶¹ In *Washington v. Davis*, the Court stated: "To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary."¹⁶² And in *Hunter v. Underwood*, the Court, without reconciling *Palmer*, held that where "a neutral state law . . . produces disproportionate effects along racial lines . . . '[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'"¹⁶³

Therefore, whatever principle regarding the futility of inquiring into government purpose may be derived from *Palmer* surely should not extend to First Amendment public forum analysis. Instead, courts should look to the principles underlying the well-established ban on viewpoint discrimination and the Court's demonstrated willingness to invalidate otherwise permissible gov-

159. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

160. *Umbehr*, 518 U.S. at 674, 685; *Doyle*, 429 U.S. at 283–84.

161. *See, e.g., Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989) ("The Supreme Court has never expressly overturned *Palmer*, but it has all but done so. Time and again over the past two decades, the Court has held that facially neutral laws may run afoul of the Equal Protection Clause if they are enacted or enforced with a discriminatory intent.").

162. 426 U.S. 229, 244 n.11 (1976).

163. 471 U.S. 222, 227–28 (1985) (citation omitted).

ernment actions taken for illicit purposes to find that closure of a designated public forum for a viewpoint-discriminatory purpose is constitutionally prohibited.

CONCLUSION

Prohibiting the government from “prescrib[ing] what shall be orthodox in . . . matters of opinion” lies at the heart of the First Amendment.¹⁶⁴ Closure of public forums for viewpoint-discriminatory purposes substantially erodes that fundamental principle. As the events at UCSD in 2010 demonstrate, courts must find viewpoint-discriminatory closure of designated public forums unconstitutional.

UCSD established a student organization fund (“the SOF”) similar to those at issue in *Rosenberger* and *Southworth*.¹⁶⁵ Various expressive groups, including many media organizations, were financially supported by this fund.¹⁶⁶ Thus, it is reasonable to expect that a court would characterize the SOF as, or analogize the SOF to, a designated public forum.¹⁶⁷ Accordingly, current free speech doctrine prevented UCSD, or any person acting on its behalf, from discriminating within that forum on the basis of a speaker’s viewpoint.¹⁶⁸

However, current doctrine did not protect the forum from closure for a viewpoint-discriminatory purpose. In February 2010, UCSD student government president Ustav Gupta explicitly expressed a desire to censor the racially motivated speech engaged in by the editor for *The Koala* on SRTV.¹⁶⁹ He then froze all SOF funding to student media, apparently recognizing that only revoking

164. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

165. See ASSOCIATED STUDENTS FUNDING GUIDE 2009–2010, http://as.ucsd.edu/finance/docs/Funding_Guide_09-10.pdf; ASSOCIATED STUDENTS MEDIA HANDBOOK 2009–2010, http://as.ucsd.edu/finance/docs/AS_Media_Handbook_09-10.pdf (on file with the University of Michigan Journal of Law Reform).

166. See ASSOCIATED STUDENTS: FINANCE–ALLOCATIONS, <http://as.ucsd.edu/finance/allocations.php> (last visited May 5, 2010).

167. More specifically, it is likely that a court would deem the SOF a limited public forum, given that the fund is subject to speaker identity restrictions limiting it to student organizations that agree to follow certain policies and procedures. See, e.g., *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995) (analogizing a similar fund to a limited public forum).

168. *Id.* at 828–37.

169. *U.C. San Diego Freezes Funds*, *supra* note 2.

funding for SRTV and *The Koala* would be a violation of those students' free speech rights.¹⁷⁰

That media freeze had impermissible disadvantaging effects on individual speakers and detrimental effects on the interchange of ideas within the student body at large. Mr. Gupta's retaliatory action chilled *The Koala* and SRTV students' speech as much would have any narrower, currently unconstitutional viewpoint restriction. And Mr. Gupta silenced the rest of the students participating in the forum as well, further diminishing the interchange of ideas on campus. Student media organizations that could have presented counterpoints to the views that triggered the freeze were unable to respond, ensuring that, ironically, the disfavored speaker had the last word in the debate.¹⁷¹

Recognizing the unconstitutionality of viewpoint-discriminatory closure, however, would have prevented these effects. Mr. Gupta's statements to the media indicate that he impermissibly acted based on hostility toward the message expressed by the editor for *The Koala*.¹⁷² Under the reform proposed by this Note, that explicit, viewpoint-discriminatory purpose would render what may otherwise have been a constitutionally permissible action—freezing SOF funding—unconstitutional.¹⁷³ Thus, rather than closing the forum, chilling debate, and stifling the interchange of ideas, all UCSD speakers' free speech rights would have been protected.

While most of us may have little regard for the sentiments against which Mr. Gupta discriminated, our regard for the First Amendment and the principles it represents must counsel against permitting viewpoint-discriminatory closure. The fostering of intellectual and spiritual growth and the free exchange of ideas necessary to a properly functioning democracy require that the government maintain not only a neutral attitude toward its citizens' views, but also a positive attitude toward encouraging public debate. Our courts must, therefore, avoid establishing a rule of law that would encourage government actors to silence everyone in

170. See Letter from Robert L. Shibley, Vice President, Found. for Individual Rights in Educ., to Marye Anne Fox, Chancellor, Univ. of Cal., San Diego para. 3 (Feb. 25, 2010), available at <http://www.thefire.org/article/11612.html> (last visited Apr. 27, 2010).

171. See Editorial, *Stopping the Presses Won't Heal the Hurt*, THE UCSD GUARDIAN, Feb. 22, 2010, <http://www.ucsdguardian.org/opinion/editorials/stopping-the-presses-won't-heal-the-hurt/>; Adam Goldstein, *UCSD Media Funding Freeze Offends the First Amendment*, HUFFINGTON POST (Feb. 25, 2010, 6:25 PM), http://www.huffingtonpost.com/adam-goldstein/ucsd-media-funding-freeze_b_477413.html.

172. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate . . . based on hostility—or favoritism—towards the underlying message expressed.").

173. See, e.g., Kagan, *supra* note 100, at 414; Rubinfeld, *supra* note 104, at 768; Stone, *supra* note 103, at 227.

order to silence a few. Prohibiting viewpoint discrimination within a forum, while permitting viewpoint-discriminatory closure of a forum, would encourage exactly that. Thus, courts confronted with situations like the media freeze at UCSD must hold that closing a designated public forum in order to discriminate against a particular viewpoint is unconstitutional.