

COMMENTS

Must the Government Waive Public Forum User Fees for Indigent Speakers?

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INTRODUCTION

Professor Harry Kalven Jr once called the public forum “the poor man’s printing press.”¹ A significant feature of the modern regulatory apparatus governing access to the public forum, however, is that it often charges user fees to cover the costs of directing traffic, policing, and administering the public forum.² And, as is the case any time the government puts a price on an activity, some people will be too poor to pay. This Comment asks whether the government must waive fees for indigent applicants for use of this “poor man’s printing press,” and if so, when and why.

Public forum user fees should be a subject of significant concern. The right to have access to a public forum is vital to a healthy marketplace of ideas and serves important democratic values. It allows speakers to convey their views to a wide audience and gives them access to specific people and institutions by enabling them to march on the streets, sidewalks, and statehouse steps near those to whom they would like to voice complaints. Furthermore, “the [open] public forum [] increases the likelihood that people generally will be exposed to a wide variety of people and views”—it is difficult to avoid seeing a parade or other demonstration in a public place.³ Even if indigent speakers are able to use other fora for free, fees still implicate distributional

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¹ Harry Kalven Jr, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S Ct Rev 1, 30.

² For purposes of this Comment, the phrase “public forum” means “quintessential” public fora—public streets, parks, and sidewalks—plus public property that has been opened up by the government for expressive purposes. See *Perry Education Association v Perry Local Educators’ Association*, 460 US 37, 45 (1983).

³ Cass Sunstein, *republic.com* 30–32 (Princeton 2001).

concerns because they ensure that wealthier speakers have their choice of forum while poor speakers do not. Choice of forum can be central to expression, so depriving poor speakers of choice means that they will have significantly fewer expressive possibilities than wealthy speakers.⁴

The circuit courts are currently split on the question whether an indigency waiver is required for public forum permitting fees. The majority of circuits have addressed the question under First Amendment doctrine and have held that the government is not required to waive fees for the indigent as long as there are ample alternative fora where the indigent can present their messages. The Eleventh Circuit, on the other hand, has held that lack of an indigency waiver renders a permitting fee facially invalid, relying partially on the Supreme Court's 1974 decision in *Lubin v Panish*.⁵

This Comment argues that the Eleventh Circuit's result is correct, but arrives at that conclusion using the Equal Protection Clause rather than the First Amendment. The Supreme Court has held in a series of equal protection and due process cases that indigents cannot be prevented by fees from exercising certain fundamental rights. This Comment argues that these cases should govern the issue of public forum fee waivers.

The Comment begins with a brief summary of the constitutional law governing state regulation of the public forum. Part II examines how the circuits have analyzed the question of indigent fee waivers. Part III evaluates two major arguments against requiring fee waivers and concludes that, while First Amendment doctrine does not provide sufficient clarity on the issue, it suggests that at least some—and possibly all—fees are permissible without an indigency waiver. Part IV, however, argues that a Fourteenth Amendment equal protection analysis is a better conceptual fit and suggests a different result: an indigency waiver is required even in cases in which the speaker can use an alternative forum.

I. REGULATION OF THE PUBLIC FORUM

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the

⁴ See Part IV.C.3.

⁵ 415 US 709 (1974).

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁶ The First Amendment has been incorporated against the states, so state and local governments are equally forbidden to make laws abridging First Amendment freedoms.⁷

The right to speak and assemble in public fora—“places which by long tradition or by government fiat have been devoted to assembly and debate”—has long been considered worthy of strong First Amendment protection.⁸ However, this right is not absolute, and public fora may be subject to some regulation consistent with the First Amendment.

A. Restrictions on the Rights of Speech and Assembly in the Public Forum: The Time, Place, and Manner Framework

Over time, it has become clear that the First Amendment’s strong “Congress shall make no law” language must be taken with a healthy grain of salt. Governmental entities can and do pass valid laws restricting the reach of First Amendment freedoms. Courts, recognizing that absolutely untrammelled rights of free speech and assembly are unworkable, will allow these restrictions in certain circumstances.⁹

In the context of the public forum, the Court seeks to strike a balance between the public’s historical right to use public streets and parks to speak and the concerns of public convenience. In *Hague v Committee for Industrial Organization*,¹⁰ a foundational case involving the use of the public forum, a plurality of the Court distinguished between permissible regulations designed to “promote [] public convenience in the use of the streets or parks” and ordinances that target “the right of assembly for the purpose of communicating views,” which are less likely to be permissible.¹¹ “[S]treets and parks,” the plurality held, “have immemorially been held in trust for the use of the public and, time out of mind,

⁶ US Const Amend I.

⁷ See *Gitlow v New York*, 268 US 652, 666 (1925) (incorporating the freedom of speech); *De Jonge v Oregon*, 299 US 353, 364 (1937) (incorporating the freedom of assembly).

⁸ *Perry Education Association v Perry Local Educators’ Association*, 460 US 37, 45 (1983) (noting that, in public fora, “the rights of the State to limit expressive activity are sharply circumscribed”).

⁹ See, for example, *Schenck v United States*, 249 US 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

¹⁰ 307 US 496 (1939).

¹¹ *Id.* at 515 (Roberts) (plurality).

have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹² *Hague* made it clear that speakers have a First Amendment right to access traditional public fora—streets, parks, and sidewalks—for the purposes of speech, communication, and assembly.¹³

Despite the “ancient” nature of this right, *Hague* indicated that the use of public fora “must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order.”¹⁴ The Court’s concern with “the general comfort and convenience” is easy to understand: if anyone at any time could claim an absolute right to parade on public streets, it would be enormously inconvenient to the public. There is even a justification for regulation rooted in promoting speech: speech in the public forum will be more easily heard and communicated without multiple speakers trying to use the same spaces at the same times.¹⁵ However, the plurality in *Hague* was careful to note that the right to use a public forum “must not, in the guise of regulation, be abridged or denied.”¹⁶

The Court’s early balancing act in *Hague* foreshadowed the evolution of the modern framework for evaluating restrictions on the use of public fora. The Court has, roughly speaking, developed a two-tier approach. Regulations based on the *content* of speech must be necessary to achieve a compelling state interest and narrowly tailored to that end.¹⁷ Content-neutral regulations relating to the time, place, and manner (TPM) of expression, meanwhile,

¹² *Id.* (Roberts) (plurality).

¹³ Professor Kalven describes this as “a kind of First-Amendment easement.” See Kalven, 1965 S Ct Rev at 13 (cited in note 1).

¹⁴ *Hague*, 307 US at 515–16 (Roberts) (plurality).

¹⁵ See, for example, *Thomas v Chicago Park District*, 227 F3d 921, 924 (7th Cir 2000) (“[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park’s utility as a forum for speech.”). But note that the Court’s concern with maintaining public order may be overblown. See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L Rev 543, 561–62 (2009) (noting that “[u]ntil the late nineteenth century, there were no procedures that had to be undertaken to gain access to public spaces” and few restrictions on one’s ability to remain in public places). Courts, however, generally accept the necessity of regulating access to public fora as a given, and perhaps rightfully so given the significant technological changes since the nineteenth century. See, for example, *Hague*, 307 US at 515–16 (Roberts) (plurality) (“The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative.”).

¹⁶ *Hague*, 307 US at 516 (Roberts) (plurality).

¹⁷ *United States v Grace*, 461 US 171, 177 (1983) (finding that “[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest”).

are subject to a less stringent standard.¹⁸ As long as the regulations “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication,” they pass constitutional muster.¹⁹ While this standard is lower than that for content-based regulations, it is far from an automatic pass. In *United States v Grace*,²⁰ for example, the Court struck down a law banning the display of certain flags, banners, and devices on the public sidewalks surrounding the Supreme Court building because the flag ban did not substantially serve the purpose of maintaining order and decorum within the Supreme Court grounds.²¹

B. Fees on the Use of the Public Forum

A significant question about the public forum involves the extent to which the government can impose fees for its use. Public forum permitting fees are usually imposed by local governments. Many such fees are designed to cover expenses incurred in administering the public forum and processing permit applications,²² as well as expenses incurred by the event itself.²³ Fees can also take the form of indemnity agreements²⁴ or liability insurance requirements.²⁵ These fees can be quite large. The plaintiffs in *Southern Oregon Barter Fair v Jackson County, Oregon*,²⁶ for example, were required to pay an \$18,000 security deposit.²⁷ In another case, demonstrators were charged \$1,435.74 to cover the costs of police

¹⁸ While there was previously some doctrinal confusion over the level of scrutiny to be applied to TPM restrictions, it is now settled that TPM restrictions are not considered “prior restraint[s]” meriting strict scrutiny. *Thomas v Chicago Park District*, 534 US 316, 321–23 (2002).

¹⁹ *Grace*, 461 US at 177, quoting *Perry Education Association*, 460 US at 45.

²⁰ 461 US 171 (1983).

²¹ *Id.* at 181–82.

²² See, for example, *Southern Oregon Barter Fair v Jackson County, Oregon*, 372 F3d 1128, 1132 (9th Cir 2004).

²³ See, for example, *Coalition for the Abolition of Marijuana Prohibition v City of Atlanta*, 219 F3d 1301, 1320 (11th Cir 2000).

²⁴ See, for example, *The Nationalist Movement v City of York*, 481 F3d 178, 181 (3d Cir 2007).

²⁵ See, for example, *Southern Oregon Barter Fair*, 372 F3d at 1132.

²⁶ 372 F3d 1128 (9th Cir 2004).

²⁷ *Id.* at 1132. This included “over \$3,600 for administrative expenses [] relat[ed] to the application, over \$11,700 for the cost to the county sheriff [for] providing neighborhood security, and other [] expenses.” *Id.*

protection.²⁸ While many ordinances cap fees, these caps can still leave would-be speakers open to significant costs.²⁹

The Supreme Court first considered the constitutionality of public forum permitting fees in *Cox v New Hampshire*.³⁰ In *Cox*, the Court reviewed the conviction of a group of Jehovah's Witnesses for violating New Hampshire's parade permitting statute.³¹ The permitting scheme at issue forbade parades or processions on public streets without a license.³² Licensing fees ranged from nominal sums to as much as \$300, depending on the size of the spectacle and the resulting cost of policing.³³ The Supreme Court held, after little analysis, that licensing fees do not violate the First Amendment, as long as they are fixed in a "reasonable" way and administered in a "fair and non-discriminatory manner."³⁴ The Court found it significant that the fee was "not a revenue tax," but rather a charge directed to "meet[ing] the expense incident to the administration of the [permitting scheme] and to the maintenance of public order."³⁵

The distinction between fees directed to defraying the costs of using a public forum and fees that serve as taxes or revenue measures appeared again in *Murdock v Pennsylvania (City of Jeannette)*,³⁶ decided two years after *Cox*. In *Murdock*, the Supreme Court struck down a local ordinance imposing flat fees on persons canvassing or soliciting within the borough.³⁷ The license tax, the Court held, was constitutionally offensive because it made payment of a tax a condition on the exercise of First Amendment privileges: "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."³⁸ While this sweeping language might have cast doubt on the validity of *Cox*, the Court was careful to distinguish the cases. The fees in cases like *Cox* are acceptable because they are

²⁸ *Central Florida Nuclear Freeze Campaign v Walsh*, 774 F2d 1515, 1517–18 (11th Cir 1985).

²⁹ See, for example, *Southern Oregon Barter Fair*, 372 F3d at 1132 (noting a \$5,000 cap); *Forsyth County, Georgia v Nationalist Movement*, 505 US 123, 126 (1992) (noting a \$1,000 daily cap).

³⁰ 312 US 569 (1941).

³¹ *Id.* at 570–71.

³² *Id.* at 570–72.

³³ *Id.* at 576–77.

³⁴ *Cox*, 312 US at 576–77.

³⁵ *Id.* at 577.

³⁶ 319 US 105 (1943).

³⁷ *Id.* at 106–07, 117.

³⁸ *Id.* at 111.

“nominal fee[s] imposed as a regulatory measure to defray the expenses of policing the activities in question.”³⁹

Murdock inaugurated a long period of inactivity from the Supreme Court on the subject of public forum user fees. Over the next forty years, a circuit split developed on the permissibility of charging fees to speak in a public forum, with one circuit holding that greater-than-nominal fees were unconstitutional,⁴⁰ while others permitted greater-than-nominal fees so long as the fees were reasonably related to preserving the public safety and order.⁴¹ In 1992, the Supreme Court stepped in to consider the constitutionality of Forsyth County’s public demonstration permitting scheme and to resolve the conflict among the courts of appeals.⁴²

The county ordinance at issue in *Forsyth County, Georgia v Nationalist Movement*⁴³ required demonstrators to obtain permits for public demonstrations, declared that demonstrators must bear the costs of law enforcement, and required a fee of not more than \$1,000.⁴⁴ An administrator was charged with adjusting the fee to meet the expense of administering the ordinance and maintaining public order at the demonstration.⁴⁵ The Supreme Court held that the ordinance at issue was invalid for at least two reasons: First, it gave the administrator too much discretion in setting

³⁹ *Id.* at 113–14, 116–17. This may have been a misreading or mischaracterization of *Cox*, in which the contested fees were not necessarily “nominal.” See *Forsyth County*, 505 US at 139–40 (Rehnquist dissenting) (“The use of the word ‘nominal’ in *Murdock* was thus unfortunate, as it represented a mistaken characterization of the fee statute in *Cox*.”). See also note 42 (describing the disagreement among the circuit courts over the meaning of *Murdock*’s language).

⁴⁰ See, for example, *Nationalist Movement v City of Cumming, Forsyth County, Georgia*, 913 F2d 885, 891 (11th Cir 1990).

⁴¹ See, for example, *Stonewall Union v City of Columbus*, 931 F2d 1130, 1136 (6th Cir 1991).

⁴² See *Forsyth County*, 505 US at 129 & n 8. The circuit split pitted the Eleventh Circuit, which read *Cox* and *Murdock* to permit only nominal fees, against other circuits, which had held or stated in dicta that greater-than-nominal fees were permissible in order to defray administrative costs. Compare, for example, *Central Florida*, 774 F2d at 1522–23 (“[W]e read *Cox* as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities.”), with *Eastern Connecticut Citizens Action Group v Powers*, 723 F2d 1050, 1056 (2d Cir 1983) (“Licensing fees used to defray administrative expenses are permissible.”), and *Stonewall Union*, 931 F2d at 1136 (rejecting the notion that *Murdock* modified *Cox* so as to permit only nominal fees).

⁴³ 505 US 123 (1992).

⁴⁴ *Id.* at 126–27.

⁴⁵ *Id.*

the fee, which could open the door to covert viewpoint discrimination.⁴⁶ Second, the fee was often content-based in practice, because the administrator would sometimes assess the fee based on the likelihood of a hostile response to the message being conveyed,⁴⁷ creating a heckler's veto.⁴⁸ Although *Cox* had permitted fees to be charged for "the maintenance of public order," the *Forsyth County* Court refused to read *Cox* to allow the state to charge a premium for delivering a potentially controversial message.⁴⁹

While the *Forsyth County* opinion provided guidance on the questions of administrative discretion and police expenses, it failed to definitively resolve the question whether more-than-nominal fees are ever permissible.⁵⁰ The Court invalidated the fee on other grounds and held that the \$1,000 cap could not save it from its other constitutional infirmities, but dodged the issue of more-than-nominal fees.⁵¹ One might think that the Court upheld the constitutionality of more-than-nominal fees by implication, because it did not strike down the fee as too large. However, given that this was the question that the Court granted certiorari to resolve, the omission seems deliberate. The Court could very easily have held that greater-than-nominal fees are not a constitutional problem, but instead it carefully avoided doing so, drawing criticism from Chief Justice William Rehnquist for its failure to decide the question on which it granted certiorari.⁵² Thus, the constitutional status of more-than-nominal user fees is somewhat uncertain, though lower courts seem to assume their constitutionality, relying on *Cox*.⁵³

In sum, restrictions on the use of a public forum are constitutional when they are directed toward regulating the time, place, and manner of expression and are "content-neutral, [] narrowly

⁴⁶ See *id.* at 133.

⁴⁷ See *Forsyth County*, 505 US at 133–34.

⁴⁸ A heckler's veto occurs when the government suppresses speech based on the hostile response of the audience. The term was coined by Kalven, who noted that, "[i]f the police can silence the speaker [based on hostile audience reaction], the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve." Harry Kalven Jr, *The Negro and the First Amendment* 140 (Ohio State 1965).

⁴⁹ *Forsyth County*, 505 US at 136, quoting *Cox*, 312 US at 577 (quotation marks omitted).

⁵⁰ *Forsyth County*, 505 US at 137–38 (Rehnquist dissenting) (noting the Court's non-committal response to the question it granted certiorari to address).

⁵¹ *Id.* at 136–37.

⁵² See *id.* at 140 (Rehnquist dissenting).

⁵³ See, for example, *Fernandes v Limmer*, 663 F2d 619, 633 (5th Cir 1981) (citing *Cox* as allowing "[a] licensing fee to . . . defray [] administrative costs").

tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁵⁴ Fees on expressive activity in a public forum are acceptable when they are directed toward defraying administrative costs and the costs of maintaining public order.⁵⁵ However, *Cox* did not provide a clear explanation as to why it is permissible to shift the costs of administering speech in public spaces to users.⁵⁶ Seemingly neutral regulatory schemes can run afoul of the content-neutrality requirement by allowing administrators too much discretion or by charging a premium for controversial speech.⁵⁷ This Comment asks whether content-neutral fees that are directed toward defraying administrative and public order costs and that are sufficiently limited in discretion—fees that, in other words, would meet the established requirements for constitutionality—must be waived for applicants who cannot pay.

II. THE CIRCUITS WEIGH IN

The question of indigent fee waivers for use of public fora has not yet come before the Supreme Court, but a number of federal appellate courts have encountered this issue, with mixed results. The Eleventh Circuit has held that lack of an indigency waiver was sufficient to render an ordinance facially unconstitutional. The First, Sixth, and Tenth Circuits, however, have reasoned that an indigency waiver is not required provided that there are “ample alternative” fora that the speaker can use without paying.⁵⁸

A. Indigency Waiver Required

The first federal appellate court to address this issue was the Eleventh Circuit. In *Central Florida Nuclear Freeze Campaign v Walsh*,⁵⁹ the court heard a nonprofit antinuclear organization’s challenge to Orlando’s demonstration permitting ordinance.⁶⁰ The

⁵⁴ *Perry Education Association*, 460 US at 45.

⁵⁵ See *Cox*, 312 US at 578.

⁵⁶ It is not obvious that speakers should be made to bear the costs of using public spaces, especially when this approach treats speakers less favorably than people who use the same spaces for nonspeech purposes. For a discussion of the appropriateness of this approach, see generally David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America’s Public Forums?*, 62 *Tex L Rev* 403 (1983).

⁵⁷ See *Forsyth County*, 505 US at 137.

⁵⁸ *Sullivan v City of Augusta*, 511 F3d 16, 41–42 (1st Cir 2007).

⁵⁹ 774 F2d 1515 (11th Cir 1985).

⁶⁰ *Id* at 1516–18.

organization was charged a \$1,435.74 permit fee, which they eventually paid under protest.⁶¹ The Eleventh Circuit held that the lack of an indigency waiver rendered the ordinance facially unconstitutional, even though these particular demonstrators were likely able to pay.⁶² While there were other constitutional problems with the ordinance—among other things, the court read *Cox* and *Murdock* to prohibit all more-than-nominal permitting fees⁶³—the court held that the inability of some persons to pay in advance was sufficient to render the statute unconstitutional.⁶⁴

The Eleventh Circuit's analysis was unclear in many ways. While it held that the fee at issue was "unconstitutional" and indicated that the ordinance as a whole violated the First Amendment,⁶⁵ it did not adequately explain why the inability of indigents to pay rendered the statute invalid. The court relied on *Lubin*, the Supreme Court's 1974 ballot access decision, to support the idea that the lack of indigency waiver rendered the demonstration ordinance unconstitutional.⁶⁶ In *Lubin*, the Supreme Court invalidated a California statute that required candidates to pay a fee to have their names placed on an election ballot without providing any alternative means to those unable to pay.⁶⁷ With little explanation, the Eleventh Circuit held that *Lubin*'s reasoning should apply to the right to access the streets for purposes of exercising First Amendment rights.⁶⁸ The court also cited *Murdock*'s admonition that "[f]reedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way."⁶⁹

Decades later, the Third Circuit agreed with the Eleventh Circuit's conclusion in dicta. Hearing a challenge from The Nationalist Movement (a white supremacist group) to a city's permitting ordinance, the Third Circuit noted that because the ordinance was interpreted to provide a fee waiver to those who could not pay, it did not "unconstitutionally burden the free speech rights of those

⁶¹ Id at 1518.

⁶² Id at 1523–24.

⁶³ *Central Florida*, 774 F2d at 1522.

⁶⁴ Id at 1524.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ *Lubin*, 415 US at 718.

⁶⁸ *Central Florida*, 774 F2d at 1524.

⁶⁹ Id, quoting *Murdock*, 319 US at 111. Reliance on *Murdock* was not essential to the court's holding that the government must provide an indigency waiver—and rightly so, because *Murdock* involved a different kind of fee.

speakers too indigent to afford its payment.”⁷⁰ The court then cited *Central Florida’s* discussion of *Lubin* with approval.⁷¹ The discussion of fee waivers was unnecessary to reach a decision because the city interpreted its ordinance as including a fee waiver,⁷² but the court’s treatment of the issue implies that it would have found the ordinance to be unconstitutional had the city not provided a fee waiver to the indigent.

Thus, one circuit has definitively held that an indigency waiver is required, and another seems inclined to agree. However, the constitutional basis for this requirement is not as clear as it could be. Reliance on *Lubin* seems to be the most important point, but the Eleventh Circuit did not explain why a holding about ballot access should also apply in the arena of speech in a public forum.⁷³ The intuitively appealing idea that speech and assembly rights should not be conditioned on ability to pay is powerfully expressed in *Murdock’s* language, but this rationale is not fully developed. Many important rights are conditioned on the ability to pay,⁷⁴ and the Eleventh Circuit did not explain why the right to use a public forum should be different or why it is related to the right to unfettered ballot access. Thus, while two circuit courts have indicated that an indigency waiver is required, their reasoning is not completely persuasive.

B. No Indigency Waiver Required, Provided There Are Ample Alternatives

In contrast to the Eleventh Circuit’s approach, the majority of circuits that have addressed this question have held that an indigency waiver is not required, provided that there are ample alternative means for indigent speakers to express their messages.

The Sixth Circuit took this view in *Stonewall Union v City of Columbus*.⁷⁵ In *Stonewall Union*, the Sixth Circuit cited *Cox* in support of the proposition that licensing fees are permissible so long as they are “designed to meet the expenses incident to the administration of the law and the cost of maintaining public order

⁷⁰ *The Nationalist Movement v City of York*, 481 F3d 178, 184 (3d Cir 2007).

⁷¹ *Id.*, citing *Central Florida*, 774 F2d at 1523–24.

⁷² The city conceded this point at oral argument, despite seemingly contrary language in the waiver provision itself. *Nationalist Movement*, 481 F3d at 184.

⁷³ See *Central Florida*, 774 F2d at 1524.

⁷⁴ The government, for example, does not hand out free guns so that all citizens may exercise their Second Amendment right to bear arms regardless of ability to pay.

⁷⁵ 931 F2d 1130 (6th Cir 1991).

for the parade.”⁷⁶ The court then rejected the contention that the lack of an indigency waiver rendered the ordinance unconstitutional.⁷⁷ Distinguishing *Central Florida* and *Lubin*, the court reasoned that this case was crucially different because “failure to satisfy the fee prerequisite” did not totally “preclude[] . . . involvement in the constitutionally protected activity.”⁷⁸ In this case, because there were alternative fora the speakers could use for free—for example, the city’s sidewalks and parks—the lack of an indigency waiver was not a constitutional problem.⁷⁹

This line of argument was picked up and expanded by other circuit courts. In *Sullivan v City of Augusta*,⁸⁰ the First Circuit reiterated and expanded on the Sixth Circuit’s alternative forum reasoning by reversing the district court’s holding that lack of an indigency waiver rendered the statute unconstitutional.⁸¹ The court reasoned at length that sidewalks and parks constitute acceptable alternatives to streets, despite testimony from the plaintiffs’ expert witness (a sociologist), who testified to street demonstrations’ greater ability to attract attention, the historical and symbolic significance of street marches, and the logistical challenges of sidewalk marches.⁸² As the First Circuit noted, however, First Amendment precedent establishes that the government is not required to guarantee to every speaker her preferred means of communication at all times and in all places.⁸³ The court held that as long as there remain “avenues for the general dissemination of a message,” the restriction is acceptable.⁸⁴ Because the sidewalks and parks provided ample opportunity for speakers to convey their message, the government was not required to do more.⁸⁵ The court also expressed concern that requiring an indigency waiver would effectively require the government to subsidize indigent speech.⁸⁶ When “there are ample alternative forums

⁷⁶ *Id.* at 1133.

⁷⁷ *Id.* at 1137.

⁷⁸ *Id.*

⁷⁹ *Stonewall Union*, 931 F2d at 1137.

⁸⁰ 511 F3d 16 (1st Cir 2007).

⁸¹ *Id.* at 41–42.

⁸² *Id.* at 42–44.

⁸³ *Id.* at 44, citing *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent*, 466 US 789, 812 (1984).

⁸⁴ *Sullivan*, 511 F3d at 44, quoting *Frisby v Schultz*, 487 US 474, 483–84 (1988) (quotation marks omitted).

⁸⁵ *Sullivan*, 511 F3d at 43–44.

⁸⁶ *Id.* at 41–42.

for speech,” there is “insufficient justification” for “forcing general taxpayers to support financially a particular organizer’s event.”⁸⁷

The *Sullivan* decision prompted a lengthy dissent from Judge Kermit Lipez, who drew on the Supreme Court’s equal protection and due process jurisprudence to articulate an argument for the necessity of an indigency waiver. Lipez pointed out that, when fundamental rights are at stake, the Supreme Court has often held—using due process or equal protection principles or both—that a public subsidy is necessary for the indigent.⁸⁸ Given the fundamental nature of the right at stake, he reasoned that the fees should be subject to heightened review.⁸⁹ Lipez then applied the traditional three-pronged TPM test, and concluded that, under the heightened scrutiny he proposed, the fees failed to leave open ample alternative channels for communication of the information.⁹⁰ Sidewalks and parks, he argued, are simply not the same as the streets.⁹¹ “[U]nder any meaningful standard of heightened review, that alternative forum cannot be ample if it lacks the qualities that make the streets a uniquely powerful forum for expression, and thereby leaves indigent speakers and the public they seek to influence with a substantially different and diminished First Amendment experience.”⁹² Lipez thus provided the most in-depth advocacy for the constitutional requirement of an indigency waiver to date, and expanded on the equal protection argument hinted at by the Eleventh Circuit’s reference to *Lubin*. However, he applied the traditional TPM framework to analyze the issue, and consequently made an argument that might be applicable only as applied to access to the streets.

The most recent appellate case on point is the Tenth Circuit’s opinion in *iMatter Utah v Njord*.⁹³ The Tenth Circuit noted the circuit split on the issue, and more or less restated the First Circuit majority’s justification in rejecting the plaintiffs’ as-applied challenge.⁹⁴ Quoting *Sullivan*, the court noted that “[t]here is a vast number of areas in which a lack of funds may disadvantage an

⁸⁷ *Id.*

⁸⁸ *Id.* at 46–47 (Lipez dissenting).

⁸⁹ *Sullivan*, 511 F3d at 48–49 (Lipez dissenting).

⁹⁰ *Id.* at 55 (Lipez dissenting).

⁹¹ *Id.* at 49–55 (Lipez dissenting).

⁹² *Id.* at 55 (Lipez dissenting).

⁹³ 774 F3d 1258 (10th Cir 2014).

⁹⁴ See *id.* at 1264.

individual, and a constitutional determination that in civil matters an indigent need not pay costs ordinarily imposed on others is a matter to be approached with some caution.”⁹⁵

In sum, the majority position among the circuits is that there is no need for the government to waive fees for the indigent as long as there are adequate alternatives to the desired fora. Sidewalks and parks, in the view of these courts, are adequate alternatives to street protests. These courts worried about imposing an obligation on the government to subsidize indigent applicants, and correctly noted that the First Amendment does not require speakers to be given their choice of forum in every circumstance. Interestingly, even the circuits that have found that no fee waiver is required have not attempted to argue that a fee that totally deprived indigents of their access to the public forum would be constitutional. This absence might suggest that there are limits on the state’s ability to restrict indigent access to the public forum, but so far courts have not thoroughly addressed the extent of these limits.

III. INDIGENCY WAIVER AS A FIRST AMENDMENT QUESTION

There are two basic arguments against requiring a fee waiver, both with strong roots in First Amendment doctrine. First, there is an argument about subsidies. It is well established that the government is not required to subsidize private speech.⁹⁶ If permitting fees simply pass along the costs inherent in the use of the public forum, there is no reason to require the state to pay those costs for indigent speakers.⁹⁷ Second, it is also well established that the government does not need to guarantee speakers their choice of platform.⁹⁸ As long as indigent speakers can generally get their messages out through use of public fora, the argument runs, the restriction is acceptable under the three-pronged test for content-neutral restrictions.

⁹⁵ Id at 1265, quoting *Sullivan*, 511 F3d at 45 (brackets in original).

⁹⁶ See, for example, *Rust v Sullivan*, 500 US 173, 193 (1991), quoting *Regan v Taxation with Representation of Washington*, 461 US 540, 549 (1983) (finding, in the context of a First Amendment challenge, that “[a] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right”).

⁹⁷ See, for example, *Cox*, 312 US at 577 (asserting that fees designed to cover event expenses are not per se unconstitutional).

⁹⁸ See *Heffron v International Society for Krishna Consciousness, Inc.*, 452 US 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”).

Both of these arguments have appeal, and both have been employed to support major decisions in this area. The argument about choice of platform comes up more than the argument about subsidies, though the subsidies argument actually would be stronger if it is correct, because it implies that fees should be permissible in all circumstances. If the indigency waiver is a subsidy, and there is no requirement that the government subsidize speech, there is no reason to require ample alternatives. The choice-of-platform argument is somewhat more palatable, however, because it allows courts to avoid saying that one may simply be too poor to exercise certain First Amendment rights.

A. Subsidized Speech?

The motivating principle behind the courts' willingness to allow the kinds of fees contemplated in *Cox* seems to be that those fees are not "taxes" on the use of the public forum but are rather the inherent costs of using the forum.⁹⁹ In the same way that an organization would need to pay for a band to play at its event or the costs of decorating a float, it must also pay the costs incurred by the government in controlling traffic, processing applications, and perhaps also providing police protection. Accordingly, courts have held that the government cannot charge more than the costs incurred in administering and carrying out the event.¹⁰⁰ While the government cannot profit from these fees, if the fees are comparable to other expenses inherent in the use of the public forum, it is unlikely that the First Amendment would require the government to subsidize indigent speakers by waiving their fees.

Indigents might point to *Forsyth County* to demonstrate that the government is already required to cover some expenses for controversial speakers, despite the general principle that the government need not pay for the costs of speech. In *Forsyth County*, the Supreme Court held that *Cox* did not permit the state to charge unpopular speakers for the extra costs of police protection.¹⁰¹ This holding, however, effectively requires the government to subsidize controversial messages, but not uncontroversial

⁹⁹ See, for example, *Sullivan*, 511 F3d at 41–42; Goldberger, 62 Tex L Rev at 412 (cited in note 56) (noting the *Cox* Court's "assumption that the relationship between a speaker and the government can be treated like a two-party business relationship").

¹⁰⁰ See *Eastern Connecticut Citizens Action Group v Powers*, 723 F2d 1050, 1056 (2d Cir 1983); *Fernandes v Limmer*, 663 F2d 619, 633 (5th Cir 1981); *Baldwin v Redwood City*, 540 F2d 1360, 1372 (9th Cir 1976); *Sullivan*, 511 F3d at 38.

¹⁰¹ *Forsyth County*, 505 US at 136.

ones. Therefore, *Forsyth County's* holding on controversial speech might indicate that the government is required to subsidize at least some of the costs of using the public forum for some speakers. However, controversial speakers are likely distinguishable from indigent speakers. Courts have historically worried more about content discrimination than income discrimination, so it would be difficult to persuade a court that *Forsyth County* mandates government assistance for indigent speakers in the same way it mandates assistance for controversial speakers.

Indigent speakers might also argue that *Cox's* requirement that fees be reasonable inherently requires some level of subsidy. Perhaps there is some level at which fees would be unreasonable even if they reflected only the actual costs of the speech to the government. To the extent that costs are unreasonable, therefore, *Cox* would appear to require subsidizing those costs for all speakers. Indigents might therefore argue that the generally applicable fees are unreasonable as applied to them. This argument is also likely to fail, however. It would require courts to inquire into the particulars of what it is reasonable to expect each speaker to pay, introducing an element of subjectivity into an apparently objective test. Courts are unlikely to want to wade into a morass of factual issues about how much it is subjectively reasonable to expect any given speaker to pay, a messy endeavor that might entail jury fact-finding. In the past, the Court has often been reluctant to get into ad hoc case-by-case judgments when it comes to speech rights,¹⁰² so there is reason to think it would not like to do so here. Furthermore, reasonableness standards are usually applied in an objective way such that indigents or other unusually positioned actors cannot challenge them.¹⁰³

In conclusion, the general principle against government speech subsidies provides a strong argument that, from a First Amendment perspective, no indigency waiver is required for public forum user fees, regardless of the availability of alternative

¹⁰² See, for example, *Brown v Entertainment Merchants Association*, 131 S Ct 2729, 2743–35 (2011) (rejecting emphatically a proposed balancing standard for categories of unprotected speech); *United States v O'Brien*, 391 US 367, 383–85 (1968) (expressing reluctance to inquire into the legislative intent behind facially neutral laws affecting speech).

¹⁰³ See, for example, *Crawford v Marion County Election Board*, 553 US 181, 205–06 (2008) (Scalia concurring in the judgment) (stating that in the voting context the Court considers the impact of voting regulations “on voters generally” rather than on individual voters).

fora. Ultimately, however, no circuit court has taken the subsidies point to its logical conclusion.

B. Ample Alternatives?

The more popular reasoning among the circuits is that the government is not required to guarantee any speaker her ideal means of speech so long as there are ample alternative fora for speech. This idea has appeal—it is clearly not true that the government has to allow speakers their ideal forum or channel of communication in all circumstances.¹⁰⁴ This is the central idea behind a TPM restriction. But the ample alternatives test does not fit well with the indigency waiver question because, unlike most other limitations on one’s ability to use certain channels of communication, permitting fees restrict speech based on characteristics of the speaker rather than the manner of the speech.

The First Circuit supported its ample alternatives formulation with references to two illustrative Supreme Court cases.¹⁰⁵ In one of these cases, *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent*,¹⁰⁶ the Court upheld an ordinance forbidding the posting of all signs on public property (with a narrow exception for officially approved commemorative plaques).¹⁰⁷ Fees were not at issue in the case.¹⁰⁸ Even though “[t]he ordinance prohibit[ed] appellees from communicating . . . in a [particular] manner[] and presumably diminishe[d] the [] quantity of their communication,” the ordinance did not violate the First Amendment because there were ample alternative modes of communication through which the speakers could demonstrate their support of Roland Vincent’s candidacy.¹⁰⁹ Over appellees’ objections, the Court held that “the posting of political posters on public property”

¹⁰⁴ See Part II.B.

¹⁰⁵ See *Sullivan*, 511 F3d at 44.

¹⁰⁶ 466 US 789 (1984).

¹⁰⁷ *Id.* at 791 n 1, 817.

¹⁰⁸ See *id.* at 793–96 (describing the procedural history of the case).

¹⁰⁹ *Id.* at 803, 812.

was not “a uniquely valuable or important mode of communication.”¹¹⁰ Similarly, in *Frisby v Schultz*,¹¹¹ the Court upheld a local ordinance forbidding picketing on the public streets around private residences in order to prevent “emotional disturbance and distress to the occupants.”¹¹² The Court reasoned that the ordinance was constitutional because it was content neutral, justified by the interest of protecting unwilling listeners in the sanctity of the home, and still permitted the “general dissemination of a message.”¹¹³ Protestors, the Court noted, were still free to march down the streets, go door-to-door, distribute literature, and even contact residents by phone.¹¹⁴ Other cases have similarly upheld bans on certain kinds of expressive conduct, including information distribution through noisy sound trucks,¹¹⁵ political advertising on city buses,¹¹⁶ and certain kinds of outdoor billboards.¹¹⁷

In light of this precedent, the majority conclusion that there is no requirement of an indigency waiver as long as there are available alternatives makes some sense. In many ways, the fees in *Sullivan* looked a lot like the picketing ordinance in *Frisby*: they were content neutral, were designed to meet a recognized government interest (administrative cost defrayal), and permitted those who could not pay other opportunities to convey their message. On the other hand, public forum fees differ from the picketing restriction at issue in *Frisby*, the signposting restriction at issue in *Taxpayers for Vincent*, and most other permitted restrictions on First Amendment expression in an important way. These cases, cited by the First Circuit, involved restrictions on the kind of speech activity permitted, whereas the fees at issue in these cases in effect restrict speech based on the characteristics

¹¹⁰ *Taxpayers for Vincent*, 466 US at 812. There is an argument to be made that streets are a “uniquely valuable” mode of communication. Judge Lipez argued this point at length in his dissent in *Sullivan*. *Sullivan*, 511 F3d at 55 (Lipez dissenting). But in the end, while an acknowledgement that the argument that streets are unique is likely to be helpful for specific plaintiffs, it does not answer the underlying question of the permissibility of prohibitive charges on the use of the public forum. If the state wanted to impose fees for the use of sidewalks or parks, or all public fora, an acknowledgement that streets are uniquely valuable would be totally unhelpful.

¹¹¹ 487 US 474 (1988).

¹¹² *Id.* at 477, 488. The ordinance was prompted by concerns related to incidents of peaceful picketing of the home of an abortion provider. *Id.* at 476–77.

¹¹³ *Id.* at 483–85.

¹¹⁴ *Id.* at 483–84.

¹¹⁵ See *Kovacs v Cooper*, 336 US 77, 87 (1949).

¹¹⁶ See *Lehman v City of Shaker Heights*, 418 US 298, 302–03 (1974) (Blackmun) (plurality).

¹¹⁷ See *Metromedia, Inc v City of San Diego*, 453 US 490, 512 (1981) (White) (plurality).

of the speaker. The laws in *Frisby* and *Taxpayers for Vincent* restricted *where*, *when*, and *how* people could speak, not *who* could speak. The First Amendment test for content-neutral regulation in the public forum is primarily designed to serve practical ends, allowing the government to coordinate among different speakers and balance the practical considerations of traffic, noise, and personal privacy. While permitting fees arise out of practical budgetary considerations, they do not raise the kinds of considerations about coordination that motivate the test for TPM restrictions.

The case of public forum user fees is therefore different in a way that should shape this analysis. What is difficult and troubling about these fees is that they allocate and restrict First Amendment rights based on the speaker's ability to pay. Solvent speakers get to access the forum of their choice, indigent speakers do not, and this distinction is caused by government action (the imposition of a fee). It is a government action that creates a categorization that grants some people more access than others. In other words, it looks like a classic equal protection problem.

IV. INDIGENCY WAIVERS AS AN EQUAL PROTECTION QUESTION

Courts have been trying to apply First Amendment frameworks to something that is better conceptualized as an equal protection question, with confusing results. The most common argument against requiring an indigency waiver relies on First Amendment case law, which allows restrictions on the kinds of ways people can speak and assemble, but it is not clear that that case law should apply to restrictions that affect who can speak. This is an issue that is better addressed by the Equal Protection Clause, which deals with laws that treat some people differently than other people. The other First Amendment concern, the proposition that the government does not have to subsidize speech, is also more clearly answered through an equal protection lens. Equal protection law has extensively addressed the question of when the government needs to subsidize the exercise of fundamental rights. Looking at this issue as a Fourteenth Amendment question therefore provides more clarity than working with First Amendment doctrines and suggests that fees must be waived even when there are alternative fora.

This Part first examines the relationship between equal protection jurisprudence and First Amendment jurisprudence. Next, it surveys cases in which the Court has dealt with fees denying indigents the exercise of fundamental rights and interests. In

these cases the Court has held that under the Fourteenth Amendment certain fees are invalid as applied to indigents. Thus, this Part argues that the same reasoning should apply to the case of public forum fees. Finally, this Part analyzes and rejects the distinctions offered by the majority of circuits between these cases and the public forum permitting cases.

A. Equal Protection and the First Amendment

The interactions between the First and Fourteenth Amendments are complex and not fully developed. It is well settled that the Equal Protection Clause of the Fourteenth Amendment prohibits certain content-based restrictions of speech.¹¹⁸ In other contexts, scholars and judges have suggested interplay between the two amendments,¹¹⁹ especially in areas that strongly implicate both expressive and equality values—for example, election law¹²⁰ and hate speech.¹²¹ However, the relationship between the amendments is not completely clear.¹²²

¹¹⁸ See *R.A.V. v City of St. Paul, Minnesota*, 505 US 377, 406 (1992) (White concurring in the judgment) (“[T]he Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest.”); *Carey v Brown*, 447 US 455, 461–62 (1980) (“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”); *Police Department of the City of Chicago v Mosley*, 408 US 92, 94–96 (1972) (“Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment.”).

¹¹⁹ Compare *Vieth v Jubelirer*, 541 US 267, 294 (2004) (Scalia (plurality), with id at 314–17 (Kennedy concurring in the judgment), with id at 324–25 (Stevens dissenting) (revealing a disagreement among the justices about what role the First Amendment should play in racial gerrymandering cases). See also generally Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 Mich L Rev 2409 (2003); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U Chi L Rev 20 (1975).

¹²⁰ See, for example, *Williams v Rhodes*, 393 US 23, 31, 34 (1968) (noting that a state law that made it difficult for a third party to appear on ballots implicated First and Fourteenth Amendment concerns).

¹²¹ See, for example, Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv L Rev 124, 126 (1992) (asking whether hate speech may be prohibited under the Thirteenth and Fourteenth Amendments rather than the First Amendment); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U Chi L Rev 795, 802 (1993) (“[T]he government might be permitted to justify certain narrow restrictions on speech by reference to the Civil War Amendments, by claiming that the interest in equality is sufficiently neutral and weighty to support those restrictions.”).

¹²² Compare, for example, *Williams–Yulee v Florida Bar*, 135 S Ct 1656, 1668–70 (2015) (analyzing campaign finance restrictions under the First Amendment), with *Buckley v Valeo*, 424 US 1, 30–31 (1976) (analyzing campaign finance restrictions under the First and Fourteenth Amendments).

In many cases, it is uncertain how the Equal Protection Clause does or should interact with the First Amendment, and vice versa. In *Police Department of the City of Chicago v Mosley*,¹²³ for example, the Court struck down a Chicago picketing ordinance on the basis that it violated the Equal Protection Clause.¹²⁴ The use of the Equal Protection Clause to strike down the ordinance in *Mosley* was surprising because it was unnecessary—the Court could have easily reached the same result on First Amendment grounds.¹²⁵ Because the First Amendment has its own equality principle, at least when it comes to discrimination based on viewpoint or content,¹²⁶ it is not always clear what the Fourteenth Amendment adds to the equation. In fact, the use of equal protection in *Mosley* and similar cases has been criticized for being too speech insensitive and open to the possibility of equalizing by reducing speech opportunities across the board.¹²⁷

Because of the fact that the First Amendment contains its own guarantee of equality in that it prevents the government from favoring certain ideas over others, equal protection claims are often beside the point when it comes to speech rights litigation.¹²⁸ Generally speaking, the government needs a good justification for any speech restriction, and most laws that are unconstitutionally discriminatory in the equal protection sense will fail to meet that standard. A law prohibiting African Americans from speaking in a public forum, for example, obviously violates the Fourteenth Amendment, but also violates the First Amendment because racial animus is not a good enough reason to restrict speech rights. In most cases, the First Amendment will actually do a *better* job of protecting group speech rights than the Fourteenth

¹²³ 408 US 92 (1972).

¹²⁴ *Id.* at 95, 102.

¹²⁵ See *id.* at 96 (“[U]nder the Equal Protection Clause, *not to mention the First Amendment itself*, 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.”) (emphasis added).

¹²⁶ See *Williams–Yulee*, 135 S Ct at 1680 (“[T]he First Amendment is a kind of Equal Protection Clause for ideas.”); Karst, 43 U Chi L Rev at 21 (cited in note 119).

¹²⁷ See generally Roy A. Black, Case Comment, *Equal but Inadequate Protection: A Look at Mosley and Grayned*, 8 Harv CR–CL L Rev 469 (1973). The concern with “equalizing down” is not a serious concern here, however. The Fourteenth Amendment analysis in this Comment suggests only that, assuming there is some basic right to access a public forum (which there is under *Hague*), indigents must be given *more* expressive opportunities, not that everyone could be given fewer.

¹²⁸ See, for example, *First National Bank of Boston v Bellotti*, 435 US 765, 774 n 8 (1978) (declining to reach appellants’ equal protection claims because appellants succeeded on their First Amendment arguments).

Amendment, because protecting speech simply is not the purpose of the Fourteenth Amendment. In the absence of the First Amendment, for example, the Fourteenth Amendment would likely permit speech restrictions based on the speaker's identity if they could be justified by a rational relationship to a legitimate state interest, so long as the restriction did not target a protected class.¹²⁹

The case of indigent speakers in the public forum provides an interesting contrast because it is a place where the Fourteenth Amendment might provide more protection for speech rights than the First Amendment. Unlike content- or viewpoint-based discrimination, which are likely to also be unconstitutional under the First Amendment, indigency fees are likely not unconstitutional under the First Amendment if they leave open ample alternative fora.¹³⁰ However, as this Comment argues, they may be unconstitutional under the Fourteenth Amendment. Unlike in *Mosley*, an equal protection analysis adds to the discussion here because it might guarantee a speech right that the First Amendment does not. While this might seem odd at first glance, it makes sense upon closer examination. The focus of Equal Protection Clause jurisprudence is differential treatment of groups of people, so it should be expected that the Equal Protection Clause will sometimes add to the protections of the Bill of Rights when government actions create inequality with respect to those rights.¹³¹

B. Indigency Waiver with No Ample Alternatives

The Supreme Court has repeatedly refused to hold that poor people are a suspect class.¹³² On the other hand, there is a long tradition of invalidating wealth classifications when they interfere with access to at least some fundamental rights, especially

¹²⁹ See *R.A.V.*, 505 US at 406–07 (White concurring in the judgment).

¹³⁰ See Part III.B.

¹³¹ For a similar example, consider the use of racial profiling in police searches. While the Fourth Amendment will provide some protection against discrimination by requiring probable cause or reasonable suspicion to justify a search or seizure, it has little to say about inequitable police administration once the threshold standard of reasonable suspicion or probable cause is met. The Equal Protection Clause, however, imposes additional limitations on how searches may be carried out. See, for example, *Whren v United States*, 517 US 806, 813 (1996) (noting that the constitutional basis for objecting to discriminatory police searches is the Equal Protection Clause rather than the Fourth Amendment); *People v Kail*, 501 NE2d 979, 981–82 (Ill App 1986) (upholding an equal protection challenge even when the police had probable cause to arrest under the Fourth Amendment).

¹³² See, for example, *San Antonio Independent School District v Rodriguez*, 411 US 1, 28 (1973).

when a government monopoly is involved.¹³³ The Court has mostly used the Equal Protection Clause to strike down these kinds of wealth classifications. But it has also relied on the Due Process Clause, and sometimes has relied on both when the cases involved the intersection of equal protection and due process concerns.¹³⁴ While the analysis in this area does not fit neatly into typical equal protection (or due process) doctrine,¹³⁵ there is a clear pattern of requiring the government to waive fees for indigents when certain fundamental rights are implicated. This Section discusses cases holding that the government must waive fees for indigents, focusing particularly on electoral process cases to establish their similarity to the right to access the public forum. While these decisions do not fit into traditional equal protection categories of scrutiny, it is clear that fees depriving indigent people of access to fundamental rights are closely scrutinized.¹³⁶ This Section argues that public forum fees should be held to similarly exacting scrutiny when they deprive indigents of access to a public forum.

¹³³ See, for example, *M.L.B. v S.L.J.*, 519 US 102, 124 (1996) (finding that access to “judicial processes in cases criminal or ‘quasi criminal in nature’” and those that “forever terminat[e] parental rights” cannot be limited to those who can pay a fee); *Lubin*, 415 US at 718 (“[I]n the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.”); *Bullock v Carter*, 405 US 134, 149 (1972) (invalidating a Texas law that “requir[ed] candidates to shoulder the costs of conducting primary elections . . . and [] provid[ed] no reasonable alternative means of access to the ballot” because it “erected a system that utilize[d] the criterion of ability to pay as a condition to being on the ballot”); *Harper v Virginia Board of Elections*, 383 US 663, 666 (1966) (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”); *Griffin v Illinois*, 351 US 12, 17 (1956) (Black) (plurality) (“In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.”).

¹³⁴ Because many cases involve the intersection of equal protection and due process concerns, there is some terminological and doctrinal confusion when referring to this set of cases. This Comment uses the term “equal protection” because most cases in this area rest on an equal protection framework. See *M.L.B.*, 519 US at 120 (noting that while cases concerning access to judicial process “reflect both equal protection and due process concerns,” “[m]ost decisions in this area . . . res[t] on an equal protection framework”) (brackets in original). Furthermore, unlike in cases involving access to the judicial process, access to the public forum does not implicate due process concerns in a significant way, so “equal protection” is a more conceptually appropriate term for this issue.

¹³⁵ See *id.* (“A precise rationale [for cases involving indigent access to judicial processes] has not been composed because cases of this order cannot be resolved by resort to easy slogans or pigeonhole analysis.”) (citation and quotation marks omitted).

¹³⁶ See note 134. The standard imposed in these cases looks a lot like strict scrutiny. See, for example, *Bullock*, 405 US at 144 (noting that “laws [related to voter financial resources] must be ‘closely scrutinized’ and found reasonably necessary to the accomplishment of legitimate state objectives”). In some places, the Court characterizes this standard as strict scrutiny. See, for example, *Rodriguez*, 411 US at 29. In other cases, however, the

1. Electoral rights analogy.

Perhaps the closest analogy to public forum fee waivers is a string of cases involving ballot access and the right to political participation. The Eleventh Circuit gestured to this group of cases by citing *Lubin*.¹³⁷ *Lubin*, however, was preceded by two other cases that are worth discussing. In *Harper v Virginia Board of Elections*,¹³⁸ the Supreme Court considered a challenge to Virginia's poll tax, which required each resident twenty-one years or older to pay a fee of not more than \$1.50 to the state on penalty of disenfranchisement.¹³⁹ The Court concluded that the Equal Protection Clause was violated "whenever [the state] makes the affluence of the voter or payment of any fee an electoral standard."¹⁴⁰ Commenting that wealth classifications, like race, are "traditionally disfavored," the Court warned that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."¹⁴¹

The Burger Court expanded the Warren Court's view in *Harper* by continuing to invalidate wealth conditions on political participation well into the 1970s. In *Bullock v Carter*,¹⁴² for example, the Court invalidated Texas's very high filing fees to appear on the primary ballot.¹⁴³ The Court applied "close scrutiny" because the fee requirement tended to limit voter choice and the rights of prospective candidates based on economic status; thus, the Court held that the fees violated the Equal Protection Clause.¹⁴⁴ Texas's proffered interests were insufficient to save the law.¹⁴⁵

First, Texas argued that it needed to use filing fees to help keep down the number of people on the ballot, because having too many candidates can lead to voter confusion, clogging of the election machinery, fractured votes, and other logistical problems.¹⁴⁶

Court avoids the "strict scrutiny" label. See, for example, *M.L.B.*, 519 US at 115–16 (using the term "heightened scrutiny"). Ultimately, the exact standard is less important than the Court's analysis and its results.

¹³⁷ *Central Florida*, 774 F2d at 1524.

¹³⁸ 383 US 663 (1966).

¹³⁹ *Id.* at 664 & n 1.

¹⁴⁰ *Id.* at 666.

¹⁴¹ *Id.* at 668, 670.

¹⁴² 405 US 134 (1972).

¹⁴³ *Id.* at 135–36, 145, 149.

¹⁴⁴ *Id.* at 142–44.

¹⁴⁵ *Id.* at 147.

¹⁴⁶ See *Bullock*, 405 US at 145.

Furthermore, the state asserted an interest in deterring “frivolous or fraudulent candidates.”¹⁴⁷ The rejection of these asserted interests as a justification for a wealth classification is important because limiting ballot size and defraying state costs parallel two of the main justifications a state might offer for public forum permitting fees.

Like ballot fees, public forum permitting fees carry significant administrability benefits. The fewer the people who can pay the fee, the fewer problems there will be coordinating among different groups. Because one of the purposes of public forum regulation is to coordinate among different speakers and balance the public’s interests in traffic control and clear streets,¹⁴⁸ this purpose might appear at first glance to be legitimate. However, no court has tried to justify public assembly fees in this way, and for good reason. The *Bullock* Court was very hostile to the “weeding out” justification, calling the fee requirement “extraordinarily ill-fitted to that goal.”¹⁴⁹ As the Court pointed out, serious candidates would be excluded by this scheme because of inability to pay, and nonserious candidates might be able to get on the ballot just by paying the fee.¹⁵⁰ With a right so important at stake, the Court was unwilling to accept the state’s interest in lowering the number of prospective users as a justification for excluding some users based on wealth. One can imagine that such a justification would be similarly disfavored in the public forum arena, and, indeed, such an argument has been rejected by at least one appellate court.¹⁵¹

The state might argue that its interest in limiting use of the public forum is different and more significant than its interest in limiting ballot size. Fees are likely an effective way of preventing frivolous or unpopular speakers from using expensive fora like

¹⁴⁷ *Id.*

¹⁴⁸ See notes 14–15 and accompanying text.

¹⁴⁹ *Bullock*, 405 US at 146.

¹⁵⁰ See *id.* at 145–46.

¹⁵¹ See *Eastern Connecticut Citizens Action Group v Powers*, 723 F2d 1050, 1056 (2d Cir 1983). In *Eastern Connecticut Citizens Action Group*, the court rejected the government’s attempt to justify an administrative fee for public demonstrations on the basis that it would “deter frivolous requests for the use of state property.” *Id.* The court reasoned that this justification had been “soundly rejected” in *Bullock*, which it characterized as holding “that the exercise of constitutional rights may not be conditioned upon financial requirements for the purpose of deterring frivolous requests.” *Id.* The court observed that the fee at issue in the case was “no more likely to deter frivolous than legitimate applicants,” especially when some people were “unable, not unwilling, to pay.” *Id.* (emphases omitted).

the public streets. The government might argue that fees are essential to prevent floods of poor speakers from constantly shutting down the streets in order to convey their messages. What, after all, is to stop poor law students from asking Chicago if they may use Michigan Avenue to protest the use of the *Bluebook* in legal writing? However, while it might be true that frivolous use of the streets imposes more social costs than an overcrowded ballot, *Bullock's* logic still holds. As the Court pointed out in *Bullock*, wealth is a poor proxy for seriousness.¹⁵² If wealth is the only thing preventing this kind of abuse of the public forum, we would already expect to see frivolous-but-wealthy speakers using the streets to broadcast their ideas.

Furthermore, the state has other tools that it could use to prevent overuse of the public forum by unpopular or nonserious speakers, and ones that do not so seriously implicate distributional concerns. The state may impose reasonable TPM restrictions on how public fora may be used, which might include requiring some kind of demonstration of interest (in the form of a petition or something similar) before allowing streets to be turned over for parades. There are, of course, reasons to be concerned by measures disfavoring unpopular speakers, but those reasons do not become less troubling when implemented by proxy. In fact, using wealth as a proxy for popularity is far more worrisome than implementing a direct popularity requirement. Even if wealth were a good proxy for popularity or support (which it probably is not), it raises serious concerns of economic equality and fairness that are not as present with a direct support requirement.

This leaves the state's interest in defraying the costs of conducting primary elections, which has an even closer parallel in the realm of public forum access. Cost defrayment is the stated reason that these fees are permissible under *Cox*.¹⁵³ The Court in *Bullock* admitted that there was a rational relationship between the ballot fees and the objective of relieving the state treasury, but held that the state had to show something more than a mere rational basis: "[U]nder the standard of review we consider applicable to this case, there must be a showing of *necessity*."¹⁵⁴ The state did not meet the high standard required by the Court.

¹⁵² See *Bullock*, 405 US at 146.

¹⁵³ *Cox*, 312 US at 577–78.

¹⁵⁴ *Bullock*, 405 US at 147 (emphasis added).

Interestingly, the Court rejected an argument that because the candidates were “availing themselves of the primary machinery, . . . they [should] pay that share of the cost that they have occasioned.”¹⁵⁵ These costs, the Court said, “do not arise because the candidates decide to enter a primary or because the parties decide to conduct one,” but because the state has decided that primaries ought to be held.¹⁵⁶ Administrative costs and traffic control costs in the public forum are analogous, though the parallel is not exact. The costs of using a public forum do not arise because speakers decide to convey their message in public; they arise because the government has decided that it is in the best interests of all for the government to take on the role of coordinating among groups and policing their events. The government does not have to regulate the public forum as extensively as it does at present; in fact, in the past, the government took a much more passive role when it came to public assemblies, largely limiting its role to criminal policing to prevent rioting and other harm to society.¹⁵⁷ In both cases, it appears that the government has assumed a regulatory role in order to promote effective participation by coordinating among different claimants on limited resources (voter attention or public areas).¹⁵⁸ Much like with political primaries, it is not obvious why the state should be able to pass on the costs of implementing these legislative judgments when they have the effect of making certain speakers unable to exercise a fundamental right.¹⁵⁹

Apart from the state interests asserted, the *Bullock* analysis has another interesting parallel to the public forum question. In *Bullock*, the Court emphasized that it was concerned about not only the equal protection rights of the candidates, but also the rights of less affluent voters. Because candidates were likely to rely on contributions from voters to pay these filing fees, the impact of the fee would likely fall most heavily on members of the less affluent segment of the community, who might be less able to put their desired candidates on the ballot.¹⁶⁰ Similarly, one might expect the impact of public forum fees to fall more heavily on the

¹⁵⁵ *Id.* at 147–48.

¹⁵⁶ *Id.* at 148.

¹⁵⁷ El-Haj, 56 UCLA L Rev at 561–62 (cited in note 15).

¹⁵⁸ See *Lubin*, 415 US at 712–13 (discussing government interests in regulating the primary ballot). See also notes 9–16 and accompanying text (discussing reasons for government regulation of the public forum).

¹⁵⁹ See *Bullock*, 405 US at 147–49.

¹⁶⁰ *Id.* at 144.

less affluent, who might be less able to make financial contributions to groups and speakers they support. This parallel might not be helpful in the long run, however. In *San Antonio Independent School District v Rodriguez*,¹⁶¹ decided only a year after *Bullock*, the Court demonstrated extreme reluctance to recognize as a wealth classification the disparate impact a funding system would have on a group of people who were likely to be poor.¹⁶² Thus, the hypothetical impact of public forum fees on an undefined class of possibly poor people would probably not be specific enough for a court to act on any perceived equal protection violation. Still, it is interesting to note that there are interests other than the speakers' at stake here. Even if the impact on the general public is not cognizable as an equal protection claim, fees might distort the public discourse in a way that tends to favor wealthy speakers and listeners.¹⁶³

Bullock dealt with very large fees (Texas charged some candidates as much as \$8,900; the appellees in the case were charged \$1,424.60, \$6,300, and \$1,000, respectively).¹⁶⁴ The holding left open the possibility that reasonable filing fees might survive.¹⁶⁵ Two years later, however, in *Lubin*, the Court rejected this possibility. In *Lubin*, an indigent person who was unable to pay California's ballot fee challenged the fee as an equal protection violation and an infringement on his rights of expression and association.¹⁶⁶ As in *Bullock*, the Court recognized the state's legitimate interest in deterring frivolous candidates and limiting ballot size.¹⁶⁷ Again, however, the Court held that the fees were not sufficiently tailored to promoting that interest when they indisputably disqualified some serious but indigent aspirants to political office. "Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard

¹⁶¹ 411 US 1 (1973).

¹⁶² See *id.* at 18–20, 22–23.

¹⁶³ Wealth distortions, of course, are likely to have disparate impacts on groups who are disproportionately poor. In *Bullock*, the appellees emphasized the possible disparate impact of the filing fee on black and Chicano people and on women, but the Court did not rely on these arguments. Compare Appellees' Brief, *Dies v Carter*, No 70-128, *27–28 (US filed Aug 26, 1971) (available on Westlaw at 1971 WL 133723), with *Bullock*, 405 US at 143–44 (discussing the impact of fees on the less affluent, but not discussing race or gender).

¹⁶⁴ *Bullock*, 405 US at 135–36, 145.

¹⁶⁵ *Id.* at 149 ("It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts.").

¹⁶⁶ *Lubin*, 415 US at 710.

¹⁶⁷ *Id.* at 715.

to their economic status.”¹⁶⁸ However historically dubious the roots of this “tradition” might be, the Court’s message was clear: when the state imposes a wealth classification on the right to appear on the ballot and does not provide an alternative means of ballot access, the classification is unconstitutional.¹⁶⁹

Given the opinions in *Bullock* and *Lubin*, which are still good law,¹⁷⁰ it is extremely likely that a wholesale denial of indigent access to a public forum would be a violation of the Equal Protection Clause. *Lubin* and *Bullock* established that the Equal Protection Clause confers a “right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process.”¹⁷¹ The right to assemble and share one’s views in public is important for many of the same reasons that voting and political candidacy are. All are central means by which citizens can participate in civic life, exhort the government to change, and attempt to advocate for policy reforms and different political views. In fact, the close connection between electoral rights and First Amendment rights has been noted by courts and scholars.¹⁷² While the parallel is not exact, it would be difficult to argue that the right to speak and assemble in public is less important than the right to vote in a way that makes it more acceptable to deny access to indigents. If anything, the right to speak and assemble is *more* important, because it is so strongly related to self-fulfillment¹⁷³ and the promotion

¹⁶⁸ *Id.* at 717–18.

¹⁶⁹ *See id.* at 718.

¹⁷⁰ While subsequent cases have limited the reach of *Lubin*’s and *Bullock*’s reasoning with respect to voting rights, their holdings are still good law insofar as they address the issue of indigent ballot access. *See Crawford v Marion County Election Board*, 553 US 181, 207 n * (2008) (Scalia concurring in the judgment).

¹⁷¹ *Lubin*, 415 US at 713, quoting *Rodriguez*, 411 US at 59 n 2 (Stewart concurring).

¹⁷² *See*, for example, *Vieth*, 541 US at 294 (Scalia) (plurality); Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 *Tenn L Rev* 549, 550–51 (1985) (arguing that the Court should develop a First Amendment analysis for voting rights controversies).

¹⁷³ *See* David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U Pa L Rev* 45, 62 (1974) (“The value of free expression, in [one] view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.”).

of a healthy marketplace of ideas,¹⁷⁴ in addition to its relationship to democratic participation.¹⁷⁵

Perhaps more importantly, however, this line of equal protection cases is not limited to the voting context: as the next Section shows, the Supreme Court has also found equal protection violations when wealth classifications block access to other fundamental rights. Thus, it is clear that this strain of equal protection jurisprudence is broader than just voting rights: the Court has held that indigents must be allowed access to rights that are considered “fundamental.”

2. Equal protection and other fundamental rights.

This Section examines the wider context of the electoral rights cases examined above to demonstrate that the Court tends to hold that fees must be waived for indigents in cases involving fundamental rights¹⁷⁶ and government monopolies. While the Court has long held that wealth is not a protected class,¹⁷⁷ in cases in which wealth restrictions implicate access to fundamental rights

¹⁷⁴ See *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

¹⁷⁵ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1146–57 (1991) (arguing that the original purpose of the speech, press, petition, and assembly clauses was to safeguard majoritarian democratic government).

¹⁷⁶ It is not entirely clear why the rights that the Court designates as “fundamental” for purposes of this analysis are characterized as such. The Court has characterized laws impacting electoral participation (*Bullock*, 405 US at 142–43; *Lubin*, 415 US at 721–22), marriage (*Boddie v Connecticut*, 401 US 371, 376 (1971); *Zablocki v Redhail*, 434 US 374, 390–91 (1978)), and criminal appeal (*Griffin*, 351 US at 18–19) as implicating fundamental rights, but has refused to treat other important rights as fundamental. See, for example, *Dandridge v Williams*, 397 US 471, 487 (1970) (rejecting an equal protection challenge to welfare restrictions); *Lindsey v Normet*, 405 US 56, 74 (1972) (rejecting a fundamental right to housing); *Rodriguez*, 411 US at 38 (rejecting a fundamental right to education). It is likely that the Court’s designation of fundamental rights reflects a practical desire to limit the reach of the Equal Protection Clause to require affirmative governmental assistance. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich L Rev 213, 289–90 (1991). However, the definitional ambiguity of fundamental rights in this context should not impact the analysis of public forum user fees, because First Amendment rights must be fundamental under any reasonable definition. See *Rodriguez*, 411 US at 17 (asking if “a fundamental right explicitly or implicitly protected by the Constitution” was at issue to determine if “strict judicial scrutiny” was required).

¹⁷⁷ *Rodriguez*, 411 US at 28 (rejecting a claim that Texas’s school financing should be subject to strict scrutiny only because of its impact on poor students).

or interests on which the government holds a monopoly, the Court uses heightened scrutiny to invalidate fees restricting access to these rights.

The Court has been forceful in requiring indigency waivers in the area of criminal justice. In *Griffin v Illinois*,¹⁷⁸ the Court held that an Illinois statute requiring criminal appellants in noncapital cases to purchase their own trial transcripts in order to appeal violated due process and equal protection.¹⁷⁹ The Court reasoned that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,”¹⁸⁰ and held that Illinois must therefore find some means of providing indigent defendants with “adequate and effective appellate review.”¹⁸¹ While this might not mean requiring the state to purchase a transcript in every case in which the defendant cannot afford it, the state must provide some alternative way of allowing indigents fair appellate review.¹⁸² This was true even though there is no federal constitutional right to appellate review of trial court decisions.¹⁸³ As long as a state chooses to provide an appellate process, the Court held, it cannot allow some defendants to be excluded based on inability to pay a fee.¹⁸⁴ In *Mayer v City of Chicago*,¹⁸⁵ the Court clarified that *Griffin* applies even to nonfelony cases in which there is no chance of confinement.¹⁸⁶ The state’s interest in protecting the public fisc was deemed “irrelevant” in light of the invidious discrimination that exists “when criminal procedures are made available only to those who can pay.”¹⁸⁷

In the context of civil law as well, wealth classifications have been found to violate equal protection when they implicate fundamental interests. The civil law equal protection cases are particularly helpful because they show a strong adherence to the principle that stricter scrutiny is required when both a fundamental interest and a wealth exclusion are present. For example, the

¹⁷⁸ 351 US 12 (1956).

¹⁷⁹ *Id.* at 18–20 (Black) (plurality).

¹⁸⁰ *Id.* at 19 (Black) (plurality).

¹⁸¹ *Id.* at 20 (Black) (plurality).

¹⁸² *Griffin*, 351 US at 20 (Black) (plurality).

¹⁸³ *Id.* at 18 (Black) (plurality).

¹⁸⁴ *Id.* (Black) (plurality).

¹⁸⁵ 404 US 189 (1971).

¹⁸⁶ *Id.* at 195–97.

¹⁸⁷ *Id.* at 197.

Court has found that indigent paternity defendants must be provided with blood tests at the state's expense,¹⁸⁸ that the state cannot prohibit people from marrying because of their unpaid child support obligations,¹⁸⁹ and that record preparation fees violated the defendant's equal protection and due process rights when inability to pay meant that the defendant was unable to appeal the termination of her parental rights.¹⁹⁰ On the other hand, the Court found no need for fee waivers for an applicant seeking a bankruptcy discharge because there was no "fundamental interest" at stake.¹⁹¹

However, the government does not subsidize the exercise of all or even most fundamental rights.¹⁹² For example, the government is not required to subsidize the right to an abortion¹⁹³ or the right to bear arms. However, the right to speak in a public forum is better analogized to rights like a fair trial or electoral participation, which the government must subsidize, because it similarly involves a government monopoly. The rights the government is constitutionally required to subsidize generally involve situations in which the government controls all of the legitimate means of exercising the right.

A helpful example is *Boddie v Connecticut*,¹⁹⁴ in which the Court held that court fees violated due process when they denied indigent couples the ability to obtain a divorce.¹⁹⁵ In *Boddie*, the Court distinguished divorce from other civil disputes because of the government monopoly involved. "[O]ur society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes,"¹⁹⁶ the Court wrote, whereas in the case of divorce "the judicial proceeding becomes the only effective means of resolving the dispute at hand

¹⁸⁸ See *Little v Streater*, 452 US 1, 3, 16–17 (1981).

¹⁸⁹ See *Zablocki*, 434 US at 390–91.

¹⁹⁰ See *M.L.B.*, 519 US at 107.

¹⁹¹ See *United States v Kras*, 409 US 434, 445 (1973).

¹⁹² See, for example, *Lyng v International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America, UAW*, 485 US 360, 363 n 2, 370–74 (1988) (rejecting an equal protection attack on a statute providing that no household could become eligible for benefits while a household member was on strike); *Harris v McRae*, 448 US 297, 321–26 (1980) (holding that Medicaid funding need not be provided for women seeking medically necessary abortions).

¹⁹³ See *McRae*, 448 US at 317–18 (holding that the government has no constitutional obligation to subsidize abortions).

¹⁹⁴ 401 US 371 (1971).

¹⁹⁵ *Id.* at 382–83.

¹⁹⁶ *Id.* at 375.

and denial of a defendant's full access to that process raises grave problems for its legitimacy."¹⁹⁷

Similarly, in *Bullock*, the Court emphasized the government's control over primary elections when rejecting an argument that primary candidates should share the costs of the primary machinery because they occasioned the costs. "[T]he costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that party primaries be held."¹⁹⁸

The public forum is similar to the political primary: the state does not have to regulate access to the public forum,¹⁹⁹ but has chosen to do so because it has decided that regulation will help to maintain order and promote the public convenience. By making itself the only avenue through which speakers can legitimately access the public forum, the government has placed public forum access in the same category as divorce, state-run primary elections, and criminal appeals. *Forsyth County* might suggest that the Court already implicitly recognizes this, because *Forsyth County* requires the government to subsidize police protection for controversial speakers in the public forum.²⁰⁰ Additionally, there is the basic point that the government by definition has a monopoly on the public forum, because the "quintessential" public fora—streets, parks, and sidewalks—are government property.²⁰¹

Thus, it is clear that the Court applies close scrutiny to cases in which fees infringe on rights found to be fundamental in a variety of contexts, not just when it comes to voting rights. There can be no real debate that the First Amendment rights to speak and assemble in a public forum are fundamental. The Bill of Rights is the template for the rights and interests considered "fundamental."²⁰² Additionally, the right to access a public forum is similar to other areas in which the government must subsidize access because it involves a government monopoly.

¹⁹⁷ *Id.* at 376.

¹⁹⁸ *Bullock*, 405 US at 147–48.

¹⁹⁹ Access to the public forum used to be more or less unregulated. See El-Haj, 56 UCLA L Rev at 561–62 (cited in note 15).

²⁰⁰ See Part III.A.

²⁰¹ See *Perry Education Association v Perry Local Educators' Association*, 460 US 37, 45 (1983).

²⁰² David A. Strauss, *The Role of a Bill of Rights*, 59 U Chi L Rev 539, 540, 554–59 (1992) (describing one perspective that "views the Bill of Rights as a charter of fundamental human rights").

It is true that First Amendment rights are substantively different from the fundamental interests the Court has recognized in cases like *Bullock* and *Griffin*. First Amendment rights are, by definition, explicitly protected by the text of the Constitution, whereas there is no independent federal constitutional right to vote or to appeal a conviction. There might therefore be some conceptual strangeness to arguing that the Fourteenth Amendment can effectively change the scope of First Amendment protections. The Supreme Court, however, has indicated that the Fourteenth Amendment imposes constitutional limitations on speech that are at least coextensive with those imposed by the First Amendment,²⁰³ and it would be even more conceptually strange to argue that the First Amendment limits the scope of the Fourteenth.²⁰⁴ It is therefore proper to analogize the fundamental rights protected by the First Amendment to the fundamental interests in *Bullock* and *Griffin*.

It is clear that, following these cases, a wealth requirement that entirely prevented indigents from exercising the right to speak in a public forum would be subject to exacting scrutiny and almost certainly be found unconstitutional. The more difficult question is whether the same would be true when there are alternative fora that the speaker can access for free.

C. Indigency Waiver with Ample Alternatives

The common situation in public forum permitting ordinances involves imposing fees for use of the streets, but allowing speakers to use sidewalks and parks without charge. As long as these alternatives exist, the majority of circuits have concluded, there is no violation of the indigent's constitutional rights. The electoral process cases are distinguishable, according to the Sixth Circuit, because in those cases "failure to satisfy the fee prerequisite precluded the prospective participants' involvement in the constitutionally protected activity."²⁰⁵ Additionally, the First Circuit relied on *Lubin*'s language of "reasonable alternative means of ballot access" to differentiate it from the issue at hand.²⁰⁶ Thus, there are at least two related arguments for why the fundamental

²⁰³ See *Mosley*, 408 US at 94–96. See also Part IV.A.

²⁰⁴ Indeed, the Court has indicated in other contexts that the Equal Protection Clause covers territory protected by other amendments and can offer broader protections than those amendments. See note 131.

²⁰⁵ *Stonewall Union*, 931 F2d at 1137.

²⁰⁶ *Sullivan*, 511 F3d at 42 n 15.

rights equal protection cases should not apply to a situation in which there are alternative fora that a speaker can use for free. If these arguments hold up, the ample alternatives fee scheme cases are distinguishable from *Lubin* and its relatives, and some fee schemes will be permitted. If, however, these distinctions are not satisfactory, *Lubin* should govern and the government should be required to waive fees for the indigent. The remainder of this Part examines the strength of the Sixth and First Circuits' arguments and ultimately concludes that they fail.

1. *Lubin*'s "alternative means" language.

One potential way to distinguish *Lubin* and related cases is by using *Lubin*'s own language. This argument is somewhat trivial, but worth discussing because it hints at the broader level-of-generality problem in the majority's reasoning. The Court's opinion in *Lubin* implied that ballot access fees might be acceptable if the state provided an "alternative means" of access to the ballot.²⁰⁷ Specifically, the Court suggested that candidates who could not pay could be required to demonstrate the seriousness of their candidacy by collecting a certain number of petition signatures.²⁰⁸ The First Circuit seized on this language to argue that *Lubin* does not apply in cases in which there are alternative available fora.²⁰⁹

This "alternative means" language was also adopted in the Eleventh Circuit's opinion in *Central Florida*. "The granting of a license permit on the basis of the ability . . . to pay . . . *without providing for an alternative means of exercising First Amendment rights*[] is unconstitutional."²¹⁰ This might be interpreted to imply that the lack of an indigency waiver is constitutional so long as there are ample alternatives.²¹¹ In light of the citation to *Lubin*, however, such a reading would be misguided. In *Lubin*, the Court's alternative means meant giving indigents a way to exercise the same rights without having to pay a fee. The Eleventh

²⁰⁷ See *Lubin*, 415 US at 718.

²⁰⁸ *Id.* at 718–19.

²⁰⁹ *Sullivan*, 511 F3d at 42 n 15:

Likewise, the plaintiffs' reliance on *Lubin* . . . is inapplicable here where the Court found that "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." The plaintiffs here have alternate means of expressing their views in the city of Augusta.

²¹⁰ *Central Florida*, 774 F2d at 1523–24 (emphasis added).

²¹¹ See Part III.B.

Circuit seems to have been imagining something similar in *Central Florida*, noting that the fee scheme in *Lubin* was a problem because it excluded potentially serious candidates without allowing them an alternative means of coming before the voters.²¹²

The reliance on *Lubin*'s alternative means language is therefore misguided. Nothing about the *Lubin* opinion suggests that it would be acceptable to put poor candidates on an alternative (and less desirable) ballot, which is analogous to the alternative fora argument. In fact, on the facts of *Lubin*, there is an analogous situation: the fee to run for the California State Assembly (\$192) was much cheaper than the fee to run for the Los Angeles County Board of Supervisors (\$701.60), which was the plaintiff's desired position.²¹³ Telling aggrieved indigent speakers to hold their parade on the sidewalks instead of on Main Street is analogous to the Court telling an indigent that even though he could not afford to run for County Board, his rights were not violated because he could afford to run for State Assembly. Instead of making an argument along these lines, the Court suggested other ways that the state could meet its stated goal of limiting ballot size while not excluding candidates from running from their chosen office because of inability to pay.

This is not to say, of course, that selecting a political office is directly analogous to choosing a forum for speech. However, the *Lubin* analysis demonstrates that the "total" versus "partial" preclusion point depends on how the right is defined, and shows the shortcomings of the majority position as a descriptive and conceptual matter. The alternative means language in *Lubin* does not imply that it is permissible to condition certain political rights on economic status so long as indigents can exercise some general right of political participation. Rather, it instructs that indigents must be granted some means of accessing the same ballot as everyone else. If anything, *Lubin*'s language therefore provides support for the idea that the government must waive fees for indigent speakers.

2. Total versus partial preclusion.

The more important distinction offered by the majority of appellate courts is that the fundamental rights line of equal protection cases should not apply because these cases dealt with total

²¹² *Central Florida*, 774 F2d at 1524.

²¹³ *Lubin*, 415 US at 710–11.

exclusions of indigents from a “constitutionally protected activity,” whereas in permitting fee cases indigents were precluded only from accessing specific fora, not from speaking or assembling in public fora altogether.²¹⁴

The strongest support for this argument comes from *Rodriguez*. In *Rodriguez*, parents challenged Texas’s local school funding scheme because it tended to deprive children in poorer districts of equal educational funding.²¹⁵ The Court found it significant that the aggrieved group sustained only a “relative [] rather than [an] absolute” deprivation of the desired benefit (that is, education).²¹⁶ Distinguishing *Griffin*, *Bullock*, and other cases in which strict scrutiny had been applied to a wealth classification, the Court held that the lack of an absolute deprivation of the asserted right, along with “the absence of any evidence that the financing system discriminate[d] against any definable category of ‘poor’ people,” meant that the Texas system did not disadvantage any particular class.²¹⁷ *Rodriguez* is an especially powerful precedent for the ample alternatives argument because it holds that providing some students with a substantially poorer quality of education than others is not an equal protection problem.²¹⁸ If access to the public forum is like education, it would not be a problem to deny access to the streets even if sidewalks and parks are a substantially worse choice for the speakers in question.

Education is *not* like access to a public forum for purposes of equal protection analysis, however. The *Rodriguez* Court explicitly refused to hold that “education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution.”²¹⁹ Education, while important, does not receive the same constitutional solicitude as First Amendment rights. The fundamental line might be artificial, but the Court has been consistent in using it to decide when waiver of fees is and is not required.²²⁰

²¹⁴ *Stonewall Union*, 931 F2d at 1137.

²¹⁵ *Rodriguez*, 411 US at 11–17.

²¹⁶ *Id.* at 19–21.

²¹⁷ *Id.* at 25, 28.

²¹⁸ *Id.* at 24–25.

²¹⁹ *Rodriguez*, 411 US at 29.

²²⁰ Compare, for example, *Kras*, 409 US at 445 (finding no obligation to waive the court fee needed to secure bankruptcy discharge because “no fundamental interest [] is gained or lost depending on the availability of a discharge in bankruptcy”), and *Ortwein v Schwab*, 410 US 656, 659 (1973) (per curiam) (holding that appellants seeking a review of an agency determination reducing their welfare benefits were not entitled to a waiver of the appeal filing fee because “no fundamental interest [] is gained or lost depending on

To the extent that *Rodriguez* indicates that *Bullock*, *Griffin*, and their progeny apply only when there is absolute deprivation of a benefit, however, it is still a significant problem for any argument in favor of an indigency waiver. Few public forum fees will entirely preclude access to every possible public forum, and so most will not constitute an absolute deprivation of the right to speak in the public forum. The distinction drawn in *Rodriguez* between absolute and relative deprivation, however, seems to be a retrospective recharacterization of *Griffin* and related cases, and one that does not hold up well upon closer inspection. While it is true that most of the cases in the *Griffin* line deal with absolute deprivation of a right, those cases themselves do not necessarily suggest that an absolute deprivation is necessary to trigger strict scrutiny.²²¹

Furthermore, whether something is an absolute or relative deprivation depends entirely on how the right at issue is defined. The right in *Griffin* itself is a good example. At one level of generality, the right at issue can be defined as the right to appeal one's conviction in a capital case. On this definition of the right, the defendant was absolutely deprived. However, at a broader level of generality, the right at issue was the right to have a fair trial, and the Court appears to have made a judgment that the right to seek review is a sufficiently important component of this due process right that depriving some people of review was fundamentally unfair. Defining the right broadly, the defendant did not experience a total deprivation of his due process rights, because presumably there was some level of fair process at the trial.

Similarly, the issue in *M.L.B. v S.L.J.*²²² was the right to appeal termination of parental rights.²²³ However, the right at issue could be defined either more narrowly as the right to have the state subsidize the preparation fees for a trial record or more broadly as the right to make choices regarding one's family life free from state interference without due process. In fact, the Court in *M.L.B.* indicated that it is the importance of the parent-child relationship which attracted strict scrutiny in the case,

the availability of the relief sought") (quotation marks omitted), with *M.L.B.*, 519 US at 127–28 (finding that fees that prevented impoverished parties from appealing parental status terminations were inconsistent with the Fourteenth Amendment).

²²¹ See *Rodriguez*, 411 US at 119 (Marshall dissenting) ("*Griffin* . . . refute[s] the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny.>").

²²² 519 US 102 (1996).

²²³ *Id.* at 106–07.

demonstrating that it conceptualized the fundamental right broadly.²²⁴ One might say that *M.L.B.* nevertheless involved an absolute deprivation of that right, because in that case, without a chance to appeal the parent stood to lose her entire legal relationship with the child. But in another sense, as in *Griffin*, the parent already had some due process protection for her parental rights at the trial level. Thus, what the court found offensive in *M.L.B.* was not that the parent was deprived of all due process regarding the termination of parental rights, but that poor parents were given less and worse process than wealthy parents.

Even when it comes to something like voting rights, which appear at first glance to be rather binary—either you can vote or you cannot—the level-of-generality problem remains. There is no constitutional right to vote or to participate in a political primary, and the right at issue in *Harper* and *Bullock* could be defined broadly as a right to participate in politics or the electoral process. A citizen who cannot vote or run for office can still campaign for candidates, fundraise, and otherwise participate in politics. Even in the electoral context, therefore, it is difficult to say whether a given restriction completely prevents an indigent person from exercising her rights.²²⁵

The same definitional problem exists regarding access to the public forum. If the right at issue is just a right to access *a* public forum, no matter how unsuitable for the speaker's needs, then there has been no absolute deprivation and perhaps no equal protection violation. If, on the other hand, the right to speak and express oneself in a public forum encompasses a right to *choose* the forum one wants to use, subject to generally applicable nonfee restrictions, at least some speakers will be denied that right by their inability to pay the required fees. The majority of circuits seem to define the right at the more general level, and thus find that there is no equal protection problem because there has been no absolute deprivation of the right.

However, it is not clear that this is the correct approach. The level-of-generality problem demonstrates that the distinction drawn by the Court based on absolute versus relative deprivation does not hold up well to closer examination, because many deprivations of rights could be framed as either relative or absolute depending on how the right is defined. Allowing cases to hinge on

²²⁴ See *id.* at 116–20.

²²⁵ To be clear, the Court in *Bullock* and *Lubin* did not frame the issue this way. See Part IV.B.1.

this kind of definitional sleight of hand is not acceptable, at least without more careful discussion. While the level-of-generality problem is a fairly common one in constitutional law, especially when it comes to fundamental rights,²²⁶ it is still a problem in a legal culture that values logical consistency and nonarbitrary decisionmaking. When a distinction rests so entirely on nonobvious definitional choices, it is open to arbitrariness and inconsistency. If similar cases are to come out differently, it should be because they are different in some normatively significant way. When the proffered difference is easily manipulable or arbitrary, it is difficult to say it is normatively significant.

Even more importantly, however, choosing a level of generality necessarily involves a value judgment,²²⁷ and by failing to acknowledge the level-of-generality problem presented by the total/partial distinction, the majority is effectively hiding a contested value judgment. Even if the level-of-generality problem on its own is not fatal to the majority position, the majority should at least be able to demonstrate that its definitional choice rests on defensible normative grounds, especially when its definitional maneuver is being used to limit vital constitutional rights in a way that raises significant concerns about fairness. The next Section argues, however, that a narrower definition of the right is preferable from a normative perspective, taking into account the values and history underlying the First Amendment.

3. Denial of the right to choose one's forum is total preclusion.

The right to speak and assemble in the public forum should be defined at a more specific level of generality as the right to choose one's forum. This means that even assuming that some version of the total/partial preclusion distinction holds up, *Lubin* and related cases should still apply, because the right to speak in a public forum is more sensibly defined at a narrower level of generality than the majority of circuits have proposed. As discussed above, the total versus partial distinction does not stand up to close inspection, because it depends on definitional choices that are not self-evident. The total/partial preclusion point is valid because it points to the normative decisions the Court is making in

²²⁶ See generally Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U Chi L Rev 1057 (1990).

²²⁷ *Id.* at 1059.

this area. It is not clear how the fundamental interests at issue should be characterized, so the Court must be making a normative definitional choice when it holds that an indigent person has been deprived of a fundamental right or interest. There is some point at which the presence of fees becomes so intrusive to an indigent's exercise of her fundamental rights that it becomes constitutionally unacceptable. The right can then be defined at that level for purposes of the total/partial distinction.

The majority of circuits are already engaging in some definitional choice. Most of the circuits define the right at issue as a right to access *any* public forum, regardless of what it is. However, the right could also be defined more broadly as the right to speak in public or convey one's views to others. Speakers who are prevented from accessing the streets, parks, and sidewalks do have alternatives. Instead of defining the right at issue as a broad right to convey one's views to the public, therefore, the majority position defines the right more narrowly as the right to access a public forum. This definition of the right is not self-evidently correct; it involves some kind of normative choice with a strong basis in constitutional tradition.²²⁸

In the context of the indigency inquiry, however, an even narrower definition of the right—as a right to *choose* one's forum (within traditional TPM limits),²²⁹ rather than a right to access *any* forum—is more sensible. The narrower definition makes more sense in light of the purposes of the First Amendment's guarantee of the right to speak and associate in the public forum. This right is fundamentally about expression, and choice of place is a vital component of this kind of expression. Choice of place has important expressive content in itself, as many scholars have recently recognized.²³⁰ Professor Timothy Zick, for example, has

²²⁸ See, for example, *Hague*, 307 US at 515–16 (Roberts) (plurality) (discussing the “ancient” nature of the right to speak in the public forum).

²²⁹ These kinds of limits could be used to prevent an unlimited flood of speech at government expense by, for example, requiring some speakers to demonstrate a threshold interest in their speech. See *Lubin*, 415 US at 718–19.

²³⁰ See, for example, Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 *Geo Wash L Rev* 439, 460 (2006) (“Speakers [] often fight for access to specific places because speech there is qualitatively and quantitatively different from speech elsewhere.”) (emphases omitted); Thomas P. Crocker, *Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence*, 75 *Fordham L Rev* 2587, 2588 (2007) (“Because where we speak is often just as important as what we say, increased efforts by the government to restrict the location of speech threaten to undermine the guarantees of the First Amendment.”) (emphases omitted). See also generally Timothy Zick, *Speech and Spatial*

noted the importance of “expressive place.”²³¹ “Expressive places are repositories for memories. They often represent practices, histories, conflicts, and accomplishments; they are condensations of values and they often convey meanings.”²³² Location is not fungible when it comes to demonstrations in public. Restricting a speaker’s access to particular places therefore implicates a key expressive component of her speech.

Understanding the vital significance of expressive space is crucial because it demonstrates the impact that user fees will have on indigent speakers. The problem is not simply that indigent speakers will not be able to access certain specific fora, like the streets. While it is of course true that parading down Main Street says something different about the importance of your message than fighting your way down a crowded sidewalk, location can matter in less obvious ways. In *Eastern Connecticut Citizens Action Group v Powers*,²³³ for example, a nonprofit dedicated to promoting the revival of railway traffic in eastern Connecticut sought to protest a highway extension by organizing a “Railathon,” a thirteen-mile march along a stretch of abandoned railway bed.²³⁴ The group believed that marching along the abandoned railway bed “would express the group’s opposition to the highway extension, and demonstrate the availability of a suitable corridor for a rail line.”²³⁵ Moreover, “[b]ecause the rail bed passe[d] under the interstate,” the group felt that the selected route would symbolically “illustrate the choice between the two competing modes of transportation.”²³⁶ The group successfully challenged a fee that would have prevented them from using the railway bed.²³⁷

While this example might be idiosyncratic, it demonstrates how central place can be to the expressive content of a demonstration, even beyond the considerations of convenience and visibility to a wide audience. If solvent, but not indigent, speakers can

Tactics, 84 Tex L Rev 581 (2006) (arguing that First Amendment doctrine should recognize the nonfungibility of place).

²³¹ Zick, 74 Geo Wash L Rev at 441 (cited in note 230).

²³² *Id.* at 443.

²³³ 723 F2d 1050 (2d Cir 1983).

²³⁴ *Id.* at 1052.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Eastern Connecticut Citizens Action Group*, 723 F2d at 1056–57 (finding that the fee was unreasonable because the state failed to show that it reflected the administrative costs incurred by the government in managing the forum and failed to offer any other legitimate justification for the fee).

choose their location, the indigent speakers will have substantially poorer expressive capacity. Thus, the ability to choose one's forum is arguably as central to the expressive function of the right of speech and association as the right to appeal the termination of one's parental rights is to the rights of due process due to parents, or as the right to appear on the primary ballot for a specific office is to the right of political participation. In this way, it is comparable to the right to have an appeal in a termination of parental rights case or the right to be on the ballot of a primary election. In each case, there is a broader right that would still exist without the narrower right, but in a much less meaningful way because the indigent individual has been deprived of an extremely important component of the broader right.

Of course, it is true that many kinds of restrictions on speech will lessen the speaker's expressive experience. Speakers who enjoy using loudspeakers at night will be differentially impacted by prohibitions on using loudspeakers at night. However, restrictions that lessen the expressive possibilities for indigents are uniquely troubling. Fees that tend to give indigents a significantly poorer expressive experience than solvent speakers are likely to systematically distort the public discourse in a way that laws differentially impacting nocturnal loudspeaker users do not.²³⁸

The Court's precedent in this area suggests that this kind of distortion is a relevant concern for this analysis. In *Bullock*, for example, the Court expressed great concern at the likely effect of the primary ballot fee on the public discourse.²³⁹ The *Bullock* Court assumed that fees precluding indigent ballot access would tend to disadvantage the poor,²⁴⁰ but there might be other troubling distortion effects from fees precluding indigent access. For example, given the complexities of collective action, fees might disfavor groups representing majority views when the benefits of expressing the viewpoint are too diffuse to motivate interested parties to donate.²⁴¹ There is also the more obvious point that laws discriminating against the poor can be expected to uniquely disadvantage social groups who are more likely to be poor—especially racial minorities. However the distortion effect works in practice,

²³⁸ See *Kovacs v Cooper*, 336 US 77, 87–89 (1949) (Reed) (plurality) (finding that a city ordinance that prohibited speakers from using sound amplifiers on city streets did not abridge free speech because, even if it restricted communication through that particular channel, the slight restriction was justified by public welfare concerns).

²³⁹ *Bullock*, 405 US at 144.

²⁴⁰ *Id.*

²⁴¹ See James Q. Wilson, *Political Organizations* 336 (Basic Books 1973).

the fact that such effects exist is a cause for concern that differentiates public forum user fees from other generally applicable restrictions on speech. A narrower definition of the right to access a public forum is therefore normatively desirable because it avoids the systematic distortions of the marketplace of ideas that result from allowing rich but not poor speakers to choose their forum.²⁴²

In sum, a narrow definition of the right as a right to choose a forum makes more sense in light of the expressive core of the rights to speak and demonstrate in public, and in light of the importance of preventing systematic distortion of the public discourse. And, if the right is defined narrowly in this way, indigent speakers are totally precluded from exercising it, which means that the Fourteenth Amendment requires a fee waiver for indigent speakers.

CONCLUSION

The majority of circuit courts to date have analyzed the issue of indigency fee waivers under the First Amendment and concluded that fee waivers are not required when indigent speakers are able to access alternative places from which to communicate their message. Analysis of the issue under the Equal Protection Clause, however, is a better conceptual fit because, unlike the First Amendment analysis, it addresses the fact that assessing fees is a government action that works to disadvantage specific groups of speakers. Unlike the First Amendment analysis, equal protection analysis leads to the conclusion that fee waivers ought to be required even when indigent speakers have access to alternative fora.

²⁴² This is not to say that antidistortion is a state interest that may justify state action curtailing the exercise of certain speakers' rights. See *Citizens United v Federal Election Commission*, 558 US 310, 348–52 (2010) (rejecting the suggestion that an antidistortion interest could justify limits on campaign contributions by corporations). It is merely a suggestion that because preventing distortion of the marketplace of ideas is one of the normative values underlying the First Amendment, it ought to be considered when deciding when intrusions on speech become constitutionally intolerable.