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Brown v. Palmer: Public Forum Analysis and the Military

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Brown v. Palmer: Public Forum Analysis and the Military[1]

I. INTRODUCTION

In *Brown v. Palmer* (*Brown II*),[2] the Court of Appeals for the Tenth Circuit sitting en banc held, by a six to four margin, that a military base[3] was not open to protestors' political speech during an open house on the base. This decision must be questioned not only because of its result, but also because of the majority's automatic deferral to the military on the important matter of free speech. This note contends that the majority's holding, that the military should be virtually free from First Amendment scrutiny during an open house, gives the military too much license to restrict free speech.

Part II of this note outlines what the Supreme Court has defined as public fora, nonpublic fora, and designated public fora. These definitions are important because they help to provide the background for the Tenth Circuit's decision in *Brown II*. Part III introduces the facts of the *Brown* cases. Part IV sets forth the court's reasoning regarding the military-base\public-forum issue during open houses. Part V analyzes the *Brown* decisions, stressing the following:

1) The objective evidence shows that a public forum was created on the day of the open house;

2) Restrictions were placed on the protestors' speech solely because of the content of that speech; and

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1. The author is a 1st Lt. in the United States Marine Corps. Some of the information in this note regarding general military operations is, therefore, based on personal knowledge.

2. Both Brown v. Palmer, 915 F.2d 1435 (10th Cir. 1990) (2-1 decision) and Brown v. Palmer, 944 F.2d 732 (10th Cir. 1991) (*en banc*) (6-4 decision) are used in this note and referred to in the text as *Brown* when dicussing both cases, and *Brown I* and *Brown II* when discussing a specific case. The latter is the en banc opinion. The arguments in the two hearings are almost identical, both finding for the military.

3. The facts of this case deal specifically with events at Peterson Air Force Base, in Colorado.

3) Military bases should not automatically be accorded special status for purposes of public forum analysis.

This note concludes that, based on the facts of *Brown*, the political and ideological speech of the protestors should have been permitted because the military base was a public forum on the day of the open house.

II. BACKGROUND

The degree to which the government can regulate free speech on government property depends on the type of property involved and whether that property is classified as a public forum or a nonpublic forum.[4] The military, as part of the government, is bound by the same limitations on restricting free speech as other government agencies.[5] The basic doctrinal test for what constitutes a public forum is set forth in *Perry Education Association v. Perry Local Educators' Association*.[6] In *Perry*, the United States Supreme Court grouped government property into three categories for First Amendment speech purposes. The categories are:

1) traditional public fora,

2) public fora created by government designation, and

3) nonpublic fora.[7]

Traditional public fora and nonpublic fora are at opposing ends of a spectrum. Traditional public fora are public places, such as streets and parks, which have been traditionally open to assembly and debate by citizens.[8] "In these quintessential public forums, the government may not prohibit all communicative activity."[9] If the state excludes speech based on its content at traditional public fora, the courts review such exclu-

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4. *Brown*, 915 F.2d at 1440.

5. The military, however, traditionally has been allowed greater leeway in deciding free speech issues than other government agencies. *See infra* notes 12, 15, 42, 91 and accompanying text.

6. 460 U.S. 37 (1983).

7. *Id.* at 45-46.

8. *See, e.g.*, Hague v. Commission. for Indus. Org., 307 U.S. 496, 515-16 (1939).

9. *Perry*, 460 U.S. at 45.

sions with strict scrutiny. Under the rigorous strict scrutiny test, the government must show that the regulation banning such speech is both necessary to serve a compelling state interest and narrowly tailored to achieve that end.[10]

If the state excludes speech in a content-neutral manner at traditional public fora, however, the state is granted more freedom in prohibiting speech. The state may put time, place and manner of expression restrictions on the speech. Regulating speech in a content-neutral manner means simply that the state excludes all forms of a particular expression without regard to the message. For example, if the state prohibited all parades on Tuesdays, this would be a content-neutral restriction. If the state only prohibited Republicans from participating in parades, however, the regulation would not be content-neutral. If the regulation is content-neutral, the government interest need only be significant as opposed to compelling, but the government must still leave open alternative channels of communication.[11]

At the other end of the spectrum are nonpublic fora. Nonpublic fora are public properties which carry with them no fundamental right to free speech because they are not traditionally used for communicative purposes.[12] The United States Supreme Court, speaking about some types of public property, emphatically stated that "the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.'"[13] This is so because the government has the power to safeguard the property under its control for its originally assigned use.[14]

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10. *Id.*
11. *Id.*
12. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (participating in Combined Federal Campaign found to be nonpublic forum); United States v. Albertini, 472 U.S. 675 (1985) (finding military bases as generally nonpublic fora); Perry Educ. Ass'n v. Perry Local Educators' Ass'n 460 U.S. 37 (1983) (finding school district's internal mail system a nonpublic forum); Greer v. Spock, 424 U.S. 828 (1976) (finding a military base during normal training hours a nonpublic forum); Adderley v. Florida, 385 U.S. 39 (1966) (finding a prison a nonpublic forum).
13. *Perry*, 460 U.S. at 46 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)).
14. Adderley v. Florida, 385 U.S. at 47.

In the middle of the spectrum lie "designated" public fora. These are places that traditionally have not been open for public assembly or debate, but for which the government intentionally has opened (either subjectively or objectively) for expressive activity.[15] In these fora, as in traditional public fora in which speech is banned in a content-neutral manner, the government may impose reasonable restrictions on speech such as time, place and manner.[16] The government may not, however, arbitrarily restrict speech based solely on its content.[17] Under the strict scrutiny test, restrictions must be narrowly tailored to a significant[18] government interest and leave open adequate alternative channels for the communication.[19]

The label chosen for the particular forum, whether traditional, nonpublic, or designated, is very important because the forum labels determine which level of scrutiny the court will apply—strict, intermediate, or rational-basis. The court will most likely apply strict scrutiny to traditional public fora, intermediate scrutiny to designated public fora, and rational-basis scrutiny to nonpublic fora.

The level of scrutiny that is applied may, in turn, determine the outcome of the case.[20] If strict scrutiny is applied, the government is very likely to fail in its attempts to regulate speech. If rational-basis scrutiny is applied, the government prohibition on speech will most likely be upheld. If intermediate scrutiny is applied, however, it is difficult to predict how the court will hold.

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15. *Brown*, 915 F.2d at 1440 (citing Widmar v. Vincent, 454 U.S. 263 (1981) (finding state university meeting facilities expressly made available for use by students a designated forum); City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (finding school board meetings opened to the public by choice or state statute a designated forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (finding municipal auditorium and city-leased theater designed for and dedicated to expressive activities a designated forum)).

16. *Brown*, 915 F.2d at 1440.

17. *Id.*

18. A "significant" government interest is nothing more than an interest more important than a rational interest, but not as important as a compelling interest. The United States Supreme Court has never come up with a workable definition of what a "significant" government interest is. For example, no one knows exactly when, in abortion cases, the government has a significant interest and when they have a compelling interest in the fetus.

19. *Brown*, 915 F.2d at 1440.

20. *Id.* at 1440-41.

III. FACTS OF THE *BROWN* CASES

Military bases across the nation routinely sponsor public open houses once a year on Armed Forces Day.[21] These open houses allow citizens to enter the base and observe the military weapons systems and training techniques. The open houses are attempts by the military to garner support and foster community relations with the cities in which the bases are located.[22]

The facts of the *Brown* cases involve events a military open house. Six peace activists passed out leaflets, during an Air Force open house, which portrayed the horrors of war and generally advocated an anti-war message.[23] The activists were issued bar letters[24] and forced off the base after they refused to cease distributing the leaflets.[25] The bar letters prohibited the activists from entering the base for any reason, including to attend an open house, without prior written permission from the base commander.[26]

One year later, the protestors filed suit seeking a preliminary injunction to prevent the base commander from executing the order, claiming that their right of speech had been violated

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21. The open houses are authorized by the respective military regulations of each branch of the Armed Forces. Brown v. Palmer, 689 F. Supp. 1045, 1048-49 (D. Colo. 1988).

22. *Brown*, 915 F.2d at 1446 (Moore, J., dissenting).

23. *Brown*, 915 F.2d at 1438.

24. Bar letters are letters issued to civilians that prevent them from entering a military base. They are issued by the Commanding General of the base, according to appropriate military regulations, after an administrative hearing has been held to determine the cause for the removal. Reasons why civilians, even dependents of Armed Forces personnel, may be barred include, but are not limited to: disruption of military operations, disturbing the peace or creating a nuisance, disobeying military base orders, or committing a crime on the base.

25. *Brown*, 915 F.2d at 1438. The base commander issued the bar letters pursuant to 18 U.S.C. § 1382 (1988) which provides:

> Whoever, within the jurisdiction of the United States goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
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> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
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> Shall be fined not more than $500 or imprisoned not more than six months, or both.

26. *Brown*, 915 F.2d at 1438.

solely because of the content of their message.[27] The suit petitioned relief from the bar order and sought to permit the peace activists to attend a future open house to be held at the base.[28]

The district court concluded that the base became a public forum on the day of the open house.[29] The district court then applied a strict scrutiny test and found for the plaintiffs.[30] The government appealed.

The Court of Appeals for the Tenth Circuit reviewed de novo the district court's finding[31] and overruled (two to one and then six to four en banc) the district court. The court of appeals held that the base was not a public forum, either by tradition or designation.[32] Instead, it concluded that the base was a nonpublic forum on all days, even the day of the open house.[33]

IV. REASONING OF THE *BROWN* DECISIONS

The crucial issue in the Tenth Circuit's analysis is whether the Air Force base was a public forum during the open house. If the court found the base to be a public forum and the restrictions on the speech content-based, the government would then have to meet the strict scrutiny test and demonstrate a compelling state interest to justify its restrictions on free speech.[34] This strict scrutiny test is very difficult, if not impossible, to pass.

If, however, the base were deemed a nonpublic forum, the military would need only to prove that the restrictions were reasonable and not the product of discrimination based on the protestors' message. This rational-basis test[35] is much easier to satisfy than the strict scrutiny test.[36]

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27. *Id.* at 1438-39.
28. *Id.* at 1438.
29. *Id.* at 1438-39.
30. *Id.* at 1439.
31. *Id.* at 1441.
32. *Id.* at 1440-43.
33. *Id.* at 1443.
34. *Id.* at 1440-41.
35. The rational basis test requires nothing more than a rational (even tenuous) relationship hetween the government's purported goal and the restriction on the speech. Gregory v. Ashcroft, 111 S. Ct. 2395, 2406 (1991) (citation omitted).
36. *Brown*, 915 F.2d at 1440-41.

If the base were viewed as a designated forum, the military would have to show that there was some important governmental interest at stake that justified curbing the protestors' speech. Using this intermediate scrutiny test, the court could plausibly find for either the military or the protestors.

The majority of the Tenth Circuit Court of Appeals concluded that the base was a nonpublic forum.[37] To support its holding, the *Brown I* court cited *Greer v. Spock*.[38] In *Greer*, the United State Supreme Court upheld a ban on political speeches at the Fort Dix military installation. The *Greer* Court held that there is "no generalized constitutional right to make political speeches or distribute leaflets" on military bases, even if they are generally open to the public.[39] The Court further stressed that "'it is . . . the business of a military installation . . . to train soldiers, not to provide a public forum.'"[40]

In its analysis, the *Brown I* court recognized that opening a military base to some speech and activity does not mean that the base must be opened to all speech or activity. The *Brown I* court cited several United States Supreme Court cases to support this assertion.[41]

The Tenth Circuit relied on *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*[42] to make its most important argument, and the basis of its holding—that the Air Force base was not a public forum because a public forum is not created by inaction, but must be created by an intentional abandoning of the nonpublic forum status.[43] In *Cornelius*, the Supreme Court stated that "[t]he government does not create a public

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37. *Id.* at 1443.

38. *Id.* at 1441 (citing Greer v. Spock, 424 U.S. 828 (1976)).

39. *Greer*, 424 U.S. at 838.

40. *Brown*, 915 F.2d at 1441 (quoting *Greer*, 424 U.S. at 838).

41. *Id.* at 1440-45. Cited cases include the following: United States v. Kokinda, 497 U.S. 720 (1990) (holding post office could permit pamphleteering and other forms of protest on its sidewalk premises yet prohibit all forms of solicitation); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (finding the Combined Federal Campaign did not have to include political advocacy groups in its list of charitable organizations); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding public school district's internal mail system was not a designated public forum, even though it was available to the school union and other non-profit organizations); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (finding mass transit authority permitted to advertise everything yet exclude political advertising).

42. 473 U.S. 788 (1985).

43. *Brown*, 915 F.2d at 1443-44.

forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[44] Both *Brown* court majorities interpreted "intentionally" from this recent Supreme Court definition to mean that one should look principally at the testimony of Air Force officials rather than at the events that actually took place the day of the open house.[45]

The *Brown I* majority based its conclusion that the base was a nonpublic forum on the following grounds: first, there was a complete "lack of any evidence suggesting that the government abandoned any claim of special interest in regulating the open house celebrations at . . . [the base]";[46] and second, "the military did not intend to open . . . [the base] to [appellants] and other individuals or groups seeking to convey ideological or political messages."[47]

Assuming that the military base is a nonpublic forum, however, does not end the inquiry.[48] Barring the protestors from the base on the day of the open house must be both reasonable and viewpoint neutral.[49] As the *Brown II* court stated, "[a]lthough the government is permitted greater latitude to regulate speech in a nonpublic forum, it must still regulate in a reasonable, viewpoint-neutral manner."[50] The court concluded that the ban met both of these requirements.[51]

V. ANALYSIS

In essence, the *Brown* courts held that the government may selectively preclude discussion of certain general topics, while at the same time inviting the public onto its premises to participate in speech on a variety of other topics.[52] Therefore, banning the protestors while allowing others to exercise free speech posed no problem for the *Brown* majorities.[53]

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44. *Cornelius*, 473 U.S. at 802 (citation omitted).
45. *Brown*, 915 F.2d at 1443.
46. *Id.*
47. *Id.*
48. *Id.* at 1444.
49. *Id.*
50. *Id.*
51. *Id.* at 1445.
52. *Id.* at 1441.
53. The *Brown I* majority sought to bolster its conclusions by citing the Eighth Circuit's Persons for Free Speech at SAC v. U.S. Air Force, 675 F.2d 1010 (8th Cir.) (*en banc*), *cert. denied*, 459 U.S. 1092 (1982). In *Persons*, however, no speech was permitted by civilians on the base. This is a marked distinction from *Brown*.

The cases decided by the U.S. Supreme Court in this area have been, almost without exception, closely divided with persuasive dissenting opinions.[54] The dissenting opinions in *Brown I* and *Brown II* were also convincing. While the majority's interpretation of what constituted a public forum on the base during the open house was plausible, the dissent provided the more compelling analysis of the public forum issue. The dissent asserted that a public forum was created on the day of the open house because of the various other activities that were permitted on the base by the Air Force.

The dissent agreed with the appellant's arguments. First, the objective evidence of what actually happened at the Air Force base was sufficient to establish that the activities that occurred there on Armed Forces Day made the base a public forum. Second, the Air Force's restrictions on political and ideological speech were not viewpoint neutral. Finally, military bases should not be accorded special status for purposes of analyzing whether or not they are public forums.[55] These arguments are discussed below.

A. The Objective Evidence Shows That a Public Forum Was Created

Air Force personnel testified that they never intended to open up the base to be a designated public forum. This is, however, what they actually accomplished by allowing civilians to express viewpoints on non-military topics. While the majority concentrated on the subjective testimonial evidence, the dissent focused on the objective circumstantial evidence.

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54. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (participating in Combined Federal Campaign found to be nonpublic forum); United States v. Albertini, 472 U.S. 675 (1985) (finding military bases as generally nonpublic fora); Perry Educ. Ass'n v. Perry Local Educators' Ass'n 460 U.S. 37 (1983) (finding school district's internal mail system a nonpublic forum); Greer v. Spock, 424 U.S. 828 (1976) (finding a military base during normal training hours a nonpublic forum); Adderley v. Florida, 385 U.S. 39 (1966) (finding a prison a nonpublic forum).

55. Brown v. Palmer, 944 F.2d 732, 740-42 (10th Cir. 1991) (Moore, J., dissenting).

The majority argued that "'[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse.'"[56] Under this analysis, the question then becomes, what does the government have to do to "intentionally" open a forum for public discourse? The *Brown* majorities looked principally at the subjective evidence and did not give much import to the objective evidence. The *Cornelius* case does not require, however, that the objective evidence be shunted off to the side.[57]

Rather than trying to fit the *Brown* cases into the same mold as other military free-speech cases as did the majority, the dissent recognized that the facts of the *Brown* cases were different than previously decided cases. Contrary to an Eighth Circuit case[58] relied upon by the majority, the facts of *Brown I & II* show that the base commander allowed other activities to take place on the base in conjunction with the open house.[59] These activities included:

1) Air Force recruiting;

2) discussion of weapons systems by defense contractors;

3) distribution of circulars advertising two different walking events;

4) distribution of brochures from the International Plastic Molder's Society; and

5) distribution of an edition of Space Observer.[60]

The first two activities can be realistically expected to take place at a military open house. The last three, however, are activities that indicated to the district court that the military turned the open house into a public forum (even if unwittingly) on this occasion.[61] In essence, the objective evidence suggests

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56. *Id.* at 734 (quoting *Cornelius*, 473 U.S. 788 (1985)).
57. *Cornelius*, 473 U.S. at 802.
58. Persons for Free Speech at SAC v. U.S. Air Force, 675 F.2d 1010 (8th Cir.) (*en banc*), *cert. denied*, 459 U.S. 1092 (1982).
59. *Brown*, 944 F.2d at 737.
60. Brown v. Palmer, 915 F.2d 1435, 1438-39 (10th Cir. 1990).
61. *Id.*

that the base personnel permitted civilians to use the base as an open forum to discuss whatever they wanted, regardless of whether or not their activity bore any connection either to military functions in general or to the mission of the base.[62]

Objectively, the activities permitted by the military at the open house demonstrate that the military intended to create either a designated or public forum. But, the military opened up the forum only to those whose message was not anti-military or anti-war. The military invited the public (who pays their salaries, through taxes) to come participate in the open house, but not to protest against the military in any way.

If the purpose of the open house is to allow taxpayers to see where their substantial "contributions" go, it doesn't appear too grievous to allow those same taxpayers the opportunity to demonstrate peaceably against particular uses of that money once a year at an open house. If the protestors had been actively passing out brochures at the congressional steps, their actions would have been applauded and upheld as the democratic process at work. But, since they elected to pamphleteer on a military base during Armed Forces Day, their actions were quashed.

An impartial look at what actually took place on the base during the open house seems to show that the dissenting opinion makes more sense than the majority opinion. According to the dissent, the Air Force created a public forum on the day of the open house by permitting some in attendance to exercise their right to speak on subjects of their choosing while denying that same right to the appellants. If the military did not want to create a public forum, it should not have allowed private

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62. *Id.* at 1438. The base chaplain's participation in various events during the open house raises other First Amendment concerns. However, because the chaplain is part of the military, his involvement, alone, did not necessarily turn the base into a public forum.

Some of the activities that the chaplain participated in include the following: he invited people to the base chapel to attend a luncheon and a religious ceremony, he distributed a Catholic book and newspaper extolling the Catholic faith and he passed out copies of the *Good News Testament Bible* with the inscription "Presented by the Air Force." *Id.* at 1439.

Surely, however, opening up the Air Force base to the distribution of literature of one religion to the exclusion of other religions raises constitutional questions. It would have been interesting to know whether the military would have let other religious persuasions on base to proselyte during the open house. With some creativity the appellants could have argued that their message of pacifism was a religious view and that this view was shut out by the government's sponsoring of the Catholic chaplain. But the protestors made no such arguments.

citizens to enter the base and speak out on a variety of topics unrelated to the military.

In his dissent, Justice Moore made a very important point—a point crucial to the military. He stressed that his opinion did not "imperil the future of military open houses. While the majority expresses this concern, it can be easily avoided if, in the future, the command . . . will refuse to permit any form of private speech at its open houses."[63] The dissent does not, therefore, advocate a ban on military open houses. It does, however, ask that the activities that take place at those open houses be closely monitored.

It was of paramount importance to the military that the forum be labeled as nonpublic because nonpublic fora carry with them no fundamental right to free speech and, therefore, avoid strict scrutiny review.[64] If, however, the base were a public or designated forum on the day of the open house, as the dissent claims, the military would have to regulate speech in a viewpoint-neutral manner.[65] Under public and designated forum analysis, the military cannot bar the appellants' speech simply because they disagree with its content.[66] This is what the *Brown* court appears to have authorized.

B. The Restrictions on the Political and Ideological Speech Were Not Viewpoint-Neutral

1. Granting a forum for some citizens while denying the same for the protestors constitutes viewpoint discrimination

The dissent does not believe that a designated or limited public forum can ever be created when certain subjects (such as religion, commercial enterprises and nature walks) can be discussed while other subjects (such as anti-war messages) cannot.[67] The dissent asserts that regulating speech in this manner is simply restricting speech based on its content; it is not

63. *Brown*, 944 F.2d at 743 (Moore, J, dissenting).
64. *See supra* note 12 and accompanying text.
65. *Brown*, 915 F.2d at 1444.
66. *See supra* notes 8-11, 15-20 and accompanying text.
67. *See Brown*, 915 F.2d at 1446 (Moore, J., dissenting).

viewpoint-neutral regulation of speech. As Judge Moore expressed in his dissent:

> In this instance, the base was not only opened to the public, but it was also open to diverse members of the public who were permitted to advertise and present essentially private materials of their own interest to the public. The only difference between what those civilians did and what the [appellants] did was the political content of the [appellants'] leaflets.[68]

The dissent argues that once a forum has been opened, that forum should be available to all.[69] The crucial issue for the dissent, therefore, is whether other leaflets were allowed to be circulated by civilians at the open house while the appellants' leaflets were barred.

The dissent contends that the government cannot create a designated or limited public forum to regulate viewpoint-based speech. Justice Moore explains why:

> When . . . the military grants some private individuals the right to address the visiting public on issues having nothing to do with the military objective of the open house, the military has created a public forum. Having done so, the military cannot then exclude others from the exercise of their rights to free speech just because the military does not agree with the political content of their message.
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> In this context, it makes no difference to me that the military did not intend to open the base to *political* speech. Those in charge unwittingly surrendered their right to regulate the conduct of the [appellants] simply by granting other civilians the right to speak on subjects of their own choosing during the course of an otherwise military event. Having done so, the First Amendment does not permit the base commander to exclude others who wish to exercise the same right.[70]

The dissent asserts that the majority's analysis, which argues that opening a base to some topics of speech and activities does not mean that it must be opened to all speech and

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68. *Id.*

69. "Once private discourse is encouraged or allowed in a governmental facility, that locus has become a forum for the free exchange of *all* ideas" *Brown*, 944 F.2d at 740 (Moore, J., dissenting) (emphasis added).

70. *Brown*, 915 F.2d at 1447 (Moore, J., dissenting).

activities, is backwards.[71] For the dissent, the "proper method of analysis is to first determine the type of forum provided by the Air Force and then decide whether that forum will permit censorship of speech."[72] According to this logic, the protestors should have been allowed to pass out their literature.

The dissent's argument, that the government should not have the power to create a designated public forum, is valid if the key concern is safeguard First Amendment rights. It would be a dangerous thing to give the government the power to decide which citizens can speak on its property and which citizens cannot. Perhaps the courts should look closer at this area of First Amendment jurisprudence to see if the designated public forum is really necessary.

2. *The military also sends out political and ideological messages*

Anti-war activists attending the military open house were not alone in exercising their freedom of speech. The military and the defense contractors were also expressing their political and ideological views supporting the military by advocating military preparedness and their willingness to go to war.[73] The military, therefore, conveyed its own ideological messages, but denied the protestors' anti-war message.

Of course, anti-war protestors do not, and should not, have unlimited access to military bases so they can protest military activities. But when an open forum is created by the military as in *Brown*, these taxpaying citizens should have a right to demonstrate peacefully against a strong military.

The *Brown* majority maintains that banning the appellants' speech is content-neutral because no political speech is ever allowed on the base. It is unrealistic, however, to think that military and defense contractors do not espouse a political view favoring a strong, well-prepared, and well-funded military. It is true that the military, itself, makes a political statements from which its members cannot divorce themselves.

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71. *Id.* at 740.

72. *Id.*

73. It is true that the military did not engage in, and has not historically engaged in, the political and ideological issues of when and where to wage war. *Brown*, 915 F.2d at 1444-45, n. 9. Although the military did not hand out pamphlets, like the protestors did, they still conveyed an ideological message concerning the role of a strong military in U.S. foreign policy.

This is precisely the reason, that the *Brown* majority should have been suspicious of the military's motives in banning the appellants' speech.

This does not mean, however, that protestors should always be allowed on base. This is an unrealistic policy that the dissent and the protestors do not advocate. Rather, their argument asks only for equal time at the open houses when private citizens are allowed to speak out on subjects of their choice.

Anytime the government is involved in regulating speech, great care should be taken to assure that all sides are allowed to express their viewpoints, even (and perhaps, especially) when they oppose the government or its operations. Refusal by the military and the Tenth Circuit to allow the protestors to pass out circulars seems to be nothing more than content-based regulation of speech.

The government is, of course, not required to create a designated public forum such as the open house on Armed Forces Day. Upon doing so, however, they should not be able to ban an entire type of communication without meeting a strict scrutiny analysis by the courts. As Justice Brennan, who dissented in *United States v. Kokinda*[74] (the most recent Supreme Court public forum case) succinctly stated, "When government seeks to prohibit categorically an entire class of expression, it bears, at the very least, a heavy burden of justification."[75]

3. Banning the protestors skews the public debate and suggests an improper governmental motive

In addition to the question of whether the military base was a public forum on the day of the open house, there are two other questions in analyzing whether banning the anti-war circulars was really content-based instead of viewpoint-neutral. First, does the regulation banning the appellant's circulars skew or distort the public debate? Second, do the circumstances surrounding the banning the appellants from the base suggest an improper governmental motive or justification?

Whenever the government restricts speech, it is important to ask whether that restriction distorts public dialogue by shutting out minority voice or viewpoint. In *Brown*, this appears to be the case because some citizens were allowed to express

74. 497 U.S. 720 (1990) (citation omitted).
75. *Id.* at 765 (Brennan, J., dissenting).

themselves freely at the open house, while others were denied this right.[76] The actions of all the civilians on the base were the same; only the message differed. The government should not have the power to exclude one side of a debate merely because they disagree with it.

The facts of the case also suggest a possible improper governmental motive. The viewpoint expressed by one group was shut out because its anti-war message was antagonistic to the military's basic mission. Clearly, the protestors were denied a forum based exclusively on the content of their message. Undoubtedly, the military would have had no argument with the protestors if their message was a political or ideological one that expressed the importance of a strong, ready-to-wage-war military. The free exchange of ideas, vital to the preservation of our democratic form of government, was stifled by the *Brown* majority.

The content-based speech restriction that the court of appeals upheld should be carefully scrutinized. If the government has the power to squelch political speech that it deems offensive, perhaps First Amendment jurisprudence is not protecting all the First Amendment rights that it should.

C. Military Bases Should Not Be Accorded Special Status For Purposes of Public Forum Analysis

The public forum issue can be interpreted differently, depending on the importance given to the fact that other civilians advertised various endeavors at the open house. The majority and dissenting opinions confirm this conclusion. Perhaps public forum analysis is not the deciding factor of this case. Maybe the whole public forum analysis is essentially a pretext for a debate, by the *Brown* majority and dissent, over the appropriate level of judicial deference to the military in free speech cases.

Essentially, the majority argues that the military should be given special status and broad leeway when a court addresses issues like the public forum issue in *Brown*.[77] The dissent asserts the opposite position.[78] It appears that the public forum doctrine is being manipulated by each side in an effort to

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76. *Brown*, 944 F.2d at 740.
77. *Brown*, 915 F.2d at 1440-43.
78. *Id.* at 1446-47.

lend credibility to their arguments.

Additionally, both sides have distorted the facts and circumstances. If the doctrine cannot be manipulated far enough to support their view, each side disregards the doctrine as irrelevant, or ignores slightly different factual circumstances of similar cases. The dissent, for example, unable to refute the fact that the designated or limited forum has become recognized as a legitimate forum in First Amendment jurisprudence, simply stated that no such thing exists and considered the doctrine irrelevant.[79] The majority failed to recognize the fact that none of the other public forum cases it relied on dealt with outside civilians who actively participated in the open house on Armed Forces Day as the *Brown* case did.[80]

Both the majority and the dissent in *Brown* become hopelessly lost in the rhetoric of public forum analysis. While expounding at great length on the public forum issue, both sides appear to be unaware that the real issue is how much license should be given to the military to decide for itself what First Amendment protections should be granted to citizens attending the open house.

The majority opinion affords the military too much leeway in regulating First Amendment issues. Indeed, the only requirements the *Brown* court required of the military were that the regulations be reasonable and viewpoint-neutral.[81] The majority held that the facts in *Brown* satisfied these requirements.[82]

The underlying assumptions of the *Brown* judges spring forth not only from their views on the appropriate level of judicial deference granted to the military, but also from their views on the role and importance of the First Amendment right of free speech.[83] The *Brown* majority takes the position that traditional fora, such as streets and parks, are sufficient outlets for public expression. They conclude, therefore, that the government has expansive discretion to decide what kind of speech to allow on nontraditional fora, such as military open houses. The *Brown* majority requires only that the military act in a content-

79. *Brown*, 944 F.2d at 740.
80. *See id.* at 739.
81. *Brown*, 915 F.2d at 1444-45 (Moore, J. dissenting).
82. *Id.* at 1445.
83. Their opinions, however, are necessarily based on the required doctrinal tests. *Id.* at 1446-47.

neutral manner by banning all political speech and that they submit a plausible basis for the regulation.[84] The military easily passes this rational-basis test.

The *Brown* dissent's basic assumptions about First Amendment speech seem more protective of free speech than the majority's. The dissent seems to have a strong presumption against governmental attempts to regulate speech. The dissent seems more suspicious of extensive government power over First Amendment speech. The dissent also recognizes that such power can be a dangerous thing and should be cautiously checked. While it admits that the government needs some power to curtail speech, it seems to place a heavy burden on the government to prove why speech should be restricted. For the dissent, the speech should have been allowed in this case because not only was other unrelated speech permitted, but the government could not point to any harm that could have resulted from the appellants' speech.[85]

1. Goldman *and the reflexive deferral philosophy towards the military*

Most prior free speech cases favored the military.[86] Courts consistently used whatever rationale necessary to defer to the choices made by the military on its bases.[87] While it is true that certain groups, such as the military, need broad discretionary powers in order to carry out their assigned functions, an automatic deferral that gives the military almost unfettered judgment in such an important area as free speech seems questionable.

Courts have likely accommodated the military's internal decisionmaking because this is necessary, in part, to the military's function and *esprit de corps.* Perhaps the courts have been too deferential at times.[88] *Goldman v. Weinberger*[89] is

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84. *Id.* at 1440. To its credit, the majority would not allow the military to have pro-war speeches and demonstrations while denying the opposite to take place. *Id.* The majority feels, however, that since a political discussion was not instigated by the military, nothing on that topic can be brought up by the public. *Id.* The dissent, in contrast, claims that once the government opens up a forum for discussion, any topic should be addressable or the restrictions on First Amendment speech are impermissible. *Id.* at 1447.

85. *Brown*, 944 F.2d at 741 (Moore, J., dissenting).

86. *Brown*, 915 F.2d at 1441.

87. *See infra* note 89.

88. *See* Goldman v. Weinberger, 475 U.S. 503 (1986); *see also* Note, *Allowing*

an example of the courts' hands-off approach toward military decisionmaking. In *Goldman*, the U.S. Supreme Court rejected a free exercise of religion challenge to an Air Force regulation prohibiting the wearing of headgear while indoors as applied to an orthodox Jewish officer who was disciplined for wearing a yarmulke. The Court saw the military as a kind of governmental unit to which extreme deference should be given, regardless of what constitutional right was at stake.[90]

While it seems like a small thing for the government to allow Goldman to practice his religion and wear the yarmulke, Justice Rehnquist, writing for the majority, repeatedly emphasized that the military should have complete freedom in its judgments.[91] In fact, in *Goldman,* the Court never reached the merits of whether the yarmulke was within military regulations.[92] The Court summarily rejected Goldman's argument that the Air Force had failed to prove that an exception for the wearing of unobtrusive religious clothing would threaten discipline.[93] Justice Rhenquist tersely declared that the decision was completely up to the appropriate military officials and that they were "under no constitutional mandate to abandon their considered professional judgment."[94]

Justice O'Connor, in her dissenting opinion, contended that there was allowance in the military code itself for the wearing

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Free Reign in the Military Establishment: Has the Court Allowed Too Much Deference Where Constitutional Rights are at Stake?-U.S. v. Stanley, 7 N.Y.L. SCH. J. HUM. RTS. 278 (1990). In United States v. Stanley, 483 U.S. 669 (1987), a Master Sergeant, in the course of Army experimentation, was asked to drink a clear liquid which appeared to be a glass of water. In fact, the liquid contained the drug LSD. In a 5-4 decision, the U.S. Supreme Court held that the constitution provided him with no remedy because his injuries were inflicted in the performance of his duties in the nation's armed forces. *Stanley*, although a tort claim, is an example of the unreasonable deference that the courts sometimes give the military when fundamental constitutional rights are at stake.

89. Goldman v. Weinberger, 475 U.S. 503 (1986).

90. *Id.* at 510.

91. *Id.* at 509-10.

92. 10 U.S.C. § 774 (1986) provides a potential exception to military regulations. As amended by Public Law 100-180, it reads:

> [A] member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed forces [unless]
>
> . . . .
>
> the wearing of the item would interfere with the performance of the member's military duties [or] the item of apparel is not neat and conservative.

93. *Goldman*, 475 U.S. at 509.

94. *Id.* at 509.

of unobtrusive religious garments.[95] Perhaps, under the regulations, wearing the yarmulke might have been allowed. But because the Supreme Court automatically deferred to the military, Mr. Goldman's case was never reached on the merits.

Other religious items have fared better than Goldman's yarmulke. For example, the military permits religious jewelry and clothing to be worn by Protestants, Catholics and Mormons. One can only speculate at how much turmoil would be stirred up if the military banned some of these other types of religious items. But just how far the courts will go in deferring to the military in the area of religion remains to be seen.

The dissent in *Goldman* argued that, at least as a minimum, if the military burdens the free exercise of religion of its members in the name of necessity, it should proffer some credible explanation.[96] The *Goldman* majority, however, neither required such an explanation, nor a compelling state interest for the regulation.[97]

2. Brown *and reflexive deferral towards the military*

This same kind of mechanical deferral granted to the military by the *Goldman* Court was also accorded to the military by the *Brown* court. This accommodation philosophy, taken by the courts towards the military in First Amendment areas, is unsettling. While *Goldman* dealt with the free exercise of religion, *Brown* dealt with another First Amendment area, free speech. *Brown* followed the *Goldman* approach by allowing the military almost unquestioned freedom to regulate the exercise of liberties that lie at the base of our Constitution and political heritage. *Brown* completely sidestepped the issue of making the military accountable for its regulations that curb some free speech while allowing other free speech to take place.

It is clear that the military must be accorded the right to be reasonably free to train and command discipline over its members. Although some (like the peace activists in *Brown*) may disagree, the military needs some elbow room to carry out its unique charge of protecting our country. If courts, unfamiliar with the military, are constantly looking over the shoulders

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95. *Id.* at 531 (O'Connor, J., dissenting).
96. *Id.*
97. *Id.* at 509-10.

of military personnel, the ability of the military to function efficiently may be hindered.

However, in *Brown*, the crux of the issue is not a military matter, it is a matter of protecting the First Amendment's right of free speech. Unless the government can show that it has a compelling interest in curbing the speech because of some imminent harm, the speech should have been allowed.[98] In *Brown*, neither the military nor the majority proffered any evidence that there was some imminent harm from the protestors or even that military discipline or *esprit de corps* were threatened.

According to the base Chief of Staff, the purpose of the open house was to "'provide the vital link of public awareness that is so important to the federal military forces in a democracy; . . . to ensure that the public is well-informed concerning the military forces their tax dollars help to support.'"[99] If this is true, perhaps those same taxpayers should have a forum to voice their opposition to how the military uses their tax dollars.

While it is undeniable that certain governmental organizations, such as the military, need some autonomy to effectively carry out their missions, the courts should take a closer look at these organizations to see if broad discretion is really necessary in all cases. This is especially true for areas that have historically received great protection in this country, such as the freedom of political and ideological speech.

3. Scrutiny of political and ideological speech prohibition on military bases should be increased

Accommodating the military to such an extraordinary degree is both unnecessary and unhealthy to First Amendment concerns. Cases such as *Goldman* and *Brown* should be examined closely because they involve important constitutional rights. The merits of adopting an automatic deferral policy should be weighed very carefully. The scrutiny of speech prohibition on military bases should be increased. For example, in *Brown*, the Tenth Circuit should have asked whether or not

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98. Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

99. *Brown*, 915 F.2d 1435, 1446 (10th Cir. 1991) (quoting Brown v. Palmer, 689 F. Supp. 1045, 1048 (D. Colo. 1988)).

restricting the protestors' speech was really necessary, given the other speech that was permitted on the base.

Political and ideological speech has always been of utmost importance in our republican democracy.[100] Without political and ideological speech available, the government could become more important than the citizens that created it. Instead of open communication about government workings and policies, the citizens would become subject to an all-powerful government that could not be openly criticized. Without such free speech, the government would become unresponsive to its citizens and take on a life all its own, acting on its own volition and contrary to popular will.

V. CONCLUSION

In considering whether a public forum was created on the day of the open house, the objective evidence of what actually took place on the base should have been relied on more heavily by the *Brown* majority. By denying the protestors their free-speech rights, based solely on the content of their leaflets, the *Brown* court erred. Although military bases carry on a unique function, they should not be given carte-blanche authority to decide free speech issues. If courts continue to automatically defer to the military's judgment anytime a First Amendment issue arises, perhaps we will see an eroding away of our First Amendment rights.

David M. Jones

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100. Political speech, until *Brown*, was always held as more important than commercial speech. For example, in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), the city of San Diego enacted an ordinance prohibiting virtually all outdoor advertising display signs. Although the Supreme Court upheld the ordinance for all commercial advertising, it invalidated the ordinance as it applied to noncommercial advertising. The noncommercial speech (political and ideological) was viewed by both the majority and the dissenting opinions as more valuable than the commercial speech, and therefore, entitled to greater protection. *Id.* at 515.

But the *Brown* court seems to hold the reverse. In *Brown*, commercial speech is given preference over noncommercial speech by the majority; the commercial speech of the plastic unions is given greater protection than the protestors' political speech. This seems to turn traditional First Amendment jurisprudence on its head. Political speech, traditionally viewed with greater scrutiny than commercial speech, is now relegated by the *Brown* majority to a lesser degree of protection.