Expanding the Public Forum Doctrine in Cyberspace: Some Lessons from Jersey

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The question of how to view free speech online has garnered much attention over the past decade or so.[1] The analyses have ranged from treating private actors online as government actors, thereby subjecting them to constitutional restrictions,[2] to advocating a purely "free market" approach,[3] to championing a concept of public fora in cyberspace.[4] This article will take another look at this ongoing debate regarding where to draw the line on constitutional obligations owed by either private actors or obligations that might attach to privately owned property. In doing so, the article will advocate that expanding the concept of the public forum doctrine provides an intriguing and helpful guideline in an attempt to expand free speech rights online.

In particular, the prospect of expanding public fora in real space received a recent boost in a case decided by the Superior Court of New Jersey Appellate Division. In this case, the court determined that private residential communities could be subjected to the state's constitutional freedom of speech clause. In so holding, the court looked not directly at whether the parties promulgating speech restrictive regulations were in fact state actors, but rather analyzed the character of the property to which these regulations attached. By examining this decision and the previous New Jersey state case law upon which it builds, this article will suggest that the reasoning proposed by the New Jersey courts in this area is a sound and perhaps workable paradigm for free speech concerns in cyberspace.

The New Jersey court precedent will then be used, together with an example from Curtis Berger's 1991 law review article concerning the expansion of public fora, in an attempt to address the "Daily Me" concerns posited by Cass Sunstein in his recent book, Republic.com. Sunstein's concerns focus on whether the Internet has caused individuals to wall themselves off from information they have not pre-selected. The expansion of the public forum in cyberspace may provide a way to solve this perceived problem.

Background

Many treatises, books, and articles have been written regarding the state action doctrine.[5] This article does not attempt such replication. However, a bit of background on the notion of the state action doctrine and public forum analysis is warranted. As noted by the Supreme Court in *Lugar v. Edmonson Oil, Co.*,[6] the state action doctrine "reflects [the] judicial recognition of the

fact that 'most rights secured by the Constitution are protected only against infringement by governments.'"[7] The roots of this distinction can be traced to the Supreme Court's 1883 Civil Rights Cases which established "the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."[8] The Court in *Lugar* noted that the distinction "preserves an area of individual freedom" by limiting federal power while also avoiding holding the government responsible for conduct for which they cannot fairly be blamed.[9]

The state action doctrine then in short prohibits government actors from interfering with individuals' constitutional rights, in particular and for purposes of this article, individuals' First Amendment rights. However, this is only half of the analysis. First Amendment jurisprudence provides that the government, under the public forum doctrine, has a duty to provide a soap box of sorts for speakers.

The public forum doctrine can be traced to the Supreme Court's decision in *Hague v. CIO*[10] wherein the Court examined whether Communist Party members' First Amendment rights had been violated by police actions prohibiting the members from holding meetings in public places and distributing literature on public sidewalks.[11] In holding that the members' rights had been violated, Justice Roberts set forth the seminal language regarding public forums: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[12]

As noted by one legal scholar, this public forum doctrine mandates that the government provide its citizens with a forum for speaking, as a way to facilitate its citizens' free speech rights and as a way to lessen the effect of economic disparities on various speakers.[13] Public forums provide speakers with less money, influence, and access a means through which to reach his or her fellow citizens. This doctrine is even more important in situations involving interstitial spaces—public spaces adjacent to private property—allowing speakers not only to speak in public, but to focus their speech on particular recipients to whom they specifically wish to reach.[14]

The Supreme Court's treatment of public forums has been divided into three categories: Traditional Public Forums, Limited Public Forums, and Non-Pubic Forums. These distinctions are important in determining what free speech rights citizens have on such property and the leeway the government has in regulating such speech. Though this area of law is quite nuanced, there are some fairly basic rules regarding these forums.

Traditional public forums are spaces such as parks, streets, and sidewalks. Individuals have the most robust protection in these venues for speech activities. Government restrictions on traditional public forums are subject to the "most stringent scrutiny under the First Amendment."[15] Designated public forums are spaces such as state-owned halls or public schools which the government has opened up to the public for specific expressive purposes. So long as the speaker is using the designated public forum for those expressive purposes designated by the government, regulation of these forums are subject to the same stringent scrutiny as regulations on traditional public forums.[16] The last category--the non-public forums--is government owned space, such as military bases or jailhouses, which the government owns but has not opened up for any expressive purposes. These spaces are subject to the least amount of scrutiny of the three categories, though the government cannot engage in any viewpoint based regulations on such property.[17]

While much First Amendment analysis concerns whether state actors are involved in the restriction of individual speech, this second front, the public forum doctrine, may provide a more salient method through which to protect greater free speech freedoms, particularly in the Internet venue. Several New Jersey court decisions recognize this important forum analysis and in doing so, the decisions have provided New Jersey citizens with more robust speech rights. In particular, the New Jersey decisions have expanded the public forum doctrine beyond property owned by the government, to privately owned property.

New Jersey—"Come See (Speak) for Yourself"

On February 7, 2006, the Superior Court of New Jersey handed down a decision in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*.[18] The *Twin Rivers* court considered several issues, but the main overarching question presented asked whether and in what circumstances the expressive right guarantees of the New Jersey constitution limit the authority of those who govern a community association.

Twin Rivers is a planned community with over 10,000 residents in East Windsor, New Jersey. The community provides various amenities to its members, such as pools, ball fields, playgrounds, snow removal, garbage collection, and street lighting. Within the community boundaries are several private businesses, along with several public facilities provided by the state, such as schools, a county library, and a firehouse. Twin Rivers Homeowners Association ("HOA") retained sole discretion to make reasonable rules and regulations for its members. The regulations that were the subject of the lawsuit included a prohibition on placing political signs on residential property and common areas and restrictions on the ability to use the community center.

The lower court in the case found for Twin Rivers Homeowners' Association on a summary judgment motion, reasoning that the HOA was not subject to constitutional limitations imposed on state actors. The New Jersey constitutional provisions at issue were its freedom of speech and assembly sections which provide:

> Every person may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.[19]

And:

> The people have the right to freely assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.[20]

The *Twin Rivers* court noted that New Jersey case law specifically establishes the New Jersey constitution as an independent source of individual rights which could surpass those guarantees under the federal constitution. In particular, New Jersey courts have held the above referenced provisions to be more sweeping than the First Amendment.

Part of this expansion was detailed in a previous New Jersey Supreme court case, *State v. Schmid*[21]. The *Schmid* court examined whether an individual distributing political literature on Princeton University's campus, a private, non-profit institution, could be convicted for trespassing, without violating his free speech rights under the New Jersey constitution. The *Schmid* court held that the State constitution could impose constitutional obligations on private entities when the private entities have "assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."[22] In particular,

the court reasoned that private property could be burdened in certain instances in order to serve the public good. In order to strike the balance between private property rights and the public's expressive rights, the *Schmid* court established a three part balancing test. This test takes into account: 1. The nature, purpose, and primary use of the private property—its normal use; 2. The extent and nature of the public's invitation to use that property; and 3. The purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.[23] Even given this balancing test, the *Schmid* court noted that private property owners were entitled to impose reasonable rules regarding time, place, and manner of the speech ("TPM regulations").[24]

Applying the three prongs to the facts, the *Schmid* court noted that the purpose of the university (as provided in the university's own language) was the pursuit of truth and discovery of knowledge.[25] In fact the university's own regulations stated that free speech and peaceable assembly were basic requirements of the university.[26] Secondly, the university had invited the public to use its resources in fulfillment of its broader educational ideals—again the university regulations dealt with the community use of its resources and the fact the resources were generally available to the public.[27] Finally, the court found that the defendant's activities were not discordant with either the private or public uses of the campus.[28] With respect to any TPM regulations, the court found that the university had no standards with respect to such activities on its campus, so by evicting the individual and securing his arrest, the university had violated his state constitutional right of expression.[29]

New Jersey courts have extended the *Schmid* reasoning to privately-owned shopping malls as well. In *New Jersey Coalition Against the War in Middle East v. JMB Realty Corp.*,[30] the court ruled in favor of individuals passing out leaflets on issues of public import at a shopping mall, using the *Schmid* balancing test. The court found the right to leaflet no more discordant with the owners' use of their property than leafleting had been centuries before for downtown business districts. In particular, the court observed that shopping centers have substantially displaced the downtown business district. "In the process of creating new downtown business districts [defendants] will have seriously diminished the value of free speech if it can be shut off at these centers. Their commercial success has been striking but with that success goes a constitutional responsibility."[31] The court concluded that the public use of

shopping centers was "so pervasive that its all-embracing invitation to the public necessarily includes the implied invitation for plaintiffs' leafleting."[32]

Of particular interest in the *JMB Realty* case is the court's willingness to expand its interpretation of the New Jersey constitution to correspond with shifts in society. "Constitutional provisions of this magnitude should be interpreted in light of a changed society… [w]e do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accident of economic transformation, or to be silenced because of a new way of doing business."[33] The court reasoned that if the population has left for the shopping centers, the constitutional right to free speech includes the right to go there too, to follow them and talk to them.[34]

In light of this precedent, the *Twin Rivers* court concluded that "the plaintiff's rights to engage in expressive exercises…must take precedence over the [HOA's] private property interests."[35] This decision was not based on determining that the HOA was a governmental actor, but turned on whether the HOA should subject to constitutional limits when exercising control over individuals on its property.[36] This question was answered in the affirmative by the court, even in light of the fact that HOA had not invited the public to the community generally (as opposed to the facts present in the *Schmid* and *JMB Realty* cases). The court reasoned that the choice to purchase property within the community should not come at the expense of forfeiting free speech rights. "The rights…of our State Constitution apply in that community [Twin Rivers] as in every other in the State."[37]

Cass Sunstein and Republic.com

Cass Sunstein's book, Republic.com,[38] first published in 2001, raises some concerns regarding the public's increasing use of the Internet[39] both a means to gather information and to connect and discuss matters with one another through the various Internet formats. While Sunstein explores these concerns, he also goes to great lengths to acknowledge the positive attributes of the Internet, such as the ability to connect with others in a way that may not have been possible in our geographically limiting real space. Nor does he deny that there is a possibility for many more avenues of information to unfold via the Internet, given the fairly easy ability for individuals to maintain their own websites, thereby providing themselves with their own soapboxes from which to speak. However, Sunstein also posits some real concerns in the form of what he sees as the "Daily Me", a term first used by MIT technology specialist Nicholas

Negroponte.[40] The Daily Me is "a communications package that is personally designed, with each component fully chosen in advance."[41]

While this Daily Me may seem like a perfect triumph of consumer choice, Sunstein is concerned that by crafting a Daily Me intake, individuals will avoid coming into contact with information that may be helpful to them, or to others around them (as they may pass along such information to others).[42] Additionally, this lack of interaction with non-selected information may also constitute a deliberate avoidance of opposing points of views and facts, therefore further isolating individuals into their own little Daily Me packages. Sunstein juxtaposes this foray into cyberspace with the inability of individuals to shield themselves from random information or opposing viewpoints when they venture out into public-- whether it be overhearing the person in the check-out line opine on the latest administration policy or a passionate activist holding forth on the sidewalk corner. One might of course quibble with whether these real space encounters have become increasingly rare or at least more avoidable, but Sunstein's argument rests on the assumption that such encounters are less avoidable in real space.

It is also of interest to note that Sunstein draws on two mighty legal minds to characterize the differences between a society basing its free speech rights on a consumer driven philosophy and one that can be characterized as driven by the need for its citizens to be informed on important public issues. His paradigmatic minds: Justice Holmes and Justice Brandeis. Sunstein describes Justice Holmes as the champion of "consumer sovereignty".[43] Consumer sovereignty means that consumers can choose what they would like limited only by what is offered and their acquisition means (finances). Quoting Justice Holmes' dissenting opinion in *Abrams v. United States*[44] Sunstein provides his support for characterizing Holmes thusly:

> When 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. That at any rate is the theory of our Constitution.[45]

For Justice Brandeis' part, Sunstein describes his judicial philosophy as supporting free speech as both a right and a political duty: the "social role of the idealized citizen."[46] Quoting

perhaps from one of the most elegant concurring opinion in First Amendment jurisprudence, Sunstein provides Brandeis own language to support his theory:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary…They believed that…without free speech and assembly discussion would be futile;…that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[47]

In Sunstein's estimation, these two views on the purpose and import of the free speech clause present an overarching abstract from which to view today's world and the place of free speech in our society.[48] Should we view information as a buffet from which we pick and choose based on the consumer's choice, equating speech and ideas as products? Or should we look to Justice Brandeis language and take heed that speech should inform citizens and engage them in today's most pressing debates? Sunstein prefers the latter view and this explains his concern with the Daily Me intake.

In Chapter 8 of his book, Sunstein sets forth several possible reforms that might curb the prospect of individuals walling themselves off from unselected information. While Sunstein concludes the proposals would best be implemented by private actors, he does not foreclose the possibility of government action if private actors fail to implement worthwhile reforms. Sunstein makes six specific proposals, but for purposes of this article, only three will be discussed: Deliberative domains, economic subsidies and must-carry requirements.[49]

Creating deliberative domains would entail simply establishing websites dedicated to involved citizen discussion and debate concerning today's pressing issues. Sunstein suggests that these domains could be established by private parties instead of the government, and that perhaps if enough interest were generated, there would be many such domains competing for web traffic.[50] The subsidy proposal describes a system wherein the government would provide funds to establish a specific website dedicated to discussing public issues from all points of view.[51] This proposal also contemplates that the website established might have a special presence on a user's desktop, enticing the user to participate even if they may not have been initially inclined to do so.[52] Finally, Sunstein proposes a few takes on the must-carry category.

The first must-carry requirement would require the most popular websites to carry links to pages discussing issues central to democracy.[53] The second must-carry proposal would mandate that highly partisan websites would need to carry links to websites espousing different viewpoints.[54]

Again, Sunstein believes that most of his proposals would be best implemented by private parties. However, he doesn't believe that website owners' First Amendment rights should preclude the government from intervening if necessary (for instance, if a website owner were required to include a link to another website on its homepage). In fact, Sunstein argues such government regulations would only constitute additional regulation, in that content providers are already subject to governmental regulation.[55] For instance, the broadcast industry is heavily regulated and ostensibly is simply a keeper of our public airwaves through licenses granted by the government.[56] Sunstein also notes that newspapers and magazines, while not being subject to the same amount of heavy regulation as broadcasters, is nonetheless affected by government regulation. He argues that newspapers take advantage of the government by relying on the state to exclude others from their property.[57] For example, if you wish to provide your opinion on the front page of the New York Times, you simply cannot march up and demand the Times include your article. They have the right to physically exclude you from their property, with the support and backing of the state (in this case, likely the NYPD).

Sunstein's ultimate point here is that if you base your objections to interference with various content providers' offerings, it is illogical to do so based on a concern over government regulation because the government has already been invited to the dinner party. Furthermore, Sunstein rightly notes that our free speech rights are not absolute--the government regulates speech in many areas--so there again, a place at the table has already been set for the government.[58]

Sunstein's suggestions are certainly intriguing and may indeed create the more robust exchange of ideas Sunstein hopes to see on the Internet. However, the suggestions for the most part still rely on content providers to make changes and do not really address how we guarantee a public soap box or cyber town square for the public at large. Perhaps the solution to this Daily Me conundrum rests with an expansion of free speech rights on these content providers cyber property, using the New Jersey cases as a guideline.

Expanding the Public Forum in Cyberspace

Using the New Jersey cases, the argument could be constructed that certain forums on the Internet are a kind of private property that have been opened up to the public. In taking this viewpoint, one could use the rationale provided in the New Jersey case precedent to allow citizens access to cyber property in order to express themselves and participate in public discussion. Of course, there would be limitations to such access, just as there was in the New Jersey cases. The third prong of the analysis set forth in *Schmid* takes into consideration the purpose of the expressional activity in relation to the private and public use of the property. The *Schmid* court specifically looked at this prong to determine whether the defendant's activities interfered with the private property owner's rights or were discordant with the purpose of the property. In addition, another layer of protection is afforded the private property owner in that reasonable time, place and manner restrictions are allowed to be implemented by the private property owner without such restrictions being viewed as a violation of the citizens' free speech rights.

Expanding the reasoning from the New Jersey cases to the Internet makes sense, given that just as the shopping mall became the new downtown, the Internet is now becoming our new town square. As noted by the *Schmid* court, to give full meaning to freedom of speech we need to allow others to follow the citizens to these new town squares and talk to them in those locations. Doing so would alleviate much of the Daily Me concern posited by Sunstein. If we created more "public space" in this new medium, individuals would be less successful in walling themselves off from information they did not pre-select. It would in theory begin to look much more like real space, where individuals must tolerate speech they may not initially (or ever) wish to confront. The student on the private campus, the petitioners at the private mall or the homeowners utilizing common space in a community development become present on the Internet as well as real space.

Of course setting forth a coherent rule of law that is easily applied in certain factual situations is oftentimes extremely difficult. However, looking at Sunstein's suggestions of "must-carry" requirements, we could gain some insight as to how this process might work. These must-carry suggestions would require popular websites to contain links to other sites with information that "might produce individual and social benefits"[59] as well as providing links (in the case of partisan sites) to information that presents a different point of view.

Looking at these websites we could determine the nature, purpose and primary use of the sites--arguably private property. Relying on the New Jersey cases, if these site owners have used the property for discussion of public issues or dissemination of knowledge generally, that would weigh in favor of applying free speech mandates. Second, the extent and nature of the public's invitation to use the property would be scrutinized. Did the website owner provide chat room forums? Encourage email feedback? Even perhaps simply profit by providing an informational forum for the public at large? Lastly, the question of whether the expressional activity undertaken interferes with the private property owner's rights would be examined. In most instances, a requirement to provide an email link to another website would probably not interfere with the property owner's overarching rights when weighed against the free speech concerns.

One important aspect of expanding the public forum doctrine beyond government-owned property and beyond real space, is that not all spaces on the Internet could be treated the same. It would, in fact, have to be a contextual analysis. While such a proposition lends itself to uncertainty, it would not be far different from many of the balancing tests used by courts currently. In addition, it would have the added benefit of providing a more robust protection for free speech in cyberspace, while possibly chipping away at the problem of the Daily Me.

Another paradigm for expanding the public forum doctrine into cyberspace is that provided by Curtis Berger. In Berger's 1991 article[60], he advocates expanding the Pruneyard Shopping Center v. Robins[61] case rationale to other private property venues. In the *Pruneyard* case, the California Supreme Court held that California's state constitution provided broad free speech rights which allowed its citizens to engage in petition efforts in privately owned shopping malls against the mall owner's wishes.[62] The Supreme Court upheld the California court's decision, reasoning that California could provide rights broader than those under the First Amendment and that in doing so the court had not violated the mall owner's own First Amendment rights.[63]

Berger contends that when the use of property starts to resemble that of a public forum, the property owner's rights are increasingly outweighed by the need of the citizens to engage in political expressive activity. According to Berger, the question of legal ownership should not be the deciding factor in whether channels for political expression should be cut off. "Where it is important legally to distinguish between private and public space, as must be done in the search

for a public forum, one should look beyond the property's title, focusing instead on its physical layout, its ongoing activity, and the occupants' reasonable expectations."[64]

Berger's suggests considering a number of questions in determining whether the property in question resembles more of a public place or a private place where individual's free speech rights can be foreclosed. First, is there an expectation of privacy?[65] Do those who enter reasonably expect to be shielded from outside eyes? Second, is there an expectation of quiet? Is the property conducive to solitude or is it subject to outside noise and interference—does the owner expect such quiet?[66] Third, is there a limitation of physical access?[67] Can all comers traverse the property or is there some limit, this could be in many forms, for instance paid entry or simply limited access via architecture—such as a walled off space. Berger also notes on this prong the limited nature of a residential property as well, the limited space residences typically occupy.[68] Fourth, freedom of association, the ability of the owner to socialize with whom they choose.[69] Fifth, the right to exclude those with whom the owner does not wish to associate.[70] Sixth, exclusivity of possession, the presence of a continuous owner on the property, which also encompasses the aforementioned right to exclude.[71] Lastly, the expectation of safety from the outside world.[72]

Berger's analysis did not apply these factors inside the Internet realm, and some of the prongs do not fit neatly within such confines. However, several of the factors provide an additional layer of balancing which complement the New Jersey test in determining when spaces in the Internet realm should be considered public fora.

We can use Berger's factors in examining a fairly high profile event on one of AOL's discussion groups. The Irish Heritage group is a discussion group hosted by AOL.[73] The group was known for its somewhat heated rhetoric and discussion regarding Irish politics. AOL, as part of its hosting, retains forum monitors to manage its groups. In 1998, the monitors for the Irish Heritage group became concerned that the group's conversations had grown too heated.[74] AOL decided that several of the conversations violated its terms and conditions of service prohibiting members from threatening or harassing others.[75] AOL shut the discussion board down for a 17-day period and additionally removed all the "heated" exchanges from the board.[76]

As noted earlier, this action by AOL is unlikely to be treated as "state action" thereby implicating the Irish Heritage group members' First Amendment rights. However, perhaps there is a better solution in asking the question of whether the discussion board is a type of public

forum, regardless of whether the forum is technically owned by a private entity, AOL. In fact, harkening back to Justice Robert's language from *Hague*, the crucial aspect of that case turned on the streets and parks having for "time out of mind" been used for "assembly, communicating thoughts between citizens, and discussing public questions." Is that not also what the Irish Heritage Group's purpose is—to communicate thoughts between citizens and discuss public questions? Although the historical importance does not accompany the Internet, as the New Jersey court in *JMB Realty* duly noted, we must adapt to our change communication structures.

Looking to Berger's analysis in the context of the Irish Heritage Group, we get an idea of what this expanded public forum doctrine might look like in cyberspace. First, does the property owner have some expectation of privacy? That is unlikely in this case—what happens on the discussion board is primarily public—those that partake in the ongoing conversation do not expect to be shielded from outside prying eyes. Second, is there an expectation of quiet? This prong may not fit nicely within the cyberspace paradigm, but one may again argue that the discussion board is not a "zone of quiet enjoyment"-- those that participate expect to be confronted with "noise". Third, is there limited physical access? Is this property enclosed—does the property owner view the property as "insulated from the rest of society".[77] This prong is a bit tricky when looking at the Irish Heritage Group. To participate in AOL's discussion boards, you must be an AOL member and agree to certain terms and conditions—however, these requirements aside, the boards are quite open and it would be hard to say that the property is "insulated from the rest of society". Fourth, freedom of association. Does the property owner enjoy the ability to associate with those present only upon invitation? Arguably, since AOL does require membership to participate, participants are contributing to boards upon invitation—but how selective is this invitation? By one count, AOL has 24 million subscribers, all of whom can participate in the discussion groups.[78] Such a gaudy number would seem to weigh against a limited association and conjures images of a public space more than a private party. Fifth, right of exclusion. AOL according to its terms and conditions has the right to terminate membership to those who violate membership agreements. However, a more practical look at this element shows that given the numbers, AOL would have a hard time controlling all its members—again denoting a more public than private space. Sixth, exclusivity of possession. Again, this element does not translate neatly into cyberspace, but one could make the argument that there is not much presence of AOL ownership in these forums, outside of the monitors. Lastly, expectation of

security. Upon entering these discussion boards, one must be wary of who they will encounter, they cannot be secure that the exchange will be what they anticipated or expected.

While Berger's test isn't set out specifically for a cyberspace application, it provides us with another way to approach the free speech concern in the Internet world. Together with the New Jersey balancing test, it provides a solid base to consider whether the answer to free speech online rests not with categorizing private entities as state actors, but instead with considering the character of the property online and expanding the public forum doctrine accordingly. These tests would not foreclose the possibility of the property owner setting reasonable time, place and manner restrictions regarding speech on their cyber properties, but would ensure that such decisions are not being made based on the content of the speech and would also ensure a public forum in what is increasingly becoming a crucial medium of communication in our society.

Notes

[1] *See e.g.*, Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV 439 (2003), Paul Schiff Berman, *Cyberspace and the State Action Doctrine: The Cultural Values of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L.REV. 1263 (2000), Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409 (1992).

[2] *See e.g.* Berman, *supra* note 1.

[3] *See e.g.* David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 VAND. J. ENT. L. & PRAC. 70 (2000).

[4] *See e.g.* Naugton, *supra* note 1.

[5] *See, e.g.*, JOHN NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12 (7th ed. 2004), John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569 (2005); Erwin Chemerinksy, *Rethinking State Action*, 80 NW. U.L. REV. 503 (1985).

[6] 457 U.S. 922 (1982).

[7] *Id*. at 936 (quoting Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978)).

[8] *Id*. at 936 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974)).

[9] *Id*. at 937.

[10] 307 U.S. 496 (1939).

[11] *Id*.

[12] *Id*. at 515.

[13] Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1147 (2005).

[14] *Id*.

[15] *Id*. at 1149.

[16] *Id*.

[17] *See e.g.*, Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666 (1998).

[18] --- A.2d ----, 2005 WL 3739659 (N.J.Super.Ct. App. Div. Feb. 7, 2006)

[19] N.J. Const. (1947) art. I, ¶ 6.

[20] N.J. Const. (1947), art. I ¶ 18.

[21] 423 A.2d 615 (1980).

[22] *Schmid*, 423 A.2d at 560.

[23] *Twin Rivers* at 8 (citing *State v. Schmid*, 423 A.2d 615 (1980)).

[24] *Schmid*, 423 A.2d at 568.

[25] *Id.* at 564.

[26] *Id*. at 564-5.

[27] *Id*. at 565.

[28] *Id*. at 566.

[29] *Id*. at 567.

[30] 650 A.2d 757 (1994).

[31] *Id*. at 761-762.

[32] *Id*. at 762.

[33] *Id.* at 779.

[34] *Id*.

[35] *Twin Rivers*, at 10.

[36] *Id.* at 11.

[37] *Id*. at 13.

[38] CASS SUNSTEIN, republic.com (2001).

[39] Although the term Internet and World Wide Web denote two different concepts (the World Wide Web in essence being available over the Internet) this article will use the term Internet, cyber space, and online to denote what is typically considered web pages, websites and forums available through the World Wide Web.

[40] *Id.* at 7.

[41] *Id.* (quoting NICHOLAS NEGROPONTE, BEING DIGITAL, 153 (1995)).

[42] *Id*. at 92-3.

[43] *Id.* at 45.

[44] 260 U.S. 616 (1919).

[45] SUNSTEIN at 46-7 (quoting Abrams v. United States, 250 U.S. 616, 635 (1919) (Holmes, J., dissenting) (emphasis added)).

[46] *Id.* at 47.

[47] *Id.* (quoting Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)).

[48] *Id.* at 49-50.

[49] *Id.* at 169.

[50] *Id.* at 171.

[51] *Id*. at 180.

[52] *Id.* at 181.

[53] *Id.* at 185-6.

[54] *Id.* at 186-7.

[55] *Id.* at 128.

[56] *Id.* at 129.

[57] *Id.* at 131.

[58] *Id.* at 151.

[59] *Id.* at 186.

[60] Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L.REV. 633 (1991).

[61] 447 U.S. 74 (1980).

[62] *Id*. at 78.

[63] *Id.* at 88.

[64] Berger, *supra* note 60 at 656.

[65] *Id.* at 653.

[66] *Id.*

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] *Id*. at 654.

[73] *See* Nunziato, *supra* note 13 at 1126 (citing Amy Harmon, Worries About Big Brother at America Online, N.Y. TIMES, JAN. 31, 1999, at 1).

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] Berger, *supra* note 60 at 653.

[78] *See* Nunziato, *supra* note 13 at 1126 (citing Alex Goldman, Top 22 U.S. ISPs by Subscriber: Q4 2004, ISP-Planet, Mar. 25, 2005, *available at* http://www.isp-planet.com/research/rankings/usa.html).