

# The Problem with Posner as Art Critic: *Linnemeir v. Board of Trustees of Purdue University Fort Wayne*

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## INTRODUCTION

Since *Bowers v. Hardwick*<sup>1</sup> signaled the difficulty of achieving social change for gay men and lesbians through constitutional protections, the battle over gay and lesbian visibility has taken place on largely cultural terrain. A complex mix of cultural and political expression has characterized much of the effort to combat stereotypes, reduce discrimination, and empower gay men and lesbians in the United States.<sup>2</sup> As a result, a proliferation of gay-themed art has covered the cultural landscape, with a concurrent backlash against the most radical of these pieces. This backlash has taken place not only among the general public, but also within the government—including courts and federal administrative agencies, and most visibly the National Endowment for the Arts.<sup>3</sup>

The most recent attempt to constrict the cultural expression of gay-themed art occurred in August 2001 at Indiana University–Purdue University Fort Wayne, where a student planned to direct a performance of Terrence McNally’s play *Corpus Christi* as his senior thesis. The play presents the story of a young gay man in contemporary South Texas and relies heavily on religious allegory to drive the narrative. Led by former Republican gubernatorial candidate John Price, several Indiana state leg-

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<sup>1</sup> 478 U.S. 186 (1986).

<sup>2</sup> See, e.g., Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, in *FEAR OF A QUEER PLANET* 196 (Michael Warner ed., 1997) (discussing the cultural politics of Queer Nation as exploiting the symbolic designs of mass and national culture).

<sup>3</sup> See, e.g., *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding the “general standards of decency” factor inserted into legislation designed to control the grants awarded to individual artists by the NEA); Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 *CARDOZO ARTS & ENT. L.J.* 79 (1994) (describing the battle over federal grants to gay and lesbian artists).

islators and a few university employees opposed the production and sought a preliminary injunction to enjoin its performance in the campus's Studio Theater.<sup>4</sup> They alleged that presenting the play on a state-supported campus would violate the U.S. Constitution's Establishment Clause because the play presents blasphemous and anti-Christian ideas.<sup>5</sup>

The district court denied the motion, holding that there was little likelihood of success on the merits. Crucially, the court found that the campus theater was a limited public forum, defined as a government created avenue for private speech, such that the play would not be confused with "government endorsement of a religious (or anti-religious) viewpoint."<sup>6</sup> Because of this determination that the theater was a limited public forum, and therefore did not involve government speech at all, the court did not need to apply the typical Establishment Clause test laid out in *Lemon v. Kurtzman*,<sup>7</sup> which scrutinizes separately the purpose and effect of the government action and the degree to which such action fosters excessive government entanglement with religion. Instead, having determined that the Studio Theater was a limited public forum, the district court presumed compliance with the Establishment Clause.<sup>8</sup>

The district court found two facts particularly helpful in reaching its conclusion. First, university policy regarding the Studio Theater permits any group to use the theater so long as its activities comport with the educational mission of Indiana University–Purdue University Fort Wayne. Second, the University provided a disclaimer in this instance, inserting a comment in the play's program: "This play was selected for its artistic and academic value. The selection and performance of the play do not constitute an endorsement by Indiana University–Purdue University Fort

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<sup>4</sup> *Linnemeier* [sic] v. Ind. Univ.–Purdue Univ. Fort Wayne, 155 F. Supp. 2d 1044 (N.D. Ind. 2001), *aff'd sub nom.* *Linnemeier v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001). The district court referred to the plaintiff cum appellant as "Linnemeier" while the Circuit Court referred to the plaintiff-appellant as "Linnemeir." For consistency, I will use the Circuit Court's spelling throughout this Article.

<sup>5</sup> See *Linnemeir*, 260 F.3d at 758 (describing the appellants' argument as suggesting that the play "will be violating the First Amendment by publicly endorsing anti-Christian beliefs"), *referencing* *Linnemeier v. Ind. Univ.–Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1044, (N.D. Ind. 2001)).

<sup>6</sup> *Linnemeir*, 155 F. Supp. 2d at 1040–42. The district court reasoned that if the campus theater is a public forum, then Supreme Court precedent upholding private religious speech on government property would control. See, e.g., *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (permitting private Christian club to meet on public school property); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (permitting church group to use school facilities to screen religious film series); *Widmar v. Vincent*, 454 U.S. 263 (1981) (permitting religious group at state university to use campus facilities).

<sup>7</sup> 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.") (citations omitted).

<sup>8</sup> See discussion *infra* Part I.C.

Wayne or Purdue University of the viewpoints conveyed by the play.”<sup>9</sup> Because the campus theater was held to be a limited public forum and because the university could not possibly be perceived as endorsing the speech contained in *Corpus Christi*, the attempt to close the curtain on the campus production failed.

On appeal, the Seventh Circuit affirmed the decision of the trial court, but did not uphold the trial court’s reasoning that the theater constituted a limited public forum. Instead, in a majority opinion written by Judge Posner, the court found that it was unnecessary to decide whether or not the theater was a public forum because, even assuming that the theater is more analogous to a classroom, the school administrators may allow blasphemous speech as long as the school doesn’t have a policy of promoting blasphemy. “[T]he school authorities and the teachers, not the courts, decide whether classroom instruction shall include work by blasphemers.”<sup>10</sup>

In this Article, I argue that even though the Seventh Circuit reached the proper outcome in upholding the denial of the injunction, the reasoning and rhetoric in Judge Posner’s opinion pose grave dangers for gay men and lesbians seeking social change through the arts. In remaining silent on the question of whether the theater was a limited public forum, Judge Posner implicitly overruled that element of the district court’s opinion. In Part I, I argue that public theater is an inherent public forum for speech where, for both normative and legal reasons, government interference should be met with the highest scrutiny. In Part II, I suggest importing the copyright law principle against judicial definition of art into First Amendment jurisprudence. This principle militates in favor of the public forum standard, which does not require a judge to expound upon the “meaning” or “purpose” of a particular play’s “speech.” In Part III, I conclude my analysis with a discussion of the rhetorical implications of Judge Posner’s majority opinion, discussing the symbolic and substantive risks of judges who assume the identity of art critic. I argue that the favorable outcome in *Linnemeir* belies the rhetorical power of Judge Posner’s dicta. A rhetorical analysis of his opinion uncovers the means by which law can perpetuate injustice even when it appears to be remedial or neutral.

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<sup>9</sup> *Linnemeir*, 260 F.3d at 767.

<sup>10</sup> *Linnemeir*, 260 F.3d at 767.

I. THE JURISPRUDENTIAL CRITIQUE:  
THE DISAPPEARANCE OF THE PUBLIC FORUM DOCTRINE

*A. The Public Forum Doctrine: Origins and Operating Principles*

The public forum doctrine was originally conceived to authorize private speech on certain types of government property.<sup>11</sup> In *Perry Education Association v. Perry Local Educators' Association*, the Supreme Court explained that there are three types of fora where private speech may take place: (1) traditional public fora, (2) designated (or limited) public fora, and (3) public fora not traditionally designated for public speech (nonpublic fora).<sup>12</sup> The government's ability to restrict speech on its property depends upon which class the property falls within.<sup>13</sup>

Traditional public fora are those spaces that "enjoy a long history of availability for free expression by the general public."<sup>14</sup> The typical examples of traditional public fora are open public spaces, such as streets, public parks, and sidewalks.<sup>15</sup> Because these fora have historically provided space for public conversation and debate, restrictions on speech in traditional public fora typically are subject to strict scrutiny,<sup>16</sup> although reasonable, content-neutral time, place, and manner restrictions are enforceable when narrowly tailored to serve significant government interests.<sup>17</sup>

A nonpublic forum includes government spaces that are either off limits to the public or that have not been designated by tradition or practice as a public space.<sup>18</sup> Though courts subject restrictions on speech

<sup>11</sup> See *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (holding that these fora are "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

<sup>12</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (dividing government property into the three categories, with each category of property subject to its own level of judicial scrutiny).

<sup>13</sup> See Regina F. Speagle, Comment, *Waging War in America's Classrooms: Recognizing the Religious Rights of Children*, 31 CUMB. L. REV. 123, 137 (2000).

<sup>14</sup> Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255, 1259 (1995).

<sup>15</sup> See *id.* at 1258-59.

<sup>16</sup> See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (requiring compelling interest to restrict speech on sidewalks); *Boos v. Berry*, 485 U.S. 312 (1988) (same); *United States v. Grace*, 461 U.S. 171, 179-80 (1983) (same for area outside of Supreme Court building); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (same for city streets); *Schneider v. Town of Irvington*, 308 U.S. 147, 160, 164 (1939) (same). See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 53 (1987) ("Strict scrutiny almost invariably results in invalidation of the challenged restriction.").

<sup>17</sup> See 16A AM. JUR. 2D *Constitutional Law* § 517 (1998); Jonathan Frels, Note, *Simplifying Establishment Clause Jurisprudence in Student-Selected Prayer Cases Through the Use of Public Forum Principles*, 20 REV. LITIG. 233, 242 (2000) (explaining that speech in public fora is subject to reasonable time, place, and manner restrictions).

<sup>18</sup> *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 667 (1998) ("Property that is not a traditional public forum or a designated public forum is either a nonpublic forum or not a forum at all.") (citation omitted).

based on viewpoint to strict scrutiny, content-based restrictions are subject to a “reasonableness” standard analyzed in light of the function of the property.<sup>19</sup> Unless a plaintiff can prove viewpoint discrimination, this “reasonableness” standard is quite easy for the government to meet.<sup>20</sup>

A limited class of property falls between the traditional public forum and the nonpublic forum. Classified as “designated” or “limited” public fora,<sup>21</sup> on these properties, if the government has opened up the space for use by the general public or a specified subset of the public, then even content-based restrictions are subject to strict scrutiny.<sup>22</sup> This is because once the government has opened up a forum for a certain purpose, the government cannot subsequently deny speakers the use of that forum if the use is reasonably in line with the forum’s purpose.<sup>23</sup> As such, the government must prove anything other than reasonable time, place, and manner regulations serve a compelling state interest, and even then, must prove that it is narrowly tailored to achieve that interest.<sup>24</sup>

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<sup>19</sup> *Id.* (“Access to a nonpublic forum can be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker’s views.”); *Perry*, 460 U.S. at 46 (indicating that restrictions on speech in public fora not typically used for public communication are allowed so long as they are not exclusively targeted at the speaker’s viewpoint).

<sup>20</sup> *See, e.g.*, *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (upholding restriction in airport terminal); *United States v. Kokinda*, 497 U.S. 720 (1990) (walkway to post office); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (residential mailboxes); *Greer v. Spock*, 424 U.S. 828 (1976) (military bases); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (privately owned shopping center); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city buses); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (schools); *Adderley v. Florida*, 385 U.S. 39 (1966) (jails). *See also* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 117 (1986) (“The reasonableness standard of judicial review used in such cases is essentially no review at all.”).

<sup>21</sup> The terms “designated public forum” and “limited public forum” have different meanings in different courts and contexts. According to a recent Ninth Circuit decision, “[t]he contours of the terms ‘designated public forum’ and ‘limited public forum’ have not always been clear. Some courts and commentators refer to a ‘designated public forum’ as a ‘limited public forum’ and use the terms interchangeably.” *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (citations omitted). *See also* Sheri M. Danz, Note, *A Non-public Forum or A Brutal Bureaucracy? Advocates’ Claims of Access to Welfare Center Waiting Rooms*, 75 N.Y.U. L. REV. 1004, 1031 n.151 (2000) (“While the [Supreme] Court seems to use the terms ‘designated public forum’ and ‘limited public forum’ interchangeably, lower courts and commentators distinguish these concepts.”). For purposes of this Article, I will follow the policy of the Supreme Court in using the terms interchangeably.

<sup>22</sup> *See, e.g.*, *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (“[A] limited public forum . . . is a type of non-public forum that the government has intentionally opened to certain groups or to certain topics. In a limited public forum, [only] restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible.”) (citations omitted).

<sup>23</sup> *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 667 (1998) (“If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”) (citations omitted); *see also* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 98 (1998) (explaining that in designated public fora, a court “enforces against the state the state’s own prior decisions to allow a speaker’s easement”).

<sup>24</sup> *See Penthouse Int’l Ltd. v. Koch*, 599 F. Supp. 1338, 1349 (S.D.N.Y. 1984) (apply-

Courts have found designated or limited public fora to include: advertising space on subway platforms and buses;<sup>25</sup> open school board meetings;<sup>26</sup> a state university that recognizes student groups seeking acceptance of their lifestyle or political views;<sup>27</sup> state fairgrounds widely opened to many different community groups;<sup>28</sup> and a municipally owned theater group that allows for private productions.<sup>29</sup>

In a court's analysis of whether a particular space constitutes a limited public forum, it is not the speech that governs the standard, but rather the nature of the property on which the speech is to take place. Of course, a court may determine that viewpoint discrimination motivated the restriction against a particular group, thereby evading the limited public forum analysis entirely.<sup>30</sup> Aside from this, however, analysis of the type of forum where private speech is being targeted is necessary for a determination of whether the restriction in question should be subject to strict scrutiny.

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ing strict scrutiny as the standard for reviewing content-based restrictions on advertising in a subway system that had invited political advertising, thereby designating it a limited public forum).

<sup>25</sup> See *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985); see also *Coalition for Abortion Rights v. Niagara Frontier Transp. Auth.*, 584 F. Supp. 985, 989 (W.D.N.Y. 1984) (concerning a public bus company that created a designated public forum by permitting multiple political and public service advertisements); *Gay Activists Alliance of Washington, D.C., Inc. v. Washington Metro. Area Transit Auth.*, No. 78-2217, slip op. (D.D.C. July 5, 1979) (finding that the transit authority's acceptance of bus ads dealing with social and political issues created a designated public forum in which messages by gay and lesbian groups must be allowed); *Preterm, Inc. v. Massachusetts Bay Transp. Auth.*, No. 74-159-M, slip op. (D. Mass. May 13, 1974) (disallowing transit authority refusal to carry pro-abortion advertisement due to past offers of space on its facilities for public advertising).

<sup>26</sup> See *City of Madison v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-75 (1976); see also *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 378 (5th Cir. 1989) (noting that "a public school board meeting" is a designated public forum); *Ysleta Fed'n of Teachers v. Ysleta Indep. Sch. Dist.*, 720 F.2d 1429, 1433 (5th Cir. 1983) (holding that when a school opened its mail system to information from all employee programs, it became a designated public forum).

<sup>27</sup> See *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1332 (5th Cir. 1984) (requiring state university to recognize gay student group because its recognition of other groups makes it a "limited public forum by designation").

<sup>28</sup> See *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981).

<sup>29</sup> See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); see also *Pfeifer v. City of West Allis*, 91 F. Supp. 2d 1253, 1258 (E.D. Wis. 2000) (referring to *Conrad* as a "designated public forum" case).

<sup>30</sup> See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (sidestepping the forum question and instead holding that a public school restriction only affecting religious films is unconstitutional viewpoint-based discrimination). Many scholars prefer the viewpoint discrimination approach. These scholars argue that the public forum doctrine is strategically empty and distracts from the real project of fighting content-based restrictions on private speech. See, e.g., LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 204-07 (1985) (arguing that the public forum doctrine cannot address the problem of viewpoint discrimination); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (criticizing the public forum doctrine as a distraction from viewpoint discrimination); Schauer, *supra* note 23, at 98-99.

In summary, content-based restrictions are only subject to strict scrutiny in public fora and designated public fora; content-based restrictions nearly always survive the mere “reasonableness” review applied in nonpublic fora. This distinction demonstrates why Judge Posner’s analogy between a theater and a classroom is so damaging. Once a university theater is found to be a nonpublic forum, it becomes easy for school administrators to censor politically charged plays by imposing restrictions on content, subject to mere “reasonableness” review. A university could, for example, disallow all plays with sexual content, thereby avoiding the appearance of viewpoint discrimination and effectively making plays about homosexuality subject to state censorship. Were the theater treated as a designated public forum rather than a nonpublic classroom, these types of restrictions would be subject to strict scrutiny and would therefore enjoy a much lower likelihood of success.

*B. Intersection of the Public Forum Doctrine and the Establishment Clause*

Another crucial distinction between limited public fora and nonpublic fora is the significance for compliance with the Establishment Clause. When Establishment Clause questions arise in limited public fora, compliance with the Constitution is typically presumed. However, in nonpublic fora, any potential violations of the Establishment Clause are analyzed using the Court’s three-pronged test devised in *Lemon v. Kurtzman*.<sup>31</sup> First, the policy must have a secular purpose. Second, its primary effect must be one that neither advances nor inhibits religion. Third, it must not foster excessive government entanglement with religion.

While some scholars have suggested that a majority of the Supreme Court no longer supports the systematic application of this test, it has not been formally replaced and remains the legal mechanism for assessing most Establishment Clause violations.<sup>32</sup> In fact, the *Lemon* test was most recently relied upon by six of the Justices in striking down a Santa Fe policy permitting public school students to lead prayer at high school football games.<sup>33</sup>

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<sup>31</sup> 403 U.S. 602, 612 (1971).

<sup>32</sup> See, e.g., Marjorie George, *And Then God Created Kansas? The Evolution/Creationism Debate in America’s Public Schools*, 149 U. PA. L. REV. 843, 852 (2001) (“Although the *Lemon* test remains good law and has never been rejected by a majority of the Court, the Court does not always apply the three-prong test, and factions of the Court have rejected it outright.”); Steven G. Gey, *When Is Religious Speech Not “Free Speech”?*, 2000 U. ILL. L. REV. 379, 383 n.13 (2000) (“It is no longer clear whether a majority of the Supreme Court supports the consistent application of the *Lemon* test.”).

<sup>33</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Justice Rehnquist observed in his dissent that the majority had applied “the most rigid version of the oft-criticized test of *Lemon v. Kurtzman*.” *Id.* at 319 (Rehnquist, C.J., dissenting).

When applying the *Lemon* test in a nonpublic forum, a court must examine the purpose and effect of the government policy permitting the questionable speech. This inquiry will lead a court to evaluate the meaning of the speech in order to determine whether the state policy permitting it could be confused as government-sponsored. As such, application of the *Lemon* test to a government policy permitting or restricting the production of an arguably religious play would require the inquiring court to determine the meaning or message of the play.

If, however, the court first determines that the play is being produced in a traditional or limited public forum, the court's Establishment Clause inquiry changes. There is some disagreement as to how courts should proceed when a policy permitting or restricting private speech in a public forum interacts with the Establishment Clause.<sup>34</sup> This confusion results when, for example, a court must analyze restrictions on private religious speech in public fora, such as prohibitions on student-led prayer at school-sponsored graduation ceremonies.<sup>35</sup> The conflict manifests itself in the debate over which test to apply in order to discern the validity of the speech restriction. While ordinarily an analysis of the forum alone would suffice to determine the constitutionality of the restriction, in some cases the religious nature of the private speech may necessitate further scrutiny under the Establishment Clause. As Justice Stevens recently stated, "[W]e have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."<sup>36</sup>

Justice Scalia's plurality opinion in *Capitol Square Review and Advisory Board v. Pinette* suggested a per se rule allowing a government entity to avoid scrutiny under the Establishment Clause when religious speech is purely private and occurs in a traditional or limited public forum.<sup>37</sup> Justice Scalia took care to emphasize that in a traditional or designated public forum, access to the forum must be open on an equal basis to all private speakers.<sup>38</sup> It has been suggested that private religious speech in such an open forum would almost always pass constitutional muster under the Establishment Clause because the public nature of the

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<sup>34</sup> See Frels, *supra* note 17, at 235 (describing the case law regarding potential Establishment Clause violations in public fora as "a morass of conflicting decisions").

<sup>35</sup> See, e.g., *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (evaluating a school policy permitting student-selected prayer at a graduation ceremony); *ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (same); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (same).

<sup>36</sup> See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303 (holding that petitioner school district's policy allowing student-led prayer prior to school football games violated the Establishment Clause).

<sup>37</sup> *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (plurality opinion) (Scalia, J.) ("[R]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.')

<sup>38</sup> *Id.*

forum “promotes a public awareness that speech within a public forum is not that of the government.”<sup>39</sup>

Justice Scalia’s per se rule is not, however, binding. In her concurrence in *Pinette*, Justice O’Connor argued against a per se rule regarding Establishment Clause violations in public fora, and instead proposed application of the endorsement test, under which potentially problematic private speech must be analyzed to determine if it might be erroneously interpreted as government-endorsed.<sup>40</sup> The endorsement test, introduced by Justice O’Connor in *Lynch v. Donnelly*,<sup>41</sup> requires an inquiry into whether the government policy permitting questionably religious private speech has the purpose or effect of endorsing religion. One commentator summarized O’Connor’s concurring opinion as establishing that when “a reasonable observer endowed with knowledge of the unique circumstances of the situation” perceives government endorsement, then there is a violation, regardless of the government’s intent.<sup>42</sup>

Neither Justice O’Connor nor Justice Scalia successfully obtained a majority in support of their respective tests. As a result, lower courts have received little guidance on how to analyze the constitutionality of private religious speech in a traditional or limited public forum. Regardless of the formal test applied by a court in evaluating a restriction on private speech, however, it is important to note that the fact of the forum’s “publicness” transforms the nature of the inquiring court’s analysis.

A public forum leads to a presumption of a secular purpose. In *Widmar v. Vincent*, the Court held that, “an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose.”<sup>43</sup> This principle has been applied on numerous occasions by lower courts to justify forgoing the “purpose” analysis when applying the *Lemon* test to speech in a public forum.<sup>44</sup> Returning to the example of the arguably religious play, then, if the theater where the play is to take place is classified as a public forum, the inquiring court may forego the “purpose” analysis. This distinction is at the heart of my critique of Judge Posner’s opinion in *Linnemeir*.

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<sup>39</sup> See Frels, *supra* note 17, at 237.

<sup>40</sup> See *Pinette*, 525 U.S. at 772 (O’Connor, J., concurring).

<sup>41</sup> 465 U.S. 668 (1984).

<sup>42</sup> See Frels, *supra* note 17, at 252–53.

<sup>43</sup> 454 U.S. 263, 271 (1981).

<sup>44</sup> See, e.g., *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 279 (4th Cir. 1998) (finding that a school board policy allowing voluntary Bible study “is neutral because it was plainly adopted, not to advance religion, but for the secular purpose of ‘opening a forum for speech’”); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1392 (11th Cir. 1993) (“The speech that takes place in a public forum belongs and can be attributed to the private speaker only; neither approbation nor condemnation of the private speaker’s message may be imputed to the state.”); *Flamer v. City of White Plains*, 841 F. Supp. 1365, 1377 (S.D.N.Y. 1993) (“A neutral open-forum policy, providing equal access for religious as well as non-religious speech, has the secular purpose of promoting free speech and religious tolerance.”).

*C. The Public Forum Doctrine and the Establishment Clause  
in Linnemeir*

The district court in *Linnemeir* evaluated the character of the Studio Theater where the students planned to stage their production of *Corpus Christi*. In evaluating the plaintiffs' Establishment Clause argument, the court cautioned that "not every message delivered on government property at government-sponsored school-related events is the government's own."<sup>45</sup> Citing several cases in which private religious speech on public property was held to be constitutional, the court reasoned that so long as the Studio Theater is a limited public forum, it need not apply the *Lemon* test to determine whether the government itself may endorse the religious message in *Corpus Christi*.<sup>46</sup>

The district court then analyzed the Studio Theater to determine whether it was sufficiently open to the public on an indiscriminate basis so as to constitute a limited public forum. Given the university's policy of allowing students to use the theater to stage public performances, and given that at least one outside group, a high school drama society, had done so, the court held that the university "has created, at the very least, a limited public forum in the Studio Theater."<sup>47</sup> Because it was a limited public forum, the private speech of students producing Terrence McNally's play could not be confused with government speech. The test is an objective one—whether the government is seen as endorsing the views of private speech on state property "is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort."<sup>48</sup> Rather, the test is whether a reasonable person might confuse the speech as something endorsed by the government. Because the Theater is a limited public forum, and especially because it is located on a univer-

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<sup>45</sup> *Linnemeir v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034, 1040 (N.D. Ind. 2001) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

<sup>46</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (permitting private Christian club to meet on school property); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (holding that a student organization that published a Christian newspaper was entitled to funding from the state university, consistent with the university's policy of funding other student groups); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (allowing church group to utilize school facilities to screen religious film series); *Widmar v. Vincent*, 454 U.S. 263 (1981) (permitting members of campus religious group to use state university facilities).

The opinion of the district court in *Linnemeir* evidences a presumption that private, religious speech in a limited public forum will withstand scrutiny under the Establishment Clause. *Linnemeir*, 155 F. Supp. 2d at 1040 ("Plaintiffs distinguish these cases by claiming that the particular facts of this case demonstrate that the Studio Theater . . . is a nonpublic forum. . . . If they are wrong, the aforementioned cases (*Good News Club*, *Rosenberger*, *Widmar*, and *Lamb's Chapel*) are controlling and foreclose their contention that the speech in this case gives the appearance of government endorsement of a religious (or anti-religious) viewpoint.").

<sup>47</sup> *Linnemeir*, 155 F. Supp. 2d at 1040.

<sup>48</sup> *Id.* at 1042 n.8 (citing *Good News Club*, 121 S. Ct. 2093, 2106).

sity campus, the district court found little risk that *Corpus Christi* might be seen as endorsed by the government.<sup>49</sup>

On appeal, however, Judge Posner concluded in a relatively short opinion that the Studio Theater is more like a classroom—as distinct from a public forum. The entirety of Judge Posner’s reasoning on this point is as follows:

The parties and the district judge have spent a lot of time debating whether the university’s theater is really a public forum. The plaintiffs seem to think that if it is not, the university has no right to allow a blasphemous play to be performed in it. If it is, that would weaken any inference that by permitting *Corpus Christi* to be performed the university was endorsing its message. That is incorrect. Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers. It is the same with a university theater.<sup>50</sup>

The decision of the district court to treat the theater as a public forum and presume compliance with the Establishment Clause is thus overruled.

Ultimately, Judge Posner denied the plaintiffs’ attempt to enjoin the performance, holding that the Establishment Clause does not force the government to censor speech that is critical of religions: “[T]he controlling principle is that the [First A]mendment forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma . . . . The state has no legitimate interest in protecting any or all religions from views distasteful to them.”<sup>51</sup> On the question of whether the speech that is the student production may be confused as government speech, Judge Posner argued: “If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a ‘curriculum review committee’ unto himself.”<sup>52</sup>

Judge Posner’s Establishment Clause arguments are sound; he correctly cites the proposition that censorship of schoolbooks which are

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<sup>49</sup> See *Linnemeir*, 155 F. Supp. 2d at 1042 (quoting Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990)) (“The proposition that schools do not endorse everything they fail to censor is not complicated.”). The court further cited a portion of the play’s program where the university explicitly states that it is not endorsing any of the views presented in the play.

<sup>50</sup> *Linnemeir*, 260 F.3d at 760 (citations omitted).

<sup>51</sup> *Id.* at 759 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)).

<sup>52</sup> *Linnemeir*, 260 F.3d at 759 (citing *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994)).

laudatory or critical of Christianity is not constitutionally required.<sup>53</sup> Yet one wonders why he must declare that the Studio Theater is more like a classroom and not at all a limited public forum. This analogy fails, both legally and normatively.

The Studio Theater is cognizably different from a classroom. A school does not permit the public to indiscriminately use the classroom as a forum for private speech. The Studio Theater, on the other hand, was open for use by any private group wishing to present a theatrical production on the university campus. Furthermore, a classroom does not historically serve the same function as a campus theater. A theater, like the streets and parks that courts treat as traditional public fora, serves a democratic gathering function.<sup>54</sup> People assemble in theaters to communicate thoughts between citizens and to discuss public questions.<sup>55</sup> David Román has written of the participatory nature of theater, specifically theater with a primarily gay male audience; “Theatre audiences are collectives, congregations of people gathered together to participate in performance.”<sup>56</sup> Particularly for groups excluded from the democratic process, theater has provided a space for gathering and communing over the political topics of the day.<sup>57</sup> These are the very functions the Supreme Court has used to define a traditional public forum.<sup>58</sup> Judge Posner’s methodological move of analogizing the Studio Theater to a classroom

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<sup>53</sup> *Id.* at 759 (“The contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd.”).

<sup>54</sup> See Erika Fischer-Lichte, *The Avant-Garde and the Semiotics of the Antitextual Gesture*, in *CONTOURS OF THE THEATRICAL AVANT-GARDE: PERFORMANCE AND TEXTUALITY* 86 (James M. Harding ed. and trans., 2000) (“The dominance of the performative, which here justifies attributing the function of a kind of civil religion to theater, is connected to the specific conditions of space in which the production occurs. It is the space that transforms the individual into a member of the community, into a communal being and thus evokes specific actions from him.”).

<sup>55</sup> It is interesting to note that the great Marxist director and theater theorist Max Reinhardt envisioned theater as literally public in nature. He was one of the first directors to stage performances in city squares and streets, in gardens, parks and forests, and in large public exhibition and festival halls. See Fischer-Lichte, *supra* note 54, at 83–87 (“Reinhardt attempted to create and to guarantee the unity between players and public by relocating the performance in spaces that stood in a direct relation to the life of the audience . . . . The transformation of the audience, when they then entered, took place via the direct physical effects in this space, and through this space the performative aesthetic of the transformation, as it here evolved, was made possible by the specific conditions of each space.”).

<sup>56</sup> See DAVID ROMÁN, *ACTS OF INTERVENTION: PERFORMANCE, GAY CULTURE, AND AIDS* 219 (1998).

<sup>57</sup> See HARRY J. ELAM, JR., *TAKING IT TO THE STREETS: THE SOCIAL PROTEST THEATER OF LUIS VALDEZ AND AMIRI BARAKA* 2–3 (2001) (describing the establishment of the Black Arts Repertory Theater School and its performances) (“The performance style was direct and confrontational. The works advocated black nationalist rebellion and the destruction of the dominant, white power structure. The theater became a weapon in the struggle to achieve racialized revolutionary ends.”).

<sup>58</sup> See *Hague v. C.I.O.*, 307 U.S. 496 (1939).

therefore lacks legal merit, given the factors used by courts to define a public forum.

If Judge Posner's analogy to a classroom does not serve a cognizable legal function, it certainly does affect the manner in which the student artists are to be viewed. Under a limited public forum test, the student voice is the instrument for the speech under constitutional scrutiny. Under Judge Posner's analysis, the students are passive recipients of government-sponsored education. Yet it is not clear what exactly it is that the school is "teaching" in *Linnemeir*. A student chose to direct the play *Corpus Christi* for his senior project. The university played no role in determining the content and form that the play would take upon production.<sup>59</sup> The limited public forum analysis recognizes that it is student speech at issue, but Judge Posner's reasoning does not permit such an approach.

Judge Posner attempts to compare the Studio Theater to the classroom in *Grove v. Mead School District No. 354*.<sup>60</sup> In *Grove*, the Ninth Circuit rejected the plaintiffs' argument that by teaching a particular book in its tenth-grade English classes, a school district would "establish" Secular Humanism in violation of the First Amendment. The analogy between a book selected for study by a high school teacher and a theatrical production initiated by a college senior is strained at best.

To conflate public theater with the classroom is not only factually incorrect, given the distinct character of artistic speech, but it also dissolves the rights that students and artists would otherwise have in a limited public forum. The shift away from a limited public forum analysis disempowers the student artists whose speech is at issue in *Linnemeir*. As Judge Posner explicitly stated, finding that a public university theater is not a public forum means that teachers have the authority to find plays "blasphemous" and thereby halt their production. This finding also deprofessionalizes the student theatrical production, making students seem entirely passive in their education. Given the important role theater has played in the civil rights struggles of the 1960s and 1970s,<sup>61</sup> this jurisprudential move is patronizing and inappropriate.

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<sup>59</sup> See *Linnemeir v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1044, 1048 (N.D. Ind. 2001).

<sup>60</sup> 753 F.2d 1528, 1534 (9th Cir. 1994).

<sup>61</sup> See ELAM, *supra* note 57, at 25, 28; see also Sally Banes, *Institutionalizing Avant-Garde Performance: A Hidden History of University Patronage in the United States*, in *CONTOURS OF THE THEATRICAL AVANT-GARDE*, *supra* note 54, at 230 ("The political upheavals taking place at many universities in 1968 (and after) swept both radical political theater and artistically experimental theater onto American college campuses. Not only were there national tours by the Living Theater, the San Francisco Mime Troupe, the Open Theater, and other groups, but also, those troupes left in their wake students who were galvanized to form local guerilla theater groups that used theater for political agit-prop and local artistic collectives that used performance for artistic exploration.").

Judge Posner's shift to an analysis of the Studio Theater under the Establishment Clause diminishes the political value of the student production. While perhaps Judge Posner's statement that teachers may decide curriculum stands for the proposition that the content of the curriculum is immaterial for the purposes of judicial analysis, district courts looking to the opinion for guidance will follow Judge Posner's lead and articulate the meaning of the content to determine if it constitutes a permissible exercise of pedagogical discretion. That Judge Posner articulates a meaning of Corpus Christi in his opinion demonstrates a model of content-based judicial analysis, unlike the district court's forum-based analysis. This shift is itself harmful because the judge announces his or her interpretation of the play's meaning as *the* definitive interpretation. Yet by nature, theater is polysemic.<sup>62</sup> How for example, does one determine exactly what religion is "established" by a play that does not announce itself as explicitly Christian, Secular Humanist, or atheist?

The limited public forum analysis is superior to the pure Establishment Clause approach because it does not require the judge to discern the "purpose" or "effect" of the speech in question, thereby avoiding any inappropriate caging of the speech's meaning. Art is uniquely situated among forms of speech, in that its "purpose" or "effect" cannot be judicially defined. An analysis under the *Lemon* test was unnecessary in *Linnemeir* because the university context required the plaintiffs to prove a *policy* of promoting Secular Humanism. A shift away from a limited public forum analysis will encourage courts to follow Judge Posner's lead and attempt to discern the "meaning" of a particular play in order to analyze its purpose and effect.

Given Judge Posner's biased account of the meaning of *Corpus Christi*, it is unlikely that a jurisprudence requiring judicial definition of the meaning of art will function effectively or accurately. In one of the canonical texts of the Cultural Studies movement, Stuart Hall describes a four-stage process whereby communication passes from author to audience: production, circulation, consumption, and distribution.<sup>63</sup> While the text at production certainly does influence the ultimate meaning according to the spectator, there is considerable room for individuals to discern their own interpretations.

Hall refers to the process whereby individuals discern meaning from a text as "decoding."<sup>64</sup> Messages are "encoded" by their authors with an intended meaning. They are further encoded as they pass through the various stages prior to reception by their audience. Hall argues: "Before this message can have an 'effect' (however defined), satisfy a 'need' or be

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<sup>62</sup> See Stuart Hall, *Encoding, Decoding, in THE CULTURAL STUDIES READER* 507 (Simon During ed., 2d ed. 1999).

<sup>63</sup> Hall, *supra* note 62, at 508.

<sup>64</sup> *Id.* at 509.

put to a 'use,' it must first be appropriated as a meaningful discourse and be meaningfully decoded. It is this set of decoded meanings which 'have an effect,' influence, entertain, instruct, or persuade, with very complex perceptual, cognitive, emotional, ideological or behavioral consequences."<sup>65</sup>

When a judge interrupts the communicative process from artist to audience and interjects his own interpretation of the text as its one true meaning, he is unnecessarily influencing the product being decoded by each spectator. According to Hall, distortions and misunderstandings of the author's intended meaning can derive from "asymmetries" between the encoder-author and the decoder-spectator.<sup>66</sup> These asymmetries "in turn depend[ ] on the degrees of identity or non-identity between the codes which perfectly or imperfectly transmit, interrupt or systemically distort what has been transmitted."<sup>67</sup> In other words, where a judge interrupts the transfer of meaning from the play's author to its intended audience, there is a considerable risk that other competing interpretations, including the author's intended meaning, will be closed off by the interjection of the judge.

Another way to understand how Judge Posner's announced interpretation of the play distorts its intended political function is through the lens of Brechtian theory. Bertolt Brecht is perhaps the first major theorist to identify the potential for radical intervention in art.<sup>68</sup> Brecht's drama and politics were inextricably intertwined, and his method provided an entirely new way to conceive of the theater. His theorization of *Verfremdungseffekt*, or "alienation effect," forced the audience to struggle with assumptions and norms they had mistakenly taken as immutable truths, paving the way for a reconstruction of those norms.<sup>69</sup>

Frederic Jameson has argued that Brechtian theater facilitates action by pointing out the possibility for change where it has not yet been conceived.<sup>70</sup> Jameson writes of "the whole political message and content of the [alienation effect] itself—namely, to reveal what has been taken to be eternal or natural—the reified act, with its unifying name and concept—as merely historical, as a kind of institution which has come into being owing to the historical and collective actions of people and their socie-

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 510.

<sup>67</sup> *Id.*

<sup>68</sup> In fact, Brecht's theorization of a political aesthetic is evident in the work of Stuart Hall. Hall writes, "How things are represented and the 'machineries' and regimes of representation in a culture do play a *constitutive*, and not merely a reflexive, after-the-event role. This gives questions of culture and ideology, and the scenarios of representation—subjectivity, identity, politics—a formative, not merely expressive, place in the constitution of social and political life." Stuart Hall, *New Ethnicities*, in *BLACK FILM/BRITISH CINEMA* 30 (ICA Documents no. 7, 1988).

<sup>69</sup> FREDRIC JAMESON, *BRECHT AND METHOD* 38 (1998).

<sup>70</sup> *Id.* at 39.

ties, and which therefore now stands revealed as changeable.”<sup>71</sup> He continues: “What history has solidified into an illusion of stability and substantiality can now be dissolved again, and reconstructed, replaced, improved . . . .”<sup>72</sup>

In alienating the spectator from that which occurs on stage, theater inspires the audience to question norms as socially constructed histories. Critical Race Theorists have seen the potential to appropriate Brechtian theory for purposes of a racial politics. Even without citing Brecht specifically, Critical Race Theorists emphasize the production of stories and narratives to demonstrate the reification of racial norms and to deconstruct them for a larger audience.<sup>73</sup> Richard Delgado writes, “[S]tories and counterstories . . . can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power.”<sup>74</sup>

*Corpus Christi* may serve this same function by questioning the necessity of homophobia in Christianity. In presenting a young gay male character who experiences similar treatment to Jesus Christ, McNally may be seen as retelling the story of Christianity in a way that does not exclude gay men and lesbians. His play can offer hope for the liberation of gay people in the Church. The political aesthetic of his play can provide gay men and lesbians with a means by which to challenge heteronormative Christianity as reified, to uncover the historical process by which homosexuality came to be seen as un-Christian, and to produce new visions of Christianity that are liberated from the sexual norms of old.<sup>75</sup>

When Judge Posner explains that *Corpus Christi* is a play about “Jesus Christ as a homosexual who has sexual relations with his disciples,”<sup>76</sup> he is announcing his own subjective estimation of the play’s meaning. By doing the work of interpretation for the audience, he effectively impairs the work’s alienation effect. Judge Posner’s pronouncement is the equivalent of announcing to a reader of *Uncle Tom’s Cabin* that she is about to read a story of unruly, runaway slaves, guaranteed to be offen-

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<sup>71</sup> *Id.* at 47.

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 776 (1994); Cornel West, *The New Cultural Politics of Difference*, in THE CULTURAL STUDIES READER 256 (Simon During ed., 1999).

<sup>74</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989).

<sup>75</sup> McNally himself has stated that his play invites the audience to question the necessity of homophobia. In the preface to the published version of *Corpus Christi*, he writes, “All *Corpus Christi* asks of you is to ‘look what they did to Him.’ At the same time, it asks you to look at what they did to [the gay male protagonist], it asks that we look at what they did one cold October night to a young man in Wyoming as well. Jesus Christ died again when Matthew Shepard did.” TERRENCE McNALLY, *CORPUS CHRISTI*, at vii (1999).

<sup>76</sup> *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 758 (7th Cir. 2001).

sive. Such an introduction affects the meaning of the text and interrupts communication between author and audience to an extent that seriously impairs the political function of the art in question. This effect is particularly egregious because of the historic role student theater has played as a haven for disadvantaged social groups where norms may be contested and identities forged. Sally Banes writes: “That the university now provides a protected haven—however random or small-scale—for experiments in performance; that it animates the next generation of young artists’ ideas—however embattled—about innovation and originality . . . and that it supplies dissident voices within the university system itself; all these aspects are crucial politically as well as culturally—not to mention pedagogically.”<sup>77</sup>

The methodology a judge uses to analyze the constitutionality of a play is an important determinant of the play’s political potential. Under a limited public forum analysis, a judge does not need to define the meaning of the play—the focus is on the nature of the theater at which it is presented. Under Judge Posner’s Establishment Clause approach, however, the meaning of the play is essentially what the judge makes of it. This means not only that the audience is deprived of an opportunity to interpret the text unadulterated, but also that the “purpose” and “effect” become altered by this judicial pronouncement of what they are. The discretion this approach leaves in the hands of the judge is far greater than when a judge must use relatively objective factors to determine the existence of a limited public forum. For individuals seeking social change through art, then, a limited public forum analysis is superior.

## II. THE COPYRIGHT CRITIQUE: THE POLICY AGAINST JUDICIAL DEFINITION OF ART

In the context of copyright law, it is considered bad policy for a judge to act as art critic. In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court held that a circus poster was eligible for copyright protection, rejecting the appellants’ contention that because it did not rise to the level of “fine art,” the poster was unworthy of protection.<sup>78</sup> Writing for the majority, Justice Holmes explained:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which

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<sup>77</sup> Banes, *supra* note 61, at 235.

<sup>78</sup> 188 U.S. 239 (1903).

their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.<sup>79</sup>

*Corpus Christi* need not be classified as a “work of genius” for the principle against judicial art criticism to apply equally in the context of First Amendment law. If judges are discouraged from determining what is art under copyright law, they also ought to avoid adjudging the meaning of artworks under the Establishment Clause.

Judge Posner, acting as art critic, evidently lacks appreciation for the artistic quality of Terrence McNally’s writing. Judge Posner belittles the students’ speech when he dismisses their work as lacking quality and characterizes the content of an extremely complex play as depicting “Jesus Christ as a homosexual who has sexual relations with his disciples.”<sup>80</sup> In fact, it is evident from numerous reviews that there are multiple competing interpretations of the play—of both its subject matter and its artistic merit. For example, one critic argues that the play does not depict Jesus himself as gay, but rather portrays “two parallel narratives: one, a contemporary story about gay men situated in the playwright’s Texas childhood hometown, Corpus Christi; the other, the New Testament Gospels with which this modern tale is allegorically connected.”<sup>81</sup>

Furthermore, while the reviews of Terrence McNally’s play have been mixed, the rationales on which art critics have based their analyses differ widely. Some critics, for example, have ranted against the play’s didactic treatment of homophobia within the Church, criticizing the play not for its blasphemy but for its preachiness.<sup>82</sup> Other critics have lavished the play with praise, declaring it “witty but not patronizing, as sober and cleansing as a dip in baptismal water.”<sup>83</sup> In fact, the only thing clear from the plethora of reviews is that there is no clear consensus about the play, its meaning, or its merits.

In the context of copyright law, it is widely recognized that because there are competing interpretations of artistic merit, judges should refrain from assuming the duties of art critic. While the principle was originally conceived to ensure that all artistic works receive protection under copy-

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<sup>79</sup> *Id.* at 300.

<sup>80</sup> See *Linnemeir*, 260 F.3d at 758, 760.

<sup>81</sup> Steven Mikulan, *Love! Valor! Crucifixion!*, L.A. WKLY., Sept. 7, 2001, at 38. See also Philip Brandes, *Skillful ‘Corpus Christi’ Preaches to the Choir*, L.A. TIMES, Aug. 24, 2001, at 25; Damien Jaques, *Cast’s Devotion Overcomes Shortcomings*, MILWAUKEE J. SENTINEL, Oct. 28, 2000, at 6B.

<sup>82</sup> See, e.g., Mikulan, *supra* note 81, at 38 (“There’s something creepily self-serving about a play that uses the founder of a major religion to sanctify a contemporary issue like gay marriage—not because this is sacrilege, but because it’s just plain silly.”).

<sup>83</sup> Richard Zoglin, *Corpus Christi by Terrence McNally*, TIME, Nov. 2, 1998, at 106.

right laws, the consequences of judges playing art critic in the context of First Amendment law are similarly grave. As such, a forum-based analysis that avoids placing the judge in a position to explain the meaning of a play by instead shifting the focus to the play's forum provides jurisprudential consistency between the realms of copyright and First Amendment law.

### III. THE DISCURSIVE CRITIQUE: JUDGE POSNER'S BIG DICTA

Justice Cardozo once wrote that the form of a judicial opinion "makes it what it is."<sup>84</sup> Judge Posner himself has acknowledged the importance of form and rhetoric to the meaning of a judicial opinion: "I want now to consider whether a judicial writing style—which might be adopted for reasons independent of one's jurisprudential stance (because one could not write any other way, because of one's aesthetic principles, or because a particular style was in fashion)—can affect content. I think it can . . . ."<sup>85</sup> His consciousness of language's power to implicate the meaning of an opinion makes the rhetorical choices in his *Linnemeir* opinion all the more distressing.

What is striking about the opinion is the reckless abandon with which Judge Posner declares his personal opinions about the artistic merit of the play as if they are universal truths. Judge Posner's opinion is littered with asides meant to belittle the artistic quality of the play and deride it as "a typical product of the lunatic cultural Left."<sup>86</sup> This breach of judicial neutrality, where unnecessary to explain the reasoning or rationale behind the decision, is dangerous because it deflates the political value of the speech being criticized.

Throughout his opinion in *Linnemeir*, Judge Posner spits ad hominem at Terrence McNally's *Corpus Christi*. He distorts the plot and meaning of the play in ways inconsistent with the interpretations of a number of well-respected theater critics. He declares the play blasphemous and speaks on behalf of "most believing Christians" in his declaration that the play is shocking and offensive.<sup>87</sup> Further examples of Judge Posner's rhetorical excesses are aplenty. He writes: "For obvious reasons, the university has been at pains to disclaim any endorsement of the theme of the play."<sup>88</sup> Never mind that Terrence McNally is a Tony award-winning playwright. Never mind that one critic has written: "This is no

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<sup>84</sup> Benjamin N. Cardozo, *Law and Literature*, 14 YALE REV. 699, 700 (1925).

<sup>85</sup> See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U CHI. L. REV. 1421, 1446 (1995). See also RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 269 (1988) (declaring the literary analysis of opinions to be "highly promising").

<sup>86</sup> See *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001).

<sup>87</sup> See *id.* at 758.

<sup>88</sup> *Id.* at 759.

satiric attack on Christianity or Christopher Durang-style rampage against the strictures of religious control. On the contrary, *Corpus Christi* is a theatrically limited but undeniably earnest and heartfelt play that pleads for the acceptance of gay sexuality within the Christian mainstream.”<sup>89</sup> Even in an unflattering review, one critic declared, “*Corpus Christi* is not an attack on faith, but a calculated defense of it.”<sup>90</sup> The play’s protagonist concludes the play with a line underscoring this very point, declaring, “We are all mother, father, brothers, and sisters, each to the other.”<sup>91</sup>

Judge Posner further admonishes the play in writing that despite his analysis leading to the denial of the preliminary injunction, “we do not mean to deny the pain that a play such as *Corpus Christi* inflicts on believing Christians (and not only on them) or to suggest that its author ranks with the nonbelieving giants of our cultural tradition. The fact that the play has been published, and ran in New York, will not immunize it from charges that it is a typical product of the lunatic cultural Left.”<sup>92</sup> Judge Posner’s editorializing on the cultural value of McNally’s play bears no relevance on his analysis of the play’s legitimacy under the Establishment Clause. He is merely washing his hands of an outcome with which he clearly seems to disagree on a personal level.<sup>93</sup> The statement of his holding is a final reflection on his distaste for the play. He writes, “the quality or lack thereof of *Corpus Christi* and other post-modernist provocations is a matter for the state university, not for federal judges, to determine.”<sup>94</sup> Aside from coming out in favor of the plaintiffs, Judge Posner does all he can to declare his unfavorable opinion of McNally’s play.

Declaring an outcome is but one of the many functions served by a judicial opinion.<sup>95</sup> The rhetoric of the opinion itself is a powerful tool for transmitting ideas about justice. Indeed, Austin Sarat has recently issued a call to recognize law as a “profession of rhetoric.”<sup>96</sup> He explains:

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<sup>89</sup> Chris Jones, *Insights Abound in ‘Corpus Christi’*, CHI. TRIB., July 10, 2001, § 5, at 2.

<sup>90</sup> See Mikulan, *supra* note 81.

<sup>91</sup> TERRENCE McNALLY, *CORPUS CHRISTI* 68 (1998).

<sup>92</sup> *Linnemeir v. Bd. of Trustees of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001).

<sup>93</sup> It is also conceivable that he is attempting to maintain some credibility with his allies on the apparently non-lunatic cultural Right.

<sup>94</sup> *Linnemeir*, 260 F.3d at 760.

<sup>95</sup> See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1467 (1995) (explaining that the elements of judicial opinion-writing include “the task of deciding,” “the task of explaining that decision,” and “the task of guiding—the setting forth of standards to help those who are expected to follow the law”); see also Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372–73 (1995) (identifying seven reasons why judges write opinions: (1) to legitimate their authority, (2) to demonstrate consistency and equality in application of the law, (3) as a result of tradition, (4) to explain the intellectual reasoning behind the decision, (5) to rationalize their decisions politically, (6) for personal gratification, and (7) to attract attention in seeking promotion to higher office).

<sup>96</sup> Austin Sarat, *Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading*, 23 LEGAL STUD. FORUM 355, 367 (1999).

For critics of law eager to expose the ways law is complicit in, if not responsible for, maintaining injustice, talk about law's discursive, aesthetic, or persuasive aspects seems to be little more than an interesting distraction. Yet it may be that attending to the rhetoric of law . . . is a way of attending . . . to questions of justice and injustice . . . . [M]ore than aesthetic self-indulgence, [it] is part and parcel of a political and ethical project whose object is the transformation of law in the name of a justice all-too-rarely spoken about in the profession of law.<sup>97</sup>

Judge Posner's extraneous remarks in his *Linnemeir* opinion are themselves a form of burlesque theater with the distinct political goal of undermining the potential of the actual holding.<sup>98</sup> While the show may go on, Judge Posner's personal theatrical performance serves only to minimize the potential that his opinion will do any real good for the student artists at Indiana University–Purdue University Fort Wayne. Both his methodological treatment of the artists as passive recipients of speech, and his linguistic treatment of their work as blasphemous and lacking in quality, represent an attack on their potential to produce political change through their art.

#### IV. CONCLUSION

It is no coincidence that each of the four artists whose federal funding was cut in 1990 by John Frohnmayer, then chairmen of the NEA, performed in projects that dealt explicitly with issues of sexuality.<sup>99</sup> Frohnmayer explained his actions, stating: “[T]he President wrote saying that . . . he didn't want censorship, but he didn't want a dime of taxpayers' money going to art that was 'clearly and visibly filth.'”<sup>100</sup> It seems that Judge Posner has something in common with the elder President Bush. His decision in *Linnemeir* does not censor the student production of *Corpus Christi*, but it does everything short of censorship to impair the production's political efficacy and to inhibit the efforts of future artists to

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<sup>97</sup> *Id.* at 368.

<sup>98</sup> Many legal scholars have written of the theatrical character of judicial opinions. See, e.g., JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 102 (1990) (“In rhetorical terms, the court gives itself an ethos, or character, and does the same both for the parties to a case and for the larger audience it addresses . . . . It creates by performance its own character and role and establishes a community with others.”); see also JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW (1985); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990).

<sup>99</sup> The four artists whose funding were cut are Holly Hughes, Karen Finley, John Fleck, and Tim Miller. All but Finley are lesbian or gay. See Richard Meyer, “Have You Heard the One about the Lesbian Who Goes to the Supreme Court?”: *Holly Hughes and the Case Against Censorship*, 52 THEATER J. 543 (2000).

<sup>100</sup> *Id.*

fight censorship through use of the limited public forum doctrine. *Linne-meir* demonstrates the importance of maintaining a vigilant critical stance towards the treatment of the arts within the judiciary, for even favorable outcomes may prove harmful for the victor.