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Constitutional Law - Freedom of Speech - Since Advertising Display Areas in Federally-Owned Airports Are Public Forums, the Government's Prohibition of Political Advertisements Violates the First Amendment

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH—SINCE ADVERTISING
DISPLAY AREAS IN FEDERALLY-OWNED AIRPORTS ARE PUBLIC FORUMS,
THE GOVERNMENT’S PROHIBITION OF POLITICAL ADVERTISEMENTS
VIOLATES THE FIRST AMENDMENT

United States Southwest Africa/Namibia Trade & Cultural Council v. United States
(D.C. Cir. 1983)

Washington National (National) and Dulles International (Dulles) Airports are federally-owned and operated facilities under the control of the Federal Aviation Administration (FAA).¹ In October 1975, the FAA entered into an exclusive contract with Transportation Displays, Inc. (TDI), whereby TDI agreed to lease and manage all advertising space in both airports.² Before TDI could lease advertising space, it was required to obtain the FAA’s written approval of the content and format of the proposed ad.³ In September 1980, the United States Southwest Africa/Namibia Trade and Cultural Council (Council)⁴ employed a professional advertising agency

1. *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 761 (D.C. Cir. 1983). The FAA was responsible for contracting with commercial concessionaires to provide goods and services to the public at both National and Dulles airports. *Id.*

2. *Id.* The contract required TDI to develop master advertising plans, to solicit advertisements, and to install displays in the available advertising space in wall units, dioramas, carousel displays, island showcases, and courtesy phone counters. *Id.* Under this contract, the parties further agreed that the FAA would receive 50% of TDI’s annual gross receipts, or a percentage of the annual gross value of the leased space. *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 16 Av. Cas. (CCH) 18,037 (D.D.C. 1981), *rev’d*, 708 F.2d 760 (D.C. Cir. 1983). In 1980, the FAA received \$251,207 in concession fees. *Id.*

3. 708 F.2d at 761. By the terms of the contract, TDI had to obtain approval of any proposed ad from the FAA’s Metropolitan Washington Airports Office (MWA). The criteria governing MWA’s approval of proposed advertisements were set forth in the TDI-FAA contract. Article I of the contract required the following:

All advertising shall be in good taste, professionally developed, and presented in such a manner as to be inoffensive to the general public and be of such a high caliber as to contribute to the establishment of the Airport’s facilities as prestige locations for commercial advertising media.

Id. Although the TDI-FAA contract did not explicitly prohibit political ads, MWA consistently interpreted it to ban ads “which would be considered political or issue-oriented in nature, rather than commercial or public service.” *Id.* at 762. In addition, TDI only leased space for public service announcements when there were insufficient commercial advertisements to fill the available advertising space. 16 Av. Cas. (CCH) at 18,038.

4. The United States Southwest Africa/Namibia Trade & Cultural Council (Council) is a non-profit corporation organized under the laws of the District of Columbia and is a registered foreign agent of the National Assembly and Council of Ministers of the territory of Southwest Africa/Namibia. 708 F.2d at 762. On behalf of its principal, the Council undertook to disseminate political propaganda throughout the United States in various forms, including advertising. 16 Av. Cas. (CCH) at 18,037.

(Agency) to prepare an advertisement for display at National and Dulles. The Agency submitted the ad⁵ to TDI which, in turn, sought the requisite FAA approval. On November 5, 1980, the FAA rejected the Council's proposed advertisement solely because it was political in nature.⁶

In December 1980, the Council commenced an action against the United States,⁷ seeking injunctive and declaratory relief on the grounds that the FAA's ban on political advertisements in airport advertising areas violated its first amendment right of free speech.⁸ On cross-motions for summary judgment, the district court denied the Council's claim, holding that for first amendment purposes, the advertising areas were separate nonforums within the airport terminals.⁹ The court went on to find that the govern-

5. 708 F.2d at 762; 16 Av. Cas. (CCH) at 18,037. The Agency prepared the advertisement for placement in the airports' dioramas. Dioramas are displays that resemble giant color slides. *Id.* The advertisement was entitled "SWAPO's Rape of Namibia" and consisted of four questions and five sketches. The questions read:

"Do you know—

- 1) SWAPO (South West Africa People's Organization) is a Soviet-Bloc Terrorist Group?
- 2) SWAPO is trying to take over Namibia by violence?
- 3) SWAPO is financed by the United Nations?
- 4) U.S. taxpayers finance the United Nations?"

The sketches accompanying each question were labelled: "Namibian Girl," "Namibian game preserve at Etosha," "SWAPO Terrorism," "Military equipment supplied by Soviet-Bloc," and "Uranium in Namibia." 708 F.2d at 762.

TDI charged a monthly fee of \$450 for the use of each diorama. The FAA asserted that the dioramas were commercially leased 85 to 95% capacity. 16 Av. Cas. (CCH) at 18,040, nn.4-5.

6. 708 F.2d at 762. On November 5, 1980, the MWA returned the initial contract to TDI marked "Not approved—Not considered as material eligible to be displayed within scope of contract." *Id.* On November 6, 1980, the Council's attorney telephoned the Chief of MWA's Financial Management Division. *Id.* During this conversation, the Division Chief stated that the ad was "controversial" but declared that the advertisement had been rejected because of its political, rather than its controversial, nature. *Id.*

7. *Id.* The district court determined that the Council had standing because of its status as a distinct corporate entity organized under the laws of the District of Columbia. *Id.*

8. *Id.* at 761. In response to the Council's claim, the FAA set forth two arguments. First, the FAA argued that the airport advertising areas did not constitute public forums for political debate and thus the government's interests in maintaining a commercial venture took precedence over the Council's first amendment rights. 16 Av. Cas. (CCH) at 18,038. Alternatively, the FAA argued that the prohibition against political messages in the airport display cases was a content-neutral, reasonable time, place, and manner restriction. *Id.* at 18,040, n.8. The district court rejected the FAA's contention that the ban was a reasonable time, place, and manner restriction, finding that this analysis was only applicable to content-neutral restrictions. *Id.* Further, the lower court reasoned that the FAA policy did not limit advertising, but banned only one subject-matter, political advertisements, from advertising display areas. *Id.*

9. 708 F.2d at 762. The district court concluded that the individual advertising areas, rather than the airport terminals, were the proper focus for first amendment public forum analysis. *Id.* at 763-64. In support of this conclusion, the district court found that the advertising areas were both structurally and functionally distinct from the larger airport terminals; they were isolated forums reserved for commercial use

ment's interests in maximizing advertising revenue, in maintaining impartiality in political matters, and in avoiding difficult administrative decisions, were significant government interests that justified the FAA's ban on political advertising.¹⁰ On appeal,¹¹ the Court of Appeals for the District of Columbia Circuit reversed, *holding* that the government's ban on political advertising violated the first amendment since the advertising areas were public forums and the government had failed to sustain its burden of showing that its regulation served a compelling state interest. *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983).

The first amendment to the United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech."¹² Characterized as the most majestic of the constitutional guarantees and the indispensable condition of nearly every other form of freedom, freedom of speech is said to be a fundamental right.¹³ However, this right is not absolute. Under certain circumstances, the government is empowered to regulate speech.¹⁴

under the FAA-TDI contract, and their sole purpose was to raise revenue for the operation of the airport. 16 Av. Cas. (CCH) at 18,039. In contrast, the district court observed that the airport's terminals and walkways were public forums in which non-commercial expression, such as leafletting and solicitation, was permitted. 708 F.2d at 765. In sum, the district court concluded that the Council sought first amendment access to a unique area of communication which it believed constituted "a separate forum for expression from the remainder of the terminal." 16 Av. Cas. (CCH) at 18,038.

10. 708 F.2d at 770-71. Initially, the district court found that the regulation served the FAA's interest in maximizing revenue because it allowed the government to maintain a higher level of revenue from long-term, commercial contracts than could be obtained from short-term, political ads. *Id.* at 770. Second, the district court found that the ban served to avoid the appearance of government endorsement or support for political positions. In acknowledging the weight of this interest, the court apparently relied on the government's assertion that the appearance of neutrality or impartiality at National and Dulles was desirable, "not only as a diplomatic matter, but also in terms of the conduct of foreign policy;" especially since these airports were the "gateways to the nation's capitol." 16 Av. Cas. (CCH) at 18,039. Third, the district court believed that the regulation relieved the FAA of "sticky administration problems" that could result from the FAA's allocation of limited ad space among a broad spectrum of political candidates and viewpoints. The district court explained that extensive FAA intervention would both implicate the first amendment and frustrate whatever efficiency had been gained in delegating the responsibility to TDI. 708 F.2d at 772.

11. The case was heard by Judges Wright, Wald, and Mikva. Judge Mikva wrote the opinion on behalf of an unanimous court.

12. U.S. CONST. amend. I. The full text of the first amendment provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances." *Id.*

13. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576 (1978).

14. *Gitlow v. New York*, 268 U.S. at 666. In explaining the scope of first amendment freedoms, the *Gitlow* Court stated,

A primary issue arising out of government regulation of speech is the extent to which the government may constitutionally restrict individual freedom of expression in publicly-owned areas and facilities.¹⁵ The United States Supreme Court first addressed this issue in the context of public streets and parks.¹⁶ In *Davis v. Massachusetts*,¹⁷ the Court reviewed a preacher's conviction for violating a Massachusetts licensing statute that prohibited any public address on public grounds unless in accordance with a permit from the mayor.¹⁸ In examining the constitutionality of the statute, the Court found that the government's authority to regulate expression was

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Id. at 666. See also *Cohen v. California*, 403 U.S. 15, 19 (1971) ("The First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses"); *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (the guarantees of the first and fourteenth amendments do not insure that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time"); *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50 (1961) ("We reject the view that freedom of speech and association . . . are 'absolutes.' . . . [C]ertain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection.")

However, above all other guarantees in the Constitution, courts have accorded the first amendment special protection. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position"). See also *Thomas v. Collins*, 323 U.S. 516, 530 (1945). In *Thomas*, the Court noted "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." The Court further explained, "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Id.* Further, Justice Cardozo, in describing the special status accorded freedom of thought and speech has stated that "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

15. See note 16 *infra*. This casenote does not address the government's ability to regulate expressive activity on private property. For a discussion of the government's ability to regulate expression on private property, see L. TRIBE, *supra* note 13, § 12-22, at 693.

16. See *Davis v. Massachusetts*, 167 U.S. 43 (1897). For a general discussion and historical background of first amendment rights of access to public property, see Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, LTD v. Conrad*, 37 OHIO ST. L.J. 247 (1976); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

17. 167 U.S. 43 (1897).

18. *Id.* at 46-47. In *Davis*, a preacher addressed a crowd on the Boston Common without the requisite permission from the mayor. *Id.* at 44. The preacher was convicted under the statute and fined. *Id.* at 45.

co-extensive with that of a private landowner.¹⁹ Thus, like the private citizen, the government had no obligation to preserve its properties as forums for expression for the general public. In effect, the Court reasoned that an individual not only had no first amendment right of access to private property, but also had no right of access to government-owned property dedicated to public use.²⁰ On the basis of these findings, the Court held that the Massachusetts statute did not violate the preacher's first amendment rights and affirmed his conviction.²¹

Forty-two years later, however, in *Hague v. Committee for Industrial Organization*,²² Justice Roberts retreated from the position set forth in *Davis*.²³ Instead of vesting unbridled discretion in the government to determine the proper uses of public property, the Court recognized a citizen's privilege to utilize those areas which had traditionally been dedicated to the public for purposes of speech and assembly.²⁴ In these areas, the Court explained, the

19. *Id.* at 47. The Court, speaking through Justice White, found that the government "[a]s representative of the public may and does exercise control over the use which the public may make of such places. . . ." *Id.* at 47. In making this determination, the Court adopted the position taken by Justice Holmes speaking for the Supreme Judicial Court of Massachusetts. Justice Holmes stated that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* at 47 (quoting *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113, 114 (1895), *aff'd*, 167 U.S. 43 (1897)).

20. *Id.* The Court found that "[i]t is, therefore, conclusively determined that there was no right in the [preacher] to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper. . . ." *Id.*

21. *Id.* at 48.

22. 307 U.S. 496 (1939).

23. In *Hague*, members of the Committee for Industrial Organization (CIO) challenged the constitutionality of an ordinance forbidding public meetings and pamphleteering in streets and other public places without a permit. *Id.* at 501. In a plurality opinion, Justice Roberts declared that the ordinance was void on its face. *Id.* at 516. Although the factual settings of *Davis* and *Hague* were quite similar, Justice Roberts expressly avoided considering whether *Davis* had been correctly decided. *Id.* at 515. Justice Roberts distinguished *Davis* on the grounds that the Boston ordinance was much broader in scope and purpose; it encompassed not only speech, but other activities in public places which were "not in the nature of civil rights," such as sales, and thus were proper subjects of regulation. In contrast to *Davis*, Justice Roberts noted that "[i]n the instant case the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks." *Id.* See also *Jamison v. Texas*, 318 U.S. 413, 415-16 (1943). In *Jamison*, the Court interpreted *Hague* as directly rejecting the principal set forth in *Davis* that the government had absolute power to prohibit the use of the streets for the communication of ideas. *Id.* at 415-16. As further support for Justice Roberts' position in *Hague*, the *Jamison* Court declared that "one who is rightfully on a street which the state has left open to the public, carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Id.* at 416.

24. *Hague*, 307 U.S. at 515-16. In dicta, Justice Roberts described the origin and extent of this privilege:

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

government's role as property owner was limited to furthering the public comfort, convenience, and order.²⁵

The most significant consequence of *Hague* and its progeny has been the development of the "public forum doctrine."²⁶ The origins of this doctrine are found in the language of the *Hague* Court which drew a correlation between the specific nature of the public property upon which an individual seeks to exercise first amendment rights and the government's authority to restrict expression on that property.²⁷ Thus, the *Hague* Court explained that in public areas which have been traditionally dedicated to public use, the government's authority to regulate expression is very limited.²⁸ These areas have come to be known as public forums. Over the years, the Court has developed two additional categories of public properties—nonforums and limited public forums—and has set forth corresponding standards to determine the constitutionality of government restrictions on speech in these ar-

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. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id.

25. *Id.* at 516. Whereas in *Davis* the Court construed the government's proprietary authority as equal to that of a private landowner, in *Hague* the Court substantially narrowed the breadth of the government's authority by recognizing a right in the citizenry to use publicly-owned property. *Id.* As a result, the government could no longer exercise absolute control over first amendment activity in these areas, and could regulate only in the exercise of its police power. *Id.* Police power considerations such as public health, safety, and convenience have been factors in the court's decision to uphold a variety of restrictions on speech and speech-related conduct. *See, e.g.,* *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) ("a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective"); *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty . . . to protect the well-being and tranquility of a community"); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people . . . has never been regarded as inconsistent with civil liberties"). For a further discussion of the relevance of these considerations, see notes 33 & 35 and accompanying text *infra*.

26. For a general discussion and historical background on the public forum doctrine, see authorities cited in note 16 *supra*.

27. *See Hague*, 307 U.S. at 515-16. Justice Roberts explicitly limited the government's authority to regulate those properties, such as streets and parks, which had been traditionally entrusted to the public for communication purposes. *Id.* at 516-17. In contrast, he made no such stipulations concerning the government's ability to regulate expression in other public areas over which the government had historically retained a greater degree of control. *Id.*

28. For a discussion of *Hague*, see notes 24-25 and accompanying text *supra*.

cas.²⁹ These categories and the corresponding tests for determining the constitutionality of government limits on freedom of expression constitute the components of the public forum doctrine.³⁰

In areas designated as public forums, the government's ability to regulate the exercise of first amendment rights is sharply circumscribed.³¹ If a government regulation discriminates among expression on the basis of its content, the government must prove that the restriction furthers a compelling state interest, and that it is narrowly drawn to achieve this end.³² In

29. For a discussion of nonforums, see notes 37-40 & 74-80 and accompanying text *infra*. For a discussion of limited public forums, see notes 41-42 & 68-73 and accompanying text *infra*.

30. For a discussion of the public forum doctrine, see authorities cited in note 16 *supra*.

31. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 103 S. Ct. 948, 954 (1983). In delineating the state's limited authority to restrict expression, Justice White explicitly applied this analysis only to those areas "which by long tradition or by government fiat have been devoted to assembly and debate." *Id.* at 954. See also *Carey v. Brown*, 447 U.S. 455, 465 (1980) (sidewalks a public forum and government restricted in its ability to regulate expression); *Hague*, 307 U.S. at 515-16 (government's authority to regulate speech in streets and parks is limited).

While some regulation of speech is permissible, the government may not restrict all first amendment access to public forums. See *Schneider v. State*, 308 U.S. 147, 160-63 (1939). The *Schneider* Court stated:

Although a municipality may enact regulations in the interest of the public safety, health, welfare, or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion. . . . [T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Id. *Hague*, 307 U.S. at 515-16 ("The privilege of a citizen of the United States to use the streets and parks for communication of views . . . may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied").

32. See *Carey*, 447 U.S. at 455. In *Carey*, the Court confronted an Illinois statute prohibiting all picketing of residences, but exempting such activity at a place of employment involved in a labor dispute. *Id.* at 457. The Court held that the state's interests in both preserving privacy in the home and providing special protection for labor protests were of insufficient weight to justify the content-based discrimination. *Id.* at 465-67. The *Carey* Court stated that though "certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives, this is not such a case." *Id.* at 465. See generally *Consolidated Edison Co. v. Public Serv. Comm'n.*, 447 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)) (if a government regulation is based on the content of the speech or message, that "action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views'"); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("a State may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions."). *But cf.* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The *Mosley* Court stated that:

the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . [O]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking

addition, the government is permitted to impose reasonable time, place, and manner restrictions.³³ However, these regulations must be content-neutral,³⁴ be narrowly tailored to serve a significant state interest,³⁵ and leave

on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id.

33. The government may restrict the vehicle through which speech is communicated by regulating the time, place, or manner of the communication. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Cox*, the Court upheld a statute proscribing unlicensed parades upon public streets on the grounds that the regulation insured proper policing and minimized disorder. *Id.* at 576. The Court reasoned that “[i]f a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without fair discrimination, to *time, place, and manner* in relation to the other proper uses of the streets.” *Id.* (emphasis added). The Court further discussed the rationale in support of reasonable time, place, and manner restrictions, by stating,

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of the public highways has never been regarded as inconsistent with civil liberties. . . . Where a restriction of the use of the highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.

Id. at 574. *See also Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned*, the Court upheld an anti-noise ordinance prohibiting a person, while on grounds adjacent to a building in which school is in session, from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session. *Id.* at 107-08. In examining the constitutionality of the ordinance, the Court stressed the importance of taking into account the special characteristics of the forum. *Id.* at 117. The Court explained that “[t]he nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.” *Id.* at 116. In light of the special nature of the school environment, the Court found that the statute was a reasonable time, place, and manner regulation designed to further the state’s legitimate interest in having an undisrupted school session conducive to the students’ learning. *Id.* at 119. *See also Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (“a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting . . . and may in other respects safeguard the peace, good order, and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment”).

34. *See Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 536 (1980). In *Consolidated Edison*, the Court emphasized that “time, place, and manner regulations must be ‘applicable to all speech irrespective of content’” and that “[g]overnmental action that regulates speech on the basis of its subject matter ‘slip[s] from the neutrality of time, place, and circumstance into a concern about content.’” *Id.* (citing *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (quoting *Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29)). The Court went on to hold that the Commission’s regulation which prohibited the discussion of controversial public policy issues in utility bill inserts was unconstitutional on the ground that the regulation did not qualify as a content-neutral time, place, and manner regulation. *Id.* at 537. *See also Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 94 (1977) (township ordinance prohibiting the posting of real

open alternative channels of communication.³⁶

In the second category of public property—nonforums³⁷—government regulation of expression is subject to less judicial scrutiny.³⁸ The government may regulate or even prohibit all speech activity in nonforums provided that the restriction is both reasonable and content-neutral.³⁹ Furthermore, regulations that discriminate among speech activities on the basis of content are permissible so long as they are both reasonable and viewpoint-neutral.⁴⁰

estate “For Sale” and “Sold” signs, although applicable only to one mode of communication, constituted a regulation of content, rather than of form, and thus could not qualify as a time, place, and manner restriction); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs held to exceed the proper bounds of a time, place, and manner restriction on commercial speech because, *inter alia*, statute singled out speech of a particular content).

35. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (ordinance forbidding use of sound trucks emitting “loud or raucous noises” on public streets valid as means of ensuring tranquility of residents); *Schneider v. State*, 308 U.S. 147, 162 (1939) (“the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.”).

36. *See Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). In *Linmark*, the Court seriously questioned whether a township ordinance proscribing use of real estate “For Sale” and “Sold” signs left open ample alternative channels of communication since, “in practice, realty, is not marketed through leaflets, sound trucks, demonstrations, or the like.” *Id.* *See also Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). In *Cox*, the Court found that “the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorably associated with resort to public places.” *Id.*

37. For further discussion of the characteristics of nonforums, see notes 50-52 & 74-80 and accompanying text *infra*.

38. *See, e.g., United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (“the First Amendment does not guarantee access to property simply because it is owned or controlled by the government”). *See generally L. TRIBE, supra* note 13, § 12-21, at 609-92.

39. *See United States Postal Serv. v. Council of Greenburgh*, 453 U.S. 114 (1981). In *Greenburgh*, the Court confronted a statute prohibiting the deposit of unstamped mail in letter boxes of private homes which had been approved by the Service. *Id.* at 116. Having determined that the letter boxes were nonforums, the Court upheld the regulation, finding it not only a reasonable means of promoting the efficiency of the Postal Service, but also content-neutral since the prohibition operated irrespective of the subject-matter of the unstamped mail. *Id.* at 132-34. *See also Brown v. Glines*, 444 U.S. 348, 353 (1980) (state may constitutionally require servicemen to obtain permit to distribute petitions on air force base in order to prevent circulation of material which is a clear threat to the readiness of the troops); *Adderley v. Florida*, 385 U.S. 39 (1966) (because the state had a valid interest in security, and because access to jail property was consistently and evenhandedly denied everyone, the Court upheld a conviction of student demonstrators for “trespass with a malicious and mischievous intent” on a nonpublic jail driveway).

40. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948 (1983). In *Perry*, the Court was faced with a school district policy limiting outside access to teacher mailboxes and the school's internal mail system to the teachers' union's exclu-

In the third category of publicly-owned property—the limited public forum,⁴¹ government restrictions on expression are subject to evaluation under the strict scrutiny public forum standard as long as the area or place remains open for some communication.⁴²

sive bargaining representative. *Id.* at 952. Initially, the Court found that the school mail facilities were nonforums. *Id.* at 957. It then addressed the question of whether the policy was both reasonable and viewpoint-neutral. *Id.* In looking to the purpose and function of the school board policy, the Court held that differential access was reasonable because it was wholly consistent with the district's legitimate interest in preserving the property for its intended use. *Id.* at 958. Despite the fact that the policy denied access to competing unions, the Court found that the restriction was viewpoint-neutral; access rights hinged upon the exclusive agent's status rather than his message. *Id.* at 957. In support of this conclusion, the Court stated that

[t]here is, however, no indication that the school board intended to discourage one viewpoint and advance another. . . . Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Id. at 957. Furthermore, the Court stressed the principle that “when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business.” *Id.* at 959. *See also* *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977) (the state can prohibit prisoners' labor union from soliciting other inmates, holding meetings, and receiving bulk mailings as a reasonable means to prevent disruption and interference with legitimate penological objectives, security and order); *Greer v. Spock*, 424 U.S. 828, 839-40 (1976) (in order to foster a military base's primary business of training soldiers, the government may require the approval of the commanding officer as a prerequisite to the delivery of speeches and demonstrations of a partisan political nature on restricted areas of the base so long as the military authorities do not discriminate among candidates on the basis of their political views.); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (municipality may ban all political advertising from the car card space on city transit buses provided that the restriction is not “arbitrary, capricious, or invidious”).

41. *See* L. TRIBE, *supra* note 13, § 12-21, at 690. Professor Tribe categorized those properties which were created not primarily for public interchange, but for purposes closely linked to expression as “semi-public forums.” *Id.* at 690. Although the phrase had not yet been employed by the Court, Professor Tribe noted that the concept seemed implicit in the Court's analyses of certain types of properties. *Id.* at 690 n.13.

The Court first employed the term “limited public forum” to classify state fairgrounds. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). *See also* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 955-56 (1983) (rejection of argument that school mail facilities are a “limited public forum”). For a further discussion of limited public forums, see notes 56-60 & 68-73 and accompanying text *infra*.

42. *See* *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 955 (1983) (“Although a state is not required to indefinitely retain the open character of the [limited public forum], as long as it does so it is bound by the same standards as apply in a traditional public forum”). *See also* *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (to justify exclusion from state university meeting facilities, the government must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end); *Heffron v. International Soc'y for Krishna*

Due to the great difference in the level of scrutiny applicable to restrictions on expression in public and limited public forums as opposed to that applicable to restrictions in nonforums, the pivotal step in first amendment analysis of government restrictions on speech is the classification of the public facility as a public forum, limited public forum, or nonforum.⁴³

In *Lehman v. City of Shaker Heights*,⁴⁴ the Supreme Court held that a speaker had no right to advertise on the car cards of city transit buses because the buses could not be considered public forums.⁴⁵ In so concluding, the Court articulated three factors which should be considered when determining whether certain property is a public forum: 1) the physical characteristics of the place; 2) the function of the place; and 3) the degree of incompatibility between the challenged manner of expression and the normal activity of the place.⁴⁶

Consciousness, Inc., 452 U.S. 640, 654-55 (1981) (ordinance making it a misdemeanor to sell or distribute any merchandise at a state fairgrounds except from a duly licensed booth upheld as a reasonable time, place, and manner restriction in a limited public forum).

43. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 954 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) ("consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) ("The nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question").

44. 418 U.S. 298 (1974).

45. *Id.* at 302. In *Lehman*, a politician submitted an advertisement to be displayed in the car card space within city transit buses. *Id.* at 300. The city had promulgated a regulation prohibiting political advertisements in the buses and thus rejected the politician's ad. *Id.* at 301. See generally Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 237 (1982) (critical of *Lehman* rationale); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 234 (1978) (discussion of *Lehman*); Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1114 (1980) (discussion of how proprietary action by government relates to individual constitutional rights).

46. 418 U.S. at 303-04. In *Lehman*, the Supreme Court utilized three factors to determine that the car card advertising space within the city transit buses was a nonforum. First, the Court emphasized that the facility was small and confined, and that the advertising space was very limited. *Id.* at 302. The Court found "no meeting hall, park, street corner, or other public thoroughfare." *Id.* at 303. In effect, the commuters were a captive audience of every message projected from the car cards. *Id.* at 302. Second, the Court found that the primary purpose of the space was to generate revenue for the transportation authority and was part of the government's commercial venture. *Id.* at 303. Thus, the car cards were only incidental to the buses' primary function of providing rapid, convenient, and pleasant public transportation. *Id.* at 303. Third, the Court found that opening the advertising space to political advertising would conflict with the intended purpose of the forum, because it might jeopardize the revenue potential for long-term commercial advertisements, impose offensive subject matter on a captive audience, create the appearance of fa-

In analyzing the first of the three *Lehman* factors, the Court has considered the property's size, location, and surroundings.⁴⁷ Where the property is wide-open, like a park or thoroughfare, rather than enclosed like a building or bus, the Court has been willing to classify it as a public forum.⁴⁸

The Court's analysis of the second factor has focused primarily upon the forum's designated purpose and upon whether the forum is generally open to

voritism, and increase administrative intervention and difficulty. *Id.* at 304. Against this background, the Supreme Court held that "[n]o First Amendment forum [existed]." *Id.* at 304.

In *Lehman*, only four Justices agreed that the three enumerated factors required the Court to find a nonforum. Justice Douglas contributed the swing vote in a concurring opinion and upheld the government regulation of speech on captive audience grounds alone. *Lehman*, 418 U.S. at 308 (Douglas, J., concurring). Justice Douglas explained,

[T]he petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles on public transportation into forums for the dissemination of ideas upon this captive audience.

Id. at 307 (Douglas, J., concurring).

See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). In *Southeastern Promotions*, the Supreme Court analyzed the constitutionality of a municipal board's authority to refuse to grant a theatre company permission to use a municipal theatre for the production of the musical, "Hair" on the grounds that it was controversial. *Id.* at 547. In evaluating the city's regulation of expression, the Court explicitly declared that the auditorium was "designed for and dedicated to expressive activities." *Id.* at 555. In addition, the Court noted that the proposed use of the facility neither conflicted nor competed with the normal activity in the forum. *Id.* Finally, notwithstanding the limited size and commercial aspect of the municipal theatre, the Supreme Court held that it was a public forum. *Id.*

47. See *Greer v. Spock*, 424 U.S. 828 (1976); *Flower v. United States*, 407 U.S. 197 (1972). In both of these cases, the Court considered the validity of a military regulation prohibiting leafletting on a military base without the consent of the base commander. In *Flower*, the Court reversed the conviction of a civilian for entering the military compound and distributing leaflets on the grounds that the main avenue, although located within the base limits, was a completely open street where the military had abandoned any claim of a superior, special interest. *Flower*, 407 U.S. at 198. The *Greer* Court, however, upheld a conviction under the same type of regulation, and distinguished *Flower* on the grounds that the two public properties at issue were quite different; the road in *Flower* was a wide-open public thoroughfare comparable to a public forum while the *Greer* property was a restricted, closely supervised military reservation and thus constituted a nonforum. *Greer*, 424 at 835-37. See also *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). For a discussion of *Heffron*, see notes 56-60 and accompanying text *infra*.

48. Compare *Hague*, 307 U.S. at 496 (streets are public forums); *Niemotko v. Maryland*, 340 U.S. at 268 (parks are public forums); *Police Dep't of Chicago v. Mosley*, 408 U.S. at 92 (grounds adjacent to school buildings are public forum) with *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948 (1983) (school's internal mail system and teachers mailboxes are nonforums); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (letterboxes at private homes are nonforums); *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119 (1977) (prison is nonforum); *Lehman*, 418 U.S. at 298 (city transit buses are nonforums).

the public as a medium of expression.⁴⁹ If the forum's purpose is narrow and the general public's ability to gain access to the forum traditionally has been restricted, the Court has been inclined to classify it as a nonforum.⁵⁰

The Court has analyzed the third *Lehman* factor as encompassing an assessment of the degree of inconsistency between the challenged first amendment use and the normal or government-endorsed use of the forum.⁵¹ In *Lehman*, the Court established this factor through a showing that the proposed expression jeopardized the purpose and function of the forum by frustrating the government's commercial venture, imposing upon a captive audience, creating the appearance of favoritism, and interfering with the administration of the forum.⁵² However, as the Court indicated in *Southeast-*

49. See *Adderley v. Florida*, 385 U.S. 39 (1966). In *Adderley*, the Court upheld the conviction for "trespass with a malicious and mischievous intent" of 32 students who had entered the premises of a Florida jail for the purpose of protesting the previous arrest of their schoolmates. *Id.* at 40. Recognizing that jails are built for security purposes, and traditionally have not been open to the public, the court declared that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it was lawfully dedicated." *Id.* at 47 (emphasis added). In subsequent decisions, the Court expressly included in its first amendment analysis a consideration of the forum's purpose. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 956 (1983) ("[t]he 'normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to teachers.' . . . The internal mail system, at least by policy, is not held open to the general public."). *But cf.* *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6 (recognizing that the specific use of a place for the communication of information and ideas does not, in itself, transform the facility into a public forum).

50. The Court has been most willing to find a nonforum in cases where the forum's purpose is narrowly defined and the general public's access to the forum traditionally has been very restricted. See *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119, 125 (1977) (prison held to be a nonforum in light of the fact that "confinement [in state prisons] and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration"); *Greer v. Spock*, 424 U.S. at 838 (recognizing that a military base is a nonforum because it has not traditionally served as a place for "free public assembly and communication of thoughts by private citizens" and that its primary function is to train soldiers, not to provide a public forum). For further discussion of restricted purposes and access policies in nonforums, see notes 74-80 and accompanying text *infra*.

51. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The *Grayned* Court was the first to articulate this third factor. *Id.* at 116. In framing this factor, the Court reasoned,

Although a silent vigil may not unduly interfere with a public library . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. Finding the public sidewalk adjacent to school grounds conducive to free expression, the Court characterized the property as a public forum. However, the Court went on to find that an anti-noise ordinance was a reasonable time, place, and manner regulation, and hence was not violative of the first amendment. *Id.* at 118, 121.

52. In *Lehman*, the Court primarily focused its analysis upon this third factor. The crucial element in the Court's assessment of this factor was the finding that the proposed political advertisements in the city transit buses would impose upon a "cap-

ern Promotions, Ltd. v. Conrad,⁵³ and *Erznoznik v. City of Jacksonville*,⁵⁴ neither the government's commercial interest, nor the risk of imposing upon a captive audience is independently sufficient to satisfy this incompatibility requirement.⁵⁵

In *Heffron v. International Society for Krishna Consciousness, Inc.*,⁵⁶ the Court substantially refined the public forum doctrine by introducing the third category of public property, the "limited public forum."⁵⁷ The *Heffron* Court developed this category in the context of analyzing the government's authority to restrict pamphleteering, sales, and solicitations at a state fairgrounds.⁵⁸ In applying the *Lehman* three-factor test to the fairgrounds, the Court noted that the fairgrounds were limited in size and purpose, but were created and maintained for purposes of freedom of expression.⁵⁹ In light of the hybrid

tive audience." In other words, the plurality found that the advertisements could intrude excessively upon the peace of mind of the passengers. For a further discussion of the captive audience doctrine in *Lehman*, see note 46 *supra*.

53. 420 U.S. 546 (1975). In *Southeastern Promotions*, the Court considered whether a municipal theatre was a public forum. *Id.* at 547. Despite the fact that the theatre was a commercial venture, the Court held that it was a public forum "designed for and dedicated to expressive activities." *Id.* at 555.

54. 422 U.S. 205 (1975). In *Erznoznik*, the Court considered whether a municipality could censor drive-in movie theatres for exhibiting films containing nudity, when the screen was visible from a public street, on the grounds that the state may protect its citizens from unwilling exposure to potentially offensive materials. *Id.* at 208. Although addressing this issue in terms of the state's power to regulate speech rather than through an assessment of the forum *per se*, the Court noted that first amendment interests outweigh privacy interests in all but two situations: 1) when the speaker intrudes on the privacy of the home, and 2) where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* at 209. Thus, the Court found that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Id.* at 210. The limited privacy interests of persons on public streets could not justify the ban on otherwise protected speech. *Id.* at 212. For a further discussion of privacy interests and captive audience concerns, see *Cohen v. California*, 403 U.S. 15 (1971); *Kovacs v. Cooper*, 336 U.S. 77 (1949). See generally Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 *Nw. U.L. REV.* 153 (1972).

55. The *Southeastern Promotions* decision has been interpreted by Professors Karst and Stone as "rejecting the *Lehman* plurality notion that the government's first amendment obligations are lessened when the government is engaged in commerce." Karst, *supra* note 17, at 252; Stone, *supra* note 45, at 81. Professor Stone noted that "[t]he Court has long recognized, however, that whatever significance the proprietary/governmental distinction may have for other purposes, it is ordinarily irrelevant to the standards imposed under the Constitution." Stone, *supra* note 45, at 91. See also Cass, *supra* note 16, at 302. Professor Karst explained that the *Lehman* opinion had "virtually read government enterprises out of the coverage of the first amendment." Karst, *supra* note 16, at 252.

56. 452 U.S. 640 (1981).

57. *Id.* at 655.

58. *Id.* at 644. In *Heffron*, the Court considered whether Minnesota could require religious organizations desiring to distribute and sell literature and solicit donations at a state fair to conduct their activities at designated booths which were available on a first-come, first-serve basis. *Id.*

59. *Id.* at 655. In analyzing state fairgrounds under the three *Lehman* factors,

nature of this public property, the Court concluded that the fairgrounds should be classified as a limited public forum.⁶⁰

In *Perry Education Association v. Perry Local Educators' Association*,⁶¹ the Court discussed the characteristics of all three types of forums and developed broad definitions of the three categories of public properties, thus simplifying the three-factor analysis of *Lehman*.⁶² First, the Court defined public forums as "places which by long tradition or by government fiat have been devoted to assembly and debate,"⁶³ such as streets,⁶⁴ parks,⁶⁵ sidewalks,⁶⁶ and state

the Court noted that 1) the size and purpose of the forum was limited in that the fairgrounds comprised a relatively small area of 125 acres and was designed to exhibit to the public an enormous variety of goods, services, entertainment and other matters of interest; 2) the fair was a temporary event with a short-term purpose of providing a medium for efficient social, religious, and commercial interchange for a large number of individuals; and 3) the expressive use of the facility was consistent with the normal or government-endorsed use, so long as the use was tempered by the limited size and purpose of the facility. *Id.* at 650-55. Thus, although the government had created a forum for expression, this forum was bounded by the characteristics and constraints of a fairground, such as the fair's duration, size, use, and purpose. Therefore it was "limited" in nature. *Id.*

60. *Id.* at 655. Having examined the Minnesota state fairgrounds under the *Lehman* three-factor analysis, Justice White, writing for five members of the Court, concluded that the "State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Id.*

After classifying the fairgrounds as a limited public forum, the Court went on to hold that the government's regulation of expression was a reasonable time, place, and manner restriction. *Id.* at 655. The Court recognized that the state had a substantial interest in maintaining the orderly movement of the crowd and providing for the safety and convenience of visitors at the fair. *Id.* at 649-50.

For a further discussion of *Heffron*, see generally Marshall, *Solving the Free Exercise Dilemma: Free Exercise As Expression*, 67 MINN. L. REV. 545, 577 (1983).

61. 103 S. Ct. 948 (1983). In *Perry*, the Court considered whether the first amendment was violated when the union elected by public school teachers was granted access to the school's internal mail facilities, but such access was denied to a rival union. *Id.* at 954. Noting that the existence of a right of access to public property and the standard by which limitations on this right are evaluated differ depending upon the character of the property, the Court implicitly invoked the *Lehman* three-factor analysis. *Id.* at 955-56. Thus, the Court looked to the type of property involved, its limited purpose of facilitating internal communication of school-related matters to teachers, and its limited nature in that the system was not held open for use by the general public. *Id.* at 955-56. Although the Court did not explicitly mention the third factor regarding incompatibility, it is evident that generalized use of the system would frustrate its normal activity and intended function.

62. *Id.* at 954-55.

63. *Id.* at 954.

64. For a discussion of streets as public forums, see *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Jamison v. Texas*, 318 U.S. 413 (1943); *Hague*, 307 U.S. at 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

65. See *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (the denial of an application for a permit to give Bible talks in a public park violated the applicant's first and fourteenth amendment rights).

66. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965). In *Cox*, a group of black

capitol grounds.⁶⁷ Second, the Court defined limited public forums as those facilities which the state has opened for expressive activity, or which the state created for a limited purpose.⁶⁸ In describing this category, the Court refined the distinction between public and limited public forums by reclassifying as limited public forums certain facilities which previously had fallen within the public forum domain.⁶⁹ Thus, the Court found that state university meeting facilities,⁷⁰ municipal theatres,⁷¹ and school board meetings⁷²

students assembled to protest against racial segregation on a sidewalk across the street from a courthouse. *Id.* at 537-41. Cox was subsequently arrested and convicted of obstructing public passages. The Supreme Court focused on the issue of the "right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly." *Id.* at 554 (citations omitted). In conclusion, the Court held that the conviction for obstructing a public passageway violated Cox's first amendment rights of freedom of speech and assembly. *Id.* at 558.

67. *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963). In *Edwards*, 187 black students converged on the grounds of the South Carolina House of Representatives, an area of two city blocks open to the general public, to protest general discriminatory practices within the state. *Id.* at 229-30. The students were arrested and imprisoned for breach of peace. *Id.* at 234. However, the Supreme Court reversed their convictions, stating that "it is clear to us that . . . [the state] infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." *Id.* at 235. Moreover, the Court stressed that "[t]he circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form." *Id.*

68. *Perry*, 103 S. Ct. at 995. The *Perry* Court explained that such a forum could be created for a limited purpose such as use for certain groups, or for the discussion of certain subjects. *Id.*

69. *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions*, 420 U.S. at 546 (municipal theatre)).

70. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the Court addressed the issue of whether a state university could prohibit student groups from using university meeting facilities for religious worship and discussion. *Id.* at 264-65. Noting that the university routinely provided these facilities for use by student organizations, the Supreme Court found that the university had created a forum in which the university had assumed an obligation to justify its exclusion under constitutional norms. *Id.* at 267. The Court then subjected the exclusion to the compelling state interest test for content-based exclusions in public and limited forums, and held that such an exclusion was unconstitutional. *Id.* at 277. Although the Court did not explicitly refer to the facility as a limited public forum, the Court explained that the campus of "a public university, at least for its students, possesses many of the characteristics of a public forum." *Id.* at 267 n.5. However, the Court recognized at the same time that, "First Amendment rights must be analyzed in light of the special characteristics of the school environment." *Id.* at 268 n.5 (citations omitted). The Court noted that the university differed in significant respects from public forums such as streets or parks, because the university functioned to educate students, and therefore, it did not have to grant equal or free access to campus facilities to non-students. *Id.*

In reviewing the *Widmar* decision, the *Perry* Court found that *Widmar* exemplified the type of public forum which is created for a limited purpose such as use by a particular group. *Perry*, 103 S. Ct. at 955 n.7.

71. *See, e.g.*, *Southeastern Promotions*, 420 U.S. at 546. For a general discussion of *Southeastern Promotions*, see notes 46 & 55 and accompanying text *supra*. Although the

constituted limited public forums.⁷³ Finally, the *Perry* Court defined

Southeastern Promotions Court explicitly classified the municipal theatre as a public forum, the *Perry* Court refined this categorization and accorded the theatre limited forum status. *Perry*, 103 S. Ct. at 955. The Court's reassessment of the original classification followed from the general definition of limited forums: 1) it served as a medium for expressive activity, and 2) it was of limited size. *Id.*

For a further discussion of the characteristics of limited forums, see notes 56-60 and accompanying text *supra*.

72. *See, e.g.*, *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167. In *Madison*, the Court considered whether the Madison, Wisconsin Board of Education could prohibit a non-union teacher from speaking at a regularly scheduled, open meeting of the board. *Id.* at 169. The Supreme Court held that because the meeting was open to the public as a forum for direct citizen involvement, the board could not discriminate among speakers on the basis of their employment or the content of their speech. *Id.* at 176. The Court, however, stated that "public bodies may confine their meetings to specified subject matter." *Id.* at 175 n.8. *See also* L. TRIBE, *supra* note 13, § 12-21, at 690 (in semi-public forums, the government enjoys the power "to preserve such tranquility as the facilities' central purpose requires . . . but [has] no power to exclude peaceful speech or assembly compatible with that purpose"); *Perry*, 103 S. Ct. at 955 n.7 (a limited forum may be created for the discussion of certain subjects such as school board business).

73. *Perry*, 103 S. Ct. at 944. *See Heffron*, 452 U.S. at 640. For a discussion of *Heffron*, see notes 56-60 and accompanying text *supra*. Extending this analysis further, the Court could find that public schools and libraries were also limited public forums. *See, e.g.*, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966). In *Tinker*, a public school suspended three students for wearing black armbands in protest of the government's involvement in the Vietnam War. *Id.* at 504. The Supreme Court held that the school authorities' restriction on the students' rights to express their opinions violated the first and fourteenth amendments. *Id.* at 513-14. In support of its position, the Court noted that

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Id. at 506. Thus, rather than equating the teachers' and students' rights in the school with those inherent in streets and parks, the Court recognized that the former were circumscribed by the school's interests in avoiding material and substantial interference with schoolwork or discipline. *Id.* at 513.

In *Brown*, five blacks entered the adult reading room of a segregated public library and staged a peaceful sit-in in protest of the library's discriminatory policy. They were subsequently arrested and convicted for violating a Louisiana breach of peace statute. 383 U.S. at 136-37. The Supreme Court overturned these convictions and held that the statute, as applied, violated the protestors' first and fourteenth amendment rights. *Id.* at 141-42. In reaching this conclusion, the Court noted that the petitioners' presence in the library was lawful because the library was a public facility open to the public. *Id.* at 139. Moreover, the Court found that the Constitution embraced the right "in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." *Id.* at 142. The Court cautioned, however, that "[a] State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner . . ." *Id.* at 143.

Although the Court did not expressly categorize these public facilities as a particular type of forum, the opinions imply that not every form of expression is compatible with the essential purposes of these facilities. Thus, these facilities resemble

nonforums as “[p]ublic property which is not by tradition or designation a forum for public communication.”⁷⁴ The Court then held that schools’ internal mail facilities were nonforums,⁷⁵ and thus entitled to treatment similar to that given to jailhouse grounds,⁷⁶ military bases,⁷⁷ prisons,⁷⁸ letterboxes,⁷⁹ and advertising space on city transit buses.⁸⁰

Against this background, the District of Columbia Circuit in *United States Southwest Africa/Namibia*⁸¹ considered whether the federal government’s ban on political advertising in National and Dulles airports violated the first amendment to the Constitution.⁸² Judge Mikva, writing for the court, observed that because the FAA’s ban was based wholly on the subject-matter of the proposed messages, the prohibition was a content-based regulation for purposes of first amendment analysis.⁸³ The *Southwest Africa/Namibia* court went on to note that the constitutionality of this regulation depended primarily upon whether it restricted expression in either a public forum or a non-forum.⁸⁴

limited forums. For a discussion of this interpretation, see L. TRIBE, *supra* note 13, § 12-21, at 690.

74. 103 S. Ct. at 955.

75. *Id.* For a discussion of the *Perry* decision, see note 61 and accompanying text *supra*.

76. *See, e.g.*, *Adderley v. Florida*, 385 U.S. 39 (1966) for a discussion of *Adderly*, see note 49 and accompanying text *supra*.

77. *See Greer v. Spock*, 424 U.S. 828 (1976). For a discussion of *Greer*, see note 47 *supra*. *See also Brown v. Glines*, 444 U.S. 348, 354 (1980) (upholding Air Force regulation requiring servicemen to obtain commander’s approval to circulate petitions on military base on the grounds that the military is, by necessity, a specialized society separate from civilian society).

78. *See, e.g.*, *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977). For a discussion of *Jones*, see note 40 *supra*.

79. *See, e.g.*, *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981). In *Greenburgh*, the Supreme Court held that homeowners’ letterboxes, designated as authorized depositories by the Postal Service, constituted neither public nor limited forums. *Id.* at 128. Thus, the state could prohibit the deposit of unstamped mail in these facilities. *Id.* In support of this conclusion, the court reasoned that there was “neither historical nor constitutional support for the characterization of a letterbox as a public forum.” *Id.* at 128. In addition, the Court recognized that the deposit of unstamped mail was “wholly incompatible with the maintenance of a nationwide system for the safe and efficient delivery of mail.” *Id.* at 130 n.6. Finally, the Court reiterated that while the government “may not by its own *ipse dixit* destroy the ‘public forum’ status of streets and parks which have historically been public forums, we think . . . a letterbox may not properly be analogized to streets and parks.” *Id.* at 133.

80. *See, e.g.*, *Lehman*, 418 U.S. at 298. For a discussion of *Lehman*, see notes 44-46 and accompanying text *supra*.

81. 708 F.2d at 760.

82. *Id.* at 763.

83. *Id.* For the content of the proposed advertisement, see note 5 *supra*. For a discussion of content-based regulations, see note 32 and accompanying text *supra*.

84. *Id.* For a discussion of content-based regulations in a public forum, see note 32 and accompanying text *supra*. For a discussion of content-based regulation in a nonforum, see note 40 and accompanying text *supra*.

Before determining whether the public facility was a forum or nonforum, however, the court addressed the narrower threshold issue—defining the parameters of the public property subject to first amendment analysis.⁸⁵ The district court, in upholding the content-based regulation, focused solely upon the advertising display areas.⁸⁶ However, Judge Mikva rejected the approach of the lower court, maintaining that in order “to appraise accurately the public forum/nonforum nature of the public properties at issue . . . [the court] must evaluate the nature of the airport terminals of which the display advertisement areas are an organic part.”⁸⁷ Thus, the court determined that the advertising areas could not be analyzed in isolation from the larger airport terminals of which they were a part.⁸⁸

In the second stage of its analysis, the court addressed the issue of whether the advertising areas, as parts of the airport terminals, were public forums.⁸⁹ Initially, the court recognized that the public areas of the airports were public forums, not only because the walkways resembled public thoroughfares,⁹⁰ but also because the airport terminals closely approximated small self-contained municipalities due to the large amount of social and

85. 708 F.2d at 763.

86. *Id.* The advertising display areas consisted of wall units, dioramas, carousel displays, island showcases, and courtesy phone counters. *Id.* at 761. Judge Mikva noted that the trial court had analyzed these areas “as separate ‘nonforums’ within the airports’ terminals, akin to the advertising spaces at issue in *Lehman v. City of Shaker Heights*.” *Id.* at 763 (citation omitted).

87. *Id.* at 764. The court of appeals rejected the lower court’s reasoning, stating that “[t]he trial court’s artificially narrow focus in this case effectively writes out of the first amendment calculus the very consideration of ‘place’ that underlies the concept of the public forum.” *Id.* at 765-66 (citations omitted).

Judge Mikva then articulated three reasons for rejecting the focus of the district court: 1) the advertising display areas were an integral part of the airport terminals in that they represented “the premiere communications medium,” if not “the dominant medium of ‘outside’ communication” within the airport terminals; 2) the sole purpose of the areas was to project messages to terminal users; and 3) the advertising display cases were physically separated from the main concourses by plexiglass panels. *Id.* at 764. In reaching this conclusion, Judge Mikva explained that the inclusion of the airport terminals in the public forum analysis paralleled the Supreme Court’s analysis of the car card space in the transit buses in *Lehman*. *Id.* See *Lehman*, 418 U.S. at 302-04.

88. 701 F.2d at 766. The Court stated that “the advertising areas at National and Dulles cannot be wholly divorced—by structure, function, or fiat—from the nature of the public place in which they occur.” *Id.*

89. *Id.* at 766-67.

90. *Id.* at 766. The court of appeals elaborated upon this point, stating that “[w]hatever commonsense differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of National and Dulles squarely within the public forum family.” *Id.* at 766. Furthermore, the court recognized that the FAA had characterized the concourses and walkways “like any other public thoroughfare where there is no question that the constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. These activities enjoy the protection of the First Amendment. . . .” *Id.* at 765.

commercial interchange that took place there.⁹¹ For these reasons, the court adopted the categorization of the airport terminals as public forums, and turned to the question of how this classification of the larger forum affected the status of the smaller advertising areas.⁹²

In order to address this question, the court of appeals focused exclusively upon the Supreme Court's decision in *Lehman v. City of Shaker Heights*.⁹³ Initially, the court noted that the advertising areas in *Lehman* were very similar to the ones in National and Dulles airports.⁹⁴ The court recognized that in *Lehman*, the Supreme Court had classified the city transit buses and the car cards as nonforums.⁹⁵ However, in comparing *Lehman* and *Southwest Africa/Namibia*, the court found two crucial points of distinction between the types of public property at issue. First, the court determined that, contrary to the regulation before the *Lehman* Court, the FAA's restriction would affect "the type of wide-open public forum where the free flow of information is especially vital."⁹⁶ Second, the court distinguished *Lehman* on the grounds

91. *Id.* at 764. The court noted that National and Dulles contained "many of the facilities and services of a fair-sized municipality." *Id.* The airports hosted 18 million people each year, offering such facilities as restaurants, snack bars, post offices, bars, banks, and medical stations. *Id.* The court further noted that Congress and the FAA previously had treated the terminals like public forums. *See id.* (citing 49 U.S.C. § 1359 (1981) (Congress ordered the FAA to promulgate rules governing access to public areas at National and Dulles for purposes of solicitation and leaf-letting); 45 Fed. Reg. 33,314 (1980) (codified at 14 C.F.R. §§ 149.91-.94 (1982)) (FAA observed that "the terminals are like any other public thoroughfare where there is no question that the constitutional guarantees of free speech . . . apply."). The Court also found it significant that other federal courts of appeals had expressly conferred public forum status on airport terminals. *Id.* at 764-65.

See Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.) (public thoroughfares at Chicago's O'Hare Airport are public forums for first amendment purposes), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973) (same for Oakland Airport), *cert. denied*, 103 S. Ct. 5 (1982); *International Soc'y for Krishna Consciousness, Inc. v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978) (same for General Mitchell Field, Milwaukee); *International Soc'y for Krishna Consciousness of Western Pa., Inc. v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977) (same for Greater Pittsburgh International Airport); *International Soc'y for Krishna Consciousness, Inc. v. Rochford*, 425 F. Supp. 734 (N.D. Ill. 1977) (same for O'Hare Airport), *aff'd in part, rev'd in part*, 525 F.2d 263 (7th Cir. 1978); *International Soc'y for Krishna Consciousness, Inc. v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977) (same for Kansas City International Airport).

92. 708 F.2d at 766-67.

93. *Id.* at 766. For a discussion of the *Lehman* decision, see note 45 and accompanying text *supra*.

94. 708 F.2d at 766-67.

95. *Id.* Judge Mikva explained that "the *Lehman* Court had specifically tied its analysis to a consideration of the place from which the advertisements were to be banned." *Id.* at 767. In *Lehman*, however, the Supreme Court determined that the buses and advertising space constituted a nonforum. *See* note 46 and accompanying text *supra*.

96. 708 F.2d at 766. The *Southeast Africa/Namibia* court noted that the *Lehman* decision emphasized the lack of "open spaces . . . or other thoroughfare" in comparing the first amendment forum of a bus with the more expansive nature of an airport terminal. *Id.* at 766.

that there was an overwhelming difference in the degree of intrusiveness between a political ad placed on a transit bus “and a similar ad placed in the more expansive, open areas of an airport terminal.”⁹⁷ Thus, the court concluded that the travelers in airport terminals, unlike the commuters on transit buses, were not a “captive audience” because they enjoyed the freedom to walk by and ignore the advertisements simply by continuing through the terminal.⁹⁸ As a result of these findings, the court of appeals held that, in contrast to *Lehman*, the advertising areas in National and Dulles airports were public forums.⁹⁹

Finally, the court invoked the compelling state interest test¹⁰⁰ to determine whether the government’s content-based regulation of expression violated the Council’s first amendment rights.¹⁰¹ Under this test, the court

97. *Id.* at 767. Thus, the court found that “[t]he captive audience concerns of the *Lehman* Court . . . [were] obviously lessened in the open parts of airport terminals that the FAA likened to ‘public thoroughfares.’” *Id.* For further discussion of privacy and captive audience concerns, see notes 46 & 54 *supra*.

98. 708 F.2d at 767.

99. *Id.* The court’s holding coincided with its initial belief that “[a]lthough not every form of speech is necessarily consistent with the airports’ primary use, it seems clear that the public places in those airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases.” *Id.* at 764 (emphasis in original).

100. *Id.* at 769-73. However, prior to focusing upon the constitutionality of the government regulation, the court addressed briefly the FAA’s contention that its proprietary interest in the advertising areas took precedence over the Council’s first amendment rights. *Id.* at 767. The court noted the government’s argument that it had a vested interest in capitalizing on this commercial venture, but stressed that the mere existence of this interest did not override the first amendment interests at stake. Rather, the *Southwest Africa/Namibia* court stated that the government’s commercial interest was a factor which would be weighed when it applied the compelling state interest test to the content-based restriction on expression. *Id.* at 768. The court, however, seemed to imply that the government’s proprietary interest would be treated differently if the larger facility were a nonforum, like the transit buses in *Lehman*. The court classified the *Southwest Africa/Namibia* case before it as a “hybrid situation,” presenting precisely those questions left open by the *Lehman* Court. *Id.* at 767. For further discussion of the compelling state interest test, see note 32 and accompanying text *supra*.

101. 708 F.2d at 768. The court also noted that the government’s subject-matter restriction posed three distinct threats to first amendment values in a public forum. *Id.* at 768. The primary impact of the ban was to curtail the central purpose of the first amendment: fostering “‘uninhibited, robust, and wide open’ debate” on public issues. *Id.* at 769 (citations omitted). The court found that the ban permitted the government to exert a substantial degree of control over the topics of discussion to which the public would be exposed at National and Dulles. *Id.* Second, the court found that the restriction operated to screen out only controversial political messages. In drawing a line between commercial and non-commercial speech, the restriction imposed a penalty on political ideas expressed in outright terms rather than those presented in “more benign ‘commercial’ forms.” *Id.* at 769. The court believed that no clear line separated commercial from non-commercial speech and thus, only blatantly controversial political advertisements would be banned. *Id.* Third, the court found that the ban implicated the first amendment preference for fostering political debate over and above commercial speech. *Id.* at 770. The court noted that American jurisprudence places a much higher value on the importance of non-commercial

balanced the three interests advanced by the government to justify the regulation against the Council's first amendment rights.¹⁰²

The court first rejected the government's assertion that the restriction was necessary to protect the FAA's revenue interest.¹⁰³ Second, the court discredited the government's contention that by prohibiting political advertising it was able to maintain the appearance of neutrality on political issues.¹⁰⁴ Finally, the court held that the risk of encountering "sticky administrative problems" and jeopardizing administrative convenience were not sufficient to justify the restriction.¹⁰⁵

Thus, the court of appeals concluded that the government had failed to sustain its burden of proof that the ban on political advertising furthered a compelling state interest, and held that the FAA's ban on political advertisements at National and Dulles violated the Council's first amendment right to freedom of expression in a public forum.¹⁰⁶

In reviewing the *Southwest Africa/Namibia* decision, it is submitted that the United States Court of Appeals for the District of Columbia Circuit correctly defined the scope of its public forum analysis. Rather than adopting the lower court's reasoning, which was based exclusively upon the individual advertising areas at National and Dulles, the court properly determined that the display areas are integral parts of the airport terminals, and, as such,

speech than on other types of expression. *Id.* The FAA ban effectively reversed this preference. *Id.*

102. *Id.* at 770-73.

103. *Id.* at 770-71. The FAA contended specifically that the restriction allowed the government to "maintain a higher level of long-term commercial revenue than could be obtained by opening the displays to less professional short-term candidacy or issue-oriented advertising." *Id.* at 770. The court rejected the government's revenue preservation argument, and similarly rejected the argument that political advertising would be less professional. *Id.* Neither of these concerns rose to the level of a compelling state interest, and, furthermore, the governmental objectives, if valid, could be achieved by a less intrusive content-neutral regulation. *Id.* at 771. For a discussion of reasonable time, place, and manner restrictions, see notes 33-36 *supra*.

104. 708 F.2d at 771-72. The FAA argued that the "mere appearance or suspicion that a political advertisement in the airports indicated Government support or even tolerance of the message advertised could undermine Government functions and objectives, particularly with respect to foreign policy." *Id.* (emphasis in original). The court, however, denounced this reasoning as "a sweeping antithesis to first amendment rights." *Id.* at 772. Moreover, the court found that a less restrictive alternative was available in the use of disclaimers. *Id.*

105. *Id.* The court noted that the FAA was already intimately involved in the approval of the airport advertising, and, therefore, the burden of approving political advertisements would be minimal. *Id.* at 772-73. The court left open the question of whether the FAA could censor advertisements for failure to conform to the government's "good taste" standards. *Id.* at 773. For a discussion of this administrative concern, see note 46 *supra* in which *Lehman* is discussed.

106. 708 F.2d at 773-74. However, the court noted that the FAA was free to impose reasonable time, place, and manner regulations. *Id.* at 773. In addition, the court stated that its opinion did not mean that the government originally was required to provide advertising space, nor that the government, having created the space, was precluded from maximizing revenue in the operation of the commercial venture. *Id.*

must be evaluated in the context of this larger forum.¹⁰⁷

In adopting this broad focus, the court of appeals relied upon the Supreme Court's reasoning in *Lehman*.¹⁰⁸ Although the *Lehman* Court did not explicitly define the scope of its public forum analysis, the Court considered the characteristics of the car card space *and* the city transit buses before concluding that the public property was a nonforum.¹⁰⁹ From this, the *Southwest Africa/Namibia* court correctly inferred that the parameters of the forum encompassed not only the disputed "free speech" area, but also those surroundings of which the area is an integral part.¹¹⁰

107. *Id.* at 764-67. The court rejected outright the lower court's bare assertion that the display areas were "discrete, self-contained forums." *Id.* at 766-67. It is asserted that the court of appeals was correct in framing its analysis around both the larger and smaller forums. The advertising areas could not be physically or functionally separated from the airport terminals. Thus, it was necessary that the court take into account the fact that the advertising areas are in public forums. For a further discussion of the court's analysis, see notes 85-88 and accompanying text *supra*.

108. *Id.* For a discussion of the reasoning behind the decision in *Lehman*, see note 46 and accompanying text *supra*.

109. *Lehman*, 418 U.S. at 303-04. The *Lehman* Court's public forum analysis of the transit system and car card space is somewhat ambiguous. Rather than explicitly identifying what properties it considered essential to its first amendment analysis, the Court employed such language as: "*Here* we have no open spaces . . ." and "No First Amendment forum *is here* to be found." *Id.* (emphasis added). However, in coming to this last conclusion, the Court stated that the city "must provide rapid, convenient, pleasant, and inexpensive service to the commuters. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture." *Id.* at 303. In these two sentences, it is suggested that the *Lehman* Court inter-related the two properties—the car card space and the transit system—and recognized that they were inseparable, therein developing the analytical framework for future cases involving such joint properties. See Cass, *supra* note 16, at 235, 253. *But see* Note, *Constitutional Law—The Public Forum in Nontraditional Areas—Lehman v. City of Shaker Heights*, 51 WASH. L. REV. 142, 152-53 (1975) (determining that the *Lehman* Court concluded that *public buses* are nonforums).

110. 708 F.2d at 764-67. Although the court's language is somewhat ambiguous, it appears that by including an examination of the airport terminals in its analysis of the advertising display areas, the court developed a two-part analytical framework for the evaluation of interrelated forums. *Id.* The first part of this framework involves an evaluation of the larger forum and the second part involves analyzing the smaller, inner forum as a part of the larger forum. This does not mean that the classification of the outer forum controls the classification of the inner forum; yet the framework does require that the court's public forum analysis of the inner forum include reference to the relevant surroundings.

It is submitted that the *Southwest Africa/Namibia* court provided a useful framework for subsequent courts' analyses of intergrated or intertwined forums. However, it is suggested that the court's analysis of the inner forum was truncated. Rather than submitting the advertising areas to a separate public forum analysis, the court hastily concluded that the areas were public forums. *Id.* at 767. By taking this shortcut, the court left open the possibility that the opinion may be interpreted as suggesting that the classification of the outer forum is conclusive for purposes of classifying the inner forum. To avoid this interpretation, it is suggested that the court should have explicitly separated its analyses of the two areas. While the court was clear in its criticism of the lower court's determination that the advertising areas could be analyzed in isolation from the terminals, the court did not explicitly delineate what the proper focus should be. *Id.* at 766. By failing to subject the advertising

Having identified the forum, the *Southwest Africa/Namibia* court invoked the *Lehman* three-factor analysis to determine whether the advertising areas, when evaluated in light of the larger forum in which they were located, were public forums.¹¹¹ In assessing these factors, the *Southwest Africa/Namibia* court appropriately distinguished *Lehman* on the basis of the third factor, finding that in the case before it, there was a significantly lesser degree of incompatibility between the challenged expression and the normal activity of the forum.¹¹² It is submitted that the court properly drew this conclusion by analogizing the terminal concourses and display areas to public streets rather than prisons and military bases,¹¹³ and by relying upon *Erzoznik* to reject the government's contention that the advertisements were imposed

areas to the *Lehman* three-factor test, the court implied that the proper focus might be solely upon the larger forum. It is asserted that the only obstacles to this interpretation are several ambiguous phrases describing the interrelationship of the advertising areas and the airport terminals. For example, the court of appeals remarked that "the trial court was wrong to hold that the Council's challenge to the FAA's advertising policy realistically could be analyzed in isolation, removed from the fact that the advertisements are placed in terminals that the FAA itself has deemed 'public thoroughfares' . . ." *Id.* at 765. In further support of this proposition, the court declared that "the display advertising areas at National and Dulles cannot be wholly divorced—by structure, function, or fiat—from the nature of the public place in which they occur." *Id.* at 766.

111. *Id.* at 767.

112. *Id.* at 766-67. In *Lehman*, the Court relied upon the following five factors to find incompatibility: 1) the characteristics of the first amendment forum; 2) the risk of imposing on a captive audience; 3) the risk of damaging the government's commercial venture; 4) the chance of engendering doubts about political favoritism; and 5) the prospect of creating "sticky administrative problems" by parceling out limited space for political messages. *Lehman*, 418 U.S. at 302-04. The *Southwest Africa/Namibia* court considered each of these factors individually and found that they were not as compelling in the context of advertising in airport terminals as in the context of advertising on city transit buses. 708 F.2d at 766-68, 770-74. For further discussion of the court's reasoning, see notes 93-99 and accompanying text *supra*.

113. *Southwest Africa/Namibia*, 708 F.2d at 764-66. The *Southwest Africa/Namibia* court easily differentiated its analysis from that in *Lehman* by demonstrating that the characteristics of the two public properties involved were very different. *Id.* Thus, whereas the *Lehman* Court distinguished the city transit buses from streets and parks, the *Southwest Africa/Namibia* court analogized the airport terminals to public thoroughfares. *Id.* See *Lehman*, 418 U.S. at 306 (Douglas, J., concurring) ("[b]ut a street-car or bus is plainly not a park or sidewalk or other meeting place for discussion"). Moreover, the *Lehman* Court characterized the car cards as merely incidental to the buses' primary function. *Id.* at 303. In contrast, the *Southwest Africa/Namibia* court characterized the advertising display areas as integral parts of the airport terminals since they constituted the primary means of communication in the forum. 708 F.2d at 764. It is submitted that the *Southwest Africa/Namibia* court correctly characterized the airport terminals as more closely resembling public thoroughfares. The concourses and walkways are heavily travelled. Expression in these areas is a natural by-product of this traffic. In addition, the airport users enjoy great freedom of movement, they are only minimally confined and restricted by the terminal buildings and safety regulations. For a discussion of the public forum nature of streets and parks, see notes 64 & 65 and accompanying text *supra*. For a discussion of nonforums, see notes 37-40 & 74-80 and accompanying text *supra*.

upon a captive audience.¹¹⁴

Once the court categorized the advertising areas as public forums, it proceeded to examine the constitutionality of the government restriction on speech by applying the compelling state interest test. In utilizing this test, the court correctly identified the government's interests as factors to be weighed in the balancing process and in this manner appropriately disentangled its classification of the forum from its scrutiny of the government regulation. As illustrated in *Southeastern Promotions*,¹¹⁵ the government's interest in operating a commercial venture is not a superseding factor in the classification of the forum, and does not preclude the court from concluding that

114. *Southwest Africa/Namibia*, 708 F.2d at 767. It is asserted that the court of appeals correctly found that the risk of imposing upon a captive audience is lessened in the "expansive, open areas of an airport terminal" in contrast to the "crowded confines of buses." *Id.* It is submitted that the court properly relied on *Erzoznik* for the principle that intrusiveness and captivity are negligible where the audience is free to simply walk away and ignore the message. 422 U.S. at 209 n.5. As explained in *Erzoznik*, to come to this conclusion, a court must weigh the first amendment rights of speakers against the privacy rights of those who may be unwilling viewers. *Id.* at 208. Where the degree of captivity of the audience makes it impractical for the unwilling viewers to avoid exposure and there is a substantial invasion of their privacy interests in an intolerable manner, the Constitution may prohibit the expression. *Id.* at 209-10. The leading example of such an intolerable intrusion is *Lehman*. In *Lehman*, the Court found a captive audience where bus passengers were completely unable to avoid or escape the portents of advertising on car cards. *See Lehman*, 418 U.S. at 304. At the opposite end of the spectrum, one finds the advertising display areas of National and Dulles. Unlike passengers in buses, the travellers using these airport terminals, which have been analogized to public thoroughfares, are free to avert their eyes, ignore the advertisements and walk away. Because they have this freedom, there is no substantial infringement of their privacy interests. As a result, they are not a captive audience and the speaker's first amendment rights prevail. *See generally Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153 (1972). For a further discussion of the captive audience doctrine, see notes 46 & 54 and accompanying text *supra*.

Finally, it is submitted that in ruling out the applicability of the captive audience doctrine in the context of airport terminals, the *Southwest Africa/Namibia* court freed itself from the *Lehman* nonforum analysis. In *Lehman*, the risk of imposing upon a captive audience was the key factor in the Court's holding that the bus or the advertising space was a nonforum because the Court's decision hinged upon the finding that the inclusion of political advertising in the car card advertising areas was incompatible with the normal function of the city transit buses. *See Lehman*, 418 U.S. at 306-07 (Douglas, J., concurring). Where the captive audience element is lacking, incompatibility is much more difficult to establish and thus the possibility of categorizing the public property as a nonforum becomes remote.

In conclusion, it is submitted that in order for the *Lehman* nonforum analysis opinion to control in an advertising situation, two elements must exist: 1) a close similarity between the physical and functional characteristics of the property at issue and the transit system; and 2) a substantial risk of imposing on a captive audience. If these two elements are present, a court is justified in finding that the proposed expression is incompatible with the normal activity of the place. Then, after an examination of the first two *Lehman* factors, a court could correctly conclude that the property is a nonforum. *See Perry*, 103 S. Ct. at 963 & n.3 (Brennan, J., dissenting) (suggesting that the *Lehman* decision is narrow and of limited importance).

115. 420 U.S. at 546. For a discussion of *Southeastern Promotions'* impact on the commercial venture doctrine, see note 55 *supra*.

the public property constitutes a public forum.¹¹⁶ Rather, the governmental interests must be weighed against the speaker's first amendment rights. Similarly, it is submitted that the court correctly classified the government's interests in minimizing appearances of favoritism and avoiding administrative difficulties as proper components of this evaluation of the government's subject-matter restriction on speech.¹¹⁷

Although the court appropriately distinguished *Lehman*, and properly invoked the compelling state interest test, it is suggested that the court adopted an artificially narrow interpretation of the public forum doctrine by failing to consider the limited public forum category as set forth in *Heffron*¹¹⁸ and *Perry*.¹¹⁹ Although under either the public forum or limited public forum analysis, the court would have applied the compelling state interest test when evaluating the government's restriction on speech,¹²⁰ it is contended that the court's failure to discuss the limited public forum doctrine reduced its analysis to a distinction between two extreme poles: streets and parks on the one hand, and prisons and letterboxes on the other.¹²¹ It is suggested that the court failed to recognize the fact that the limited public forum doctrine serves the important purpose of relieving the courts of the pressure of having to make strained analogies to either of these two poles and further permits the government to safeguard a government facility for its intended purpose.¹²² Moreover, it is suggested that the terminal/display areas of Dul-

116. *Southwest Africa/Namibia*, 708 F.2d at 767. It is submitted that the court correctly found that the government can operate a commercial venture in a public forum. The court solidly supported its finding, noting that the Supreme Court had conferred public forum status upon a municipal theatre and a city parking facility. *Id.* Thus, it is asserted that the co-existence of a commercial venture and a nonforum in *Lehman* is not conclusive evidence, nor does it raise a presumption, that they are inextricably linked together. See *Southeastern Promotions*, 420 U.S. at 548, 555. The government can manage a commercial venture in forums, nonforums, and limited forums. For further discussion of the commercial venture doctrine, see notes 46 & 55 and accompanying text *supra*.

117. *Southwest Africa/Namibia*, 708 F.2d at 767, 770-72. For a discussion of the factors the court must take into account when classifying the publicly-owned property, see notes 45-55 & 63-80, and accompanying text *supra*.

118. 452 U.S. 640 (1981). For a discussion of *Heffron*, see notes 56-60 and accompanying text *supra*.

119. 103 S. Ct. 948 (1983). For a further discussion of *Perry*, see notes 40 & 61-80 and accompanying text *supra*. It is asserted that the *Southwest Africa/Namibia* court only completed part of its analysis of the airport terminal properties. The court examined whether the areas constituted nonforums, but then concluded that the properties were public forums without ever expressly analyzing the advertising areas, and more specifically without ever addressing whether they were limited public forums. 708 F.2d at 766-67. For a general discussion of the Supreme Court's analysis of the limited public forum, see notes 56-60 and accompanying text *supra*.

120. For an examination of the constitutional limits on government regulation of speech in a limited public forum, see notes 41-42 and accompanying text *supra*.

121. 708 F.2d at 766-67. For other examples of courts' reliance on this same distinction and adherence to these strained analogies, see notes 46-47 & 50.

122. It is asserted that by perpetuating a polar framework of analysis wherein a facility must be categorized as either a public forum or a nonforum, the court defeated the purpose of the first amendment to protect and preserve free expression. As

les and National present a prime example of what the *Heffron* and *Perry* Courts described as a limited public forum.¹²³

However, in light of the long and troubled history of public forum analysis, it is submitted that the public forum doctrine, as articulated in the note case and even as explained in *Perry*, is no longer a viable analytical framework for the evaluation of government restrictions on speech in publicly-owned property.¹²⁴ Rather than immediately devoting their energies to balancing the government and free speech interests asserted in each public facility or property, courts instead have been forced to make strained analogies to streets and parks, jails and military bases, or state fairgrounds and municipal theatres.¹²⁵ The district court's and the court of appeals' opinions

the *Lehman* Court stated, to confer public forum status on a facility propagates the fear that the "public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician." 418 U.S. at 304. However, conferring only nonforum status subjects publicly-owned property to practically absolute government dominion, negating the value of the first amendment in these areas. By developing the third category, limited public forums, the Supreme Court has created a safety valve by recognizing a forum where a court "enjoy[s] the power to preserve such tranquility as the facilities' central purpose require[s]." See L. TRIBE, *supra* note 13, § 12-21, at 690. Thus, the Court has tried to relieve the tremendous stress which had heretofore inhered in a court's determination whether the facility constituted a public forum. For a general discussion of limited public forums, see notes 56-60 and accompanying text *supra*.

123. See *Perry*, 103 S. Ct. at 955; *Heffron*, 452 U.S. at 655. Thus, in following the guidelines set forth in *Heffron*, it is contended that 1) the size of the terminals is limited; 2) the purposes of the properties, including the display areas, are narrowly defined; and 3) the display areas are state-created mediums designed for expressive activity, and expressive use of these facilities is compatible with their normal, intended use. These three factors parallel those enunciated in *Heffron* to delineate the parameters of limited public forums. See notes 56-60 and accompanying text *supra*. Furthermore, the terminals and advertising space fall into the second *Perry* category describing limited forums as places which the state creates for use by the public as a place for expressive activity, but where the state's interest in preserving the central purposes of the forum is accorded greater weight. See *Perry*, 103 S. Ct. at 955; notes 40 & 61-80 and accompanying text *supra*.

124. Although the *Perry* Court, in a 5-4 decision, discussed each of the three types of forums, it is suggested that the Court's definitions are vague and overlapping. The *Perry* formulations provide an unclear distinction among properties "which by long tradition or by government fiat have been devoted to assembly and debate," properties "which the state has opened for use by the public for expressive activity," and those which are "not by tradition or designation a forum for public communication." *Perry*, 103 S. Ct. at 954-55. Certainly a newly opened park of a limited size which the government claims was developed solely as an area for children's recreation would be difficult to classify. Moreover, the *Perry* Court refrained from expressly labelling each category of property, and created further confusion by grouping together cases which, in earlier opinions, fell into separate categories. *Id.* at 955. Furthermore, in addressing the intermediate class of property—limited public forums—the court blatantly omitted any reference to the leading case, *Heffron*. In addition, four members of the Court, Justices Brennan, Marshall, Powell, and Stevens, joined in a vehement dissent. It is against this background that it is asserted that the current public forum doctrine has outlasted its usefulness.

125. For examples of cases which illustrate this type of reasoning, see notes 46-47 & 50 *supra*. See also note 5 *supra*.

in *United States Southwest Africa/Namibia Trade & Cultural Council* illustrate this problem.

Furthermore, it is suggested that the note case clearly illuminates a second area of conflict and uncertainty in the application of the public forum doctrine: the identification of the forum property.¹²⁶ At this time, it is submitted that no Supreme Court case has provided adequate guidelines for the lower courts' resolution of the issues concerning the identification and classification of the public forum. Thus, it is urged that the Court develop a more precise analytical framework for public forum analysis, focusing more on the conflicting interests at stake rather than the property's resemblance or dissimilarity to other public properties. As it now stands, the *Southwest Africa/Namibia* decision will inject little additional clarity to this confused area of law, but it is hoped that its discussion of defining the parameters of the proper forum for analysis will provide a useful tool for subsequent courts' analyses of integrated or intertwined forums.¹²⁷

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126. 708 F.2d at 763-66. For a further discussion of the court's reasoning in identifying the forum for analysis, see notes 107-110 and accompanying text *supra*.

127. See notes 107-127 *supra*.