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Constitutional Law—The Public Forum in Nontraditional Areas—Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)

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CONSTITUTIONAL LAW—THE PUBLIC FORUM IN NONTRADITIONAL AREAS—*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

In 1970, Harry Lehman, a candidate for election to the Ohio state legislature, attempted to purchase advertising space[1] on local buses belonging to the city of Shaker Heights' rapid transit system.[2] Although space was available, the advertising agent for the transit company rejected Lehman's request because its contract with the city proscribed political advertising on buses.[3] Lehman sought a declaratory judgment and an injunction, alleging violation of the first and fourteenth amendments. The trial court denied relief, and the state supreme court affirmed.[4]

In a 5–4 decision, the United States Supreme Court affirmed.[5] In the plurality opinion, Justice Blackmun concluded that no first amendment public forum existed and that no equal protection violation had occurred. Concurring in the result, Justice Douglas argued that there was no constitutional right to spread a message before a captive audience on a public bus. Justice Brennan, speaking for the dissent,[6] maintained that the city itself had created a public forum by accepting and displaying commercial advertising. Having opened such a forum, the city could not discriminate solely upon the subject matter

1. Lehman's proposed placard contained his picture and read:
"HARRY J. LEHMAN IS OLD-FASHIONED!
ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT
"State Representative—District 56 [X] Harry J. Lehman."
Lehman v. City of Shaker Heights, 418 U.S. 298, 299 (1974).

2. The Shaker Heights' rapid transit system had been municipally owned and operated since 1944. Appendix to Briefs for Appellants and Respondents at 30A.

3. The applicable clause of the contract read: "The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder." 418 U.S. at 299–300. Except for its political content, Lehman's advertisement met the standards promulgated by the Metro Transit Division of Metromedia, Inc., advertising agent for the City of Shaker Heights. *Id.* at 309 (Brennan, J., dissenting). Previously, the city's buses had displayed advertisements from banks, liquor and cigarette companies, retail and service establishments, churches, civic and public service oriented groups. *Id.* at 300.

4. 34 Ohio St. 2d 143, 296 N.E.2d 683 (1973). The Ohio Supreme Court split 4–3. The majority concluded that no public forum existed and that the regulation in question constituted permissible control of *commercial* advertising. *Id.* at 685–86. The dissent, focusing on the equal protection issue, argued that under the circumstances presented in *Lehman* commercial and political advertising were similar and that no appropriate governmental interest warranted the prohibition of the latter. *Id.* at 688–90 (Stern, J., dissenting).

5. Justice Blackmun was joined by Chief Justice Burger and by Justices White and Rehnquist. Justice Douglas concurred only in the judgment. 418 U.S. 298 (1974).

6. Justice Brennan was joined by Justices Stewart, Marshall and Powell. *Id* at 308.

of the message. To do so, he contended, violated both the first and fourteenth amendments.

In upholding the proscription of political advertising on buses, the Supreme Court effectively halted the trend of many courts to find public forums for first amendment purposes in circumstances analogous to those in *Lehman.*[7] The decision, therefore, marks a constriction of the concept of the public forum as a vehicle for determining the existence of some first amendment rights. More important, however, the *Lehman* opinions indicate doctrinal confusion about use of the public forum concept in locations not traditionally considered arenas for public expression.

This note will develop an analytic framework for examining the use of the public forum concept in nontraditional areas and will apply it to the Court's reasoning in *Lehman.* In so doing, the inconsistencies in the existing use of public forum language will be brought into focus. Clearly defined, these inconsistencies demonstrate the latent danger to the exercise of first amendment rights inherent in the present doctrine. The existence of such latent danger indicates that the existing bifurcated approach to public forum analysis should be replaced by a unitary balancing test.[8]

I. EVOLUTION OF THE PUBLIC FORUM CONCEPT

A. Origins of the Bifurcated Approach

The development of the public forum concept, like that of first amendment law in general, represents a relatively recent phenomenon in our constitutional history. Nineteenth century freedom of speech

7. In each of the following cases public buses were found to be public forums: Stoner v. Thompson, 377 F. Supp. 585 (M.D. Ga. 1974) (removal of political advertising from public buses pursuant to mayor's directive enjoined); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (preliminary injunction requiring acceptance of anti-Vietnam war advertisements affirmed); Hillside Community Church v. City of Tacoma, 76 Wn. 2d 63, 455 P.2d 350 (1969) (specific performance of contract for anti-Vietnam war advertisements required). *See also* Kissinger v. New York Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1968) (summary judgment for defendant denied in action challenging its refusal to accept anti-Vietnam posters on subways and in subway stations).

8. For an explanation of the evolution of the "bifurcated approach" to public forum analysis see Part I *infra.* The efficacy of the "unitary balancing approach" is discussed in Part III *infra.*

cases were nonexistent,[9] and when the first confrontations with such issues occurred, speech did not emerge the victor.

Commentators[10] tend to trace the evolution of the public forum to Judge (later Justice) Holmes' decision while sitting on the Massachusetts Supreme Judicial Court in *Commonwealth v. Davis*.[11] The *Davis* court upheld the conviction of a Baptist preacher for violating a city ordinance requiring a permit to speak on Boston Commons. Judge Holmes wrote:[12]

> For 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.

The United States Supreme Court affirmed, endorsing the Holmes position.[13]

The *Davis* decision survived for almost forty years until it collided with the dictum of Justice Roberts in *Hague v. CIO*.[14] In *Hague,* the Court confronted the claim of the Mayor of Jersey City that the city's ordinance requiring a permit for a meeting in a public park was justified under the *Davis* rationale. The Court rejected the contention, and

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9. Justice Brennan has suggested that the first amendment did not become a "lively issue" until after 125 years of the country's history because during the earlier period legal questions involved:

> not so much problems of individual liberty as problems of the respective domains of federal and state powers incident to territorial expansion and economic growth . . . . Issues of individual liberty and the relationship of the citizen to his government waited in the wings pending the events of this century that brought them to the fore.

Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 2 (1965).

10. *See, e.g.*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 [hereinafter cited as Kalven]; Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931 (1969) [hereinafter cited as Horning]. *But see* Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1966).

11. 162 Mass. 510, 39 N.E. 113 (1895).

12. *Id.*

13. 167 U.S. 43 (1897). The Court has been chided for failing to recognize the real issue, that of the essential right of freedom of speech:

> The logic of the Court's decision ignores this argument for the question raised was the existence of such a common law right and, if capable of infringement by any means, whether this right had been infringed by the action of the Boston city government. To answer that the state possesses the power, in some manner, to abolish or limit *general* common law rights was to state the obvious. What the Court left unanswered, however, was the question of whether the state can infringe common law speech rights.

Horning, *supra* note 10, at 934 (emphasis in original).

14. 307 U.S. 496 (1939).

Justice Roberts articulated the foundation for the concept of the public forum:[15]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

The Court went on to note that the right to such a forum "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.*"[16]

The *Hague* opinion established an elemental definition of the public forum and provided an historical justification for its implementation. In his elucidation of the criteria for the existence of a public forum, Justice Roberts invoked the tenet of the English common law that the parks and streets historically have been open to public speech and assembly. Thus, he defined the limits *geographically—i.e.*, within the public areas defined by the common law, the state cannot absolutely proscribe speech activity. A kind of first amendment easement is created.[17]

Under the *Hague* approach, the recognition of the existence of such an easement does not *ipso facto* legitimize any activity and insulate the speaker from regulation, however. Rather, if important interests exist in conflict with the exercise of first amendment rights, the state can impose reasonable restrictions on the time, place, and manner of that activity.[18] Such regulatory authority, because it cannot proscribe

15. *Id.* at 515. It has been noted that Justice Roberts' dictum was launched with a shaky endorsement from his fellow Justices, since only Justice Black joined the opinion and Chief Justice Hughes concurred only in part. Kalven, *supra* note 10, at 13–14. The continued validity of the dictum is suggested by its frequent modern quotation, including that of Justice Blackmun in *Lehman. See* note 37 and accompanying text *infra.*

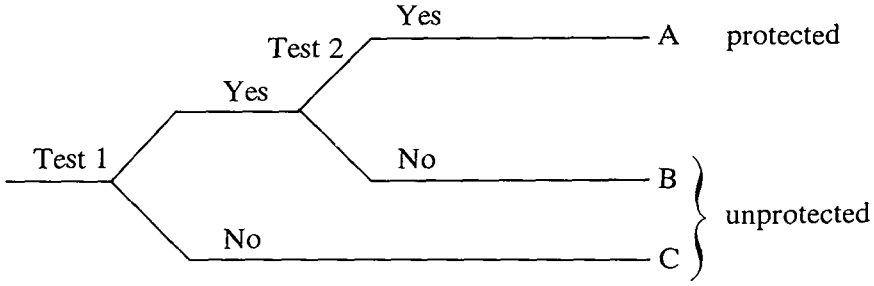
16. 307 U.S. at 516 (emphasis added).

17. Kalven, *supra* note 10, at 13. The requirement has also been characterized as "the 'constitutional obligation' of the government to provide access to certain facilities of mass communication as an irreducibly minimal forum for the communication of ideas." Horning, *supra* note 10, at 937.

18. The specific language of "time, place, and manner" regulation originated in Cox v. New Hampshire, 312 U.S. 569 (1941). Since that time, it has been frequently recited

speech, is that of the policeman and not the censor.[19]

This distinction between determining the existence of a public forum and regulating the time, place, and manner of first amendment activity within the forum, is pivotal. In the case of the former, the court determines whether *any* first amendment activity is protected and insulated from absolute proscription; in the latter, it determines whether a *particular* activity is subject to regulation. Thus, the Court in *Hague* by implication suggested a bifurcated approach to determine the existence of first amendment rights in public areas. The tests involved can be illustrated as follows:



Test 1 determines whether a public forum exists. If none is found, the speech is unprotected. As indicated above, under the *Hague* formula this issue is geographically determined. But the diagram also indicates that an activity may still be unprotected if a forum exists. If, under Test 2, a court finds that the activity is subject to reasonable restrictions of time, place, and manner, it is unprotected notwithstanding the existence of a public forum. Conversely, speech activity is protected only if Test 1 finds the existence of a public forum, and Test 2 determines that no restrictions can be imposed. Thus, at Point A the speech activity is protected; it is not at Points B and C. The conclusion that a public forum exists is necessarily a threshold determination—only if a first amendment easement is found can a question of its use arise.

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in cases involving expression in public places. For example, the Court in Cox v. Louisiana (*Cox II*) articulated the requirement as follows:

> [O]ur constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful protest, so important to the preservation of the freedoms treasured in a democratic society. . . . [However,] the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest, and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.

379 U.S. 559, 574 (1965). *See* notes 24 & 25 and accompanying text *infra*.

19. Horning, *supra* note 10, at 937.

B. The Evolution of Bifurcation

The development of the approach enunciated in *Hague v. CIO* has been erratic and sometimes tacit, but the public forum concept has remained bifurcated. However, the analytically distinct tests have frequently been blended, and in some cases have been merged into a unitary test in fact. While this process did not pose analytic difficulties when the Court expanded the boundaries of the public forum,[20] *Lehman* clearly illustrates the inconsistencies and dangers which result when those boundaries are constricted.

The blending of these discrete tests has occurred in part because the Supreme Court has often assumed the existence of a forum when confronted with a first amendment challenge in a public place. In such cases, the Court has focused on the second test of the bifurcated approach, the issue of the constitutional validity of imposing regulations of time, place, and manner within clearly existent public forums.[21] Just as the Jehovah's Witness cases of the 1930's and 1940's frequently involved proselytizing in traditional public forums,[22] so too the resurgence of such cases in the 1960's often involved demonstrations in clearly established forums.[23]

In the usual public forum case of this type, the Court has examined the extent to which a particular activity was subject to regulation. To make this determination, it has utilized a balancing approach, weighing the interests of the state against those of the individual in

20. *See* note 93 and accompanying text *infra*.

21. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (sidewalk adjacent to public school); Coates v. Cincinnati, 402 U.S. 611 (1971) (sidewalk); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (public street); Gregory v. City of Chicago, 394 U.S. 111 (1969) (public street); Cox v. Louisiana, 379 U.S. 536 (1965), 379 U.S. 559 (1965) (*Cox II*) (sidewalk adjacent to courthouse); Edwards v. South Carolina, 372 U.S. 229 (1963) (State House grounds); Feiner v. New York, 340 U.S. 315 (1951) (public street corner); Terminiello v. City of Chicago, 337 U.S. 1 (1949) (public auditorium); Kovacs v. Cooper, 336 U.S. 77 (1949) (public street); Saia v. New York, 334 U.S. 558 (1948) (public street); Thomas v. Collins, 332 U.S. 516 (1945) (city hall); Prince v. Massachusetts, 321 U.S. 158 (1944) (public street); Cox v. New Hampshire, 312 U.S. 569 (1941) (public street).

22. More than thirty first amendment cases came before the Court during this period, the decided majority of which involved Jehovah's Witnesses. Kalven, *supra* note 10, at 1 n.2. For a compilation of the cases and a summary of their effect on the law of expression in public places see Niemotko v. Maryland, 340 U.S. 268, 273–89 (1951) (Frankfurter, J., concurring).

23. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (march on public street); Gregory v. City of Chicago, 394 U.S. 111 (1969) (march on public street); Cox v. Louisiana, 379 U.S. 536 (1965) (demonstration on sidewalk adjacent to courthouse); Edwards v. South Carolina, 372 U.S. 229 (1963) (demonstration on State House grounds). *See generally* Kalven, *supra* note 10.

delivering his or her message.[24] Since freedom of expression occupies a "preferred position" in the hierarchy of constitutional protections, the Court has required the state to demonstrate substantial countervailing interests in order to inhibit speech activity.[25]

This balancing of interests between the state and the individual has spilled over into cases where the existence of the public forum itself is in issue. This is the first test of the bifurcated approach. In such cases,

24. The reason for using an ad hoc balancing approach in first amendment cases has been perhaps best articulated by Justice Frankfurter in the context of determining the validity of a Smith Act prosecution:

> The demands of free speech in a democratic society as well as the interest in national security are better served by a candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring). In the context of regulating speech in public places, similar problems of non-Euclidian precision exist, and the Court's resultant methodology has been the same. However, there has been a reticence to use the label "balancing" for the process. This tendency can be traced to Justice Black's "absolutist" position and his fear of balancing away first amendment freedoms. For a juxtaposition of the balancing and absolutist positions, see the exchange between Justices Harlan and Black in Konigsberg v. State Bar of California, 366 U.S. 36 (1961). To circumvent Justice Black's position while maintaining a flexible standard, the Court developed the "speech pure/speech plus" dichotomy whereby pure speech could not be regulated, but if speech and conduct were combined, the conduct was subject to regulation. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Cox v. Louisiana, 379 U.S. 536 (1965). However, since all speech necessarily involves some conduct, the Court has de facto accomplished what it has been reluctant to recognize de jure. *See* Kalven, *supra* note 10, at 23.

The efficacy of ad hoc balancing has been criticized by numerous commentators, and alternative methodologies recommended. *See, e.g.*, A. MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (definitional approach); DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972); Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968) (definitional interest balancing); Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374 (1973) (plain language analysis).

25. The notion of "preferred position" springs from footnote 4 in United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 (1938). In the first amendment context, this concept has been interpreted to mean that regulation of time, place, and manner of "speech plus" activities may occur only in order to further significant governmental interests. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965); Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. New Hampshire, 312 U.S. 569 (1941). The concept has been recently expanded to encompass conduct without speech, or so-called symbolic expression. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974) (displaying inverted flag); Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) (wearing armbands to school); *cf.* United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning unprotected). The articulation of this principle in the first amendment context became virtually indistinguishable from the protections of the equal protection clause. *See* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). The notion of preferred position has not gone without criticism, however. *See* Kovacs v. Cooper, 336 U.S. 77, 89 (1951) (Frankfurter, J., concurring).

the Court has by implication determined whether or not a public forum existed by examining and balancing the interests of the particular parties before it. Thus, in *Brown v. Louisiana*,[26] the court implicitly found that a library was a public forum by concluding that the appellant's silent protest was an appropriate exercise of first amendment rights there. Similarly, in *Tinker v. Des Moines Independent Community School District*,[27] the Court balanced the rights of the school against those of its arm-banded students, and concluded that a school is a public forum for appropriate speech activity.

This blending of the two discrete tests suggested in *Hague v. CIO* has also occurred when the Court has found that no forum exists. In *Adderley v. Florida*,[28] the general public forum test was blended into the more specific individual activity test. Justice Black concluded that the state could proscribe general speech activity in a jailhouse yard through enforcement of its general trespass statute. In drawing this conclusion, however, Justice Black focused on the appropriateness of the particular activity engaged in by the appellants.

The evolution of the two public forum tests into one inquiry can be seen most clearly in the cases involving speech activity on private property. In the initial extensions of the public forum to private property locations, the Court explicitly preserved the two-step approach of *Hague. Marsh v. Alabama*,[29] the first such private property case, is a good example. In *Marsh*, the Court concluded that a public forum existed and that there were no restrictions on the appellant's distribution of religious literature on the street corner of a company town. Such activity was protected by the first amendment. In reaching this conclusion, the Court also replaced Justice Roberts' definitional approach of the public forum as developed in *Hague v. CIO* with a functional equivalency test.[30] More than twenty years later, in *Amal-*

26. 383 U.S. 131 (1966).
27. 393 U.S. 503 (1969).
28. 385 U.S. 39 (1966).
29. 326 U.S. 501 (1946).
30. Justice Roberts' enunciation of the threshold determination of public forum analysis relied on analogy to the geographical limits of the English common law. *See* text accompanying notes 16 & 17 *supra*. These limits provided a definitional test for the existence of a public forum which could be applied easily in similar geographical settings. *See, e.g.*, Jamison v. Texas, 318 U.S. 413 (1943). When first amendment challenges were raised in areas outside those boundaries, however, the need for greater flexibility militated for a different approach. Justice Black accomplished the necessary expansion by concluding that the "business block" of Chickasaw, Alabama, was

gamated Food Employees Local 590 v. Logan Valley Plaza,[31] the Court again applied both the two-step public forum test and the *Marsh* functional equivalency language, this time to a shopping center mall.[32]

Logan Valley, with its explicit recognition of separate tests, survived for four years, until the Court's decision in *Lloyd Corp. v. Tanner*.[33] In *Lloyd*, Justice Powell concluded that no public forum existed in a shopping center because the distribution of anti-Vietnam war literature was unrelated to the primary use of the property and because alternative locations existed for the expression of the respondent's ideas. Although he maintained that the Court was only limiting *Logan Valley* to its holding,[34] Justice Powell in fact combined public forum analysis in private property cases into a unitary inquiry.[35]

Such cases dealing with both public and private property suggest that the bifurcated approach of *Hague* may have become unitary,

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functionally identical to the public places of the English common law. In reaching his conclusion, Justice Black emphasized that the nature of the supposed forum, and not the location or title, should determine the existence of first amendment rights. 326 U.S. at 507–08.

31. 391 U.S. 308 (1968).

32. Justice Marshall, speaking for five members of the Court, expanded the concept suggested in *Marsh* to include areas not functionally *identical* to those of the English common law. Despite the sweep of his language, however, he concluded:

> All we decide here is that because the shopping center serves as the community business block . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

391 U.S. at 319–20 (citation omitted). Justice Black dissented because he maintained that his opinion in *Marsh* required private property to possess *all* the attributes of public property before it could be considered functionally equivalent to public property. *Id.* at 332 (Black, J., dissenting). The *Logan Valley* approach did not represent a radical departure from the trend of private property speech cases, however. Indeed, it had been presaged by lower court decisions. *See, e.g.*, Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (injunction dissolved proscribing picketing at privately owned shopping center); Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963) (right to distribute handbills at privately owned shopping center recognized); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1963) (summary judgment to enjoin picketing denied).

33. 407 U.S. 551 (1972). The *Lloyd* decision has been the subject of extensive commentary. *See, e.g.*, Note, *Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973); Comment, Lloyd Corp. v. Tanner: *Handbilling in a Shopping Center—First Amendment*, 3 N.Y.U. REV. L. & SOCIAL CHANGE 70 (1973); 27 U. MIAMI L. REV. 219 (1972); Note, Lloyd Corp. v. Tanner: *Death of the Public Forum?*, 7 U. SAN FRAN. L. REV. 582 (1973); 1973 WIS. L. REV. 612.

34. 407 U.S. at 560. *See* note 32 *supra*.

35. Under the *Lloyd* formula, the existence of a public forum, and hence of first amendment protections on private property, is an ad hoc determination. By enumerat-

and that the existence of a public forum is an ad hoc determination made vis-à-vis each individual's speech activity. However, two factors militate against these conclusions.

First, the Supreme Court has developed doctrine which recognizes a distinction between a public forum generally and the protections of individual speech specifically. In licensing cases, for example, the Court has struck down regulations which impose impermissible prior restraints on speech activity in public places, regardless of the particular activity involved.[36] Such actions suggest the continued efficacy of the notion of a general first amendment easement in public places. This conclusion is reinforced by the recurrent invoking of Justice Roberts' dictum in *Hague,* language which makes sense only in terms of a general public forum and not an individual inquiry.[37]

The Court has also prescribed additional protections which arise when a public forum is found. Justice Marshall in *Police Department of Chicago v. Mosley* stated:[38]

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking 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.

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ing the prerequisites to finding such protection the Court not only substituted a unitary approach for a bifurcated one, it replaced a balancing test with a definitional one. *See* note 30 and accompanying text *supra.* For an interpretation of the implications of such a shift in terms of plain language analysis see Comment, *The Speech and Press Clause of the First Amendment as Ordinary Language,* 87 HARV. L. REV. 374 (1973).

36. *See, e.g.,* Saia v. New York, 334 U.S. 558 (1948) (ordinance prohibiting use of sound amplification equipment except by permission of police chief invalid); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ordinance requiring license to solicit invalid); Lovell v. City of Griffin, 303 U.S. 444 (1938) (ordinance requiring permission of city manager to distribute literature invalid). More recently, the Court struck down such statutes for vagueness or overbreadth. *See, e.g.,* Coates v. Cincinnati, 402 U.S. 611 (1971) (vagueness); Cox. v. Louisiana, 379 U.S. 536 (1966) (overbreadth). The continued applicability of these doctrines may be circumscribed because of the current Court's attitude toward their use. *See* Parker v. Levy, 417 U.S. 733 (1974) (phrase "conduct unbecoming an officer and a gentleman" in Uniform Code of Military Justice not impermissibly vague); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (Oklahoma statute proscribing political involvement by state employees not void for vagueness or overbreadth); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (Hatch Act proscribing political involvement by federal employees not void for vagueness or overbreadth).

37. *See, e.g.,* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Wolin v. Port Authority of New York, 392 F.2d 83, 88 (2d Cir.), *cert. denied,* 393 U.S. 940 (1968); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

38. 408 U.S. 92, 96 (1972).

The existence of such a guarantee presupposes a public forum of general applicability.

The second factor which indicates that the bifurcated approach of *Hague* has not become unitary is that state and lower federal courts recognize the public forum concept. In finding forums in areas such as airports,[39] bus terminals,[40] railroad stations,[41] welfare offices[42] and migrant camps,[43] as well as public buses,[44] the courts conceive the public forum to be an area where speech can be regulated but not proscribed. In many of these opinions, the tests become blurred; yet the determination that a public forum exists and that an individual activity is protected remains conceptually distinct. The former is a prerequisite to the determination of the latter.

II. *LEHMAN* AND THE PUBLIC FORUM

A. The Analytic Insufficiencies

Justice Blackmun was unequivocal in his conclusion in *Lehman*: "No First Amendment forum is here to be found."[45] In reaching this conclusion, he alluded to Justice Roberts' dictum in *Hague v. CIO*:[46] "Here, we have no open spaces, no meeting hall, park, street corner or other public thoroughfare." Thus, the Court did not analogize the Shaker Heights' bus to other public areas previously found to be public forums, nor did it draw upon state and lower federal court decisions which found forums to exist in circumstances virtually iden-

39. Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975).
40. Wolin v. Port Authority of New York, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).
41. *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).
42. Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319 (2d Cir. 1974).
43. Folgueras v. Hassle, 331 F. Supp. 615 (C.D. Mich. 1971).
44. *See* note 7 *supra*.
45. 418 U.S. at 304.
46. *Id.* at 303. Compare the Court's statement in *Lehman* with that of a federal district court in a case decided only two weeks earlier, involving almost identical facts:

> Buses operated daily by the City of Macon for the transportation of the public—like the city streets, city sidewalks, city auditorium, city coliseum, and city parks—are appropriate places for the exercise of First Amendment rights.

Stoner v. Thompson, 377 F. Supp. 585, 587 (M.D. Ga. 1974). While *Stoner* can be distinguished because Macon had allowed some political advertising on buses in the past, the conclusion that a bus constituted a public forum is diametrically opposite to the holding in *Lehman*.

tical to those in *Lehman*.[47] Rather, its language implied that a public bus was geographically inappropriate for the exercise of first amendment rights. Taken literally, this conclusion suggests the resurrection of the geographical limits of the English common law for the threshold determination of the existence of a public forum.

However, it is clear that the Court did not intend this result. While it did invoke the explicit language of the *Hague* approach, it indicated that some sort of balancing of competing interests must occur. Justice Blackmun stated:[48]

> Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

Analysis of the "degree of protection" to be afforded particular speech activity presupposes the existence of a public forum under the bifurcated approach of *Hague v. CIO*, and involves the determination of time, place, and manner regulation. The above-quoted language in *Lehman* suggests that the Court, as it has in the past,[49] blended the two separate tests of public forum analysis.

But the plurality in *Lehman* also confused the results of the distinct inquiries, and it is this confusion which can result in diminished first amendment rights. This can be seen clearly in the Court's articulation of what appears to be the underlying fear:[50]

> Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Finding the existence of a public forum would not lead inexorably to this result. The argument's fallacy is the premise that the existence of a forum precludes regulation of time, place, and manner. Under traditional theory,[51] even if a forum exists, a particular activity may be subject to such regulation. Thus, the conclusion that a bus or a hos-

47. *See* note 7 *supra*.
48. 418 U.S. at 302–03.
49. *See* Part I–B *supra*.
50. 418 U.S. at 304.
51. *See* text accompanying notes 18 & 19 *supra*.

pital is a forum does not open up such areas to unrestricted political propaganda. The finding of a forum, rather than negating the state's regulatory role as policeman, only eliminates its role as censor.

The diagram used above[52] illustrates the potential danger in confusing the inquiries of traditional public forum analysis. If a court concludes that an activity is not protected, a substantial difference in implication exists if the conclusion is based on lack of a public forum (Point C), or on legitimate state interests in regulating the particular activity within the forum (Point B). If in a subsequent case, a court adopts the *Lehman* holding (*i.e.*, no public forum), it may conclude that *all* speech activity is unprotected, since the conclusion at Test 1 that no forum exists precludes ever applying Test 2. Thus, if other parties seek an audience on the Shaker Heights' bus and can show that their advertisement is not subject to the same criticism as Lehman's,[53] the city can nevertheless refuse to allow it because it has been determined that no public forum exists. In effect, then, the *Lehman* test may determine the nonavailability of buses as public forums in subsequent cases regardless of the variables in the individual fact situations. This danger militates for adoption of a unitary balancing approach.[54]

This conclusion gives the company the ability to act as censor—it can regulate access to its medium based on the content of the message.[55] Within a public forum such regulation based on subject matter is expressly forbidden; yet by concluding that such a forum does not

52. *See* Part I–A *supra*.
53. *See* text accompanying note 70 *infra*.
54. *See* Part III *infra*.
55. While the extent of this de facto censorship is circumscribed by other constitutional restraints (*e.g.*, the equal protection clause), permissible exclusions can be made, many of which can lead to incongruous results. The California Supreme Court enumerated some of these incongruous possibilities which can result if a bus system is allowed to exclude certain types of advertising as allowed by *Lehman*:

> A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. . . .

Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 57, 434 P.2d 982, 986, 64 Cal. Rptr. 430, 434–35 (1967), *quoted in* Lehman v. City of Shaker Heights, 418 U.S. at 318 n.10 (Brennan, J., dissenting). The court in *Wirta* concluded:

> The foregoing prohibitions cannot be ascribed to whimsical or aberrant conduct of the district's management; they are the vices inexorably resulting from any deliberate effort to circumscribe First Amendment rights.

68 Cal. 2d at 57, 434 P.2d at 986, 64 Cal. Rptr. at 435.

exist, this first amendment tenet can be circumvented.[56]

Because of the lack of clarity in the Court's explanation and the undiscussed implications of finding no public forum, it is unclear whether the Court meant that no forum existed vis-à-vis any first amendment activity, or whether it meant only that Lehman's placards were unprotected.[57] In other words, the Court may have intended to place Shaker Heights' buses at Point B rather than at Point C. Given the potential far-reaching implications of the latter conclusion, the former is preferable.

B. Inadequacies of the Lehman *Test*

1. Failure to consider all relevant criteria

Beyond the analytical inconsistency, the test applied by the Court was inadequate for it failed to incorporate three criteria heretofore considered relevant in public forum analysis. First, the Court failed to adequately analyze the appropriateness of speech activity in general or Lehman's activity in particular in relation to the proposed forum. Justice Blackmun suggested that because the city was engaged in commerce a lesser degree of protection could be afforded to first amendment activity.[58] In so doing, he may have been analogizing to the test in *Lloyd* which requires that first amendment activity on private property be "in consonance" with the owner's intended use of the property.[59] However, other cases involving speech on public property have emphasized the extent of interference with the area, not the relation of the speech to it.[60]

Second, the Court neglected to examine whether a relevant audience existed for Lehman's placard, a factor considered important in lower court opinions.[61] At trial, Lehman testified that the majority of

56. *See* text accompanying note 38 *supra.*

57. This same criticism has been made of the Court's decision in Adderley v. Florida, 385 U.S. 39 (1966). *See* Horning, *supra* note 10, at 945.

58. 418 U.S. at 303.

59. *See* notes 34 & 35 and accompanying text *supra.*

60. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), in which the Court focused on the level of interference of the speech activity within the forum.

61. In Wolin v. Port Authority of New York, 392 F.2d 83 (2d Cir.), *cert. denied,* 393 U.S. 940 (1968), the court indicated that the relevant inquiry for determination of the existence of a public forum is the appropriateness of first amendment activity to the

the transit company's 6,000 to 8,000 daily passengers resided in his legislative district.[62] Thus, the bus clearly provided him with an available audience. Moreover, as a practical matter, elimination of the bus system as an advertising medium may have economically precluded Lehman from ever reaching his audience.[63]

Third, the Court demonstrated insensitivity to the importance of the first amendment rights involved. There is a noticeable lack of recital as to the preferred position of such rights; indeed, Justice Blackmun indicated that the transit company's exclusionary policy "is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops . . . ."[64]

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particular location. A location is appropriate if *either* of two criteria are met: the speech activity is related to the purpose of the place; or, a relevant audience exists there. *Id.* at 89. The *Wolin* court determined that although the speech activity was unrelated to the bus terminal, the existence of a relevant audience meant that the location was appropriate and the speech protected. Thus the relation of the speech to the area is not an exclusive factor to be considered in determining whether a public forum exists.

62. 418 U.S. at 309 (Brennan, J., dissenting).

63. In terms of cost, the bus placards represent a relatively inexpensive way to reach a large audience. Shaker Heights rapid transit operated 55 buses each with 20 places for advertising. 418 U.S. at 300 n.3. The monthly rate was approximately $2.90 per card per bus (exclusive of the cost of making the placard). Appendix to Briefs for Appellants and Respondents at 27A.

With bus placard advertising foreclosed, a candidate would have to turn to more expensive mailings, newspaper advertising, purchasing of broadcast time, or to more time-consuming (though relatively inexpensive) handbilling. Candidates may find such added costs and/or time prohibitively expensive. For example, the author's survey of the metropolitan Seattle area produced the following figures illustrative of the relative disparity in cost of advertising methods:

1. Television*	$500-1100
2. Radio*	$25-50
3. Newspapers**	$1500
4. Buses***	$2.70

*Television and radio figures are based on a single 30-second spot for a local audience at prime time. **The newspaper figure represents a one-half page daily ad for one day. ***Bus advertising is based on the monthly rate per card per bus for interior advertisements in a quantity less than 300.

In addition, individuals or groups not seeking office, but desiring a forum to air their views may be effectively foreclosed from reaching a large proportion of their desired audience because of the prohibitive cost of alternative advertising methods. Thus, officials like those regulating advertising for the city in *Lehman* can operate as de facto censors by limiting access to the only economically feasible available forum.

This criticism was also raised by Justice Marshall in the *Lloyd* dissent. He argued that the practical effect of the holding there was to eliminate perhaps the only available arena where the poor could reach a substantial audience at a small cost. 407 U.S. at 580–81 (Marshall, J., dissenting). This theme also pervades much of the commentary on *Lloyd*. *See* note 33 *supra*. To the extent that this actually occurs. *Lehman* will exacerbate the results. The shrinking of the public forum does not cut across class lines equally. As less expensive arenas are cut off as forums, the poor suffer a disproportionate loss.

64. 418 U.S. at 304.

This assertion also fails to consider the particular nature of the speech activity involved. This is not a case of producing the musical *Hair* in a local auditorium,[65] or of determining if wrestling is expressive conduct.[66] Rather, as the dissent pointed out,[67] Lehman's placard contained a political message, an expression warranting special consideration under the first amendment. By allowing proscription of such messages, the Court dampened the "uninhibited, robust, and wide open" debate on public issues which the Court has frequently asserted to be an underlying purpose of the first amendment.[68]

2. *Failure to adequately balance competing interests*

The failure to adequately discuss the first and fourteenth amendment rights involved on Lehman's side of the balance contrasts sharply with the Court's ready acceptance of the respondent's assertions of conflicting interests.[69] Each of the reasons expounded by the

65. Southeastern Promotions, Ltd. v. West Palm Beach, 457 F.2d 1016 (5th Cir. 1972).

66. Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973).

67. 418 U.S. at 310–11 (Brennan, J., dissenting).

68. *Id.* at 311 (Brennan, J., dissenting), *citing* New York Times v. Sullivan, 376 U.S. 254 (1964). Although *New York Times* involved the narrow issue of libel, it has been frequently cited in other first amendment contexts. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal defamation of judges); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (broadcasting); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (public demonstrations). Because of the extensive use of its language, it has been suggested that the Court is recognizing a central meaning in the first amendment. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. According to the theory purportedly underlying *New York Times*, the first amendment is the repository of the power of self-government and the act of governing encompasses debate and discussion on public issues without infringement. *See generally* A. MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). *See also* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1963); Comment, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374 (1973). Since the activity in *Lehman* involved precisely the type of debate on public issues envisaged by Professor Meikeljohn, adherence to his position arguably would lead to the opposite conclusion reached by the Court in *Lehman*.

69. In terms of subjecting state action to scrutiny to determine if a violation of equal protection had occurred, the Court's analysis of the transit company's arguments was inadequate. The Court in *Lehman* appears to have utilized a "rational basis" test to determine if there was a violation of the equal protection clause:

> The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

418 U.S. at 304. In utilizing this standard, the Court ignored the strict scrutiny test traditionally applied when a fundamental right such as speech is involved. *See* Police

Court for accepting the respondent's position, as well as Justice Douglas' explanation in concurrence, relied more on assertion than on thoughtful analysis. The specific justifications given by the plurality were recited in a litany by Justice Blackmun:[70]

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians.

Like the commerce argument,[71] each of these assertions can be challenged.[72]

The contention that long-term revenues would be jeopardized rests on one or both of two questionable premises. The first is that the creation of a public forum would impose a requirement that the city reduce its commercial advertising in order to accept that of political candidates. However, the conclusion that a public forum exists means only that political advertising which meets the requisite format requirements cannot be excluded from *available* space because of its content.[73] The second premise suggests that because political or issue-oriented advertising is more offensive than commercial or public service announcements, advertisers will be less willing to have their products presented with such messages. However, it is fallacious to argue that political advertising is more offensive than other types of messages.[74] Moreover, the creation of a forum would not insulate political

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Dept. of Chicago v. Mosley, 408 U.S. 92, 98–99 (1972); Cox v. Louisiana, 379 U.S. 559, 581 (1965) (Black, J., concurring). *See also The Supreme Court, 1973 Term*, 84 HARV. L. REV. 43, 149 (1974).

70. 418 U.S. at 304.

71. *See* text accompanying note 58 *supra*.

72. When confronted with virtually identical arguments, the California Supreme Court concluded:

> These pragmatic hurdles are no more relevant to a public forum when it is a motor coach than they are to a public park or a school auditorium. The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board.

Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 58, 434 P.2d 982, 989, 64 Cal. Rptr. 430, 437 (1967).

73. *See* text accompanying note 38 *supra*.

74. The examples suggested by the California Supreme Court in *Wirta* indicate the shallowness of this reasoning. *See* note 55 *supra*.

advertising from the format requirements applicable to other placards. The state can still legitimately regulate such messages pursuant to time, place, and manner. At the same time, this premise avoids the economics of advertising. It is the audience to be reached which concerns the advertiser, not the content of the adjacent message.[75] In sum, then, it is by no means clear—indeed, it is highly conjectural—that revenues would be lost by accepting political advertising.

The suggestion that users would be subject to the blare of political propaganda is substantially undermined by the fact that the transit district already accepted advertisements. Substantively, political advertising is no more propagandistic than the already accepted public service announcements.[76] Moreover, since placards already blare advertising propaganda to some extent, the marginal effect of changing the transit company's policy to allow political announcements would probably be slight.

Finally, arguments about lurking doubts as to favoritism and sticky administrative problems are spurious. In an era where the mass media inundate society with commercial and political advertising, it is naive to suggest that the consumer believes that the medium which carries the message necessarily advocates its content.[77] Messages by competing brands or competing candidates need evidence no favoritism.[78] Moreover, fear of awkward administrative problems does not deter action by legislative or administrative agencies in a myriad of other areas. Certainly, a program short of absolute proscription could be evolved which would balance administrative problems with the competing and fundamental rights of open expression.[79]

75. *See* J. MERRILL & R. LOWENSTEIN, MEDIA, MESSAGES, AND MEN 79–88 (1971). While the authors' argument is addressed to the traditional mass media, it is apropos to *Lehman*. The concern of advertisers—selling their products—is identical, whether the message is contained on a bus placard or on a television commercial.

76. The dissent spoke of the existing "bland commercialism and noncontroversial public service messages . . . ." 418 U.S. at 315 (Brennan, J., dissenting). However, it is by no means clear that commercial advertising is less offensive than political announcements. Indeed, in the situations posited by the California Supreme Court in *Wirta*, the proscribed messages are arguably less offensive than the commercial ones. *See* note 55 *supra*.

77. At least no evidence was introduced as to the naivete of Shaker Heights. 418 U.S. at 321 (Brennan, J., dissenting).

78. Writing for the dissent, Justice Brennan indicated that "the appearance of favoritism can be avoided by the evenhanded regulation of time, place and manner for all advertising, irrespective of subject matter." 418 U.S. at 322.

79. Justice Brennan argued that "[c]learly, such ephemeral concerns do not provide the city with *carte blanche* authority to exclude an entire category of speech from a public forum." *Id.*

C. *The Douglas Concurrence*

In concurring in the judgment, Justice Douglas focused on more cogent arguments regarding the nature of the proposed forum and the level of interference with its primary use. However, he not only ignored the fact that other advertising already existed, but his examination of the competing factors reflected an insensitivity toward the nature of Lehman's message. Moreover, he was inconsistent in his discussion of the public forum.

Justice Douglas argued that the "[b]uses are not recreational vehicles used for Sunday chautauquas,"[80] and to open a forum in such circumstances "overlooks the constitutional rights of the commuters."[81] Elaborating on this theme, Justice Douglas stated:[82]

> In my view, the right of the commuters to be free from forced intrusion on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon their captive audience.

According to Justice Douglas, the city thus possessed the power to exclude speech activity selectively because of the inappropriateness of the proposed forum.

Justice Douglas' invocation of a right of privacy argument springs from his dissent in *Public Utilities Commission v. Pollack*.[83] While he there articulated a constitutional basis for preventing the bus company from infringing on its passengers' privacy, he also sowed the seed of a rebuttal argument. Although he found a right to privacy within a person's home under the fourth amendment, he also recognized that "[a] man loses that privacy of course when he goes upon the streets or enters public places."[84] Thus, while a man's home is his castle, a public bus is not his private chariot.

More important, however, is the fact that the transit district already accepted advertising. Any right of privacy which the patron could assert had already been infringed. As indicated above, the marginal effect of selling political advertising, especially placards as unobtrusive as Lehman's, would be slight.[85] Thus, while Justice Douglas' argu-

80. 418 U.S. at 307 (Douglas, J., concurring in the result).
81. *Id.*
82. *Id.*
83. 343 U.S. 451 (1952).
84. *Id.* at 467 (Douglas, J., dissenting).
85. *See* note 76 and accompanying text *supra*. The dissent in the state court opinion

ment would have some credence if all advertising were proscribed, it is less compelling where only selective proscription occurs.[86]

Justice Douglas' conception of the public forum is unclear. He recited the familiar language of *Hague v. CIO* and indicated that a bus is not tantamount to a park. Thus, he stated: "The fact that it is owned and operated by the city does not without more make it a forum."[87] However, he then analogized the restrictions on advertising on Shaker Heights' buses to regulation of highway road signs pursuant to the Highway Beautification Act. The latter appears to be a regulation of time, place, and manner within a traditional forum, not a conclusion that no public forum exists.

Justice Douglas then indicated that if a bus can be considered a forum, it is more analogous to a newspaper than to a park because an owner possesses the power to exclude. This analogy, however, fails to recognize that within a forum as defined by the public place cases, discrimination based on content has been held expressly impermissible.[88]

Thus, Justice Douglas confused, as did the plurality, the discrete inquiries of public forum analysis. Moreover, he did not recognize that even if a forum exists, advertising is subject to time, place, and manner regulation. Therefore, finding a public forum on a rapid transit bus would not represent the wholesale invasion of a passenger's interest that Justice Douglas fears. It would only recognize the existence of an area open to the exercise of appropriately regulated first amendment activity.

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in *Lehman* pointed out that the city had already decided that advertising warranted infringement of the passengers' rights:

> In deciding to create such an arena, the city examined the detrimental effects which such displays might have on the primary purpose of transporting people, apparently finding that the primary function could be accomplished while gaining the pecuniary advantage of providing space for the display of paid *commercial* advertising.

296 N.E.2d 683, 689 (Stern, J., dissenting) (emphasis in original).

86. 418 U.S. at 315. Justice Brennan pointed out another fallacy of the captive audience argument. He maintained that it could not dispose of first and fourteenth amendment issues in *Lehman* because the policy affected advertising *outside* as well as inside the cars: "Whatever applicability a 'captive audience' theory may have to interior advertising, it simply cannot justify the city's refusal to rent Lehman *exterior* advertising space." *Id.* at 320 n.12 (Brennan, J., dissenting) (emphasis in original).

87. *Id.* at 306 (Douglas, J., concurring).

88. *See* text accompanying note 38 *supra*. Justice Douglas' analogy also failed to perceive a more fundamental distinction. Proscription of advertising on a public bus constitutes state action where a similar limitation by a newspaper does not. *See The Supreme Court, 1973 Term*, 84 HARV. L. REV. 43, 152 (1974).

D. The Brennan Dissent

Justice Brennan, upset at what he perceived to be an insensitivity to first amendment issues,[89] argued that a public forum existed on Shaker Heights' buses and that both the free speech and equal protection clauses precluded the exclusion of Lehman's advertisements because no substantial justification existed for the city's policy. In rebutting the arguments of Justices Blackmun and Douglas, Justice Brennan distinguished the separate inquiries of traditional public forum analysis. In applying them, however, he too blended the tests of the bifurcated approach.

According to Justice Brennan, the Court must "assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted"[90] to determine whether a public forum exists. The extent of such interference should be determined by striking a balance between the competing interests of the government and that of the individual speaker and his audience.[91] Thus, the strength of the individual party's interest will in part determine whether a public forum for all persons exists. In the factual setting of *Lehman,* Justice Brennan found this determination unnecessary because he concluded that the city voluntarily established a public forum by accepting commercial advertising in its buses.[92]

Having found a public forum, Justice Brennan concluded that the justifications advanced by the respondents failed to meet the burdens imposed by the test applicable in the second part of the bifurcated approach. In articulating the test, Justice Brennan utilized the same approach and the same factors which he indicated were applicable in determining the existence of a public forum. According to Justice Brennan, the existence of a public forum and the susceptibility of an

89. Justice Brennan maintained that Lehman's message was precisely the genre to which the *New York Times* decision was directed. 418 U.S. at 310–11 (Brennan, J., dissenting). *See* note 68 *supra.*

90. 418 U.S. at 312.

91. *Id.*

92. In reaching this conclusion, Justice Brennan relied on a kind of first amendment waiver or estoppel argument:

> By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation.

Id. at 314. The dissent in the Ohio Supreme Court opinion reached the same conclusion. 296 N.E.2d at 690 (Stern, J., dissenting).

individual speaker to regulation of time, place and manner are *both* determined by an ad hoc balancing test which includes, *inter alia*, consideration of the interests of the individual and his particular audience. Thus, while he recognized the bifurcation of public forum analysis, Justice Brennan blended the analytically discrete tests.

III. THE *LEHMAN* PROBLEM IN PERSPECTIVE—AN ANALYTICAL FRAMEWORK FOR PUBLIC FORUM ANALYSIS

The prevailing arguments in *Lehman* represent an insensitivity to important first amendment issues. The Court did not adequately evaluate the competing interests, but rather substituted assertions and rhetoric for the careful analysis required when such fundamental constitutional rights are involved.

More important, all the opinions in *Lehman* demonstrated a deficient methodology for use of public forum analysis in nontraditional arenas. Each opinion blended the analytically discrete tests involved in these determinations. The plurality and concurring opinions also illustrated a failure to distinguish between the results of these tests, *i.e.*, the difference between the determination that a public forum exists and the determination that a particular activity is subject to regulation of time, place and manner within such a forum.

As long as the Court expanded the parameters of the public forum,[93] this analytic shortcoming did not make a difference in judicial results. Even if the Court blended the discrete tests or combined them fully into a unitary one, the conclusion that an activity was protected necessarily incorporated the conclusion that a public forum existed. In terms of the diagram above,[94] finding an activity protected (*i.e.*, placing it at Point A) presupposes finding a forum at Test 1 and protection at Test 2. As *Lehman* illustrates, however, the failure to distin-

93. This expansion in the private property cases reached its zenith in Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). In the public property context, with the exception of Adderley v. Florida, 385 U.S. 39 (1966), the Court has consistently expanded the parameters of the public forum. In cases where speech activity has been found to be unprotected, it has been clear that the regulation was of time, place and manner within clearly existent forums. *See, e.g.*, Feiner v. New York, 340 U.S. 315 (1951); Cox v. New Hampshire, 312 U.S. 569 (1941). *Compare* Kovacs v. Cooper, 336 U.S. 77 (1949) *with* Saia v. New York, 334 U.S. 558 (1948).

94. *See* Part I–A *supra*.

guish between the two inquiries can produce confusion when no protection is afforded the speech because it is not clear whether the Court has found that no public forum existed (Point C) or whether a forum existed but the specific activity was proscribed (Point B).

The danger of *Lehman* is in its value as precedent. The Court, while speaking the rhetoric of a bifurcated approach, in fact utilized a unitary test to determine that no public forum existed.[95] As suggested above,[96] in subsequent litigation a court could preclude a first amendment challenge concerning a public bus because it accepted the conclusion that no forum existed. Therefore, the result of *Lehman's* balancing test would become determinative in all subsequent assertions of first amendment rights in analogous settings, regardless of the strength of factors militating for protection of a subsequent litigant in Test 2. This danger suggests that *Lehman* should be construed as concluding only that no public forum existed vis-à-vis the particular activity involved there.[97] This could be done in either of two ways.

First, a court could utilize the traditional bifurcated approach and conclude that, despite its language, *Lehman* held only that the particular activity in question was not protected. This conclusion would allow a court to assume that a public forum exists on buses, and to weigh the relevant factors in Test 2 in the new litigation to determine if the activity there was protected. Alternatively, a court could use both discrete tests and re-examine whether a bus is indeed a public forum. To avoid the pitfalls of *Lehman*, the court would have to carefully elucidate the considerations in Tests 1 and 2 to ensure that a potential conclusion of no public forum was not based on limitations peculiar to the individual litigant.

The second possibility would be to expressly recognize the use of a single ad hoc balancing approach. This would amount to explicit adoption of the approach tacitly utilized by the plurality in *Lehman*. A party's particular interests, and the general interest in providing a

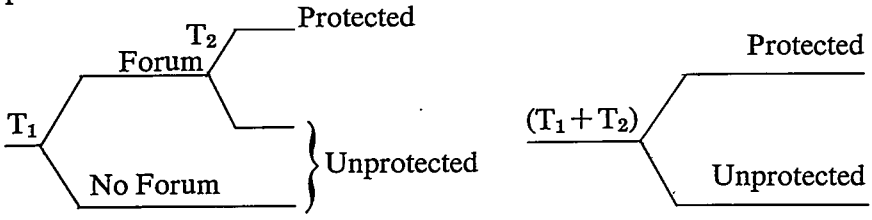
95. *See* text accompanying notes 48 & 49 *supra*.
96. *See* text accompanying notes 52–56 *supra*.
97. At least one court has declined to read *Lehman* expansively and distinguished it on this basis:

> The *Lehman* case, settling an equal protection argument as to access to car card spaces in the vehicles of a city-owned rapid transit system, is based almost entirely upon the nature of the free speech expression involved therein, display advertising, as to which the passenger's eye is captive.

Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975).

forum at that location, would be balanced with the specific interferences involved and general considerations militating against the exercise of first amendment rights. However, the result of this balancing process in an individual case would not be determinative of the existence of a public forum for future litigants. In essence, a single location would have one catalogue of protected activities and another of those unprotected.

An analysis of the efficacy of these approaches in protecting speech activity can be made with the diagram used above. In addition, a second diagram illustrates the alternatives under the unitary approach.



As has been suggested,[98] under the bifurcated approach an initial determination is made whether a public forum exists. This test is represented by T_1. If a forum is found, a subsequent test (T_2) is utilized to determine if a particular activity is protected. Under a unitary approach, factors considered in T_1 and T_2 are combined into a single inquiry ($T_1 + T_2$).

Both approaches achieve similar results where T_1 finds a public forum and T_2 concludes that an activity is protected. Conversely, if T_1 finds no public forum, and factors against protection of the individual activity outweigh those for protection, none exists under either approach.

However, where T_1 and T_2 reach opposite results, the bifurcated and unitary approaches can yield different outcomes. As has been suggested,[99] under the bifurcated approach the conclusion that no public forum exists precludes the use of T_2. Theoretically, the interests of the individual at T_2 may be so substantial that under a unitary approach they would more than counterbalance the factors militating against finding a public forum. A similarly inconsistent outcome is possible if the interests in maintaining a forum are substantial enough to out-

98. *See* Part I–A *supra.*
99. *Id.*

weigh the negative factors which by themselves would lead to the conclusion that the individual activity would be unprotected.

The combination of possible outcomes under the two approaches can be illustrated in the following matrix. An upward arrow ($\uparrow$) indicates that under the appropriate test counterbalancing factors yield the conclusion that a forum exists (T_1) or that an activity is protected (T_2). A downward arrow ($\downarrow$) indicates no forum or no protection.[100]

				Unitary	Bifurcated
1	$T_1 \uparrow$	$T_2 \uparrow$		protected	protected
2	$T_1 \uparrow$	$T_2 \downarrow$	$(T_1 < T_2)$	unprotected	unprotected
3	$T_1 \uparrow$	$T_2 \downarrow$	$(T_1 > T_2)$	protected	unprotected
4	$T_1 \downarrow$	$T_2 \downarrow$		unprotected	unprotected
5	$T_1 \downarrow$	$T_2 \uparrow$	$(T_1 > T_2)$	unprotected	unprotected
6	$T_1 \downarrow$	$T_2 \uparrow$	$(T_1 < T_2)$	protected	unprotected

The matrix suggests that two cases theoretically exist where the unitary test affords protection and where the bifurcated test does not. Translation of these theoretical possibilities into actual application may minimize the differences. Indeed, practice may demonstrate that situations (3) and (6) above are in fact null sets.[101] However, the matrix does demonstrate that the outcome can vary with the approach utilized. If the goal is protecting freedom of expression as mandated by the first amendment, the purpose is better served by the unitary approach, which consistently provides at least comparable, and theoretically superior, protection of these rights.

David D. Swartling

100. The symbol ">" means "greater than" and the symbol "<" means "less than." Therefore, if $T_1 < T_2$, the interests of the individual at T_2 would be greater than the factors militating against finding a public forum at T_1.

101. Hypothetical cases can be suggested, however, which may reflect such situations. For example, soliciting signatures for a referendum on utility rates outside the local company's office may represent situation (6). If a bus does indeed represent a significant available medium for less wealthy groups, as suggested in note 63 *supra*, the facts of *Lehman* arguably represent situation (3).