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Constitutional Law - Freedom of Speech - Public Forum - Captive Audience - Transit Advertising on Municipally Owned Transit System

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approach that would have retained the salutary features of the fundamental error doctrine without condoning inadequate trial preparation or abuse of the doctrine. If allegations of basic and fundamental error, coupled with an inquiry into whether procedural defaults were the result of a deliberate bypass and trial strategy[64] were heard on direct appeal, every possible claim which the defendant could raise would be directly examined. Strategic defaults would be disposed of and defendants would not be penalized for counsel's or the trial judge's inadvertence or mistake. Relief dispensed on direct appeal would relieve the burden on the avenues of collateral proceedings. Further, time and resources would be saved for the defendant (and counsel who represents him), thus accommodating both the interest of the defendant and the state.

Margaret K. Krasik

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—PUBLIC FORUM—CAPTIVE AUDIENCE—TRANSIT ADVERTISING ON MUNICIPALLY OWNED TRANSIT SYSTEM—The United States Supreme Court has held that a municipality does not violate a candidate's right of free speech and equal protection under the first and fourteenth amendments to the United States Constitution when it sells space on its transit vehicles for commercial and service advertisements but refuses to accept political advertising of a candidate for public office.

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

Harry J. Lehman, petitioner, sought to promote his candidacy for public office by purchasing car card space on a transit system owned and operated by respondent, the City of Shaker Heights.[1] Although space was then available, the respondent denied petitioner's re-

64. *See* TEMPLE Comment, *supra* note 27, at 237-38.

1. The text of the proposed advertisement read as follows:
HARRY J. LEHMAN IS OLD-FASHIONED!
ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT
State Representative—District 56 [X] Harry J. Lehman
Lehman v. Shaker Heights, 418 U.S. 298, 299 (1974).

quest. In keeping with its policy, the city prohibited any political advertising[2] but accepted commercial and social service advertisements. Petitioner's prayer for a temporary and permanent injunction to require the city to accept his advertisement was denied in the state courts.[3] The Supreme Court affirmed and held that respondent's refusal to accept petitioner's request did not violate the right of free speech guaranteed by the first amendment[4] or the equal protection clause of the fourteenth amendment.[5]

Justice Blackmun, announcing the judgment of the Court,[6] rejected the argument that the car cards were a "public forum" protected by the first amendment and that there was a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication, regardless of the primary purpose for which the area was dedicated.[7] Although recognizing that access to public places for purposes of free speech has been jealously preserved, Justice Blackmun noted that the nature of the forum and conflicting interests remained important in determining the degree of protection afforded by the first amendment to the speech in question.[8] The nature of the forum was examined in light of its purpose, a commercial venture in transportation. In *Lehman*, there were "no open spaces, no meeting hall, park, street corner or other public thoroughfare."[9] Instead, the city was engaged in commerce. The car card space, although incidental to the provision of public transpor-

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2. Petitioner's request was refused by Metromedia, the exclusive advertising agent for respondent, on the basis of a contract between the city and Metromedia which provided:

> 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.

Id. at 299-300.

3. Lehman v. Shaker Heights, 34 Ohio St. 2d 143, 145, 296 N.E.2d 683, 684-85 (1973).

4. U.S. CONST. amend. I reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." Freedom of speech is among the fundamental rights and liberties protected against infringement by the states through the fourteenth amendment. De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Grosjean v. American Press Co., 297 U.S. 233, 243 (1936); Stromberg v. California, 283 U.S. 359, 368 (1931).

5. U.S. CONST. amend. XIV, § 1, provides, *inter alia*:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. Justice Blackmun announced the judgment of the Court and was joined by Chief Justice Burger, Justice White, and Justice Rehnquist.

7. 418 U.S. at 301-03.

8. *Id.* at 302-03.

9. *Id.* at 303.

tation, was part of the commercial venture. The city, therefore, had "discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."[10] Regardless of the lack of a "public forum," Justice Blackmun indicated the first amendment requires a rational basis for the exclusion of speech where commercial advertising is allowed.[11] A rational basis was found for the exclusion of political speech, thereby satisfying first amendment and equal protection requirements.[12]

Justice Douglas, concurring, dealt specifically with the "captive audience" concept of the first amendment.[13] He felt that great liberties were taken with people who "of necessity became commuters and at the same time captive viewers or listeners."[14] Because the advertisements were constantly before the eyes of the riders, the city was precluded from transforming its vehicles into forums for the dissemination of ideas,[15] notwithstanding the fact that the vehicles were owned and operated, and advertising solicited, as a commercial venture.[16] Thus, the right of the passengers to be free from

10. *Id.*

11. After Justice Blackmun found no "public forum" and therefore no first amendment right to speech, he applied a "rational basis" test to determine if allowing commercial speech and disallowing political speech violated the equal protection clause. As the Court found that no fundamental right of freedom of speech was involved, a rational basis rather than a strict scrutiny test was used. Of particular interest is Justice Blackmun's indication that this equal protection test is part of the first amendment, not the fourteenth amendment, and is to be utilized when any speech, whether protected by the first amendment or not, is involved. *Id.*

Normally, in determining the validity of a classification under the equal protection clause of the fourteenth amendment the following must be considered: the "facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those . . . disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23, 30 (1968). As a result, similar interests will be weighed to determine both the first amendment access and equal protection questions. The same interests which for Justice Blackmun outweighed petitioner's first amendment access claim—the passenger's interest in privacy, the chances of favoritism, and administrative convenience—were also found to be "reasonable legislative objectives." Thus, no equal protection violation was found. Under a first amendment "rational basis" test the interest to be analyzed will usually coincide with those analyzed under the first amendment access issue. The value of even entertaining the inquiry seems anomolous since the two tests will seldom yield different results.

12. *See* note 11 *supra*.

13. Justice Douglas, in omitting discussion of petitioner's equal protection claim, has been criticized as being incomplete in his analysis. *See* Freund, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 150 n.15 (1974).

14. 418 U.S. at 306-07 (concurring opinion).

15. *Id.* at 307.

16. *Id.* at 306. Justice Douglas remarked that "if a bus is a forum it is more akin to a newspaper than to a park." Yet if a bus is treated as a newspaper, the owner has discretion

intrusions on their privacy prevented petitioner from presenting his message before a "captive audience."[17] The constitutional right of the passengers to be free from speech was found to outweigh petitioner's constitutional right of free speech.[18]

Justice Brennan, arguing in dissent,[19] recognized two factors to be balanced in determining if a particular place is a "public forum": the primary use to which the facility is committed, and the extent to which it will be disrupted if access to free expression is permitted.[20] These factors did not need to be considered because of the circumstances of the case. By accepting commercial and social service advertisements, the city waived any argument that advertising in its vehicles disrupted its primary function of providing transportation. By installing physical facilities for advertising and by creating the necessary administrative machinery for regulating access to them, the city established a voluntary forum.[21] Once a first amendment forum for communication was established, free speech principles prohibited discrimination based solely on subject matter or content.[22] Since differential treatment extended only to political advertising, free speech was infringed. Concerning a "captive audience," Justice Brennan noted the lack of any evidence indicating political advertisements are more disruptive to transportation than commercial advertisements.[23] This factor and the presence of a voluntary "public forum" led to his finding that petitioner's first amendment rights were violated.

The division of opinion centered on the existence or nonexistence of a "public forum." If a "public forum" had been found, the right

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to include or exclude what is offered. No difference exists between press privately or publicly owned. The implication is that a finding of "public forum" would nevertheless allow the city to regulate its advertising.

17. *Id.* at 308.

18. The content of the message was found not relevant either to petitioner's right to express it or the commuters' right to be free from it. Although commercial messages may be as offensive or intrusive as political advertisements because of their infringement of commuters' interest in privacy, Justice Douglas believed he was restrained from deciding the issue of their validity since "the validity of the commercial advertising program is not before us." *Id.* at 308.

19. Justice Brennan, writing for the dissent, was joined by Justices Marshall, Stewart, and Powell.

20. 418 U.S. at 312 (dissenting opinion).

21. *Id.* at 314.

22. *Id.* at 315.

23. *Id.* at 319.

to free speech would necessarily attach.[24] Categorizing the system as providing public transportation was essential to Justice Blackmun's finding of no "public forum." When so viewed, the city, as a commercial advertiser, had discretion to choose the type of advertising it would accept. Besides the nature of the forum as a basis for finding no "public forum," Justice Blackmun discussed and impliedly used the "captive audience" concept in analyzing the conflicting interests. However, the conflicting interests—the right of the passengers, a "captive audience," to be free from certain types of speech and the right of petitioner to exercise the first amendment guarantee[25]—were balanced in a cursory fashion.

For Justice Douglas, the emphasis on providing transportation stressed by Justice Blackmun was of lesser importance than the right of the passengers to be free from speech. An analysis of Justice Blackmun's use of the "captive audience" concept will by implication be directed to Justice Douglas' concurrence as well. A "captive audience" is a group of persons so situated that they have no alternative but to remain; they have no choice but to hear and see what is said and shown to them. Based on the right to be "free from speech,"[26] the "captive audience" concept protects persons so situated from unwanted or unsolicited speech of others. Riders of the transit vehicles were deemed "captives" because they had no recourse but to remain on the bus until their destination was reached.[27] By focusing attention solely on the interests of the riders as "captives," the free speech interest of petitioner was not seriously weighed, and the passenger's right to be free from speech prevailed.

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24. The evolution of the concept that a state cannot exclude speakers from a "public forum" began with the cases of Lovell v. Griffin, 303 U.S. 444 (1938) (allowed distribution of religious literature on city streets without obtaining permission as required by ordinance) and Hague v. CIO, 307 U.S. 496 (1939) (injunction affirmed against city mayor who denied union organizers permits to use public parks and streets for speeches and leaflet distribution). There is no right to a "public forum" unless a forum has been declared to exist. Gorlick, *Right To a Forum*, 71 DICK. L. REV. 273, 274 (1967) [hereinafter cited as Gorlick].

25. 418 U.S. at 302-04. Two other interests of lesser importance were administrative problems and the appearance of favoritism which the city felt would result if political advertising were to be allowed.

26. Freedom from speech is related to the intertwining of speech and privacy. The privacy interest is protected in the "captive audience" situation by the right not to be spoken to, which is also the basic premise of freedom from speech. *See* Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 NW. U.L. REV. 153, 153-54 (1972) [hereinafter cited as Haiman]; 48 WASH. L. REV. 667 (1973).

27. 418 U.S. at 307 (concurring opinion); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (dissenting opinion).

An analysis of the historical development of the concept of a "captive audience" shows certain fundamental trends. In exercising the right of expression conflicts may arise. Expression may infringe on the privacy interest of others;[28] that interest in privacy may be so compelling in certain situations that the right to free speech must be subordinated to it.[29] The areas of communications in which the most frequent claims of freedom from speech have arisen are door-to-door solicitation,[30] residential picketing,[31] public address systems and sound trucks,[32] billboards and other "public thrustings."[33] While there is a paucity of substantive law in this area, there does emerge a noticeable trend that a citizen has less interest in privacy in public than in his own home.

The Court in *Lehman* appears to be cirumscribing this trend by implicitly raising the interest in freedom from speech in a public setting to the level of that interest in the privacy of the home. In doing so the Court arguably endorsed Justice Douglas' dissent in *Public Utilities Commission v. Pollak*.[34] In *Pollak*, the Court permitted a District of Columbia transit company under exclusive fran-

28. *See* Emerson, *Toward A General Theory Of The First Amendment*, 72 YALE L.J. 877, 926 (1963); 48 WASH. L. REV. 667, 676-79 (1973).

29. A compelling interest has been found in preserving privacy in the home. Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (government may at homeowner's request bar persons from sending mail of an erotically arousing or sexually provocative nature); Breard v. Alexandria, 341 U.S. 622 (1951) (constitutionally protected right to circulate publications does not include door-to-door canvassing for subscriptions contrary to the reasonable limitations of a municipal ordinance); Kovacs v. Cooper, 336 U.S. 77 (1949) (state may prohibit soundtrucks on residential streets as an invasion into domestic privacy). *See* 48 WASH. L. REV. 667, 678 (1973).

30. Breard v. Alexandria, 341 U.S. 622 (1951) (door-to-door canvassing for subscriptions).

31. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (picketing and the distribution of leaflets in a residential suburb not an infringement on householder's privacy); Gregory v. City of Chicago, 394 U.S. 111 (1969) (permitting picketing in front of mayor's home urging the removal of a public official).

32. Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (broadcasting music in public buses permitted); Kovacs v. Cooper, 336 U.S. 77 (1949) (soundtrucks on residential streets prohibited); Saia v. New York, 334 U.S. 558 (1948) (ordinance forbidding sound amplification devices was an unconstitutional prior restraint of speech).

33. Cohen v. California, 403 U.S. 15 (1971) (wearing of a jacket with "Fuck the Draft" on it in a courthouse may not, consistently with the first and fourteenth amendments, be made a criminal offense); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (government may at homeowner's request bar persons from sending mail of an erotically arousing or sexually provocative nature); Packer Corp. v. Utah, 285 U.S. 105 (1932) (state statute forbidding all advertising of tobacco and cigarettes on streetcars, billboards, and placards but allowing such advertisements in newspapers and magazines is constitutional).

34. 343 U.S. 451 (1952).

chise of Congress to broadcast music in its buses despite complaints from some riders that their privacy was abridged. Justice Douglas dissented, arguing that "the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen."[35] In *Lehman*, Justice Blackmun acknowledged the inability of transit riders to exercise choice in viewing political advertisements; Justice Douglas, concurring, reasoned that an individual has "no right to force his message upon an audience incapable of declining to receive it."[36]

The premises justifying a restriction on free expression in a public context are: 1) recipients of communication should be able to control what they see and hear; and 2) no one should be held as a "captive audience."[37] Notwithstanding the theoretical validity of these premises, we are today living in a densely populated society in which isolation from unwanted communication is made more difficult. The Supreme Court in *Cohen v. California*[38] recognized this fact by noting that persons are oftentimes "captives" outside their homes and must, to some extent, be subject to objectionable speech.[39] The problem is to determine at what point persons are so confined and expression so objectionable that the state has a compelling interest in protecting the privacy of these persons. A criterion for this inquiry was established in *Cohen*:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that *substantial privacy interests* are being *invaded* in an *essentially intolerable manner*.[40]

This position suggests that the interest of an individual in privacy should not require absolute protection from stimuli.[41] Rather, the *Cohen* Court's language suggests an evaluation of: 1) the invasion of privacy, to see if the person subjected to the stimuli can avoid it; 2) the privacy interest, to determine if it is substantial; and 3) the manner of expression, to determine if it is essentially intolerable.

First, the degree to which privacy is invaded must be established.

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35. *Id.* at 469 (dissenting opinion).
36. 418 U.S. at 307 (concurring opinion).
37. Haiman, *supra* note 26, at 174-75.
38. 403 U.S. 15 (1971) (wearing of jacket bearing "Fuck the Draft" in courthouse).
39. *Id.* at 21; *accord*, Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970).
40. 403 U.S. at 21 (emphasis added).
41. 48 WASH. L. REV. 667, 682 (1973).

While a rider on a transit vehicle has no effective recourse but to remain until his destination is reached, his inability to escape contact with the communication should not in itself be dispositive. The liberty of each individual in a public vehicle must be subject to reasonable limitations in relation to the rights of others.[42] While there may be some truth to the assertion that "[t]he radio can be turned off but not so the billboard or streetcar placard,"[43] realistically, the distinction represents an oversimplification.[44] The viewer may with reasonable effort escape the contact. Although the initial impact cannot be avoided, he can shut out any further communication. The process known as "selective perception" enables the viewer to choose what he wishes to assimilate from the sensory bombardments surrounding him.[45] The viewer can avoid communication that might disturb him by looking without seeing and hearing without listening.[46] If, after the initial exposure, the rider finds the communication objectionable, he may with a reasonable effort avoid future contact by averting his eyes.[47] Such a minor inconvenience, in order to preserve free speech, is a small price to pay.[48] Thus, the degree of invasion of privacy appears slight.

Second, the interest in privacy must be examined to determine if it is substantial. The right to freedom of speech is expressly guaranteed; the right to be free from speech is not.[49] Priority should be given to the speaker as opposed to the attenuated interests of the individual who seeks to avoid the message.[50] Indeed, the Court in *Pollak* and *Cohen* indicated that outside the home the degree of protection afforded a "captive audience" is significantly less than if one is "captive" in his own home.[51] The expectations of those whose privacy is sought to be protected should also be examined.

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42. Public Utils. Comm'n v. Pollak, 343 U.S. 451, 465 (1952).

43. Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

44. Haiman, *supra* note 26, at 177-85.

45. *Id.* at 184.

46. *Id.*

47. Cohen v. California, 403 U.S. 15, 21 (1971); Haiman, *supra* note 26, at 182-83.

48. Lehman v. Shaker Heights, 418 U.S. 298, 320-21 (1974) (dissenting opinion).

49. The constitutional basis protecting the right to be free from speech, especially in situations outside of the home, appears to stem from the liberty clause of the fifth amendment. Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting). The Supreme Court, however, has failed to indicate its exact constitutional basis.

50. 48 WASH. L. REV. 667, 682 (1973).

51. Cohen v. California, 403 U.S. 15, 21-22 (1971); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 464 (1952).

In *Lehman*, the Court focused on the possibility of disrupting the function of the transit system but made no mention of the rider's expectations of privacy. When a transit system holds itself out to the public, for example, each rider knows there must be a significant degree of interaction with other human beings and realizes there must be a process of accommodation between his privacy and the desire of others to communicate.[52] Certainly, it is not too much to expect an individual to be sturdy enough to absorb at least the initial impact of political messages.[53] Thus, the interest in privacy both from prior Court statements and from the rider's expectations would not seem substantial.

Third, the intolerability of manner of expression must be established. Since commercial advertisements may be presented in a manner as equally objectionable as political advertising, there is no persuasive basis for distinguishing political advertising as a category.[54] Both political and commercial advertising[55] attempt to persuade, presenting information so that a choice can be made between competing "products." They differ only in that commercial advertising is designed to influence private economic decisions[56] while political advertising is designed to influence private political decisions. The difference does not pertain to the manner of expression; it relates only to the content of the advertisements. Thus, permitting commercial expression while prohibiting its political counterpart seems unreasonable.

A practical inquiry not encompassed in the *Cohen* criterion is the extent of disturbance to the transit system or to the riders that

52. Haiman, *supra* note 26, at 187.

53. *Id.* at 199.

54. The dissent points to the apparent inconsistency of upholding such a regulation:

> [A] commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate, such as Lehman, would be barred from informing the public about his candidacy, qualifications for office, or position on particular issues.

418 U.S. at 317 (Brennan, J., dissenting).

55. For discussion of commercial advertising as it relates to political speech and the first amendment see Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433 (1971); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965) [hereinafter cited as *Commercial Context*].

56. *Commercial Context*, *supra* note 55, at 1192.

would result if political advertising were allowed. There must be more than a mere undifferentiated fear or apprehension of disturbance in order to overcome the right to freedom of expression.[57] In *Lehman*, for example, Justice Brennan noted the absence of evidence in the record to show political advertisements have a greater propensity than commercial or public service advertisements to impair the transit system's primary function of transportation.[58] By permitting commercial speech, the transit system has made a determination that some disturbance does not impair its primary function.[59] To think commercial advertisements evoke different responses than political messages is an erroneous assumption. Commercial advertisements are discussed with as much interest as political advertisements, require the same "product" choice to be made, and may affect the sensibilities of the riders as much as political advertisements.[60] Even assuming a difference does exist between political and commercial advertisements, the burden is on the party attacking the speech to show that political advertisements cause greater disturbance to the riders.[61] No such showing was made in *Lehman*. Without such a showing political advertising should not be restricted.

The underlying reasons for protecting a substantial privacy interest from an invasion in an essentially intolerable manner are not present here; there is no substantial "captive audience" interest to be protected. Without that interest, the concept appears to have been inappropriately used to dismiss the "public forum" argument and to override petitioner's constitutionally protected speech. To

57. In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), the dismissal of three students for violating a regulation banning the wearing of armbands was held unconstitutional where there was:

> [N]o evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.

Id. at 508; *cf.* Cohen v. California, 403 U.S. 15, 20 (1971).

58. 418 U.S. at 319 (dissenting opinion).

59. *See* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952). In permitting broadcasts of music and commercials in streetcars, the Court stated: "[I]t is evident that public comfort and convenience is not impaired." *Id.* at 459.

60. *But see Commercial Context, supra* note 55, at 1195.

61. Freedom of speech is expressly guaranteed in the first amendment and has a protected position in the system of civil liberties. Any infringement on this right must be balanced against other interests and must serve a reasonable purpose. The burden of proving its reasonableness rests with those wishing to regulate it.

prohibit political speech, traditionally afforded greater protection[62] while allowing commercial speech, is anomalous.

The second basis for Justice Blackmun's finding of no "public forum" was the commercial nature of the activity: a "commercial venture" providing transportation. His position was founded on the premise that a forum exists only where there has been a dedication for that purpose.[63] Since no such dedication occurred here, there was no opening of a forum.

Perhaps no conscious decision was made to dedicate these vehicles as "public forums," but it was impliedly done by opening them to members of the public to purchase space for social and commercial advertisements. To state that the city's commercial venture, which involves communication, precludes a finding of "public forum" is to evade the issue of regulation by content. Once a forum has been opened to members of some groups, prohibiting others from speaking on the basis of what they intend to say is not constitutionally permissible.[64] The position of Justice Blackmun is, in essence, an indirect way of allowing regulation by content. Regulation by content in the first amendment area,[65] is permitted only for the protection of the public order on which civil liberties ultimately depend.[66] Since communication of views must be exercised to assure the safety and convenience of people,[67] a municipality may regulate speech so long as its regulation is both reasonable and without unfair discrimination as to time, place, and manner.[68]

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62. Commercial speech is unprotected by the first amendment. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (a municipal ordinance forbidding distribution in the streets of printed handbills bearing commercial advertising matter held constitutional). In *Valentine* the Court stated:

> [T]hough the states and municipalities may appropriately regulate the privilege of the freedom of speech] in the public interest, they may not unduly burden or proscribe its employment in [the] public thoroughfares . . . the Constitution *imposes no such restraint on government as respects purely commercial advertising.*

Id. at 54 (emphasis added).

63. Gorlick, *supra* note 24, at 274.

64. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

65. *Id.*

66. Cox v. New Hamphire, 312 U.S. 569, 574 (1941) (religious march without required license); Hague v. CIO, 307 U.S. 496, 515-16 (1939) (interference with meeting held to discuss National Labor Relations Act).

67. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

68. *Id.* at 576. Freedom of speech has, therefore, been found to be less than absolute. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972) (city ordinance prohibiting all picketing within a certain distance of a school, except peaceful labor picketing, found unconstitutional

Justice Blackmun dealt only with the "place" element and ignored consideration of the "manner" of expression.[69] Viewing the "place," the transit vehicle, as a commercial venture in transportation, he found the commercial aspect alone to be a sufficient basis for the regulation of political speech.[70] Since some advertising was allowed, however, a further determination should have been made about the compatibility of the manner of expression with the normal activity of the place at a particular time.[71] Justice Blackmun failed to examine petitioner's speech to determine its compatibility with respondent's transporting function. It is arguable that the use of vehicles for political advertising is not incompatible with the primary purpose of providing transportation.[72] Further, by opening transit vehicles to commercial speech, a determination was made that advertising is not incompatible with the primary function.[73] Thus, notwithstanding the designation of the nature of this place as a commercial venture in transportation, the primary function of providing transportation would not have been seriously impaired by permitting political expression in transit vehicles.

Political advertising and commercial advertising do not differ in the manner of their presentation.[74] If the manner is appropriate to the place, then political advertising must be allowed. Once communication was allowed, the inadequate examination of the place and the failure to examine the manner of expression effectuated a regulation by content. By basing selective exclusion on content the regulation is removed from the neutrality of time, place, and manner.[75] The result of this regulation was to raise commercial, rather than political expression, to an apparently preferred position. Justice Blackmun disregarded a line of cases enshrining noncommercial

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because of impermissible constitutional distinction); Adderley v. Florida, 385 U.S. 39 (1966) (statute prohibiting picketing on grounds of jailhouse found constitutional); Cox v. Louisiana, 379 U.S. 559 (1965) (ordinance prohibiting picketing and parading in or near a courthouse found constitutional); Breard v. Alexandria, 341 U.S. 622 (1951) (constitutionally protected right to circulate publications does not include door-to-door canvassing for subscriptions).

69. "Time" was not at issue in *Lehman*.

70. 418 U.S. at 304.

71. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

72. *See* text accompanying notes 59-63 *supra*.

73. *See* Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 54, 434 P.2d 982, 985, 64 Cal. Rptr. 430, 433 (1967).

74. *See* text accompanying notes 56-58 *supra*.

75. *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29.

messages that expressly states commercial messages do not come within the coverage of the first amendment.[76]

While this case may have limited application in the future because it involves a narrow factual situation, it shows at least five members of the Court are willing to limit the right of free speech where there are "captive audiences." In so doing, the right of an individual to be free from speech has been extended from the traditional environs of the home into the public arena. Although the individual's privacy interest should be considered, where the communication is political in nature, any regulation should be narrowly drawn to further the principles of our democratic system. This is especially true when the intended audience impliedly acknowledges by travelling on a public transit vehicle that its interest in privacy is limited.

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76. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (ordinance forbidding newspapers to carry sex-designated advertising columns for job opportunities not in violation of first amendment); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (free speech principles applicable to "editorial" advertisements); Valentine v. Chrestensen, 316 U.S. 52 (1942) (ordinance forbidding distribution in streets of handbills bearing commercial advertising matter found constitutional).