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# Right to a Forum

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# RIGHT TO A FORUM

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The first amendment to the Constitution of the United States guaranteeing freedom of speech and the right of the people to assemble[1] was adopted in 1791, but it was not until 1938, more than a century later, that the United States Supreme Court declared that the people had a right to exercise these guarantees in the streets and open areas of the parks.[2]

The streets and parks have for centuries been regarded as a place where citizens may meet for the purpose of discussion and assembly. In Greek history, it was the agora;[3] in Roman times, the forum.[4] It is, therefore, not surprising that the streets and parks have been held by our courts to constitute a forum for the exercise of free speech and assembly.

Over the years, efforts have been made to enlarge the forum to include public buildings and other facilities,[5] but as yet no court has held that there is an inherent constitutional right to use public buildings for such purposes. The cases on the subject are few in number but they explicitly hold that public buildings need not be made available for public meetings.[6]

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1. U.S. CONST. amend. I: "Congress shall make no law abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ." These guarantees are also protected by the fourteenth amendment provision that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . . ."

2. Hague v. CIO, 307 U.S. 496 (1939).

> 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 and immunities, rights, and liberties of citizens.

*Id.* at 515. *Cf.* Davis v. Massachusetts, 167 U.S. 43, 47 (1897); *but see* Commonwealth v. Gilfedden, 321 Mass. 335, 73 N.E.2d 241 (1947).

3. MUMFORD, CITY IN HISTORY 148-50 (1961).

4. *Id.* at 221-27.

5. Extensions of the forum beyond the streets and parks might include not only public buildings but public grounds (other than parks), including grounds around a public building, steps of a public building and outdoor facilities such as stadia and amphitheaters. This article addresses itself only to extension of the forum into public buildings, although the law makes no distinction between public buildings and other public facilities. See Adderley v. Florida, 385 U.S. 39 (1966).

6. Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963); Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 171 P.2d 885 (1946); Coughlin v. Chicago Park Dist., 364 Ill. 90, 4 N.E.2d 1 (1936); Buckley v. Meng, 35 Misc.2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962); Ellis v. Allen, 4 App. Div.

The law is clear that there is no right to a forum unless a forum has been declared to exist. A forum exists only where there has been a dedication for such purpose.[7] This is true of the streets and parks as it is elsewhere. The streets and the parks are a public forum because the dedication for street or park purposes includes availability as a forum. From ancient times the right to assemble, to communicate thoughts between citizens, and to discuss public questions has been considered within the purposes for which a street or park may be used. The present state of the law may be derived from three cases: *Danskin v. San Diego Unified School Dist.*,[8] *State ex rel Greisinger v. Grand Rapids Bd. of Educ.*,[9] and *Hooker v. Conte*.[10] The first two deal with schools, the third, with a firehouse auditorium.

In *Danskin*, an affiliate of the American Civil Liberties Union filed an application with the local school board to use a high school auditorium for a series of meetings on the general theme of the "Bill of Rights in Postwar America." The school board conditioned its permission on applicants' signing an affidavit that they did not advocate and were not affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the Government of the United States by force or violence, or other unlawful means. The applicant refused to comply with this re-

2d 343, 165 N.Y.S.2d 624 (1957); Hooker v. Conte, 208 Misc. 188, 143 N.Y.S.2d 750 (Sup. Ct. 1955); Ellis v. Dixon, 118 N.Y.S.2d 815 (Sup. Ct. 1953), *aff'd*, 281 App. Div. 987 120 N.Y.S.2d 854 (1953), *appeal denied*, 306 N.Y. 981, 115 N.E.2d 437 (1953), *cert. dismissed*, 349 U.S. 458 (1953), *rehearing denied*, 350 U.S. 855 (1953); Stanton v. Board of Educ., 190 Misc. 1012, 76 N.Y.S.2d 559 (Sup. Ct. 1948); State *ex rel.* Greisinger v. Grand Rapids Bd. of Educ., 88 Ohio App. 364, 100 N.E.2d 294 (1949). See also the opinion of Mr. Justice Black in Brown v. Louisiana, 383 U.S. 131 (1966) (dissenting opinion): "Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by the government and dedicated to other purposes, as a stage to express dissident ideas." *Id.* at 166.

7. Danskin v. San Diego Unified School Dist., *supra* note 6. See also Marsh v. Alabama, 326 U.S. 501 (1946), wherein the Court upheld the right of Jehovah's Witnesses to distribute religious literature on the streets of a company town, saying: "The more an owner, for his own advantage, opens up his property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506 Goodhart, *Freedom of Speech and Freedom of Press*, 1964 WASH. U.L.Q. 248: "[T]here is no right of public meeting as such unless such place has been dedicated or otherwise opened for such meeting." *Id.* at 257. Dedication as a public forum does not preclude regulations aimed at safeguarding the primary function of the public property from interference by the forum. Payroll Guarantee Ass'n, Inc. v. Board of Educ., 27 Cal.2d 197, 162 P.2d 433 (1945); Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 171 P.2d 885 (1946).

8. *Supra*, note 7.

9. 88 Ohio App. 364, 100 N.E.2d 294 (1949), *appeal dismissed* 153 Ohio St. 474, 92 N.E.2d 393 (1950), *cert. denied*, 340 U.S. 820 (1950).

10. 208 Misc. 188, 143 N.Y.S.2d 750 (Sup. Ct. 1955).

quirement and sought and obtained mandamus compelling the school district to allow use of the auditorium without the required condition.

In *Greisinger*, Jehovah's Witnesses made application to the local school board to use the school auditorium for a series of lectures concerning the Bible and the purposes of Almighty God. The request was refused, primarily because of the character of the organization and its beliefs. Petitition for a writ of mandate commanding the board to allow the use of the auditorium was denied.

In *Hooker*, the Westchester Chapter of the Nationalist Party sought and was denied a permit to use an auditorium for a public meeting stated to be "educational for public interest." The auditorium sought to be used was part of a firehouse situated in a fire district in the Town of Mamaroneck, Westchester County, New York. A fire department council administered the affairs of the fire department and, subject to the approval of the Town Board, had care, custody and control of the property of the district. The use of the auditorium was governed by duly adopted rules and regulations which, inter alia, provided that the firehouse auditorium is "limited to the use of residents and non-profit organizations of [the fire district] for social and recreational purposes." An action in the nature of mandamus seeking an order directing the Town Board, Fire Council, fire chief and deputy fire chief to issue the permit was dismissed.

The applicants, in each of these cases, claimed a right to use the auditorium as a concomitant to their constitutional right of free speech and assembly. There were other contentions, but the crucial issue in each case was whether the governing body could in the lawful exercise of its discretion restrict the use of the auditorium without concern for the guarantees of free speech and assembly. Since public buildings need not be made available for public meetings, the right to use the auditorium as a public meeting place hinged on whether the governing body having jurisdiction over the building had declared the auditorium to be a public forum.[11] When a public building, or any of its rooms, is made available as a public meeting place, the building or room—like the streets and parks—becomes a public forum. While available as a public forum, use of the building for the exercise of free speech and assembly cannot be denied contrary to the guarantees of the

11. See Danskin v. San Diego Unified School Dist., 20 Cal.2d 536, 171 P.2d 885 (1946), wherein the court said:

> The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any member of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions that would deprive any member of the public of their constitutional rights.

*Id.* at 546, 171 P.2d at 891.

first amendment.

In *Danskin*, California state law[12] designated the public schools and their grounds as civic centers where citizens might meet and discuss any subjects and questions which in their judgment pertained to the educational, political, economic, artistic, and moral interests of the citizens in the community. The court held that this made the schools and their grounds a public forum and that to deny the American Civil Liberties Union the use of the school auditorium for a lawful purpose, simply because it refused to sign an affidavit that it did not advocate the overthrow of the Government by force, was an unlawful infringement of the organization's rights of free speech and assembly.[13]

In *Greisinger*, however, the state law regulating the use of schools[14] was held not to have made the schools a public forum.

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12. CAL. EDUC. CODE § 16556 provides that:

> There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Camp Fire Girls, Boy Scout Troops, farmers' organizations, senior citizens' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities.

13. Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946). The court stated its reasoning as follows:

> The convictions or affiliations of one who requests the use of a school building as a public forum is of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or the market place. The ancient right to free speech in public parks and streets cannot be made conditional upon the permission of a public official if that permission is used as an "instrument of arbitrary suppression of free expression.". . . It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens its doors [as a forum], however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable.

*Id.* at 550, 171 P.2d at 892.

14. OHIO GENERAL CODE §§ 4839-4839-2 provided:

> The board of educational of a city, exempted village or local school district, in its discretion, may authorize the opening of such schoolhouses for any lawful purposes. But nothing herein shall authorize a board of education to rent or lease a schoolhouse when such rental or lease in any wise interferes with the public schools in such district, or for any purpose other than is authorized by law.
>
> Upon application of any responsible organization, or of a group of at least seven citizens, all school grounds and schoolhouses . . . shall be available for use as social centers for the entertainment and education of the people, including the adult and youthful population, and for the discussion of all topics tending to the development of personal character and of civic welfare, and for religious exercises.
>
> The board . . . shall, upon request and the payment of a rea-

Consequently, the school boards were held to be vested with broad discretion in restricting the use of school facilities for public meetings.[15] The granting of such discretion implied that it was not to be circumscribed by the first amendment.[16] Likewise in *Hooker* the court found that the statute vested discretion as to the use of the auditorium in the Fire Council and Town Board and that such discretion could be exercised without concern for the constitutional rights of freedom of speech and assembly. The court succinctly stated that "[w]hile there are constitutional rights of free speech and freedom of assembly, there is no constitutional privilege to exercise these rights in a firehouse auditorium."[17]

From these cases it is evident that the state of the law at present is that unless a public building has been declared to be a public forum, freedom of speech and assembly are not germane to its use, and the only constitutional requirement that must be met is the equal protection clause of the United States Constitution.[18] Since first amendment freedoms have a paramount, if not preferred, place in our democratic system, should the public forum be extended into public buildings?

In recent years, first amendment freedoms have been extended into areas not previously regarded as encompassed by such rights. In *Schwartz-Torrance Investment Corp. v. Bakery Workers' Union*,[19] picketing on private property was upheld. In the sit-in cases, demonstrations on private property have for various reasons been held not unlawful.[20] In *Edwards v. South Carolina*[21] demon-

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sonable fee . . . permit the use of any schoolhouse and rooms therein . . . when not in actual use for school purposes, for any of the following purposes:

2. For holding educational, religious, civil, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community.

15. State *ex rel.* Greisinger v. Grand Rapids Bd. of Educ., 88 Ohio App. 364, 100 N.E.2d 294 (1949). "The language employed in these sections evinces a clear intention on the part of the legislature to grant to a board of education discretionary power." *Id.* at 363, 100 N.E.2d at 299.

16. *Cf.* N.Y. EDUC. LAW § 414, which has been construed as giving school authorities discretion to permit use of school buildings for public or private discussions, although such use may not be demanded as a matter of right. Ellis v. Allen, 4 App. Div. 624, 165 N.Y.S.2d 624 (1957).

17. Hooker v. Conte, 208 Misc. 188, 143 N.Y.S.2d 750, 755 (Sup. Ct. 1955).

18. U.S. CONST. amend. XIV, § 1, See Cox v. Louisiana, 379 U.S. 536, 558 (1965).

19. 61 Cal.2d 766, 394 P.2d 921 (1964), *cert. denied*, 380 U.S. 906 (1965). In this case a union picketed a bakery in a shopping center. Because of the shopping center's public character, the owner's interest in the exclusive possession and enjoyment of his private property was held to be theoretical and thus outweighed by the unions interest in picketing the bakery which it had unsuccessfully tried to organize.

20. Bouie v. Columbia, 378 U.S. 347 (1964); Bell v. Maryland, 378 U.S. 226 (1964); Barr v. Birmingham, 378 U.S. 146 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Gober v. Birmingham, 373 U.S. 374 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244

strators on the grounds of the state capitol were held to be there as a matter of right and their arrest for breach of the peace was held violative of their first amendment rights. In *Brown v. Louisiana*[22] the United States Supreme Court could not agree on an opinion but Mr. Justice Fortas, in announcing reversal of the conviction of five negroes for disturbing the peace in a public library, based his decision on their "right in a peaceable and orderly manner to protest by silent and reproachful presence" the library's policy of unlawful discrimination.[23]

These decisions do not indicate any tendency to go beyond the narrow ambit of the situations with which they deal. Each is a protest case and, except for *Schwartz-Torrance*, a product of the nation's involvement in the civil rights movement. *Schwartz-Torrance* can be reconciled as similar to *Marsh v. Alabama*[24] and *Tucker v. Texas*[25] in which the property owner was deemed as a matter of law to have dedicated his property for first amendment use. Decisions such as *Edwards* deal with the right to petition rather than the right of free speech. The constitutional right to petition for redress of grievances must of necessity be conducted on public property, whereas free speech may be effectively exercised anywhere. In any case, silent picketing and peaceful assembly are not the equivalent of free speech nor the same as holding a public meeting in a public forum.

In a recent decision[26] the United States Supreme Court has upheld the right of government to control the use of its property free from the restraints of the first amendment. The trespass convictions of a group of negro students, who had peacefully demonstrated on the grounds of a jailhouse in Florida, were sustained. Mr. Justice Black speaking for the majority said:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only reasonable but also particularly appropriate. . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightfully rejected in two of the

(1963); Taylor v. Louisiana, 370 U.S. 154 (1962); Garner v. Louisiana, 368 U.S. 157 (1961).

21. 372 U.S. 229 (1963).
22. 383 U.S. 131 (1966).
23. *Id.* at 142.
24. 326 U.S. 501 (1946); see note 7 *supra.*
25. 326 U.S. 517 (1946).
26. Adderly v. Florida, 385 U.S. 38 (1966).

> cases petitioners rely on. . . . We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.[27]

The control, management and protection of public property is a discretionary function of government.[28] The discretion of the elected governmental officials who have jurisdiction over such property should not be unnecessarily inhibited.[29] Under the balancing of interests doctrine currently favored in testing the extension of first amendment freedoms,[30] neither free speech nor assembly are unduly hampered by the fact that the public forum does not extend into public buildings, or other undedicated public places. On balance, any interest the individual may have in extending the forum into public buildings is far outweighed by the interest which the people have in preserving the sovereign power of government to control, manage and preserve public property. Available indoor facilities to meet the demands of the citizenry for a place to meet appear to exist in most cities and towns. This will probably improve with the passage of time as more communities add to their public facilities by availing themselves of the increasing opportunities for urban rehabilitation, renewal and improvement.

In each community, governing bodies should be free to exercise their discretion as to the utilization of public property without being subject to the whims of the citizenry as to whether the property shall be used as a public meeting place. At the very least, there should be some tangible evidence that the forum is inadequate

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27. *Id.* at 47-48. Mr. Justice Black had decried the decision in Brown v. Louisiana, 383 U.S. 131 (1966):

> Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas. The novel constitutional doctrine of the prevailing opinion nevertheless exalts the power of private nongovernmental groups to determine what use shall be made of governmental property over the power of the elected governmental officials of the States and the Nation.

*Id.* at 166 (dissenting opinion).

28. McQUILLEN, MUNICIPAL CORPORATIONS § 28.01 (3d ed. 1966): "Without property the Municipal Corporation could not perform its functions. It must possess in its own right, or have an interest in, or be permitted to control such property, real and personal, as will enable it to administer suitably the local government."

29. See Dennis v. United States, 341 U.S. 494 (1950) (concurring opinion of Frankfurter, J.):

> Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile the competing interests is the business of legislatures and the balance they strike should not be displaced by ours, but respected unless outside the pale of fair judgment.

*Id.* at 539-40.

30. Alfange, *The Balancing of Interest in Free Speech Cases: In Defense of an Abused Doctrine*, 2 LAW IN TRANSITION Q. 35 (1965).

to meet the needs of the citizenry before consideration is given to extending it into public buildings. Recently, Mr. Justice Black said:

> The problems of state regulation of the streets on the one hand, and public buildings on the other, are quite obviously separate and distinct. Public buildings such as libraries, schoolhouses, fire departments, court houses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation. . . . In the public buildings, unlike the street, peace and quiet is a fast and necessary rule. . . .[31]

Until it appears that the streets and parks in any given community are no longer adequate to provide citizens with a place where they may as a matter of right exercise their constitutional guarantees of free speech and assembly, there is no need to extend the public forum beyond its historic domain. First amendment freedoms are not absolute. It has been said: "The principles of the first amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussions or instruction."[32] Moreover, any citizen who is dissatisfied with the availability of a public building or facility as a meeting place may express his displeasure, as he would with respect to any legislative or administrative policy of government, by petitioning the governing body to change the policy, or, failing in this, by taking appropriate action at the polls. Extension of the forum to give citizens the right to meet in public buildings does not now or in the foreseeable future appear to be a first amendment necessity.

31. Brown v. Louisiana, 383 U.S. 131, 157 (1966) (dissenting opinion).
32. Poulos v. New Hampshire, 345 U.S. 394, 405 (1953).

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