Public Forum Analysis After Perry Education Association v. Perry Local Educator's Association - A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property

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NOTES

PUBLIC FORUM ANALYSIS AFTER PERRY EDUCATION ASSOCIATION v. PERRY LOCAL EDUCATORS' ASSOCIATION—A CONCEPTUAL APPROACH TO CLAIMS OF FIRST AMENDMENT ACCESS TO PUBLICLY OWNED PROPERTY

INTRODUCTION

The right to use public property for public speech is not absolutely protected by the first amendment. The extent of the first amendment protection varies with the character of the property to which speakers seek access. Property well suited to public speech is deemed a “public forum.” Because public forum status is central to the rights available to an aspiring speaker, legal tools for identifying such fora must be clearly and fully developed. Unfortunately, they are not.

Recently, the Supreme Court tried to clarify the public forum doctrine, but its restatement of the law seems to have left basic questions unanswered and lower courts confused. This Note proposes a conceptual approach to determining whether a particular place is a public fo-


Even where the first amendment guarantees access, the speaker's activities are subject to reasonable time, place and manner restrictions. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); L. Tribe, American Constitutional Law 688-91 (1978).


4. See infra notes 57-65 and accompanying text.


6. See infra notes 57-65 and accompanying text.

7. See infra notes 73, 81-94 and accompanying text.
I. HISTORY

The public forum concept is rooted in history. Over ninety years ago, the Supreme Judicial Court of Massachusetts, speaking through then-Justice Oliver Wendell Holmes imposed upon streets and parks a type of first amendment martial law. In dismissing a constitutional attack on a criminal statute forbidding speech on the Boston Common without a permit, Holmes observed: "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 Supreme Court in Davis v. Massachusetts unanimously affirmed. Mr. Justice White wrote: "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

Today, analysis of an issue of unquestionably constitutional dimensions by resort to the common law of real property seems misplaced. At the turn of the century, however, it was not unusual because the first amendment had not yet been held to apply to the states through the fourteenth. Not until 1939 was Justice Holmes' property analysis questioned.

In Hague v. C.I.O., Justice Roberts invoked some property law of his own to rescue the streets and parks.

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. Th[is] privilege . . . must
not, in the guise of regulation, be abridged or denied.  

Justice Roberts, through the common law notions of adverse possession and trusts, raised the issue to the constitutional level of "privileges and immunities" protected by the fourteenth amendment.  

Despite the stark clash of the two opinions, Hague did not overrule Davis. References to Davis or its reasoning in subsequent cases attest to its continuing vitality. As shall be seen, for certain types of property, the Davis reasoning lives today. Hague did, however, carve out from the Davis reasoning a clear exception for "streets and parks." During the decade after Hague, the Court consistently invalidated statutes restricting speech in streets and parks. These cases, protecting access to the streets and parks for speech purposes, were the seeds of the public forum doctrine.  

Since 1960, virtually every form of public property has been the subject of public forum litigation. These have included: places valued by speakers for their symbolic "backdrops," such as military bases and nuclear power plants; places which themselves served as channels of discourse; places which had been used for purposes other than speech or expression; and places used for expressive purposes other than speech. As will be seen, the current version of the Davis reasoning reads: "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." Adderley v. Florida, 385 U.S. 39, 47 (1966). This formulation of the Davis reasoning has pervaded public forum cases through the 1970's and 1980's up to Cornelius v. NAACP Legal Defense & Educ. Fund., 105 S. Ct. 3439, 3448 (1985). Compare the quoted phrase with Davis v. Massachusetts, 167 U.S. 43, 47 (1897) ("[The State] may . . . limit[] the public use to certain purposes.") (quoting Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895)).  

17. Id. at 515-16. This passage has come to be the cornerstone of the public forum doctrine. See Kalven, supra note 3, at 13-15; Stone, supra note 8, at 238-39. It has been quoted in 43 federal court opinions since 1939. See LEXIS Genfed library, Courts file (author's calculations) (available in the files of the Fordham Law Review).  


19. Hague v. C.I.O., 307 U.S. 496, 515 (1939) ("We have no occasion to determine whether . . . the Davis case was rightly decided, but we cannot agree that it rules the instant case."). But see In re Hoffman, 67 Cal. 2d 845, 849 n.4, 434 P.2d 353, 355 n.4, 64 Cal. Rptr. 97, 99 n.4 (1967) (asserting that Hague did overrule Davis).  

20. Davis was cited without disapproval in several cases through the 1940's and 1950's. See, e.g., Fowler v. Rhode Island, 345 U.S. 67, 68-69 (1953); Niemotko v. Maryland, 340 U.S. 268, 279 (1951) (Frankfurter, J., concurring); Saia v. New York, 334 U.S. 558, 561 n.2 (1948).  


21. See infra notes 51-52 and accompanying text.  


24. See Kalven, supra note 3; Stone, supra note 8, at 239-41.  


communication, such as theaters, mailboxes and publications; public office buildings; and places used in connection with everyday travels, including bus and rail terminals, airports and parking lots.

The judiciary lacked experience with such diverse properties under the public forum concept. The courts tried to analogize to—or distinguish from—the "streets and parks" cases. But no coherent principles of analogy ever emerged. The public forum concept was stretched beyond recognition and became incapable of consistent application. The Supreme Court most recently restated the law of public fora in Perry Education Association v. Perry Local Educators’ Association. Unfortunately, Perry has only compounded the confusion.

II. CURRENT LAW

In Perry, a public school system had a policy of granting the incumbent labor union access to teachers’ mailboxes while denying similar acc-

36. The cases that explicitly analogized to streets and parks typically mentioned a characteristic or two that streets and parks did or did not have in common with the property at issue. See, e.g., Connecticut State Fed’n of Teachers v. Board of Educ., 538 F.2d 471, 480 (2d Cir. 1976) (mailboxes do not resemble thoroughfares); Moskowitz v. Cullman, 432 F. Supp. 1263, 1266 (D.N.J. 1977) (subway terminal is used by thousands of travelers each day).
cess to the rival union. The rival union claimed a violation of its first amendment rights, insisting that the mailboxes were public fora. The Supreme Court held that the mailboxes were not public fora and took the opportunity to restate the law of public fora in dictum.

Writing for the Court, Justice White established three categories of public property: public forum by tradition; public forum by designation; and nonpublic forum. Each category has a definition and receives a corresponding level of judicial scrutiny for restrictions on access to its property for speech purposes.

The first two categories contain public fora. The first, traditional public forum, comprises streets and parks. Restrictions on access to these properties come under strict judicial scrutiny. If the restrictions are not narrowly tailored to serve a compelling state interest, they are unconstitutional. The second, public forum by designation, encompasses those public properties that the state has dedicated primarily as sites for communicative activity. These include auditoriums, meeting facilities and theaters. Second category properties enjoy the same strict scrutiny protection as properties in the first category.

The third category is defined as "property which is not by tradition or designation a forum for public communication." Thus, all public property not included in the first two categories falls, by default, into the third category. Restrictions on access to third category properties will be upheld if they are simply "reasonable." "[T]he State may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." This standard can be viewed as the current incarnation of the Davis reasoning with two added requirements: reasonableness and a proscription on de jure viewpoint discrimination. Neither requirement substantially limits restrictions of access.

Reasonableness is the most relaxed standard of judicial scrutiny. In-

38. Id. at 39-41.
39. Id. at 41.
40. See id. at 44-48.
41. See id. at 53. The Court also rejected the rival union's equal protection claims under the fourteenth amendment. See id. at 54-55.
42. See id. at 45-46.
43. See id.
44. Id. at 45.
45. See id.
46. Id.
47. Id.
48. Id.
49. See id. at 46.
50. Id.
51. Id.
52. Id. (emphasis added).
53. Indeed, the section discussing the third category ends with the phrase quoted in supra note 18.
54. See L. Tribe, supra note 1, at 994-98.
deed, since Perry, no restriction of access to a nonpublic forum has ever been held unreasonable. The weakness of the ban on viewpoint discrimination in third category properties is evident from the Court's use of the word "merely" emphasized in the quoted passage. It follows from the passage that the Court would tolerate viewpoint discrimination so long as it is not the only justification for the restriction. Indeed, this appears to be what happened to the rival labor union in Perry. As the dissent noted, the school's policy of exclusive access to the mailboxes for the incumbent labor union "amounts to viewpoint discrimination." The majority explicitly stated that this kind of discrimination is permissible in third category properties. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."

Because property designations within the Perry framework will determine what access restraints courts will tolerate, it is crucial that the first two categories be readily recognizable and clearly defined. Unfortunately, the definition of the first category is not clearly developed. The second category, however, is adequately defined, and a comparison of the two definitions will help clarify the first category's shortcomings.

The Court introduces the second category with a conceptual formula by which it can be readily recognized. "A second category consists of public property which the State has opened for use by the public as a place for expressive activity." Although this characterization leaves some latitude for interpretation, it is at least an attempt to formulate an abstraction, a general theory of the second category. This sort of generalization is needed if the category is to be useful in applying judicial standards to the vast array of factual situations that give rise to public forum litigation.

By contrast, the first Perry category offers no conceptual formula. First category properties are described as "quintessential" and "tradi-

55. For an example of deference to those promulgating restrictions on nonpublic fora, see Low Income People Together, Inc. v. Manning, 615 F. Supp. 501, 518 (N.D. Ohio 1985) (requiring "convincing evidence" of unreasonableness). For a discussion of the vast discretion vested in the officials who govern nonpublic fora, see Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3451-52 (1985). But see Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1409 (9th Cir.) (while rejecting the argument that public utility poles are public fora, the court held that the granting of franchised monopolies to single cable television operators is unreasonable because it amounts to impermissible viewpoint discrimination), cert. granted, 106 S. Ct. 380 (1985).

56. See supra text accompanying note 52.
58. Id. at 49.
59. Id. at 45. Strictly speaking, the second category does not ensure access to property for speech purposes; by definition, property dedicated to expressive activity assumes access by someone. Rather, the protections afforded properties in this category work to subject speech restrictions to strict scrutiny, thereby ensuring equality of access.
60. See id.
Beyond these simple modifiers, the Court offers no characteristics inherent in first category properties. This is one of the category's major shortcomings. It leaves the lower courts without a conceptual method for determining the presence of first category public fora.

The first category does come with a rather brief list of kinds of properties included in it—"streets and parks." The first category thus restricts the public forum concept to its narrow roots. The brevity of the list, however, demonstrates a second shortcoming of this category: it fails to treat the extensions of the public forum concept developed by the courts in the years since Hague. Since the early "streets and parks" cases, courts have extended the public forum concept by analogy leading to the use, in this connection, of the phrase "streets, parks and other similar public places." Recently, the Supreme Court has used these terms. Even the brief for the incumbent labor union in Perry quoted this phrase. Viewed in this light, the absence in the first category of the phrase "and similar public places" is a glaring omission. It calls into question the status of many types of public property previously held to have been public fora.

Streets and parks are the only public areas specifically enumerated in the first Perry category. This brief enumeration is all the Supreme Court has expressed about the first category. The omission from the first category of a descriptive formula or even the elastic phrase "and similar public places" has worked to undermine the weight of the pre-Perry lower court law. Types of property long held to have been public fora have,

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61. See id.
62. Id. The list was soon expanded to include sidewalks. See United States v. Grace, 461 U.S. 171, 177 (1983).
64. See cases cited in supra notes 30-34.
68. See, e.g., Wright v. Chief of Transit Police, 558 F.2d 67 (2d Cir. 1977) (subway station); Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.) (airport), cert. denied, 421 U.S. 992 (1975); Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319 (2d Cir.) (welfare office building), cert. denied, 419 U.S. 838 (1974); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.) (bus terminal), cert. denied, 393 U.S. 940 (1968); United States Labor Party v. Knox, 430 F. Supp. 1359 (W.D.N.C. 1977) (public parking lots). These places do not seem to fall into either the first or second category. Yet they have all been held to be public fora.
since *Perry*, been relegated to the third category by some courts. Other courts have reached different results. The next section samples some of this conflict.

## III. SOME PROBLEMS

A case illustrating the problems of post-*Perry* analysis is *ACORN v. City of Phoenix*. In *Phoenix*, the property whose use was in dispute was the intersection of two streets. The "speakers" approached cars stopped at a traffic signal to address the driver. Public authorities considered this behavior hazardous and imposed an outright ban on solicitation at intersections. The district court upheld the restrictions as a constitutionally permissible regulation of first amendment rights.

It is not the result that is troubling about *Phoenix*, but rather its reasoning. Soliciting contributions from drivers stopped at traffic lights may not be a reasonable manner in which to exercise first amendment rights in the street. Thus, the ordinance could have been viewed as a proper "time, place and manner" regulation. The court, however, chose not to view it this way. Instead, the court applied a *Perry* analysis and held that intersections of two streets are third category properties. This holding, of course, easily validates the ordinance. But it also has the effect of allowing restrictions that distinguish among speakers "on the basis of subject matter and speaker identity." Furthermore, the holding removes intersections from the protections of strict judicial scrutiny.

The *Phoenix* holding is unfortunate and defective for at least two reasons. First, it is logically indefensible: How can the confluence of two first category properties constitute a third category property? Second, the holding creates within streets a subcategory, intersections, which it then neglects to define. Must speakers in the streets be on guard not to approach intersections lest they be stripped of their constitutional right

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69. See infra notes 77, 83 and accompanying text.
70. See infra notes 77, 84-93 and accompanying text.
72. *Id.* at 870.
73. *Id.*
74. The city ordinance provides: "No person shall stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupant of any vehicle." *Id.* At the time of the dispute *Phoenix* had no specific ordinance governing this activity. The ordinance quoted above was adopted just prior to trial. See *id.*
75. *See id.* at 871.
76. In United States Labor Party v. Oremus, 619 F.2d 683 (7th Cir. 1980), a similar ordinance, the one on which the *Phoenix* ordinance was based, was upheld as a valid time, place and manner restriction. See *id.* at 687-88; see also *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647-50 (1981); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).
80. Close examination shows no correlation between the court's subcategory of "in-
to a forum? Of course not. Yet this would be the consequence of the Phoenix holding. Phoenix is an instance of resort to the convenient third category for want of conceptual standards for determining the applicability of the first category.

Another apparent misapplication of the Perry categories appears in the Second Circuit case of Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority. In terse dictum, with dubious support, the court decreed that "[t]he public areas of the MTA [subway] stations are in the third [Perry] category." This view conflicts with most prior case law. In an earlier case, Wright v. Chief of Transit Police the Second Circuit held the government to a "compelling interest" standard to justify a ban on speech in subway public areas. This is tantamount to holding that subway public areas are first category public fora. In Moskowitz v. Cullman, the court, after quoting Justice Robert's famous passage from Hague, stated flatly that "the PATH [subway] terminal is a public forum." Other courts substantially agree, drawing analogies between subway stations and public streets.

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81. 745 F.2d 767 (2d Cir. 1984).
82. The court devoted only one sentence to the issue. See id. at 773.
83. The court's citation reads: "See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 764-66 (D.C. Cir. 1983) (Southwest Africa) (holding public areas of airport in third category); Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. 1981) (same), cert. dismissed, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982)." Gannett, 745 F.2d at 773. Neither Southwest Africa nor Fernandes holds that public areas of airport are nonpublic fora. It is almost impossible to interpret them as doing so.

In Southwest Africa, the court reversed the district court's holding that the public areas of an airport "constituted a 'nonforum.'" Southwest Africa, 708 F.2d at 764-66. The court was unequivocal: "[I]t seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." Id. at 764. "Whatever common-sense differences may exist in the forms of free speech allowable in airports, as opposed to parks and streets, an unusual consensus of judicial, legislative, and administrative opinion would classify the public areas of [airports] squarely within the public forum family." Id. at 766. Indeed, the court cites seven similar airport cases with which it is in accord. See id. at 764-65. The third of these is Fernandes. The Fernandes court made its holding clear on the page to which the Gannett court cites: "[W]e find that the interior of the terminals contains areas which are public forums." Fernandes, 663 F.2d at 626.
85. 558 F.2d 67 (2d Cir. 1977).
86. See id. at 68 n.1.
89. See supra note 15.
90. Moskowitz, 432 F. Supp. at 1266.
91. "No distinction can be wrung for First Amendment purposes between a subway platform and a public street." People v. St. Claire, 56 Misc. 2d 326, 328, 288 N.Y.S.2d 388, 391 (Crim. Ct. 1968). "The contest for men's minds, the 'free trade in ideas'... cannot expire upon a subway platform or the First Amendment to our Constitution has gone partially underground." Id. at 329, 288 N.Y.S.2d at 392 (citation omitted); see also
Just weeks after the decision was rendered, the *Gannett* view of subways as nonpublic fora was criticized in *Penthouse International, Ltd. v. Koch*. With all due deference, I cannot understand how the Second Circuit in *Gannett* derives authority for the statement that public areas of the MTA [subway] stations belong in the third *Perry* category. 

The *Penthouse* court took pains to distinguish *Gannett* and arrived at its own theory of subway stations. "I do not read *Gannett* or its rationale as requiring me to depart from the clearly established line of authority which characterizes such public property, thus used, as a designated public forum." 

Thus, there appear to be three views on the status of subway public areas for first amendment access purposes: subway stations, analogous to public streets, are traditional public fora; subway stations are public fora by designation; and subway stations are nonpublic fora. This particular confusion has appeared only since *Perry*. The pre-*Perry* cases were basically consistent. This confusion results from the first category's relative lack of conceptual principles by which it can be rationally applied to new situations.

As *Perry's* deficiencies and the conflicts among the lower courts demonstrate, the public forum doctrine needs answers to this question: What is it about streets and parks that is conducive to free speech that does not interfere with the normal use of the property? To answer this question is to deduce those characteristics of streets, parks and like places that were influential in arriving at holdings evincing the view that "streets are natural and proper places for the dissemination of information and opinion." 

These are the characteristics that make public fora of streets and parks. It should be these characteristics that determine whether any other public property is a public forum. In other words, the test for public fora should not be a "laundry list" based on a static view of history, but rather an inquiry into whether a particular public property suffi-

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93. *Id.* at 1348.
94. *Id.* at 1349 (emphasis added); accord Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985); Lebron v. Washington Metropolitan Area Transit Auth., 749 F.2d 893 (D.C. Cir. 1984).
95. See *supra* notes 88-91 and accompanying text.
96. See *supra* note 94 and accompanying text.
97. See *supra* note 84 and accompanying text.
98. See *supra* notes 85-91 and accompanying text.
ciently embodies the public forum qualities of streets and parks. These characteristics, then, are the indicia of public fora.

IV. Proposal

This Note proposes five characteristics that, if present in any combination, strengthen the argument that the particular property is a first category public forum: 1) the property is open and spacious; 2) the property is a public thoroughfare; 3) the property is frequented by many people; 4) the people are present as private citizens, rather than in any official capacity; and 5) the people are present voluntarily. The following paragraphs examine the five indicia individually.101

A. Openness

Since the "streets and parks" cases, courts have been concerned that public fora should be spacious.102 A public forum should be relatively spacious to ensure both the physical and psychological comfort and convenience of all users of the property. The assurance of physical convenience is a practical concern: keeping passageways open so that traffic may flow unobstructed.103 There must be ample room for listeners to

101. It should be noted here that the proposed indicia obtain only when access to public realty is sought. The public forum doctrine has been invoked in trying to gain access to public personality. E.g., Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Alaska 1978) (city publication); see also Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971) (state college newspaper); Radical Lawyers Caucus v. Pool, 324 F. Supp. 268 (W.D. Tex. 1970) (state bar journal). Applying the public forum concept to mandate access to a public publication presents a host of interesting questions. For example, the Supreme Court rejected mandatory access to private publications, see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), but granted such access in the broadcasting context. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The distinction rested in large measure on the scarcity of airwaves relative to printing presses. See L. Tribe, supra note 1, at 697-98. Does the scarcity of government printing presses together with the public forum notion require mandatory access?

Whatever the application of the public forum doctrine to personality, the ideas advanced in this Note are not designed to reach the question.


listen as well as for non-listeners to go about their business. The speech must not materially interfere with the normal functioning of the property. For example, a speaker should not be permitted to assemble a crowd near a staircase or doorway. The interiors of buses and trains, with their single narrow aisles, should also be free of obstruction. In general, the “openness” characteristic of public fora ensures that a speaker is not putting the property to a use that is inconsistent with its normal functioning.

The second function of this indicium, the psychological comfort of all users of the property, bears on the concern that the audience not be captive. This notion will be discussed in connection with the “voluntariness” indicium.

B. Thoroughfare

A thoroughfare is a public place, open at both ends, through which traffic passes. Thus, rather than being a characteristic, this indicium is more a characterization, a general term encompassing streets, parks, sidewalks and similar places. It is best understood by pointing out an often overlooked distinction. The “public” in “public property” refers to ownership. The “public” in “public forum” refers to use and occupation. Although the state holds title to a public forum, the state “seek[s] neither privacy within nor exclusive possession” of the property.

Publicly owned places that are not public thoroughfares—for example mailboxes or an art gallery—are essentially publicly owned private fora if fora at all. Their use is intended exclusively for those privy to the


108. In re Hoffman, 67 Cal. 2d 845, 851, 434 P.2d 353, 356, 64 Cal. Rptr. 97, 100 (1967); see also Flower v. United States, 407 U.S. 197, 198 (1972) (per curiam) (street owned by military base is a public forum because the base has abandoned all claim to its control).

property. Any other view would open all publicly owned property to aspiring speakers without regard to whether the property is open to the public at large.

Over time, changes in people's locomotive habits have brought corresponding changes in the nature of thoroughfares. Judge McMillan noted this change in the context of automobiles:

Publicly owned streets, sidewalks and parks are "historically associated with the exercise of First Amendment rights" in part because, historically, those places were where the people were. Handbilling, soliciting, and speaking in downtown areas could be expected to reach the great numbers of citizens who shopped and worked there. Unable to go onto private property, people with a message went to the streets and sidewalks to spread their word, ultimately deriving First Amendment protection for their activities.

The automobile has radically changed the places where people shop and otherwise appear in public. In many places downtown streets have emptied and patronage of suburban shopping centers has swelled. The new "downtowns" . . . are usually privately owned and thus not accessible as of right to the activities associated with free speech. People en route to the shopping plazas in cars are ordinarily beyond the practical reach of speech.

Handbillers and solicitors are therefore remitted to the "other similar public places" that most closely resemble the traditional gathering places of the people—the parking areas and approaches to state stores and other public buildings.

In addition to the automobile, advances in air, bus and various forms of rail travel have given rise to thoroughfares beyond the contemplation of the founders of the public forum doctrine. Therefore, references to "traditional" or "historical" public fora ought not require a static historical view of streets and parks. On the contrary, bus and train terminals and airports are the streets of modernity. Parking lots are inseparable
adjuncts to modern streets. In the final analysis, it is thoroughfares that are traditionally and historically associated with the exercise of free speech. Courts should not freeze, for public forum purposes, the concept of a thoroughfare as it stood in 1939.

C. *Populousness*

This indicium addresses the practical concern that since speech requires a listener, public speech requires many. The public forum doctrine is misapplied if used to guarantee access to a small, predictable group of listeners. For the term public, in the public forum sense, comprehends a sort of anonymity—at least initially—among the audience.

Of course, this indicium should not exclude those speakers who address individuals, one by one, rather than a group of listeners. The characteristic is measured over time. Thus, many consecutive individual listeners indicate a public forum as well as does a single large audience. Moreover, the size of the audience should be, of course, relative to the population of the region in which the forum is located.

“The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.” This opportunity requires the right to speak “where the relevant audience may be found.” To the public speaker, this means a place that a substantial cross section of the public frequents—a public forum.

It must be made clear, however, that a large audience refers to people who are present, not to viewers of a broadcast or readers of press coverage. This limitation prevents abuse of the public forum doctrine by

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117. This is the case with those most prolific of modern public forum litigants, International Society for Krishna Consciousness (ISKCON). ISKCON has brought over thirty public forum cases since 1970. See LEXIS, Genfed library, Courts file (author’s calculations) (available in the files of the *Fordham Law Review*). This is particularly interesting in light of Professor Kalven’s observation that the Jehovah’s Witnesses brought most of the thirty or so first amendment cases to reach the Supreme Court in the 1930’s and 1940’s. See Kalven, supra note 3, at 1 & n.2.
121. Issues concerning access to the media are beyond the scope of this Note. See supra note 101. The character of the property, the central issue in public forum analysis, is not, however, changed by the presence of cameras or reporters. If it were, then the public forum status of a place could change from day to day, indeed, minute to minute. Such fickle law would be both difficult to apply and easy to circumvent by hiring a cam-
those who would invoke it to fortify their speech with a dramatic backdrop. The public forum doctrine affords the bare opportunity to exercise first amendment rights. It should be beyond both the power and purpose of the doctrine to bolster the content of speech. Indeed, such use would cast the state as an unwitting ally of the speaker. Simply put, the public forum doctrine must not be allowed to deteriorate into a “public backdrop” doctrine.

Thus, military bases, prisons and nuclear power facilities are not public fora. The first amendment requires that the state allow citizens the opportunity to air opinions about these places. No similar requirement exists that the property itself be made available as the stage and scenery for the speech.

The speaker might rejoin that the military personnel or the nuclear facility employees are his intended audience. Still, the speaker’s recourse is not access to the military base or the nuclear facility. These places evince none of the other proposed indicia and are not public fora. Rather, the speaker should look to the nearest public forum—an adjoining street, park or other similar place—to reach his audience.

Indeed, this appears to be what the Supreme Court had in mind when ruling that a public forum “will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression.”

D. Private Capacity

A public forum is an assembly of people in their private capacities. The operative distinction is between people on public property for private
purposes, \textsuperscript{129} and those on public property to carry on business for or with the state. \textsuperscript{130} In the latter case, the state is, in a sense, coercing the listener's presence. \textsuperscript{131} The official business of the state should not be used to assemble a speaker's audience. \textsuperscript{132} For, as has been noted, the public forum doctrine assures access to property, not to public employees or people having business with the state.

Just as the state must not be required to bolster the content of speech by providing a backdrop, \textsuperscript{133} it must not be required to guarantee the speaker an audience, \textsuperscript{134} for in both cases the state would be actively aiding the speaker's cause. \textsuperscript{135} Thus, the reception area of a social services office, \textsuperscript{136} teachers' mailboxes \textsuperscript{137} and ticket lines at transportation terminals \textsuperscript{138} are probably ineligible for public forum status. In sum, the public forum doctrine is not meant to ally the state with the speaker, but only to ensure the state's tolerance of the speaker's activities. \textsuperscript{139}

E. Voluntariness

Freedom to receive information is the corollary of the freedom to

\textsuperscript{129} Examples of private purposes include recreation and travel.

\textsuperscript{130} See, e.g., Rhoads v. McFerran, 517 F.2d 66, 68 (2d Cir. 1975) (public or private nature of forum may turn on the capacity of individuals engaged in the speech as well as the capacity in which the audience is present). Examples of people on public property to carry out business for or with the state include public employees and recipients of free cheese.

\textsuperscript{131} It can be argued that people in the streets are in their public capacity as travelers on public thoroughfares. Thus, the state would be assembling the speaker's audience simply by providing public streets. See Kunz v. New York, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting). This argument, however, goes too far, for the State coerces the presence of street travelers in only a nominal sense because they are transient. Public employees in the workplace and those transacting official business with them are present for a relatively longer time. The difference is that the street affords the speaker a mere opportunity to reach an audience while the workplace would actually secure an audience. See New York City Unemployed & Welfare Council v. Brezenoff, 742 F. 2d 718, 722 (2d Cir. 1984).

\textsuperscript{132} Cf. Winston-Salem/Forsyth County Unit v. Phillips, 381 F. Supp. 644, 646 (M.D.N.C. 1974) ("The State is not required to provide plaintiffs with a special forum in order to advocate their views."). See generally Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 51-53 & n.10 (1983) (discussing the incompatibility of public forum status with a place used to communicate official business).

\textsuperscript{133} See supra notes 123-24 and accompanying text.

\textsuperscript{134} Cf. Hanover Township Fed'n of Teachers v. Hanover Community School, 457 F.2d 456, 461 (7th Cir. 1972) (first amendment "provides no guarantee that a speech will persuade or that advocacy will be effective").

\textsuperscript{135} See New York City Unemployed & Welfare Council v. Brezenoff, 742 F.2d 718, 723 (2d Cir. 1984). See supra note 123 and accompanying text.


\textsuperscript{139} See Kalven, supra note 3, at 2.
This freedom of the listener necessarily includes the liberty to choose what information to receive. The public forum doctrine has long taken account of the listener's rights through its concern that the audience not be captive.

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

Riding in a bus or other form of transportation is not the only way an audience can be rendered captive. For instance, in the case of oral communication, everyone within earshot of the speech is somewhat captive. Unlike eyes, nose and mouth, ears cannot be shut. Such a broad view of captivity, however, encroaches too far on the first amendment protections. The better view of captivity turns on the listener's freedom to remove himself from earshot. This ability must likewise not be interpreted in the extreme. Strictly speaking, only the incarcerated and the infirm are unable to get themselves out of earshot. Yet theirs is not the only captivity with which the public forum doctrine sympathizes. Captivity, for first amendment purposes, is best phrased as the inability to get out of earshot without having to go out of one's way.

Under this view, doorways, turnstiles and "bottlenecks" of any kind render an audience captive. Similarly, any place where people must stand in a line makes for a captive audience. A speaker should not be allowed to use a public forum to hold an audience captive. More accurately, a place within earshot of people who are "captive" should not be considered a public forum.

These five indicia are not sine qua non of public fora. The indicia are offered as a flexible guide to recognizing public fora and distinguishing them from other settings. The more of these indicia that coexist in a particular case, the stronger the argument that the property is a tradi-

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141. This notion was implicit in some of the early "street and parks" cases. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (qualifying the speaker's right to free speech with the listener's "desir[e] to receive it"); Schneider v. State, 308 U.S. 147, 160 (1939) (giving examples of how the speaker's rights are circumscribed by the listener's rights).
143. Id. at 307 (Douglas, J., concurring).
144. Cf. New York City Unemployed & Welfare Council v. Brezenoff, 742 F.2d 715, 722 (2d Cir. 1984) (welfare recipients could not leave waiting room to avoid solicitors); International Soc'y for Krishna Consciousness v. Rochford, 585 F.2d 263, 268-69 (7th Cir. 1978) (passengers on line become "part of captive audience").
146. See supra note 144.
tional public forum. Conversely, the absence of one or more of the indicia militates against public forum status.

CONCLUSION

Courts have long acknowledged that the question of whether a particular property is a public forum turns on the character of the property.\textsuperscript{147} Yet neither court nor scholar has ever tried to distill characteristics of property which are indicative of a public forum. Rather, the public forum doctrine has developed into little more than a "laundry list" of types of property. Because static lists are unresponsive to the changing uses of public property, there have been inconsistent results when courts were asked to apply the doctrine to "unlisted" types of property. Without a conceptual approach to the public forum doctrine, courts lack the necessary tools for applying that doctrine to newly emerging types of public property. Proper judicial use of the characteristics proposed in this Note as indicia of public fora would help solve this problem.

Peter Jakab

\textsuperscript{147} See supra note 2 and accompanying text.