

# THE FIRST AMENDMENT RIGHT TO A PUBLIC FORUM

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*When faced with organized protest against governmental policies, groups controlling governmental processes often seek to avoid change and a resulting diminution of power by denying dissenting groups access to facilities for communication of grievances to the community. In many situations this denial of access takes the form of barring dissenters from the use of public communication facilities. Yet, the first amendment seems to place the Constitution on the side of free access to the community. The first amendment's prohibition on denial of access to communication facilities has been termed "the right to a public forum," and has been the subject of scrutiny by the Supreme Court in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).*

In *University Committee v. Gunn*<sup>1</sup> a United States district court stated *obiter dicta* that "[i]ndeed, it has been held that the individual must be afforded some appropriate 'public forum' for his peaceful protests."<sup>2</sup> Although this bald assertion of a right to a public forum<sup>3</sup> finds some support among commentators<sup>4</sup> and

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<sup>1</sup> 289 F. Supp. 469 (W.D. Tex.), *prob. juris. noted*, 393 U.S. 819 (1968), *restored to calendar for reargument*, 395 U.S. 956 (1969).

<sup>2</sup> *Id.* at 476.

<sup>3</sup> The per curiam opinion of the court in *University Comm. v. Gunn* cited *Guyot v. Pierce*, 372 F.2d 658, 661 (5th Cir. 1967), and *Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, as authority for its statement. While *Kalven* does indeed endorse the concept of a public forum right wherein the individual has a right to a forum for his peaceful protest, this is merely persuasive authority. It does not support the language "it has been held . . ." used by the Court in *Gunn*. And *Guyot*, a case which held unconstitutional a Jackson, Mississippi ordinance which banned parades without a permit, does not contain any language establishing a right to a public forum. There, the ordinance was held constitutionally defective in that it lacked standards to guide the authorities in determining whether to grant or deny the permit, and thus would seem to be a restatement of *Kunz v. New York*, 340 U.S. 290 (1951). The ordinance, however, imposed a flat ban on parades in the streets—the use of the streets being limited to commercial intercourse and travel in connection with legitimate business.

<sup>4</sup> See, e.g., *Barron, Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); *Kalven, supra* note 3.

persons interested in the field of civil liberties,<sup>5</sup> others have found the right to a public forum to be somewhat less extensive, limited to those areas of public ownership "dedicated" to general use.<sup>6</sup> Still another investigator has panned the idea of a public forum right as "nonsense" and obsolete in light of modern communications theory.<sup>7</sup> In addition to analyzing the origins and constitutional underpinnings of the right to a public forum, this article will discuss the present limits of the "right" and its potential for future expansion by legislative action.

#### THE DECISIONAL BASES

The evolution of the right to a public forum began with *Davis v. Massachusetts*,<sup>8</sup> and nearly ended there. Davis, a preacher whose congregation apparently consisted of the crowds on the Boston Common,<sup>9</sup> was convicted under a city ordinance which forbade "any public address . . . except in accordance with a permit from the mayor." In affirming the conviction of Davis, the Supreme Judicial Court of Massachusetts, speaking through Judge (later Justice) Holmes, recognized that a question of freedom of speech was involved in the case. Seeking to avoid any conflict with the first amendment by resorting to statutory construction, Judge Holmes interpreted the ordinance to be other than a general prohibition on speech, and thus avoided possible conflict with the ban expressed in the *Des Plaines v. Poyer*<sup>10</sup> decision. Echoing *McAuliffe v. Mayor of New Bedford*<sup>11</sup> Holmes indicated that while the defendant arguably had a right to free speech, in view of the licensing ordinance then before the court he had no right to speak on the Boston Common without a permit. Although a

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<sup>5</sup> Brief for Special Committee on the Bill of Rights of the American Bar Association as Amicus Curiae, *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>6</sup> Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273 (1967).

<sup>7</sup> Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1966).

<sup>8</sup> 167 U.S. 43 (1897), affirming 162 Mass. 510, 39 N.E. 113 (1895).

<sup>9</sup> Davis previously had been convicted for violation of an ordinance having the same effect as the ordinance involved in the 1895 decision. See *Commonwealth v. Davis*, 140 Mass. 485, 4 N.E. 577 (1886).

<sup>10</sup> 123 Ill. 348, 14 N.E. 677 (1888). The ordinance in *Des Plaines* declared "all public picnics and open-air dances within the limits of the village . . . to be nuisances." *Id.* at 349, 14 N.E. at 678. While acknowledging the "power" of the village to declare what shall constitute a nuisance, the Supreme Court of Illinois noted that the determination of what constitutes a nuisance was a question of *fact*, not law, and held the ordinance to be void.

<sup>11</sup> 155 Mass. 216, 29 N.E. 517 (1892). "The petitioner has a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

permit ordinance has since been held constitutionally permissible when properly drawn,<sup>12</sup> the rationale upholding the permit ordinance in *Davis* seemed to indicate that a flat ban would be permissible and constitutional:

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. When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.<sup>13</sup>

In affirming, the Supreme Court reinforced this implication that an outright prohibition on "speech use" would be constitutional: "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."<sup>14</sup> Under the Supreme Court's rationale in *Davis*, an absolute ban on speaking in public streets and parks, being less than a total prohibition on the use of those facilities, was constitutionally permissible because, as the Court stated, the "greater power contain[ed] the lesser."

Before passing to a criticism of the Supreme Court's reasoning, and indirectly that of Judge Holmes, it should be noted that the Holmes opinion in *Davis* did lay the foundation for future expansion of the freedom of speech protection by noting the potential applicability of equal protection arguments to attempted speech limitations. His seeming reference<sup>15</sup> to *Yick Wo v. Hopkins*<sup>16</sup> indicates that though aware of the potentially improper use of permit ordinances of the type upheld, he apparently believed that the equal protection argument of *Yick Wo* would provide sufficient protection against abuse.<sup>17</sup> A similar recognition of the potential

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<sup>12</sup> See, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941).

<sup>13</sup> 162 Mass. at 510, 39 N.E. at 113 (emphasis added).

<sup>14</sup> 167 U.S. at 48.

<sup>15</sup> "It is argued that the ordinance really is directed especially against free preaching of the gospel in public places, as certain western ordinances, seemingly general, have been held to be directed against the Chinese." 162 Mass. at 512, 39 N.E. at 113.

<sup>16</sup> 118 U.S. 356 (1886).

<sup>17</sup> Judge Holmes may be chided for being overly optimistic. See *Coughlin v. Chicago Park Dist.*, 364 Ill. 90, 4 N.E.2d 1 (1936); *People ex rel. Doyle v. Atwell*, 232 N.Y. 96, 133 N.E. 364 (1921). See generally Pollit, *Free Speech for Mustangs and Mavericks*, 46 N.C.L. REV. 39 (1967).

applicability of equal protection reasoning to freedom of speech problems was demonstrated by the United States Supreme Court in its decision on appeal.<sup>18</sup>

Nevertheless, the Supreme Court may be chided for ignoring what appears to have been the main thrust of the defendant's argument<sup>19</sup> that the "Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways, and the preaching of the gospel there has been, from time immemorial to a recent period, one of those ways."<sup>20</sup> In raising the allegation of such traditional "usage," Davis was attempting to assert a common law right<sup>21</sup> of the public in general to use the Boston Common for speech purposes. The logic of the Court's decision ignores this argument for the question raised was the existence of such a common law right and, if capable of infringement by any means, whether this right had been infringed by the action of the Boston city government. To answer that the state possesses the power, in some manner, to abolish or limit *general* common law rights was to state the obvious. What the Court left unanswered, however, was the question of whether the state can infringe common law speech rights. In short, the argument that the greater power included the lesser was not a sufficient answer to the defendant's legal argument.

Despite this weakness of the *Davis* decision and the possible limitation of the holding to the constitutional validation of nondiscriminatory "mere administrative"<sup>22</sup> licensing ordinances, the dictum of the case was widely followed and, like *McAuliffe*,<sup>23</sup>

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<sup>18</sup> 167 U.S. at 47.

<sup>19</sup> Davis doubtless raised this same argument in the Supreme Judicial Court of Massachusetts. Since there is, however, no direct evidence that he did, Judge Holmes escapes the thrust of criticism.

<sup>20</sup> 167 U.S. at 46.

<sup>21</sup> The language used by Davis in his brief was an apparent attempt to invoke the Blackstone formula for the transformation of local custom into common law right: "Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary." 1 W. BLACKSTONE, COMMENTARIES \*67.

<sup>22</sup> 167 U.S. at 48. The characterization of the ordinance in question as vesting a "mere administrative" function in the mayor may mean that the Supreme Court believed that such an administrative discretion was subject to control through the mandamus powers of the courts. See *Goodman v. Board of Educ.*, 48 Cal. App. 2d 731, 120 P.2d 665 (1941). But see *Coughlin v. Chicago Park Dist.*, 364 Ill. 90, 4 N.E.2d 1 (1936).

<sup>23</sup> See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

spawned a series of decisions upholding ordinances granting unlimited discretion to speech licensing authorities.<sup>24</sup> Although *Davis* could have been attacked as incorrectly decided for its denial by implication of a right to a public forum in the streets and parks<sup>25</sup> as well as for its reliance upon the *McAuliffe* right-privilege distinction,<sup>26</sup> it was not until 1939 and the case of *Hague v. CIO*<sup>27</sup> that the right to a public forum became recognized and the implication of the *Davis* decision denying such a right overruled.

The controversy in *Hague* involved efforts by Mayor Hague, then political boss of Jersey City, New Jersey, to maintain the non-union labor system in Jersey City by keeping union organizers out of town, and limiting the range of their activities in town. One of the mayor's chief weapons was the suppression of speech and assembly in public streets and parks,<sup>28</sup> although the coercion of private hall owners was an additional feature of his anti-union campaign.<sup>29</sup> Hague sought to justify the suppression of speech and assembly mainly by the recitation of threats of violence against the intended speakers—threats generated in large measure through the efforts of Hague himself.<sup>30</sup> Groups seeking to organize the Jersey City industries brought suit in federal court to enjoin the anti-union tactics of Mayor Hague and, more specifically, to compel him to

<sup>24</sup> See, e.g., *Love v. Phalen*, 128 Mich. 545, 87 N.W. 785 (1901); *People v. Smith*, 236 N.Y. 255, 188 N.E. 745 (1934); *People ex rel. Doyle v. Atwell*, 232 N.Y. 96, 133 N.E. 364 (1921). See also the complaint of District Judge Clark in *Hague v. CIO*, 25 F. Supp. 127, 151 (D.N.J. 1938), *aff'd*, 307 U.S. 496 (1939).

<sup>25</sup> Note the discussion of contrary decisions in *Wilson v. Eureka City*, 173 U.S. 32 (1899). The grounds upon which Justice Halmer distinguished *Des Plaines v. Poyer*, 123 Ill. 348, 14 N.E. 677 (1888), in *Davis* would also seem inconsistent with the result reached in *Davis* inasmuch as the result of *Davis* was a general prohibition of speech.

<sup>26</sup> See *Van Alstyne*, *supra* note 23, at 1439.

<sup>27</sup> 307 U.S. 496 (1939).

<sup>28</sup> See Comment, *The Hague Injunction Proceedings*, 48 YALE L.J.257 (1938). The suppression of dissent by denial of access to the streets and parks has not disappeared, despite the decision in *Hague*. A study undertaken to investigate the disorders surrounding the Democratic National Convention in Chicago in August, 1968 has accused the city of suppressing dissent by denial of permits for use of streets and parks when such permits are sought by groups holding "unpopular" views. See N.Y. Times, August 21, 1969, at 26, col. 1. The City of Oakland, California, apparently attempted to achieve a similar result during the early phases of the anti-Viet-Nam war movement. This attempt resulted in the decision of the district court in *Hurwitz v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965), granting use of the streets for protest purposes.

<sup>29</sup> *Hague v. CIO*, 101 F.2d 774, 778 (3d Cir. 1938), *aff'd*, 307 U.S. 496 (1939).

<sup>30</sup> See 101 F.2d at 779; Record, vol. 1, at 35, *passim*, *Hague v. CIO*, 307 U.S. 496 (1939).

cease denying speaking permits for Jersey City public parks and to cease enforcing the absolute ban on leaflet distribution. The injunction was granted. Although Judge Clark in the district court referred to the municipality's proprietary rights in the public parks and streets as "subject to an easement of assemblage in such parks as are dedicated to the general recreation of the public,"<sup>31</sup> the presence of the Committee on the Bill of Rights of the American Bar Association<sup>32</sup> as *amicus curiae* appears to have contributed significantly to the holding of the Supreme Court on the right to a public forum. While the CIO group relied primarily upon the discriminatory denial of permits, an argument compatible with and devolving from the *Davis* decision,<sup>33</sup> the Committee on the Bill of Rights argued the broader principle that "the constitutional doctrine which should control the problems is that a city *must in some adequate manner provide* places on its property for public meetings—as distinguished from a more rigid doctrine which would *compel* both its streets and its ordinary parks to be made available."<sup>34</sup> Justice Roberts, speaking for a plurality of the Court, made the following statement concerning the right to a public forum: Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>35</sup> This recognition of the common law right of the citizen to use the public streets and parks as a free speech forum overruled the implication of the *Davis* decision. Although *Davis* was distinguished by Mr. Justice Roberts on the ground that *Davis* had not applied for a permit, the dissent of Judge Davis in the Third Circuit properly

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<sup>31</sup> 25 F. Supp. at 145.

<sup>32</sup> The Committee was composed of Zechariah Chafee, Jr., Douglas Arant, Grenville Clark, Osmer Fitts, George Haight, Monte Lemann, Burton Musser, John Francis Neylan, Joseph Padway, Lloyd Garrison, Charles P. Taft and Ross Malone, Jr. Brief for Committee on the Bill of Rights of the American Bar Association as *Amicus Curiae* at 1, *Hague v. CIO*, 307 U.S. 496 (1939):

<sup>33</sup> See Brief for Appellee at 92-99, *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>34</sup> Brief for Committee on the Bill of Rights of the American Bar Association as *Amicus Curiae* at 31, *Hague v. CIO*, 307 U.S. 496 (1939) (emphasis in original). In its preliminary brief the Committee argued that "a city *must* make some reasonable provision for the holding of outdoor meetings. If it chooses to close its streets to such meetings and can constitutionally do so, it must make its parks available at reasonable times and places." Brief for Special Committee on the Bill of Rights of the American Bar Association as *Amicus Curiae* at 23, *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>35</sup> 307 U.S. at 515.

recognized the distinction as trivial to the thrust of the *Davis* reasoning.<sup>36</sup> Indeed, four years later in *Jamison v. Texas*<sup>37</sup> the Supreme Court itself recognized that *Hague* had overruled *Davis* on this point.

This overruling of the dictum in *Davis* by the above-quoted statement of Justice Roberts was the crucial part of the *Hague* opinion, for the remainder of the decision can be reconciled with the *Davis* holding affirming the constitutionality of a nondiscriminatory speech licensing ordinance. With respect to licensing the Court noted that the right to a public forum "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."<sup>38</sup> Though not an entirely lucid statement, this remark can be interpreted to mean that the state may retain a degree of regulatory authority. Indeed, most scholars on the subject would agree that the right of free speech is incapable of realization in the absence of regulatory authority where a limited amount of time or space is involved.<sup>39</sup> Such regulatory authority is not, however, that of the censor as under the *Davis* dictum; rather, it is more akin to that of the traffic policeman or the chairman of the town meeting.

#### A CONSTITUTIONAL JUSTIFICATION OF THE PUBLIC FORUM RIGHT

It is submitted that the right to a public forum is a two level right recognized by the developing first amendment case law. At the lower level is the "constitutional obligation" of the government to provide access to certain facilities of mass communication as an irreducibly minimal forum for the communication of ideas. In essence this "obligation" means that the government may not utilize such laws as those forbidding trespass and loitering as a means to prohibit the use of certain "forum" areas for first amendment purposes. On the second level the right to a public forum requires that publicly owned communication media not

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<sup>36</sup> 101 F.2d at 800.

<sup>37</sup> 318 U.S. 413, 415 (1943).

<sup>38</sup> 307 U.S. at 516.

<sup>39</sup> See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). See also *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Cottonreader v. Johnson*, 252 F. Supp. 492, 498 (M.D. Ala. 1966).

subject to the first level test are bound to render service on a nondiscriminatory basis, constituting thereby a guarantee of nondiscriminatory access to publicly owned media.

The dictum in *Hague v. CIO* recognizing the right to a public forum is but a starting point for an inquiry into the constitutional justification of public forum rights. There, Justice Roberts took the easy way out by falling back upon the accident of the English common law that parks and streets historically had been used for public speech and assembly. The result of such reliance upon the common law as the justification for the public forum in the streets and parks is the disutility of the *Hague* reasoning as a source of constitutional theory. While *Marsh v. Alabama*<sup>40</sup> may be justified by the language of *Hague v. CIO* to the extent that the streets are still a public forum despite the fact that title to the streets may rest in private hands,<sup>41</sup> the language of Mr. Justice Roberts ignores the purpose of the right to a public forum as well as its more formidable constitutional underpinnings.

As recognized by the amicus brief of the Committee on the Bill of Rights in *Hague v. CIO*, rights of free speech are meaningless unless there is some method by which the message of the speaker can be communicated to the public.<sup>42</sup> Thus, the first amendment should be viewed as carving out a public forum in both the state and private arenas in order to preserve a minimum channel of communication.<sup>43</sup> Rich, influential and entrenched interests have ready access to the public through their domination and control of the privately-owned mass communication media;<sup>44</sup> their wealth, power and influence are ample assurance that their message will find a channel to the public ear. On the other hand, the poor and

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<sup>40</sup> 326 U.S. 501 (1946). See also *People v. St. Clair*, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968).

<sup>41</sup> In *Marsh* the defendant, a Jehovah's Witness, was convicted under an Alabama trespass statute for distributing religious tracts on the streets of a town wholly owned by the Gulf Shipbuilding Corporation. This conviction was reversed on appeal to the United States Supreme Court. 326 U.S. 501 (1946).

<sup>42</sup> See also *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537, cert. denied, 385 U.S. 844 (1966); *Wollam v. Palm Springs*, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963).

<sup>43</sup> Kalven, *supra* note 3, at 11-12.

<sup>44</sup> See Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964); cf. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters Inc.*, 270 F. Supp. 619 (S.D.N.Y. 1967).

unrepresented are provided with a minimal means of communication to the public ear by the first level right to a public forum.<sup>45</sup> Furthermore, this first level right equalizes the ability of groups of the poor and unrepresented to influence their own lives and destinies and those of their communities by providing a place where they can inexpensively gather to organize and consolidate for political and social action, and as such is entirely consistent with orthodox first amendment theory. It has been suggested<sup>46</sup> that two of the functions of the first amendment are the maintenance of an effective system of freedom of expression<sup>47</sup> and the securing of participation in the social and political processes of the country.<sup>48</sup> The base level public forum right of opportunity for communication to the public serves both these goals. Where facilities are available as a matter of right, the citizenry can use these facilities for speech and assembly to challenge governmental action.<sup>49</sup> Furthermore, this invitation to dispute, inherent in the public forum right, may serve other purposes including the furthering of individual self-fulfillment and providing for an escape valve for closely felt emotions. A reading of Marshall McLuhan<sup>50</sup> suggests that these functions of the first amendment may be more important than the traditional market place theory of Justice Holmes.<sup>51</sup> While the provision for a public forum might lend itself to serving the truth ascertainment function of the first amendment by provision for the communication to the public ear of views not otherwise voiced,<sup>52</sup> the public forum itself would seem to be of only limited utility to this first amendment objective.

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<sup>45</sup> In this respect, the first level right to a public forum may be part of the developing right of substantive equal protection. See Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39.

<sup>46</sup> Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

<sup>47</sup> *Id.* at 878.

<sup>48</sup> *Id.*

<sup>49</sup> See A. ETZIONI, *DEMONSTRATION DEMOCRACY* (1968).

<sup>50</sup> M. MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964).

<sup>51</sup> "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>52</sup> See *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968). "[N]ot all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal." *Id.* at 1102.

Mr. Justice Black, the chief philosopher of the Warren Court,<sup>53</sup> disagrees sharply with this view of the first amendment. Both *ex cathedra*<sup>54</sup> and *ex curia*<sup>55</sup> he has stated his view that the first amendment does not create a public forum right.<sup>56</sup> The distinction he attempts is one between speech and speech-plus; the state is flatly forbidden from regulation of the former but may regulate and ban the latter. Picketing and mass marches fall into this latter category and, according to Justice Black, may be regulated and banned by the state without violation of the first amendment.<sup>57</sup> A relevant critical observation with regard to this view and the attempted categorization of speech activities is that the *act of speaking* invariably involves some form of *speech-plus* activity, be

<sup>53</sup> "Justice Black and the Bill of Rights," CBS-TV Interview, December 3, 1968, *reprinted* in 27 CONG. Q. 6 (1969) [hereinafter referred to as Interview].

<sup>54</sup> *E.g.*, *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966); *Brown v. Louisiana*, 383 U.S. 131, 162, 166 (1966) (dissenting); *Cox v. Louisiana*, 379 U.S. 536, 577-78 (1965) (concurring).

<sup>55</sup> H. BLACK, A CONSTITUTIONAL FAITH (1968); Interview.

<sup>56</sup> "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." *Brown v. Louisiana*, 383 U.S. 131, 166 (1966) (Black, J., dissenting).

"The State, no less than a private owner of property, has the 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. . . . 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 . . . was . . . rejected . . . [in *Cox v. Louisiana* and we] reject it again." *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (citations omitted).

While Justice Black speaks for the Court in *Adderley v. Florida*, the actual holding of that case can be squared with the right to a public forum, as will be pointed out at notes 79-80 *infra* and accompanying text. Despite the quoted statement by Justice Black, the *Adderley* opinion is not directly *contra* to the right to a public forum, as the distinguishing of *Edwards v. South Carolina*, 372 U.S. 229 (1963) implicitly recognizes.

Note should also be taken at this point of the opinion of Justice Goldberg for the Court in *Cox v. Louisiana*, 379 U.S. 536 (1965), another of the cases in which Justice Black states his view that the first amendment does not create a public forum right. Justice Goldberg stated that "we have no occasion in this case to consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings." *Id.* at 555. This same comment would seem equally applicable to Justice Black's opinion in *Adderley*, as the Court in that case was not faced with the question of a flat prohibition on public forum speech activities.

<sup>57</sup> See Justice Black's opinion in *Cox v. Louisiana*, 379 U.S. 536, 575 (1965). See also H. BLACK, A CONSTITUTIONAL FAITH 54 (1968).

it marching in the streets or the conversion of voice into radio waves for transmission and reconversion into speech.<sup>58</sup> The constitutional permissibility of state regulation of these non-speech aspects of communication thus relates to the permissibility of regulation of speech itself. For example, the ability of the state to forbid conduct likely to result in litter could be used by the state to suppress handbilling activity. The public forum right recognizes this link between speech and non-speech aspects of communication; it recognizes that the constitutional right to freedom of speech has no substance where it exists *in vacuo* and does not protect activities necessary to the communication of ideas to the public.<sup>59</sup>

#### THE METES AND BOUNDS OF THE PUBLIC FORUM RIGHT

The first level public forum right—the first amendment viewed as carving out areas from flat governmental bans on speech—has received case law support. Two recent decisions involving anti-war protestors, *In re Hoffman*<sup>60</sup> and *Wolin v. Port of New York*

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<sup>58</sup> Kalven makes the following statement concerning Justice Black's speech-plus theory: "The Court's neat dichotomy of 'speech pure' and 'speech plus' will not work. For it leaves us without an intelligible rationale. . . . To begin with, I would suggest that all speech is necessarily 'speech plus.'" Kalven, *supra* note 3, at 23.

*Brown v. Louisiana*, 383 U.S. 131 (1966), also highlights the weakness of the distinction between speech and speech-plus. There the majority of the Court held that petitioner's silent protest in the public library was constitutionally privileged under the first amendment, even though no speech was involved. While the *Brown* decision has launched the Court into the troublesome waters of symbolic speech, *see, e.g.* Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1; Note, *Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040 (1968), these problems need not be explored here. *Brown* is cited merely to point out the limited utility of a speech-plus theory.

<sup>59</sup> *Cf.* *Mandel v. Municipal Court*, 81 Cal. Rptr. 173, 183-84 (Ct. App. 1969). In denying the existence of a public forum right, Mr. Justice Black would seem to have fallen into the trap against which Mr. Justice Holmes warned in his dissent in *Olmstead v. United States*, 277 U.S. 438, 469 (1928); "[C]ourts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them." In the case of the first amendment, the policy of that amendment is the protection of public debate on social and political questions. By sticking to the literal wording of the amendment, and denying the public forum right, Mr. Justice Black ignores this policy which goes beyond the mere words.

Justice Black has used the phrase "right to talk where they have a right to be" in an attempt to provide protection for some types of speech activities beyond any reasonable definition of "speech pure." Interview, 27 CONG. Q. at 8; *see Cox v. Louisiana*, 379 U.S. 536, 578 (1965); H. BLACK, A CONSTITUTIONAL FAITH 53 (1968). This phrase offers little protection to those seeking to exercise speech rights in the public forum, since it makes the existence of public forum rights depend upon permissive state law. The decision in *Hague v. CIO*, 307 U.S. 496 (1939), would seem to have settled long ago that freedom of speech guarantees do not turn upon state law notions of "dedication."

*Authority*,<sup>61</sup> recognize public forum rights at the first level. Hoffman was convicted under the local trespass ordinance for his refusal to leave Union Station in Los Angeles where he was passing out anti-war leaflets to soldiers en route to California military installations. In granting habeas corpus relief to Hoffman, the California Supreme Court recognized that certain areas of great public use, whether privately or municipally owned, are like the streets,<sup>62</sup> and the use of such areas of general access for free speech purposes cannot be prohibited under general or special trespass laws, absent special considerations of complete inconsistency of primary use and free speech activity.<sup>63</sup> The court found Union Station to be open to the public generally, and the speech use made of it by Hoffman was held not inconsistent with its main use as a railroad station. The availability of alternative areas for Hoffman's use was held immaterial, except insofar as it entered into the calculus of determining inconsistency of speech use and primary purpose.

In *Wolin* petitioners sought to enjoin interference with their "leafletting" by the Port Authority police. The Port Authority defended on the grounds of private property and lack of public forum rights in the bus terminal. The district court granted the injunction, making the first level right to a public forum the grounds for decision.<sup>64</sup> On appeal, the Second Circuit affirmed the holding of the lower court, but made the first level right the alternative grounds for its decision.<sup>65</sup> The Port Authority had allowed speech activities in the bus terminal in the past, and the discrimination against petitioners violated the guarantee of *equal access* referred to herein as the second level public forum right. As

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<sup>60</sup> 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

<sup>61</sup> 268 F. Supp. 855 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

<sup>62</sup> "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the primary uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can First Amendment activities be prohibited solely because the property involved is not maintained as a forum for such activities." 67 Cal. 2d at 850, 434 P.2d at 356, 64 Cal. Rptr. at 100.

<sup>63</sup> *Cf. Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967). See also *Wolin v. Port of New York Authority*, 268 F. Supp. 855, 859-60 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83, 89-92 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

<sup>64</sup> 268 F. Supp. 855 (S.D.N.Y. 1967).

<sup>65</sup> 392 F.2d 83 (2d Cir. 1968).

to whether the terminal was private property, both the district court and the court of appeals considered the question irrelevant.<sup>66</sup>

A recent Supreme Court decision, *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,<sup>67</sup> also recognizes the existence of a public forum right. The theory of Justice Marshall for the majority was that the shopping center and its parking lot were akin to the business district of the company town held subject to public forum rights in *Marsh v. Alabama*,<sup>68</sup> and thus state law could not ban speech activities.<sup>69</sup> Justice Marshall attempted to limit the holding of *Logan Valley* to the facts of the case through a caveat expressed in footnote nine to the effect that it had not been decided whether speech activities not related to shopping center employees could be barred.<sup>70</sup> But the theory of the majority in *Logan Valley*, with its heavy reliance on *Marsh v. Alabama*, would seem equally applicable to nonrelated speech activities because the activities in *Marsh* were not related to the company town's labor situation—there the petitioners were Jehovah's Witnesses preaching the gospel,<sup>71</sup> a fact pointed out by the dissent of Justice White.<sup>72</sup> While the presence of "special considerations" flowing from the labor dispute in *Logan Valley* prevents direct recognition of the public forum right,<sup>73</sup> nevertheless it is a situation involving public forum type rights which the Supreme Court may experience difficulty distinguishing or limiting in the future when the theory of *Logan Valley* is sought to be applied to *nonrelated* speech activities.<sup>74</sup>

In a recent case, the Supreme Court of California has indicated that the "degree of relationship" question raised by Justice Marshall

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<sup>66</sup> 268 F. Supp. at 860; 392 F.2d at 88.

<sup>67</sup> 391 U.S. 308 (1968).

<sup>68</sup> 326 U.S. 501 (1946).

<sup>69</sup> In *Marsh v. Alabama* the Court held that title to the streets was irrelevant for first amendment purposes, and the decision in *Hague v. CIO*, 307 U.S. 496 (1939), recognizing the public's right to use the streets for speech purposes applied with equal force to the company-owned town. The state was thus prohibited from enforcing its trespass law against plaintiff's first amendment protected activities.

<sup>70</sup> 391 U.S. at 320 n.9.

<sup>71</sup> 326 U.S. at 503.

<sup>72</sup> 391 U.S. at 337.

<sup>73</sup> See text accompanying notes 137-41 *infra*.

<sup>74</sup> Indeed, shopping center managers have expressed the fear that the Supreme Court will recognize complete public forum rights in shopping center parking lots. See "Meet Me at the Mall," *Wall St. Journal*, Feb. 20, 1969, at 1, col. 6.

in *Logan Valley* will pose little obstacle to nonrelated speech activities. In *In re Lane*<sup>75</sup> petitioner was an officer of a labor union involved in a labor dispute with the publisher of certain newspapers. His "activity" was the distribution of handbills on a sidewalk owned by a supermarket urging customers not to patronize the market because it advertised in those newspapers. Holding irrelevant the fact that the sidewalk in question was privately owned and used only as a means of access to this particular market, the court in *Lane* stated that

when a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk . . . .<sup>76</sup>

*Tinker v. Des Moines Independent Community School District*<sup>77</sup> adds support to the public forum analysis advanced here. In upholding the right of public school students to wear black armbands in nondisruptive protest against American involvement in Viet-Nam, Justice Fortas for the majority stated:

[U]nder our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. . . . [W]e do not confine the permissible exercise of First Amendment rights to the telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.<sup>78</sup>

The fact that the Supreme Court would allow some regulation of first amendment uses of school property, and the prohibition of *disruptive* protests, does not detract from the significance of the Court's holding in *Tinker*: the recognition that the first amendment excludes certain physical areas from permissible state *total* prohibitions of first amendment activities.

A review of this case history enables one to establish tentative boundaries of the public forum right while attempting to formulate trends for future development. At the core of the right are those pure speech activities<sup>79</sup> in areas accessible to substantial segments of

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<sup>75</sup> 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

<sup>76</sup> *Id.* at 565, 79 Cal. Rptr. at 733.

<sup>77</sup> 393 U.S. 503 (1969).

<sup>78</sup> *Id.* at 513.

<sup>79</sup> In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), the Supreme Court drew a distinction between speech pure and speech-plus, allowing the state to regulate the

the public. However, the exact dimensions of the public forum right are presently undefined, as there are yet no clear criteria for determining whether the property involved is properly subject to public forum rights. Factors such as customary usage, access to large numbers of the public, and historically unlimited public access must all be considered. Furthermore, consistency with other public uses of the property also seems a vital factor, as indicated by the following words of Justice Douglas in *Adderley v. Florida*:

There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petition for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. . . . And in other cases it may be necessary to adjust the right of petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put. But this is quite different from saying that all public places are off limits to people with grievances.<sup>80</sup>

The judiciary should be liberal in the determination of this question of consistency of speech use, because a finding that the public forum right does not exist with respect to the particular property may mean that no first amendment speech use can be made of that property. Of course, a finding that the public forum right exists in the property does not end the inquiry. Still to be determined is whether the particular use sought to be made of the property is allowable under the circumstances.<sup>81</sup> Thus in *Adderley*, a similar result could have been reached by first holding the property subject to the public forum right, and then determining that the disruptive mass picketing practiced there was impermissible. Such a reinterpretation properly focuses attention on the type of first amendment activity practiced,<sup>82</sup> and avoids the implication that all first amendment activity on jailhouse grounds is impermissible.

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latter in some instances. Kalven thinks this distinction is without factual foundation, as all speech is "speech plus." Kalven, *supra* note 3, at 23. See also Kamin, *supra* note 7, at 231. Nevertheless, the distinction helps characterize the type of first amendment activity at the core of the first level public forum right—handbilling being a classic example of pure speech (i.e., speech with a minimum amount of coercive pressure on the recipient or bystanders). See *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

<sup>80</sup> *Adderley v. Florida*, 385 U.S. 39, 54 (1966) (dissenting opinion) (citations omitted).

<sup>81</sup> See *Women Strike for Peace v. Hickel*, \_\_\_ F.2d \_\_\_ (D.C. Cir. 1969).

<sup>82</sup> Compare *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) and *Brown v. Louisiana*, 383 U.S. 131 (1966) with *Adderley v. Florida*, 385 U.S. 39 (1967).

It would seem clear that the public forum right extends to streets and parks,<sup>83</sup> subways,<sup>84</sup> mass transportation terminals,<sup>85</sup> mass entertainment areas,<sup>86</sup> school buildings and grounds,<sup>87</sup> and grounds of general governmental buildings.<sup>88</sup> Private ownership, standing alone, would seem of limited significance for public forum purposes; in *Marsh v. Alabama*,<sup>89</sup> the streets of a privately owned town were held subject to a public forum right, while in *Logan Valley* and *In re Lane*, the private ownership of a shopping area was held irrelevant.<sup>90</sup> Likewise, no distinction has been drawn between public and private mass transportation facilities.<sup>91</sup> It should be noted, however, that in the extreme case the public forum right may run into the fifth amendment expropriation clause if private property is involved.<sup>92</sup> By distinguishing between public and private property in such extreme cases<sup>93</sup> the fifth amendment question probably can be completely avoided, because the public use made

<sup>83</sup> *Hague v. CIO*, 307 U.S. 496 (1939). *But see* *Jeanette Rankin Brigade v. Chief of the Capital Police*, 278 F. Supp. 233 (D.D.C. 1968).

<sup>84</sup> *People v. St. Clair*, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968).

<sup>85</sup> *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); *Wolin v. Port of New York Authority*, 268 F. Supp. 855 (S.D.N.Y. 1967), *aff'd* 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

<sup>86</sup> *Farmer v. Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964).

<sup>87</sup> *See* Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328 (1963); Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132 (1966).

In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), the Supreme Court held that the wearing of arm bands and political protest buttons was constitutionally privileged in public schools under the first amendment. The decision would seem to indicate that public schools and public school grounds are subject to the public forum right. *See also* *Blackwell v. Board of Educ.*, 363 F.2d 749 (5th Cir. 1966); *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967).

<sup>88</sup> *Edwards v. South Carolina*, 372 U.S. 229 (1963).

<sup>89</sup> 326 U.S. 501 (1946).

<sup>90</sup> *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315-16 (1968); *In re Lane*, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

<sup>91</sup> Compare *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) with *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

<sup>92</sup> *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

<sup>93</sup> A fifth amendment question might be raised in a case where the public forum right is applied against a privately owned auditorium. Despite payment for use of the facilities, the use of the auditorium by groups exercising the public forum right might be viewed as an expropriation of control of the property, and thus the expropriation of the property itself. *United States v. Causbey*, 328 U.S. 256 (1946) indicates that a "taking" may occur when the governmentally directed use is so frequent as to be a direct and immediate interference with enjoyment of the property. *See also* *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Dunham*, *supra* note 92.

of the private property in less extreme cases would not rise to a "taking" for which the public is required to pay.

Having found a public forum right to exist does not end the examination of the first amendment questions presented in any particular case; the character of the protection afforded for activity in the public forum depends upon the *location* of the activity in question in the hierarchy of first amendment protection.<sup>94</sup> For example, while pure speech activities such as "leafletting"<sup>95</sup> and silent protest seem to be protected in all public forums,<sup>96</sup> they are subject to being outweighed in extreme cases by the right to privacy in one's dwelling.<sup>97</sup> Likewise, sound trucks in the streets cannot be flatly forbidden,<sup>98</sup> but such activity may be regulated as to time, place and manner,<sup>99</sup> and probably banned completely in certain areas.<sup>100</sup> The inverse relationship between "kind" and degree of speech activity versus amount of first amendment protection becomes apparent when we move from pure speech to conduct such as picketing. Although subject to some constitutional protection,<sup>101</sup> picketing is susceptible to being outweighed by several permissible state regulatory interests.<sup>102</sup> Finally, lowest in this hierarchal system

<sup>94</sup> That such a hierarchy exists cannot be doubted. *Compare* *Lovell v. Griffin*, 303 U.S. 444 (1938) and *Talley v. California*, 362 U.S. 60 (1960) with *Butler v. Michigan*, 352 U.S. 380 (1957) and *Roth v. United States*, 354 U.S. 476 (1957).

<sup>95</sup> Commercial handbilling is not subject to the same protection as political or social issue handbilling. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>96</sup> *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Talley v. California*, 362 U.S. 60 (1960); *Lovell v. Griffin*, 303 U.S. 444 (1938); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

<sup>97</sup> *See* *Breard v. Alexandria*, 341 U.S. 622 (1951); *cf.* *Time, Inc. v. Hill*, 385 U.S. 374, 411 (1967) (Fortas, J., dissenting). *But see* *Martin v. Struthers*, 319 U.S. 141 (1943). *See also* *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949); *cert. denied*, 339 U.S. 981 (1950); *Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948).

<sup>98</sup> *Saia v. New York*, 334 U.S. 558 (1948); *Wollam v. Palm Springs*, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963).

<sup>99</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949).

<sup>100</sup> *Cf.* *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). *See also* *Kamin*, *supra* note 7.

<sup>101</sup> *See* *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

<sup>102</sup> *See* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). *See also* *Cox v. Louisiana*, 379 U.S. 536, 559, 575 (1965) (Black, J., concurring & dissenting).

<sup>103</sup> *See* *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

is unprotected speech,<sup>103</sup> and the fact that speech of this nature takes place in the public forum does not secure to its author any additional protection.<sup>104</sup>

This hierarchal structure established by case development indicates that the first level public forum right, as a "constitutional obligation" flowing out of the first amendment,<sup>105</sup> provides access to a forum of mass communication potential without requiring legislation for its satisfaction. Indeed, it is largely self-executing and self-enforceable, the "obligation" being such that the state cannot take any action except under regulatory statutes of the type approved in *Cox v. New Hampshire*,<sup>106</sup> which flatly forbid use of the public forum. The state may not deny use of the public forum through laws against littering,<sup>107</sup> loitering,<sup>108</sup> and trespass,<sup>109</sup> nor can it encroach on the right through injunctive penalties.<sup>110</sup> The public forum right would also seem to require that the state be compelled to intervene to prevent private groups from interfering with public forum rights.<sup>111</sup> In short, the public forum right takes its shape independent of any legislative action through imposing a disability on the state to do otherwise while compelling the state to protect its use.

Nevertheless, the state may seek to legislate in the area of public forum rights, and certain types of legislation, such as

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<sup>104</sup> *Feiner v. New York*, 340 U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

<sup>105</sup> The obligation to provide a public forum may also flow out of the substantive equal protection clause. See note 17 *supra* and accompanying text.

<sup>106</sup> 312 U.S. 569 (1941).

<sup>107</sup> *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>108</sup> *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

<sup>109</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>110</sup> *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

<sup>111</sup> See *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Hurwitt v. Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965). See also *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

The requirement that the government intervene to protect the exercise of public forum rights may involve considerable cost to the public purse. In the aftermath of *Hurwitt v. Oakland*, *supra*, the Alameda County Board of Supervisors sent the University of California a bill for some \$141,500 for police services rendered in protecting the march route. It should be noted that the bill also included costs incurred in policing the 1964 Sproul Hall FSM sit-in and was not limited to the *Hurwitt* authorized march. The Board of Supervisors have apparently not succeeded in their attempt to collect from the University. Letter from Thomas J. Cunningham, General Counsel of the University of California, to the *Duke Law Journal*, Feb. 20, 1969.

ordinances for the regulation of time, place and manner of the public forum, are compatible with recognition of public forum rights. The regulation of the use of the public forum may not, however, be so severely drawn as to be in fact a prohibition upon use of the public forum.<sup>112</sup> Where the state seeks to meet its public forum obligation by creating a Hyde Park on the outskirts of town and banning all speech use of streets and other parks in town, *In re Hoffman* and *Wolin v. Port of New York Authority* make it clear that the choice of forum is initially one for the speaker, not for the state, and the fact that there was a more convenient officially-proclaimed forum provided nearby is largely irrelevant.<sup>113</sup> This does not mean, however, that one may speak anywhere at any time.<sup>114</sup> The state may regulate the speaker's choice to the extent that the choice places a heavy burden upon other permissible governmental objectives and responsibilities, but only so long as this objection is not used as a screen for denying use of the forum altogether.<sup>115</sup>

In distinction, the second level public forum right is a guarantee of nondiscriminatory *access* to publicly owned communication media not covered by the first level guarantee. In addition, the second level right of nondiscriminatory treatment is capable of expansion by the legislature or by the courts to apply to privately owned and controlled media.<sup>116</sup> *Kissinger v. New York City Transit Authority*<sup>117</sup> and *Wirta v. Alameda-Contra Costa Transit District*<sup>118</sup>

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<sup>112</sup> *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968). See also *Wollam v. Palm Springs*, 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963). Note also the quoted language from the opinion of Mr. Justice Roberts in *Hague v. CIO*, 307 U.S. 496, 500 (1939).

<sup>113</sup> See also *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Hague v. CIO*, 307 U.S. 496 (1939). In *NLRB v. Fruit Packers Local 760*, 377 U.S. 58 (1964) Justice Black had the following comment to make concerning the alternative grounds theory of speech prohibition:

I cannot accept my Brother HARLAN's [dissenting] view that the abridgement of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city does not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop. *Id.* at 79-80 (concurring).

<sup>114</sup> See *Adderley v. Florida*, 385 U.S. 39 (1966) (Black, J.).

<sup>115</sup> See *Hurwitt v. Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965). See also *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

<sup>116</sup> See *Barron*, *supra* note 4. But see *Crommelin v. Capitol Broadcasting Co.*, 280 Ala. 472, 195 So. 2d 524 (1967), where the court refused to create a common law duty on the broadcaster to treat all political candidates alike in offering air time in connection with political campaigns.

<sup>117</sup> 274 F. Supp. 438 (S.D.N.Y. 1967).

are two recent cases recognizing this second level right of nondiscriminatory access to publicly owned or controlled communication media. In both cases anti-war groups sought to have anti-war advertisements placed in publicly owned transit facilities. In both instances the rules of the transit authority limited advertising in the transit system to commercial advertisements, political advertisements in conjunction with election campaigns, and public service announcements and upon these rules denied access to the advertising media. The content of the message was the sole criterion<sup>119</sup> for rejection of the advertisement; in both cases the anti-war group was prepared to pay the standard rate for the space sought to be used.

In *Wirta* the California Supreme Court first noted that although the advertisement was a paid message, its content was political in nature and thus protected under the *New York Times Co. v. Sullivan*<sup>120</sup> rule. The line of cases allowing state regulation of commercial messages was thus distinguished.<sup>121</sup> In effect, the Transit District in *Wirta*, through its unlimited acceptance of commercial speech and its limitation on acceptance of political speech to political campaigns, had attempted to elevate commercial speech to a higher position in the first amendment hierarchy than political speech. The California Supreme Court, in holding this type of censorship in favor of commercial speech a violation of the first amendment, indicated that where commercial speech is allowed, political speech must be accepted on the same nondiscriminatory terms.

In both *Wirta* and *Kissinger* the transit officials attempted to meet the first amendment challenge by asserting rational classification, the likely disturbance of the traveling public flowing from the advertisement, characterized by transit officials as objectionable to a substantial portion of the community, and the availability of alternative forums. The argument of availability of alternative forums was held irrelevant, just as in *In re Hoffman*<sup>122</sup>

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<sup>118</sup> 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

<sup>119</sup> In *Kissinger* the advertising company also mentioned a current space squeeze as a reason for rejecting the advertisement. The mistake the advertising agency made was basing its objection also upon the views expressed by the proposed advertisement, which gave rise to a suspicion of political censorship rather than bona fide space limitations.

<sup>120</sup> 376 U.S. 254 (1964).

<sup>121</sup> See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>122</sup> 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

and *Logan Valley*,<sup>123</sup> and the rational classification argument held not germane to the issue.<sup>124</sup> While the fourteenth amendment equal protection clause could be used to achieve the same result,<sup>125</sup> the first amendment has developed, through the vagueness and overbreadth line of cases,<sup>126</sup> its own equal protection clause, capable of achieving the same results as the fourteenth amendment but without distortion of the rational classification test of the fourteenth amendment equal protection clause.<sup>127</sup> Disturbance of the traveling public and opposition by the majority of the community is a sophisticated restatement of the problem posed by the heckler's veto.<sup>128</sup> Opposition by the majority or a significant portion of the community is not irrelevant to the first amendment—it goes to the heart of activities sought to be protected by the first amendment. The first amendment is dedicated to an invitation to dispute the majority will,<sup>129</sup> and to disallow speech for this reason is to deny this high purpose of the amendment and leave only impotent speech protected. Thus in *Kissinger* the court quite properly stated that the test was whether “the posters present[ed] a serious and immediate threat to the safe and efficient operation of the subways.”<sup>130</sup> To the contention that the posters would seriously endanger safety in the subways—would give rise to a “clear and present” danger—the court replied that the Transit Authority and the advertising company could sufficiently protect themselves through the imposition of reasonable regulations on the display of plaintiffs' posters and others of a similar nature.<sup>131</sup>

The force of the second level public forum right—nondiscriminatory access to publicly owned media—is

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<sup>123</sup> 391 U.S. 308 (1968).

<sup>124</sup> 68 Cal. 2d at 60, 434 P.2d at 988, 64 Cal. Rptr. at 436.

<sup>125</sup> See *Railway Express Agency v. City of New York*, 336 U.S. 106, 111 (Jackson, J., concurring) (1949); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>126</sup> See, e.g., *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>127</sup> See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) for a statement of the usual test under the equal protection clause.

<sup>128</sup> See H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140-60 (1965). See also *Brown v. Louisiana*, 383 U.S. 131 (1966); *Watson v. Memphis*, 373 U.S. 526, 535 (1963).

<sup>129</sup> *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Hurwitt v. Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965).

<sup>130</sup> 274 F. Supp. at 442. See also *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 62, 434 P.2d 982, 989, 64 Cal. Rptr. 430, 437 (1968).

<sup>131</sup> 274 F. Supp. at 443 & n.6; cf. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

directed against the public media because the words of the first amendment do not operate directly against individuals.<sup>132</sup> This does not, however, prevent the government from examining private restrictions on freedom of speech and the public forum right, and expanding the public forum right of nondiscriminatory access to the privately controlled media.<sup>133</sup> The government has so acted in the past, and its efforts to expand the right of nondiscriminatory access are not only constitutional but in keeping with a realistic appraisal of the functions of the first amendment and the situation as it exists in the private media.

One means by which the government has acted to ensure access to the privately owned media is through the antitrust laws. In *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*,<sup>134</sup> the court held that a private party claiming concerted refusal to deal by a television station stated a cause of action under section 1 of the Sherman Act.<sup>135</sup> While the antitrust laws are not a totally satisfactory protection for the second level public forum right in light of the difficulties of proof involved in antitrust suits and the lack of a relationship between the proof of attempt to monopolize and the censorship claim of the nondiscriminatory access right sought to be enforced, it does represent an effort by the government to open access to the media.<sup>136</sup>

The right of nondiscriminatory access to privately controlled communications facilities has been recognized in a series of labor decisions beginning with *NLRB v. Stowe Spinning Co.*<sup>137</sup> In *Stowe Spinning* the company coerced the lessee of the meeting hall into retracting his agreement to allow the labor union to use the hall. The National Labor Relations Board found this conduct by the employer to violate the National Labor Relations Act and ordered

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<sup>132</sup> "Congress shall make no law . . . abridging the freedom of speech. . . ." The fourteenth amendment applies this wording to state governments. *Cf. Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>133</sup> See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

<sup>134</sup> 255 F.2d 708 (3d Cir. 1958).

<sup>135</sup> See also *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting Inc.*, 365 F.2d 478 (5th Cir. 1966). In *Bratcher v. Akron Area Bd. of Realtors*, 381 F.2d 723 (6th Cir. 1967), the court held that the Sherman Act applied to realtors who refused to deal with black customers on racially discriminatory grounds.

<sup>136</sup> See *Lorain Journal v. United States*, 342 U.S. 143 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Times Mirror Co.*, 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd mem.*, 390 U.S. 712 (1968).

<sup>137</sup> 336 U.S. 226 (1949), *modifying* 165 F.2d 609 (4th Cir. 1947).

the company to make the meeting hall available to the union. Affirming the unfair labor practices finding of the NLRB, the Supreme Court modified this order, forbidding the employer from coercing the lessee of the hall. This more limited result of forbidding the coercion of third parties into discriminatory access policies was expanded by the Court's language in *NLRB v. Babcock & Wilcox Co.*:<sup>138</sup>

It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.<sup>139</sup>

Under the *Babcock & Wilcox* restatement of *Stowe Spinning*, access to the private communications facilities of the employer may be ordered by the NLRB when other facilities are not available for effective communication of the union message or where the employer has granted others access and seeks to discriminate against the union.<sup>140</sup> A second line of cases deals with "equal time" for the union when the employer has used company property to deliver an anti-union message and the union seeks to counter the message using company facilities. Although split on whether "equal time" is an appropriate remedy for the NLRB to grant,<sup>141</sup> these cases nevertheless manifest a recognition of the problem posed by private restrictions on first amendment protected activities, and represent an attempt to deal with the problem within the context of the National Labor Relations Act.

Another instance of legislation providing for "nondiscriminatory access" is section 315 of the Federal

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<sup>138</sup> 351 U.S. 105 (1956).

<sup>139</sup> *Id.* at 112.

<sup>140</sup> See *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967); *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964); *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952).

<sup>141</sup> Compare *NLRB v. F.W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954) with *Bonwit Teller, Inc., v. NLRB*, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953).

<sup>142</sup> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of the broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. 47 U.S.C. § 315(a) (1964).

Communications Act,<sup>142</sup> which seeks to make certain equal access to the television media for political candidates where one candidate has been granted access. That this right of nondiscriminatory access for political candidates is an ineffective remedy due to its apparent limitation to administrative relief from the Federal Communications Commission<sup>143</sup> is beside the point, for at the very least section 315 represents a judgment that freedom of speech in the context of modern election campaigns requires nondiscriminatory access to the television media.<sup>144</sup>

The intervention of the government seeking to promote nondiscriminatory access to various privately controlled communications facilities seemingly conflicts with the "laissez faire" theory of free speech embodied in the *New York Times Co. v. Sullivan*<sup>145</sup> line of decisions. The implicit assumption of the *Times* rule is that free speech is promoted by the almost complete insulation of the various privately controlled media from government interference in any form.<sup>146</sup> However, the intervention of the government seeking to preserve nondiscriminatory access to the private media, control of which is concentrated in the hands of a few,<sup>147</sup> assumes the opposite—free speech will be denied by further insulation of the private media from governmental interference aimed at expanding access. Under this view, free speech will be promoted only when the particular media in question cannot refuse access to the public either upon whim alone or as a result of opposition to the views sought to be expressed.<sup>148</sup> It is not the

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<sup>142</sup> See *Daly v. West Central Broadcasting Co.*, 201 F. Supp. 238 (S.D. Ill.), *aff'd*, 309 F.2d 83 (7th Cir. 1962).

<sup>143</sup> The decision of the United States Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), legitimizes the expansion of this "equal time" rule to such subjects as personal attack and controversial issues. See also *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

<sup>144</sup> 376 U.S. 254 (1964). See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>145</sup> See *Barron*, *supra* note 4. See also Address by Frank Stanton, President, Columbia Broadcasting System, Sigma Delta Chi National Convention, Nov. 21, 1968, reprinted in *N.Y. Times*, Nov. 27, 1968, at 29.

<sup>146</sup> See *Barron*, *supra* note 4. See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1968); *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters Inc.*, 270 F. Supp. 619 (S.D.N.Y. 1967).

<sup>147</sup> But see *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945); *Massachusetts Universalist Conv. v. Hildreth & Rogers Co.*, 87 F. Supp. 822 (D. Mass. 1949), *aff'd*, 183 F.2d 497 (1st Cir. 1950).

purpose of this article to reconcile this seeming conflict in theories of the first amendment or to investigate which of these conflicting theories is more consistent with the historical meaning of the first amendment. The United States Supreme Court attempted such a reconciliation in the *Red Lion* decision,<sup>149</sup> which upheld the FCC's equal time rule<sup>150</sup> as it applied to personal attacks. The Court held that in view of the limited resource of channels of television communication, the FCC could, consistent with the first amendment, impose such an obligation on broadcasters: "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount."<sup>151</sup> This same argument would seem

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<sup>149</sup> 395 U.S. 367 (1969).

<sup>150</sup> 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969).

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. § 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion. *Id.*

<sup>151</sup> 395 U.S. at 390.

applicable to newspaper publishers,<sup>152</sup> and in light of the rationale of the *Red Lion* decision the Court apparently would respond favorably to properly drawn legislation aimed at expanding this second level right of nondiscriminatory access to public communication facilities to include privately controlled media as well.<sup>153</sup>

### CONCLUSION

Justice Goldberg, speaking for the Court in *Cox v. Louisiana*, stated that "the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs may address a group at any public place and at any time."<sup>154</sup> Although the holding of the Court in *Cox* is consistent with the public forum right, and the dictum itself consistent with the existence of such a right to the extent that it merely implies the permissibility of time, place and manner regulation, the dictum, like the dictum of Justice Holmes in *Davis v. Massachusetts*,<sup>155</sup> has been widely noted by opponents of the public forum right. Justice Black has made frequent reference to this portion of *Cox* in his dissenting opinions in later public forum cases.<sup>156</sup> This situation has led to a questioning of the existence of a public forum right,<sup>157</sup> and has presented the potential for an antilibertarian return to the pre-*Hague* days when the *Davis* dictum held sway. This article has attempted to counter this trend by setting out the constitutional and case law bases of the public forum right.

This effort also represents an attempt to provide the judiciary

<sup>152</sup> See generally Barron, *supra* note 4.

<sup>153</sup> See Barron, *supra* note 4; Emerson, *supra* note 46; Kalven, *supra* note 3. See also Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

<sup>154</sup> 379 U.S. at 544.

<sup>155</sup> See note 13 *supra* and accompanying text.

<sup>156</sup> See, e.g., cases cited in note 54 *supra*.

<sup>157</sup> See T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 516-19 (3d ed. 1967). Justice Goldberg attempted to prevent any confusion regarding the effect of this dictum by addition of footnote 13.

It has been argued that, in the exercise of its regulatory power over streets and other public facilities, a State or municipality could reserve the streets completely for traffic and other facilities for rest and relaxation of the citizenry. . . . The contrary, however, has been indicated, at least to the point that some open area must be preserved for outdoor assemblies. 379 U.S. at 555 n.13.

The footnote has apparently not had its intended effect. See *Guyot v. Pierce*, 372 F.2d 658 5th Cir. 1967).

with an analytical framework useful in dealing with public protest situations. The current judicial analysis of public protest leaves much to be desired. The vagueness, overbreadth and chilling-effects doctrines all have their place in first amendment analysis. But they seem of limited utility in dealing with public protest situations because they fail to focus attention on the fundamental right of the public to use public facilities for protest purposes.

The right to a public forum is not the only concept embodied in the first amendment. But the importance of the public forum right cannot be overemphasized. Professor Etzioni, in his policy paper prepared for the President's National Commission on the Causes and Prevention of Violence, puts the right to a public forum into proper perspective:

Ultimately, a society which fails to respond effectively to its members, especially when the neglect of the needs of some of them has been accumulating and has been repeatedly called to its attention, will have little choice except between anarchy and tyranny. Demonstrations are a useful though potentially volatile warning mechanism. Muffling their sound will not prevent the explosion.<sup>158</sup>

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<sup>158</sup> A. ETZIONI, *supra* note 49, at 66.

