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Notes and Comments

***Board of Airport Commissioners v. Jews for Jesus, Inc.*: A Missed Opportunity to Restore Fundamental Fairness to Public Forum Analysis**

I. Introduction

*Board of Airport Comm'rs v. Jews for Jesus, Inc.*¹ exemplifies the fundamental unfairness inherent in the public forum/nonpublic forum distinction currently used by the Supreme Court in addressing first amendment challenges to governmental regulations affecting government property.² If a court determines that a specific public property constitutes a public forum, the court will apply strict scrutiny³ in ruling on the constitution-

1. 107 S. Ct. 2568 (1987).

2. Justice O'Connor, writing for the *Jews for Jesus* Court, succinctly summarizes the current public forum analysis applied by the Supreme Court:

In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, the Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. The proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to *heightened scrutiny* We have further held, however, that access to a nonpublic forum may be restricted by government regulation as long as the regulation "is *reasonable* and not an effort to suppress expression merely because officials oppose the speaker's view."

Id. at 2571 (citations omitted) (emphasis added) (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (emphasis added)). For examples of the Court's application of its current public forum analysis, see *infra* notes 80-99, 142-166, and accompanying text.

3. Justice O'Connor used the equivalent term "heightened scrutiny" in her *Jews for Jesus* opinion. *Jews for Jesus*, 107 S. Ct. at 2571. See *supra* note 2. Strict scrutiny is applied by the courts when reviewing government regulations which infringe on fundamental constitutional rights. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL

ality of government restrictions directed at communicative activity conducted within that public property.⁴ On the other hand, if a court determines that a specific public property is a nonpublic forum, the court will apply to those same government restrictions a deferential reasonableness test.⁵

The Supreme Court framed the issue presented in *Jews for Jesus* as "whether a resolution banning all 'First Amendment activities' at Los Angeles International Airport (LAX) violates the First Amendment."⁶ Justice O'Connor, writing for a unanimous Court, stated that "the [LAX] resolution is facially unconstitutional under the First Amendment overbreadth doctrine,"⁷ thus enabling the Court to sidestep the issue of whether LAX is a public forum⁸ — one of the questions on which the Supreme Court originally granted certiorari.⁹

Although the *Jews for Jesus* Court was correct in its overbreadth decision, its failure also to address the public forum issue reflects a regrettable reluctance on the part of the Supreme Court to rectify a problem it created by a line of decisions beginning with *Lehman v. City of Shaker Heights*¹⁰ and continuing through such recent cases as *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*¹¹ and *Cornelius v. NAACP Legal Defense and Educ. Fund.*¹² The problem created by the Court is disparate

LAW § 14.3, at 531 (3d ed. 1986) [hereinafter cited as NOWAK]. For a discussion of what rights (in addition to the right of freedom of speech) are currently held to be fundamental by the Court, see NOWAK § 11.7, at 370-72. A regulation which infringes on a fundamental right will pass constitutional muster only where such regulation is shown to be "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Jews for Jesus*, 107 S. Ct. at 2571 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

4. *Jews for Jesus*, 107 S. Ct. at 2571.

5. *Id.* See *supra* note 2.

6. *Jews for Jesus*, 107 S. Ct. at 2570.

7. *Id.* at 2571.

8. *Id.*

9. *Id.* at 2573 (White, J., concurring).

10. 418 U.S. 298 (1974) (city ban against political advertising on available commercial advertising space on vehicles of a city transit system held constitutional because the Court concluded that such vehicles are not public forums). *Id.* at 304. See *infra* note 83.

11. 460 U.S. 37 (1983) (denial of access to school district's internal mail system and teachers' mailboxes to rival union held constitutional because these mail facilities did not constitute a public forum). *Id.* at 48, 55.

12. 473 U.S. 788 (1985) (executive order excluding legal defense and political advocacy organizations from participation in a charity drive held to be constitutional because charity drive found to be a nonpublic forum). *Id.* at 806, 813.

treatment of individuals wishing to exercise first amendment rights on public property based solely upon whether a court, at the outset, classifies the property as a public forum or a nonpublic forum. Further evidence that a problem does indeed exist is provided by the dissents in the above-named cases,¹³ by commentators who have previously addressed the public forum issue,¹⁴ and by the procedural background of *Jews for Jesus*.¹⁵

Background on the Supreme Court's use of the overbreadth doctrine in addressing first amendment issues will be dealt with briefly in Part II before turning to the development of the public forum concept, which constitutes the major focus of this Note. Part III will present the facts, procedural history, and summaries of the majority and concurring opinions in *Jews for Jesus*. Part IV will provide an analysis of the opinion and will suggest how the Court could have dealt with the public forum question in a manner that would restore a fundamental fairness that is lacking in the Supreme Court's current application of the public forum/nonpublic forum distinction in addressing first amendment challenges to regulations affecting government property.

Part V concludes that the failure to address the public forum issue presented in *Jews for Jesus* constitutes a missed opportunity to correct a problem that will continue to plague both lower courts and governmental bodies until the Supreme Court restructures its current public forum analysis.

II. Background

A. *The First Amendment Overbreadth Doctrine*

As noted by the dissenting justices in *Gooding v. Wilson*,¹⁶ the overbreadth doctrine is of recent origin.¹⁷ The doctrine permits "an individual whose own speech or conduct may be pro-

13. See *Lehman*, 418 U.S. at 308 (Brennan, J., dissenting); see *infra* text accompanying notes 95, 99.

14. See *infra* notes 32, 53, 77.

15. See *infra* text accompanying notes 154-158.

16. 405 U.S. 518 (1972) (Georgia statute which provided that "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor," "held to be on its face unconstitutionally vague and overbroad under the first and fourteenth amendments). *Id.* at 519-20.

17. *Id.* at 535.

hibited . . . to challenge a statute on its face 'because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution'¹⁸ This approach represents a sharp departure from the Court's traditional approach of denying an individual standing to challenge a statute on the grounds that it may possibly be unconstitutionally applied to third parties not before the Court.¹⁹

The traditional rule was based on the belief that it is not the purpose of courts to act as "roving commissions" charged with the task of passing judgment on the constitutionality of all the laws in the United States.²⁰ Such judgments were deemed justified only in those cases brought before the Court for the purpose of adjudicating the rights of actual litigants.²¹ The two major exceptions to the traditional rule involve the concepts of equal protection,²² "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves,"²³ and first amendment rights, which can only be restricted by statutes narrowly

18. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2571 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (court of appeals held to have erred in facially invalidating a Washington state moral nuisance law in its entirety where partial invalidation is the required course to follow when possible)).

19. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (citing several cases chronologically, beginning with *Austin v. Aldermen*, 74 U.S. (7 Wall) 694, 698-99 (1869), and concluding with *United States v. Raines*, 362 U.S. 17 (1960)). In *Broadrick*, state employees were unsuccessful in arguing that portions of a state merit system act were vague and overbroad and, thus, facially unconstitutional, where those employees' particular conduct was clearly proscribed by the challenged portions of the act. *Broadrick*, 413 U.S. at 616-18.

20. *Broadrick*, 413 U.S. at 610-11 (citing *Younger v. Harris*, 401 U.S. 37, 52 (1971)).

21. *Id.* at 611 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

22. The fourteenth amendment provides, *inter alia*, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). Thus, the equal protection clause of the fourteenth amendment is not applicable to the Federal Government; however, individuals are afforded similar protection from federal actions which violate equal protection by the due process clause of the fifth amendment which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. See NOWAK, *supra* note 3, § 14.1, at 524. "Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same." *Id.* at 526 (citing Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949)).

23. *Broadrick*, 413 U.S. at 611.

drawn to serve compelling, competing interests of society.²⁴

An arguably more recent development²⁵ in the application of the overbreadth doctrine is the requirement, introduced in *Broadrick v. Oklahoma*,²⁶ that "[a] statute may be invalidated on its face . . . only if the overbreadth is 'substantial.'"²⁷ Although the Court did not adequately define what it meant by "substantial overbreadth" in *Broadrick*,²⁸ it did attempt to do so in *Members of the City Council v. Taxpayers for Vincent*.²⁹ In *Vincent*, the Court equated "substantial overbreadth" with "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court"³⁰

Specifically with respect to the first amendment, the Court has applied the first amendment overbreadth doctrine to forbid the enforcement of a challenged statute "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."³¹

24. *Id.* at 611-12.

25. *Id.* at 630 (Brennan, J., dissenting). Justice Brennan criticized the Court for not defining the term "substantial overbreadth" as used in *Broadrick*, inasmuch as "a requirement of substantial overbreadth [had] already [been] implicit in the doctrine" prior to the Court's pronouncement in *Broadrick*. *Id.* Justice Brennan also criticized the Court for not providing a rationale justifying the Court's conclusion that overbreadth analysis will be applied differently depending upon whether conduct or speech is involved "even where both are equally protected by the First Amendment." *Id.* at 631.

26. 413 U.S. 601 (1973).

27. *Jews for Jesus*, 107 S. Ct. at 2571-72 (citing *Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987); *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

28. *See supra* note 25.

29. 466 U.S. 789 (1984). The Los Angeles municipal code prohibiting the posting of signs on public property in order to prevent visual clutter, to minimize traffic hazards, and to prevent interference with intended use of public property was held to be constitutional both on its face (thus defeating an overbreadth challenge) and as applied against supporters of a candidate for a local elected position wishing to post political signs on such public property. *Id.* at 796-817.

30. *Id.* at 801.

31. *Broadrick*, 413 U.S. at 613.

B. *The Public Forum Doctrine*

1. *Origin of the Traditional Public Forum*

In the 1897 case of *Davis v. Massachusetts*,³² the Supreme Court affirmed the Supreme Judicial Court of Massachusetts' conviction of a preacher who had addressed crowds in the Boston Common in violation of a city ordinance which forbade, *inter alia*, "any public address" upon publicly owned property "except in accordance with a permit from the mayor."³³ Justice Edward White, writing for a unanimous Court, adopted dictum from then Judge Oliver Wendell Holmes' Massachusetts Supreme Judicial Court opinion in the case,³⁴ stating that the Federal Constitution "does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State."³⁵ Justice White concluded that "[t]he 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."³⁶

32. 167 U.S. 43 (1897). The history of public forum analysis presented in this Note is purposefully limited in order to highlight only Supreme Court cases which represent major points in the development of public forum doctrine. Readers whose interests are piqued by this Note are encouraged to read the more detailed and excellent public forum articles relied upon by the author of this Note. See Stone, *Fora Americana: Speech In Public Places*, 1974 SUP. CT. REV. 233; Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986). See also Note, *Constitutional Law — The Public Forum in Nontraditional Areas — Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), 51 WASH. L. REV. 142 (1975) [hereinafter cited as Note, *Constitutional Law*]; Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982). The unifying theme throughout all of these articles is the writers' recognition of the importance of the right of freedom of expression guaranteed by the first amendment, and the concomitant recognition that the Court must adopt a public forum analysis which will adequately insure the continued protection of this fundamental first amendment right.

33. *Davis*, 167 U.S. at 44.

34. See *Commonwealth v. Davis*, 162 Mass. 510 (1895). The lower court opinion of then Judge Holmes in addition to confirming the conviction of Davis, stated, "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." *Id.* at 511.

35. *Davis*, 167 U.S. at 47-48.

36. *Id.* at 48.

It was not until forty-two years later, in *Hague v. CIO*,³⁷ that the Supreme Court placed restrictions on a government's ability to prohibit the exercise of first amendment speech rights on public property.³⁸ In *Hague*, the Court was confronted with a municipal ordinance which forbade all meetings in the streets and other public areas without a permit.³⁹ Justice Roberts' plurality opinion⁴⁰ contained the following often quoted dictum establishing what is now viewed as the traditional public forum concept:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it 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.⁴¹

Justice Roberts' last sentence above provided for balancing the communicator's right to publicize his views with the society's interest (represented by the state) in comfort, convenience, peace, and order.

That the state's inconvenience must be more than slight in order to tip the scales in its favor was established less than seven months after *Hague*, in *Schneider v. State*.⁴² In *Schneider*, the Court held unconstitutional three municipal ordinances prohibiting leaflet distribution in order to prevent littering.⁴³

37. 307 U.S. 496 (1939).

38. *Id.* at 516-18.

39. *Id.* at 502.

40. *Id.* at 500. Justice Roberts was joined in his opinion by Justice Black. Justice Stone, joined by Justice Reed, filed a separate concurring opinion. Chief Justice Hughes also filed a separate concurring opinion. Justices McReynolds and Butler each filed separate dissenting opinions. Justices Douglas and Frankfurter took no part in the decision.

41. *Id.* at 515-16.

42. 308 U.S. 147 (1939).

43. *Id.* at 162-65.

Justice Roberts, writing for an overwhelming majority,⁴⁴ concluded that such inconveniences are insufficient to warrant an absolute denial of such "fundamental personal rights and liberties" as freedom of speech and of the press.⁴⁵

Although absolute denial of fundamental speech rights is prohibited in a traditional public forum, *Cox v. New Hampshire*⁴⁶ established that less restrictive forms of regulation may be justified in order to protect the state's interest in maintaining the orderly and efficient use of the streets.⁴⁷ In *Cox*, the Court unanimously held that an ordinance requiring a permit for any "parade or procession upon any public street or way"⁴⁸ was a constitutionally permissible time, place, and manner regulation of speech-related activity.⁴⁹ The Court, in reaching its decision, recognized that the maintenance of public order is an essential prerequisite to the enjoyment of constitutionally guaranteed civil liberties.⁵⁰

2. *The Nontraditional Public Forum*

The foregoing discussion dealt only with the recognition of a constitutionally guaranteed first amendment right of access to a traditional public forum.⁵¹ The acknowledgment by Justice Roberts of a right of access to public property for speech purposes if that property has traditionally been used for speech and assem-

44. *Id.* at 165. Justice McReynolds, the lone dissenter, filed no opinion.

45. *Id.* at 161.

46. 312 U.S. 569 (1941).

47. The statute at issue in *Cox* was New Hampshire Public Law chapter 145, section 2, which required a permit for any parade or procession to be held on public property. *Id.* at 571.

48. *Id.*

49. *Id.* at 576. A state or local government may impose reasonable time, place, and manner restrictions on the exercise of speech-related activities within a public forum, provided that such restrictions are applied without regard to the content of the speech (restrictions must be content-neutral), and that such restrictions are narrowly tailored to further legitimate government interests (such as to promote peace and order within the forum). See NOWAK, *supra* note 3, § 16.47, at 970. A somewhat simplified example of a government restriction that might, under appropriate circumstances, qualify as a reasonable time, place, and manner restriction would be a municipality's requirement that a march, procession or parade be conducted during daylight hours (time), along a specified route (place), and that participants in the march walk no more than four abreast (manner).

50. *Cox*, 312 U.S. at 574.

51. See *supra* notes 32-50 and accompanying text.

bly⁵² implied that access to public property lacking such traditional use "could be denied absolutely upon the state's naked assertion of title."⁵³ It was not until 1966, in *Brown v. Louisiana*,⁵⁴ that the Supreme Court showed signs of willingness to extend the right of access for speech purposes to public property not traditionally used for first amendment activities.⁵⁵

In *Brown*, Brown and four other blacks entered the public room of a segregated regional library.⁵⁶ Brown sat down while the other four blacks stood nearby, thus silently protesting the library's segregation policy.⁵⁷ They were arrested approximately ten minutes later for violation of the Louisiana breach-of-the-peace statute⁵⁸ and were subsequently convicted.⁵⁹ In a five-to-four decision reversing their conviction, Justice Fortas, joined by Chief Justice Warren and Justice Douglas,⁶⁰ recognized an individual's "right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."⁶¹

52. See *supra* note 41 and accompanying text.

53. See Stone, *supra* note 32, at 238-39. Stone indicates that Justice Roberts' reliance in *Hague* on adverse possession and public trust concepts to establish a public forum right of individuals sufficient to overcome the common-law property rights of the state, where the property at issue was traditionally used for speech and assembly, amounted to a failure to recognize "that access to public property for speech purposes is essential to effective exercise of First Amendment rights . . . [and] created by implication two distinct classes of public property." *Id.* at 238.

54. 383 U.S. 131 (1966).

55. See Stone, *supra* note 32, at 246 (emphasis added).

56. *Brown*, 383 U.S. at 136.

57. *Id.*

58. *Id.* at 137-38. The statute reads as follows:

Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: 1) crowds or congregates with others . . . in . . . a . . . public place or building . . . and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer . . . or any other authorized person . . . shall be guilty of disturbing the peace.

Id. at 138 (citing LA. REV. STAT. ANN. § 14:103:1 (West 1962)) (footnote omitted).

59. 383 U.S. at 137-38.

60. *Id.* at 131. Justices Brennan and White filed separate concurring opinions. *Id.* at 143, 150, respectively (Brennan, White, JJ., concurring).

61. *Brown*, 383 U.S. at 142. Stone characterizes Justice Fortas' approach as an "important first step . . . toward acceptance of the view that the right to a public forum could extend, in at least some instances, even to publicly owned property that manifestly was not historically dedicated to the exercise of First Amendment rights." Stone, *supra*

The number of Supreme Court Justices recognizing this right of access to a nontraditional public forum grew to four in *Adderley v. Florida*.⁶² In *Adderley*, a group of students were convicted under a Florida trespass statute for peacefully demonstrating on the grounds of a county jail in order to protest the arrest of several other students and the racial segregation which existed within the jail.⁶³ Although the students' convictions were upheld by the majority,⁶⁴ four justices strongly dissented.⁶⁵ Chief Justice Warren and Justices Douglas, Fortas, and Brennan criticized the majority for relying on the common-law property rights of the state to deny access to the publicly owned jail grounds.⁶⁶ Justice Douglas stated that "[t]o say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government, not to private proprietors."⁶⁷ Rather than base their public forum analysis on common-law property rights, the four dissenting justices advocated an approach which would exclude a proposed speech activity only if it so interfered with the normal uses of that public property that no accommodation would be possible.⁶⁸

note 32, at 247.

62. 385 U.S. 39 (1966). Justice Douglas filed a dissenting opinion in which Chief Justice Warren and Justices Brennan and Fortas joined. *Id.* at 48 (Douglas, J., dissenting). Stone has characterized Justice Brennan as "the new adherent [to the Fortas approach]." Stone, *supra* note 32, at 248.

63. *Adderley*, 385 U.S. at 40. The Florida trespass statute at issue, as quoted by the Court, stated, "'Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specially provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars.' FLA. STAT. § 821.18 (1965)." *Id.* at 40 n.1.

64. *Id.* at 48 (Douglas, J., dissenting).

65. *Id.*

66. *Id.* at 52. Dienes views *Adderley* as "the foundation for the *nonpublic-forum doctrine*." Dienes, *supra* note 32, at 116 (emphasis added).

67. *Adderley*, 385 U.S. at 52.

68. *Id.* at 54. "There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. . . . But this is quite different from saying that *all* public places are off limits to people with grievances." *Id.* (emphasis added). See also Stone, *supra* note 32, at 249. Stone interprets the minority's opinion to be a recognition that a person's right "to utilize public property for the exercise of First Amendment rights turns, not on the common law property rights of the state but, rather, on whether, in each instance, the particular form of communication involved *seriously interferes* with the normal uses to which the property is put." Stone, *supra* note 32, at 249 (emphasis added).

Six years and five new justices⁶⁹ later, in *Grayned v. City of Rockford*,⁷⁰ the Supreme Court adopted a public forum analysis which signalled a retreat from the Court's former position focusing on the government's ability to deny access to nontraditional public property under its control.⁷¹ Justice Marshall, writing for a seven-member majority,⁷² stated that "[t]he crucial question [in public forum analysis] is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."⁷³ Marshall further stated that "[o]ur cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest."⁷⁴

The implication to be drawn from this statement "is a presumption of speaker access to *all* public places"⁷⁵ which can only be overcome in those instances where the government controlling the forum can clearly demonstrate that the proposed manner of expression is "functionally incompatible" with the normal use of the forum.⁷⁶ The *Grayned* analysis represents a funda-

69. Justices Marshall, Blackmun, Burger, Powell, and Rehnquist replaced Justices Clark, Fortas, Warren, Black, and Harlan, respectively. See Stone, *supra* note 32, at 250-51.

70. 408 U.S. 104 (1972). In *Grayned*, the Court upheld the constitutionality of a municipal anti-noise ordinance which prohibited any person "while on public or private grounds adjacent to any building in which a school or any class thereof is in session . . . [from making] . . . any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." *Id.* at 107-08.

71. See *supra* notes 62-68 and accompanying text.

72. Justice Marshall was joined in his opinion by Chief Justice Burger and Justices Brennan, Stewart, White, Powell, and Rehnquist. *Grayned*, 408 U.S. at 104.

73. *Id.* at 116. In response to Justice Marshall's statement announcing the public forum analysis to be applied in *Grayned*, Professor Stone remarked that "the right to a public forum came of age." Stone, *supra* note 32, at 251.

74. *Grayned*, 408 U.S. at 116-17.

75. Werhan, *supra* note 32, at 412 (emphasis added). "The presumption shifts the burden to the government custodian to make a particularized showing of functional incompatibility of the manner of expression with the normal activity conducted at the forum. The inconsistency of the content of expression . . . with governmental interest is irrelevant to the analysis." *Id.*

76. *Id.* Werhan considers the *Grayned* approach to be the culmination of the balancing methodology initially fashioned by the Court in *Schneider v. New Jersey*, 308 U.S. 147 (1939), for the purpose of evaluating the claims of individuals seeking to exercise their speech rights on public property. See Werhan, *supra* note 32, at 411-12. For a discussion of *Schneider*, see *supra* notes 42-45 and accompanying text. "The Court rec-

mentally fair approach, because it permits accommodation of conflicting interests in a publicly owned property, to the extent that such interests may be accommodated, rather than denying speakers access in the first instance, with no attempt made towards accommodation, merely because the property is deemed to be a nonpublic forum.⁷⁷

3. *The Nonpublic Forum*

Unfortunately, the public forum analysis advocated in *Grayned*⁷⁸ met an untimely demise.⁷⁹ Two years later, in *Lehman v. City of Shaker Heights*,⁸⁰ Chief Justice Burger, along with Justices White and Rehnquist, abandoned their former *Grayned* approach⁸¹ and joined Justice Blackmun in a plurality

ognized that these [conflicting] claims implicated two sets of public interests — that the primary purpose for which the property is maintained be protected and that freedom of expression not be unduly hindered.” Werhan, *supra* note 32, at 411.

77. Werhan describes the *Grayned* approach as a “unitary, functional approach.” Werhan, *supra* note 32, at 378. This approach initially treats *all* public property equally, and then proceeds to balance the interests of individual speakers seeking access to the property against the interests of the public as a whole in maintaining the property for its normal function. *Id.* at 378-84 (emphasis added). Contrast this unitary, functional approach with the Court’s current public forum/nonpublic forum approach which denies speakers access to public properties deemed to be nonpublic forums without ever attempting to balance the countervailing interests involved. See *infra* text accompanying note 99. For a somewhat novel and graphic representation of how the Court’s current public forum/nonpublic forum approach fails to adequately protect the fundamental first amendment right of freedom of expression, see Note, *Constitutional Law*, *supra* note 32. Through the use of diagrams, a matrix, and mathematical symbols, the author of the Note compares the “unitary” approach of *Grayned* with the Court’s current “bifurcated” public forum/nonpublic forum approach and concludes that “[i]f the goal is protecting freedom of expression as mandated by the first amendment, the purpose is better served by the unitary approach, which consistently provides at least comparable, and theoretically superior, protection of these rights.” *Id.* at 166.

78. See *supra* notes 70-77 and accompanying text.

79. Werhan observes that, after formulating the *Grayned* analysis, “the Court never truly followed . . . [this analysis] in a public forum controversy.” Werhan, *supra* note 32, at 412.

80. 418 U.S. 298 (1974). Harry J. Lehman, an Ohio State Representative candidate for a district encompassing the city of Shaker Heights, attempted to promote his candidacy by purchasing advertising space on the Shaker Heights Rapid Transit System. *Id.* at 299. The transit system was comprised of 55 cars and each car contained 20 advertising spaces. *Id.* at 300 n.3. Pursuant to city council action, no political advertising had been permitted on the vehicles of the system during the 26 years that it was operated publicly. *Id.* at 300-01.

81. See *supra* notes 70-77 and accompanying text.

opinion⁸² which relegated available commercial advertising space on vehicles of a city transit system to a nonpublic forum category.⁸³ Absent from the opinion was any attempt to balance conflicting interests.⁸⁴ Also absent was the requirement that the government entity involved must clearly demonstrate that the proposed expressive activity is actually incompatible with the normal use of the place under consideration.⁸⁵ Instead, the public forum/nonpublic forum distinction adopted in *Lehman*⁸⁶ resulted in two correspondingly distinct levels of scrutiny to be applied. Strict scrutiny⁸⁷ would continue to be applied in those instances where government restrictions were placed in a public forum.⁸⁸ However, those identical restrictions on expressive activity would warrant only a deferential reasonableness test⁸⁹ if imposed on expressive activity conducted in a nonpublic forum.⁹⁰

Subsequent cases indicate that the public forum/nonpublic forum distinction continues to be relied upon by a sufficient number of Supreme Court Justices to result in decisions that

82. *Lehman*, 418 U.S. at 298. Justice Douglas filed a separate concurring opinion. *Id.* at 305 (Douglas, J., concurring). Justice Douglas relied on a captive audience theory to defeat Mr. Lehman's claim of a constitutional right of access to a public forum. *Id.* at 305-08. Justice Brennan filed a dissenting opinion in which Justices Stewart, Marshall, and Powell joined. *Id.* at 308 (Brennan, J., dissenting).

83. *Lehman*, 418 U.S. at 304.

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are *reasonable legislative objectives* advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

Id. (emphasis added). For an explanation of the Court's application of strict scrutiny and the reasonableness test, see *supra* notes 3, 2 respectively.

84. *Lehman*, 418 U.S. at 302-04. The plurality's determination in this case that no public forum existed freed the Court from the necessity of engaging in *any* balancing and permitted the Court to *defer* to the judgment of the city council.

85. See *supra* note 76 and accompanying text.

86. 418 U.S. at 302-04.

87. For an explanation of the courts' application of strict scrutiny, see *supra* note 3.

88. *Lehman*, 418 U.S. at 302. The requirement of strict scrutiny is implied in the Court's recognition that in "traditional [public forum] settings . . . First Amendment values inalterably prevail." *Id.*

89. See *supra* note 2.

90. See *supra* note 2. See also Werhan, *supra* note 32, at 412; Note, *Constitutional Law*, *supra* note 32, at 163-64.

often deny individuals access to public property in order to exercise their constitutionally guaranteed right to speak. In *Greer v. Spock*,⁹¹ for example, the Court held that a military base was a nonpublic forum, thus precluding the application of strict scrutiny to restrictions on speaker access.⁹² A more recent and more extreme use of the public forum/nonpublic forum distinction occurred in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*.⁹³ In *Perry*, the Court categorized an interschool mail system and teacher mailboxes as a nonpublic forum, and refused to acknowledge that a first amendment violation existed where a rival union was denied the access to the interschool system that had been granted to the union certified as the teachers' exclusive representative.⁹⁴ In his dissenting opinion, Justice Brennan, joined by Justices Marshall, Powell, and Stevens, strongly criticized the majority for "focusing on the public forum issue [and] disregard[ing] the First Amendment's central proscription against censorship in the form of viewpoint discrimination, in any forum, public or nonpublic."⁹⁵

Another case exemplifying the disparity that results when public property is labeled a nonpublic forum is *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*⁹⁶ Justice O'Connor, speaking for a plurality,⁹⁷ concluded that the Combined Federal Campaign, a government charity drive, was a non-

91. 424 U.S. 828 (1976).

92. *Id.* at 838-40.

93. 460 U.S. 37 (1983).

94. *Id.* at 54-55.

95. *Id.* at 57.

96. 473 U.S. 788 (1985).

97. *Id.* at 789. Justice O'Connor was joined in her opinion by Chief Justice Burger and Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan, filed a dissenting opinion. Justice Stevens filed a separate dissenting opinion. Justices Marshall and Powell took no part in the decision.

It is interesting to speculate on whether the outcome in this case would have been different had Justices Marshall and Powell participated in the decision. Both justices are advocates of the balancing approach adopted in *Grayned*. See *supra* notes 70-77 and accompanying text. Moreover, Justices Marshall and Powell have both been strongly critical of the public forum/nonpublic forum distinction. See *supra* text accompanying note 95. Additionally, if Justice Blackmun's dissenting opinion in *Cornelius* is viewed in conjunction with the dissenting opinion of Justices Brennan, Marshall, Powell, and Stevens in *Perry*, it is evident that a clear majority of the Court was dissatisfied with the public forum/nonpublic forum distinction as it was being applied by the Court when *Cornelius* was decided.

public forum, thus permitting the government to exclude speaker access by advancing only "reasonable" justification for such exclusion.⁹⁸ In a lengthy dissent, Justice Blackmun strongly criticized the plurality's analysis:

Rather than recognize that a nonpublic forum is a place where expressive activity would be incompatible with the purposes the property is intended to serve, the Court states that a nonpublic forum is a place where we need not even be concerned about whether expressive activity is incompatible with the purposes of the property. Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property [a nonpublic forum] and dispenses with the balancing.⁹⁹

Justice Blackmun's observations clearly reflect the position that the Court's designation of public property as a nonpublic forum is fundamentally unfair and represents an erosion of first amendment rights.

III. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*

A. *The Facts*

On July 13, 1983, the Board of Airport Commissioners adopted Resolution No. 13787, which provided, *inter alia*, that "the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity."¹⁰⁰ On July 6, 1984, Alan Howard Snyder, a minister of the Gospel for Jews for Jesus, while engaged in the distribution of free religious literature on a pedestrian walkway in the Central Terminal Area at Los Angeles International Airport, was stopped by an airport peace officer, who showed Snyder a copy of the resolution and explained that Snyder's actions were in violation of the resolution.¹⁰¹ The officer asked Snyder to leave LAX, and warned him that the City of Los Angeles would

98. *Cornelius*, 473 U.S. at 797.

99. *Id.* at 820-21.

100. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2570 (1987).

101. *Id.*

pursue legal action against him if he refused to leave.¹⁰² Thereupon, Snyder ceased his activity and departed the airport.¹⁰³

Subsequently, Snyder and Jews for Jesus filed an action in the District Court for the Central District of California.¹⁰⁴ They challenged the constitutionality of the resolution under the California and Federal Constitutions.¹⁰⁵

First, respondents contended that the resolution was facially unconstitutional under Art. I, § 2, of the California Constitution and the First Amendment to the United States Constitution because it bans all speech in a public forum. Second, they alleged that the resolution had been applied to Jews for Jesus in a discriminatory manner. Finally, respondents urged that the resolution was unconstitutionally vague and overbroad.¹⁰⁶

B. *Lower Court Opinions*

The case came before the United States District Court for the Central District of California for trial on January 8, 1985.¹⁰⁷ The sole issue addressed by the court was whether Resolution No. 13787 was constitutional.¹⁰⁸

The district court determined the pivotal question to be "whether a municipally-owned and operated airport terminal is a public forum."¹⁰⁹ Citing *Kuszynski v. City of Oakland*¹¹⁰ as

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at B-1, *Jews for Jesus* [hereinafter Board's Petition]. The memorandum decision of the district court was not reported. It was, however, included as Appendix B in the Board's petition for a writ of certiorari. Hereinafter, cites to the memorandum decision will be accomplished by reference to the page numbers as they appear in the Board's petition for a writ of certiorari.

108. *Id.* at B-3.

109. *Id.* at B-4.

110. 479 F.2d 1130, 1131 (9th Cir. 1973) (portions of an ordinance which regulated the dissemination of ideas at a public airport by requiring that materials for distribution first be submitted to the airport manager and that the identity of distributors and the purpose of the distribution be disclosed, held invalid by the Court of Appeals for the Ninth Circuit because such portions were unreasonably restrictive and, as written, permitted acts of censorship on the part of airport officials).

"the seminal case on the subject,"¹¹¹ the court found it "obvious . . . that airports are public forums."¹¹² The court cited *Rosen v. Port of Portland*¹¹³ as further support for its holding that airports are public forums.¹¹⁴ In *Rosen*, an ordinance which required individuals wishing to exercise their rights of free speech to provide port authorities with both advance notice and the identity of the individuals and their sponsors was held to be unconstitutional.¹¹⁵ The district court stated that "if Portland cannot require advance notice by and identification of leafleters, Los Angeles cannot ban them all together."¹¹⁶ The court then concluded that "LAX is a *public forum* and the challenged Resolution is unconstitutional."¹¹⁷

The district court completely rejected the Board's argument that, unlike other airports that "chose to be public forums by enacting time, place, and manner restrictions," LAX had chosen to remain a nonpublic forum.¹¹⁸ The court stated that this argument was not supported by fact or law.¹¹⁹ It noted that the facts stipulated to by the defendant disclosed a history of use of the Central Terminal Area at LAX for first amendment purposes and other matters unrelated to travel.¹²⁰ The court also found that the Board's legal support for such an argument was undermined by *Wolin v. Port of New York Authority*,¹²¹ where the same argument¹²² made with respect to a bus terminal was rejected by the Second Circuit.¹²³ According to the district court,

111. Board's Petition at B-4.

112. *Id.* at B-5.

113. 641 F.2d 1243 (9th Cir. 1981).

114. Board's Petition at B-5, B-6.

115. 641 F.2d at 1244, 1252.

116. Board's Petition at B-6. This is the converse of Justice Edward White's now infamous argument in *Davis v. Massachusetts*, 167 U.S. 43 (1897). See *supra* text accompanying note 36. In *Davis*, Justice White argued that where the government has a greater power it is free to exercise a lesser degree of that power. *Davis*, 167 U.S. at 48. The district court in *Jews for Jesus*, indicated that where the government lacks even that lesser power it certainly cannot exercise a greater power. See Board's Petition at B-6.

117. Board's Petition at B-6 (emphasis added).

118. *Id.*

119. *Id.*

120. *Id.* at B-6 to B-7.

121. 392 F.2d 83 (2d Cir. 1968).

122. See *supra* text accompanying note 118.

123. *Wolin*, 392 F.2d at 89.

"[s]treets, parks and airports do not become public forums because government consents to their use as such. They are public forums, as the Supreme Court explained in *Hague*, because they are traditional gathering places for the citizenry. They are held in trust by government for public use."¹²⁴ After citing recent cases wherein "the Supreme Court [had] grappled with difficult questions of what constitutes a public forum,"¹²⁵ the district court found no difficulty in finding that "[a]n airport used by an estimated 60 million people a year is a public forum,"¹²⁶ and concluded that the LAX resolution banning first amendment activity is unconstitutional.¹²⁷

The United States Court of Appeals for the Ninth Circuit affirmed the decision and reiterated much of the district court's reasoning.¹²⁸ Additionally, the Ninth Circuit cited cases wherein other circuits found airports to be public forums.¹²⁹ The circuit court then concluded that, because the Central Terminal Area at LAX is a "*traditional public forum*,"¹³⁰ the LAX resolution which banned "all First Amendment activity rather than setting forth reasonable time, place, and manner restrictions on such activity, . . . is unconstitutional on its face."¹³¹

The Board subsequently petitioned for and was granted cer-

124. Board's Petition at B-7. See also *supra* notes 39-41 and accompanying text.

125. Board's Petition at B-7.

126. *Id.*

127. *Id.* at B-7 to B-8.

128. *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 793-95 (9th Cir. 1986).

129. *Id.* at 794-95 (citing *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (local ordinance which provided, *inter alia*, for a blanket prohibition of both the solicitation and the distribution of literature within the terminal buildings of a public airport held to be an unconstitutionally overbroad restriction on "First Amendment activity within a public forum"); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 774 (D.C. Cir. 1983) (government ban on political advertising within airport terminal advertising areas held to be unconstitutional "*if in the absence of demonstrably compelling countervailing reasons*," because airport terminals are public forums) (emphasis added); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), (airport terminal buildings held to be public forums, thus precluding airport officials from denying individuals the right to distribute literature in those open areas of the terminals resembling public thoroughfares), *cert. denied*, 421 U.S. 992 (1975).

130. *Jews for Jesus*, 785 F.2d at 795.

131. *Id.* For an explanation of time, place, and manner restrictions, see *supra* note 49.

tiorari to the United States Supreme Court.¹³² The questions presented for review in the Board's petition were:

1. May an airport operator constitutionally limit the uses of the interiors of its terminal facilities to their dedicated and intended airport-related purposes or are those facilities public forums that require the airport operator to permit their use for non-airport related activities?

2. If the interiors of the terminal facilities at Los Angeles International Airport are not public forums, is the Board of Airport Commissioners' policy that limits the uses of those facilities to airport-related purposes a reasonable exercise of its right to reserve the uses of the terminal facilities to their dedicated and intended airport-related purposes?¹³³

C. *The Supreme Court Opinions*

1. *The Majority*

Justice O'Connor, writing for a unanimous Court, affirmed the lower court's conclusion that the resolution banning all first amendment activities within the Central Terminal Area at Los Angeles International Airport was unconstitutional on its face.¹³⁴ The Court, however, based its decision on the first amendment overbreadth doctrine:

[A]n individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."¹³⁵

The majority found that, because the resolution "prohibit[ed] *all* protected expression,"¹³⁶ the ban swept too broadly with the result that "virtually every individual who enters LAX may be found to violate the resolution by engaging in some

132. *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 107 S. Ct. 61 (1986).

133. Board's Petition at i.

134. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568 (1987).

135. *Id.* at 2571 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). For an explanation of the overbreadth doctrine, see *supra* notes 16-31 and accompanying text.

136. *Id.* at 2572.

'First Amendment activit[y].'¹³⁷ Moreover, the majority concluded that the broad language of the resolution defied any limiting construction which might save the resolution.¹³⁸ This reliance on the overbreadth doctrine freed the *Jews for Jesus* majority from the necessity of deciding "whether LAX is indeed a public forum."¹³⁹

2. *The Concurrence*

Justice White, joined by Chief Justice Rehnquist, filed the following two-sentence concurring opinion:

I join the Court's opinion but suggest that it should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum. That issue was one of the questions on which we granted certiorari, and we should not have postponed it for another day.¹⁴⁰

IV. Analysis

The Supreme Court cannot be faulted for using the first amendment overbreadth doctrine¹⁴¹ to declare that the Los Angeles International Airport resolution is unconstitutional.¹⁴² As the Court aptly noted, the resolution forbade *all* expressive activity in the Central Terminal Area at LAX.¹⁴³ If carried to its logical extreme, the resolution "prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing [S]uch a ban cannot be justified even if LAX were a non-public forum because no conceivable governmental interest would justify such an absolute prohibition of speech."¹⁴⁴ The Supreme Court *is* to be faulted, however, for its failure to use this case as a vehicle to restore to the public forum doctrine the fundamental fairness which has been lacking since the Court abandoned the balancing approach¹⁴⁵ to public forum analysis origi-

137. *Id.*

138. *Id.*

139. *Id.* at 2571.

140. *Id.* at 2573.

141. See *supra* notes 7, 134-139, and accompanying text.

142. See *supra* text accompanying notes 134-139.

143. *Jews for Jesus*, 107 S. Ct. at 2572.

144. *Id.*

145. See *supra* notes 78-90 and accompanying text.

nally adopted in *Grayned v. City of Rockford*.¹⁴⁶

The strong dissents presented in *Lehman*,¹⁴⁷ *Perry*,¹⁴⁸ and *Cornelius*,¹⁴⁹ the cases cited as examples of the Supreme Court's current public forum approach,¹⁵⁰ provide cogent evidence that the Court's use of the public forum/nonpublic forum distinction continues to trouble individual members of the Court.¹⁵¹ Additionally, commentators who have addressed public forum analysis favor the Court's adoption of an approach which will adequately balance competing interests in publicly owned property, before reaching a determination that a restriction on expressive activity is warranted in a particular case.¹⁵² Such balancing is in stark contrast to the Supreme Court's current approach which, in effect, denies the exercise of first amendment rights at the outset when public property is labeled a nonpublic forum.¹⁵³

Further evidence of the need for a balanced approach to public forum analysis is apparent in the circumstances surrounding the *Jews for Jesus* case. Had the Supreme Court not adopted a public forum/nonpublic forum distinction, the Board of Airport Commissioners would have had no reason to attempt to have the reviewing courts, including the Supreme Court, recognize LAX as a nonpublic forum.¹⁵⁴

Assuming that the Board's resolution had been more narrowly tailored (thus eliminating the overbreadth problem) and that LAX had been held to be a nonpublic forum,¹⁵⁵ the Board would have been free to prohibit various types of communication entirely, so long as it acted reasonably and the prohibition was content-neutral.¹⁵⁶ In other words, the applicable standard

146. 408 U.S. 104 (1972). See *supra* notes 70-77 and accompanying text.

147. See *supra* notes 10, 80-90, and accompanying text.

148. See *supra* notes 11, 93-95, and accompanying text.

149. See *supra* notes 12, 96-99, and accompanying text.

150. See *supra* notes 80, 83, 93, 94, 96-98, and accompanying text.

151. See *supra* notes 13, 95, 99, and accompanying text.

152. See *supra* note 32.

153. See *supra* note 99 and accompanying text.

154. See *supra* notes 132-133 and accompanying text.

155. For those skeptics who contend that this is too great an assumption, see *Acorn v. City of Phoenix*, 603 F. Supp. 869 (D. Ariz. 1985) (traffic intersections held to be nonpublic forums, in spite of the public forum status long afforded to streets and parks). But see *Acorn v. City of New Orleans*, 606 F. Supp. 16 (E.D. La. 1984) (traffic intersections held to be traditional public forums).

156. See *Greer v. Spock*, 424 U.S. 828 (1976) (Fort Dix military base deemed not to

of judicial review would be the deferential reasonableness test.¹⁵⁷ If on the other hand, a reviewing court declared LAX to be a public forum, then that same narrowly tailored resolution would be subjected to the significantly more stringent strict scrutiny standard.¹⁵⁸

The foregoing hypotheticals serve to highlight the disparate treatment afforded speakers seeking access to public property when the Supreme Court applies its current public forum/non-public forum analysis. They also indicate that the majority should have heeded Justice White's advice and confronted the public forum issue presented in *Jews for Jesus*.¹⁵⁹ The Court should have seized upon the opportunity presented in *Jews for Jesus* to renounce its use of the outcome-determinative¹⁶⁰ public forum/nonpublic forum analysis and to announce its return to the balancing approach articulated in *Grayned*,¹⁶¹ which insured that speakers' interests would at least be considered, regardless of the type of public property involved.

Implicit in such an announcement would be the need for lower courts to resume their traditional role of balancing¹⁶² to assure that first amendment expressive activity is restricted only if the "manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹⁶³ Ad-

be a public forum, thus enabling the Court to deny the existence of any "generalized constitutional right to make political speeches or distribute leaflets at Fort Dix"; *United States Postal Serv. v. Council of Greenburgh Civil Ass'ns*, 453 U.S. 114 (1980) (letterbox approved by the United States Postal Service deemed not to be a public forum, thus permitting the Court to hold constitutional a federal statute prohibiting the depositing of all unstamped mail into such letterbox).

157. See *supra* note 2.

158. See *supra* notes 2 and 3.

159. See *supra* note 140 and accompanying text.

160. See *Dienes*, *supra* note 32, at 117. *Dienes* asserts that "no government regulation of the nonpublic forum has been declared unconstitutional by the Supreme Court." *Id.*

161. See *supra* notes 73-76 and accompanying text.

162. See *supra* note 155. The *Acorn* cases cited represent the two extreme positions taken by lower courts. Where public property is held to be a nonpublic forum, a court may adopt a deferential approach to government regulation. On the other hand, if a court holds public property to be a public forum, the presumption exists that any government regulation is unconstitutional. Such extreme approaches serve to highlight the lower courts' abandonment of their traditional balancing role in those instances where courts find a property to be a nonpublic forum.

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

ditionally, government officials would be forewarned that any restrictions they attempted to impose on first amendment rights would be strictly scrutinized, and that they would bear the heavy burden of showing that the above-mentioned basic incompatibility exists.

V. Conclusion

The Supreme Court's failure to take the opportunity presented in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*¹⁶⁴ to correct the problems that plague current public forum analysis is regrettable. As long as the Court continues to divide publicly owned property into two distinct categories, each with a radically different level of first amendment protection, government entities will continue to avail themselves of the argument that property under their control falls into the nonpublic forum category.

From government's point of view, this is understandable, for to do otherwise would subject its regulations and restrictions to the strict scrutiny of the courts.¹⁶⁵ Similarly, the lower courts, in many instances, will have the option of labeling publicly owned property as a nonpublic forum, thus relieving them of their responsibility to balance an individual's constitutional right to speak against competing state interests. As a result, a speaker could be denied access to a property simply because the property was already being used for a less compelling (and possibly not incompatible) societal function.¹⁶⁶

This fundamentally unfair situation will be corrected only when the Supreme Court replaces its current public forum/nonpublic forum analysis with a *Grayned*¹⁶⁷-type balancing approach to resolve issues involving speaker access to public property. Under a *Grayned*-type approach, both government officials and lower courts would be precluded from ever again using the "nonpublic forum" label to deny a speaker access to a public

164. 107 S. Ct. 2568 (1987).

165. See *supra* note 3 and accompanying text.

166. See *supra* note 162 and accompanying text.

167. See *supra* notes 70-77 and accompanying text.

property in order to exercise his most essential first amendment freedoms.

Lonnie S. Davis

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