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Protecting West Virginia's Public FORA: Criteria to Safeguard Our Rights of Expression

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PROTECTING WEST VIRGINIA'S PUBLIC FORA:
CRITERIA TO SAFEGUARD OUR RIGHTS OF EXPRESSION

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I. INTRODUCTION

On the steps of the West Virginia State Capitol, President George W. Bush addressed a crowd as follows on Independence Day, 2004: "[T]oday we remember names like Washington, Adams, Jefferson, and Franklin. . . . We're thankful that this nation they created 228 years ago remains free and independent and the best hope for all mankind."1 As President Bush was speaking, Jeff Rank and his wife, Nicole, were handcuffed and asked to leave the event after they refused to cover up their t-shirts which read: "Love America, Hate Bush," and "Regime change starts at home."2 The Ranks were charged with trespass because they refused to leave their spots and move to a designated protest area.3 Although the Ranks had tickets to attend this event, a White House spokesman commented that, as a general rule, official events for the President do not allow the presence of "political signage."4

Other recent events have also left the United States citizenry questioning to what extent we are allowed to express political protest on public property. In Boston, Massachusetts, the site of the Democratic National Committee’s ("DNC's") Convention for Presidential Candidate John Kerry, a twenty-five foot wide caged zone surrounded by a twelve-foot fence was erected for protestors of the convention, blocking them from the street where the convention was held.5 The City of Boston claimed that the precautions were necessary to protect the delegates.6 In Rio Rancho, New Mexico, an event hosting Dick Cheney required all those wishing to attend to sign a 'loyalty oath' to President George W. Bush to enter the premises.7 This decision, made by the New Mexico GOP

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1 Remarks on Independence Day in Charleston, West Virginia, 40 WEEKLY COMP. PRES. DOC. 1202 (July 4, 2004).
3 Free speech, supra note 2. The charges against the Ranks were later dropped, and the Charleston City Council and Mayor Danny Jones issued a public apology to the couple. Couple Arrested at Bush Rally Files Suit. Pair Seeks Change to Protest Policy, Monetary Damage for Emotional Stress from July 4 Scene, CHARLESTON DAILY MAIL, Sept. 15, 2004, at 5A.
4 Coleman, supra note 2, at 1A. Note that the White House spokesman, Taylor Gross, also stated that people attending the rally wearing pro-Bush items were similarly asked to cover up or leave. Id.
5 Marie Szaniszlo, Convention Countdown; Groups Sue to Protest Closer to Fleet, BOSTON HERALD, July 20, 2004, at 7.
6 Id.
officials, was for the purpose of curbing demonstrations by anti-Bush activists at the campaign event.\textsuperscript{8}

Turbulent times and controversial issues, such as war, AIDS, abortion, and civil rights, have historically encouraged the public to increase its activity of protest in the public forum.\textsuperscript{9} There is no doubt that protesting has been more prevalent in recent years for such reasons as the war in Iraq, the presidential election, and gay rights issues. Just as owners of private property can control their property’s usage, the government is not required to give protestors unlimited access to protest on public property in whichever manner the protestor so chooses.\textsuperscript{10} But to what extent can the government constitutionally limit a protestor’s right to passive, nonviolent expression on public property, particularly where that property is a traditional public forum?\textsuperscript{11} For fifty-five years, the U.S. Supreme Court has attempted to set standards for the government to use when regulating free speech and expression on public property.\textsuperscript{12} The resulting Public Forum Doctrine has left courts across the nation unsure of what criteria govern, and to what extent speech may be suppressed in a traditional public forum.\textsuperscript{13}

The following discussion provides insight into the Public Forum Doctrine and its role in American politics, both past and present. Part II of this Note analyzes the history of the Public Forum Doctrine from its very beginnings to the most recent decision by the U.S. Supreme Court. Part III outlines the modern means of regulation, and gives insight through case law of challenges to modern government regulation. Part IV then analyzes foreign precedent in an effort to compile criteria for the Supreme Court of Appeals of West Virginia to use in potential future public forum cases coming before it, and concludes that an audience member’s right to passive expression in a traditional public forum trumps any right of the political party organizer to exclude him or her from attending.

\textsuperscript{8} ‘Loyalty Oaths’ Not Required in West Virginia, THE CHARLESTON DAILY MAIL, Aug. 6, 2004, at 14A.


\textsuperscript{10} Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985) (“Even protected speech is not equally permissible in all places and at all times.”); see also O’Neill, supra note 9, at 419.

\textsuperscript{11} See O’Neill, supra note 9, at 419.


\textsuperscript{13} See id.
II. THE HISTORY OF THE PUBLIC FORUM DOCTRINE

A. Forming the Doctrine and Initial Developments

1. Davis v. Massachusetts

The first notable opinion by the U.S. Supreme Court concerning the right of the state to limit public speech came by way of Justice White’s opinion in Davis v. Massachusetts.14 In Davis, the Court considered whether an ordinance requiring a permit to engage in speech or expression on public property was constitutional.15 Davis had made a public address without first obtaining a permit from the mayor, which was required by the ordinance.16 The lower court affirmed Davis’s conviction, and stated that the legislature “may and does exercise control over the use which the public may make of such places.”17 On appeal, Justice White defended the lower court’s position that the state has control over the use of public places by citizens.18 Justice White contended that the Constitution does not create a personal right in the citizenry of the state to use the property of the state in a manner that is against the Legislature’s wishes.19 Thus, the original rule concerning use of public property was that state ownership “entails unreviewable state power to control speech in public places.”20 Justice White’s opinion displayed the Supreme Court’s view that free speech did not supersede the property rights of the state, and it would be forty years before a decision would modify this notion.21

2. Hague v. Committee for Industrial Organization

The Davis decision of absolute government control over public fora lasted until the Supreme Court decided Hague v. Comm. for Indus. Org.22 The Hague opinion, rendered over forty years after Davis, marked the emergence of

14 167 U.S. 43 (1897).
15 Id. at 47.
17 Id. Justice Holmes, author of the lower court opinion, stated that for “the Legislature absolutely . . . 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.
18 Davis, 167 U.S. at 46-47.
19 Id. at 47-48.
22 307 U.S. 496 (1939).
the Public Forum Doctrine. In Hague, the plaintiff challenged a municipal ordinance forbidding all public meetings in streets and other public places without first obtaining a permit. In an opinion authored by Justice Roberts, the Supreme Court held that the right to gather in public and speak to one another is a privilege inherent in United States citizenship, and is protected under the Fourteenth Amendment. Although the facts were analogous to those in Davis v. Massachusetts, the Court’s holding was not. Justice Roberts held that the ordinance was facially void, and he explained the reason in dictum:

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 the purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has . . . been part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen to . . . use the streets and parks for communication . . . may be regulated in the interest of all; it is not absolute, but relative, and must be exercised . . . in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Justice Roberts’s reasoning infers that a state may regulate a citizen’s right to speak in a public forum to maintain order, but his opinion recognizes that a state cannot regulate to the extent that it completely or arbitrarily bars access to such a forum. Unlike Justice White in Davis, Justice Roberts used a privileges and immunities clause analysis. The Hague opinion distinguished the ordinance in Davis because “it was not directed solely at the exercise of the right of speech and assembly, but was addressed . . . to other activities . . . which doubtless might be regulated or prohibited as respects their enjoyment in parks.” Justice Roberts’s opinion in Hague articulating the “immemorially . . . time out of mind” characterization of property is a central feature of the Public Forum Doctrine. Courts have stricken numerous ordinances based on such

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24 Hague, 307 U.S. at 496.
25 Id. at 512.
26 Id. at 514-18.
27 Id. at 515-16.
28 See id.
29 Id. at 515.
30 Id.
31 See id.; see also Pfohl, supra note 23, at 566.
principles.\textsuperscript{32} Not once in Justice Roberts’s opinion in \textit{Hague} is there any mention of the First Amendment.\textsuperscript{33} Courts have also combined Justice Stone’s concurrence in \textit{Hague} (using a due process rationale) with Justice Roberts’s plurality opinion to produce the modern Public Forum Doctrine.\textsuperscript{34}

The \textit{Hague} plurality opinion also fails to mention where the idea of the public forum originated, whether it be from the Constitution, or a result of historical customs.\textsuperscript{35} Justice Roberts also failed to suggest criteria to use when applying the Public Forum Doctrine in future cases.\textsuperscript{36} While no criteria were specifically enumerated, Justice Robert’s opinion does rest on an application of a reasonableness analysis.\textsuperscript{37} With the opinion in \textit{Hague}, Justice Roberts put to rest the idea that municipalities could keep public fora clear of influence from potentially unsettling ideas.\textsuperscript{38}

3. \textit{Schneider v. State}

The same year that the Supreme Court decided \textit{Hague}, the Court rendered another important decision concerning speech in a public forum. In \textit{Schneider v. State}, the Supreme Court considered whether an ordinance forbidding distribution of handbills to passers-by upon the public streets of Los Angeles was a reasonable exercise of police power by the state.\textsuperscript{39} The City argued that it had a legitimate interest in protecting the City and its people from such distribution because the ordinance prevented littering.\textsuperscript{40} The Court rejected the City’s proposed legitimate interest.\textsuperscript{41} Writing for the Court again, Justice Roberts held that “cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.”\textsuperscript{42} The Court acknowledged that courts have the difficult task of “[weighing] the circumstances and . . . [appraising] the substantiality of the reasons advanced in support of the regulation,” but a legislative preference may “be insufficient to justify such as diminishes the exercise of rights

\textsuperscript{32} See Pfohl, supra note 23, at 566 n.190.
\textsuperscript{33} Id. at 564.
\textsuperscript{34} Id. at 561.
\textsuperscript{35} Bevier, supra note 20, at 83.
\textsuperscript{36} Id.
\textsuperscript{37} Pfohl, supra note 23, at 560.
\textsuperscript{38} MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS 168 (1992).
\textsuperscript{39} 308 U.S. 147, 153-55 (1939).
\textsuperscript{40} Id. at 162.
\textsuperscript{41} Id. at 161. Regarding the purported governmental interest, Justice Roberts stated: “Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.” Id.
\textsuperscript{42} Id. at 163.
so vital to the maintenance of democratic institutions.”

Despite the City’s legitimate interest in keeping the streets open for movement and in maintaining the well-being of its citizens, the Court struck down the ordinance as an abridgement of First Amendment free speech liberties. Ultimately, the opinions in both 

Hague and 

Schneider 

afforded more protection to people to communicate openly in public fora.

B. Advancing Towards Inconsistency: The Last Thirty Years of Public Forum Analysis

1. Lehman v. City of Shaker Heights

In the last three decades, the Supreme Court has issued fragmented opinions in public forum cases. In 1974, the Supreme Court decided the case of 

Lehman v. City of Shaker Heights, where a political candidate brought action against the City for refusing him space on the side of a public bus to post campaign ads. The City had denied him permission because it wished to minimize opportunities for abuse, lessen the appearance of favoritism, and eliminate the risk of having a captive audience to political advertising. The Court agreed with the City of Shaker Heights that a public bus was not a public forum, and thus the ordinance prohibiting the displays was not a First Amendment violation. Justice Blackmun authored the Court’s plurality opinion, and stated that because there were no open spaces, parks, or “other public thoroughfare,” the Constitution did not afford to the petitioner the right sought. The plurality opinion “sounded the death knell” for the right to broad public forum access.

The dissenters made strong arguments that illuminate the plurality’s inconsistency when analogized with parallel preceding cases. Justice Brennan’s

43 Id. at 161.
46 See infra notes 47-98 and accompanying text.
48 Id. at 304.
49 Id.
50 Id. at 303.
51 Bevier, supra note 20, at 89. Bevier explains that “[b]efore Lehman, it seemed that the ‘public forum’ would become an expansive concept: the Court seemed on the verge of holding . . . that citizens may always speak in a public forum unless the Court independently agreed with the judgment of the forum managers.” Id. (emphasis added). The opinion in Lehman did not provide “an additional brake on governmental restriction of speech,” but instead, “Justice Blackmun’s approach makes mandatory access a threshold test for protection.” Id. (citing Ronald A. Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287, 1301 (1979)).
dissent relied on *Hague* to clarify that identifying a place as a public forum requires "the Court to strike a balance between the competing interests of the government . . . and the speaker and [the] audience . . ."52 After he declared that a public bus is a public forum, Justice Brennan stated that free speech and equal protection principles prohibit discrimination when the regulation is content-based.53 After *Lehman*, the public forum label became a way to restrict First Amendment access rights, and Justice Blackmun's plurality opinion offered no explanation as to why car cards on public transportation vehicles were not public forums.54

2. U.S. v. Grace

Nearly a decade after *Lehman*, a less-fragmented Court issued a decision in favor of First Amendment public forum rights. In *United States v. Grace*, Justice White wrote for the seven-to-two majority in a case that hit close to home for the Court; the section of the statute in question prohibited the "display [of] any flag, banner, or device designed or adapted to bring into public notice any part, organization, or movement" in or on the grounds of the U.S. Supreme Court building.55 In striking down the statute as unconstitutional, Justice White disagreed with the United States that because the public had not traditionally used it for expressive purposes, the sidewalk outside the Supreme Court building was a nonpublic forum.56

Writing for the majority, Justice White opined that "Congress . . . may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums,"57 and a sidewalk in front of the Supreme Court building deserves the same public forum status as any other sidewalk in Washington D.C. or elsewhere.58 While Justice White contended that the government may impose reasonable time, place and manner restrictions, the Court found that the statute was not a reasonable place restriction because it had an "insufficient nexus" with any public interest that might be thought to "undergird" the statute in question.59 The majority's emphasis that a public fo-
rum cannot, without sufficient justification, be demoted by a statute or ordinance to a nonpublic status is one of the most significant aspects of the \textit{Grace} decision.\footnote{\textit{See O'Neill, supra note 9, at 459.}}

3. \textit{Boos v. Barry}

While \textit{Grace} re-emphasized the right to freedom of expression in a public forum, another sidewalk case decided shortly after \textit{Grace} provided insight into the level of scrutiny the Supreme Court applies when an ordinance limits expression in the public forum.\footnote{\textit{See Boos v. Barry, 485 U.S. 312, 321 (1988); cf. Grace, 461 U.S. at 179-81.}} In \textit{Boos v. Barry}, the Court examined a content-based D.C. Code Section that prohibited the display of certain signs within five hundred feet of a foreign embassy to determine if this prohibition violated expression rights in a public forum.\footnote{\textit{Boos, 485 U.S. at 315. The section of the statute included in the above text is referred to by the Supreme Court as the "display clause" portion of the statute. \textit{Id.} at 316. The "display clause" only prohibited the signs if they tended to bring that foreign government they were directed at into "public odium" or "public disrepute." \textit{Id.} The other portion of the statute which prohibits any congregation of three or more persons within 500 feet of the embassy (referred to as the "congregation clause" by the Supreme Court), is not mentioned in this analysis. \textit{Id.} at 331-32.}} Justice O'Connor authored the Court's majority opinion, and stated that if a statute is a content-based restriction on political speech in a public forum, "[i]t must be subjected to the most exacting scrutiny."\footnote{\textit{Id.} at 321.} The government asserted that it had a dignity interest for foreign diplomatic personnel, but the Supreme Court found that the code section in question was not narrowly tailored to serve that interest and therefore violated the First Amendment.\footnote{\textit{Id.} at 322-29. Note that regarding the "congregation clause," discussed infra note 69, the Court held that it was a constitutional time, place, and manner restriction because it was site-specific and was limited to groups posing a security threat. \textit{Id.} at 331-32.}

4. \textit{U.S. v. Kokinda}

After \textit{Boos} and \textit{Grace}, it seemed that the Supreme Court was providing ammunition for the public forum as an open area for expressive communication, and that the analysis used in the prior \textit{Lehman} holding restricting access rights was vanishing.\footnote{\textit{See supra notes 46-64 and accompanying text (discussing Lehman, Boos, and Grace).}} Then came \textit{U.S. v. Kokinda}, where the plurality opinion concluded that a regulation prohibiting activity such as campaigning, commercial soliciting, and displaying or distributing commercial advertising from postal decorum. \textit{Id.} at 182. Despite its recognition that this was an important objective, the Court found that because the perimeter of the building was indistinguishable from any other sidewalk, a total ban on the conduct usually allowed on other public sidewalks was unjustifiable. \textit{Id.}
property was not a First Amendment violation. Justice O'Connor, relying heavily on \textit{Lehman}, stated that the postal sidewalk did not have the characteristics of the traditional public sidewalk open to free expression and was constructed solely to help post office patrons access the post office. Because the plurality did not identify the area as a traditional public forum, and because the regulation was not content-based, the plurality applied a reasonableness test and upheld the regulation.\footnote{497 U.S. 720, 723-24, 737 (1990).}

The dissenters in \textit{Kokinda} were confused as to why the Court seemingly ignored its opinion in \textit{Grace}. Writing for the dissent, Justice Brennan stated that over the years, the Court has categorized three areas where expression may occur on public property: "(1) traditional ... 'places which by long tradition ... have been devoted to assembly and debate' ...; (2) 'limited-purpose' ... forums opened 'for use by the public as a place for expressive activity' ...; and (3) nonpublic forums or public property 'which ... [are] not by tradition ... a forum for public communication.'"\footnote{Id. at 736-37.} Justice Brennan questioned the Court's interpretation of a public forum, which he stated has seemed to restrict freedom of expression rather than protect it.\footnote{See id. at 740 (5-4 decision) (Brennan, J., dissenting).} Using a common sense approach and relying on \textit{Grace}, Justice Brennan declared that a public sidewalk next to a public office where people are free to enter and exit is a natural choice for speech and expression to take place, and "[n]o doctrinal pigeonholing, complex formula, or multipart test can obscure this evident conclusion."\footnote{Id. at 740-41 (Brennan, J., dissenting) (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983)).}

The holding in \textit{Kokinda} reverted back to the \textit{Lehman}-way of reasoning and provided just as little explanation as to why the space outside of a U.S. post office was a nonpublic forum.\footnote{Id. at 741 (Brennan, J., dissenting).} The interest proposed by the government, that the solicitation was disruptive of business, was enough to pass the plurality's reasonableness test applied to nonpublic fora.\footnote{Id. at 742-43 (Brennan, J., dissenting).} While the Public Forum Doctrine was over fifty years old at the time of \textit{Kokinda}, the holdings up through and including \textit{Kokinda} left the public forum as a vague, undefinable concept.\footnote{See Bevier, supra note 20, at 95-96.}

\textit{Kokinda}, 497 U.S. at 730, 736-37; \textit{see also} \textit{FIRST AMENDMENT, supra} note 21, at 303.\footnote{Kokinda, 497 U.S. at 730, 736-37; \textit{see also} \textit{FIRST AMENDMENT, supra} note 21, at 303.}
C. Where the U.S. Supreme Court Has Left Us: ISKCON v. Lee

In 1992, the Supreme Court rendered its most recent decision affecting the Public Forum Doctrine. In ISKCON v. Lee, the Court was confronted with two issues: first, whether an airport terminal was a public forum, and second, whether it was within the public authority's right to regulate solicitation. The International Society for Krishna Consciousness, Inc. ("ISKCON") alleged that the Port Authority ban on solicitation deprived members of First Amendment rights. After finding that an airport terminal is not a public forum, the Court upheld the solicitation ban.

The Court's public forum analysis included a significant classification system, dividing public property into three categories: traditional public fora, designated public fora, and nonpublic fora. In its majority opinion, authored by Chief Justice Rehnquist, the Court described each category as follows: traditional public fora are property that have "traditionally been available for public expression," that designated public fora are "property that the State has opened for expressive activity by part or all of the public," and the remaining property is nonpublic fora. Because an airport terminal has not "immemorially . . . time out of mind" been used by the public for expressive purposes and because using terminals for expression is new, the majority held that an airport terminal falls into the nonpublic category and is not a public forum.

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76 Int'l Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee, 505 U.S. 672, 674 (1992). Note that there was also a regulation of sale and distribution in the airport terminals, which is addressed in Lee v. ISKCON, 505 U.S. 830 (1992). The focus of this discussion, however, concerns the solicitation ban decision.

The regulation in place by the public authority forbid "the repetitive solicitation of money or distribution of literature," "the sale or distribution of any merchandise," and "the sale or distribution of flyers, brochures, pamphlets, books, or any other printed or written materials." ISKCON, 505 U.S. at 675-76. The regulations only pertained to the terminals; solicitation and distribution on the outside sidewalks was not within the scope of the regulation. Id. at 676.

77 Id. at 676. ISKCON specifically alleged that, under the regulation, it was unable to perform "sankirtan," described by the court as a ritual of "going into public places, disseminating religious literature and soliciting funds to support religion." Id. at 674-75.

78 Id. at 679 ("[W]e conclude that the terminals are nonpublic fora and that the regulation reasonably limits solicitation."). Regarding the ban on the sale and distribution of literature, the Court found that the ban violated the First Amendment. Lee v. ISKCON, 505 U.S. 830, 831 (1992).


80 ISKCON, 505 U.S. at 678-79. The category of traditional public fora includes sidewalks, streets, and parks. Id.

81 Id. at 680. Chief Justice Rehnquist opines that: [T]he tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals . . . have been intentionally opened . . . to such activity . . . . In short, there can be no argument that society's time-
According to the majority, when property falls in the nonpublic fora category it receives a relaxed scrutiny, and the government’s role is then the most analogous to a private property owner. The Court states that for a regulation over nonpublic fora to pass, it only needs to be reasonable, as long as the government is not regulating based on a favored or disfavored viewpoint. Under this standard, as long as property fits into the nonpublic category, there is little to no First Amendment analysis, even if more reasonable alternatives exist.

Justice O’Connor and Justice Kennedy each authored significant concurrences in this case. Justice O’Connor agreed that airport terminals are not public fora for many of the same reasons enumerated by the majority. However, Justice O’Connor went further and cautioned that this does not give the government the right to “restrict speech in whatever way it likes.” Justice O’Connor proceeded to go through a reasonableness analysis, but with a compatibility twist – she stated that a reasonable regulation must also be consistent with a legitimate government interest to maintain the property for its lawfully intended use. According to Justice O’Connor, the correct reasonableness inquiry was “whether [the speech restrictions] are reasonably related to maintaining a multipurpose environment that the Port Authority has deliberately created.”

Justice Kennedy’s concurrence accused the majority of a flawed analysis by leaving the government “with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-

tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in petitioners’ favor.

Id. at 680-81.

82 Id. at 678-79; O’Neill, supra note 9, at 423-24.
83 ISKCON, 505 U.S. at 679.
84 Stoll, supra note 12, at 1304. Chief Justice Rehnquist’s approach involves an intent-based inquiry, asking whether the government intended for the forum to be fully open for expressive purposes. Id. at 1302. If the answer is no, then the property is nonpublic fora, and the regulation need only be reasonable, despite adverse affects on expressive activities. See id. at 1302-03.
85 While the Court’s opinion on the solicitation regulation, ISKCON v. Lee, 505 U.S. 672 (1992), and the sale and distribution regulation, Lee v. ISKCON, 505 U.S. 830 (1992), were issued separately, Justice O’Connor’s concurrence and Justice Kennedy’s concurrence, along with Justice Souter’s dissent, are contained in a separate opinion under the same citation as ISKCON v. Lee, 505 U.S. 672 (1992), but these opinions discuss each of the Court’s opinions regarding the solicitation ban and the sale and distribution ban.
86 ISKCON, 505 U.S. at 686-87.
87 Id. at 687.
88 Id. at 688.
89 Id. at 689. The “multipurpose environment” that Justice O’Connor refers to includes the shopping mall atmosphere in the terminal, including but not limited to restaurants, barber shops, food stores, and banks. Id. at 687-89.
related purpose for the area ..." Justice Kennedy further included a compatibility element, stating that the inquiry into whether property is a public forum should include the "actual, physical characteristics and uses of the property." The Court, according to Justice Kennedy, is indirectly holding that traditional public fora are a closed category of streets, parks, and sidewalks, and the Court is foreclosing any property with similar characteristics (such as airport terminals) from joining. Overall, Justice Kennedy's trepidation lies in the excessive authority the majority leaves the government, the lack of room for new additions to the traditional public forum list, and the majority's narrow view of Public Forum Doctrine purposes.

The opinions in ISKCON v. Lee leave no clear articulation of a test or criteria for courts to apply when determining if a space is a public forum. The Court gives no indication of what extent First Amendment privileges should be factored into a court's analysis. Justice O'Connor and Justice Kennedy urge the Court not to allow too much governmental authority and to consider compatibility when property has not traditionally been held as a public forum. Chief Justice Rehnquist alternatively states that if the property is nonpublic fora, all that is required is a reasonable regulation free from viewpoint discrimination. Despite concerns surrounding the outcome of ISKCON v. Lee, the majority's categorical approach is where the Court has left us, leaving much trust in governmental authority, and leaving some justified concern as to the significance of First Amendment considerations in public forum analysis.

90 Id. at 695.
91 Id.
92 Id. at 694-96. Justice Kennedy states that when constitutional time, place and manner restrictions are in place to govern fora, such as airport terminals, the expressive activity is compatible with the other major uses of the airport. Id. at 701. This is analogous to Justice O'Connor's description of compatibility in her concurrence. See id. at 687-89.
93 See Bevier, supra note 20, at 98-99.
94 Id. at 100. Bevier outlines four main reasons why this is so:

First, it is unclear whether the categorical approach to the question of whether particular public property is a public forum retains vitality. Second, if it does, it is unclear what test the Court will use to determine whether particular property should be categorized as a traditional public forum. Third, if the categorical approach survives, will the Court adopt a sliding scale of judicial scrutiny or will it move toward [a] preference for a more activist judicial review? Finally, will the Court eschew the categorical approach completely and embrace [a] case-by-case analysis instead?

95 Id.
96 See ISKCON, 505 U.S. at 686-709.
97 Id. at 678-79.
98 See ISKCON, 505 U.S. at 672-709; see also Bevier, supra note 20, at 113-21; First Amendment, supra note 21, at 303-06.
III. MODERN MEANS OF REGULATING SPEECH IN THE PUBLIC FORUM

The First Amendment guarantees the right to free speech and expression, but governments are still allowed to regulate assemblies and expression through time, place, and manner restrictions in public places.99 The most favored method of control over assemblies is to require those seeking to assemble to obtain licenses or permits.100 Such systems requiring permits and licenses have been challenged over time as a violation of our right to expression by imposing a financial burden, and by leaving too much power in the hands of the authority issuing the license or permit.

A. The Basics of Permitting Systems: Licenses and Fees

Most jurisdictions have similar licensing and permitting systems in place.101 Typically, the speaker or organizer must pay a nominal fee to the licensor or licensing board in order to secure the permit.102 Although there are prior restraint concerns103 with such permit systems, the courts have upheld such schemes as constitutional as long as certain criteria are met.104

There are legitimate concerns that permit systems may threaten First Amendment guarantees,105 yet endless disputes will never resolve whether regulations imposed by the government are reasonable.106 States have the police power to regulate public areas, particularly streets, so that the area may function both as a place for traffic and as a place for expression or expressive demonstra-

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99 Grace, 461 U.S. at 177 ("[T]he government may enforce reasonable time, place, and manner regulations" in public places associated with "the free exercise of expressive activities, such as streets, sidewalks, and parks."); see also Janiszewski, supra note 44, at 128.
100 O’Neill, supra note 9, at 463.
101 See id.
102 Id. at 464. The license and permitting schemes described above apply only to demonstrations, parades, and similar events or processions. Hand-billing and door-to-door canvassing cannot be licensed by the government. Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 165-169 (2002) (stating that for fifty years the Court has invalidated restrictions on door-to-door solicitation and pamphleteering, and ultimately holding that requiring a permit for such activity is incompatible with First Amendment requirements).
103 For an in-depth discussion of such prior restraint concerns, see First Amendment, supra note 21, at 116-25 and Janiszewski, supra note 44, at 124-26.
104 Janiszewski, supra note 44, at 131-32; see also infra Part III.C. (outlining the specific criteria to determine if a permitting scheme passes constitutional muster as set forth by Justice Blackmun in the Forsyth opinion).
105 C. Edwin Baker, Unreasonable Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations, 78 NW. U. L. REV. 937, 1013-18 (1983). Baker states that there are three categories of costs that may result from licensing schemes: (1) Permits make a valuable, passive type of expression unlawful; (2) The permit scheme requires the assemblers to succumb to the same authority that it is challenging; and (3) The licensor uses its authority to issue licenses as a means to harass the permittees. Id.
106 Id. at 1000.
tions. It may be argued that permitting systems should not work to suppress or undermine expression in a public forum. In contrast to this argument, it may also be argued that the primary purpose of a public forum, such as a street or sidewalk, is traffic flow, whether by car or on foot. Despite this counter argument, prior decisions such as Hague have dedicated places like streets and sidewalks as places of expression, supporting the notion that the government cannot regulate such areas through permitting when the property is traditionally a place of expression.

There are generally two inquiries to see if a licensing scheme is constitutional: first, a court considers the degree of discretion given to the licensing official(s), and second, the court considers the extent that the fee may bar or deter a speaker from speaking. Typically, the fees set by the government are constitutional if there is a direct link with administrative expenses that the government will encounter as a result of regulating the speakers assembly or activity. The cases and analyses that follow demonstrate a history of challenges to permitting systems, wherein some governmental authorities have exceeded their right to exercise police power in public fora.

B. A Case Law Explanation of the Effects of Permitting

Three seminal cases concerning permitting are: Lovell v. City of Griffin, Cox v. New Hampshire, and Murdock v. Pennsylvania. All three occurred within a six-year span, and laid the groundwork for permit analysis. In Lovell v. City of Griffin, an ordinance was challenged that required written permission from the City Manager in order to distribute literature anywhere within the City limits. In holding that this broad permitting system was unconstitutional, the U.S. Supreme Court stated that the system "strikes at the very

107 Id. at 1004. The issue noted by Baker is whether the government should be allowed to provide for transportation in a manner that limits the expressive use of the street. Id.
108 Id. at 1006.
109 Id.
110 Id. at 1007.
111 O’Neill, supra note 9, at 463-64.
112 Id. at 467-68.
113 303 U.S. 444 (1938).
114 312 U.S. 569 (1941).
115 319 U.S. 105 (1943).
116 O’Neill, supra note 9, at 463-74; Pfohl, supra note 23, at n.23 (referring to the impact of Hague’s citation to Lovell). See also First Amendment, supra note 21, at 294-96; Janiszewski, supra note 44, at 128-30.
117 Lovell, 303 U.S. at 447. Violation of this ordinance was considered a "nuisance, and [was] punishable as an offense against the City of Griffin." Id. The appellant was convicted after failing to apply for the permit, for distributing religious material. Id. at 447-48.
foundation of the freedom of the press by subjecting it to license and censorship."\(^{118}\)

A few years later, the Court considered another permitting system challenge, but this time the system regulated assemblies in public streets.\(^{119}\) In *Cox v. N.H.*, a statutory prohibition was challenged that prohibited parades or processions on public streets without first obtaining a special license from "the selectmen of the town, or from a licensing committee for cities hereinafter provided for."\(^{120}\) Appellants, who had passively marched single file down the sidewalk without acquiring the permit, were charged with taking part in a procession on public streets without the required permit.\(^{121}\) In upholding the permitting scheme, the Court stated that the central question was whether the governmental control was exercised in a way that did not deny or abridge the communication and assembly opportunities of the appellants in the public forum.\(^{122}\) The government's asserted purpose, that it needed advance notice to properly police the assembly, was legitimate to the Court, and the Court stated that as long as a system is "free from improper or inappropriate considerations and from unfair discrimination," it is legitimate.\(^{123}\) The Court also found that the fee system in place, ranging from "$300 to a nominal amount," was constitutional, and that local governments could give themselves flexibility in their fee schedules.\(^{124}\)

Shortly after *Cox*, the Court more closely considered a fee arrangement that required people to pay a licensing tax before pursuing expressive activities.\(^{125}\) In *Murdock v. Pa.*, petitioners wished to distribute religious materials without first obtaining a license to do so.\(^{126}\) The ordinance had required that, in order for persons to canvass for or solicit anywhere within the Borough, a license must first be obtained by paying the required fee.\(^{127}\) The Court invalidated this permitting system because the State was imposing a charge on privi-

\(^{118}\) *Id.* at 451. Chief Justice Hughes, who delivered the Court's opinion, stated, "Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form" because the ordinance prohibited all materials, at any time, place, and manner, without the City Manager's permission. *Id.* at 451-52.

\(^{119}\) *Cox*, 312 U.S. at 570-71.

\(^{120}\) *Id.* at 571 (citing N.H. P. L., ch. 145, § 2 (1926)).

\(^{121}\) *Id.* at 573.

\(^{122}\) *Id.* at 574.

\(^{123}\) *Id.* at 576.

\(^{124}\) *Id.* at 576-77.

\(^{125}\) *Murdock*, 319 U.S. at 106.

\(^{126}\) *Id.* at 106-07.

\(^{127}\) *Id.* at 106. The fee system, outlined in the ordinance was: $1.50 for one day, $7.00 for one week, $12.00 for two weeks, and $20.00 for three weeks. *Id.* The petitioners were selling books for twenty-five cents each and pamphlets for five cents each, yet they sold the books and pamphlets for cheaper and even occasionally donated them. *Id.* at 106-07.
leges guaranteed by the First Amendment. The Court stated that "[i]t is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. . . . It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." The tension resulting from the decisions of Cox and Murdock would be resolved through a later case.

Following the three aforementioned cases, another case also contributed to the opinions concerning permitting systems. In Shuttlesworth v. City of Birmingham, an ordinance for the City of Birmingham was challenged as unlawful because it required the commission to issue a permit in order for a permittee to hold a public demonstration on the streets or other public ways. The demonstrator in Shuttlesworth challenged the ordinance, which was declared invalid by the Court. The Court stated that it "[has] consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." The Court cautioned officials who use their own opinions to grant or withhold permits. In lieu of the surrounding relevant circumstances, the Court in Shuttlesworth found that the officials had abused their power and acted under their personal beliefs.

C. The Four Criteria of Forsyth

The central case outlining the modern criteria for evaluating licensing systems is Forsyth County, GA v. Nationalist Movement. In Forsyth, a parade

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128 Id. at 113.
129 Id. at 113-14.
130 See infra note 153 and accompanying text.
132 Id.
133 Id. at 149 (citing BIRMINGHAM, ALA., CODE § 1159 (1944)). The ordinance required written permission from the commission prescribing what streets or other public ways may be used. Id.
134 Id. at 158-59. Shuttlesworth was permitted to challenge the ordinance because his conviction was for marching without a permit. Id. at 150. In another case stemming from the same event, Walker v. City of Birmingham, 388 U.S. 307 (1967), the demonstrators were not allowed to challenge the validity of the same ordinance because the Walker demonstrators were charged with contempt of an injunction. See Walker, 388 U.S. at 311-12.
135 Shuttlesworth, 394 U.S. at 153 (citing Kunz v. N.Y., 340 U.S. 290, 293-94 (1951)).
136 Id. at 153-59.
137 Id. The surrounding circumstances in both the records of Shuttlesworth and Walker showed that several times the Civil Rights demonstrators had attempted to obtain permits from Commissioner Connor, who, at one point, replied: "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail." Walker, 388 U.S. at 317; Shuttlesworth, 394 U.S. at 157-58.
ordinance was challenged for allowing a government administrator to vary the fee for assembling.\textsuperscript{139} According to the ordinance, the fee was varied for each applicant to reflect the estimated cost of maintaining public order.\textsuperscript{140} The ordinance in question provided that to secure a permit, a permittee must pay "a sum of not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place."\textsuperscript{141} In a 5-4 decision, the majority struck down the ordinance as unconstitutional.\textsuperscript{142}

To reach its conclusion, the majority used four criteria to determine if a permitting scheme is constitutional.\textsuperscript{143} The first is whether the scheme leaves the licensing official with too much discretion.\textsuperscript{144} Writing for the Court, Justice Blackmun declares that, "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official," and that the Forsyth Ordinance leaves the official with the ability to set a fee without relying on objective factors and without giving an explanation.\textsuperscript{145} Secondly, the Court directed that the permitting scheme cannot be content-based.\textsuperscript{146} In this case, the administrator issuing the permits had to "examine the content of the message that is conveyed" in order to "assess accurately the cost of security for parade participants."\textsuperscript{147} The third criterion for a constitutional permit scheme is that it be narrowly drawn to serve a legitimate governmental interest.\textsuperscript{148} After considering the administrator's explanation of prior fees imposed, and after considering the county's implementation of the ordinance, Justice Blackmun stated that the standards used by Forsyth were not narrowly drawn, reasonable, or definite.\textsuperscript{149} The fourth and final criterion in Forsyth examines whether the ordinance setting up the scheme leaves open ample alternatives for communication.\textsuperscript{150} Finding

\textsuperscript{139} Id. at 124.
\textsuperscript{140} Id. Two demonstrations led to the passage of the ordinance. The first demonstration was a "March Against Fear and Intimidation" led by a city councilman, which turned violent and ended prematurely when counterdemonstrators threw bottles and rocks. Id. at 125. A follow-up demonstration the next weekend resulted in the largest civil rights demonstration in the South since the Civil Rights Movement of the 1960s. It cost $670,000 for police protection and Forsyth County had to pay part of the cost. Id.
\textsuperscript{141} Id. at 126 (citing Forsyth County, Ga., Ordinance 34 (Jan. 27, 1987)).
\textsuperscript{142} Id. at 137.
\textsuperscript{143} See id. at 130; Janiszewski, supra note 44, at 131.
\textsuperscript{144} Forsyth, 505 U.S. at 130.
\textsuperscript{145} Id. at 133.
\textsuperscript{146} Id. at 130; Janiszewski, supra note 44, at 131.
\textsuperscript{147} Forsyth, 505 U.S. at 134. The Court further states that "[t]he fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content," which could mean that "[i]n those wishing to express views unpopular with bottle throwers . . . may have to pay more for their permit." Id.
\textsuperscript{148} See id. at 130; Janiszewski, supra note 44, at 131.
\textsuperscript{149} Forsyth, 505 U.S. at 132-33.
\textsuperscript{150} See id. at 130; Janiszewski, supra note 44, at 131.
that the ordinance did not leave alternatives open,151 in addition to its other shortcomings, the majority struck down the permitting scheme for its many constitutional violations.152 Forsyth resolved the tension which had resulted from the Cox and Murdock decisions, and it provides the clearest description yet of the standards for permitting.153 Its decision also provides an outline of the constitutional requirements for regulating a public forum.154

D. Private Party Organizers in Public Fora

The above discussion focused on whether permitting systems put in place by the government are constitutional, or whether they abridge a speaker’s right to assemble in a public forum. The question becomes more difficult, however, when two private parties each wish to have the same public forum space. The following cases address when more than one private party wishes to engage in expression in the same public forum space.

1. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston

In 1995, the U.S. Supreme Court rendered a landmark unanimous decision in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB"), when it held that a private party parade organizer did not have to allow GLIB to march in its parade.155 In Hurley, GLIB wished to march in the St. Patrick’s Day-Evacuation Parade, of which the South Boston Allied War Veterans Council ("the Veterans Council") held the permit to organize.156 The Supreme Judicial Court of Massachusetts had found that the Veteran’s Council was required to admit GLIB, but on appeal, the U.S. Supreme Court disagreed, finding instead that such mandatory inclusion violates the private organizer’s First Amendment expressive rights.157

The Court in Hurley opined that even though the Veteran’s Council was not very choosy in selecting most of its participants, “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject

152 Id. at 137.
153 Janiszewski, supra note 44, at 130.
154 Id.
156 Id. at 560-61.
157 Id. at 564-66. The Supreme Judicial Court of Massachusetts stated, in its holding, that because “it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment,” the parade was not an exercise of the Veteran Council’s First Amendment rights entitling it to protection. Id. at 564.
matter of the speech.” 158 Further, the Court stated that every unit participating will affect the message conveyed by the Veteran’s Council, thus, the lower court was essentially ordering the Veteran’s Council to change the expressive content of its parade. 159 Whatever the reason that GLIB was not welcome to participate in the parade, the choice to select who can and cannot participate “[i]s beyond the government’s power to control.” 160

_Hurley_ clarified that once a private organizer has a permit to assemble, the organizer alone can decide who may participate, and can exclude others even if the reason is discrimination based on sexual preference. 161 Overall, government-compelled membership in a group can be voided if the inclusion would alter the group’s expressive message. 162

2. _Boy Scouts of America v. Dale_

In a case following in the footsteps of _Hurley_, the U.S. Supreme Court again affirmed the right of an association to pick and choose who associates with it, even if a member is excluded due to his sexual affiliation. 163 In _Boy Scouts of America (“BSA”) v. Dale (“the BSA Case”),_ the Court, in a 5-4 opinion, held that because the BSA is a group engaging in “expressive association,” forcing the BSA to include a member violates its rights because the inclusion would alter the message that the BSA wished to express. 164 Because the BSA believes that homosexuality is inconsistent with its values, the government may not force the BSA to include a homosexual scout leader. 165 The Court stated that “[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” 166 Thus, the law is not free to interfere with speech “for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” 167

The BSA Case depended largely on who held the discretion to determine the mission of an association or group. 168 The Court ultimately held that the association or group itself holds the discretion to determine its mission and

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158 Id. at 569-70.
159 Id. at 572-73.
160 Id. at 575.
161 Janiszewski, supra note 44, at 133-34.
164 Id. at 656.
165 Id. at 653-54.
166 Id. at 655.
167 Id. at 661 (citing Hurley v. GLIB, 515 U.S. 557, 579 (1995)).
168 Sullivan, supra note 162, at 740.
its members – not the government.\textsuperscript{169} Both Hurley and the BSA Case are important to adequately formulate criteria for West Virginia to use in public forum cases involving political parties.

IV. CRITERIA FOR WEST VIRGINIA TO EVALUATE CONTENT-BASED RESTRICTIONS AT POLITICAL RALLIES

If a case with a similar fact pattern to the Ranks’ arrest at the Charleston Independence Day Rally\textsuperscript{170} were to come before the West Virginia Supreme Court of Appeals, it is difficult to discern what controlling criteria exist when a political party is the organizer of the assembly or event. A political party is an association that is sometimes viewed as a private association, yet it is also viewed as a governmental actor.\textsuperscript{171} The preceding cases\textsuperscript{172} are helpful as a starting point for the hypothetical West Virginia case, but foreign circuit and district court precedent provide more narrow and analogous facts to help establish this sought-after criteria. Case law exists in fellow circuits, which, combined with the aforementioned case law and some notable district court decisions, may help to establish criteria for the West Virginia Supreme Court of Appeals to adopt if and when faced with such a situation.

A. Relevant West Virginia Precedent: UMWA Int’l Union v. Parsons

\textit{UMWA Int’l Union ("UMWA") v. Parsons} provides a foundation for Public Forum Doctrine in West Virginia, even though it was decided prior to ISKON v. Lee, Forsyth, Hurley, and BSA.\textsuperscript{173} In UMWA, the petitioners (UMWA) wanted airtime on the Mountaineer Sports Network to express views contrary to what coal association ads were already expressing on the network.\textsuperscript{174} Respondents (Assistant Athletic Director of West Virginia University and the West Virginia Board of Regents) had previously denied the UMWA’s request, and the UMWA brought action, arguing that it was entitled to time to express contrary political views.\textsuperscript{175} Relying on Public Forum Doctrine and the West

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} For a review of the facts, see discussion, supra Part I. A person convicted of trespass in facts analogous to the Ranks’ case could appeal his or her conviction to the Supreme Court of Appeals.

\textsuperscript{171} Sullivan, supra note 162, at 741.

\textsuperscript{172} Particularly, see Cox, Murdock, and Forsyth (cases where a government permitting system is questioned), discussed supra Part III.B-D.

\textsuperscript{173} United Mine Workers of Am. Int’l Union (UMWA) v. Parsons, 305 S.E.2d 343 (W. Va. 1983).

\textsuperscript{174} \textit{Id.} at 346.

\textsuperscript{175} \textit{Id.} at 349 n.3.
Virginia Constitution, the West Virginia Supreme Court agreed with the UMWA.

The Court began its public forum analysis by stating the recognized importance of the public forum, and noting that "[c]entral to the doctrine is the concept that access to public forums must be provided by government on an equal basis." Further, the court declared that a university facility is a public forum, specifically "a governmentally created specialized forum for the propagation of information and knowledge." Even though much of the Court’s discussion centered on broadcast and media, which is not relevant to this public forum discussion, the Court did come to a conclusion that could be transcendent into other cases with different fact patterns.

The West Virginia Supreme Court of Appeals indicated that it did not support the controversial holding of the U.S. Supreme Court in Lehman, which had limited the Public Forum Doctrine by upholding a rule prohibiting political candidates from placing ads on city transportation. The Court also stated that, in the present case, allowing airtime to only one side of the debate was "[encouraging] monopolization of the special forum it has created, and effectively [is preventing] . . . the expression of new ideas and viewpoints." The Court held that MSN was required to afford the opposing side a "reasonable opportunity for the balanced presentation of contrasting points of view," which would benefit the listening audience and the public in general. This case implies that West Virginia recognizes a broad Public Forum Doctrine, and the necessity to protect the speaker’s access to the forum regardless of the speaker’s stance on an issue.

B. Guidance from Fellow Circuit Courts

UMWA provides insight into West Virginia’s interpretation of the Public Forum Doctrine, but it is not sufficiently analogous to the proposed West

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176 Id. at 354. Specifically, the Court relied on W. VA. CONST. art. III, § 3 and art. III, § 7. Id.
177 Id.
178 Id. at 350.
179 Id. at 351. Although this case was decided prior to ISKCON v. Lee, the way in which the W. Va. Supreme Court describes a university as a legislature-created specialized forum implies that it would fall into the Forsyth “designated” public forum category. See ISKCON, 505 U.S. at 678-79.
180 UMWA, 305 S.E.2d at 352-53.
181 See id. at 343.
182 For a review of Lehman, see discussion supra notes 46-54 and accompanying text.
183 UMWA, 305 S.E.2d at 355 (citing Lehman, 418 U.S. 298 (1974)).
184 Id. at 355.
185 Id. at 354-55.
186 See id. at 349-56.
Virginia hypothetical case. To answer what standards should be used when a political party acts as an organizer of an event in a traditional public forum, and proceeds to exclude opposing viewpoints from its assembly, similarly situated cases from fellow circuits provide more specific insight. The following discussion of foreign case law is on point for the proposed hypothetical case, and helps suggest criteria for the West Virginia Supreme Court to use in the future.

1. The Sixth Circuit: Sistrunk and Bishop

In the Sixth Circuit, two relevant cases provide guidance to establish the sought-after criteria. In Sistrunk v. City of Strongsville, the plaintiff, with ticket in hand, entered a rally for the then-President George H. Bush's reelection, which was held on public property. The permit to hold the rally was issued to the organization for the fee of one dollar, and the permit stated that the grounds were limited to the members of the organization and their invitees. The plaintiff was asked to surrender a button she wore, which endorsed Bill Clinton for President, and was told that she could not take such a display inside the rally. The issue before the Sixth Circuit was whether the defendant permit-holder had the right to exclude speech from its rally, which occurred on a public forum.

The Sixth Circuit, relying on Hurley, found that groups obtaining permits could not be compelled by the government to include persons displaying a contrary message. The Sixth Circuit stated that, similar to the situation in Hurley, requiring the Bush Campaign to include displays advocating Clinton would "alter the message the organizers sent to the media and other observers," even if there was no interference per se with the actual assembly. Further, if the plaintiff was upset that she could not display contrary messages, "[she] could have held a pro-Clinton rally on another day . . . ."

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187 See generally UMWA, 305 S.E.2d 343. The West Virginia Supreme Court indirectly categorizes the Mountaineer Sports Network as a designated public forum, not a traditional public forum. Id. at 394 (referring to the network as "a governmentally created specialized forum"). Also, the speech is not by a political party, who (as previously mentioned), are both private parties and governmental actors. Our hypothetical deserves consideration of cases where political parties obtain permits to hold assemblies on a traditional public forum.

188 See id. at 343.


190 Id. at 196.

191 Id.

192 Id. at 195.

193 Id. at 198. The Sixth Circuit states that although Hurley does not control, the similarity of facts it has with the present case make its holding applicable. Id. The Court stated: "A public rally is speech to the same extent that a parade is speech." Id. at 199.

194 Id. at 199.

195 Id.
In a strong dissent, Judge Spiegel found that the Sixth Circuit should have looked to a previously formulated test to come to its decision. In Bishop v. Reagan-Bush '84, the plaintiffs tried to attend a political rally in support of President Reagan, held in a public forum, carrying signs contrary to the Reagan Administration. The Sixth Circuit outlined step-by-step criteria in its per curiam opinion to determine if the permit holder could exclude whom it wished. First, a court is to determine what type of forum is involved: traditional public forum, designated public forum, or non-public forum. Second, a court must determine if the City can demote the public forum into a private forum. Third, if the City has the power to demote the forum, a court must decide the questions of state action and qualified immunity. Lastly, a court must decide if the limitations are reasonable time, place, or manner regulations.

According to the dissent, the real question in Sistrunk is to what extent a municipality controlling a traditional public forum can turn over that control to a private group holding a permit. The dissent questioned the majority’s use of Hurley because Hurley involved a parade participant – not a person wishing to be a member of an audience. “The folks along a parade route or in a public square during a rally are the audience,” and “[u]nlike the gay marchers, Ms. Sistrunk did not seek to intrude upon the Committee’s speech by participating in the proceedings.” Thus, according to the dissent, the District Court should have determined whether the City had the authority to demote the status of the forum into a private forum through the use of a permit, and the majority should have distinguished Hurley as being a case about a participant’s exclusion rather than an audience member’s exclusion.

2. The D.C. Circuit: Mahoney v. Babbitt

Case law from the D.C. Circuit also lends criteria suggestions for the hypothetical West Virginia case. In Mahoney v. Babbitt, a group opposing abortions received a permit to assemble a demonstration along the inaugural

196 Id. at 202.
198 Sistrunk, 99 F.3d at 202 (Speigel, J., dissenting) (discussing the criteria of Bishop).
199 Id.
200 Id.
201 Id.
202 Id.
203 Id. at 201.
204 Id.
205 See id. at 200-03.
206 For a review of the West Virginia hypothetical case, see supra notes 1-13 and accompanying text.

https://researchrepository.wvu.edu/wvlr/vol108/iss2/10
parade route for President Bill Clinton. The City’s permit regulation allowed the Field Director to revoke a previously issued permit when "'[a] fully executed prior application' ... will authorize activities which do not 'reasonably permit multiple occupancy' of the area covered by the permit." After the plaintiff organization’s permit was revoked, it brought an action seeking injunctive relief from a potential arrest if it proceeded with the demonstration. The pertinent issue in front of the D.C. Circuit Court was whether this regulation was a wrongful content-based speech restriction.

The D.C. Circuit Court found that the government was not entitled to restrict the organizer’s speech in this case. The Court distinguished Hurley on two grounds: (1) The parade organizer in Hurley was a private group exercising its First Amendment rights, and (2) Hurley involved demonstrators seeking participation in the parade – this case did not involve the plaintiff organization seeking to participate in the Inaugural Parade. After discussing the importance of public fora, the Court stated that there is "no authority for the proposition that the government may by fiat take a public forum out of the protection of the First Amendment by behaving as if it were a private actor." After noting that the inauguration of the nation’s chief executive is "an event less private than almost anything else conceivable," the Court found that the government offered no compelling justification that its policy was narrowly tailored to reach a legitimate end, and that the plaintiffs were entitled to interject their beliefs.

3. The Ninth Circuit: Galvin v. Hay

The Ninth Circuit recently outlined the importance of a protestor’s location in its decision in Galvin v. Hay. While Galvin did not involve a political rally, its opinion is relevant because it discusses the importance of the protestor

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207 105 F.3d 1452, 1453 (D.C. Cir. 1997).
208 Id. at 1454 (quoting 36 C.F.R. § 7.96 (g)(4)(iii)(A) (1996)) (alteration in original).
209 Id.
210 Id. at 1455.
211 Id. at 1460.
212 In contrast, the Court states that in the present case, the First Amendment conduct is being barred directly by the government, not by a private party wishing to assert its expressive rights. Id. at 1456.
213 Id.
214 Id. at 1457. The Court states: "Neither will we permit the government to destroy the public forum character of the sidewalks along Pennsylvania Avenue by the ipse dixit act of declaring itself a permittee." Id. at 1458. The government’s power over the property it controls is to keep it "for the use to which it is lawfully dedicated." Id. (quoting U.S. v. Grace, 461 U.S. 171, 177-78 (1983)).
215 Id. at 1458-59.
216 374 F.3d 739 (9th Cir. 2004).
to demonstrate where the relevant audience is found.\footnote{Id. at 747-52.} A group in Galvin wished to secure a permit to hold a demonstration in a park.\footnote{Id. at 742. The group wishing to protest was Religious Witness with Homeless People ("RWHP"), and it was protesting the restoration of a park. Id. It wished for the park not to restore the park by tearing down former army housing units, but instead, sought for the Park Service to convert these units to housing for the poor and homeless. Id.} The permit authorities in Galvin stated that they would not issue the permit unless the permittee agreed that it would not engage in acts of civil disobedience.\footnote{Id. at 743.} The permittee was asked to move to and stay in a designated First Amendment area, which was 150 to 175 yards away from the organization's target audience.\footnote{Id.}

The issue before the Ninth Circuit was whether conditioning the permit was a narrowly tailored restriction, and further, whether requiring the organization to remain in the First Amendment area was a reasonable time, place, and manner restriction.\footnote{See id.} The Ninth Circuit found that the conditional permit was not narrowly tailored and that the location restriction on the demonstration was unconstitutional.\footnote{Id. at 753.} The Ninth Circuit provided illustrations showing the importance of individual choice of message and manner of expression and then stated that "the First Amendment mandates that we presume the speakers, not the government, know best both what they want to say and how to say it."\footnote{Id. at 750 (citing Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 790-91 (1988)).} Speakers may ordinarily control the presentation of their message in a public forum, and, the Ninth Circuit further declared, "there is a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that are critical to the content of their message . . . ."\footnote{Id. at 752 (emphasis added).}

4. The First Circuit: Black Tea Society

In another more recent decision, the First Circuit produced an opinion relevant to the location of a speaker's message and pertinent to the 2004 presidential election.\footnote{See Black Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004).} The demonstrators in Black Tea Society v. City of Boston challenged the zone erected at the DNC\footnote{For a more thorough description of the designated demonstration zone, see supra notes 5-6 and accompanying text.} and wished for the zone to be modified so that the demonstrations would be closer to those attending the convention.\footnote{Black Tea Society, 378 F.3d at 10-11.} The First Circuit was asked to determine if the government's regulation
was narrowly drawn, and if it was the best way to reach the City's interest. The First Circuit found that the security interests alleged by the City were enough to justify the regulation, even though the expression was burdened.

In coming to its conclusion, the First Circuit stated that “[t]he question is not whether the government may make use of the past experience –it most assuredly can- but the degree to which inferences drawn from past experience are plausible.” The First Circuit found that in the present case, even though the decision was a difficult one, the regulations were narrowly tailored because of the realistic security concerns. The demonstrators, according to the First Circuit, were not constitutionally entitled to closer access to their intended audience.

C. Notable District Court Decisions: Schwitzgebel and Gathright

Two district court decisions are worth mention. In Schwitzgebel v. City of Strongsville, the plaintiffs attended the same rally at issue in Sistrunk. The plaintiffs were arrested after they held up anti-Bush signs. Charges against the plaintiffs were dropped, but the plaintiffs still brought an action claiming that their First Amendment rights were violated. The District Court found that the City had not violated the First Amendment rights of the plaintiffs and that the permit system was appropriate, leaving ample alternatives of communication open.

In its analysis, the Court first declared that the City was not permitted to demote the traditional public forum into a private forum merely by issuing a permit and that the Commons remained a public forum during its use by the permittee. The next inquiry, according to the District Court, was whether the

228 Id. at 12.
229 Id. at 12-15.
230 Id. at 14. The City of Boston was justifying the zone by arguing that the elaborate security measures were necessary in light of past experiences at the 2000 Democratic National Convention in Los Angeles. Id. at 13. One group of protestors that the federal judge who upheld the zone was particularly protecting against had been known to use “urine-filled squirt guns and sling shots.” J. M. Lawrence, Convention Countdown; Judge: Protestors Must be Penned in, BOSTON HERALD, Jul. 23, 2004, at 6.
231 Black Tea Society, 378 F.3d at 13-14.
232 Id. at 14. The Court also found that the demonstrators were underestimating modern communication; the Court was sure that the intended audience would get the demonstrators’ message through radio, TV, Internet, and other sources. Id.
234 Schwitzgebel, 898 F. Supp. at 1211. The signs related to the Bush administration’s handling of AIDS research and funding. Id.
235 Id. at 1211-13.
236 Id. at 1218.
237 Id. at 1216.
permit system was narrowly tailored and left ample alternatives of communication open for the plaintiffs.\textsuperscript{238} The District Court found that even though a person with ideas opposed to the permittee's ideas has the right to express his or her views, he or she does not have the right to do so in an area specifically set aside for an event "where his intrusion would be an interference."\textsuperscript{239} The Court found that the permit system was narrowly tailored and that "[i]t is precisely the avoidance of the cacophony which such action creates that is the constitutionally allowed aim of the permit system."\textsuperscript{240}

Another important District Court opinion comes from \textit{Gathright v. City of Portland}, where the District Court considered if a private permittee can choose who can or cannot attend functions held at a public forum.\textsuperscript{241} The District Court in \textit{Gathright} agreed with the defendants that permit holders can determine the content of speech expressed at the event, but limited this right, stating, "this right does not extend to individuals who are not participants in the event."\textsuperscript{242} The District Court was careful to note that the expression the permit issuers excluded was unrelated to the message of the event; the Court distinguished this from cases were there is an attempt to participate in the event, such as "[displaying] a controversial button at a political rally."\textsuperscript{243}

\textbf{D. Criteria for the West Virginia Supreme Court of Appeals}

The Capitol Grounds in Charleston, West Virginia, is a traditional public forum.\textsuperscript{244} The State Capitol has unquestionably "immemorably been held in trust for the use of the public," and "time out of mind" been used for assembly and communication by people of the State.\textsuperscript{245} The West Virginia State Government and the City of Charleston have undoubtedly intended the forum to be fully open for expression by the public, and it has traditionally been used as such.\textsuperscript{246} The physical characteristics and uses of the Capitol grounds are also compatible with expression and assemblies.\textsuperscript{247} Also, the permit system used by the City of Charleston is facially constitutional, and satisfies the \textit{Forsyth} crite-

\begin{itemize}
\item \textsuperscript{238} \textit{Id.} at 1217-18.
\item \textsuperscript{239} \textit{Id.} at 1218 (citing Sanders v. U.S., 518 F. Supp. 728, 729-30 (D.D.C. 1981)).
\item \textsuperscript{240} \textit{Id.} at 1219.
\item \textsuperscript{241} \textit{Gathright v. City of Portland}, 315 F. Supp.2d 1099, 1101 (D.C. Or. 2004).
\item \textsuperscript{242} \textit{Id.} at 1103.
\item \textsuperscript{243} \textit{Id.} at 1104.
\item \textsuperscript{244} \textit{See generally} Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939), discussed supra notes 23-38 and accompanying text; ISKCON v. Lee, 505 U.S. 672 (1992), discussed \textit{supra} notes 76-98 and accompanying text.
\item \textsuperscript{245} \textit{See Hague}, 307 U.S. at 515-16.
\item \textsuperscript{246} \textit{See ISKCON}, 505 U.S. at 680; \textit{see also} supra notes 80-81 and accompanying text.
\item \textsuperscript{247} \textit{See ISKCON}, 505 U.S. at 695 (Kennedy, J., concurring).
\end{itemize}
Despite accompanying U.S. UMWA and accompanying W. fee form 

In Charleston is constitutional, the question for the West Virginia Supreme Court is: To what extent can a permittee exclude a non-disruptive person/group with contrary views from the audience of the permittee's ticketed event, held on a traditional public forum?

The U.S. Supreme Court has indicated that destroying the status of a traditional public forum is "presumptively impermissible," and that transforming its character is unacceptable unless through a reasonable time, place, and manner restriction. Based on its decision in UMWA, the West Virginia Supreme Court would agree with this notion. When a political party obtains a permit to hold a rally at a traditional public forum, the party is simultaneously acting as both a private party and as a governmental entity. Thus, an argument can be made that the political party should have the right to exclude those that hold contrary viewpoints. Despite this, a stronger argument is apparent that, in a traditional public forum (such as the steps of the State Capitol), a person wishing to attend an event as a member of the audience, and not wishing to actively participate in the event, should be allowed entry.

By wearing a button or shirt advocating a political opponent or displaying a contrary viewpoint, the perspective audience member is not actively participating in the event, nor is he or she interfering with the speaker's message. Also, it is unrealistic and unnecessarily burdensome to First Amendment privi-

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248 To obtain a permit to use the West Virginia State Capitol grounds, the permittee requests a form for use of the grounds from the governor's general services office. The permittee submits the completed form, and it is reviewed. If the permit is approved, the permittee must pay a fee for setup, cleanup, etc. Telephone Interview with the Office of the Governor, in Charleston, W. Va. (Nov. 30, 2005). For discussion of the Forsyth criteria, see supra notes 138-54 and accompanying text.


250 In UMWA, the majority states

Since Hague, the [public forum] doctrine has become firmly established as an important principle of constitutional law. It prohibits states from regulating speech-related conduct on certain governmental property except through reasonable, nondiscriminatory time, place, and manner regulations. Central to the doctrine is the concept that access to public forums must be provided by government on an equal basis.


251 See Sullivan, supra note 162, at 741.


254 See Sistrunk, 99 F.3d at 201; see also Mahoney, 105 F.3d at 1456.
leges to require all audience members wishing to display contrary views to each obtain a permit for another day, in order to hold a ‘rally’ of their own. As the dissent stated in Sistrunk, Hurley cannot be applied where the contrary-view holder is not seeking participation in the event, but is instead just hoping to be an audience member. Just as the Inaugural Parade of President Clinton was viewed in Mahoney as “so public” that the government could not remove the public forum from First Amendment protection, so are political rallies hosting the nation’s president (particularly when held on State Capitol steps). Thus, no compelling justification could be argued by the government to deny someone wishing to display contrary views, so long as the person has a ticket to the permitted event and is not seeking to interfere or actively participate in the event.

Equally important is location – it is not appropriate to force those wishing to display their viewpoint to maintain an unreasonable distance from their intended audience. Demanding a person who only wishes to be an audience member, with ticket in hand, to choose between removing his or her opposing-view items or stand in a designated free speech zone is unduly burdensome to First Amendment privileges. A city naturally has a strong and legitimate interest in preserving safety for its citizens and in avoiding interference on behalf of the permit holder. Yet, because adequate security checkpoints are in place, and because there is a presumption that the speaker, not the government, knows the best way and place to engage in his or her expression, mandating that a passive audience member remove opposing-view items or relocate to a demonstration zone runs counter to traditional public forum principles.

If a case of this disposition were to come before the West Virginia Supreme Court, the Court would likely first recognize its dicta in UMWA, which noted the importance in preserving traditional public fora. The Court should then apply the above criteria, including the security risks of the particular event, the intended participation by the person holding the contrary views (whether the person is seeking to just be an audience member or to actually interfere), and the relevance of the location of the person displaying the contrary-view items.

255 See Sistrunk, 99 F.3d at 199. The majority’s solution in Sistrunk was to have the pro-Clinton button-wearer hold her own rally another day. Id.
256 Id. at 201.
257 See Mahoney, 105 F.3d at 1458-59.
258 See Sistrunk, 99 F.3d at 201; Mahoney, 105 F.3d at 1456.
259 See Galvin v. Hay, 374 F.3d 739, 750-53 (9th Cir. 2004), discussed supra notes 216-24 and accompanying text.
260 See id.
259 Black Tea Society v. City of Boston, 378 F.3d 8, 10-12 (1st Cir. 2004), discussed supra notes 225-32 and accompanying text.
263 See UMWA v. Parsons, 305 S.E.2d 343, 350 (W. Va. 1983); see also supra note 250.
264 For a review of all criteria, see discussion supra notes 244-62 and accompanying text.

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Applying the outlined criteria to the hypothetical case, First Amendment privileges guarantee protection for the prospective audience member. The right to attend the event undoubtedly trumps the permit holder’s wishes to exclude anyone wearing opposing-view items.\textsuperscript{265}

V. CONCLUSION

While making his 2004 Independence Day speech in West Virginia, President George W. Bush declared: “On this 4th of July, we confirm our love of freedom, the freedom for people to speak their minds . . . . Free thought, free expression, that’s what we believe.”\textsuperscript{266} To protect our freedom of speech, criteria must be adopted that work to preserve the characteristics of traditional public fora in West Virginia.\textsuperscript{267} When an event is held in a traditional public forum, a non-participating audience member should be allowed entry despite garb. As stated in fellow jurisdictions, a state can work towards maintaining a safe citizenry, but cannot deny entry when someone does not desire to participate. A lack of participation cannot alter the speaker’s or permittee’s intended message. By adopting the criteria of fellow foreign courts, the West Virginia citizenry can enjoy its right to freedom of expression. This right and the right of the State to maintain a functional society can then exist in a harmonious balance.

\textit{Melissa M. Rounds*}

\textsuperscript{265} \textit{Id.}

\textsuperscript{266} Remarks on Independence Day in Charleston, West Virginia, 40 WEEKLY COMP. PRES. DOC. 1202 (July 4, 2004). Jeffery and Nicole Rank, arrested for criminal trespass during this address by the President, see \textit{supra} Part I., have currently brought an action against the Deputy Assistant to the President of the U.S., et al., in the Southern District of West Virginia for deprivation of their Civil Rights pursuant to 42 U.S.C. § 1983. Rank v. Jenkins, No. 2:04cv997 (S.D. W. Va. filed Sept. 14, 2004).

\textsuperscript{267} See discussion of suggested criteria, \textit{supra} notes 244-65 and accompanying text.

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