NAVIGATING THE TROUBLED WATERS OF THE PUBLIC FORUM: The Public Trust Doctrine as a Life Jacket

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I. INTRODUCTION

The First Amendment protection is failing in an important setting of our current society: advertising spaces in public transit systems. The United States courts of appeals are split as to how to characterize such spaces for purposes of First Amendment protection.[1] Justice Alito and Justice Thomas made their intent to resolve that issue very clear in 2016 in their dissent from the denial of certiorari in *American Freedom Defense Initiative v. King County*.[2] They "see no sound reason to shy away from this First Amendment case. It raises an important constitutional question on which there is an acknowledged and well-developed division among the Courts of Appeals.

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1. *See* Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 252 (3d Cir. 1998) (holding that advertising spaces on subway walls and buses in Pennsylvania are a designated public forum); N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998) (holding the same with regards to New York City buses); Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth., 767 F.2d 1225, 1232 (7th Cir. 1985) (holding the same with regards to all the advertising spaces under the ownership of the Chicago Transit Authority); Lebron v. Wash. Metro. Area Transit Auth., 749 F.2d 893, 896 (D.C. Cir. 1984) (holding that the transit system in Washington, D.C. as a whole is a designated public forum). *But see* Am. Freedom Def. Initiative v. King County, 796 F.3d 1165, 1169 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1022 (2016) (holding that buses were a limited public forum at most, or a nonpublic forum); Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 578 (1st Cir. 2015) (holding that the Massachusetts Transit System was not a designated public forum); Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885, 890 (6th Cir. 2012) (holding that buses in Michigan are a nonpublic forum). Other circuits do not appear to have considered the issue in as much depth or at all.

2. *Am. Freedom Def. Initiative*, 136 S. Ct. at 1022 (Thomas, J., dissenting).

One of this Court's most basic functions is to resolve this kind of question."[3] Despite the split between the circuits, the courts all agree the analysis requires applying the Public Forum Doctrine. The Public Forum Doctrine originated from the Supreme Court of the United States in two cases: *Perry Education Ass'n v. Perry Local Educators' Ass'n*[4] and *Cornelius v. NAACP Legal Defense & Education Fund*.[5]

Any government property where speech takes place is classified into four categories: the public forum, the designated public forum, the limited public forum, and the nonpublic forum.[6] Public fora are places that have been traditionally open to speech;[7] designated public fora are places where the government has accepted a wide variety of speech;[8] limited public fora are places which the government opened to a limited range of speech;[9] nonpublic fora are places that have never been open to public speech and where it is absolutely incompatible with the purpose of the fora.[10] In a public forum or designated public forum, the government can only restrict speech if it can give a compelling state interest and its restrictions are narrowly tailored to achieve that interest.[11] In a limited public forum or a nonpublic forum, the government only needs a reasonable justification to ban the speech at issue.[12]

This Article advocates the introduction of the Public Trust Doctrine, a property law concept, into the Public Forum framework. The Public Trust Doctrine instructs that the government holds in trust the natural resources and the land containing those resources to protect them from private monopolies and to allow access and enjoyment to the public at large.[13] This Article argues that speech should be treated as a natural resource: a vital element of what our society needs to function and survive, which is why blending the two doctrines—Public Forum and Public Trust—would provide a solution to resolve the issue of advertising spaces in public transit systems.

Part II outlines the Public Forum Doctrine, the Public Trust Doctrine, and the current circuit split. Then, Part III explains why the Public Trust Doctrine could help rescue the Public Forum Doctrine, and what a new test

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3. *Id.* at 1026.
4. 460 U.S. 37, 45–46 (1983).
5. 473 U.S. 788, 802 (1985).
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.* at 804–05.
10. *Id.* at 803–04.
11. *Id.* at 802.
12. *Id.*
13. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458–60 (1892).

incorporating the two doctrines might look like. Finally, Part IV briefly concludes this Article.

II. BACKGROUND

To fully appreciate the parallels between the Public Forum and Public Trust doctrines, it is necessary to examine the origin and development of both doctrines. First, this Part briefly explains the history of the Public Forum Doctrine, from its initial rejection by the judiciary to the modern form of the test created by *Perry*[14] and *Cornelius*[15] that caused the split between the circuit courts regarding public transit advertising. This Part then proceeds to the history of the Public Trust Doctrine, first discussing its inception and finishing with expanded discussion of its modern use. This Part concludes by laying out the current split among the circuit courts related to the issue of the public forum as applied to public transit advertising.

A. The Public Forum Doctrine

The Public Forum Doctrine is a recent creation of the judiciary.[16] Before turning to the modern use of the term "public forum" as applied to First Amendment concerns, it is necessary to explain how the Supreme Court had treated government property and the rights of the government to restrict expression on its property before 1972.

1. The Early Struggle with the Rights to Expression on Public Property

At the close of the nineteenth century, the Supreme Court of the United States had yet to recognize a right of expression on government property, as supported by *Davis v. Massachusetts* in 1897.[17] At issue in that case was a municipal ordinance which provided that: "No person shall, in or upon any of the public grounds, make any public address . . . except in accordance with

14. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

15. *Cornelius*, 473 U.S. at 802.

16. The use of the term "public forum" is credited to Harry Kalven, Jr. in 1965. *See* Henry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 1. The Supreme Court of the United States itself used the term for the first time in its First Amendment jurisprudence in 1972. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96, 99 & n.6 (1972).

17. *See* Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

a permit from the mayor."[18] The Court upheld a conviction for making a public address on the Boston Commons without a permit from the mayor.[19] The Court rejected Davis's argument that the Commons were the property of the inhabitants of the city of Boston for their use and enjoyment, including making public addresses.[20] The Court reasoned that the legislature was the absolute owner of the Commons and that it could ban all expression on its property like a homeowner could exclude others from expressing themselves on his private property.[21]

By the middle of the twentieth century, the Supreme Court began to retract from that absolute deference to the property rights of the government as related to prohibition of expression on its property.[22] In *Hague v. Committee for Industrial Organization*,[23] the Court faced a public ordinance that prohibited all meetings in the streets or any other public places unless the city gave a permit for it. The mayor attempted to bar a union from holding a meeting in town.[24] In a famous plurality opinion, Justice Roberts concluded that there existed a right of the public to use government property for speech purposes:

> 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.[25]

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18. *Id.* at 44.
19. *Id.* at 47.
20. *Id.* at 46.
21. *Id.* at 46–47.
22. *See* Schneider v. New Jersey, 308 U.S. 147, 160 (1939); Hague v. Comm. for Indus. Org., 307 U.S. 496, 500 (1939).
23. *Hague*, 307 U.S. at 501 (Roberts, J., concurring).
24. *Id.*
25. *Id.* at 515–16.

In *Schneider v. New Jersey*,[26] the Court declared a city ordinance that prohibited distribution of leaflets on public property unconstitutional.[27] The Court rejected the City's argument that it could prohibit leafletting to minimize litter and preserve the appearance of its streets.[28] The Court reasoned that it was an insufficient reason for preventing a citizen from lawfully distributing leaflets to anybody willing to receive them and that the cost associated with cleaning was an indirect consequence of the freedom of speech and press.[29] The decision is important because the Court rejected the government's argument that additional costs associated with free speech, such as cleaning leaflets left on the streets, were a sufficient reason to restrict expression. It is important to note that at that time, the Court did not make any distinction between the rights of exclusion of the government and the rights of exclusion of a private property owner, whether that be to exclude speech or any other type of use by outsiders.[30]

The term "public forum" was first used by Harry Kalven, Jr., a preeminent twentieth-century legal scholar, in 1965.[31] He relied on the decisions in *Hague* and *Schneider* to write that "the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."[32] The United States Supreme Court began to use the term in *Police Department of Chicago v. Mosley*[33] but it was not until *Lehman v. City of Shaker Heights*[34] that the Court gave deep and detailed attention to the analytical framework tied to a restriction of speech in a public forum.

In *Lehman*, the United States Supreme Court analyzed a public transit system policy to sell advertising spaces for commercial advertisements but to

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26. 308 U.S. 147 (1939).
27. *Id.* at 165.
28. *Id.* at 162.
29. *Id.*
30. *Compare Hague*, 307 U.S. at 516 (Roberts, J., concurring) (arguing that street demonstrations cannot be subject to the whimsical decisions of the City), *and* Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940) (holding that the City could not bar citizens from playing a phonograph with propaganda materials to bystanders on the street without their consent), *with Schneider*, 308 U.S. at 163–65 (holding that distribution of leaflets even on private property grounds was constitutionally protected), *and* Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949) (holding that an address about controversial topics held in a private hall was protected from a city ordinance that barred all expression or improper noise that would disturb the peace within the city limits).
31. *See* Kalven, Jr., *supra* note 16.
32. *Id.* at 11–12.
33. 408 U.S. 92, 96, 99 & n.6 (1972).
34. 418 U.S. 298 (1974).

refuse any political message.[35] Lehman applied to display his advertisement for his political campaign and the City, relying on the policy, refused to display it.[36] Lehman's argument was that the cars of the transit system were a public forum and that nondiscriminatory access was guaranteed by the First Amendment.[37]

The plurality opinion disagreed with Lehman's argument.[38] The Court turned to the primary purpose of the car card spaces and contrasted it with traditional public fora such as parks and meeting halls.[39] The plurality reasoned that the City was engaging in a commercial venture and was acting as a proprietor who did not have to accept all kinds of expression on its property, similar to how a newspaper or radio station is not bound to run all submitted advertisements.[40] Looking at how the City enforced its policy, the plurality found that the City's decision to only allow less controversial commercial speech was in line with its goal of generating revenue and that permitting political or issue-oriented advertisements would jeopardize the City's ability to maximize revenue.[41] That line of reasoning led the plurality to conclude that the car card spaces were not a "First Amendment forum."[42]

In his concurrence, Justice Douglas focused his analysis on the constitutional rights of the commuters who would be subjected to the advertisement at issue.[43] He would have held that Lehman was not allowed to display his advertisement because the commuters would be a captive audience who could not freely choose to receive the message.[44] He concurred in the judgment because, regardless of the reasoning, he agreed that Lehman had no constitutional right to impose his speech on such a captive audience.[45]

The dissent would have held that the City had created a public forum when it allowed commercial and public service advertisements.[46] The dissenting Justices reasoned that by allowing communication in the form of advertising in its transit cars, the City had waived any argument that advertising as a whole was incompatible with the primary purpose of the forum to provide

35. *Id.* at 299.
36. *Id.* at 300.
37. *Id.* at 301.
38. *Id.* at 302.
39. *Id.* at 303.
40. *Id.*
41. *Id.* at 304.
42. *Id.*
43. *Id.* at 307 (Douglas, J., concurring).
44. *Id.*
45. *Id.* at 308.
46. *Id.* at 310 (Brennan, J., dissenting).

transportation.[47] Addressing the plurality's argument that accepting less controversial and commercial-only speech does not create a First Amendment forum, the dissent found this line of reasoning meritless because those types of speech are protected by the First Amendment and are surely capable of eliciting strong reactions from their audience and being controversial.[48]

Lehman is an important decision for several reasons: although the Court used the language "First Amendment forum," it was clearly laying down the foundation for the modern Public Forum Doctrine. Furthermore, the decision contains a dichotomy that will prove a point of disagreement among the circuit courts—the plurality reasoned that the City was engaged in a commercial venture, acting as a proprietor, and the dissent reasoned that it had allowed all communications. Finally, *Lehman* is the only decision the United States Supreme Court published on the application of the First Amendment to protect speech in advertising spaces in a public transit system, and it did not reach a majority opinion. This last point is particularly important because litigants have relied on that decision heavily when bringing or defending lawsuits regarding freedom of speech and advertising spaces in public transit systems.

2. The Modern Public Forum Doctrine

The modern analytical framework of the Public Forum Doctrine[49] is outlined and summarized in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[50] The case involved the access to an interschool mail system and teacher mailboxes in the Perry Township schools.[51] Two teacher unions, Perry Education Association ("PEA") and Perry Local Educators' Association ("PLEA"), had equal access to the interschool mail system.[52] Then, PEA won an election and negotiated an agreement with the school

47. *Id.* at 314.

48. *Id.* at 314–15 ("The plurality opinion, however, contends that as long as the city limits its advertising space to 'innocuous and less controversial commercial and service oriented advertising,' no First Amendment forum is created. I find no merit in that position. . . . There can be no question that commercial advertisements, when skillfully employed, are powerful vehicles for the exaltation of commercial values. Once such messages have been accepted and displayed, the existence of a forum for communication cannot be gainsaid." (citation omitted)).

49. Although the decisions in *Perry* and *Cornelius* are the ones discussed in detail to explain the modern doctrine, the influence of two other cases was crucial in their decisions and analysis. *See generally* Greer v. Spock, 424 U.S. 828 (1976); Adderley v. Florida, 385 U.S. 39 (1966).

50. 460 U.S. 37 (1983).

51. *Id.* at 38–39.

52. *Id.* at 39.

district to be the sole employee union authorized to use the system and be allowed to insert promotional materials for their union.[53] PLEA filed a lawsuit alleging a violation of their First Amendment rights—even though they were still allowed to use other facilities to communicate with the teachers.[54] The issue, as summarized by the Court, was whether the First Amendment was violated when "a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union."[55] The Court stated that its analysis of both the right of access to a property and how this right can be restricted depended on the character of the property.[56] The Supreme Court held that the interschool mailing system was a nonpublic forum.[57] The Court, reasoning that the access was selective, rejected PLEA's argument that it was a designated public forum because several organizations and unions had been allowed to communicate through the system.[58]

The Court outlined and explained three different categories of public fora. The first category is called a traditional public forum and is characterized as places that have always been open to discourse, including streets, parks and any other place that "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."[59] In those fora, the state cannot impose any content-based restrictions without passing strict scrutiny, meaning the state bears the burden to show that the prohibition is narrowly drawn to achieve a compelling state interest.[60] When the restrictions are not content-based, the state is allowed to make reasonable time, place, and manner restrictions; they must be narrowly tailored and the state must leave open "ample alternative channels of communication."[61]

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53. *Id.* at 39–40.
54. *Id.* at 41.
55. *Id.* at 44.
56. *Id.*
57. *Id.* at 48.
58. *Id.*
59. *Id.* at 45 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).
60. *Id.*; *see also* Carey v. Brown, 447 U.S. 455, 461 (1980) (holding that an ordinance prohibiting picketing solely based on the content of the communication was an impermissible content-based prohibition).
61. *Perry*, 460 U.S. at 45; *see also* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

The second category of forum is the designated public forum and is created when "the State has opened [it] for use by the public as a place for expressive activity."[62] The state faces the same scrutiny for any restriction it would try to impose on expressive activities in this type of forum as in a traditional public forum.[63] There is no doubt, however, that the state could extinguish the forum at any time.[64] The Court noted in a footnote that the state could create a public forum for a limited purpose such as use by certain groups or for specific subjects.[65]

The third category of forum is the nonpublic forum and consists of all the fora which are neither traditionally public nor designated as public.[66] In this type of forum, the state has a lot of discretion to restrict speech: the state can use time, place, and manner restrictions or can limit the forum to its intended purpose as long as the restriction is reasonable and viewpoint neutral.[67] In a nonpublic forum, the state acts as a proprietor and "has power to preserve the property under its control for the use to which it is lawfully dedicated."[68]

Soon after its decision in *Perry*, the Supreme Court analyzed the issue of how to determine the intention of the state to designate a public forum in *Cornelius v. NAACP Legal Defense & Education Fund*.[69] This case is particularly important because it outlines the analysis used by the circuit courts in public transportation system cases and created, unintentionally, the current circuit split over how to apply the public forum doctrine to public transit systems.

At issue in *Cornelius* was whether the government had violated the First Amendment when it excluded some organizations from participating in the Combined Federal Campaign ("CFC"), a charity drive that took place in the federal workplace and targeted employees for donations.[70] The CFC policy at issue limited participation in the drive to "voluntary, charitable, health and

62. *Perry*, 460 U.S. at 45.

63. *Id.*

64. *Id.* at 45–46.

65. *Id.* at 45 n.7. There is a fourth category of forum that was later created based on that footnote: the limited public forum. Its use has been severely limited in First Amendment litigation by *Cornelius* and it is very unclear how it is different from a designated public forum in principle, but for an understanding of what the Supreme Court has done with it, see Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243–44 (2015); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 668–73 (2010).

66. *Perry*, 460 U.S. at 46.

67. *Id.*

68. *Id.* (citing Greer v. Spock, 424 U.S. 828, 836 (1976); Adderley v. Florida, 385 U.S. 39, 48 (1966)).

69. 473 U.S. 788 (1985).

70. *Id.* at 790.

welfare agencies that provide or support direct health and welfare services to individuals or their families."[71] The policy excluded any organization that would "seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."[72] The application of that policy excluded the NAACP from the CFC drive, and it brought suit alleging a violation of its First Amendment rights.[73] The Supreme Court first held that solicitation for contributions is protected by the First Amendment.[74] The Court next decided that the forum at issue was the CFC charity drive itself and not the federal workplace as a whole.[75]

The Court then conducted its analysis and concluded that the CFC was not a public forum under *Perry*.[76] In ascertaining if the government intended to designate the forum for discourse and create a public forum, the Court looked to the government's policy and practice.[77] It also looked at the nature of the property and its compatibility with expressive activity.[78] Applying those factors and analysis, the Court held that the government's policy and practice did not demonstrate an intention to designate the charity drive as a public forum.[79] The Court reasoned that the policy was consistent in requiring all agencies interested in participation to apply for a permit with the state or federal government and that there was no evidence that the policy had been enforced inconsistently over the twenty-four years of its existence.[80]

The Court also reasoned that the enforcement of that policy showed no intent to designate a public forum because the requirement to obtain a permit was more than "ministerial."[81] The Court held that this selective access demonstrated that the government had no intention to designate a public forum.[82] The Court also analyzed the nature of the government property, and it found that the CFC had historically been created to minimize disruption to the federal workplace from solicitation.[83] It also found that the federal

71. *Id.* at 795.
72. *Id.*
73. *Id.*
74. *Id.* at 799 (reasoning that soliciting contributions deserves First Amendment protection because the nexus between solicitation and communication of information was present).
75. *Id.* at 801.
76. *Id.* at 802–05.
77. *Id.*
78. *Id.* at 802–03.
79. *Id.* at 804.
80. *Id.*
81. *Id.*
82. *Id.* at 805.
83. *Id.*

workplace's primary purpose is to accomplish the business of the employer and that the government has the right to control access to it.[84]

The framework and analysis conducted in *Cornelius* is the primary method used by circuit courts in analyzing which type of forum advertising spaces in public transit systems are and how much restriction the government can impose on expressive activities on them. As discussed later in Part II.C, the circuits disagree on the results when conducting this analysis and the Supreme Court should step in and resolve the conflict. The next part of this Article explains the Public Trust Doctrine to highlight why it should be incorporated in the Public Forum framework to resolve the difficulties encountered by courts.

B. The Public Trust Doctrine

Compared to the Public Forum Doctrine, the Public Trust Doctrine is a long-standing doctrine in American jurisprudence. Although scholars disagree as to the exact origin of the Doctrine,[85] it was used as early as 1810 in American courts.[86] It is based on the notion that the public at large possesses inviolable rights in certain natural resources. Before turning to its modern use, it is useful to trace its development over the last two centuries to see the similarities it shares with the Public Forum Doctrine and how the Public Trust Doctrine can blend into the Public Forum Doctrine's analytical

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84. *Id.* at 805–06.

85. Mark Dowie, *Salmon and the Caesar: Will a Doctrine From the Roman Empire Sink Ocean Aquaculture?*, LEGAL AFF., Sept.–Oct. 2004, at 14, 14–16 (writing a succinct summary of the origins of the Public Trust Doctrine and its passage through time and stating that it originated during the Roman Empire times); *see also* Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SE. ENVTL. L.J. 47, 50–54 (2006) (providing a brief overview of the Public Trust Doctrine). *But see* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 9–12 (2007) (describing as mythological the common-told tale of the Public Trust Doctrine's origins).

86. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 57–58 (1894) (applying the Public Trust Doctrine to block private claims to submerged land); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 413–14 (1842) (applying the Public Trust Doctrine to block private claims to shellfish beds); Arnold v. Mundy, 6 N.J.L. 1, 10, 71–78 (1821) (applying the Public Trust Doctrine to block private claims to oyster beds); Carson v. Blazer, 2 Binn. 475, 494–95 (Pa. 1810) (applying the Public Trust Doctrine to protect public use rights to the Susquehanna River); *see also* McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119–20 (S.C. 2003) (tracing the Public Trust Doctrine in South Carolina back to 1884 and applying the Public Trust Doctrine recently to protect coastal tidelands).

framework. This Article focuses on how American courts have used the Doctrine since the nineteenth century.[87]

1. The Early Theoretical and Analytical Framework of the Public Trust Doctrine

Adopting the distinction first expressed in Lord Chief Justice Hale's treatise,[88] nineteenth-century jurists divided the interests in navigable waters into three categories: (1) *jus publicum*—the rights of the general public; (2) *jus regium*—the royal right to manage resources for public safety and welfare (similar to modern police power); and (3) *jus privatum*—the private right of title.

The landmark case from the Supreme Court is *Illinois Central Railroad Co. v. Illinois*.[89] In this case, the Court had to decide whether the attempt of the Illinois legislature to repeal and annul a previous grant of a vast amount of submerged land to the Illinois Central Railroad in 1869 was a valid exercise of power.[90] The grant included all the underlying land in Lake Michigan one mile out from shore and extended one mile in length and width along the Chicago's business district.[91] In 1873, the legislature decided to repeal the grant and brought suit to request the judiciary to hold the grant invalid.[92]

The Supreme Court held that the grant was an invalid exercise of State power and restored the ownership of the submerged land to the State of Illinois in fee simple absolute.[93] The Court reasoned that the title under which the State of Illinois owns the submerged land of Lake Michigan was special: "It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of

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87. This Article will not address the disagreement regarding the origin of the Public Trust Doctrine as explained *supra* note 85.

88. *See generally* MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (1667), *reprinted in* STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370 (3d ed. London, Stevens & Haynes 1888).

89. 146 U.S. 387 (1892). One of the first recognized uses of the Public Trust Doctrine was in 1821. *Arnold*, 6 N.J.L. at 10. The *Mundy* case from the New Jersey Supreme Court is discussed in *Illinois Central Railroad* and most of its reasoning was adopted by the United States Supreme Court.

90. *Ill. Cent. R.R. Co.*, 146 U.S. at 433–34.

91. *Id.*

92. *Id.* at 433, 449.

93. *Id.* at 463–64. As a reminder, a fee simple absolute vests the owner with the strongest property rights among any type of estate, it is not subject to divestment by others and will last forever, including passing down to heirs after the owner's death.

fishing therein, freed from the obstruction or interference of private parties."[94] The Court also reasoned that the size of the grant was hardly conceivable and that no legislature could divest the State of its control of such a vast and busy harbor.[95] Relying on cases such as *Arnold v. Mundy*,[96] *Martin v. Waddell's Lessee*,[97] *Pollard's Lessee v. Hagan*,[98] and *McCready v. Virginia*,[99] the Court further reasoned that the "ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state."[100] The Court concluded that "[t]he trust with which they are held, therefore, is governmental, and cannot be alienated" unless it is a temporary grant for improvements of the land or if no public interest would be harmed by such a grant.[101] The decision in this case created a skepticism from the courts with regards to any grant from the government of public land or public resources to private parties.[102] Although it is one of the very few decisions that invalidated an act of the legislature under the Public Trust Doctrine, it is considered the landmark decision explaining the framework associated with the doctrine.[103]

The notion of sovereign ownership in trust and *jus publicum* did not remain confined to protection of navigable waterways and submerged lands. The concepts underlying the Public Trust Doctrine have also been applied to protect wildlife[104] and public land.[105] An early expansion of the Doctrine was its use by courts to allow railroads to use streets and many other public trust properties after the municipality granted them those rights.[106] California

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94. *Id.* at 452.

95. *Id.* at 454–55. The Court noted that the area covered by the grant expanded over more than 1,000 acres, a surface area larger than the docks on the Thames River in London, and that the annual arrivals and departures of vessels were as important as those of the New York and Boston harbors combined for the years 1886 through 1890.

96. 6 N.J.L. 1 (1821).

97. 41 U.S. (16 Pet.) 367 (1842).

98. 44 U.S. (3 How.) 212 (1845).

99. 94 U.S. 391 (1876).

100. *Ill. Cent. R.R. Co.*, 146 U.S. at 455–58.

101. *Id.* at 455–56.

102. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970).

103. *See id.* at 489 (writing that the Court in this case clearly stated that it could not find any other case that invalidated such a grant and that the facts were exceptional).

104. *See* Geer v. Connecticut, 161 U.S. 519, 534 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979); *see also* Lacoste v. Dep't of Conservation, 263 U.S. 545, 549 (1924).

105. *See, e.g.*, Am. Emigrant Co. v. County of Wright, 97 U.S. 339, 342 (1877); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224 (1845).

106. *See, e.g.*, Chapman v. Albany & Schenectady R.R., 10 Barb. 360, 363 (N.Y. Gen. Term 1851); Drake v. Hudson River R.R., 7 Barb. 508, 547 (N.Y. Gen. Term 1849).

courts were pioneers in finding a new rationale for the Doctrine: the protection of economic development by upholding expanded sovereign rights to water within their original land to growing cities.[107] The prohibition on grants of natural resources by the government is not absolute—it needs to show that the grant still furthers a value within the scope of the public trust or that developing such lands or resources does not impair the public interest in trust resources.[108] The key period for the expansion and refinement of the Doctrine was the second half of the twentieth century.

2. The Modern Thesis of the Doctrine

Scholars agree that the most influential work with regards to the Public Trust Doctrine has been Joseph Sax's 1970 article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.[109] The article set forth the modern analytical framework for the doctrine. It relies heavily on the decision in *Illinois Central Railroad Co. v. Illinois*.[110] Professor Sax explained that the doctrine's legal legitimacy to protect environmental resources rested on three principles: (1) the legal right was vested in the public, (2) the right supported a valid cause of action against the government, and (3) the substance of that right could not go against environmental concerns.[111] The article outlined the use of the doctrine by several states, mostly to ban governmental actions to grant ownership of resources to private parties.[112] Professor Sax saw the doctrine as non-substantive[113] and merely a judicial effort to correct "perceived imperfections in the legislative and administrative process."[114] More recently, Professor Sax retreated from that

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107. *See* City of Los Angeles v. Pomeroy, 124 Cal. 597, 646 (1899) (finding that the pueblo right of city expands with needs of its inhabitants). Samuel Wiel has characterized such types of ruling as "state socialism in water." *See* Samuel Wiel, *Political Water Rights*, 10 CALIF. L. REV. 111, 111 (1922).

108. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 732 (Cal. 1983) (applying the doctrine to limit diversions from non-navigable tributary streams); Eldridge v. Cowell, 4 Cal. 80, 87 (1854) (upholding the filling of San Francisco Bay because the development allowed for a deepwater port that will benefit the public of the city and beyond); Caminiti v. Boyle, 732 P.2d 989, 996 (Wash. 1987) (en banc) (stating in dicta that private recreational docks constructed on public trust lands were permitted because they promoted public trust objectives).

109. *See generally* Sax, *supra* note 102.

110. *Id.* at 489.

111. *Id.* at 474.

112. *Id.* at 546–47. Professor Sax studied California, Maryland, Massachusetts, Virginia, and Wisconsin.

113. *Id.* at 521.

114. *Id.* at 509.

view and reformulated his view of the doctrine as one whose primary purpose is to "preven[t] the destabilizing disappointment of expectations held in common but without formal recognition such as title" and to "protect such public expectations against destabilizing changes" in a similar fashion as to private property protection.[115]

Three categories of litigants have used the doctrine to support their claims: (1) private citizens suing the government, (2) private citizens suing other private citizens, and (3) the government suing a private party.[116] The doctrine's use has expanded beyond waterways and navigable waters and has reflected the favorable view the judiciary has on it.[117] The Louisiana Supreme Court held that the doctrine protects all natural resources—including air—and accordingly, all legislation in the State that aims to control hazardous waste needs to satisfy the doctrinal requirement of the Public Trust.[118]

The next question is: What restrictions does the government face when its actions are challenged on grounds of public trust? Courts differ as to the exact standard to apply and use any of three options: (1) relying on a public trust purpose, (2) relying on a preliminary study of the impact on the trust resource and upholding the actions only if they took place after such an analysis and the impact is minimal or necessary, or (3) solely using the doctrine on executive agencies' actions and upholding them only if a clear legislative authorization exists.[119]

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115. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188–89, 192–93 (1980).

116. For a list of state court decisions, see Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 645–46 nn.78–80 (1986).

117. *See id.* at 649–50 nn.97–106. Courts have applied it to marine life, sand and gravel in water beds, dry sand area of beaches, rural parklands, wildlife, and archeological remains.

118. Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1154 n.2, 1157 (La. 1984).

119. *See, e.g.*, State v. Zimring, 566 P.2d 725, 734–35 (Haw. 1977) (access to lava extensions as a valid public purpose); N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 580, 589–91 (N.J. Super. Ct. Law Div. 1971) (sports facility as a valid public purpose); Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 592 (Pa. 1973) (development as a valid public purpose); *see also* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983) (concerns for violations of public trust arise prior to actual governmental actions); United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976) (standing for the proposition that courts will not uphold a grant if there is no evidence of prior comprehensive resource planning). *But see* People v. City of Long Beach, 338 P.2d 177, 179–81 (Cal. 1959) (holding that when a government grants authority to an executive agency to apportion public resources to private parties, the utmost scrutiny should apply to such grant); Haggerty v. City of Oakland, 326 P.2d 957, 959–62 (Cal. Dist. Ct. App. 1958) (holding the same).

With regards to the first standard, courts diverge in how strictly they apply it. Some courts hold that any public purpose will satisfy the test, while others will require a purpose be linked to the substantive aspects of the Public Trust Doctrine.[120] The second standard is the strictest. It requires the government to assess the potential impact on public trust interests before enacting legislation, create comprehensive resource planning beforehand, and reassess the impact during the delegation of property interest each time the circumstances change.[121] Most courts agree that the harm to the public trust resources has to be minimal, borrowing language directly from *Illinois Central Railroad Co. v. Illinois*.[122] The last standard rests on the principle that only the legislature can properly decide when the government will harm natural resources because it inherently represents the public at large.[123] The harm can come directly from the legislature or can be a grant to an executive agency.[124]

Before turning to why this Article advocates the introduction of Public Trust concepts into the Public Forum Doctrine in order to resolve the dilemma about the restrictions on speech placed in advertising spaces on public transit systems, it is necessary to outline the current circuit split on the issue, explaining the source of the courts' disagreement.

C. Current Split: Different Treatments of Public Transit Systems Open to Advertising

Currently, there is a split among the circuit courts as to how to characterize public transit systems with regards to forum analysis and First Amendment protection. Most circuits hold that public transit systems are designated public fora and any speech restrictions imposed by the government must meet

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120. *See, e.g.*, *Zimring*, 566 P.2d at 734–35 (access to lava extensions a valid public purpose); *McCrane*, 292 A.2d at 589–91 (sports and racing facility a valid public purpose). *But see, e.g.*, People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 779–81 (Ill. 1976) (promotion of plant facilities and jobs not valid trust purpose).

121. *See Nat'l Audubon Soc'y*, 658 P.2d at 728–29.

122. *See, e.g.*, Superior Pub. Rights, Inc. v. State Dep't of Nat. Res., 263 N.W.2d 290, 296 (Mich. Ct. App. 1977); Morse v. Or. Div. of State Lands, 590 P.2d 709, 711–12 (Or. 1979) (en banc); Wisconsin's Envtl. Decade, Inc. v. Wis. Dep't of Nat. Res., 340 N.W.2d 722, 728–29 (Wis. 1983).

123. Sax, *supra* note 102, at 542–43. It is Professor Sax's preferred standard.

124. *See* State, Dep't of Nat. Res. v. City of Haines, 627 P.2d 1047, 1052 (Alaska 1981); Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 586 (La. 1974) (statutes should be interpreted in light of state's public policy).

strict scrutiny to be valid.[125] A minority of circuits hold that they are instead limited public fora or nonpublic fora and therefore, speech restrictions only need to satisfy a rational basis test to be valid.[126]

1. Majority View

In *New York Magazine v. Metropolitan Transportation Authority*,[127] the Metropolitan Transit Authority ("MTA") leased advertising spaces on its buses, in part in an effort to raise revenue.[128] In 1997, MTA displayed an advertisement from *New York Magazine* that showed the magazine's logo and a statement: "Possibly the only good thing in New York Rudy hasn't taken credit for."[129] Although MTA displayed the advertisement for a couple of weeks, it removed it following a complaint from the mayor's office alleging that it violated the New York Civil Rights Law concerning use of a living person's name without their consent.[130] MTA's advertising policies did not prohibit political speech but prohibited any speech that violated the New York Civil Rights Law.[131] The issue was whether the advertising policies and MTA's refusal to display the ad violated *New York Magazine*'s First Amendment rights.[132]

Relying on the framework outlined in both *Perry*[133] and *Cornelius*,[134] the court first turned to MTA's advertising policy to determine whether the

125. *See* Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 252 (3d Cir. 1998); N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998); Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth., 767 F.2d 1225, 1227 (7th Cir. 1985); Lebron v. Wash. Metro. Area Transit Auth., 749 F.2d 893, 896–97 (D.C. Cir. 1984).

126. *See* Am. Freedom Def. Initiative v. King County, 796 F.3d 1165, 1170 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1022 (2016); Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 581 (1st Cir. 2015); Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885, 890 (6th Cir. 2012). Other circuits have not published a decision on this particular matter. This Article does not claim to be an exhaustive analysis of each decision on the topic by each circuit. Accordingly, only one opinion from the majority and one from the minority are included and analyzed in detail in this Part. Furthermore, the reasoning from the various circuit courts is similar and follows the *Cornelius* and *Perry* framework.

127. 136 F.3d 123 (2d Cir. 1998).

128. *Id.* at 125.

129. *Id.*

130. *Id.* at 126. This section stated that "[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, . . . is guilty of a misdemeanor." *Id.* (quoting N.Y. CIV. RIGHTS LAW § 50 (McKinney 1997) (alteration in original)).

131. *Id.*

132. *Id.* at 125.

133. 460 U.S. 37 (1983).

134. 473 U.S. 788 (1985).

transit system was a designated public forum.[135] The court stated that excluding one category of speech is not enough by itself to turn the forum into a nonpublic forum and trigger a reasonableness analysis.[136] In response to MTA's argument that it proved its intent not to open the forum, the court noted that adopting such a rule would allow any government entity to turn a designated public forum into a nonpublic forum simply by restricting speech based on its content, which is impermissible in a designated public forum.[137] The court held that the buses were a designated public forum—reasoning that MTA's policies allowed for political and commercial speech and showed an intent to open the forum for public discourse.[138] Accordingly, the court held that MTA could not enforce the New York Civil Rights Law because the buses were a designated public forum.[139]

Showcasing the confusion about the analysis of the government's intent, the dissent stated that MTA had created a limited public forum that only allowed some forms of political speech.[140] The dissent reasoned that MTA's standards imposed restrictions on the type of advertisement allowed based on any violation of the New York Civil Rights Law and, accordingly, clearly showed its intent not to open the forum to everybody.[141] The dissent also stated that a restriction based on the New York Civil Rights Law was reasonable and viewpoint neutral because under *Cornelius*, a subject-matter restriction in a nonpublic forum only needs to fit those two characteristics to be permissible.[142]

2. Minority View

The Ninth Circuit recently heard two cases dealing with the same issue: *Seattle Mideast Awareness Campaign v. King County* ("*SeaMAC*")[143] and *American Freedom Defense Initiative v. King County*.[144] This Article only discusses the latter, as the court pointed out that it waited for the resolution of *SeaMAC* before hearing arguments and rendering its decision in the second

135. *N.Y. Magazine*, 136 F.3d at 129.
136. *Id.* at 129–30.
137. *Id.* at 130.
138. *Id.*
139. *Id.* at 132.
140. *Id.* at 134 (Cardamone, J., dissenting).
141. *Id.*
142. *Id.*
143. 781 F.3d 489 (9th Cir. 2015).
144. 796 F.3d 1165 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1022 (2016).

case.[145] In this case, King County rejected an advertisement by the American Freedom Defense Initiative ("AFDI") that purported to encourage people to share with the FBI any information they may have about a list of terrorist figures because it violated its guidelines for advertising on buses.[146] King County had an extensive list of prohibited advertisements based on their substance, spanning eleven different categories.[147] The advertisement at issue contained pictures of sixteen individuals who are classified as terrorists by the Department of State with the caption underneath reading "AFDI Wants You To Stop a Terrorist. The FBI Is Offering Up To $25 Million Reward If You Help Capture One Of These Jihadis."[148] The AFDI sued under the First Amendment because King County had displayed a similar but not completely identical advertisement by the Department of State earlier in the year.[149] King County put the Department of State's ad under review, and the Department of State retracted it before AFDI submitted its version and rejected AFDI's advertisement because it violated the advertising policy.[150]

Relying on its decision in *SeaMAC*, the court held that King County did not intend to create a designated public forum with the advertising spaces on its buses.[151] The court first turned its attention to AFDI's argument that the advertising spaces on the buses were a designated public forum and held that under *Cornelius*, it should focus on the government's intent for the forum.[152] It relied on King County's own assertion on its policy that it did "not intend its acceptance of transit advertising to convert [its ad spaces] into open public forums" to hold that the buses were not a designated public forum.[153] The court also relied on the three factors used in *SeaMAC*: (1) the public transit agency had adopted a pre-screening process, (2) it had rejected a wide variety of advertisements in the past, and (3) the nature of the buses to provide safe

145. *Id.* at 1168.

146. *Id.* at 1167.

147. *Id.* The prohibited advertisements are: (1) political campaign speech, (2) tobacco, alcohol, firearms, and adult-related products and services, (3) sexual or excretory subject matter, (4) false or misleading, (5) copyright, trademark, or otherwise unlawful, (6) illegal activity, (7) profanity and violence, (8) demeaning or disparaging, (9) harmful or disruptive to transit system, (10) lights, noise, and special effects, and (11) unsafe transit behavior. *Id.*

148. *Id.* at 1168.

149. *Id.* at 1167. The Department of State ad had the same pictures but the caption read: "Stop a Terrorist. Save Lives. Up to $25 Million Reward." *Id.*

150. *Id.* at 1167–68.

151. *Id.* at 1169.

152. *Id.*

153. *Id.* at 1169–70.

and efficient transportation for passengers was not conducive with a broad range of advertisements.[154]

The court then turned to whether the restrictions imposed by King County were reasonable and viewpoint neutral given that the advertising spaces on the buses were a nonpublic forum.[155] It noted that King County justified its rejection of the advertisements because it was false or misleading and relied on its analysis in *SeaMAC* to analyze reasonableness under three factors: (1) the standard is reasonable when compared with the purpose of the forum, (2) the standard is sufficiently objective to prevent arbitrary enforcement by officials, and (3) an independent review of the record supports the County's decision that the advertisement is false.[156] With regard to the first factor, the court reasoned that the purpose of the buses is to provide safe and efficient transportation to the public, which becomes by necessity a "captive audience."[157] Accordingly, it was reasonable for the County to prohibit the dissemination of false information to a captive audience.[158] With regard to the second factor, the court reasoned that the falsity of an advertisement can be tied to personal belief but that some assertions are clearly false.[159] Thus, the policy objective regarding the falsity of the advertisement was sufficient to satisfy the second factor.[160] Finally, the court stated that the third factor was de facto satisfied because the court had conducted an independent review and found that two assertions in the AFDI's advertisement were false.[161] The court also stated that the prohibition of false or misleading advertising was viewpoint neutral because there was no proof that an advertisement with the same factual inaccuracies but advocating a different viewpoint would have been accepted.[162]

Although the circuit courts use the same analytical framework under *Perry* and *Cornelius*, the two decisions above showcase the prong of the analysis that divides courts: both courts referred to the intent of the government but the Second Circuit, and the majority of circuits, refused to consider the subjective intent of the government as a factor[163]—turning instead to the policy itself to determine its goals—while the Ninth Circuit, and the minority

154. *See id.* at 1170.
155. *Id.*
156. *Id.* at 1170–71.
157. *Id.* at 1170.
158. *Id.*
159. *Id.* at 1171.
160. *Id.*
161. *Id.*
162. *Id.*
163. *See* N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998).

of circuits, accepted the self-serving statements of the government with regard to its intent.[164] This Article offers a solution to this disagreement by creating a simplified analytical framework. The obvious question that arises from *New York Magazine v. Metropolitan Transportation Authority* and *American Freedom Defense Initiative v. King County* is: What can be done to get a uniform application of the Public Forum Doctrine to advertising spaces in public transit systems?

III. ANALYSIS

This Article suggests removing the designated and limited public forum categories and to introduce the Public Trust concept into the public forum analysis to place the government under strict scrutiny once it has opened its advertising spaces to expressive activity and attempts to restrict those activities. This Part first outlines the proposed test and applies it to one case to show how it would operate in practice, and then proceeds to answer some of the potential criticism.

A. The New Test: Public Forum Doctrine Enhanced by Public Trust Principles

The Public Forum and Public Trust doctrines can sufficiently blend together in practice to provide for a reliable analytical framework. First, both doctrines apply to government actions attempting to restrict the rights of citizens on the government's property. They both protect a public right unless the government can satisfy a test and show an appropriate justification for its attempt to extinguish that right. They differ as to which test the government must meet to restrict access—the Public Trust Doctrine centers on a legislative action, usually when the government writes a document to grant land to someone, while the Public Forum Doctrine does not center on such a legislative grant—but they both encompass a public right that the government must respect. To further this point, both Henry Kalven, Jr., in his famous article[165] and the Supreme Court in *Hague v. Committee for Industrial Organization*[166]—although in dicta—have recognized that the two doctrines are very similar. Kalven spoke of a "kind of First-Amendment easement" on

164. *Am. Freedom Def. Initiative*, 796 F.3d at 1169–70.
165. Kalven, Jr., *supra* note 16, at 12–13.
166. *See* 307 U.S. 496, 515 (1939).

specific types of public property.[167] He himself relied on a famous part of the *Hague* opinion where the Court stated that:

> 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.[168]

Second, and perhaps more importantly, expression is as vital of a resource to society as natural resources are. Society is not able to exist without access to natural resources, and the Public Trust Doctrine protects the public from private monopolies over vital resources. Similarly, speech and communication are not something that society and humankind can live without. Critics may attempt to distinguish natural resources from speech by arguing that unlike speech, resources are finite and exhaustible. This, however, is a false characterization of speech found in a public forum. That is, when speech is restricted based on its content or topic, everyone is deprived of that avenue. In the same vein, much like a river that runs out, this type of speech is extinguished for all speakers. The core principle of this Article is to provide a workable analytical framework for analyzing governments' attempts to restrict speech on their property.

A historical review supports this analogy. At the time of their apogee, the Romans had public properties reserved for specific types of speech: some for religions, some for political speech.[169] Greeks had the "*agora*," a place that gave birth to the forum in the Roman Empire, where citizens could gather to listen and discuss civic announcements as well as politics.[170] Philosophers such as Plato and Socrates were known to walk through the *agora* to question bystanders and merchants on politics, philosophical issues, or their purpose for being there, and it usually attracted a large crowd without any speech restriction.[171] Carol Rose referred to the Romans to explain her concept of

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167. Kalven, Jr., *supra* note 16, at 13.

168. *Hague*, 307 U.S. at 515.

169. *See* Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 802 n.194 (1979) (describing *res sacrae*, a Roman law category of public property).

170. Joshua J. Mark, *Agora*, ANCIENT HIST. ENCYCLOPEDIA (Sept. 2, 2009), http://www.ancient.eu/agora/.

171. *Id.*

inherently public property.[172] She then proceeds to explain that the Romans' creation of dedicated public property for religions made sense because their society rested heavily on their beliefs in mythology and divinities.[173] Similarly, our modern society rests on principles of communication, and perhaps the more ideas we have and share with each other, the better we can self-govern.[174]

Two comments in Supreme Court decisions are important to illustrate this point: in his dissent in *Members of City Council v. Taxpayers for Vincent*,[175] Justice Brennan reasoned that some types of public property are particularly suitable for dissemination of political speech and should be open to "time-honored" means of communication such as posting signs. In *Abrams v. United States*,[176] Justice Holmes explained his famous theory of the marketplace of ideas, and the concept that humankind

> may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[177]

Both those statements reflect the underlying concept of holding property in public trust to protect and foster expression of the citizens. Clearly, Justice Brennan was thinking about holding the posts in public trust for the citizens. Justice Holmes advocates for considering speech a key element of society, on the same level as commerce, that needs to be afforded great protection, even in public transit systems. These systems are a prime location for dissemination of ideas—millions of people use them each year, and are exposed to those messages. However, completely unrestricted speech on advertising spaces in public transit systems should still not exist, as illegal speech for example should never be allowed.

Based on those similarities between the Public Trust concept and freedom of speech, this Article offers the following analytical framework to resolve

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172. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 777–78 (1986).

173. *Id.* at 778 (speaking of religion as being a social glue between individuals at the time of the Romans).

174. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing Judge Learned Hand's words that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection").

175. 466 U.S. 789, 818 (1984) (Brennan, J., dissenting).

176. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

177. *Id.*

the circuit split. When a public transit system permits its property, or property under its control through an agency, to be used to display any message to the public, then the transit system must permit the display of all messages unless it can establish by clear and convincing evidence that the suppression of a message or type of message satisfies a compelling state interest, such as, but not limited to, preserving the public safety or protecting children from inappropriate content. In other words, the government would need to meet strict scrutiny if it had allowed some speech but attempted to ban other types.

The courts should first turn to the policy and practice of the government to determine the type of restriction it attempts to place on speech. The Public Trust Doctrine should now appear: the government, as the owner of the transit system and advertising spaces, holds them in trust for the public regarding expressive activities. This prong should be based on the fact that, as outlined above, speech is a vital resource for society and similarly to the trust the government has in natural resources and lands, it holds the public trust in fora related to communication. This should not fundamentally change the rest of the analysis, as the government would now be faced with strict scrutiny to justify its restrictions. What it should do is remove the designated public forum and the limited public forum once and for all, which at present, merely confuse the courts. In the current analytical framework of the Public Forum Doctrine, the government faces only two types of standards when justifying its actions: strict scrutiny for a public forum or a designated public forum and reasonableness for a limited public forum or a nonpublic forum.[178] There is no longer a need for the intermediate categories as they rely on concepts that should disappear in the proposed test—government intent and limited types of speech allowed.

From a public policy standpoint, it should simplify the process and allow courts to more easily resolve disputes that arise out of access to advertising spaces in public transit systems, as well as be more fair to the public by placing all government restrictions under strict scrutiny. It should also have beneficial effects on administration of such lawsuits by reducing the potential for endless subjective arguments by the government with regards to its intent for the forum. Courts should not defer anymore to statements from the government such as "those advertising spaces were leased solely to generate revenue" and there was no intent to allow a wide range of expression.[179]

The best way to see how the test would work is to apply it to one of the cases that is part of the current split among the circuit courts. This Article

178. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

179. N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998).

chooses to apply the test to *American Freedom Defense Initiative v. King County*.[180] In that case, the Ninth Circuit held that the advertising spaces in King County were a limited public forum and the restriction imposed by the County—that an ad cannot be false or misleading—was reasonable, viewpoint neutral, and passed constitutional challenge.[181] To begin with, the court should decide what type of forum is at issue. As explained above, the court should likely decide, based on the arguments of the party, to use the public transit system and not the advertising spaces. Turning to the policy and past practice of the government, the court should find that the government allowed some speech and needs to meet the strict scrutiny standard to restrict expressive activities. Obviously, the court would consider that the government did not allow a wide variety of speech but it is not dispositive under the proposed test. Accordingly, the court should find that the government created a "public trust forum," that it is holding in trust for the citizens to express themselves and encourage discourse and reflection. As a reminder, in this case, the County rejected as misleading and false an advertisement that incorrectly stated that the FBI offered a twenty-five million dollar reward for information leading to the capture of a list of terrorists.[182]

What would happen to the County's rejection under the new test and strict scrutiny? It would violate the First Amendment. The County would need a compelling state interest to ban such advertisements, and prohibiting an advertisement solely because it is false may not be enough of an interest. The policy also looks like a content-based restriction, which is usually prohibited, and falsity of an advertisement has never been a compelling interest besides specific circumstances.[183] The policy would also need to be narrowly tailored to achieve that interest, although it does not need to be the only available method to pass that standard. There are less sweeping alternatives to the ban of the advertisement that are more narrowly tailored to achieve that purpose: notify the proponent at the time of submission that his content is incorrect or give him some time to fix it before pulling it off the advertising spaces if it is already displayed.

The County also argued that it banned the advertisement because it was demeaning and disparaging to Muslims by showing pictures of terrorists

180. 796 F.3d 1165 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1022 (2016).

181. For the detailed facts of this case, see *supra* Part II.C.2.

182. *Am. Freedom Def. Initiative*, 796 F.3d at 1171.

183. United States v. Alvarez, 567 U.S. 709, 715–16 (2012) (plurality opinion) (explaining that the falsity of a speech is not enough by itself to place it in one of the few recognized categories allowing content-based prohibition).

dressed in traditional attires.[184] This is also a content-based restriction and problematic. The terrorists were clearly identified with their pictures so it is hard to support the argument that the advertisement referred to *all* Muslims. The government in that case clearly banned the advertisement because it was false. The government could suppress advertisements that discriminate on their face a group or minority but would need a strong reasoning and proof that it did, stronger than just stating that traditional attires support the discriminatory nature of the ad, which is simply a content-based restriction.

The argument that it would protect the captive passengers from offensive speech is also weak and has been rejected several times by the Supreme Court: it has recognized that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[185] The government is not allowed to ban expressive activities solely to protect others.[186] Furthermore, the AFDI never attempted to link terrorists with Muslims in general in its proposed advertisements because they clearly identified a set of known terrorists with their individual photographs. Before concluding, this Article answers some of the criticisms that the proposed test will likely draw, although this list is surely not exhaustive.

B. Counterarguments to the Proposed Test

Three criticisms of the proposed test are obvious: (1) the government will adopt an all-or-nothing approach, (2) it would force the captive audience to endure speech it may not like or agree with, and (3) litigants would flood the courts with lawsuits because the government must meet strict scrutiny. The first criticism is that it will encourage the government to adopt an all-or-nothing approach because once it opens its space for expression, it must allow all types of expression. It would therefore call for the government to shy away from opening its advertising spaces at all. Such an argument misses the point on the government's power to regulate speech on its advertising spaces. The restriction is not different from the current strict scrutiny that the courts apply to a public forum or a designated public forum. Accordingly, the government can restrict speech with a compelling state interest, an action that is narrowly tailored to further that interest, or reasonable time, place, and manner restrictions that are content-neutral.

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184. *Am. Freedom Def. Initiative*, 796 F.3d at 1168.

185. Cohen v. California, 403 U.S. 15, 21 (1971) (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970)).

186. *Id.*

Furthermore, with regard to that argument, some types of speech are never allowed in public, and the government could meet that burden easily for such types of expression: advocacy intended and likely to cause imminent lawless actions,[187] obscenity,[188] defamation,[189] speech that is part of criminal conduct,[190] "fighting words,"[191] child pornography,[192] fraud,[193] actual threats,[194] and speech that presents an imminent danger that the government has the power to prevent.[195] Prohibiting those topics is a clear content-based restriction that is permissible according to the Supreme Court itself. The government will always be allowed to ban speech that is illegal. It provides the government with more than an all-or-nothing approach and there is no indication that other speech could not be restricted if the government can provide a compelling interest. For example, things such as sexually explicit content to protect minors and preserve decency, and violent content that could be considered psychologically damaging to most of the audience come to mind.

The second criticism is that it imposes expression on the passengers while they are essentially a captive audience and forcing information on a captive audience is not something the First Amendment should protect. That criticism is unpersuasive because there is no proof that advertisements in public transit systems have caused any disruption to the activities of the systems or have indirectly caused physical harm to passengers through riots or assault. It has not caused such anger and discomfort in the audience that chaos ensued. Furthermore, controversial speech "invite[s] dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[196] And as

187. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (detailing the clear and present danger test used by the Court at that time to analyze restrictions on speech by pro-Russian citizens who advocated against the draft).

188. *See* Miller v. California, 413 U.S. 15, 22 (1973).

189. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (providing substantial protection for speech about public figures).

190. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

191. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

192. *See* New York v. Ferber, 458 U.S. 747, 756 (1982).

193. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 752 (1976).

194. *See* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam).

195. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 732–33 (1971) (per curiam) (White, J., concurring).

196. Texas v. Johnson, 491 U.S. 397, 408–09 (1989) (internal quotation marks omitted) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949)); *see also* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2256 (2015) (Alito, J., dissenting) (deciding

mentioned earlier, once a citizen steps out of his home, he accepts that he will face some expression that he cannot avoid.[197] Courts have not considered the captive audience argument to be persuasive in public places.[198]

The third criticism is that it would open the courts to a flood of lawsuits because citizens would feel confident that the government cannot meet its burden under the strict scrutiny standard. This criticism is equally misplaced for several reasons: (1) the nonpublic fora (outside of jails and military bases, for example) would remain nonpublic because the new test does not allow the public to force the government to open its spaces where it has always banned all forms of expression, (2) litigation is costly and the new test does not alleviate the financial burden to bring a lawsuit, and (3) the new standard does not create new topics of expression. This last point is true because the new standard does not create new topics of expression, which is the basis for causes of action in this area of law.

IV. CONCLUSION

As Justices Thomas and Alito stated, it is time for the Supreme Court to take up the issue of how to treat advertising spaces in public transit systems and decide what kind of restrictions the government is allowed to impose.[199] The Court should not simply take a similar case, apply the current analytical framework, and render its decision, leaving lower courts in the same state of disagreement regarding public forum analysis in general. It should rule that the analytical framework of *Perry* and *Cornelius* has outlived its usefulness and workability. It should adopt the proposed test that removes intermediate categories—the designated public forum and the limited public forum—by incorporating the concept of Public Trust as applied to speech and hold that once the state has opened up its advertising spaces, it must face strict scrutiny if it attempts to censor any type of speech.

What would result from the proposed test would be a durable solution for the issues arising out of the control of what is displayed on advertising spaces in public transit systems. It would transform all public transit system advertising spaces into public fora, and increase the fairness across the

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whether states could reject confederate flag license plates); Snyder v. Phelps, 562 U.S. 443, 448 (2011) (deciding whether protesters could display signs reading "God Hates Fags" and "God Hates the USA/Thank God for 9/11" outside a soldier's funeral); Cox v. Louisiana, 379 U.S. 536, 537–38 (1965) (deciding whether protesters against desegregation could be a threat to public peace and, if so, whether the states could prohibit their expression).

197. Cohen v. California, 403 U.S. 15, 21 (1971).

198. *See Johnson*, 491 U.S. at 408–09; *Cohen*, 403 U.S. at 21.

199. Am. Freedom Def. Initiative v. King County, 136 S. Ct. 1022, 1022 (2016) (Thomas, J., dissenting).

country, as well as the protection of speech through such media. This Article does not advocate extending this test to all litigation over public forum and government restrictions on expression, as the analysis was solely focused on resolving the circuit split over the characterization of public transit systems. This Article recognizes that other types of fora may raise other questions and it may prove difficult to accommodate this new test in such situations. The proposed test, however, solves the current split among the circuit courts by removing the possibility for the government to engage in endless subjective arguments over its intent and directing advocacy regarding compelling interests to restrict speech.