WHEN THE KLAN ADOPTS-A-HIGHWAY: THE WEAKNESSES OF THE PUBLIC FORUM DOCTRINE EXPOSED

INTRODUCTION

Generally, the United States Constitution prohibits Congress and state legislatures from curtailing an individual's freedom of speech.[1] As demonstrated by the 1989 Supreme Court case on flag burning, if an individual's conduct contains elements of communication, the Court will label it "expressive conduct" and will grant First Amendment protection.[2] In another well-known opinion,[3] however, the Court held that an individual's freedom of speech and expression is not absolute. Most high school civics students are familiar with Justice Holmes's recognition that the "protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[4]

As a means of determining when a state or local government can limit an individual's exercise of free speech, the Supreme Court developed the public forum doctrine.[5] Recognizing three different forums, the traditional public forum, the limited or designated public forum, and the nonpublic forum, the Court has specified different rules for speech expressed within each forum.

Recognizing that certain public places have immemorially been held out as places of public discourse, when a traditional public forum exists, the state can only impose reasonable time, place, and manner restrictions on the speech, and these restrictions must not substantially curtail speech more than

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people to peaceably assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I (emphasis added).

2. *See* Texas v. Johnson, 491 U.S. 397 (1989).

3. *See* Schenck v. United States, 249 U.S. 47 (1919).

4. *Id.* at 52.

5. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985) ("[W]e must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.").

Prior to the adoption of the public forum doctrine in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Court applied an "incompatibility" test to determine whether a state or local government had the authority to regulate an individual's exercise of free speech on government property. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (holding school authorities could not forbid students from wearing black armbands in protest of war because the expressive conduct was not incompatible with maintaining "appropriate discipline in the operation of the school" (citing Burnside v. Byars, 363 F.2d 744, 749 (1966))).

necessary.[6] Similar rules apply to a limited or designated public forum during its use as a public forum.[7] Conversely, in a nonpublic forum the state can impose any reasonable limits on the public's access to the forum because of its interest in its governmental duties.[8]

While the Court has explicitly described the limits a government may place on speech in each type of forum,[9] the Court has offered lower courts virtually no guidance in determining what analysis applies to any given location. The courts do not know whether to define the location scrutinized broadly or narrowly. Therefore, they do so indiscriminately, based, at least in part, on the decision they wish to reach.

The public forum doctrine has proved unworkable in practice. This difficulty became clear in the recent Adopt-A-Highway Cases in Missouri,[10] Texas,[11] and Arkansas.[12] In these cases, four different federal courts,[13] confronted with three substantially similar programs,[14] approached the public forum doctrine in five different ways. Therefore, the courts reached three different decisions regarding the type of forum at issue.[15] Using these cases as a background, this Note develops a balancing test for lower courts to apply in determining the location for consideration in applying the public forum doctrine. This balancing test works in the Adopt-A-Highway cases and, generally, in other public forum cases.

Part I of this Note analyzes the Supreme Court's treatment of the First Amendment as it applies to the states and the public forum doctrine. Part II discusses the history behind and litigation confronted in these cases, and the necessity of First Amendment protection for an applicant to an Adopt-A-

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6. *See infra* Part I.B.1.
7. *See infra* Part I.B.2.
8. *See infra* Part I.B.3.
9. *See infra* Part I.B.
10. *See* Cuffley v. Mickes, No. 4:97CV2110-SNL, 1999 WL 216439 (E.D. Mo. Apr. 13, 1999); Missouri *ex rel.* Missouri Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248 (E.D. Mo. 1996), *rev'd on other grounds*, 112 F.3d 1332 (8th Cir. 1997).
11. *See* Texas v. KKK, 58 F.3d 1075 (5th Cir. 1995); Texas v. KKK, 853 F. Supp. 958 (E.D. Tex. 1994).
12. *See* KKK v. Arkansas State Highway & Transp. Dept., 807 F. Supp. 1427 (W.D. Ark. 1992).
13. The federal courts that addressed these cases were the Eastern District of Missouri (twice), the Fifth Circuit Court of Appeals, the Eastern District of Texas, and the Western District of Arkansas.
14. The five published opinions on which this Note will focus began with Ku Klux Klan applications to state Departments of Transportation for adoption of a portion of a state highway under an Adopt-A-Highway program.
15. Addressing the case the first time, the district court in Missouri determined that the forum was a limited public forum. *See Cuffley I*, 927 F. Supp. at 1257. The district court in *KKK v. Arkansas* determined that the forum was a traditional public forum. *See KKK v. Arkansas*, 807 F. Supp. at 1434-35. The Fifth Circuit Court of Appeals determined that it was a nonpublic forum. *See Texas v. KKK*, 58 F.3d at 1078.

Highway Program. Part III of this Note discusses Adopt-A-Highway Programs in the context of the public forum doctrine. Finally, Part IV proposes a balancing test for determining the proper scope of the location of the forum so that courts can more effectively employ the public forum doctrine.

I. FIRST AMENDMENT ANALYSIS

A. General

The First Amendment to the United States Constitution guarantees the right of freedom of speech to individuals and groups.[16] Indeed, this is one of the most important liberties enjoyed by Americans. Justice Cardozo characterized an individual's interest in free speech as "the matrix, the indispensable condition, of nearly every other form of freedom."[17]

The direct language of this amendment applies only to Congress, and therefore, to the Federal Government alone. The Supreme Court, however, through the Fourteenth Amendment's due process clause[18] and the doctrine of selective incorporation,[19] has explicitly made the First Amendment

16. Professors John E. Nowak and Ronald D. Rotunda argue that the Constitution's Framers did not view the protection of free speech as a necessary provision in the original Constitution because of the limited nature of the Federal Government that they had created. According to Nowak and Rotunda, "the government they envisioned, limited to the enumerated powers, could not constitutionally enact a law restricting free speech because that was not among the government's enumerated powers." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 989 (5th ed. 1995). Due to popular pressure, the protection was added in the form of an amendment in 1791. *See id.*

17. Palko v. Connecticut, 302 U.S. 319, 327 (1937) (while *Palko*'s famous holding was overruled in *Benton v. Maryland*, 395 U.S. 784 (1969), this statement was unrelated to the holding in *Benton*). In support of a broad interpretation of this fundamental liberty, Justice Holmes recognized that it is "not free thought for those who agree with us, but freedom for the thought that we hate" that gives the liberty its most enduring value. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Also, both philosophers and political theorists have argued that government should allow all speech, both true and false, both popular and unpopular. As early as 1644, in *Areopagitica*, John Milton argued: "[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in free and open encounter?" NOWAK & ROTUNDA, *supra* note 16, at 991 (quoting JOHN MILTON, AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND (1644)); *see also* JOHN STUART MILL, ON LIBERTY (Henry Regnery Co. 1955) (1859).

18. "[N]or shall any State deprive any person of life, liberty, or property, *without due process of law*." U.S. CONST. amend. XIV, § 1, cl. 3 (emphasis added). "The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

19. Prior to the enactment of the Civil War Amendments, the Supreme Court held that the liberties protected in the Bill of Rights against Congressional action did not apply to the activities of state and local governments. The Court explained in 1833:

applicable, in all aspects, to the states.[20]

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and *not for the government of the individual states*. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.

Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (emphasis added).

Soon after the enactment of the Fourteenth Amendment, however, individuals began to argue that the due process clause contained in that Amendment made the guarantees in the Bill of Rights applicable to the states. *See, e.g.*, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873). In 1925, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated a state law prohibiting private religious schools under a general understanding of due process, not because the First Amendment prohibited government from prohibiting the exercise of religion. *See id.* at 534-36.

In defining the concept of liberty protected by the due process clause, the Court sometimes incorporates the rights and liberties guaranteed in the Bill of Rights. But the Court has never explicitly stated that the Fourteenth Amendment makes all Bill of Rights guarantees applicable to the states; they "incorporated" Bill of Rights guarantees through the due process clause "selectively." *See generally* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 432-52 (13th ed. 1997). When confronted with a specific guarantee, the Court decides whether the Fourteenth Amendment should incorporate that specific guarantee. Through this doctrine of "selective incorporation," the Court has made most, but not all, of the Bill of Rights liberties applicable to the states. *See id.* at 436-39 (discussing Court's rejection of "total incorporation").

20. *See* Schneider v. New Jersey, 308 U.S. 147, 160-61 (1939); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States."); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (stating the Fourteenth Amendment makes the First Amendment applicable to the states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state."); Lovell v. City of Griffen, 303 U.S. 444, 450 (1938) (applying First Amendment in Georgia state case); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.").

Interestingly, one of the amendments proposed with the original Bill of Rights was one written by James Madison that protected freedom of speech, press, and religion from abridgment by state governments. Though the House of Representatives approved this proposed amendment, the more state-oriented Senate rejected it. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 67-68 (1991).

As early as 1907 in *Patterson v. Colorado*, 205 U.S. 454 (1907), Justice Harlan, in his dissenting opinion, offered an early articulation of the application of the First Amendment through the Fourteenth Amendment. The majority opinion, written by Justice Holmes, explicitly left undecided "the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First." *Id.* at 462. Recognizing that freedom of speech and freedom of the press are rights belonging to citizens of the United States at large, Harlan emphasized the explicit language of the Fourteenth Amendment allowing no state to "make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*." *Id.* at 464 (citing U.S. CONST. amend. XIV, § 1, cl. 1) (emphasis added). In his articulation that the First Amendment guarantees apply to the states through the Fourteenth Amendment, Harlan stated:

> As the First Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that when the Fourteenth Amendment prohibited the States from impairing or abridging the privileges of citizens of the United States it necessarily

Further, the Supreme Court has consistently held that the First Amendment's prohibition against abridging speech extends to expressive conduct, so long as that conduct is sufficiently imbued with elements of communication.[21] The Court developed a two-factor test to determine whether conduct is expressive conduct. To be protected by the First Amendment, the conduct must reflect an intent to convey a particularized message and there must be a great likelihood that the message will be understood.[22] Applying this test, the Court has found various forms of conduct to be forms of expression, such as: a sit-in;[23] the hanging of a United States flag upside-down;[24] the burning of an American flag;[25] a child's decision, on religious grounds, not to salute the American flag;[26] and the wearing of a black armband.[27]

> prohibited the States from impairing or abridging the constitutional rights of such citizens to free speech and a free press.

Id. at 464.

By 1925, however, the Supreme Court "assumed" that the First Amendment guarantees applied to the states through the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). A holding that the Fourteenth Amendment guaranteed freedom of speech was not necessary to determine this case because the Court ultimately decided that the substantive due process argument had little, if any, merit. *See id*. at 666-67. Justice Holmes's dissenting opinion clearly indicates the persuasive force of Justice Harlan's argument in *Patterson*. Holmes's dissent states that "[t]he general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used . . . ." *Id*. at 672.

While this principle appears to be a settled issue of constitutional law, Supreme Court Justice John Paul Stevens recently spoke at the University of Chicago School of Law's symposium entitled *The Bill of Rights in the Welfare State* and criticized the incorporation doctrine. Stevens recognized that "[r]espected scholars have, however, questioned the legitimacy of the Court's doctrine incorporating portions of the Bill of Rights into the Liberty Clause of the Fourteenth Amendment." John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 20 (1992). Stevens recognized that by incorporating the command of the First Amendment into the Fourteenth, the Supreme Court ignored the plain language of the First, which prohibited only Congress from making laws. *See id*. at 24-25.

21. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989) ("[W]e have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" (quoting Spence v. Washington, 418 U.S. 405, 409 (1974))).

22. *See Johnson*, 491 U.S. at 404. Also, in *Spence v. Washington*, the Court stated that if the actor has an "intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it," the First Amendment protects the expression of that message. *Spence*, 418 U.S. at 410-11.

23. *See* Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (plurality opinion).

24. *See Spence*, 418 U.S. at 415 (holding that displaying flag with peace symbol on it outside an apartment was a form of expressive conduct protected by the First Amendment).

25. *See Johnson*, 491 U.S at 406.

26. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

27. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969) ("[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.").

The Supreme Court has even found nude dancing in a lounge and in an adult bookstore to be expressive conduct. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991).

B. Public Forum Doctrine

While the First Amendment appears to speak in absolutist terms, "Congress[28] shall make *no law* . . . abridging the freedom of speech . . .,"[29] the Supreme Court has repeatedly held that the protection offered to speech and expressive conduct by the First Amendment is not absolute.[30] Speech is not equally permissible at all times and in all places, especially when the property where the speech occurs is owned by the state.[31] To determine

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The Court, however, has rejected the notion that its previous opinions demonstrate that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968). For example, the Court has refused to extend freedom of speech rights to physical assault. *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (noting that a physical assault is not, "by any stretch of the imagination," expressive conduct protected by the First Amendment).

28. Additionally, through the extension of the Fourteenth Amendment's due process clause, neither may states. *See supra* notes 18-20 and accompanying text.

29. U.S. CONST. amend. I (emphasis added).

30. A recent law review article discussing the Texas Adopt-A-Highway case noted that "[w]hile the freedom of speech is regarded as the central protection afforded by the Bill of Rights, it is by no means absolute." David Garland, Recent Development, Texas v. Knights of the Ku Klux Klan*: The Fifth Circuit Applies the Public Forum Doctrine to Adopt-a-Highway Programs*, 70 TUL. L. REV. 1195, 1196 (1996); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

While a majority of the Supreme Court has never adopted an absolutist view of free speech, several notable justices on the Court have, at times, championed such a view. Arguing against a balancing approach to First Amendment liberties, Justice Black stated that "the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Konigsberg v. State Bar, 366 U.S. 36, 60 (1961) (Black, J., dissenting), *reh'g denied*, 368 U.S. 869 (1961).

31. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) ("It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State."); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (noting that the First Amendment does not require "equivalent access to all parts of a school building in which some form of communicative activity occurs"); *see also* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 136 (1977) (prison administrators permitted to regulate expression of prisoners); Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972) (no "absolute constitutional right to use all parts of a school building or its immediate environs" for unlimited expressive purposes). Further, the Supreme Court has stated that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800.

Interestingly, the First Amendment is the only Constitutional Amendments prohibiting governmental action that is written in absolutist language. For example, the Fourth Amendment does not guard against all searches and seizures; it merely protects individuals against "*unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added). Similarly, the Eighth Amendment does not protect an individual from having to post bail; he is merely protected from paying "[*e*]*xcessive* bail." U.S. CONST. amend. VIII (emphasis added).

whether a court should protect speech or expressive conduct on goverment-owned property, the Supreme Court adopted the public forum doctrine.[32] Under this doctrine, the Supreme Court directs lower federal courts and state courts to consider the type of forum where the speech occurs.[33] Beginning with *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[34] the Court has recognized three different types of forums, granting each a different level of First Amendment protection. These forums are (1) the traditional public forum, (2) the limited or designated public forum, and (3) the nonpublic forum.[35]

Different rules control the permissible governmental regulation of each forum. Therefore, in First Amendment analysis, the Supreme Court directs lower courts to first determine the type of forum in question.[36] While the doctrine is not comprehensive, the Supreme Court has offered some guidance in this task.

1. Traditional Public Forum

The Court has defined traditional public forums as "places which by long tradition or by government fiat have been devoted to assembly and debate."[37]

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32. For an early discussion of the public forum doctrine, see Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 S. CT. REV. 1. Through a discussion of civil rights protest cases, Kalven sought to constitutionally justify the exercise of speech rights by proposing that the Court consider public property as a public forum. *See id.* at 11-12.

For an excellent discussion of the history of the public forum doctrine, see Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 237-54 (1997).

33. *See Cornelius*, 473 U.S. at 800 (noting that "the extent to which the Government can control access depends on the nature of the relevant forum"); Greer v. Spock, 424 U.S. 828, 836 (1976) (holding that a state has power to "'preserve property under its control for the use to which it is lawfully dedicated'" (quoting Adderly v. Florida, 385 U.S. 39, 47 (1966))).

34. 460 U.S. 37 (1983).

35. This forum analysis recognizes that "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); *see also* United States v. Kokinda, 497 U.S. 720, 725-27 (1990); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961).

36. *See Cornelius*, 473 U.S. at 797 ("[W]e must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (recognizing that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue").

37. *Perry*, 460 U.S. at 45; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985) (noting that a traditional public forum is property that has as a principle purpose the free exchange of ideas).

Examples offered by the Court are streets and public parks because 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."[38] Lower federal courts have recognized public forums to exist in places such as town squares,[39] public sidewalks,[40] and state and federal capitol complexes.[41]

The Court is most likely to invalidate state or local regulation of speech in a traditional public forum. When the government regulates speech in such a forum, it may only base its restriction on the content of the speech being regulated if: (1) the content falls within a category of speech that the Supreme Court has found unprotected by the First Amendment;[42] or (2) the government can demonstrate a compelling interest in suppressing the speech.[43] In regulating public forums, the Supreme Court has held that a state or Congress "may impose [only] reasonable, content-neutral time, place, and manner restrictions"[44] so long as the restriction is "necessary, and narrowly drawn, to serve a compelling state interest."[45]

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38. Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1936) (Roberts, J., concurring); *see also Perry*, 460 U.S. at 45.

39. *See* Missouri *ex rel.* Missouri Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248, 1255 (E.D. Mo. 1996), *rev'd on other grounds*, 112 F.3d 1332 (8th Cir. 1997).

40. *See* United States v. Grace, 461 U.S. 171, 177 (1983); *Cuffley I*, 927 F. Supp. at 1255-56.

41. *See* ACT-UP v. Walp, 755 F. Supp. 1281, 1287 (M.D. Pa. 1991).

42. For a discussion of the categories of speech not protected by the First Amendment, or granted a lower level of protection, see STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS 239-332 (2d ed. 1996).

43. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

44. *Id.* Some Supreme Court justices have argued that because this so-called public property is actually owned by the government, the government has the right to prohibit anyone from using it. For example, while still a Massachusetts state court judge, Justice Holmes reasoned that "[f]or the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), *aff'd sub nom.*, Davis v. Massachusetts, 167 U.S. 43 (1897). In unanimously affirming Holmes, the Supreme Court noted that "the right to absolutely exclude all right to use [public property], necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Davis*, 167 U.S. at 48.

45. *Capitol Square*, 515 U.S. at 761; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (The state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (citing Carey v. Brown, 447 U.S. 455, 461 (1980))).

The state does not have the right to exclude someone simply because they do not agree with the message that the person wishes to convey. "A state may not grant the use of a forum to groups who use it to express popular views, but deny use to those wishing to express views not favored by the public or those officials who presume to represent the public view." KKK v. Arkansas, 807 F. Supp. 1427, 1436 (W.D. Ark. 1992).

In 1989, in *Ward v. Rock Against Racism*,[46] the Court defined this compelling interest test in a way that has been criticized as taking some of the "bite" out of the test. The Court determined that a narrowly-tailored requirement is one that promotes a substantial and legitimate government interest that, without the regulation, would be achieved less effectively.[47] Such a regulation may not burden substantially more speech than is necessary to further the government's interest.[48]

The government also must implement these restrictions without regard to the content of the speech.[49] The government does not have the power to grant the use of a forum to people whose views it finds acceptable, but deny use to people whose views it does not like.[50] The Supreme Court has noted that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[51] If this rule were otherwise, a state would be able to hide infringements on speech through governmental regulations of the forum used for the speech. Such an infringement would frustrate the purpose of the public forum.

Further, the regulations cannot have the effect of prohibiting all types of

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Rather than using this two-prong test, the Supreme Court will sometimes apply a more general principle in determining whether a governmental regulation violates an individual's or a group's right to free speech. In *United States v. O'Brien*, the Court stated that governmental regulation of speech or expressive conduct in a public forum is permissible:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377 (1968), *reh'g denied*, 393 U.S. 900 (1968).

46. 491 U.S. 781 (1989).

47. *See id.* at 799. The dissent criticized the Court for seriously distorting the narrowly tailored requirement. *See id*. at 804-07 (Marshall, J., dissenting).

48. *See id.* at 799. For example, a ban on handbilling would suppress speech that does not cause the harms that the ban seeks to eliminate, such as fraud, crime, litter, traffic congestion, or noise. Therefore, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it. *See* SHIFFRIN & CHOPER, *supra* note 42, at 391 n.7.

49. For example, in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court invalidated an ordinance that prohibited picketing near a school building but provided an exemption for peaceful labor picketing. The Court reasoned that while the ordinance purported to regulate the time, place, and manner of speech activities in the public forum, it did so based on the content of the speech, which was impermissible. *See id.* at 102*; see also* Carey v. Brown, 447 U.S. 455 (1980) (invalidating statute that prohibited all picketing of residences or dwellings except for peaceful picketing of a place of employment involved in a labor dispute); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) (invalidating ordinance that banned "for sale" and "sold" signs because it regulated based on content of speech); Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (holding that governmental agencies at public meetings cannot discriminate between speakers on the basis of their employment or the content of their speech).

50. *See, e.g.*, KKK v. Arkansas, 807 F. Supp. 1427, 1436 (W.D. Ark. 1992).

51. *Mosley*, 408 U.S. at 95.

speech in the public forum because such a ban would totally suppress the public's ability to communicate messages in a public place. In *United States v. Grace*,[52] the Court directed that in implementing reasonable time, place, and manner restrictions, the government must "leave open ample alternative channels of communication."[53]

2. Limited or Designated Public Forum

In terms of limits on regulation, limited or designated public forums are treated substantially similar to traditional public forums.[54] Defined as "public property which the state has opened for use by the public as a place for expressive activity,"[55] the Court looks for clear governmental intent to create the limited forum. As such, the Court will not infer the government intent to

52. 461 U.S. 171 (1983).

53. *Id.* at 177 (internal quotations omitted).

54. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) ("Regulation of such property is subject to the same limitations as that governing a traditional public forum."). In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), the Court noted that "[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."

Some courts have argued, then, that it does not matter if a forum is labeled either a limited or a traditional public forum. *See* Texas v. KKK, 853 F. Supp. 958, 960 n.3 (E.D. Tex. 1994); KKK v. Arkansas, 807 F. Supp. 1427, 1434 (W.D. Ark. 1992). This argument lacks merit, however. Because a state has the right to take away a limited public forum, just as easily as it has the right to create one, limited public forums are inherently given less protection than traditional public forums. *See Perry*, 460 U.S. at 46. For example, if a court held that the program was a limited public forum in any of the cases being discussed in this Note, the state could have simply disposed of the program as a means of not allowing the Klan to participate in it. Indeed, Anne Arundel County, Maryland recently took this approach in response to the Klan's application to adopt a county highway. *See* Tom Pelton, *Klan Bid to Join Adopt-A-Road Leads to Closing; Arundel Executive Is Strongly Opposed; "What Good Does This Do?*", BALTIMORE SUN, Mar. 6 1999, *available at* 1999 WL 5175063. If this program were a limited public forum, that action would in no way violate the Constitution. But if a court determines that the program is a traditional public forum, there is no way for the state to exclude the Klan absent a finding of a compelling governmental purpose.

In *Lee*, Justice Kennedy's dissenting opinion recognized the flaw in this argument as well. By allowing the government to define, in effect, the terms and limits of a forum, the government is given "almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area." *Lee*, 505 U.S. at 695. Under this clear intent approach, all a state has to do to curb an individual's free exercise of speech is to leave its intentions vague in the statutory language. *See id*.

55. *Perry*, 460 U.S. at 45. In *Cornelius*, the Court defined this type of forum as "a forum . . . created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

Further, "[a] public forum may be created for a limited purpose such as for certain groups, or for the discussion of certain subjects." *Perry*, 460 U.S. at 46 n.7 (internal citations omitted). For example, the Court has recognized a limited public forum for student groups at a university in *Widmar v. Vincent*, 454 U.S. 263 (1981), and one for school board business in *Madison Joint School District No. 8 v. Wisconsin Public Employment Relations Commission*, 429 U.S. 167 (1976).

create a limited public forum.[56] The Court looks to the "policy and practice" of the government in determining whether it intended to designate a nontraditional forum as open to assembly and debate.[57] The Court also considers the nature of the property in question to determine whether it is compatible with expressive activity.[58] Some examples of forums that courts have labeled as limited public forums are university meeting facilities, municipal theaters, and school board meetings.[59]

Although the state voluntarily creates a limited public forum, there are still many restrictions imposed upon the government in regulating the language and expressive conduct in the forum.[60] For example, in *Widmar v. Vincent*, the Court held that once a state university opened its facilities for the activities of registered student groups, it could not discriminate among those groups on the basis of content and could not close its facilities to a student group desiring to use the facilities for religious worship and discussion.[61] Although the Court recognizes that a state need not indefinitely keep a limited public forum open to the public, while the forum is open, the Court imposes the same restrictions on the state concerning restrictions on limited public forums as it does on traditional public forums.[62] Specifically, in a limited public forum, a state may only impose reasonable, content-neutral time, place, and manner restrictions so long as the restriction is necessary and narrowly drawn to serve a compelling state interest.[63]

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56. "The government does not create a [limited] public forum by . . . permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802 (emphasis added).

57. *Id.*

58. *See id.*; *see also Widmar*, 454 U.S. 263 (holding that a university that had expressly created a place for student groups to meet had created a designated public forum).

59. *See* Missouri *ex rel.* Missouri Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248, 1256 (E.D. Mo. 1996), *rev'd on other grounds*, 112 F.3d 1332 (8th Cir. 1997).

60. *See Perry*, 460 U.S. at 45. "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public *even if it was not required to create the forum in the first place*." *Id.* (emphasis added). "Even if the state was not required to create the forum, once it does, it may not discriminate against groups because of the content of the speech which the group intends to promote in that forum." *KKK v. Arkansas*, 807 F. Supp. at 1436; *see also Widmar*, 454 U.S. at 267.

61. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981).

62. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.*; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (noting that "when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest").

63. *See supra* notes 37-53 and accompanying text.

3. Nonpublic Forum

Every forum that is not a traditional or limited public forum is a nonpublic forum. The Supreme Court defines a nonpublic forum by what it is not. Any forum "which is not by tradition or designation a forum for public communication" is a nonpublic forum.[64] Examples of nonpublic forums are street light posts,[65] prisons,[66] military reservations,[67] polling places,[68] statutorially-required meetings of school administrators and a teachers union,[69] and a school district's internal mail system.[70]

Recognizing that states need public property for purposes other than public communication, the Court grants states much wider latitude in controlling and limiting access to nonpublic forums than to traditional or limited public forums.[71] Indeed, the Court recognizes that the government may operate property dedicated to the promotion of a specific governmental purpose where public speech may not be appropriate.[72] Reminiscent of the words of Justice Holmes,[73] the Court recognizes that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[74] The state may impose restrictions on time, place, and manner of speech and expression, and the regulation on speech merely has to be reasonable,[75] so long as it "is not an

64. *Perry*, 460 U.S. at 46; *see also Cuffley I*, 927 F. Supp. at 1256 (recognizing further that nonpublic forums consist of "property usually incompatible with expressive activity").

65. *See* Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

66. *See* Turner v. Safley, 482 U.S. 78 (1987) (upholding prison ban on letters between nonrelative inmates); Adderley v. Florida, 385 U.S. 39 (1966) (labeling prison grounds as nonpublic forum).

67. *See* United States v. Albertini, 472 U.S. 675 (1985).

68. *See* Burson v. Freeman, 504 U.S. 191 (1992) (Scalia, J., concurring). In determining that a polling place was a nonpublic forum, Justice Scalia focused on the term "traditional" in the definition of a public forum. *Id*. at 214. Restrictions on speech around polling places have long been a part of the American tradition of secret balloting. *See id*. at 214-15. The plurality, however, determined that the 100-foot zone around the polling place was a public forum. *See id*. at 196-98.

69. *See* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984).

70. *See* Missouri *ex rel.* Missouri Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248, 1256 (E.D. Mo. 1996); *see also Perry*, 460 U.S. 37.

71. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 805-06 (1985); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

72. *See Cornelius*, 473 U.S. at 805-06.

73. *See supra* note 44.

74. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citations omitted).

75. *See id*. "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*.; *see also Cornelius*, 473 U.S. at 806.

effort to suppress the speaker's activity due to disagreement with the speaker's view."[76]

II. ADOPT-A-HIGHWAY CASES

A. Generally

Traditionally, states have been responsible for transportation and road maintenance, including litter control.[77] Because the total cost of road maintenance takes a large portion of state revenue, states have sought ways to reduce this cost.[78] Accordingly, some states, such as Missouri, Texas, and Arkansas,[79] have developed "Adopt-A-Highway" Programs in which members of the public cleanup the litter along the sides of highways at their own cost.[80] Under such a program, a person, a group of persons, or an

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76. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (citing *Perry*, 460 U.S. at 46). In *Perry*, the Court stated that it would permit a state to regulate speech in nonpublic forums so long as the regulation on speech "is not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).

77. In applying the "traditional government function" test from *National League of Cities v. Usery*, the First Circuit found that transportation and highway programs are one of the "activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 844-45 (1st Cir. 1982) (citing National League of Cities v. Usery, 426 U.S. 833, 851 (1976)). The First Circuit recognized that arranging for the building of roads, building roads, operating toll roads, and keeping roads in repair are traditional and integral state governmental activities. *See id.* at 845.

Most states have created an administrative agency to maintain the state highway systems. These agencies are typically given full authority in the construction and maintenance of the highways. *See, e.g.*, MO. REV. STAT. § 227.030 (1994) ("The construction and maintenance of said highway system and all work incidental thereto shall be under the general supervision and control of the state highways and transportation commission.").

78. *See* Missouri *ex rel.* Missouri Highway & Trans. Comm'n v. Cuffley, 927 F. Supp. 1248, 1251-52 (E.D. Mo. 1996).

79. Other states, such as Connecticut, CONN. AGENCIES REGS. § 13a-97b-1 to -7 (1997), North Carolina, N.C. ADMIN. CODE tit. 19A, r. 2D.1001-.107 (June 1998), Oregon, OR. ADMIN. R. 734-029-0005 to -0040 (1998), and Washington, WASH. ADMIN. CODE § 468-72-010 to -050 (1997) have similar programs. This Note, however, will focus only on programs in Missouri, Texas and Arkansas because only these states have litigated applications to participate in the program.

80. "The purpose of the Adopt-A-Highway Program is to increase public awareness of the environmental needs along Missouri's highways and to provide volunteer community support for anti-litter and highway beautification programs. This program will reduce litter along the highways, enhance the environment and beautify Missouri's roadsides." MO. CODE REGS. ANN. tit. 7, § 10-14.010 (1995).

In describing the adoption of the program, the Eastern District of Missouri recognized that "[i]n furtherance of its continuing maintenance of the state highway system, the [Missouri Highway and Transportation] Commission has established an Adopt-A-Highway Program, which is a voluntary Program enacted to promote litter control and to reduce the costs of litter abatement to the Commission." *Cuffley I*, 927 F. Supp. 1248, 1251-52 (E.D. Mo. 1996), *rev'd on other grounds*, 112

organization[81] "adopts" a portion of the highway, and in return for maintaining its cleanliness, the state dedicates a sign on the side of the highway recognizing the group's work and commitment to the community.[82]

In Missouri, the Missouri State Highway Transportation Commission (the "Commission") adopted regulations to oversee this program.[83] These regulations provide that "civic and nonprofit organizations, commercial and private enterprises and individuals" may join to clean or maintain a designated portion of the highway.[84] The Commission does not distinguish between individual or group participation, non-profit or for-profit groups, or secular or religious groups.[85] The regulations grant the Commission "sole responsibility" to accept or reject an application for participation[86] based upon any of several reasons.[87] The Commission does not, however, have the authority to reject a group's application based upon disagreement with the group's views.[88]

The application process is substantially similar in Missouri, Texas, and Arkansas. In Missouri's program, a prospective applicant begins by contacting the local highway department office and requesting the availability of highway locations.[89] The applicant then submits an application for a location based upon the information provided at the highway

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F.3d 1332 (8th Cir 1997).

81. "Eligible adopters include civic and nonprofit organizations, commercial and private enterprises and individuals." MO. CODE REGS. ANN. tit. 7, § 10-14.030(1) (1995).

82. "[T]he participants receive recognition for their efforts through a sign provided by the Commission acknowledging the identity of the group providing the work." *Cuffley I*, 927 F. Supp. at 1252.

83. *See* MO. CODE REGS. ANN. tit. 7, § 10, ch. 14 (1995). The Commission adopted these regulations in response to the Klan's application to participate in the program. *See* Cuffley v. Mickes, No. 4:97CV2110-SNL, 1999 WL 216439, at *2 (E.D. Mo. Apr. 13, 1999). Prior to the adoption of these regulations in February 1995, local highway department offices followed an informal "internal letter" in administering the program. *See Cuffley I*, 927 F. Supp. at 1252. This letter provided no procedures, restriction, or minimal qualifications for participation in the program. *See id.*

84. *Id*. § 10-14.030(1). Arkansas's program is similar in this respect. "Businesses, individuals, and other groups are permitted to adopt a section of the highway for the purpose of litter control." KKK v. Arkansas, 807 F. Supp. 1427, 1430 (W.D. Ark. 1992). The Texas program allows participation in the program by "members or employees of civic and non-profit organizations, and of commercial and private enterprises." Texas v. KKK, 853 F. Supp. 958, 959 (E.D. Tex. 1994).

85. *See* MO. CODE REGS. ANN. tit. 7 § 10-14.030(1) (1995).

86. *Id*. § 10-14.030(2).

87. The regulations give the Commission the right to deny an application for many reasons: if the grant of the application would "jeopardize the program," *id*. § 10-14030(2)(A), if it would "be counterproductive to [the program's] purpose," *id.*, if it would "have undesirable results such as increased litter, vandalism or sign theft," *id*., if the applicant "discriminate[s] on the basis of race, religion, color, national origin or disability," *id*. § 10-14030(2)(B), or, if the applicant has a "history of unlawfully violent or criminal behavior." *Id*. § 10-14030(2)(C).

88. *See id*. § 10-14030(2).

89. *See Cuffley I*, 927 F. Supp. at 1252.

department office.[90] The local office forwards the completed application form to the main Commission office.[91] The Commission approves the overwhelming majority of the applications without any review. Applications that the Commission does review are considered on a case-by-case basis.[92] When the Commission sets aside an application for review, it labels the application "sensitive."[93] The Commission can deny an application for such broad, vague reasons as "the request would jeopardize the program," or it would be "counterproductive to its purpose"; therefore, the Commission exercises broad discretion in deciding which applicants receive this status.[94]

B. Adopt-A-Highway Programs as a Form of Expressive Conduct

In May 1994, Michael Cuffley, as a representative of the Knights of the Ku Klux Klan, applied to adopt a portion of an interstate highway in St. Louis, Missouri.[95] Following the procedures outlined above, Cuffley sought to adopt a portion of Interstate 55[96] by completing the application.[97] The Commission voted in a special meeting to "refer the matter for litigation as a means of securing the Commission's right to deny the Klan's participation in the Program."[98] The Commission sued the Klan for declaratory judgment for

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90. *See id.*

91. *See id.*

92. MO. CODE REGS. ANN. tit. 7, § 10-14.030(2)(A) (1995). Examples of groups that have received "special review treatment" are a gay and lesbian awareness group, the Environmental Witches, and Truckin' Seduction. All of these groups ultimately received approval, although Truckin' Seduction was asked to change its name. *Cuffley I*, 927 F. Supp. at 1252. Similarly, the Texas Commission approved applications from groups such as pit bull owners, nudists, prison inmates, a smokers rights organization and a gay and lesbian rights group. *See* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1052 (1995).

93. *Cuffley I*, 927 F. Supp. at 1252.

94. *See id*. Addressing the case for the first time, the district court noted that "[t]he measure of acceptability of a group is solely within the discretion of the Commission officials." *Id.*

95. *See id*.

96. *See id*. "The section of the highway that is on the application received by the Commission from the Klan is one of the routes used by busses transporting African-American students from St. Louis City to and from county schools as part of the desegregation efforts." *Id*. at 1253. Similarly, the Klan's application in Texas was for a stretch of highway near a federally subsidized housing complex, which had recently been desegregated. *See* Texas v. KKK, 853 F. Supp. 958, 959 (E.D. Tex. 1996).

97. *See Cuffley I*, 927 F. Supp. at 1252.

98. *Id*. at 1253. In December, 1991, the Arkansas State Highway and Transportation Department received an application similar to Cuffley's from Nathan Robb, acting on behalf of the Klan. *See* KKK v. Arkansas, 807 F. Supp. 1427, 1431 (W.D. Ark. 1992). In a memorandum dated December 9, 1991, the department's chief counsel recommended that the department deny the Klan's application, which the department soon did. *See id*. This was the first and only denial of an application to participate in the Adopt-A-Highway Program made by the Arkansas State Highway and Transportation Program. *See id*. at 1431-32.

In December, 1993, Michael D. Lowe and James R. Hall, Jr., acting on behalf of the Ku Klux

the right to deny the application. While the Eastern District of Missouri concluded that the Commission did not have the right to deny the Klan's application, the Eighth Circuit reversed that decision. The Eighth Circuit determined that because the Commission had not yet acted upon the Klan's application, the issue of the Commission's right to deny the application was not ripe for judicial review. The court dismissed the state's declaratory judgment action.[99]

Following dismissal of the case, the Commission denied the Klan's application, stating that the Klan violated discrimination laws and had a history of violent lawlessness.[100] The Klan responded by filing suit under 42 U.S.C. § 1983,[101] claiming that the Commission deprived it of equal protection and freedom of speech, and seeking to enjoin the Commission from denying its application.[102]

The Adopt-A-Highway Programs of Missouri, Texas, and Arkansas are forms of expressive conduct, and, therefore, fall under the protections of the First Amendment's Free Speech Clause.[103] At least in part, participants in the programs intend to and actually do convey a message to the traveling public.[104] By picking up litter and maintaining a litter-free portion of the highway, the participants convey that they are environmentally conscious and politically and socially correct.[105] The Commission presumes that most applicants have good intentions and thus approves most applications as a matter of form.[106] The Commission, however, did not afford this presumption to the Klan, as demonstrated by the Commission's act of setting

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Klan, applied to join the Texas Adopt-A-Highway Program. *See Texas v. KKK*, 853 F. Supp. at 959. Similar to the Missouri Commission, the Texas Department took no action on the application, rather, it sued the Klan for declaratory judgment. *See id*.

99. *See Cuffley I*, 927 F. Supp at 1253; Missouri v. Cuffley, 112 F.3d 1332, 1337-38 (8th Cir. 1997).

100. *See* Cuffley v. Mickes, No. 4:97CV2110-SNL, 1999 WL 216439, at *2 (E.D. Mo. Apr. 13, 1999). The Commission also denied the application based on a moratorium on adoptions within the City of St. Louis, enacted by the Commission during the pendency of the first litigation. *See id.*

101. *See id*. The court was outraged by the Klan's use of this civil rights statute which Congress originally enacted as Section 1 of the Ku Klux Klan act of April 20, 1870, designed to end the Klan's practice of systematically depriving African-Americans of their rights in the Reconstruction South. *See id*. at *6. The court noted that it could not "escape the bitter irony in the fact that the Klan should now seek shelter for those same views of hatred and superiority under the very statute that Congress passed to end the Klan's unsavory influence." *Id.*

102. *See id*. at *2.

103. *See supra* note 21 and accompanying text.

104. This discussion temporarily ignores the Klan, or any other potentially offensive group, as a possible participant in the program.

105. *See KKK v. Arkansas*, 807 F. Supp. at 1435-36. The states also recognize that participants in the programs are also motivated by the "desire for publicity or 'free advertising,' . . . recognition of their views, . . . the desire to proselytize for new members." *Cuffley I*, 927 F. Supp. at 1252.

106. *See supra* notes 92-94 and accompanying text.

aside the Klan's application to receive special treatment.

Courts that have addressed the issue tend to agree with the presumption of such commissions and recognize that the message intended by the Klan is not always as altruistic as environmental friendliness. The Eastern District of Texas concluded that the message intended by the Klan through participation in Texas's Program was the intimidation of minority residents of a desegregated federal housing complex.[107] While the general public may not agree with the message, it is a message nonetheless.[108] A message of intimidation does not, however, detract from the fact that the Klan can be just as environmentally friendly and generous with its time as other groups.[109]

Both the message that the court concluded was intended by the Klan, and the message that the Adopt-A-Highway Program presumes that its participants will send to the public, meet the two-prong test necessary for conduct to fall into the special category of expressive conduct that is protected by the First Amendment.[110] Simply by participating in the program, the Klan and other participants have demonstrated their intent to convey a message, whether that message be environmental friendliness or intimidation.[111] Further, a great likelihood exists that the intended message will be understood by passersbys seeing the sign on the side of the highway.[112]

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107. *See* Texas v. KKK, 853 F. Supp. at 959 (5th Cir 1995). Similarly, the message intended by Cuffley's application to Missouri's program cannot be determined without, at the very least, a recognition that the Klan chose a portion of highway traveled daily by young African-Americans bused out of the city for desegregation. *See Cuffley I*, 927 F. Supp. at 1253.

108. There is a strong argument that the message is a form of "hate speech," which the Court has stated, at times, does not receive the same level of protection as other types of speech. It is unclear what level of protection hate speech should receive. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992). Such a discussion is beyond the scope of this Note. This Note assumes that the stages of public forum analysis addressed here would not change if a court determined that the speech at issue in *Texas v. KKK* should receive some lesser form of First Amendment protection.

109. *See Cuffley I*, 927 F. Supp. at 1254-55 (recognizing that "the message intended to be conveyed by the participants is that they are environmentally-conscious and altruistic contributors to their community").

110. *See supra* notes 21-27 and accompanying text.

111. The intent element is proved whether the intent is to convey a message of intimidation or a message of environmental friendliness.

112. For example, if the Texas court correctly determined the message intended by the Klan to be intimidation of residents of a recently desegregated housing complex, then a sign clearly stating "Adopted by the Ku Klux Klan" seen by minority residents previously harassed by the Klan members the message of intimidation would be understood.

III. PUBLIC FORUM DOCTRINE IN THE CONTEXT OF ADOPT-A-HIGHWAY PROGRAMS

Federal courts have taken five approaches to the issue of which type of forum a state's Adopt-A-Highway Program entails. These decisions are inconsistent both in rationale and result.[113] The Western District of Arkansas concluded that Arkansas's program was a traditional public forum.[114] On appeal from the Eastern District of Texas, the Fifth Circuit decided that Texas's program was a nonpublic forum.[115] Addressing Missouri's program prior to the adoption of formal regulations, the Eastern District of Missouri concluded that the program was a limited public forum.[116] When confronted with these formal regulations, however, a different judge in the Eastern District of Missouri concluded that the Commission intended to create a nonpublic forum.[117] In making these decisions, the courts cited the same Supreme Court cases, yet, for remarkably similar programs, they reached different results.[118]

In deciding that the program was a traditional public forum, the Arkansas court looked to the highways themselves as the relevant forum.[119] According to the court, because highways are traditional public forums,[120] the program must also be a traditional public forum because it utilizes these highways as the place for the expressive conduct.[121]

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113. *See* Texas v. KKK, 58 F.3d 1075 (5th Cir. 1995); Cuffley v. Mickes, No. 4:97CV2110-SNL, 1999 WL 216439 (E.D. Mo. Apr. 13, 1999); *Cuffley I*, 927 F. Supp. 1248; Texas v. KKK, 853 F. Supp. 958 (E.D. Tex. 1994); KKK v. Arkansas, 807 F. Supp. 1427 (W.D. Ark. 1992).

114. *See KKK v. Arkansas*, 807 F. Supp. at 1435.

115. *See Texas v. KKK*, 58 F.3d at 1078. The Eastern District of Texas stated that highway rights-of-way used in the Adopt-A-Highway Program were either traditional public forums or designated public forums but chose not to determine with certainty the specific type being used. *Texas v. KKK*, 853 F. Supp. at 959 n.3.

116. *See Cuffley I*, 927 F. Supp. at 1257.

117. *See Cuffley II*, 1999 WL 216439, at *3.

118. *See supra* notes 77-94 and accompanying text.

119. *See KKK v. Arkansas*, 807 F. Supp. at 1435.

120. "It is undeniable that public roads . . . are used for public speech and for the promotion of various political, religious, social and commercial views. . . . [P]ublic highway rights-of-way have become places where 'speech' of one type or another is engaged in." *Id*.

121. *See id*. The court also recognized that even if they determined that the program was a limited public forum, the result would be the same because the same constitutional rules controlling state action against expressive conduct apply for traditional public forums and limited public forums. *See id*. at 1434. "[E]ven if public highways are non-traditional places for public speech, the State of Arkansas had created a public forum on public highways in Arkansas through the Adopt-A-Highway Program." *Cuffley I*, 927 F. Supp. at 1256 n.6.

The District Court for the Eastern District of Texas stated "[I]t [is not] necessary . . . to determine with certainty the specific type of public forum being used; both are bound by the same standard." *Texas v. KKK*, 853 F. Supp. at 959 n.3.

The assumption by these courts that it does not matter if a forum is a traditional public forum or a

Addressing Missouri's program without the formal regulations, the Eastern District of Missouri determined that the program was a limited public forum.[122] The court looked to the highway right-of-way as the relevant forum.[123] The court, however, concluded that the Commission's creation of the program constituted a decision to open the highways to expressive conduct.[124] Because the program inherently limited the speech to the participants and also limited the speech that those participants could have,[125] it could not be a traditional public forum.

Focusing on the formal regulations governing Missouri's program, three years later, the Eastern District of Missouri concluded that the program was a nonpublic forum.[126] Disagreeing with its earlier decision, the court concluded that the program itself, rather than the highway right-of-way, was the relevant forum to consider.[127] Similarly, the Fifth Circuit decided that the Texas program was a nonpublic forum,[128] also holding that the program itself was the forum, not the highway.[129]

IV. PROPOSAL: THE PROPER FORUM TO CONSIDER

The decisions of these courts demonstrate that public forum analysis can depend upon a court's determination of the forum in question.[130] More

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limited public forum is problematic because the creation and dissolution of traditional public forums and limited public forums are not governed by the same standard. *See supra* notes 37-63 and accompanying text.

122. *See Cuffley I*, 927 F. Supp. at 1257.

123. *See id*. at 1258. "[T]he access sought by the Klan in this case is not the program itself. Instead, the Klan seeks access to the highway right-of-way where it can convey its message." *Id*.

124. *See id*. at 1257.

125. *See id*. at 1257-58. The Commission limited the speech that the program allowed to "the picking up of litter and the attendant expression that the participants are environmentally-conscious and altruistic contributors to the community." *Id*. at 1257-58.

126. *See* Cuffley v. Mickes, No. 4:97CV2110-SNL, 1999 WL 216439, at *3 (E.D. Mo. Apr. 13, 1999).

127. *See id*. at *4. In so holding, the court considered the Commission's "tight control over the program," especially its control in choosing participants. *Id.*

128. *See Texas v. KKK*, 58 F.3d at 1078.

129. *See id*. at 1078.

> [W]e define the forum in this case as the Program rather than the public highways. The Klan does not seek general access to the public highways for speech purposes or even for litter retrieval purposes. Rather, by participation in the Program, the Klan wishes the put its members on the highway under the auspices of the State and get its name on a sign at a particular location.

Id.

130. For example, the Supreme Court's decision in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), depended upon the nature of the forum. In this case, a not-for-profit religious organization brought suit against the police superintendent of the Port Authority of New York and New Jersey for the right to go "into public places, disseminat[e] religious literature and solicit[] funds to support the religion." *Id*. at 674-75. The Port Authority had adopted a

importantly, these decisions demonstrate that judges can use the forum determination to get the result they desire. Because the Supreme Court's doctrine gives states substantial leeway in controlling speech on nonpublic forums, once a court determines that a forum is nonpublic, it will likely determine that the governmental regulation is reasonable.[131] Moreover, the more narrowly a court defines the forum in question, the easier it is for the court to find that it is a nonpublic forum.[132] Conversly, once a court determines that the forum is public, it will usually determine that the government does not have a compelling interest in regulating the conduct[133] because of the restrictions that the Supreme Court has imposed on the government.[134] Strong judicial discretion in the determination of the forum

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regulation forbidding the "repetitive solicitation of money or distribution of literature" in airport terminals but not on the sidewalks outside the airport terminals. *Id*. at 675. Similar to Cuffley's claim against the Commission in *Cuffley II*, the religious organization brought suit seeking "declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the regulation worked to deprive its members of rights guaranteed under the First Amendment." *Id*. at 676.

The Southern District of New York analyzed the claim under the traditional public forum approach and found that the state did not have compelling interests in prohibiting this activity and granted summary judgment for the organization. *See id*. at 676-77. The Second Circuit and the Supreme Court, however, both analyzed this case as a nonpublic forum. *See id*. at 677, 679. Because it only requires a showing of reasonableness to uphold a regulation in a traditional public forum, the Court determined that the regulation was within the state's authority. *See id*. at 683.

131. The obvious exception to this statement is the Eastern District of Missouri's decision in *Cuffley II*. Although the court found that Missouri's Adopt-A-Highway program was a nonpublic forum, the court enjoined the Commission from denying the Klan's application to participate in the program in all areas of Missouri, except the City of St. Louis. *See* Cuffley v. Mickes, No. 4:97CV2110-SNL, 1999 WL 216439, at *6 (E.D. Mo. Apr. 13, 1999). That decision, however, was based in part on the lack of specificity in the regulation prohibiting participation in the program by "[a]pplicants with a history of unlawfully violent or criminal behavior." *Id*. at *5. Had the Commission explained what criminal behavior would prevent participation, and the reasons preventing such participation, it is likely that the court would have upheld the exclusion of the Klan. *See id.*

132. For example, the Western District of Arkansas defined the forum in question as the highway itself. Because streets are quintessential traditional public forums, *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983), once the forum was defined as the highway, the Arkansas court had no choice but to determine that it was a traditional public forum. *See* KKK v. Arkansas, 807 F. Supp. 1427, 1434 (W.D. Ark. 1992).

The Fifth Circuit, on the other hand, defined the forum much more narrowly. That court defined it as the Adopt-A-Highway program. *See* Texas v. KKK, 58 F.3d 1075, 1078 (5th Cir. 1995). Because the program did not intend to provide a forum for public discourse as its central purpose, it was not a traditional public forum. *See id.* Further, because the court focused on the one sign granted to program participants as the forum for speech, the court had a simpler task to argue that the state did not intend that sign to become a place of public discussion. Thus, the court also found that the state did not create a designated public forum. Therefore, the Fifth Circuit determined that the forum, the Adopt-A-Highway program and attendant sign, was a nonpublic forum. *See Texas v. KKK*, 58 F.3d at 1079.

133. The Adopt-A-Highway decision by the U.S. District Court for the Eastern District of Texas, 853 F. Supp. 958 (E.D. Tex. 1994), is an exception to this rule. Barring this case from the analysis, states are usually not found to have a compelling interest in regulating conduct within the bounds of a public forum. *See supra* Part I.B.1.

134. "[R]egulation of speech on government property that has traditionally been available for

when applying the public forum doctrine is simply not a sufficiently objective standard.[135]

Because the public forum analysis occurs at the stage at which the court determines which forum is at issue, courts need guidance in correctly determining the type of forum.[136] A court should utilize a balancing approach when determining the relevant forum for public forum analysis. Therefore, in determining the relevant forum for public forum analysis, courts should consider three factors: (1) the state's intent in creating the program; (2) the access sought by the particular party in the suit; and, (3) generally speaking, the access sought by other participants in the program.

Currently, in determining the relevant forum for purposes of analysis, lower courts only look to the second factor.[137] For example, in *Missouri ex*

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public expression is subject to the highest scrutiny." *See Lee*, 505 U.S. at 678.

135. In his dissent in *International Society for Krishna Consciousness, Inc.*, Justice Kennedy articulated an objective test for applying the public forum doctrine which moved away from the tripartite approach the Court first accepted in *Perry*. In rejecting the principles of traditional use and government intent, Justice Kennedy stated:

> The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.

Lee, 505 U.S. at 698-99. Kennedy's approach implies a three-part inquiry: (1) a comparison of physical characteristics between the property at issue and archetypical public forums; (2) the extent to which the property has been opened to public use; (3) the extent to which unconstrained free speech would interfere with the objective uses of the property. For an excellent discussion of Justice Kennedy's proposed inquiry, see Edward J. Neveril, *"Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. Rev. 1185, 1217-53 (1996).

136. At least one author has identified a three-step inquiry for determining whether free speech rights have been violated. First, courts should determine whether the participation or conduct is an engagement in speech protected by the First Amendment. *See* Joe Sellars, Note, *Can Courts Refrain from Bias? The Fifth Circuit's Decision in* Texas ex. rel. Texas Transportation Commission v. Knights of the Ku Klux Klan, 33 HOUS. L. REV. 1619, 1625 (1997). Second, courts should identify the nature of the forum. *See id*. at 1626. Third, courts should "assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id*. at 1628 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985)).

As demonstrated above, the second step tends to be dispositive. With no restrictions on identifying the forum, courts have free reign to select a forum, and, therefore, also have free reign to determine if someone's conduct is protected from the governmental regulation at issue under the First Amendment.

Sellars suggests that if courts were instructed to apply a broad test of public forum as opposed to a narrow test, they would analyze the problem correctly. *See* Sellars, *supra* at 1629-31, 1646-47. This approach, however, simplifies the problem too much and looks too closely at the effect of the regulation rather than the determination of the forum.

137. To illustrate, in discussing its decision that the program was a nonpublic forum, the Fifth Circuit stated that the inquiry "[i]n pinpointing the relevant forum . . . must focus on the 'access sought by the speaker.'" *KKK v. Texas*, 58 F.3d at 1078 (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

rel. Missouri Highway & Transportation Commission v. Cuffley, the Eastern District of Missouri began to articulate a test for the determination of the proper forum.[138] This court, however, suggested that the forum should be defined by the *access* the party seeks.[139] This factor is not sufficient in and of itself, however, because the Fifth Circuit applied the same test[140] in *Texas v. KKK* and defined the forum more narrowly than did the Missouri district court.[141] A workable test should have similar results in similar cases. These contrasting decisions demonstrate that this factor is not sufficient because it leaves too much latitude for a court to read its prejudices into the decision.

Another consideration should be whether the state, in creating the program, intended it to be open for public discourse.[142] For example, in examining the Adopt-A-Highway Program, the relevant question for a court would be whether the state intended, in creating the program, to open the highways for public discourse or to limit the discourse to the sign and the litter-collecting activity of the party.[143]

The court should also consider the conduct actually undertaken by people in the program; that is, the court should consider the way in which the program plays out in practice. For example, whether a forum has become a place of public discourse should be of concern to the court, independent of whether the state intended it for that purpose.[144] By considering the program

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138. *See* Missouri *ex rel.* Missouri Highway & Transp. Comm'n v. Cuffley, 927 F. Supp. 1248, 1258 (E.D. Mo. 1996).

139. *See id.* The Eastern District of Missouri determined:

> The Klan does not seek general access to the public highways for speech purposes or even for litter retrieval purposes. Rather, by participation in the Program, the Klan wishes to put its members on the highway under the auspices of the State and get its name on a sign at a particular location.

Id. at 1257 (citing Texas v. KKK, 58 F.3d 1075, 1078 (5th Cir 1995)).

In *Cornelius*, the Supreme Court referred to the access sought by the speaker as "the particular channel of communication." *Cornelius*, 473 U.S. at 801.

140. In fact, both courts cited the same language from the same Supreme Court opinions. For example, the Fifth Circuit recognized that a "tailored approach" should be taken in determining the proper forum. *Texas v. KKK*, 58 F.3d at 1078 (citing *Cornelius*, 473 U.S. at 800 (1985)). The Eastern District of Missouri extensively quoted the Fifth Circuit opinion, including the "tailored approach" language. *See Cuffley I*, 927 F. Supp. at 1256-57.

141. That is, the Fifth Circuit determined the forum at issue narrowly to be the Adopt-A-Highway program, while the Missouri District Court in *Cuffley I* determined the forum more broadly to be the highway right-of-way. *See supra* notes 122-30 and accompanying text.

142. This consideration, of course, does not pertain to traditional public forums because they exist independent of a state's determination. Traditional public forums exist because they have always existed, not because the state created them. As such, the state's intentions are irrelevant.

143. This consideration also has problems because state-created programs do not always remain the way that they are originally created. This problem can be remedied by considering the intention of the state in maintaining the program if the program has changed since its creation.

144. Had this factor been utilized by the Fifth Circuit, the decision in *Texas v. KKK*, 58 F.3d 1075 (5th Cir. 1995), might have been different. The court there merely considered the state's intentions in

from this broader perspective, the court's ability to read its political bias into the decision is somewhat curtailed. It is more important that the program be considered from the abstract view of *any* participant, rather than the particular participant that is party to the suit.[145]

In balancing these factors, the court should place greater weight on the state's intentions and the general use of the program than it does the access sought by the party to the suit. A court cannot, however, ignore that factor because it removes the court's analysis from an abstract "vacuum" and places the analysis in a concrete, actual context, with real facts and real people to consider.[146]

V. APPLICATION OF THE PROPOSED STANDARD

The three-factor balancing test proposed by this Note works in the context of both Adopt-A-Highway and non-Adopt-A-Highway public forum cases. As will be demonstrated by the analysis of the non-Adopt-A-Highway case, the use of this test will sometimes result in the same forum chosen by the court. Nevertheless, as will be shown in the Adopt-A-Highway context, the test will sometimes result in the choice of a completely different forum.

A. Application of the Proposed Standard to the Adopt-A-Highway Case

If this balancing test were applied to the facts of the Adopt-A-Highway cases discussed in this Note, the results would be more consistent. In creating

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the development of the program and the Klan's intention in applying to the program. The court did not undertake a discussion of how others involved in the program see their participation in the program.

145. The majority of the population would generally agree that the Klan is not a sympathetic party in a lawsuit on free speech grounds. Judges, like most people, have preconceived ideas about a group's purposes or intentions. It is as difficult for a judge, as any person, to separate his views of a party independent of the legal question at issue. Judicial interpretation of law based on the unappealing nature of the plaintiff, however, lacks legitimate legal foundation and threatens future constitutional interpretation. *See* Deborah A. Widiss, Note, *Re-Viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237, 249 (1998) (stating that a judge may not give "free rein to his own emotions").

For example, did the Fifth Circuit decide that Texas's program was a nonpublic forum independent of its disgust of the Klan's previous actions? Probably. The decision was also based, in large part, upon the Klan's prior harassment of the local housing project. *See Texas v. KKK*, 58 F.3d at 1078 & n.1. In its holding, the court stated that "the State will not violate the First Amendment by rejecting the Klan's application to adopt a portion of highway near the housing project in Vidor, Texas." *Id*. The court also recognized that "the Klan's conduct would serve only to threaten and intimidate current and potential future residents of the Vidor project." *Id.* at 1078 n.1.

146. By keeping the access sought by the party to the suit as a factor to be considered by the court, the particular facts in cases such as *Texas v. KKK* would be taken into consideration. For example, in Texas, the district court could determine that the Klan sought access to intimidate minority residents of a housing complex; they did not seek access to a forum for public discourse.

the programs, the states did not intend to create an open forum for speech along the states' highways. Rather, as the administrative codes of Missouri and Texas exemplify, the states created the programs for one purpose: to control litter along highways.[147] The states, however, impliedly recognized that the participants may use the programs as limited forums for speech by offering participants a sign identifying their efforts on their "adopted" portion of highway.[148]

Participants in the program, however, use the sign as a forum for speech and propaganda, and the states are aware of this use.[149] The states recognize that some of the participants are motivated by the desire for free publicity and advertising,[150] and, for most groups, the Commission administering the program does not object to participation in the program and use of the recognition signs for this purpose.[151]

In the principle cases discussed in this Note, the Klan sought to participate in the program for the same reasons as most other participants—they sought either to use the sign for free publicity or to communicate a viewpoint.[152]

Of paramount importance is the fact that the states did not intend to create an open forum for speech along its highways.[153] The states' tacit acceptance

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147. The Texas Administrative Code describes the purpose of the program as:

> The Adopt-A-Highway Program . . . allows private citizens an opportunity to support the department's antilitter programs by adopting a section of highway *for the purpose of controlling and reducing litter* on an adopted section.

43 TEX. ADMIN. CODE § 2.63(a) (West 1998) (emphasis added). Missouri Code of State Regulations articulates a similar purpose:

> (1) The purpose of the Adopt-A-Highway Program is to *increase public awareness of the environmental needs* along Missouri's highways and to provide volunteer community support for anti-litter and highway beautification programs.
>
> (2) *This program will reduce litter along the highways, enhance the environment and beautify Missouri's roadsides*.

MO. CODE REGS. ANN. tit. 7, § 10-14.010 (1995) (emphasis added).

148. *See, e.g.*, MO. CODE. REGS. ANN. tit. 7, §§ 10-14.040(3)(B), 10-14.050(1)(A), (C) (1995).

149. *See, e.g.*, *Cuffley I*, 927 F. Supp. at 1252.

150. In *Cuffley I* the Missouri Commission recognized:

> [M]any of the groups participating in the Program are motivated to participate in the Program by the desire for publicity or "free advertising," in the case of commercial organizations; recognition of their views in the case of political or social organizations; and even the desire to proselytize for new members, in the case of religious organizations.

Id. at 1252.

151. *See id*. "The Commission has no objection to these mixed motives." *Id*.

152. For example, the court found the Klan in Texas sought participation in the program as a means of communicating its intimidation of the residents of the recently-desegregated Vidor housing project. *Texas v. KKK*, 58 F.3d at 1077. While this is not a sympathetic view, it is, nonetheless, communication of an expression.

153. *See id*. at 1078. The Fifth Circuit explained that "[a]ny opportunity for speech provided by

of the use of the signs as a form of free publicity, however, combined with the participants' use of the program for that purpose, demonstrate that the programs themselves and the signs are public forums designated by the states. Therefore, they should receive the First Amendment protection appropriate for a limited public forum.[154]

B. Application of the Proposed Standard to a Non-Adopt-A-Highway First Amendment Case

The balancing test for public forum analysis that this Note proposes[155] can also be used effectively in the context of non-Adopt-A-Highway expressive conduct cases. For example, suppose a state owns a public plaza near the statehouse in the capital city.[156] The state's administrative code makes this plaza available for "use by the public . . . for free discussion of public questions, or for activities of a broad public purpose."[157] The state has established a simple application procedure for a group to follow to use the plaza.[158] While the state does not permit every applicant to use the plaza, the reasons given for excluding groups focus primarily upon safety and sanitation concerns.[159] The state's administrative code is neutral as to the content of the proposed speech.[160] Since this plaza was established over a century ago, the state has allowed "a broad range of speakers and other gatherings of people to conduct events."[161]

The current litigation involves a local group seeking to place a religious symbol that is potentially offensive to some community members in the plaza for a three-week period.[162] The state has already given permission for

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the Program is peripheral" to the central purpose of the program. *Id.*

154. This program cannot be a traditional public forum because the program is too new to be traditionally a place where ideas are exchanged. *See supra* notes 130-46 and accompanying text. It is, therefore, a limited or designated public forum.

155. *See supra* notes 136-46 and accompanying text.

156. This hypothetical will loosely follow the facts from *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). For the Supreme Court's articulation of the facts in *Capitol Square*, see *id*. at 757-59.

157. *Id.* at 757 (quoting OHIO ADMIN. CODE ANN. § 128-4-02(A) (1994)).

158. *See id.* at 757-58.

159. *See id.* at 757-58.

160. *See* OHIO ADMIN. CODE § 128-4-02(A) (1997).

161. *See Capitol Square*, 515 U.S. at 758 (internal citations omitted). In *Capitol Square*, the Ku Klux Klan applied to Ohio's Capitol Square Review and Advisory Board for permission to place a cross in the plaza during the Christmas season. *See id.* The state agency denied the application. *See id.* On appeal from the Sixth Circuit, the Supreme Court determined that the public plaza was a traditional public forum and granted the Ku Klux Klan an injunction, requiring the state to permit the Ku Klux Klan to display the cross. *See id*. at 770.

162. *See id.* at 758.

other groups to place two other religious symbols in the plaza for the same time period.[163]

The first factor of the balancing test requires that the court consider the state's intent in creating the plaza.[164] To determine the appropriate forum for the public forum analysis, the court applying this test must consider whether the state intended to open the plaza entirely, or merely some small portion of it to public debate. In this hypothetical, the state, for over a century, has made the plaza available for "use by the public . . . for free discussion of public questions."[165] Therefore, the state's intent in creating this plaza and the state's continuous use of the plaza as a place of public debate for over a century points to the plaza being the forum at issue.

The second factor is the access sought by the particular party in the suit.[166] In this case, the group is not seeking access to the entire plaza. Because there are already two displays in the plaza, the group is only seeking a small portion of the plaza. Most individuals and groups seeking access to the plaza, however, seek access to the entire plaza, not merely a small portion of it.[167] Further, they do not seek to use the plaza concurrently with another group's discussion or display.

In balancing these factors, it is clear that although the group in question is seeking to only use part of the plaza, the proper forum for the court to consider in its analysis is the entire plaza. The two factors of greatest importance, the state's intent and the general use of the plaza,[168] weigh in favor of this approach.

CONCLUSION

While the United States Constitution guarantees an individual's exercise of his right to speak freely, that right is not absolute. When property is owned by a state, the Supreme Court permits some regulation by the state government. The public forum doctrine is the means by which a state or federal court can determine whether a state has lawfully regulated expressive conduct on state-owned property. The Court has effectively detailed the limits on a state's regulation of speech activity on each of the three types of forums. The Court, however, has failed to instruct lower courts in the proper means of determining the applicable location for this forum analysis.

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163. *See id.*
164. *See supra* notes 142-43 and accompanying text.
165. OHIO ADMIN. CODE § 128-4-02 (1997).
166. *See supra* notes 139-41 and accompanying text.
167. *See supra* notes 144-45 and accompanying text.
168. *See supra* text accompanying note 146.

This Note offers a balancing test that, if adopted by the Court, would fill the missing gap from this doctrine. To determine the proper location on which to focus in the forum analysis, a court should balance three factors: (1) the state's intent in creating the program; (2) the access sought by the particular party in the suit; and (3) generally speaking, the access sought by other participants in the program. By utilizing this approach, a judge is less likely to allow personal bias about a particular individual or group to cloud the First Amendment analysis.

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