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Constitutional Law -- Southeastern Promotions, Ltd. v. Conrad: A Contemporary Concept of the Public Forum

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Mortmain statutes have been whittled away at by state legislatures,⁸⁴ evaded by estate planners,⁸⁵ and criticized by scholars and practicing lawyers.⁸⁶ Finally they have been invalidated by the courts. The combination of *In re Small*, *In re Estate of Cavill*, and *Doyle v. Key* represents a frontal attack on the mortmain statute as an anachronistic feudal holdover. Other courts confronted with challenges to mortmain statutes should consider whether a state's role in policing the distribution of a decedent's estate ought to extend beyond guaranteeing dependent heirs continued support. Invalidation of a mortmain statute does not deny those heirs a right to complain of undue influence by an offending charitable organization. Rather, the intervention of the courts leaves that remedy healthy while, hopefully, tolling the demise of the mortmain statute.

ELIZABETH ANANIA

Constitutional Law—*Southeastern Promotions, Ltd. v. Conrad*: A Contemporary Concept of the Public Forum

In *Southeastern Promotions, Ltd. v. Conrad*¹ the United States Supreme Court held that municipal auditoriums in Chattanooga, Tennessee "were public forums designed for and dedicated to expressive activities."² The Court looked in part to the traditional public forum cases (those involving streets and parks)³ for the relevant criteria for its

84. *E.g.*, "By recent amendment the Idaho mortmain statute now permits an unlimited bequest to charity even within the proscribed thirty-day period, provided the first \$100,000 goes to the lineal descendants of the testator." 1 W. BOWE & D. PARKER, *supra* note 4, § 3.16, at 1973-74 Supp. 15 (footnote omitted); *see also Restrictions*, *supra* note 5, at 297.

85. Various "avoidance techniques" are catalogued in Fisch, *Restrictions on Charitable Giving*, 10 N.Y.L.F. 307, 325-31 (1964). These include substitutional and conditional dispositions, *in terroram* and no-contest clauses, dependent relative revocation, contracts to bequeath and *inter vivos* dispositions.

86. *Id.*; Hollinger, *Decedents' Estates & Trusts Laws, Annual Survey of Pennsylvania Legal Developments*, 45 PA. B. ASS'N Q. 221, 229 (1974); Remick, *supra* note 66; and *Restrictions*, *supra* note 5, at 298-99.

1. 420 U.S. 546 (1975).

2. *Id.* at 555.

3. *Cameron v. Johnson*, 390 U.S. 611 (1968); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. C.I.O.*, 307 U.S. 496

conclusion, and thus demonstrated that the application of these historical tests is not to be confined to the particular settings in which they were developed. As a result, the Court did more than declare two municipal auditoriums in Chattanooga to be public forums: it evidenced a willingness to apply public forum analysis whenever a public facility is denied to those who desire to exercise their first amendment rights.

When the Municipal Auditorium Board of the City of Chattanooga rejected Southeastern's application for the production of the rock musical "Hair" solely on the strength of outside reports that the production was obscene, the petitioner sought injunctive relief in the federal courts.⁴ Although both the district court⁵ and the court of appeals⁶ upheld the Board's action, finding conduct in the production, apart from speech, to be obscene and thus violative of city and state laws against public nudity,⁷ the Supreme Court reversed.⁸ The Court was not concerned with whether the play were obscene or not,⁹ refusing even to review the reasons behind the Board's rejection of it, or the standards upon which the Board had based its decision.¹⁰ Rather, the majority chose to view the main issue before the Court as whether the Board in its managerial capacity could function as do private individual proprietors—outside the strictures of the first and fourteenth amendments.¹¹ Finding the auditorium to be a public forum, the Court emphatically repudiated the

(1939). See also *Cox v. Louisiana*, 379 U.S. 536 (1965); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Jamison v. Texas*, 318 U.S. 413 (1943).

4. *Southeastern Promotions, Ltd. v. Conrad*, 341 F. Supp. 465, 468 (E.D. Tenn. 1972).

5. *Id.* at 477.

6. *Southeastern Promotions, Ltd. v. Conrad*, 486 F.2d 894, 897 (6th Cir. 1973).

7. TENN. CODE ANN. §§ 39-1013, 39-3003 (1971 Supp.); CHATTANOOGA, TENN., CODE §§ 6-4, 25-28. See 420 U.S. at 550-51. The Court rejected the Board's argument that it would itself violate the law if it approved Southeastern's application: "Hair" had not been judicially declared to be obscene, and "respondents did not permit the show to go on and rely on law enforcement authorities to prosecute for anything illegal that occurred. Rather, they denied the application in anticipation that the production would violate the law." *Id.*

8. 420 U.S. at 552.

9. *Id.* at 557-59. *Accord*, *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634, 639 (N.D. Ga. 1971). See also *Schacht v. United States*, 398 U.S. 58 (1970); *United States v. O'Brien*, 391 U.S. 367 (1968).

10. 420 U.S. at 552, 559, 562. The Board had looked to a booklet prepared for the dedication of the auditorium to find support for its actions. The booklet stated in part that the Board was entrusted with the responsibility of insuring that "civic, educational, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory." Further, the auditorium was "to be devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship." See *id.* at 549 n.4. See also note 61 *infra*.

11. 420 U.S. at 553-56.

Board's claims of proprietary privilege.¹² Public officials charged with the management of a public facility that is found to be a public forum must recognize the constitutional limitations upon their proprietary discretion. The Board's failure to appreciate the nature of its responsibility led it to deny the use of the auditorium without regard for the procedural safeguards dictated by the first amendment.¹³ Therefore, the Court concluded, without reaching questions of the validity of the Board's standards, that "[d]enying use of the municipal facility under the circumstances present here constituted the prior restraint."¹⁴ Because this prior restraint was accomplished without adherence to the minimum procedural requirements of *Freedman v. Maryland*,¹⁵ the Board's refusal was impermissible.¹⁶

Holding that a municipal auditorium could indeed be a public forum, the Court provided itself with the basis for a due process analysis of petitioner's claims.¹⁷ Clearly, one of the most valued incidents of private ownership is the right to exclude others, and to regulate their conduct once admitted, without breaking first amendment command-

12. The Auditorium Board had advanced the claim in the district court that, acting in a proprietary capacity, it should be accorded the managerial discretion allowed to private owners. Although the district court ruled against this contention, *see note 64 infra*, it was again argued on brief to the Supreme Court. The Court's answer was that "[r]espondent's action was no less a prior restraint because the public facility under their control happened to be municipal theaters." 420 U.S. at 555.

13. Professor Monaghan has coined the term "First Amendment due process" to describe the approach that the Supreme Court has adopted to handle the procedural issues presented in first amendment cases. Surveying a long series of cases, capped by *Freedman v. Maryland*, 380 U.S. 51 (1965), he observes that, "the Court has placed little reliance upon the due process requirements of the fifth and fourteenth amendments, but instead has turned directly to the first amendment as the source of the rules. . . . [D]oes the procedure show 'the necessary sensitivity to freedom of expression?' [380 U.S. at 48]" Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518-19 (1970).

14. 420 U.S. at 556.

15. 380 U.S. 51 (1965). In *Freedman* the Court held that where a prior restraint is imposed which calls into question the protected nature of speech, "only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* at 58. Therefore, (1) the burden is on the state to either issue a permit or initiate judicial proceedings, (2) any restraint prior to judicial review must be brief, preserving the status quo, and (3) a prompt judicial determination must be provided. *Id.* at 58-59.

16. Not all prior restraints are unconstitutional. *See note 60 and accompanying text infra.* *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

17. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court refused to find a municipal bus system to be an appropriate public forum. Therefore, the city was allowed to prohibit political advertising on its buses even though other commercial advertising was permitted. *See note 54 infra.* Thus, because "[n]o First Amendment forum is here to be found," the Court held that, "[i]n these circumstances there is no First or Fourteenth Amendment violation." 418 U.S. at 304. *See also* Adderley v. Florida, 385 U.S. 39 (1966), discussed in text accompanying note 36 *infra*.

ments.¹⁸ Likewise, municipal properties, never expressly dedicated for purposes of free expression, are not necessarily of right open to all people as a public forum.¹⁹ However, once a place has been declared by the courts to be a public forum the first and fourteenth amendments are called into play, and property "rights become circumscribed by the statutory and constitutional rights of those who use it."²⁰ The ease with which the Court moved the idea of the public forum out of the streets and indoors is not without support in the principal cases which have shaped the public forum concept.

The first pronouncement of a modern theory of the public forum came in 1939 when the United States Supreme Court, in *Hague v. C.I.O.*,²¹ overruled *Davis v. Massachusetts*²² which had confirmed in the states unlimited control over access to, and the use of their public parks and streets.²³ In *Hague* the Court upheld the right of labor activists to peacefully assemble, speak and distribute literature in the city streets, and therefore struck down the licensing ordinance which had been used arbitrarily to deny them a forum. The Court explicitly renounced the absolute dominion contentions of *Davis*, postulating what has been called "a kind of first amendment easement"²⁴ right to a public forum in the people:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

18. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972): "In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Id.* at 567. Cf. *Food Employees v. Logan Plaza*, 391 U.S. 308 (1968) and *Marsh v. Alabama*, 326 U.S. 501 (1946), where even privately owned properties, opened to the public, were found to be public forums. See generally Comment, *The Public Forum from Marsh to Lloyd*, 24 AM. U.L. REV. 159 (1974).

19. See cases cited note 17 *supra*.

20. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

21. 307 U.S. 496 (1939).

22. 167 U.S. 43 (1897).

23. The Court in *Davis* quoted with approval the language of then Justice Holmes of the Supreme Court of Massachusetts:

"There is no evidence before us to show that the power of the legislature over the common is less than its power over any other park dedicated to the use of the public, or over public streets, the legal title to which is in a city or town. For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."

167 U.S. at 47, quoting *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895).

24. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.²⁵

Thus, in order to give meaning to first amendment guarantees, a state is prohibited by the fourteenth amendment from divesting the public of access to these historical forums.²⁶

The Court, in *Hague*, confined its opinion to a narrowly conceived concept of the public forum, based on common law property notions:²⁷ only the streets and parks were considered. Although the rationale of *Hague* has continued to be applicable in the streets and parks cases,²⁸ in recent years, as local governments assumed an increased role in the development of public facilities, it began to be questioned whether the right to a public forum were to be restricted to these traditional public places. In two major civil rights cases of the 1960's, *Brown v. Louisiana*²⁹ and *Adderley v. Florida*,³⁰ the Supreme Court indicated its answer, displaying a disposition to adopt a more generalized approach to public forum analysis.

In *Brown* five blacks staged a sit-in demonstration in a public library, in protest of segregated library facilities, and were arrested when they refused to disburse.³¹ Reversing their convictions, the Court found unconstitutional state action in the discriminatory enforcement of a local ordinance prohibiting disruptive conduct in public buildings.³² After noting that the demonstrations had been conducted in a quiet and peaceful manner, the Court declared such conduct to be fully protected by the first and fourteenth amendments,³³ and affirmed the right of the petitioners to stage a "reasonable, orderly, and limited" protest in a public facility where they had "every right to be."³⁴ Although not historically a public forum, the library was elevated to that status through the combined effect of the first amendment and the equal protection clause. But, as the majority was careful to acknowledge, had

25. 307 U.S. at 515.

26. See *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1937).

27. See generally *Kalven*, *supra* note 24; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

28. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Kunz v. New York*, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

29. 383 U.S. 131 (1966).

30. 385 U.S. 39 (1966).

31. 383 U.S. at 136-38.

32. *Id.* at 142.

33. *Id.* at 139-42.

34. *Id.* at 142.

there been "disturbance of others, . . . disruption of library activities, . . . violation of any library regulations," the issue presented would have been quite different.³⁵ Thus it is clear that the Court, in finding a public forum, looked beyond traditional concepts to other relevant considerations: (1) was the place open to the public; (2) would the form of speech advocated interfere with the normal functions to which the facility was committed; (3) did the state by its actions deny equal access to an appropriate forum for protected expression?

The next year in *Adderley*³⁶ the Court was called upon to consider the public forum issue again, this time in the light of *Brown*. Demonstrators were convicted of trespass when they refused to leave the grounds of a county jail.³⁷ The Supreme Court affirmed their convictions, answering each of the questions suggested in *Brown* against contentions that the jail was a suitable public forum. The jail premises were not open to the public, at any time, as a forum for expressive activities,³⁸ because such activity was inconsistent with the security purposes for which the jail was built.³⁹ Therefore, over a strong dissent which viewed the jail as "an obvious center for protest,"⁴⁰ the majority found the jail to be "so clearly committed to other purposes that [its] use for the airing of grievances is anomalous."⁴¹ Finding no public forum, the Court upheld the statute which gave to the state the "power to preserve the property under its control for the use to which it is lawfully dedicated."⁴²

By the 1970's the Supreme Court was ready to announce an approach to public forum analysis that in no way depended upon the accidents of history. Summarizing the developments in *Brown* and *Adderley*, the Court in *Grayned v. City of Rockford*⁴³ formulated its test:

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a pub-

35. *Id.*

36. 385 U.S. 39 (1966).

37. *Id.* at 40.

38. *Id.* at 47.

39. *Id.* at 41, 45.

40. *Id.* at 49.

41. *Id.* at 54. Although the words are those of Justice Douglas, admitting in his dissent that not every public place is also a suitable public forum, I have chosen to appropriate them as the best statement of the case holding: the majority took Justice Douglas at his word.

42. *Id.* at 47.

43. 408 U.S. 104 (1972).

lic library, *Brown v. Louisiana*, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.*⁴⁴

In *Grayned*, students picketing a high school on adjacent sidewalks were arrested and fined for violating a municipal ordinance banning disruptive noise and conduct near school buildings while classes were in session.⁴⁵ Reaffirming its holding in *Tinker v. Des Moines School District*⁴⁶ that a school campus can be an appropriate public forum,⁴⁷ the Supreme Court nevertheless upheld the ordinance as a constitutionally permissible time, place, and manner regulation designed to protect school activities.⁴⁸ Thus, it is necessary to consider the purposes to which a public facility is devoted, first in order to determine whether its use as a public forum would be inconsistent with that purpose, and second, so that reasonable standards for time, place, and manner regulations can be devised.

Although the test as stated in *Grayned* casts public forum analysis primarily in terms of appropriateness of use considerations, the Supreme Court, on the same day that it decided *Grayned*, found a public forum to have been created on equal access grounds. In *Police Department of Chicago v. Mosley*,⁴⁹ the Court struck down a city ordinance which allowed labor picketing near school facilities while prohibiting any other type of picketing in the same areas.⁵⁰ Such "selective exclusion" was held to run afoul of both the equal protection clause and the first amendment.⁵¹ Public places open to some must be open to all; and if appropriate as forums for some points of view, such places must be

44. *Id.* at 116 (footnotes omitted) (emphasis added).

45. *Id.* at 105-06.

46. 393 U.S. 503 (1969). In *Tinker*, the Court upheld the right of students to wear black armbands to protest against the war in Vietnam, as long as their conduct did not substantially interfere with school functions.

47. 408 U.S. at 117.

48. *Id.* at 121.

49. 408 U.S. 92 (1972).

50. *Id.* at 94.

51. Necessarily then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

. . .

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. at 96. *Accord*, *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (concurring opinion); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

made available to all points of view.⁵² The Court did not hesitate to find a deprivation of public forum rights even though the state was unaware that by its actions it had provided one.⁵³

After *Grayned* and *Mosley* it was apparent that the Court left behind the narrow theory of the public forum conceived in *Hague*. In these two opinions the Supreme Court expressed the principles of *Brown* and *Adderley* in yet broader terms, reflecting a commitment to apply public forum analysis in new and varying contexts. Although perhaps the Court retreated somewhat from this stand in *Lehman v. City of Shaker Heights*⁵⁴ when it declined to find a city-owned bus to be a "First Amendment forum," in *Southeastern Promotions* the Court reconfirmed its commitment to an expansive theory of the public forum.⁵⁵

The Court in *Southeastern Promotions* quickly tested the auditoriums against this adaptable public forum concept, before turning to the question of prior restraint. The petitioners did not claim the right of access to a "facility primarily serving a competing use. Nor was rejection of the application based on any regulation of time, place, or manner related to the nature of the facility or applications from other users."⁵⁶ Thus it is clear that under the rationale of *Grayned*, the auditoriums were not disqualified from being suitable for use as public forums. The Auditorium Board made no attempt to justify its actions

52. See generally Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931, where it is contended that, "The first amendment has developed, through the vagueness and overbreadth line of cases, its own equal protection clause, capable of achieving the same results as the fourteenth amendment . . ." *Id.* at 951 (footnotes omitted).

53. Cf. *Food Employees v. Logan Plaza*, 391 U.S. 308 (1968); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946).

54. 418 U.S. 298 (1974). The majority concluded that the city could constitutionally "[limit] access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304. Thus it found no public forum. In a strongly worded dissent, Justice Brennan reviewed the history of the public forum concept and concluded that the buses were indeed public forums:

In the circumstances of this case, however, we need not decide whether public transit cars *must* be made available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum.

Id. at 313-14.

55. In fact the Court explicitly rejected the applicability of *Lehman* in the case at hand. 420 U.S. at 556.

56. *Id.* at 555 (footnotes omitted).

on the grounds that the auditoriums could not sufficiently accommodate the production.⁵⁷ And certainly at no time could the Board deny that it regularly made the facilities available to others as forums for public expression, for it was just for such purposes that the buildings were dedicated.⁵⁸ Therefore, under the holding of *Mosley* a right of equal access to the facilities for purposes of protected expression inured to the public as a whole. The auditoriums were indeed public forums.

Once the Court found the auditoriums to be public forums, the ultimate disposition of the case was clearly dictated. The Board's denial of the use of these public forums was "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of [the] Court's decisions."⁵⁹ Although a prior restraint is not unconstitutional per se,⁶⁰ those who would control access to a public forum may not go farther than to establish such limited regulations as are not incompatible with the purposes of the forum.⁶¹ And if those standards would condition the right of access to the public facility upon the type of expressive activity proposed, only after a judicial determination that the speech is unprotected can the authorities deny the use of the public forum on grounds such as obscenity.⁶² Because the Auditorium Board failed to recognize these constitutional constraints upon its role in the management of a public forum, it neglected to insure that its rejection of "Hair" "[took] place under procedural safeguards designed to obviate the dangers of a censorship system."⁶³ Although inadvertently infirm, the Board's refusal was nevertheless effective in cutting off public forum rights in an unconstitutional manner. As such, the Board's actions could not be upheld.

57. *Id.*

58. See note 2 and accompanying text *supra*.

59. 420 U.S. at 552, citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951); *Schneider v. State*, 308 U.S. 147, 161-62 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938).

60. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 n.10 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Near v. Minnesota*, 283 U.S. 697 (1931). Cf. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

61. 420 U.S. at 553. *Accord*, *Brown v. Louisiana*, 383 U.S. at 143 (The Court emphasized that although "[a] State or its instrumentality may, of course, regulate the use of its libraries or other public facilities, . . . it may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."); and *Hague v. C.I.O.*, 307 U.S. at 515-16 ("The privilege of a citizen of the United States to use the streets and parks . . . must not, in the guise of regulation, be abridged or denied.").

62. 420 U.S. at 559-60. See also note 15 *supra*.

63. 420 U.S. at 559, quoting *Freedman v. Maryland*, 380 U.S. at 58.

In dissent, Mr. Justice Rehnquist sought to discredit the public forum foundations of the majority opinion by resurrecting the argument that the Board could constitutionally deny access to the auditoriums consonant with its proprietary as opposed to its governmental duties.⁶⁴ Insisting that in prior decisions the Supreme Court had limited itself to finding a public forum only in settings functionally similar to the streets and parks, he questioned the validity of applying the same analysis to such dissimilar facilities as public auditoriums, "which must of necessity schedule performances by a process of inclusion and exclusion."⁶⁵ If to find the auditoriums to be public forums is to deny any "selective role whatsoever" to the Board in the management of them, by what standards are managers of municipal auditoriums to decide which speakers shall have the forum?"⁶⁶

The Court acknowledged that eventually many of the questions raised by Justice Rehnquist would have to be resolved, but it expressly declined to confront them in *Southeastern Promotions*.⁶⁷ At no time, however, did the Court indicate that the Board could serve no "constitutionally permissible role" in the selection of productions to be presented in the auditoriums. The licensing standards appropriate to the streets and parks cases are not to be transported wholesale to other forums where they may well be inapplicable. For, "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each has its own problems."⁶⁸ Assuming that the requisite procedural safeguards were incorporated, the Board was clearly not prohibited from establishing guidelines necessary to the

64. 420 U.S. at 570-74. The district court had rejected the proposition that characterization of the Board's actions would help to determine the case: "Accordingly, it is apparent that whether the Board acts in a governmental capacity or in a proprietary capacity it nevertheless remains a public body, and as such it cannot differentiate or discriminate where the sole basis of that differentiation or discrimination is for some constitutionally impermissible [sic] reason." 341 F. Supp. at 470. *Accord*, *Southeastern Promotions, Ltd. v. Oklahoma City*, 459 F.2d 282, 283 (10th Cir. 1972); *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1019 (5th Cir. 1972); *Southeastern Promotions, Ltd. v. City of Charlotte*, 333 F. Supp. 345, 351-52 (W.D.N.C. 1971). *But see* *Healey v. James*, 408 U.S. 169, 201-03 (1972) (Rehnquist, J., concurring). *See also* *United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1971); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946).

65. 420 U.S. at 570.

66. *See id.* at 572-74.

67. *Id.* at 562. "The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances." *Id.*

68. *Id.* at 557, *citing* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

successful production of theatrical programs.⁶⁹ The Court simply refused to go farther than to confirm the fact that a public forum may not be run as if it were a privately owned facility, leaving it up to the municipalities to develop the " 'narrow, objective, and definite standards to guide the licensing authority' " ⁷⁰ required by the Constitution.

CONCLUSION

The fundamental implications of the Supreme Court's decision in *Southeastern Promotions* are to be derived from the public forum underpinnings of its holding. That the Court never reached the substantive obscenity questions raised in the lower courts should put those accountable for the management of municipal facilities on notice that they must apprise themselves of the potential public forum ramifications that might well attend their actions. And since the Court refused to lay down specific guidelines, the burden of devising sufficiently narrow standards to govern the managing authority in its function was defaulted to the states. Furthermore, lower courts are charged with the responsibility of exploring the public forum consequences of governmental action that would frustrate the exercise of first amendment rights. Thus, the Court recognized that "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual,"⁷¹ those forums appropriately public must be kept open to constitutionally protected expression.

JAMES M. PHILLIPS, JR.

Constitutional Law—Standing to Sue in Exclusionary Zoning Litigation: Catch-22 Revisited

Catch-22, Yosarian observed, involved a simple test with conditions defined so that it was impossible to meet them.¹ In an opinion

69. See note 61 and accompanying text *supra*. See also *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634, 641 (N.D. Ga. 1971); *Southeastern Promotions, Ltd. v. City of Charlotte*, 333 F. Supp. 345, 351 (W.D.N.C. 1971).

70. 420 U.S. at 553, quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

71. *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972).

1. J. HELLER, CATCH-22 47 (1955).