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A FUNNY THING HAPPENED TO THE (NON)PUBLIC  
FORUM: *LEBRON V. NATIONAL RAILROAD  
PASSENGER CORPORATION*

*Jonathan Bloom*<sup>†</sup>

In November 1992 Michael A. Lebron, a commercial art director and occasional creator of politically pointed artworks for public spaces,<sup>1</sup> signed a contract with Transportation Displays Incorporated ("TDI") to display one of his pieces on the Spectacular, the most prominent advertising space in New York's Penn Station. Lebron's proposed "advertorial" was a parody of a Coors beer advertisement with text critical of the Coors family for supporting various right-wing causes, including that of the contras in Nicaragua. Yet in the spring of

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<sup>1</sup> Lebron has stated that an important goal of his work is to "responsibly engage the public in important political or social issues, which I seek to achieve by placing my works in mass transit stations where I can reach a wide audience." Affidavit of Michael Lebron ¶ 2, Dec. 29, 1992, submitted in support of his motion for a temporary restraining order, *Lebron v. National R.R. Passenger Corp.*, 811 F. Supp. 993 (S.D.N.Y. 1993) [hereinafter *Lebron I*], 69 F.3d 650 (2d Cir. 1995), *amended, reh'g denied*, 74 F.3d 371 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

Lebron previously displayed political works in the Washington, D.C. subway system. In 1984, Lebron was involved in a lawsuit with the Washington Metropolitan Area Transit Authority ("WMATA") after WMATA tried to suppress a poster photomontage Lebron installed in the Washington subway critical of the Reagan administration on the ground that it was "deceptive." *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 894 (D.C. Cir. 1984). The Court of Appeals for the D.C. Circuit held that WMATA's refusal to display the poster because of its content violated the First Amendment. *Id.*

In 1987, shortly after the Iran-Contra hearings, Lebron installed in advertising space in Washington subway stations a series of 25 works comprised of drawings by Nicaraguan children, photographs and text that described the impact of the war in Nicaragua on that country's children.

1996, with civil war in Nicaragua receding from memory, Lebron still was attempting to establish his First Amendment right to display the work.<sup>2</sup>

In the course of his legal battle, Lebron was able to convince the U.S. Supreme Court that Amtrak, which owns Penn Station and controls access to the Spectacular, is a government agency subject to the First Amendment.<sup>3</sup> But he was unable to convince the Second Circuit that Amtrak violated his First Amendment rights when it denied him access to the Spectacular by asserting, for the first time, an unwritten policy against "political" advertising.<sup>4</sup>

Lebron's effort to express his political views in dramatic fashion in one of New York's most heavily trafficked public spaces met with strong resistance from a Second Circuit panel that seemed determined to deny him that right. Notwithstanding the findings of then District Judge Pierre N. Leval that Amtrak's purported policy against "political" advertising was unwritten, inconsistently applied, vague and possibly (depending upon the actual content of the policy) viewpoint-biased,<sup>5</sup> a panel majority consisting of Judges Mahoney and Lumbard, over a dissent by Chief Judge Newman, held that because Amtrak had never opened the Spectacular to noncommercial advertising, it could exclude Lebron's advertisement. The court of appeals also held that Amtrak's policy was not facially unconstitutional.

At the heart of the court of appeals' ruling was its finding that the relevant forum for purposes of Lebron's First Amendment claims was the Spectacular, and that the Spectacular is a nonpublic forum or a limited public forum for commercial speech only. The court's resistance to second-guessing Amtrak's determination that Lebron's advertisement was not appropriate for the Spectacular was reflected in its

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<sup>2</sup> On May 13, 1996, the Supreme Court denied Lebron's second petition for a writ of certiorari. *Lebron v. National R.R. Passenger Corp.*, 116 S. Ct. 1675 (1996).

<sup>3</sup> *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995).

<sup>4</sup> *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650 (2d Cir.) [hereinafter *Lebron II*], amended, reh'g denied, 74 F.3d 371 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996).

<sup>5</sup> *Lebron I*, 811 F. Supp. at 1000-04 (S.D.N.Y. 1993), rev'd, remanded, 12 F.3d 388 (2d Cir. 1993), rev'd, remanded, 115 S. Ct. 961 (1995), on remand, rev'd, remanded, 69 F.3d 650 (2d Cir. 1995), amended, reh'g denied, 74 F.3d 371 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996).

disregard of unchallenged factual findings concerning the scope and interpretation of Amtrak's policy and in its reliance upon other nonpublic forum decisions having limited relevance to the case at hand. The court's unduly narrow view of the relevant forum and its highly deferential view of Amtrak's role as proprietor of the station formed the basis for upholding Amtrak's suppression of Lebron's political advertisement despite Amtrak's having permitted other political advertisements elsewhere in the station under the same policy. The court's flawed application of the public forum doctrine produced a result that exposes the starkly speech-restrictive possibilities of that doctrine as currently formulated.<sup>6</sup> The decision below should have been affirmed without even reaching forum analysis, but the court instead engaged in forum analysis as a means of evading the glaring constitutional defects in Amtrak's policy.<sup>7</sup>

## I. FACTUAL AND PROCEDURAL BACKGROUND

Section I of this Article reviews the factual and procedural background of the case, and includes a summary of the Second Circuit decisions analyzed in detail in the remainder of the Article. Section II discusses the Second Circuit's two rulings on the merits—its rejection of Lebron's First Amendment claims and its denial of his petition for rehearing—issue by issue, beginning with its evaluation of the policy itself and followed by the court's public forum analysis. The Article concludes that the court's undue reliance upon, and overly narrow interpretation of, the public forum doctrine, combined with a disregard of pertinent aspects of the factual record, improperly denied Lebron the right to display his work.

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<sup>6</sup> The court's public forum analysis produced the odd result that political speech, which traditionally has been accorded the highest level of First Amendment protection, was excluded from one of New York's most widely used indoor public spaces, whereas a sexually suggestive commercial advertisement for jeans was permitted in exactly the same space without incident or issue. *See Boos v. Barry*, 485 U.S. 312, 318 (1988); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>7</sup> This Article will focus on the Second Circuit's consideration of Lebron's First Amendment claim and will not address its analysis of the state action issue.

### A. *Lebron's Work*

The art installation/advertisement around which the dispute centered features the caption "IS IT THE RIGHT'S BEER NOW?," a parody of the then current Coors beer advertising slogan "IT'S THE RIGHT BEER NOW." The work is a montage of photographs and text that uses verbal and visual parody of a typical Coors beer billboard advertisement in order to criticize the Coors family's financial support of right-wing political causes, which are identified in the text, including the Nicaraguan contras. The caption appears over a photomontage that depicts, on the left, a buoyant group of young Americans partying, each holding a can of Coors beer, and on the right, a darker scene showing a group of Nicaraguans looking apprehensively in the direction of the American beer drinkers. Linking the two scenes is a can of Coors beer with a comet tail shooting out behind it—a parody of the Coors "silver bullet"—which suggests a missile and symbolizes U.S. financial and military support for the Nicaraguan contras. Lebron's accompanying text, which appears to the left of these images and is superimposed on an image of the American flag, connects the profits made by the Coors Brewing Company and its owners with the right-wing causes supported by Coors family members and the Coors Foundation. Specifically, it mentions that Joseph Coors financed the purchase of an aircraft for the Nicaraguan contras, and it lists several right-wing groups which are supported by the Coors family.<sup>8</sup> Text along the lower left edge of the work states: "This art installation is an advertisement paid for by Michael Lebron and produced by the ATW Communications Group."

By using the format of an actual beer advertisement, Lebron aimed to awaken the viewer to the connection between the sanitized, carefree image of American leisure represented in such advertisements and the civil war in Nicaragua, with which the corporate profits flowing from such advertisements, in the case of Coors beer, are directly linked.<sup>9</sup>

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<sup>8</sup> The organizations listed are The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. The sources for all of the factual statements contained in the advertisement are referenced in footnotes which appear along the top center portion of the advertisement.

<sup>9</sup> The genesis of the project dates to the spring of 1987, when Lebron spent

## B. *The Site*

The Spectacular is a long, curved, back-lit advertising display area, approximately 103 feet long and 10 feet high. It is located above a circular crossing area known as the rotunda on the upper level of Penn Station above the entrance to the Amtrak waiting room and ticketing area. Lebron rode Amtrak frequently to and from Penn Station, and he selected the Spectacular as the ideal place to display the ambitious work he was contemplating. Penn Station, which is owned by Amtrak, is one of the busiest public crossroads of pedestrian traffic in New York. Approximately 200,000 people pass through the station every day going to and from the Amtrak, New Jersey Transit and Long Island Railroad trains that use the station, and the New York City subway that abuts it.<sup>10</sup> The Spectacular is the most prominent advertising location in the station and, indeed, one of the most prominent in New York, and it is visible to a large segment of the travelling public using Penn Station. For this reason, Lebron created his work specifically for the Spectacular. The unique dimensions of the site are such that the work, conceived and created with the Spectacular in mind after Lebron was told that the space would be available, was unsuitable for display at any other location. For Lebron, the Spectacular provided not only the scale necessary to accommodate the multiple visual components of his work, but also a spatial context in which viewers had room to stop and read the

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three weeks in the war zone in Nicaragua, where he was witness to a war which at the time was being supported by the United States government in the form of aid to the contras. After this visit, on May 21, 1987, Lebron saw Joseph Coors, president of the Coors Brewing Company, testify in support of continued funding for the contras during the congressional Iran-Contra hearings. Lebron learned from this testimony that Coors himself had purchased an aircraft for the contras. Through further investigation, Mr. Lebron learned that the Coors family, through the Coors Foundation, was spending millions of dollars annually to support right-wing groups such as The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. Lebron's surprise at learning that profits earned from the sale of beer were being used to support the war in Nicaragua, as well as other causes associated with the Moral Majority and the policies of the Reagan administration, inspired the idea to create a public art installation to bring these facts to the attention of the public.

<sup>10</sup> *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1057 (S.D.N.Y. 1995).

text, which would not have been possible at other available sites, such as on a highway billboard or a large billboard at the World Trade Center visible only from a moving escalator.

### C. *The Contract Negotiations*

Lebron first contacted TDI about contracting for billboard space in Penn Station in August 1991. William B. Schwartz, the TDI account executive with whom he negotiated, told Lebron that while no displays would be accepted that included obscenity or violence, there were no other policy restrictions on advertising.<sup>11</sup>

Lebron and TDI reached agreement on a contract for the Spectacular for January and February 1993 at a rate of \$18,500 per month. In August 1992, Schwartz gave Lebron the standard rental form contract, which Lebron signed and returned.<sup>12</sup> During the negotiations, when Schwartz asked Lebron what he would display on the billboard, Lebron responded that in general his work was political, although it often looked like advertising, but that until negotiations were concluded he regarded the specific content of the work as confidential.<sup>13</sup> Schwartz did not indicate that there was any prohibition on political advertisements on the Spectacular or anywhere else in Penn Station.<sup>14</sup>

TDI signed the contract on November 30, 1992. The contract included the following terms:

All advertising copy is subject to approval of TDI and the Transportation Facility concerned (*i.e.*, the owner of the billboard) as to character, text, illustration, design and operation.

If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.<sup>15</sup>

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<sup>11</sup> *Lebron I*, 811 F. Supp. at 995.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Although neither Lebron nor Schwartz knew it at the time, the "Transportation Facility" referred to in the contract was Amtrak.

On December 2, 1992, Lebron provided TDI with a color photocopy of his piece for review.<sup>16</sup>

#### D. *The Rejection of Lebron's Proposed Advertisement*

On December 7, TDI forwarded Lebron's work to Amtrak for approval. On December 17, Anthony DeAngelo, Amtrak's Vice President for Real Estate and Operations Development, who was authorized by Amtrak's Board of Directors to oversee advertising located on Amtrak property, rejected Lebron's advertisement on the grounds that it was "political."<sup>17</sup> Amtrak notified TDI of this decision on December 23, in a letter which stated that "Amtrak's policy is that it will not allow political advertising on the [S]pectacular advertising sign."<sup>18</sup> Lebron was not notified of Amtrak's rejection from TDI until December 29, 1992, three days before his advertisement was to appear on the Spectacular.<sup>19</sup>

At the time Lebron's advertisement was rejected, a variety of other advertisements appeared on the walls and on kiosks in the immediate vicinity of the Spectacular. Appearing on a kiosk in front of the Spectacular in the rotunda was an advertisement for, and accompanying free copies of, *The Plain Truth*, a magazine devoted to discussion of social and political issues published by the fundamentalist Christian group The World Wide Church of God.

#### E. *The District Court Proceedings*

Lebron promptly filed suit in the Southern District of New York, seeking an order preliminarily and permanently enjoining Amtrak and TDI from violating his First and Fifth Amendment rights and seeking specific performance of the contract. After expedited discovery, the case was tried on January 27, 1993, with the parties having stipulated to submit witness testimony through deposition transcripts.

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<sup>16</sup> *Lebron I*, 811 F. Supp at 995.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



On February 5, 1993, the district court ruled that "in rejecting [Lebron's] contract to display his art on its billboard Amtrak was engaged in governmental action and . . . the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment."<sup>20</sup> The court ordered defendants to give Lebron immediate access to the billboard in accordance with the contract.

There were several independently sufficient grounds upon which the district court held that Amtrak had violated the First Amendment. The court noted that when the government regulates speech "it must do so by a policy that is (i) clearly set forth, (ii) not so vague as to be subject to abuse, (iii) consistently applied and (iv) not based on viewpoint."<sup>21</sup> As the court explained, "these rules are intended to avoid the risk that government may impose arbitrary, discriminatory, or preferential controls on speech. Without explicit standards, clearly disclosed government regulation of speech may be applied in an arbitrary and discriminatory manner."<sup>22</sup>

The court found that Amtrak had violated at least three, and possibly four, of these constitutional requirements. First, the court found that Amtrak's policy was not clearly set forth. Indeed, the court found that the asserted policy against "political" advertising was unwritten.<sup>23</sup> Moreover, the existence of the policy had not been disseminated.<sup>24</sup> Deposition testimony revealed that executives of TDI, Amtrak's leasing agent for advertising space in Penn Station, were not even aware of the policy's existence.<sup>25</sup> Even William P. Delaney, a project manager in Amtrak's Real Estate Department who was responsible

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<sup>20</sup> *Id.* at 1005.

<sup>21</sup> *Lebron I*, 811 F. Supp. at 995.

<sup>22</sup> *Id.* (citation omitted).

<sup>23</sup> *Id.* A 1980 contract between Amtrak and TDI provided that Amtrak could refuse any advertising that it deemed "unlawful, immoral, improper or offensive to good taste . . . or involve[s] political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ." *Id.* at 1002. The court noted, however, that the contract was no longer in effect, having been superseded by virtually unbounded language allowing Amtrak to deny any advertising "at its own discretion." The court noted that this "broad provision clearly does not state, or even imply, the rejection of all 'political' advertising." *Id.*

<sup>24</sup> *Id.* at 1001.

<sup>25</sup> *Id.*

for supervising Amtrak's arrangements with TDI for advertising in Amtrak's facilities, was unaware of a ban on "political" advertising.<sup>26</sup>

Second, the court found that even if Amtrak's policy were clearly set forth, it was unconstitutionally vague. "[T]he term 'political' is of such unclear meaning that it is easily susceptible to arbitrary or discriminatory censorship by those administering the policy."<sup>27</sup> The court also relied upon the fact that Amtrak's executives were unable to offer a coherent definition of the scope of the policy. The court concluded that "[s]uch a vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment."<sup>28</sup>

Third, the policy had not been consistently applied. Billboard space in Penn Station had been leased many times for advertisements that would be "political" by one of the definitions Amtrak had advanced, i.e., not related to the sale of a product or service. The record showed that advertising space had been leased to a number of noncommercial advertisers, including the New York Department of the Environment, the New York Department of Commerce, a muscular dystrophy foundation and The Worldwide Church of God for its *Plain Truth* magazine, and also had been used for public service advertisements on such subjects as homelessness, the environment, drunk driving, AIDS awareness, health issues and race relations.<sup>29</sup> The court also noted that the contract between Amtrak and TDI expressly allows public service advertisements as well as "political" advertisements.<sup>30</sup> The guidelines TDI used to interpret that contract accept political advertising and treat it in the same way as commercial advertising, charging the full rate.<sup>31</sup>

Addressing Amtrak's argument that its policy had been consistently applied with respect to the Spectacular, the court pointed out that Amtrak never contended that the policy applied only to the Spectacular, a finding which was the basis for

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<sup>26</sup> *Lebron I*, 811 F. Supp. at 1002.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1003.

<sup>29</sup> *Id.* at 1004.

<sup>30</sup> *Id.* at 1003.

<sup>31</sup> *Lebron I*, 811 F. Supp. at 1003.

the court's consideration of Amtrak's practice with respect to advertising throughout the station. In any event, the court pointed out that regardless of its scope, the policy would be void because it was unwritten and vague.<sup>32</sup>

Finally, the court held that Amtrak's policy might be void for viewpoint bias, depending upon which of the several versions of the policy Amtrak employees had described were actually the Amtrak policy. If, as DeAngelo testified, the policy gave Amtrak discretion to refuse advertising involving "views which could result in dissension or involve [Amtrak] in dissension, complaints, or controversy with its patrons or the public," it would be void.<sup>33</sup> For the same reason, the court held that the policy would be void if it were as set forth in TDI's advertising guidelines, which "are designed to ensure against advertising that is controversial, in bad taste, or inconsistent with the taste and preferences of the majority of the community."<sup>34</sup> The court concluded that "Amtrak . . . may not regulate speech in an effort to shield its customers from the abrasive, the obnoxious, the controversial."<sup>35</sup> Because the district court rejected Amtrak's policy on grounds that applied regardless of the nature of the forum, the court never reached the issue of whether the Spectacular was a public forum.

#### F. *The Second Circuit's Decisions*

Amtrak appealed,<sup>36</sup> and a divided court of appeals reversed, holding that Amtrak was a private entity not subject to constitutional constraints.<sup>37</sup> Accordingly, the court did not

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<sup>32</sup> *Id.* at 1004 n.12.

<sup>33</sup> See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.").

<sup>34</sup> *Lebron I*, 811 F. Supp. at 1004.

<sup>35</sup> *Id.* at 1005.

<sup>36</sup> On February 10, 1993, the district court denied Amtrak a stay pending appeal, but granted it time to seek a stay from the court of appeals. The district court recommended that the court of appeals not grant a stay, but on February 23, 1993, a court of appeals panel granted a stay and expedited the appeal.

<sup>37</sup> *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388 (2d Cir. 1993), *rev'd*, *remanded*, 115 S. Ct. 961 (1995).

reach the merits of Lebron's First Amendment claim and remitted the case to state court for resolution of Lebron's contract claim. In February 1994, however, the Supreme Court reversed, holding that Amtrak is a government entity for constitutional purposes.<sup>38</sup> The Court remanded the case to the Second Circuit to determine whether Amtrak had violated Lebron's First Amendment rights.

After receiving supplemental letter briefs and hearing reargument on the First Amendment issues, the Second Circuit again reversed. Rather than beginning, as the district court did, with a review of the facial constitutionality of Amtrak's policy, Judge Daniel Mahoney, writing for the court, began with a public forum analysis. The panel held that the relevant forum for First Amendment purposes was the Spectacular, rather than all Penn Station advertising, because the Spectacular was the specific advertising space to which Lebron had sought access.<sup>39</sup>

Although the court acknowledged that Amtrak does not maintain a written policy with respect to advertising on the Spectacular, it found that Amtrak's "practice is clear; it has never opened the Spectacular for anything except purely commercial advertising."<sup>40</sup> In light of this "undisputed practice," the court concluded that the Spectacular "is not a public forum; most likely, it is a nonpublic forum, or perhaps it is a limited public forum opened for purely commercial speech."<sup>41</sup> Accordingly, Amtrak's policy against noncommercial advertisements on the Spectacular would be upheld as long as it was viewpoint-neutral and reasonable in relation to the forum's purpose.<sup>42</sup>

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<sup>38</sup> *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995).

<sup>39</sup> *Lebron II*, 69 F.3d at 655, *amended, reh'g denied*, 74 F.3d 371 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996) ("Because of its unique size, location, and visibility, Lebron sought access only to the Spectacular, and refused to accept any other advertising space in New York City managed by TDI. Although Lebron now contends that we should broaden our public forum inquiry to all Penn Station advertising space, it was he who determined that only the Spectacular would be acceptable for his display.").

<sup>40</sup> *Id.* at 656.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Relying upon *Lehman v. City of Shaker Heights*,<sup>43</sup> in which the Supreme Court narrowly upheld an ordinance against political advertising inside city buses, the court held that "Amtrak's decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable . . . to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view."<sup>44</sup>

The court rejected Lebron's vagueness challenge to Amtrak's policy against "political" advertising simply by citing the plurality opinion in *Lehman*, which did not even address a vagueness argument.<sup>45</sup> The court also asserted that the fact that a policy "is not committed to writing does not of itself constitute a First Amendment violation." Distinguishing *City of Lakewood v. Plain Dealer Publishing Co.*,<sup>46</sup> in which the Court struck down a newsrack licensing regulation on the ground that it contained no written standards, the court found that

prior written agreements [between Amtrak and its in-station advertising contractor], together with the testimony of the Amtrak official responsible for approving advertisements on the Spectacular and Amtrak's historic practice of reserving the Spectacular for commercial advertisements, dispel the notion that Amtrak enjoyed "unbridled discretion" or could have perpetrated an "illegitimate abuse of censorial power" in rejecting an advertisement because of its political content.<sup>47</sup>

As to the district court's finding that the policy had been inconsistently applied, the panel held that "because the policy against political advertisements was limited in scope to the Spectacular, there is no evidence that Amtrak's policy has ever been applied inconsistently."<sup>48</sup> Because it found that Amtrak

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<sup>43</sup> 418 U.S. 298 (1974).

<sup>44</sup> *Lebron II*, 69 F.3d at 658.

<sup>45</sup> *Id.*

<sup>46</sup> 486 U.S. 750 (1988).

<sup>47</sup> *Lebron II*, 69 F.3d at 658.

<sup>48</sup> *Id.* Amtrak conceded that there had been only six previous advertisers on the Spectacular, which tended to be leased out for long-term contracts. None of these prior advertisers had sought to display a political advertisement. Amtrak Brief at 7 n.5, *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650 (2d Cir.), *amended, reh'g denied*, 74 F.3d 371 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

applied a different policy to the rest of Penn Station advertising, the court deemed irrelevant the fact that Amtrak had displayed political advertisements elsewhere in the station, including the long-running advertisement for *The Plain Truth* immediately in front of the Spectacular.

Finally, the court concluded that Amtrak's policy was not viewpoint-based. By confining its analysis to the Spectacular, the panel ignored the *Plain Truth* advertisement, which provided the most compelling evidence of viewpoint discrimination. The court also rejected the district court's finding that the policy might be viewpoint-based on its face, noting that the lower court's concern with viewpoint discrimination was based upon Amtrak's 1980 agreement with TDI and a 1967 agreement between TDI and the former Penn Station owner, Pennsylvania Railroad. The 1967 agreement gave Amtrak the discretion to refuse any advertising that "involve[s] political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public."<sup>49</sup> While conceding that "if such a policy were used to screen out only controversial political advertisements," it would be void for viewpoint bias, the panel reasoned that "it seems more sensible to read the language as a justification, however inartfully phrased, for a categorical ban against political advertising."<sup>50</sup>

Nor was the court persuaded by Lebron's additional argument that Amtrak had engaged in viewpoint discrimination by excluding his message not to buy Coors beer for political reasons even though an actual Coors beer advertisement would have been permitted. Avoiding the issue, the panel noted simply that Lebron's advertisement did not address the "merits or demerits of Coors beer," although it did not explain the significance of this observation.<sup>51</sup>

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<sup>49</sup> *Lebron II*, 69 F.3d at 658 (citing *Lebron I*, 811 F. Supp at 1001-02) (quoting TDI licensing agreement (alterations added)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 659 n.4. Finally, the panel concluded that "[b]ecause we have found that Amtrak's policy against political advertisements was limited in scope to the Spectacular," Lebron lacked standing to maintain a facial challenge to Amtrak's advertising policy as applied in other parts of Penn Station because that policy was "not at issue" in this case. Lebron lacked standing to maintain a facial challenge to Amtrak's advertising policy as applied in other parts of Penn Station. In reaching this conclusion, the panel reasoned that the more liberal standing re-

Chief Judge Jon O. Newman dissented. First, he took issue with the majority's narrow focus on the Spectacular as the forum. He maintained that under the majority's approach, Amtrak could deny use of the Spectacular for Republican Party advertising even if it had permitted the Democratic Party to advertise on one of the dioramas flanking the Spectacular.<sup>62</sup> In Chief Judge Newman's view, "The relevant forum must be at least the advertising space in the rotunda of Penn Station—the means of communication to which Lebron sought access."<sup>63</sup> Once the forum is properly defined, Chief Judge Newman maintained, "Amtrak's violation of the First Amendment is evident because it has leased advertising space on a kiosk in the rotunda for *The Plain Truth*, a magazine the Court acknowledges is devoted to 'political and social issues.'"<sup>64</sup>

Chief Judge Newman also criticized the majority's conclusion that Amtrak's policy was not vague simply because Amtrak previously had not permitted any political advertisements on the Spectacular:

[W]here a policy is unwritten, unclear, and undisseminated, the fact that it has not yet been used discriminatorily does not save it from invalidation under the First Amendment. The vice of conferring discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination . . . .<sup>65</sup>

Lebron sought rehearing, pointing out that the finding on which every one of the panel's legal conclusions was grounded conflicted with the district court's finding (and Amtrak's stipulation) that Amtrak's advertising policy applied to all advertis-

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quirements of the overbreadth doctrine in the First Amendment context were inapposite because that doctrine "has only been applied to the conduct of the government in its role as a regulator, not as a proprietor." *Id.* at 659.

<sup>62</sup> *Id.* at 661 (Newman, C.J., dissenting).

<sup>63</sup> *Id.*

<sup>64</sup> *Lebron II*, 69 F.3d at 661.

<sup>65</sup> *Id.* at 662. While he found it unnecessary to reach the question given the policy's other constitutional infirmities, Chief Judge Newman also observed that Amtrak's policy may constitute viewpoint discrimination because it allows advertisements promoting the sale of beer for commercial reasons, but bars an advertisement opposing the purchase of the same product for political reasons. *Id.* at 662-63.

ing in Penn Station and not just to the Spectacular. In response, the panel denied rehearing and issued an amended opinion in which it simply deleted the sentences that had expressly referred to its finding of a Spectacular-specific policy.<sup>56</sup> It made no substantive change to its legal analysis or conclusions.

Dissenting from the denial of rehearing, Chief Judge Newman noted that the deletions from the court's decision "leave the Court's legal analysis . . . even more vulnerable than I thought it was in my original opinion."<sup>57</sup> Chief Judge Newman observed that the principal legal conclusions in the court's revised opinion lacked a factual foundation, stating that

[t]he revised recognition that Amtrak's policy, whatever its content, is not limited in scope to the Spectacular leaves unsupported the majority's view that the policy has not been applied inconsistently. In fact, as the district court found, advertisements falling within a broad category of political messages had been displayed in Penn Station. The majority has concluded that the policy has been consistently applied by overlooking the instances where it has not been consistently applied.<sup>58</sup>

Moreover, Chief Judge Newman maintained:

[N]o matter what the scope of the forum, a governmental entity violates the First Amendment when it bars display of political messages pursuant to a "policy" that has been found by a fact-finder, with abundant evidentiary support, to be vague, unwritten, undisseminated, unclear to those who administer it, and inconsistently applied.<sup>59</sup>

## II. ANALYSIS OF THE DECISION

The following analysis of the court of appeals' ruling begins with a discussion of the scope of Amtrak's policy, a factual matter as to which the court of appeals, in *Lebron II*, disagreed with the district court and which served as the framework for the court of appeals' analysis of the case. The Article then discusses Lebron's facial challenge to Amtrak's asserted policy,

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<sup>56</sup> *Lebron v. National R.R. Passenger Corp.*, 74 F.3d 371 (2d Cir. 1995) [hereinafter *Lebron III*].

<sup>57</sup> *Id.* at 372 (Newman, C.J., dissenting).

<sup>58</sup> *Id.* at 371.

<sup>59</sup> *Id.* at 372-73.



which the district court found to be an independently sufficient basis for ruling in Lebron's favor. The Article then looks at the court of appeals' public forum analysis, which comprised the conceptual foundation for its disposition of the case.

### A. *The Scope of Amtrak's Policy*

As Chief Judge Newman recognized, a fundamental flaw in the panel's decision was its inexplicable deviation from the district court's unchallenged factual finding that the same policy against political advertising applied throughout Penn Station.<sup>60</sup> Indeed, Amtrak had admitted the following proposed finding of fact:

According to Anthony DeAngelo, Amtrak Vice President for Real Estate and Operations Development, Amtrak applies the same advertising standards to the Spectacular as it does to all other advertising, including in-station advertising (wall posters, dioramas, free-standing 'island' or kiosks) and billboards along Amtrak's right of way.<sup>61</sup>

Amtrak never challenged as clearly erroneous the district court's finding that one substantive policy applied throughout the station.<sup>62</sup> In fact, Amtrak asserted on appeal that its policy "applies to all advertising in Amtrak's facilities."<sup>63</sup> Accordingly, Amtrak waived the right to challenge that finding, and the court of appeals had no authority to set aside, nor any factual basis for setting aside, the district court's finding and substitute its own finding that the policy was limited to the Spectacular.<sup>64</sup>

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<sup>60</sup> The district court noted that "[t]he Amtrak policy identified by Mr. DeAngelo as the reason for the rejection is its prohibition of 'political' advertisements in Penn Station." *Lebron I*, 811 F. Supp. at 1001 (emphasis added).

<sup>61</sup> Supplementary Exhibit Volume at SE2384, *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650 (2d Cir.), *amended, reh'g denied*, 74 F.3d 371 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

<sup>62</sup> According to Amtrak, the only difference between the treatment of the Spectacular and other advertising space is procedural: With other advertising spaces, Amtrak applies its policy against "political" advertising after the advertisements have gone up, whereas with the Spectacular, advertisements are pre-screened for conformity with the policy. Prior to Lebron's case, however, no advertisement in Penn Station had ever been found to violate the policy.

<sup>63</sup> Amtrak Brief at 7, *Lebron v. National R.R. Corp.*, 69 F.3d 650 (2d Cir. 1995).

<sup>64</sup> See FED. R. CIV. P. 52(a) (trial court's factual findings "shall not be set

Once Lebron forced the court of appeals to acknowledge that it had misconstrued the scope of Amtrak's policy and that the same policy applied throughout the station, the conceptual underpinning of the entire decision collapsed, and the violation of Lebron's First Amendment rights was patent. By deleting from its opinion all references to the policy being limited to the Spectacular without altering any of the conclusions that had been premised upon that finding, the Second Circuit's opinion, as amended, contains the following conclusions:

(1) Amtrak's unwritten policy does not present a danger of unbridled discretion in regulating speech notwithstanding record evidence of numerous noncommercial/political advertisements in Penn Station—including an advertisement for a free conservative religious magazine on a kiosk immediately in front of the Spectacular—that were permitted under the same policy invoked to reject Lebron's advertisement;

(2) Amtrak's policy has been consistently applied, notwithstanding record evidence of other noncommercial/political advertising in Penn Station permitted under the same policy;

(3) Amtrak's refusal to display Lebron's politically liberal, noncommercial advertisement urging viewers not to buy Coors beer was not viewpoint-based, notwithstanding the contemporaneous display of an advertisement for the politically conservative, noncommercial publication *The Plain Truth*.<sup>65</sup>

A close analysis of the opinion reveals a court seemingly more intent on justifying the suppression of controversial speech than with enforcing First Amendment and due process limitations on government regulation of speech in one of New York's most prominent public venues.

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aside unless clearly erroneous"); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *Apex Oil Co. v. Vanguard Oil and Serv. Co.*, 760 F.2d 417, 422 (2d Cir. 1985) (district court's factual findings may not be disturbed unless appellant carries "heavy burden" of showing that they are clearly erroneous).

<sup>65</sup> The court originally held that since Amtrak policy only applied to the Spectacular, Lebron lacked standing to bring a facial challenge to Amtrak's advertising policy for the station as a whole. *Lebron II*, 69 F.3d at 659-60. In effect, the court held that Lebron could not challenge the constitutionality of the very policy invoked to deny him his right to speak. This aspect of the decision was rendered insupportable by the court's concession in its revised opinion that Amtrak's policy applies throughout Penn Station, although the court failed to acknowledge this in *Lebron III*. The standing issue will not be further discussed in this Article, which focuses on the substantive First Amendment issues in the case.

## B. *The Constitutionality of Amtrak's Policy*

The district court found Amtrak's policy unconstitutional without regard to the nature of the forum. Diverging sharply from the district court, the court of appeals began its opinion with a review of the public forum doctrine. The court of appeals appears to have followed previous Supreme Court cases<sup>66</sup> in which public forum analysis was a threshold inquiry.<sup>67</sup> None of those cases, however, involved a facial challenge, such as *Lebron's*, to the policy at issue that would have provided a basis for deciding the case without reaching the public forum issue.<sup>68</sup>

The panel's failure to begin its analysis with an examination of the facial validity of Amtrak's policy indicates its insufficient sensitivity to the First Amendment rights at stake. Particularly where free speech rights are implicated,<sup>69</sup> due process requires that the regulations be sufficiently precise to safeguard against the discriminatory suppression of constitutionally protected speech.<sup>70</sup> As the district court and Chief Judge Newman recognized, forum analysis is irrelevant if a regulation of speech is unwritten, impermissibly vague, incon-

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<sup>66</sup> See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

<sup>67</sup> In *Cornelius*, the Court stated: "To determine whether the First Amendment permits the Government to exclude respondents . . . we must first decide whether the forum consists of the federal workplace, as petitioner contends, or the Combined Federal Campaign, as respondents maintain. Having defined the relevant forum, we must then determine whether it is public or nonpublic in nature." 473 U.S. at 800; see *infra* notes 127-128 and accompanying text.

<sup>68</sup> *Lebron* challenged Amtrak's policy both on its face and as applied to him.

<sup>69</sup> Political speech, such as *Lebron's*, traditionally has been accorded the highest level of First Amendment protection. See *Boos v. Barry*, 485 U.S. 312, 318 (1988); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open").

<sup>70</sup> See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

sistently applied and possibly viewpoint-based.<sup>71</sup> Indeed, the vagueness doctrine applies even where no forum whatsoever is involved.<sup>72</sup>

### 1. Amtrak's Unwritten Policy

The district court recognized that the unwritten nature of Amtrak's policy implicated the constitutional proscription against placing unfettered discretion to regulate speech in the hands of government officials.<sup>73</sup> The court noted that a licensing scheme devoid of explicit standards "constitutes a prior restraint and may result in censorship."<sup>74</sup>

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<sup>71</sup> *Lebron I*, 811 F. Supp. at 1004 n.12; *Lebron II*, 69 F.3d at 662 (Newman, C.J., dissenting). In *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 573-75 (1987), the Court held that it did not need to determine whether an airport was a public forum or a nonpublic forum because the ordinance challenged—which prohibited all "First Amendment activities" in the airport—was overbroad and therefore unconstitutional regardless of the forum. The Court also declined to adopt a narrowing construction on the ground that doing so would have rendered the statute unconstitutionally vague. *Id.* at 576; see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) ("In focusing on the public forum issue, the Court disregards the First Amendment's central prescription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic."); *AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 9 (1st Cir. 1994) (challenged transportation advertising policy prohibiting messages or representations "pertaining to sexual conduct" was vague and broad, thus making it unnecessary to divine the nature of the forum to invalidate the policy).

<sup>72</sup> See, e.g., *Bullfrog Films v. Wick*, 847 F.2d 502, 512-14 (9th Cir. 1988) (holding unconstitutionally vague federal regulations that governed distribution of benefits to documentary films); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C. Cir. 1980) (holding unconstitutionally vague IRS criteria for granting tax exemptions to non-profit educational groups); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 295-96 (S.D.N.Y. 1992) (holding unconstitutionally vague grant guideline for AIDS educational materials).

<sup>73</sup> *Lebron I*, 811 F. Supp. at 1001, 1003.

<sup>74</sup> *Id.*; see *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); *Saia v. New York*, 334 U.S. 560-62 (1948) (ban on use of sound amplification devices without permission of chief of police unconstitutional prior restraint where no standards prescribed for exercise of discretion); see also *Abel v. Town of Orangetown*, 759 F. Supp. 161, 164-65 (S.D.N.Y. 1991) (striking down zoning ordinance allowing town board unfettered discretion in granting consent to place sign on town property); *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1064-65 (S.D.N.Y. 1990) (invalidating parks special events permit system lacking any regulatory guidelines).

In *City of Lakewood v. Plain Dealer Publishing Co.*,<sup>76</sup> upon which the district court relied, the Supreme Court considered a facial challenge by a daily newspaper to an ordinance vesting the mayor with absolute discretion to grant or deny applications for annual newsrack permits. The Court began by identifying the dangers of standardless licensing schemes that justified permitting a facial challenge. First, the Court noted that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."<sup>76</sup>

Second, the Court explained that the "absence of express standards makes it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power."<sup>77</sup> The Court noted that without standards,

*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.<sup>78</sup>

In *City of Lakewood*, the city asked the Court to presume that the mayor would act in good faith and deny permit applications only for reasons relating to the health, safety or welfare of the citizens, and that additional terms would only be imposed for similar reasons.<sup>79</sup> The Court, however, rejected the city's reliance upon "the very presumption that the doctrine forbidding unbridled discretion disallows."<sup>80</sup>

In *Lebron*, Amtrak attempted to establish a written source for its policy by pointing to the superseded 1967 and 1980 agreements with TDI that permitted Amtrak to refuse any advertising that Amtrak deemed to involve, inter alia, "political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ."<sup>81</sup> However, the 1991 contract in effect

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<sup>76</sup> 486 U.S. 750 (1988).

<sup>76</sup> *Id.* at 757.

<sup>77</sup> *Id.* at 758.

<sup>78</sup> *Id.* at 758.

<sup>79</sup> *Id.* at 770.

<sup>80</sup> *City of Lakewood*, 486 U.S. at 770.

<sup>81</sup> *Lebron I*, 811 F. Supp. at 1001-02.

when Lebron contracted with TDI gave Amtrak the right to disapprove any advertising "at its own discretion"—a standard no less unbounded than that struck down in *City of Lakewood*. As the district court noted, citing *City of Lakewood*, "An unwritten censorship policy is susceptible to inconsistent application that threatens free speech."<sup>82</sup> The district court further found that neither Delaney nor any TDI executive, including the agent who had negotiated the contract with Lebron, had ever heard of a policy against "political" advertising.<sup>83</sup>

The absence of written standards does not, in itself, necessarily render a licensing scheme unconstitutional. As the Supreme Court noted in *City of Lakewood*, standards not explicitly incorporated into a written regulation must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."<sup>84</sup> For the Second Circuit majority, the consistent, albeit limited, practice of reserving the Spectacular for commercial advertisements, coupled with the superseded prior written agreements and DeAngelo's testimony of Amtrak's "historic practice" of reserving the Spectacular for commercial advertising, "dispell[ed] the notion that Amtrak enjoyed 'unbridled discretion' or could have perpetrated an 'illegitimate abuse of censorial power' in rejecting an advertisement because of its political content."<sup>85</sup>

There are several problems with this reasoning. First, there had been only six previous advertisers on the Spectacular, which tends to be leased under long-term contracts, and none of those advertisers had sought to display a noncommercial/political advertisement.<sup>86</sup> Thus, Amtrak's asserted policy

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<sup>82</sup> *Id.* at 1001.

<sup>83</sup> *Id.* at 1002.

<sup>84</sup> 486 U.S. at 770 (emphasis added); cf. *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 762 (D.C. Cir. 1983) ("Although the contract [between the FAA and TDI] does not, by its terms, prohibit political advertisements, it consistently has been applied by the MWA to prohibit ads which would be considered political or issue-oriented in nature, rather than commercial or public service.") (internal quotes omitted).

<sup>85</sup> *Lebron II*, 69 F.3d at 658.

<sup>86</sup> The court of appeals pointed out that "in the twenty-six years of its existence, the Spectacular has never been used for any type of advertising other than commercial promotions. The only advertisements that have appeared on the Spectacular have promoted the DuPont Company, Resorts International in Atlantic City, the Broadway play 'Sophisticated Ladies,' Fujitsu Computers, Nike athletic wear, and A & S Department Stores." *Id.* at 654.

with respect to the Spectacular had never been tested previously. In fact, as already noted, not only the parameters of that policy but also its very existence was, at best, less than clear to those responsible for administering the leasing of the Spectacular or Amtrak station advertising in general.

Second, since Amtrak conceded that the same substantive advertising policy applied throughout Penn Station (the only difference being prior review by Amtrak of proposed advertisements for the Spectacular), the relevant "well established practice" should have been the practice throughout Penn Station, not merely that with respect to the Spectacular. Thus, the *Plain Truth* advertisement, advertisements by non-profit organizations and the public service advertisements of which there was record evidence all properly should have been factored into the panel's analysis. But the court relied upon the unique size and prominence of the Spectacular, which were key reasons for Lebron's insistence upon the Spectacular over any other location in Manhattan, as a basis for ignoring Amtrak's practice with respect to the rest of the station.

Only by artificially truncating the relevant scope of Amtrak's practice, and by giving undue weight to the extremely limited body of Spectacular advertising, was the court able to sustain Amtrak's unwritten policy. Apparently satisfied by DeAngelo's assertion that noncommercial advertising would never be permitted on the Spectacular, the court expressed no concern over Chief Judge Newman's observation that the "vice of conferring unfettered discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination . . . ."<sup>87</sup> In effect, the court ignored *City of Lakewood* and relied upon "the very presumption that the doctrine forbidding unbridled discretion disallows."<sup>88</sup>

Once the court corrected its erroneous assumption that the policy applied to the Spectacular only,<sup>89</sup> it nevertheless left unaltered its conclusion that Amtrak's clear practice as to the Spectacular neutralized any concern with arbitrary en-

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<sup>87</sup> *Id.* at 662 (Newman, C.J., dissenting).

<sup>88</sup> *City of Lakewood*, 486 U.S. at 770.

<sup>89</sup> *Lebron III*, 74 F.3d at 371.

forcement—a concern that would appear to have been amply justified by the acceptance of the *Plain Truth* advertisement and the rejection of Lebron's. In short, even once the basis upon which the panel distinguished *City of Lakewood*—consistent past practice—disappeared, the panel upheld Amtrak's apparently arbitrary refusal to display Lebron's advertisement.

## 2. Vagueness

Even if the unwritten nature of Amtrak's asserted policy against "political" advertising were not sufficient to render it invalid, the district court held that it was unconstitutionally vague.<sup>90</sup> It is difficult to fathom how the court of appeals found otherwise.

It is a fundamental requirement of due process that regulations of speech must be clearly delineated. The due process doctrine of vagueness—applicable to both criminal and non-criminal regulations—incorporates two basic principles. First, the regulation must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."<sup>91</sup> Second, the regulation must provide explicit standards for those charged with its enforcement to prevent discriminatory application.<sup>92</sup> These interests are served by regulations that contain terms "susceptible of objective measurement."<sup>93</sup>

The Supreme Court repeatedly has emphasized that the vagueness doctrine applies with particular force in relation to regulations of constitutionally protected speech. In *Smith v. Goguen*, the Court stated that where a statute "is capable of reaching expression sheltered by the First Amendment, the

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<sup>90</sup> *Lebron I*, 811 F. Supp. at 1002-03.

<sup>91</sup> *Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

<sup>92</sup> *Grayned*, 408 U.S. at 108.

<sup>93</sup> *Cramp*, 368 U.S. at 286-87 (striking down oath requiring state employees to swear they had never lent "aid, support, advice, counsel or influence to the Communist Party").



[vagueness] doctrine demands a greater degree of specificity than in other contexts."<sup>94</sup> Thus, where First Amendment interests are at stake, the Court has emphasized that "precision of drafting and clarity of purpose are essential."<sup>95</sup>

Speech regulations which are not committed to writing present the greatest possible threat to the policies served by the vagueness doctrine. Such undisclosed standards fail to provide notice of what is prohibited, invite arbitrary enforcement and chill protected speech. Vague standards likewise fail to safeguard free speech rights and pose a threat of prior restraint.<sup>96</sup> In *Lebron's* case, the threat of arbitrary enforcement was clear. Likewise, particularly in view of the expense involved in *Lebron's* chosen form of expression, the uncertainty flowing from the arbitrary application of the vague guidelines very well might chill the initiative to undertake other projects dealing with controversial subject matter.

Amtrak rejected *Lebron's* advertisement on the basis of a never-before-asserted policy against "political" advertising. The district court found that policy to be "of such unclear meaning that it is easily susceptible to arbitrary or discriminatory censorship by those administering the policy."<sup>97</sup> But the court of

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<sup>94</sup> 415 U.S. at 573; see *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Keyishian v. Board of Regents of the Univ. of New York*, 385 U.S. 589, 603-04 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)); *Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

<sup>95</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975); see *Button*, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

<sup>96</sup> See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (overturning conviction for violating ordinance giving city commission authority to deny permit for public parade or demonstration if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" require that it be refused); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968) (same regarding standard of "not suitable for young persons"); *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954) (same regarding "immoral" and "tend to corrupt morals"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 496 (1952) ("sacrilegious" an unconstitutionally vague film licensing standard).

<sup>97</sup> *Lebron I*, 811 F. Supp. at 1002.

appeals held, without further discussion: "Nor would a policy against 'political' advertising on the Spectacular be void for vagueness in light of the Supreme Court's decision in *Lehman*"

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In *Lehman*, the Court considered a challenge by a candidate for state office to a policy, embodied in the contract between the City of Shaker Heights and its advertising contractor, that prohibited "political" advertising in car cards on the city's public transit system. There was uncontradicted evidence at trial that during the twenty-six years of its operation, the Shaker Heights public transportation system had not accepted or permitted any "political or public issue advertising on its vehicles."<sup>99</sup> The system had accepted advertisements from churches and civic and public-service oriented groups (which presumably did not address public issues).<sup>100</sup> The advertising contractor informed Lehman that although advertising space was available, its agreement with the city did not allow it to accept political advertising. The Supreme Court of Ohio rejected Lehman's contention that the rejection of his advertisement violated his First Amendment speech and Fourteenth Amendment equal protection rights, holding that Lehman's free speech rights did not extend to rapid transit vehicles and that there was no equal protection violation because all candidates for public office were treated alike.<sup>101</sup> Lehman never contended that the policy was void for vagueness.

The only issues before the Supreme Court in *Lehman* were whether the car cards constituted a public forum and, if they were not, whether the city's policy was reasonable. In his plurality opinion, Justice Blackmun distinguished the car card spaces from traditional public fora such as parks, street corners, open spaces and other public thoroughfares. Terming the city's management of the car card space in the public transportation system "part of a commercial venture,"<sup>102</sup> the plurality concluded that just as a newspaper, periodical, radio or television station need not accept all proposed advertisements, a city

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<sup>98</sup> *Lebron II*, 69 F.3d at 658 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)).

<sup>99</sup> *Lehman*, 418 U.S. at 300-01.

<sup>100</sup> *Id.* at 300.

<sup>101</sup> *Id.* at 301.

<sup>102</sup> *Id.* at 303.

transit system "has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."<sup>103</sup> The plurality went on to conclude:

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.<sup>104</sup>

It is clear that in *Lehman*, the Supreme Court did not confront a vagueness challenge to the city's policy. *Lehman* therefore lacks the precedential value ascribed to it by the Second Circuit in *Lebron*.

Moreover, there are critical factual differences between *Lehman* and *Lebron*. Amtrak's unwritten "policy" is far more open-ended and ambiguous than the written policy at issue in *Lehman*. In *Lehman*, the city drew a sharp distinction between advertisements by "purveyors of goods and services saleable in commerce," and other advertisements, namely political or public issue advertisements.<sup>105</sup> Amtrak's asserted policy, by contrast, does not distinguish between commercial advertisements and political or public issue advertisements. In practice, Amtrak allows some noncommercial political advertisements, such as those for *The Plain Truth*, and prohibits others.<sup>106</sup> Thus, Amtrak's policy does not draw the commercial/noncommercial line upheld in *Lehman*.<sup>107</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Lehman*, 418 U.S. at 304.

<sup>105</sup> *Id.* at 300, 303-04.

<sup>106</sup> See *Lebron I*, 811 F. Supp. at 1004.

<sup>107</sup> Amtrak also suggested that its policy was not vague because Lebron's advertisement was clearly political, and therefore as applied to him the policy was not vague. But "political" and "objectionable" are such vague terms that one can *never* know whether any particular expression will fall within their ambit. Indeed, Amtrak's own employees were divided and uncertain about whether Lebron's advertisement was political. Delaney testified that he understood "political" to cover only campaign advertisements, and thus he would not find Lebron's advertisement political. There is no doubt that some would find Lebron's advertisement political and/or objectionable, but there is equally no doubt that some would find *any* advertisement Amtrak has ever displayed political and/or objectionable. The current Spectacular advertisement for Bloomberg Radio, for example, proclaims "All The News You Need To Know," a statement fraught with political judgment as to what information merits dissemination.

Elsewhere in its opinion, the court of appeals adopted Amtrak's post hoc characterization of its policy with respect to the Spectacular as "excluding noncommercial advertisements from the Spectacular."<sup>108</sup> Such a policy would not be as vulnerable to a claim of vagueness as would a policy against "political" advertising. This undoubtedly was why Amtrak characterized its policy in that manner during the litigation and why the court, apparently intent upon upholding Amtrak's action, accepted that characterization. The court may have assumed that, in informing Lebron that it had a policy against "political" advertising, Amtrak was characterizing its policy against noncommercial advertising in a manner tailored to Lebron's indisputably political advertisement. But that assumption is problematic for several reasons.

First, the district court properly reviewed the policy asserted to deny Lebron the right to display his advertisement: a policy against "political" advertising.<sup>109</sup> Instead of accepting Amtrak's post hoc characterization, the court of appeals properly should have reviewed the policy as asserted (and as understood by the district court), rather than allowing Amtrak to benefit from the unwritten nature of the policy by redefining it once litigation had commenced.

Second, as the district court observed, the terms "political" and "noncommercial" generally are not regarded as synonymous:

Amtrak contends that the term "political" as employed in its policy means to include (and therefore prohibit) all advertisements that do not seek to sell a product or service. However, that is certainly not what the term "political" is generally understood to mean, and, as noted, this is not how the relevant personnel understand the policy. When a standard for governmental control of speech is so unclear, there is a high likelihood of inconsistent and discriminatory application. Such a vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment.<sup>110</sup>

The notion that "political" can be equated with "noncommercial" was belied by Amtrak's own witnesses. Both Bourque and DeAngelo testified that an indisputably commercial

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<sup>108</sup> *Lebron II*, 69 F.3d at 656.

<sup>109</sup> *Lebron I*, 811 F. Supp. at 1002-03.

<sup>110</sup> *Id.* at 1003.

advertisement for *Time* magazine discussing the magazine's coverage of the fall of Mikhail Gorbachev would be barred for its "political" content. When shown several advertisements for Benetton, a clothing manufacturer, Bourque testified that they contained political messages. The trouble Bourque and DeAngelo had in articulating the contours of Amtrak's policy in relation to certain undeniably commercial advertisements demonstrates the amorphous nature of the term "political" and the difficulty of neatly distinguishing between "political" and "commercial."<sup>111</sup> In fact, the two categories frequently overlap.<sup>112</sup>

Justice Brennan highlighted the uncertainty of the distinction between commercial and ideological speech in his concurrence in *Metromedia, Inc. v. City of San Diego*, stating: "May the city decide that a United Automobile Workers Billboard with the message 'Be a patriot—do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it? What if the same sign is placed by Chrysler?"<sup>113</sup>

Finally, Amtrak's contention that its policy barred all noncommercial advertisements was belied by its display of the noncommercial *Plain Truth* advertisement, as well as the pub-

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<sup>111</sup> See *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 769 (D.C. Cir. 1983) ("[T]he capacity of commercial speech to communicate simultaneously political and social messages can be discerned by anyone who gives second thought to a 'public relations' advertisement by an industrial manufacturer of defense-related equipment or an advertisement for commercial abortion services available at a family planning clinic.").

<sup>112</sup> Indeed, Lebron argued that the advertisement for Levi's jeans that was featured on the *Spectacular* when the Second Circuit heard his appeal for the first time "contains political messages about sexuality, commercialism, and objectification of the human body, to name just a few." Lebron Brief at 36, *Lebron II*, 69 F.3d 650 (2d Cir. 1995). That Lebron, an artist steeped in semiotic theory, would see a Levi's advertisement as political whereas other viewers would not perceive such political connotations in the same advertisement demonstrates the vagueness of the term "political" if left undefined.

<sup>113</sup> 453 U.S. 490, 539 (1981) (Brennan, J., concurring). Justice Brennan pointed out that the constitutional concern is not so much with the definitional difficulty of distinguishing commercial from noncommercial speech, but the danger of viewpoint censorship posed by vesting the discretion for drawing that distinction in government officials. *Id.* at 538-39 (Brennan, J., concurring). As noted earlier, the uncertainty in this area is where the vagueness and the viewpoint discrimination problems converge: The vagueness of the categories of permitted and excluded speech creates the opportunity for viewpoint discrimination, as Lebron's experience vividly illustrates.

lic service and nonprofit advertisements that had been displayed in the station without having been removed by Amtrak.

Other courts also have noted that "political" is a term fraught with ambiguity and uncertainty. In *Air Line Pilots Association International v. Department of Aviation of Chicago*, the Seventh Circuit noted that "the content of the word 'political' is not immediately obvious . . . [and] is not self-defining."<sup>114</sup> In a concurring opinion, Judge Flaum explained that "independent of any forum analysis, we should be most cautious whenever a state actor undertakes to restrict political speech,"<sup>115</sup> because

the very terms "political or nonpartisan" are themselves insusceptible of principled application. Far too frequently the mantle of nonpartisanship is thrown over the shoulders of those who have been successful in obtaining political and economic power in our society, while the pejorative of "political" is reserved for those who have been less successful in those same endeavors. More obliquely (although no less perniciously), the appellation of nonpartisan is often affixed to ideas and values whose very emptiness of political content may itself be considered an expression of political position. What is "political" and what is "nonpartisan" must of necessity—as must beauty—lie in the eyes of the beholder. For that very reason, the Constitution will not allow such determinations to be made by government officials.<sup>116</sup>

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<sup>114</sup> 45 F.3d 1144, 1154 n.7 (7th Cir. 1995).

<sup>115</sup> *Id.* at 1162 (Flaum, J. concurring).

<sup>116</sup> *Id.* (Flaum, J., concurring) (quoting *Lawrence Univ. Bicentennial Comm'n v. City of Appleton*, 409 F. Supp. 1319, 1325 (E.D. Wis. 1976)); see *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E.D. Ark. 1994) (holding impermissibly vague a provision of the state's Code of Judicial Conduct prohibiting judicial candidates from announcing their views "on legal or political issues"); *Ruff v. City of Leavenworth*, 858 F. Supp. 1546, 1558 (D. Kan. 1994) (striking down as vague and overbroad a ban on city employees engaging in "political activity" because "[c]ity employees are left to speculate as to what conduct their employer might consider 'political'").

Other cases in which regulations of undefined categories of speech have been struck down on vagueness grounds include the following: *Keyishian v. Board of Regents*, 385 U.S. 589, 598 (1967) ("treasonable" and "seditious," if undefined, are "dangerously uncertain"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952) ("sacrilegious" an unconstitutionally vague film licensing standard); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513 (9th Cir. 1988) ("appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices" unconstitutionally vague standard for evaluating films); *Association of Community Orgs. for Reform Now v. Golden*, 744 F.2d 739, 741, 744 (10th Cir. 1984) (ordinance prohibiting door-to-door peddling and solicitation with exemption for "charitable, religious, patriotic or philanthropic purpose" does not sufficiently guide city council); *Hall v. Board of Sch. Comm'rs of Mobile County*, 681 F.2d 965,

The most compelling basis for the district court's finding that Amtrak's policy was unconstitutionally vague was the confusion of Amtrak's officials over what the policy meant. The court found that

Amtrak's executives were themselves at odds over the meaning of Amtrak's policy. Mr. DeAngelo at times indicated that the policy prohibited only those advertisements that were both "political" and divisive or objectionable; at other times, he stated that the policy prohibited all advertisements that were not devoted to the selling of a product or service. Bruce M. Bourque, Amtrak's Project Director for Real Estate Development for Penn Station, who first reviews advertising material submitted for the Spectacular, knew that there was a policy barring "political" advertisements, but he could not really say what such a policy meant.<sup>117</sup>

DeAngelo at one point defined "political" as "mostly noncommercial," but at still another point he stated that noncommercial advertisements are only "potentially" political.<sup>118</sup> He could not say whether a Benetton advertisement that promoted a product while expressing a political message would be considered political.<sup>119</sup> Thus, according to Amtrak's own officials, the noncommercial character of an advertisement apparently is neither necessary nor sufficient to render an advertisement "political," and what makes an advertisement either "objectionable" or "political" is unclear.<sup>120</sup>

The district court, unlike the appellate panel, readily saw the multiplicity of meanings that can attach to the term "political":

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968-69 (5th Cir. 1982) (school board policy giving administrator prior approval over distribution of literature that is "political or sectarian in nature" held unconstitutionally vague); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1036-37 (D.C. Cir. 1980) ("advocates a particular position," equated with "controversial," unconstitutionally vague standard in IRS regulation).

<sup>117</sup> *Lebron I*, 811 F. Supp. at 1002.

<sup>118</sup> Record on Appeal at A354, *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650 (2d Cir. 1995).

<sup>119</sup> Record on Appeal at A353, *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650.

<sup>120</sup> At oral argument, counsel for Amtrak urged the panel not to rely upon some "bad answers" that Amtrak's witnesses had given during their depositions, and the panel apparently complied. Surely, though, inconsistent responses by those charged with enforcing an advertising policy as to the content of the policy and how it would be applied to a series of specific advertisements is persuasive evidence of Amtrak's failure to define the policy adequately.

The policy might be thought, for example, to bar only advertisements relative to candidates for political office. It might be thought to encompass public service messages on public issues, including drunk driving, safe sex, abortion counselling, and religious messages. It might also cover commercial advertising that included public service messages like "Keep America Beautiful," or that discussed controversial issues.<sup>121</sup>

The undisputed record evidence of Amtrak's confusion and inconsistency in attempting to define its advertising policy provided a clear illustration to the district court of the inherent vagueness of the term "political." Yet the panel majority, without even addressing the basis in the record for the district court's vagueness holding, was content to brush aside a virtual textbook example of vagueness with a citation to *Lehman*, in which the issue was never even considered.

Such striking insensitivity to one of the most significant safeguards against the discriminatory restriction of speech—the vagueness doctrine—is one of the most disturbing aspects of *Lebron*.

### C. Public Forum Analysis

Instead of first engaging in the facial analysis discussed above, the court of appeals treated forum analysis as the proper threshold inquiry. The public forum analysis provides a framework for evaluating rights of speech access to government property by determining "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."<sup>122</sup> Public forum analysis categorizes government property in accordance with the degree to which the property has been opened—either by tradition or by government action—to expressive activity. The doctrine is premised on the notion that "[t]he existence of a right of access to public property and the standard by which limitations upon such a

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<sup>121</sup> *Lebron I*, 811 F. Supp. at 1002.

<sup>122</sup> *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800 (1985); see generally Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220-21 (1984). This Article is indebted to Farber and Nowak who articulate a critical view of the public forum doctrine.



right must be evaluated differ depending on the character of the property at issue."<sup>123</sup> As articulated in *International Society for Krishna Consciousness, Inc. v. Lee*, cited by the panel, public forum doctrine provides that

regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the state has opened for expressive activity by part or all of the public. Regulation of such property is subject to the same limitations as that governing a traditional public forum. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.<sup>124</sup>

Underlying the public forum doctrine is the Supreme Court's long-standing recognition 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."<sup>125</sup>

### 1. The Relevant Forum

The court of appeals began its forum analysis by defining the relevant forum. The issue was whether the relevant forum was just the Spectacular, as Amtrak argued, or Penn Station advertising generally, as Lebron contended based upon the fact that the same advertising standards applied throughout the station. To answer this question, the panel looked to *Cornelius v. NAACP Legal Defense and Education Fund*,<sup>126</sup> in which the Supreme Court held that where legal defense and political advocacy organizations were excluded from participating in a

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<sup>123</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

<sup>124</sup> 505 U.S. 672, 678-79 (1992) (citing *Perry*, 460 U.S. at 45-46).

<sup>125</sup> *Perry*, 460 U.S. at 460 (quoting *United States Postal Serv. v. Council Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981)); see *Lee*, 505 U.S. at 679; *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

<sup>126</sup> 473 U.S. 788 (1985).

federal fund-raising campaign, the relevant forum for purposes of a First Amendment claim was the federal fund-raising campaign, not the federal workplace generally. The Court in *Cornelius* noted that its precedents dictated focusing on the access sought by the speaker in determining "the perimeters of a forum within the confines of government property."<sup>127</sup> In *Cornelius*, access was sought to "a particular means of communication"—the Combined Federal Campaign ("CFC")—rather than to the federal workplace generally, and the Court accordingly identified the CFC as the relevant forum.<sup>123</sup>

Applying this guidance in a strictly literal manner, the panel concluded that the Spectacular was the relevant forum because Lebron had sought access only to the Spectacular because of its unique size, location and visibility, and because he had refused, when Amtrak rejected his work, to accept any other advertising space managed by TDI in New York.<sup>123</sup> That conclusion provided the basis for the court's rejection of Lebron's argument that Amtrak had created a designated public forum for political speech by accepting the *Plain Truth* advertisement and other noncommercial, issue-oriented advertising elsewhere in the station.<sup>130</sup>

The court's decision to limit its public forum inquiry to the Spectacular is not supported by the authority upon which it purports to be based. As Chief Judge Newman pointed out in dissent, in distinguishing a charity drive aimed at federal employees from the entirety of the federal workplace, the *Cornelius* Court focused on "a particular means of communication," not a particular location.<sup>131</sup> The cases relied upon by *Cornelius* likewise focus on the mode of communication to which the speakers had sought access. In *Perry Education Association v. Perry Local Educators' Association*,<sup>132</sup> the Court identified a school district's interschool mail system, rather than school property as a whole, as the relevant forum for

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<sup>127</sup> *Id.* at 801.

<sup>128</sup> *Id.* at 801-02.

<sup>129</sup> *Lebron II*, 69 F.3d at 650, 655.

<sup>130</sup> *Id.* at 656.

<sup>131</sup> *Id.* at 660 (Newman, C.J., dissenting). In *Cornelius*, the Court rejected petitioner's argument that a First Amendment forum "necessarily consists of tangible government property." 473 U.S. at 800-01.

<sup>132</sup> 460 U.S. 37, 46-47 (1983).

analyzing the claims of an excluded teachers' organization, and in *Lehman*,<sup>133</sup> the Court identified advertising space on city-owned buses as the relevant forum.

The circuit court cases upon which the panel relied also support identifying the entirety of the particular mode of communication to which the speaker sought access as the relevant forum. In *Air Line Pilots*,<sup>134</sup> a pilot's union sought access to diorama display cases in O'Hare Airport to display a "political" advertisement critical of United Air Lines for having sold off parts of Air Wisconsin, costing hundreds of Air Wisconsin employees their jobs. The court's forum inquiry centered on display cases in all of the airport terminals rather than just those in the United Airlines concourse in which the union sought to place its advertisements.<sup>135</sup> In *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*,<sup>136</sup> where an advertiser sought access to advertising space on the scoreboard in a municipally owned sports stadium, the court's public forum inquiry focused on advertising space in the stadium. The forum analysis in *Air Line Pilots* and *Hubbard* squarely supports Lebron's argument that advertising display spaces in Penn Station—"a particular means of communication"—were the relevant forum. In none of the cases cited by the panel did the court physically dissect the advertising spaces into separate forums based upon their size or prominence.<sup>137</sup>

The fact that Lebron sought access to one particular display space—a fact that the panel turned against Lebron—should not have been determinative. As Chief Judge Newman pointed out:

It is unimaginable that in *Cornelius* the Court would have permitted one political party to solicit funds through the Combined Federal

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<sup>133</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

<sup>134</sup> *Airline Pilots Ass'n Int'l v. Department of Aviation of Chicago*, 45 F.3d 1144 (7th Cir. 1995).

<sup>135</sup> *Id.* at 1154 (advertisements appearing in airport concourses other than that to which the union sought access are relevant to consideration of advertising policy and practice at airport).

<sup>136</sup> 797 F.2d 552, 555-56 (8th Cir.), *cert. denied*, 479 U.S. 986 (1986).

<sup>137</sup> See *Eagon v. City of Elk City*, 72 F.3d 1480, 1485-87 (10th Cir. 1996) (where a Republican club sought to display a sign at a Christmas event in a public park, the relevant forum for First Amendment analysis was not the Christmas event itself, but the public park).

Campaign at one side of the lobby of a federal building while denying another party the opportunity to solicit funds through the Campaign at the other side, or that in *Perry* the Court would have permitted one group to place a political message in the mail boxes of one school while denying another group a similar right at other schools, or that in *Lehman* the Court would have permitted political advertisements on one bus while prohibiting political advertisements on other buses.<sup>138</sup>

The unique size of the Spectacular, in Chief Judge Newman's view, was immaterial. He pointed out that there are two smaller billboards atop the north and south walls of the rotunda, while the west wall is occupied by the Spectacular. If Amtrak were to permit the Democratic Party to place an advertisement on one of those smaller billboards, he queried,

can it seriously be argued that any court would limit its forum analysis to the one large billboard and permit Amtrak to deny the Republican Party the opportunity to place its political advertisement on the Spectacular, just because no political advertisement had previously been on that precise space?<sup>139</sup>

Chief Judge Newman concluded that the relevant forum must at least be advertising space in the rotunda of Penn Station—which would include the *Plain Truth* advertisement directly in front of the Spectacular toward the center of the rotunda.

The panel's conceptual severing of the Spectacular from all other Penn Station advertising locations was further undermined by Amtrak's concession that it applies the same substantive policy to all advertising in the station. The fact that for Lebron's purposes no other display space was acceptable should not have rendered the station-wide scope of the policy irrelevant.<sup>140</sup>

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<sup>138</sup> *Lebron II*, 69 F.3d at 661 (Newman, C.J., dissenting).

<sup>139</sup> *Id.* The same point may be made with reference to a sports stadium: If the Democratic Party were allowed to advertise on a small billboard beyond the right field wall, could the Republican Party be prohibited from using a larger billboard atop the scoreboard?

<sup>140</sup> The Second Circuit has in the past looked beyond the specific speech venue at issue to determine the nature of the forum, where, as here, the government's policy encompassed multiple venues. In *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676 (2d Cir. 1988), the court affirmed a preliminary injunction ordering that a religious group be given access to a particular school, P.S. 60, on a record showing that "the School Board has opened this forum to Deeper Life through a practice of granting permits to use *public school facilities* to

## 2. The Nature of the Forum

Once the relevant forum has been identified, the court must examine the government's "policy and practice" with respect to permitting speech access to the forum to determine whether the government actor, here Amtrak, intended to create a designated public forum.<sup>141</sup> The Supreme Court repeatedly has stated that the government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."<sup>142</sup> Moreover, selective access does not transform government property into a public forum.<sup>143</sup> Government intent, therefore, has emerged as the most significant factor in determining the nature of a forum for First Amendment purposes.

Several circuit courts have emphasized that the inquiry into the government's policy and practice with respect to speech access must be based upon objective evidence rather than merely upon the government's asserted intent. In *Grace Bible Fellowship, Inc. v. Maine School Administration District Number 5*,<sup>144</sup> the First Circuit stressed that "actual practice speaks louder than words"<sup>145</sup> in public forum analysis, and

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other religious organizations." *Id.* at 680 (emphasis added). Because the challenged policy was district-wide, the court did not limit its analysis to the particular school building Deeper Life sought to use, but looked at prior uses of all school facilities.

<sup>141</sup> *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985) ("the Court has looked to the policy and practice of the government to ascertain" whether it created a designated public forum); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) ("[i]f by policy or by practice" the school had opened the forum, it would create a designated public forum) (emphasis added).

<sup>142</sup> *Cornelius*, 473 U.S. at 802; see *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

<sup>143</sup> Although the extent to which the government can permit "selective access" to property without creating a public forum is by no means clear, the Court has permitted the government considerable latitude in this regard. In *Perry*, the Court held that the fact that some outside organizations such as the YMCA, Cub Scouts and other civic and church organizations had been given permission to use the school mail facilities did not compel a finding that the facilities had been opened "as a matter of course to all who seek to distribute material." 460 U.S. at 47; see *United States v. Kokinda*, 497 U.S. 720, 733 (1990) (plurality opinion) (Postal Service's allowances of "other types of potentially disruptive speech on a case-by-case basis" does not convert postal premises into public forum).

<sup>144</sup> 941 F.2d 45 (1st Cir. 1991).

<sup>145</sup> *Id.* at 47.

looked to prior uses of a school's facilities to determine that those facilities were a designated public forum.<sup>146</sup> In *Stewart v. District of Columbia Armory Board*,<sup>147</sup> the D.C. Circuit similarly underscored the importance of past speech practices and the compatibility of plaintiffs' speech with the forum, noting that "it is from such objective factual indicia that the real intent [to create a designated forum] is often inferred even when expressed intent runs counter."<sup>148</sup>

As the Seventh Circuit stated in *Air Line Pilots* (in language directly relevant to Amtrak's conduct in *Lebron*), a factual inquiry into "consistent policy and practice" is necessary because it "guards against the dangers of post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy. The government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message."<sup>149</sup>

Lebron argued that through its practice of permitting political advertisements under this policy, Amtrak had created a designated public forum for political advertisements and had discriminated on the basis of viewpoint when it refused to display his advertisement.<sup>150</sup> The relevant facts, as found by

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<sup>146</sup> *Id.*

<sup>147</sup> 863 F.2d 1013 (D.C. Cir. 1988).

<sup>148</sup> *Id.* at 1019; see *Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991) ("[o]bjective indicia of intent to create a public forum, combined with a history of consistent practice, can overcome a bare statement of contrary purpose"); *Concerned Women for America, Inc. v. Lafayette County*, 883 F.2d 32, 33-34 (5th Cir. 1989) (looking to library's past practices to override asserted policy against use of public library for political or religious purposes).

<sup>149</sup> *Air Line Pilots Ass'n, Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1153 (7th Cir. 1995). The court also noted that if the government relies upon a "policy" to demonstrate that it has not opened a forum for communicative activity, that policy "must be something more than a strategy adopted or relied upon for the purposes of litigation. . . . [O]bjective indicia of intent are . . . more telling in forum analysis." *Id.* at 1154 (citing *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1019 (D.C. Cir. 1988)).

<sup>150</sup> Cases in which courts have found that a designated public forum was created in public transportation facilities include *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (WMATA created a limited public forum in Washington subway stations by accepting political advertisements in the past); *Penthouse Int'l Ltd. v. Koch*, 599 F. Supp. 1338, 1349 (S.D.N.Y. 1984) (New York City Transit Authority created limited public forum by accepting political advertisements in its subway system); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 592 F. Supp. 544, 553 (N.D. Ill. 1984), *aff'd*, 767 F.2d 1225 (7th Cir. 1985) (Chicago transit system created limited public forum for pro-abortion

the district court, were not challenged on appeal: Amtrak repeatedly had displayed noncommercial, political advertisements in Penn Station, including—for five years—an advertisement for *The Plain Truth* immediately in front of the Spectacular.<sup>151</sup> By Amtrak's own account, one substantive policy governed all advertising in Penn Station, including the Spectacular, and Amtrak had never before rejected an advertisement as "political." Moreover, objective evidence of Amtrak's policy—a contract with its advertising agent, TDI—expressly provided for the display of public service advertisements for nonprofit organizations.

The court of appeals at first ignored these factual findings entirely. In light of Amtrak's "clear" practice of never having opened the Spectacular for "anything except purely commercial advertising," the panel concluded that the Spectacular was either a nonpublic forum or a limited public forum opened for purely commercial speech.<sup>152</sup> In its revised opinion, the court acknowledged the uniformity of Amtrak's policy throughout the station but failed to acknowledge the significance of that uniformity to the public forum analysis.

The need to look to objective indicia of prior practice was especially critical in *Lebron*, where Amtrak relied on an unwritten, undisseminated policy that it had never before asserted to exclude similar speakers. The panel stressed that no political advertisements had been displayed on the Spectacular, but it failed to note that no one before Lebron had sought to display a political advertisement there. The evidence the panel disregarded demonstrated that where people previously had sought to display political advertisements under the same policy, Amtrak had always permitted them to do so. Had the panel examined Amtrak's objective practices in administering its policy stationwide rather than deferring to its post hoc

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messages by permitting other "controversial" public service announcements); *Coalition for Abortion Rights v. Niagara Frontier Transp. Auth.*, 584 F. Supp. 985, 989 (W.D.N.Y. 1984) (public bus company created limited public forum by permitting political and public service advertisements); *Gay Activists Alliance of Washington, D.C., Inc. v. Washington Metro. Area Transit Auth.*, No. 78 Civ. 2217 (D.D.C. July 5, 1979) (WMATA created limited public forum by accepting advertisements dealing with social and political topics).

<sup>151</sup> The *Plain Truth* advertisement was removed sometime after Lebron commenced his action.

<sup>152</sup> *Lebron II*, 69 F.3d at 656.

justification and narrowly focusing on the Spectacular, it would have concluded that Amtrak created a designated public forum.

The panel's refusal to acknowledge the relevance of Amtrak's practice of allowing political advertisements elsewhere in Penn Station under what Amtrak admitted was a single, stationwide policy, "emptie[d] the limited-public-forum concept of all its meaning."<sup>153</sup> Under the panel's approach, a public school that had permitted outside Protestant and Catholic groups to use meeting rooms on its second floor could deny a Jewish group access to a larger first floor room by asserting a policy against any outside groups using school rooms. If the first floor room had not previously been used by outside groups, the school's decision would be upheld, even though other religious groups had been granted access to other rooms under the same policy. Discrimination can always be made to look neutral by narrowing the scope of analysis to ignore cases of different treatment.

In support of its conclusion that the Spectacular was either a nonpublic forum or a limited public forum opened only for "purely commercial speech,"<sup>154</sup> the panel relied in part upon *Calash v. City of Bridgeport*.<sup>155</sup> In *Calash*, the court held that the city was not required to make a sports arena available to a commercial rock concert promoter even though permission previously had been given for a Beach Boys concert to benefit various charitable organizations. The court held that even though the concert would not be incompatible with the property's principal function as a sports arena, plaintiff's exclusion was not unconstitutional because the city had the right to limit access to the arena to civic, charitable and nonprofit

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<sup>153</sup> *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting).

<sup>154</sup> As the majority's opinion indicates, the distinction between a limited public forum, which the government has opened for expressive activity for a limited amount of time, for a limited class of speakers, or for a limited number of topics, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), and a nonpublic forum, which the government has not opened for expressive activity but which may be used for activities that further the forum's business or the goals the government uses the property to serve, is not always clear. *Cornelius*, 473 U.S. at 819-20 (Blackmun, J., dissenting).

<sup>155</sup> 788 F.2d 80 (2d Cir. 1986).



organizations, as had been its consistent policy.<sup>156</sup> Relying upon *Perry* and *Cornelius*, the *Calash* court held that the city had not intended to open the stadium to the general public for all uses or permit its use for profit-making purposes, and that the stadium was therefore a nonpublic forum.<sup>157</sup> The court further held that even if the city had created a limited public forum, under *Perry* the right of access extended only to "entities of similar character" to those permitted access.<sup>158</sup> Since the plaintiff was not a civic, charitable or nonprofit speaker, exclusion was permissible because it was consistent with the limits the city had placed on access.<sup>159</sup>

One problem with the panel's reliance on *Calash* is that in *Calash* the city adopted a written policy prohibiting use of the stadium by profit-making entities,<sup>160</sup> whereas Amtrak had no operative written policy excluding either political or noncommercial advertisers from the Spectacular or any other part of Penn Station. Thus, in *Calash*, the class of speakers granted (and, by implication, the class denied) access were defined clearly. But even assuming that Amtrak's policy against political advertising were clearly set forth and sufficiently precise to be readily comprehensible, a ban on "political" speech does not address the permissible class of speakers. Corporations, for instance, engage in political speech all the time. For example, Mobil Oil regularly places political advertisements on the Op Ed page of the *New York Times*.<sup>161</sup> Thus, Amtrak's policy lacked the objective basis for distinguishing between appropriate speakers that was present in *Calash*. Accordingly, Amtrak's exclusion of Lebron, and its attempt to define the Spectacular as a forum limited to commercial speech, could not be justified by reference to clear, objective standards, thus rendering *Calash* inapposite.

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<sup>156</sup> *Id.* at 84.

<sup>157</sup> *Id.* at 83.

<sup>158</sup> *Id.* at 84 (citing *Perry*, 460 U.S. at 48). In *Perry*, the result turned entirely on the fact that the educational association that permitted access to the school's internal mail system was the teachers' official bargaining representative, whereas the excluded association lacked the same official status.

<sup>159</sup> *Id.*

<sup>160</sup> *Calash*, 788 F.2d at 84.

<sup>161</sup> See, e.g., N.Y. TIMES, Oct. 31, 1996, at A29 (Mobil advertisement entitled "The Top 10 Reasons For Voting November 5th").

Moreover, as discussed above, "political" standing alone does not define adequately the category of speech to be excluded from the forum. Indeed, the evidence of Amtrak's previous acceptance of political and public service advertising in Penn Station was inconsistent with its asserted ban on such advertising.

Another factor relevant to evaluating claims of speech access to public property is the physical characteristics and function of the forum and its context. Compatibility of the speech with the purposes of the forum, considered in its broader context, frequently has been a component of the Supreme Court's review of speech restrictions on government property.<sup>162</sup> However, in *Cornelius*, the Court pointed out that the nature of the property and its compatibility with expressive activity are relevant "to discern the government's intent," not as part of an objective inquiry into the nature of the forum.<sup>163</sup> Several members of the Supreme Court, taking issue with the Court's analysis in *Cornelius*, have highlighted the importance of utilizing objective criteria to establish the proper level of scrutiny to be applied to speech restrictions on public property. Justice Kennedy has observed, "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case."<sup>164</sup> Justices Kennedy, Blackmun, Stevens and Souter, concurring in *Lee*, stated that "the [public forum] inquiry must be an objective one, based on the actual, physical characteristics and uses of the property."<sup>165</sup>

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<sup>162</sup> *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992) (purpose of airport terminals to facilitate efficient air travel supports finding that they are not public fora); see, e.g., *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 801-02 (1985) (identification of the CFC rather than the federal workplace as the relevant forum did not preclude considering the special nature and function of the federal workplace in evaluating restrictions on access to CFC); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (university campus possesses many characteristics of a traditional public forum).

<sup>163</sup> *Cornelius*, 473 U.S. at 802.

<sup>164</sup> *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring).

<sup>165</sup> 505 U.S. at 695. In *Lee*, although the Court concluded that the airport terminals at issue were nonpublic fora, the Court distinguished between airports and other transportation centers. The Court noted that airports, unlike bus and rail terminals, have "security magnets," restrict public access and are visited almost

In *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, the D.C. Circuit noted that the advertising display cases in National and Dulles Airports were "an organic part" of the airport terminals and that, in undertaking public forum analysis, the advertising displays "cannot be wholly divorced . . . from the nature of the public place in which they occur."<sup>166</sup> This observation is especially pertinent to the Spectacular, which is a huge, illuminated, curving wall that helps define the contours of the rotunda. Penn Station is a major thoroughfare, transportation center and underground mall for hundreds of thousands of New Yorkers every day. In addition to the political advertisements noted above, Amtrak also has permitted various other forms of political speech in Penn Station. Copies of *The Plain Truth* have been distributed freely from an advertising kiosk in the rotunda. Under Amtrak's "Free Speech" access policy, anyone may receive a permit to distribute leaflets and express political points of view. News agents and booksellers advertise and sell books and magazines with political points of view throughout the station. Notably, the record contained no evidence that Amtrak ever had received a complaint about political speech of any kind in the station. Thus, political speech is clearly compatible with Penn Station's other uses in the same way political speech is compatible with a downtown sidewalk. In fact, the only thing that distinguishes the Penn Station thoroughfare from a downtown sidewalk is that it is underground.<sup>167</sup>

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exclusively for travel-related purposes. The Court also noted that bus and rail terminals traditionally have been privately owned, which was true of Penn Station until 1967.

<sup>166</sup> 708 F.2d 760, 766 (D.C. Cir. 1983). Rejecting the trial court's focus solely on the advertising displays without considering their context, the D.C. Circuit stated that such analysis "distorts the first amendment realities of this particular medium of communication at these particular public places." *Id.* Although the court's conclusion that the airport terminals were public fora was effectively overruled by the Supreme Court in *Lee*, its analysis of the relationship between advertising displays and the terminals as a whole remains valid. See *Cornelius*, 473 U.S. at 802 (nature and function of federal workplace relevant to evaluating restrictions on access to fund-raising campaign); *Air Line Pilots Ass'n, Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1114, 1156 (7th Cir. 1995) (both broader physical context and commercial purpose of airport advertising displays must be considered in public forum inquiry).

<sup>167</sup> The panel's failure to consider the physical characteristics and prior uses of Penn Station and its advertising is inconsistent with the Supreme Court's plurality decision in *Lee*, 505 U.S. at 690-91 (O'Connor, J., concurring). In *Lee*, the Court

As Chief Judge Newman pointed out in dissent, the panel's failure to consider the physical setting of the Spectacular also leads to insupportable results. It plainly would be unconstitutional for Amtrak to lease some billboard space in the Penn Station rotunda to the Democratic Party and simultaneously to deny the Spectacular to the Republicans on the ground that their speech violated a policy against "political" advertising in Penn Station. Yet that is effectively what Amtrak did. *The Plain Truth* was permitted to run an advertisement urging viewers to "Say No to Adultery," but Lebron was barred from displaying an advertisement that effectively urged viewers to "Say No to Coors." Since Amtrak had only one policy, there was no justification for treating Lebron differently.

The extremely public nature of Penn Station, including the rotunda, appears to have had no bearing whatsoever upon the court of appeals' forum analysis. Indeed, the distinction between Penn Station and the restricted access fora at issue in other First Amendment public forum cases could hardly be more striking.<sup>168</sup> The Spectacular and its indoor mall-like environment are also quite different from the public buses at issue in *Lehman* or the airport terminals at issue in *Lee*. Surely these clear differences in relationship between the forum and the public at large should have been germane to the court's forum analysis. Because the court was content to overlook the overwhelmingly public character of the station, New York City subway riders (a captive audience under *Lehman*) in the past year have seen advertisements protesting Citibank's

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held that a restriction on the distribution of pamphlets was not "reasonable in light of the purposes of the forum" because there was no evidence that leafletting would cause any disruption of the airport's other uses. Here, had the panel considered the evidence showing that prior political speech in Penn Station had never created a problem, it would have found Amtrak's policy unreasonable, just as the Court had in *Lee*. The only justification the panel cited for the policy—avoiding the appearance of favoring some political views—cannot be reconciled with the fact that Amtrak has permitted other political speech in Penn Station, including political advertisements and even solicitation for political causes, without any adverse effects.

<sup>168</sup> *Cornelius*, 473 U.S. 788 (fund-raising campaign in federal workplace); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (mail system in public school); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Adderley v. Florida*, 385 U.S. 39 (1966) (state prison).

labor practices, but Lebron's advertisement was excluded from the Spectacular, part of an enormous open area to which the captive audience rationale would seem inapposite.

One obvious problem with the public forum doctrine, as articulated by the Supreme Court and as applied by the Second Circuit in *Lebron*, is that deference to government intent in classifying the forum eliminates (or greatly diminishes the significance of) consideration of the compatibility of the speech with the forum. In *Cornelius*, for instance, the Court considered compatibility of the property with expressive activity only as bearing upon the government's intent. The Court found that the government's policy and practice did not demonstrate an intent to open the CFC to all tax-exempt organizations<sup>169</sup> and emphasized that "strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of [a] nonpublic forum is not mandated."<sup>170</sup> Justice Blackmun, dissenting in *Cornelius*, emphasized the circular reasoning involved in classifying the forum on the basis of government intent:

If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum.<sup>171</sup>

Justice Blackmun's concern, shared by Justices Kennedy, Souter, Stevens<sup>172</sup> and Brennan,<sup>173</sup> is that government regulation of speech on public property effectively evades judicial oversight if courts categorize the forum solely with regard to the government's intent and fail to consider the compatibility of the speech in question with the uses of the forum.<sup>174</sup>

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<sup>169</sup> *Cornelius*, 473 U.S. at 804.

<sup>170</sup> *Id.* at 808.

<sup>171</sup> *Id.* at 825 (citation omitted).

<sup>172</sup> *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 695 (1992) (Stevens, J., concurring).

<sup>173</sup> *United States v. Kokinda*, 497 U.S. 720, 751 (1990) (Brennan, J. dissenting).

<sup>174</sup> As Justice Blackmun put it in *Cornelius*:

Rather than recognize that a nonpublic forum is a place where expressive activity would be incompatible with the purposes the property is intended to serve, the Court states that a nonpublic forum is a place where we need not even be concerned about whether expressive activity is incom-

The panel's analysis vividly illustrates the threat to speech access to public property posed by such uncritical judicial deference to the governmental objectives for content-based speech restrictions in determining the nature of the forum. As Justice Brennan noted in *United States v. Kokinda*:

Ironically, these public forum categories [public, limited-purpose public, and nonpublic]—originally conceived of as a way of preserving First Amendment rights—have been used in some of our recent decisions as a means of upholding restrictions on speech.<sup>175</sup>

That is precisely what happened in *Lebron*.

### 3. Reasonableness

A restriction of speech in a nonpublic forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."<sup>176</sup> The court of appeals viewed *Lehman* as dispositive of the reasonableness of Amtrak's ban on political advertising on the Spectacular. As noted above, in *Lehman*, the plurality found that car card spaces on city buses were a nonpublic forum and that the city's exclusion of political advertisements was reasonable to protect revenues, to spare a captive audience from "the blare of political propaganda" and to avoid "lurking doubts about favoritism."<sup>177</sup> In the plurality's view, these were "reasonable legislative objectives . . . advanced by the city in a proprietary capacity."<sup>178</sup>

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patible with the purposes of the property.

473 U.S. at 820-21, (Blackmun, J., dissenting).

<sup>175</sup> 497 U.S. at 741 (Brennan, J., dissenting) (citation omitted); see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) ("In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic").

<sup>176</sup> *Cornelius*, 473 U.S. at 808; *Lee*, 505 U.S. at 683; *Kokinda*, 497 U.S. at 730 (plurality opinion).

<sup>177</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion).

<sup>178</sup> *Id.* at 303-04. The *Lebron* panel also relied upon *Lee*, in which the Court (relying in turn upon *Kokinda* and *Lehman*) stated: "Where 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." *Lee*, 505 U.S. at 678.

As Lebron pointed out, however, the majority in *Lehman* was provided by Justice Douglas, who in his concurring opinion relied upon "the right of the commuters to be free from forced intrusions on their privacy."<sup>179</sup> In Justice Douglas' view, consideration of the constitutional rights of the passengers "precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."<sup>180</sup> Notwithstanding its citation to the holding in *Lehman* in several cases that did not involve captive audiences,<sup>181</sup> the Supreme Court has repeatedly recognized the dependence of *Lehman* on the "captive audience" rationale, which applies only in settings where there is a substantial intrusion on privacy.<sup>182</sup>

Following *Lehman*, the panel concluded that "Amtrak's decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable."<sup>183</sup> The panel based this conclusion upon the advisability of avoiding "the criticism and the embarrassments of allowing any display seeming to favor any political view," particularly in light of the unique size of the Spectacular.<sup>184</sup>

Avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum,<sup>185</sup> but

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<sup>179</sup> *Lehman*, 418 U.S. at 307 (Douglas, J., concurring).

<sup>180</sup> *Id.*

<sup>181</sup> See *Lebron II*, 69 F.3d at 657 n.3 (citing cases).

<sup>182</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 n.19 (1981) (plurality opinion) (*Lehman* turned on a "unique fact situation[ ]" having no application to consideration of outdoor billboards); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 539-40 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (rejecting captive audience rationale for ordinance barring nudity in films shown by drive-in theater and distinguishing *Lehman* on ground that intrusion of privacy is greater for passenger on bus than for person on street); see *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 767 (D.C. Cir. 1983) (distinguishing the more expansive, open areas of an airport terminal from the crowded confines of the buses at issue in *Lehman*). But see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 37 n.9 (1983) (rejecting Justice Brennan's characterization of *Lehman* as limited in scope and involving an "unusual" forum); *Lebron II*, 69 F.3d at 657 n.3 (citation omitted); *Air Line Pilots Ass'n, Int'l v. Department of Aviation of the City of Chicago*, 45 F.3d 1114, 1153 n.3 (7th Cir. 1995) (declining to limit *Lehman* to situations involving captive audiences).

<sup>183</sup> *Lebron II*, 69 F.3d at 658.

<sup>184</sup> *Id.*

<sup>185</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *Greer v. Spock*,

not in a limited public forum.<sup>186</sup> The panel's willingness to accept this justification for Amtrak's policy illustrates the extent to which meaningful judicial scrutiny of content restrictions is cut off by designating the forum "nonpublic." First, the panel reached its decision without any evidence that other non-commercial advertisements in Penn Station, including the *Plain Truth* advertisement which directly confronted pedestrians crossing through the rotunda, had given rise to questions about favoritism.<sup>187</sup> Second, the panel failed to mention that the advertisement states clearly that Lebron paid for the work and disclaims any association between the work and "TDI, Amtrak, or The Port Authority of New York & New Jersey."<sup>188</sup> Third, the panel gave no consideration to the First Amendment interests at stake. Finally, the court failed to consider the availability of alternative means by which Lebron could have communicated his message. In both *Perry* and *Cornelius*, the availability of other means by which the speakers could have reached the same audience was expressly considered in evaluating the reasonableness of the restrictions at issue.<sup>189</sup> In *Lebron*, where the court was well aware that Lebron had designed his work specifically for the Spectacular so as to reach a particular audience and that he had rejected as inadequate other advertising locations throughout the city, the absence of an equally effective alternative forum was not even considered.

A central purpose of the First Amendment, "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people"<sup>190</sup>—a purpose

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424 U.S. 828, 839 (1976); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

<sup>186</sup> *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); see *Cornelius*, 473 U.S. at 829 (Blackmun, J., dissenting).

<sup>187</sup> In *Cornelius*, the Court pointed to record evidence supporting the inference that permitting legal defense and political advocacy groups to participate in the CFC would jeopardize the success of the campaign. 473 U.S. at 810-11.

<sup>188</sup> See *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 772 (D.C. Cir. 1983) ("To the extent that the FAA wishes to ensure that political advertisements are not misconstrued as official pronouncements of government policy, it can serve this end by the far less restrictive alternative of printing disclaimers . . . in much the same way that it now displays printed disclaimers regarding the political views espoused by leafletters and solicitors.").

<sup>189</sup> *Cornelius*, 473 U.S. at 809; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983).

<sup>190</sup> *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Roth v. United*



that would have been directly advanced by the display of Lebron's advertisement—was accorded no weight under the court's public forum analysis. However understandable Amtrak's interest in maintaining a level of decorum in the station, the court jettisoned its role as a guardian of constitutional rights by failing to consider whether the need for Amtrak's content-based restrictions on speech outweighed Lebron's First Amendment rights or that the restrictions were administered in a principled, non-arbitrary manner according to clear standards.

In short, the panel used public forum doctrine to foreclose a balancing of the competing interests, with unfortunate consequences both for Lebron's freedom of expression and the public interest in informed debate on issues of public importance.

#### 4. Viewpoint Neutrality

Speech regulations in nonpublic fora must be viewpoint neutral as well as reasonable in light of the purposes of the forum.<sup>191</sup> The government "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."<sup>192</sup> Viewpoint discrimination is "censorship in its purest form."<sup>193</sup> As the Supreme Court recently has made clear in *Lamb's Chapel v. Center Moriches Union Free School District*<sup>194</sup> and *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>195</sup> the doctrine is not limited to discrimination against one side of a dispute. Rather, it extends to discrimination against entire categories of speech, such as religious speech.<sup>196</sup>

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States, 354 U.S. 476, 484 (1957)).

<sup>191</sup> *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46; *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring).

<sup>192</sup> *Cornelius*, 473 U.S. at 806; see *Perry*, 460 U.S. at 61 (Brennan, J., dissenting) ("Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not.").

<sup>193</sup> *Perry*, 460 U.S. at 62 (Brennan, J., dissenting).

<sup>194</sup> 508 U.S. 384 (1993).

<sup>195</sup> 115 S. Ct. 2510 (1995).

<sup>196</sup> See *infra* note 197.

Lebron argued that even if the panel were to find Penn Station advertising to be a nonpublic forum, Amtrak's policy would be unconstitutional because it is not neutral as to viewpoint. Based on DeAngelo's invocation of the language in the superseded 1980 Amtrak-TDI contract, which prohibited political advertising that would be objectionable to Amtrak's passengers, Lebron argued that such a policy effectively gave a heckler's veto to Amtrak's passengers because the policy expressly turned on the hostility of the audience to the speaker's point of view, an unconstitutional basis for restricting speech.

Lebron also advanced two additional bases for finding Amtrak's policy to be viewpoint discriminatory. First, in allowing the *Plain Truth* advertisement, with its fundamentalist Christian messages on the European Community, homosexuality, adultery and gambling in the same room as the Spectacular, while rejecting Lebron's advertisement because it was political, Amtrak impermissibly discriminated between political viewpoints. Second, relying on *Lamb's Chapel* and *Rosenberger*,<sup>197</sup> Lebron argued that rejecting his advertisement, which effectively urged viewers not to buy Coors beer for political reasons, under a policy that would permit a Coors beer advertisement urging viewers to buy the beer was viewpoint discriminatory.

The district court agreed with Lebron that if, "as Mr. DeAngelo sometimes testified," Amtrak's policy were "directed against divisive, controversial, or objectionable matter," or if it gave Amtrak "discretion to refuse any advertising involving 'views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the

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<sup>197</sup> In *Lamb's Chapel*, the Supreme Court held that a public school district engaged in impermissible viewpoint discrimination when it denied a religious group access to its property to show religious films. 508 U.S. at 392-94. The Court reasoned that the school's across-the-board ban on "religious" films constituted viewpoint discrimination because secular films on the same subject matter were not banned. It was irrelevant that there was no showing that any *particular* religious viewpoint was disfavored; the categorical rejection of religious films was sufficient to constitute viewpoint discrimination. *Id.* Likewise, in *Rosenberger*, the university's ban on funding for a student religious publication was held to discriminate on the basis of viewpoint, since it was not a prohibition against religion as a subject but rather against student journalism with a religious editorial viewpoint. 115 S. Ct. at 2517. Thus, in both cases "religious" speech was singled out for exclusion.

public . . . , it would be void."<sup>198</sup> The trial court noted that speech such as Lebron's "cannot be prohibited . . . merely because it provokes disagreements and offends the sensibilities of the majority . . . . It is precisely this speech for which the protection of the First Amendment was intended."<sup>199</sup>

The district court also opined that if the policy was as set forth in TDI's guidelines, it would be void for the same reason, "for these guidelines are designed to ensure against advertising that is controversial, in bad taste, or inconsistent with the taste and preferences of the majority of the community,"<sup>200</sup> standards which the court held impermissible for a government actor, as it had found Amtrak to be.<sup>201</sup>

The court of appeals panel conceded that if Amtrak's policy were used to screen out only controversial political advertisements, it would be void for viewpoint bias.<sup>202</sup> However, relying upon the 1967 and 1980 agreements with TDI, which the district court had found were no longer even in effect,<sup>203</sup> and DeAngelo's testimony as to his understanding of the language in those contracts, the panel concluded: "[I]t seems more sensible to read the language as a justification, however inartfully phrased, for a categorical ban against political advertising rather than as a test for discriminating against certain types of political advertisements."<sup>204</sup>

The panel dismissed as "specious" Lebron's argument that Amtrak engaged in viewpoint discrimination by refusing to display his advertisement urging viewers not to buy Coors beer because of the causes which the profits would be used to support. In the panel's view, the subject matter of Lebron's work "can hardly be described, with any remote sense of accuracy, as the merits or demerits of Coors beer. As Lebron himself stated in an affidavit, 'I do not seek to sell anything other than ideas with this advertisement.'"<sup>205</sup> Since the panel limited its anal-

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<sup>198</sup> *Lebron I*, 811 F. Supp. at 1004 (quoting 1980 Amtrak-TDI contract).

<sup>199</sup> *Id.* (quoting *Penthouse Int'l Ltd. v. Koch*, 599 F. Supp. 1338, 1350 (S.D.N.Y. 1984)).

<sup>200</sup> *Id.* at 1002.

<sup>201</sup> *Id.* at 1004-05.

<sup>202</sup> *Lebron II*, 69 F.3d at 658.

<sup>203</sup> *Lebron I*, 811 F. Supp. at 1002.

<sup>204</sup> *Lebron II*, 69 F.3d at 658 (citation omitted).

<sup>205</sup> *Id.* at 659 n.4.

ysis to the Spectacular, it avoided entirely Lebron's argument that rejecting his advertisement while displaying the *Plain Truth* advertisement constituted viewpoint discrimination.

In dissent, Chief Judge Newman opined that Amtrak may well have engaged in viewpoint discrimination. He noted that Lebron

makes a substantial argument that viewpoint-based discrimination is occurring when government allows an advertisement promoting the sale of a product, but purports to prohibit an advertisement opposing a product because of the views of its manufacturer. Presumably, Amtrak would allow an advertisement opposing the sale of Coor's [sic] beer because of its alcoholic content or for any reason unrelated to the views of its manufacturer.<sup>205</sup>

The majority, however, avoided a thoughtful analysis of the viewpoint discrimination issue. It simply interpreted away the ambiguity as to whether Amtrak's policy prohibited all political advertisements or just objectionable or controversial political advertisements. Although conceding that the language being construed was "inartfully phrased"—an odd admission for a court to make regarding a speech regulation it proceeds to uphold—the court construed it in the manner most favorable to Amtrak.

DeAngelo had testified that he understood the policy to prohibit, in relevant part, advertisements that are "objectionable to our riding public and others associated with us including political and other types of potentially controversial matters."<sup>207</sup> To the district court, this testimony meant that Amtrak's policy prohibited "only those advertisements that were both 'political' and divisive or objectionable."<sup>208</sup> The district court also found that the content of Amtrak's policy was unclear and that Amtrak's witnesses offered conflicting versions of the policy.<sup>209</sup> Moreover, evidence of numerous political advertisements throughout the station strongly suggested

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<sup>205</sup> *Id.* at 662-63 (Newman, C.J., dissenting). Chief Judge Newman did not decide the viewpoint discrimination issue, since he found it unnecessary to do so in order to affirm the district court's decision.

<sup>207</sup> Record on Appeal at A354, *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650 (2d Cir. 1995), *amended, reh'g denied*, 74 F.3d 371 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

<sup>208</sup> *Lebron I*, 811 F. Supp. at 1002.

<sup>209</sup> *Id.*

that some political advertisements were acceptable, while others, like Lebron's, were not. On such a record, it would seem to be an abandonment of principled decisionmaking to construe in the least constitutionally objectionable manner a superseded policy impervious to ready comprehension.

Having construed the policy as banning all "political" advertisements the court still was confronted with the *Lamb's Chapel* argument: Could Amtrak permit an advertisement for Coors beer but reject an anti-Coors beer advertisement? The court's footnote disposing of this argument is hardly convincing. Lebron did not contend, as the court implies, that his advertisement addressed the merits or demerits of Coors beer.<sup>210</sup> Rather, he stated that his advertisement urged people not to buy Coors beer because, in doing so, they were contributing profits to Coors that were used to support a right-wing political agenda that, in Lebron's view, was destructive of civil rights at home and supportive of civil war abroad. In other words, Lebron argued that to the extent the desirability of purchasing Coors beer would be an acceptable subject for an advertisement, expressing a "political" viewpoint on that subject would be permissible under *Lamb's Chapel*.

The relevant portion of the text of Lebron's advertisement states, "When you buy Coors products, you help them turn back civil rights, censure high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs." Lebron's testimony that he did not seek to sell anything other than ideas with the advertisement was merely an acknowledgement that the work was noncommercial; it is in no way inconsistent with his argument that the thrust of his advertisement was to urge people not to buy Coors beer.

The panel's decision cannot readily be reconciled with *Lamb's Chapel*, *Rosenberger* or the circuit court decisions which also have held that across-the-board bans on "religious" speech constitute impermissible viewpoint discrimination.<sup>211</sup>

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<sup>210</sup> *Lebron II*, 69 F.3d at 659 n.4.

<sup>211</sup> See *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995) (ban on all religious displays in public building lobby invalidated as viewpoint-based); *Good News/Good Sports Club v. School Dist. of Laude*, 28 F.3d 1501 (8th Cir. 1994) (invalidating policy prohibiting religious speech in school as viewpoint-based), *cert. denied*, 115 S. Ct. 2640 (1995); *Hedges v. Wauconda Com-*

In *Air Line Pilots*, the Seventh Circuit stated that if an across-the-board ban on "religious" speech constitutes viewpoint discrimination, so does an across-the-board ban on "political" speech.<sup>212</sup> It "matters little whether the entire category of 'political' speech was prohibited,"<sup>213</sup> the court reasoned, because if other speech on the subject would have been permitted, the ban is viewpoint-based.<sup>214</sup> The Seventh Circuit explained that the district court's holding that no viewpoint discrimination had occurred because all "political" advertisements were barred was flawed because that determination "effectively avoided viewpoint inquiry by retreating to an exaggerated level of generality. The appropriate focus of the viewpoint inquiry examines whether the proposed speech dealt with a subject that was 'otherwise permissible' in a given forum."<sup>215</sup>

The *Air Line Pilots* court criticized an approach to the viewpoint discrimination inquiry that would permit speech to be excluded on the basis of a category label rather than on the basis of the subject matter being addressed. As the court there noted, "[a] view labelled as 'political' (presumably because it is controversial or challenges the status quo) may nevertheless exist in opposition to a view that has otherwise been included in a forum."<sup>216</sup>

Of course, even accepting the propriety of the more discerning viewpoint analysis urged by the Seventh Circuit, the issue remains whether the general subject matter addressed by the speech in question previously has been, or in theory could be, permitted in the forum. In *AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transportation Authority*, the First Circuit held that the suppression of condom adver-

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munity Unit Sch. Dist. No. 118, 9 F.3d 1295, 1297 (7th Cir. 1993) (school policy prohibiting all religious written material invalidated as viewpoint discrimination).

<sup>212</sup> *Air Line Pilots Ass'n v. Department of Aviation of the City of Chicago*, 45 F.3d 1144, 1159 (7th Cir. 1995).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* The *Rosenberger* Court also rejected the argument that no viewpoint discrimination had occurred because an entire class of viewpoints had been discriminated against. The Court held that "exclusion of several views on [a] problem is just as offensive to the First Amendment as exclusion of only one." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995).

<sup>215</sup> *Air Line Pilots*, 45 F.3d at 1159 (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

<sup>216</sup> *Id.* at 1159.

tisements that used sexual innuendo and double entendre to convey their message constituted viewpoint discrimination where the transit authority had displayed an advertisement for the movie "Fatal Instinct," which the court found "more overtly sexual and more blatantly exploitative" than the proposed condom advertisements.<sup>217</sup> In that case, the court examined whether the aspect of the speech that formed the basis for its exclusion, its sexual content, previously had been permitted in the forum and found that it had. The cases in which the Supreme Court has found violations of viewpoint neutrality likewise demonstrate that the pertinent inquiry focuses on whether the objected-to aspect of the speech in question is of a general type that previously has been permitted in the forum.<sup>218</sup>

The display of the *Plain Truth* advertisement in the same portion of the station as the Spectacular clearly constituted viewpoint discrimination: Conservative, religious discussion of social and political issues was permitted, while Lebron's liberal, secular discussion of social and political issues was excluded under the same policy. But Lebron's argument that rejection of his advertisement based upon its message not to buy Coors beer on political grounds was viewpoint discrimination presented a more difficult question.

Consistent with the Seventh Circuit's analysis in *Air Line Pilots*, Lebron asked the panel to look beyond the labels "political" and "commercial" to the general subject being addressed.<sup>219</sup> But how should that subject matter properly be

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<sup>217</sup> 42 F.3d 1, 11 (1st Cir. 1994).

<sup>218</sup> See, e.g., *City of Madison, Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (striking down state order that board of education prohibits employees other than union representatives from speaking at board meetings on matters subject to collective bargaining); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (striking down decision by school officials to suspend students for wearing black arm bands to protest Vietnam War where students had been permitted to wear symbols related to other politically significant issues); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (invalidating denial of Jehovah's Witnesses to public park to give Bible talks where other religious organizations had been given access for purposes related to religion).

<sup>219</sup> Because Amtrak's policy is so vague, it is not clear whether Budweiser, a commercial advertiser, could include political messages similar to Lebron's in a Spectacular advertisement. Such ambiguity is where the problems of vagueness and viewpoint discrimination dovetail. It is interesting to speculate as to what Amtrak would have done had Budweiser sought to lease the Spectacular for an

framed? The panel took the view that the merits of Coors beer is a subject otherwise includible in the forum, but the politics of the Coors family is not. Lebron argued for a broader view of the pertinent subject, namely whether to buy Coors beer. If the forum is open to commercial speech, Lebron contended, non-commercial political speech critical of commercial messages cannot be excluded. In this regard, it is significant to note that Lebron's proposed advertisement incorporates a skillfully executed parody of an actual Coors beer advertisement, including the Coors logo, a satirical variation on Coors' then-current advertising slogan, and professional models posing as clean-cut, upbeat Coors beer drinkers. The argument that the excluded speech does not address otherwise includible commercial subject matter is weak indeed when the speech in question is an elaborate parody of an actual commercial advertisement.<sup>220</sup>

The panel's view that Lebron could not establish viewpoint discrimination because his advertisement does not address the merits or demerits of Coors beer suggests that had Lebron directly addressed the quality of the product (i.e., if his critique of Coors were analogous to Ralph Nader's critique of GM cars for being unsafe), he would have had a legitimate claim of viewpoint discrimination. Presumably, in the panel's view, had Lebron been addressing the quality of the Coors product, his

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advertisement urging viewers to buy Budweiser instead of Coors because Anheuser-Busch, unlike Coors, does not fund right-wing political causes (or because it funds liberal causes such as the Sierra Club and the ACLU). Such an advertisement obviously would have been both commercial and political, and it would be no less controversial than Lebron's proposed advertisement.

<sup>220</sup> The rejection of Lebron's advertisement because it was political struck at the conceptual heart of the work. The piece relies upon the subversion of the form and content of commercial advertising to communicate its critique of consumer culture. As an exposé of what Lebron views as damaging uses of corporate profits, the medium (a parody of an actual Coors beer advertisement) and the message (the disturbing reality beneath the carefree gloss of Madison Avenue image-making) are inextricably intertwined. The careful balance of mimicry and subversion in the work depends upon Lebron's having access to a forum in which the mimicry achieves a plausibility that, in turn, enhances the subversion. Lebron's political message, in other words, was deliberately related both in form and in content to the type of commercial speech that concededly is permitted on the Spectacular. It would be a different case if Lebron's proposed advertisement were critical of the administration's Middle East policy. Such an advertisement clearly would not relate to subject matter to which the Spectacular (as opposed to Penn Station advertising) had been opened.



advertisement would not have been political. But such an advertisement still would have been noncommercial, and thus, under Amtrak's characterization of its policy as banning all noncommercial advertisements on the Spectacular, it still could have been barred.

In any event, it is difficult to see why a noncommercial advertisement urging viewers not to buy a bad product would be permissible whereas an equally noncommercial advertisement urging viewers not to buy a product because the owner of the company exploits his workers or funds abortion clinics would not be. Both are engaging a subject—the desirability of purchasing a product—that is permissible speech on the part of the manufacturer of the product. To permit a product-oriented, negative advertisement by Ralph Nader's Public Citizen organization but not a politics-oriented, negative advertisement from Michael Lebron—as the Second Circuit's reasoning appears to allow—would seem to be viewpoint-based discrimination. The government may not define the contours of public debate in such a manner.

The court took both too broad and too narrow a view of the includible subject matter. By holding that a ban on all political advertisements was viewpoint-neutral, it failed to look closely enough at the specific subject matter at issue. By suggesting that Lebron's work did not address an includible subject because it did not discuss the merits of Coors beer, the court unduly restricted the scope of permissible speech on a commercial subject. In short, the court's bases for rejecting Lebron's claim of viewpoint discrimination are not conceptually sound. At a minimum, the court's failure to explore the implications of its "product versus politics" distinction is unsatisfying and issue-begging.

## 5. Inconsistent Application

The panel's ruling as to whether Amtrak's policy had been consistently applied depended entirely upon its finding that the Amtrak policy applied only to the Spectacular. The district court found it "clear beyond dispute" that Amtrak's policy had not been followed consistently.<sup>221</sup> Yet the court of appeals had

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<sup>221</sup> *Lebron I*, 811 F. Supp. at 1004.

no trouble disposing of the finding that the policy had been inconsistently applied, since its finding that the forum was limited to the Spectacular enabled it to exclude from its analysis the *Plain Truth* advertisement, the political and public service advertisements that are expressly permitted by TDI's advertising guidelines,<sup>222</sup> and the advertisements placed by such noncommercial organizations as the New York Department of the Environment and the New York Department of Commerce. Amazingly, even its concession in its revised opinion that its finding regarding the scope of Amtrak's policy was incorrect did not compel the panel to acknowledge the inconsistency with which the policy had been applied. As Chief Judge Newman aptly noted, the majority "concluded that the policy has been consistently applied by overlooking the instances where it has not been consistently applied."<sup>223</sup>

In defending Amtrak's discretion to determine which noncommercial advertisements were suitably innocuous to be displayed in the station, the court downplayed the significance of the noncommercial advertisements identified by Lebron, calling them "[a] handful of assertedly borderline cases."<sup>224</sup> Quoting Chief Judge Newman's dissent from the court's first opinion in the case, the court noted that the Spectacular "has not become a forum for advertisements of such pointed political content" as Lebron's advertisement.<sup>225</sup> While that may be true, such fine discrimination between speakers on the basis of content too closely approximates the very evil—censorship—that the First Amendment forbids.

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<sup>222</sup> The district court noted that TDI's guidelines do not prohibit "political" advertisements but rather provide that they are to be treated as commercial advertisements and are subject to full rate charge. *Id.* at 1003, n.11.

<sup>223</sup> *Lebron III*, 74 F.3d at 372 (Newman, C.J., dissenting).

<sup>224</sup> *Lebron II*, 69 F.3d at 660.

<sup>225</sup> *Id.* Chief Judge Newman made the observation in the context of discussing the appropriate relief. *Lebron v. National R.R. Passenger Corp.*, 12 F.3d at 394 (Newman, C.J., dissenting). In *Lebron II*, he criticized the majority for taking his observation out of context, insisting that the statement "was directed solely at the issue of the possible scope of relief, not the issue of liability . . ." 69 F.3d at 663.

## CONCLUSION

*Lebron* is not an encouraging case for those looking to the Second Circuit for vigilant protection of First Amendment rights. What can most generously be described as a casual attitude toward the district court's factual findings, combined with a wooden, insensitive interpretation of the public forum doctrine, reflects a determination to accord the government acting as a proprietor great discretion in controlling speech access to its property.

While due regard for the government's right to manage its commercial property in an efficient manner is an essential component of public forum analysis, the right to selectively exclude advertisers whose views may provoke controversy, without the guidance of clear and coherent regulations that draw such distinctions for valid reasons, cannot be squared with the Constitution, regardless of the forum.

*Cornelius*<sup>226</sup> best exemplifies the Supreme Court's reluctance to second-guess the government's decisions as to the speech access it will allow to public property that is not a traditional public forum. That reluctance flows from the centrality of the government's intent to the forum designation analysis.<sup>227</sup> *Lebron* is an extreme example of this deferential approach. Indeed, the court's refusal to modify its holding once it was forced to recognize that the Spectacular was governed by the same advertising standards as the rest of Penn Station left nothing supporting the court's denial of *Lebron*'s claim other than deference.

The panel seems to have taken the view that the unusual size and prominence of the Spectacular, as well as Amtrak's role as a proprietor rather than a regulator, justified allowing Amtrak greater discretion in controlling access to the space. A more appropriate approach would have been just the opposite: Since the greater prominence of speech on the Spectacular relative to the other advertising spaces in the station made the Spectacular a more significant means of communication and heightened the likelihood that Amtrak would seek to suppress

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<sup>226</sup> *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 803-04 (1985).

<sup>227</sup> *Id.* at 802-03.

controversial speech in that space, more searching scrutiny of Amtrak's regulation of the Spectacular would have been justified. That notion has particular force here, since for Lebron there was no satisfactory alternative means of communicating his message.<sup>228</sup>

Ironically, Lebron himself was stung by a curtailment of constitutional rights not unlike that which he sought to bring to the public's attention.

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<sup>228</sup> *Id.* at 803-04.

