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Planned Parenthood: An Aborted Attempt to Waive Rule 52(a)'s Clearly Erroneous Standard of Review in the Public Forum

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Planned Parenthood: An Aborted Attempt to Waive Rule 52(a)'s Clearly Erroneous Standard of Review in the Public Forum

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I. INTRODUCTION

Critics have persistently and persuasively attacked the cursory review courts give to restrictions on first amendment¹ expression on government property that courts do not consider a public forum.² These critics see a threat to free expression because the Supreme Court requires only that the regulation be reasonable,³ in-

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S. Ct. 3439, 3460 (1985) (Blackmun, J., dissenting) (tradition or governmental designation of forum should not be completely determinative of a citizen's right to speak on public property). See generally Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1337 (1979) (demanding a constitutional right of minimum access to certain government properties other than streets and parks); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1240 (1984) (calling for careful "focused balancing" of government and first amendment interests when the government restricts speech in nontraditional public forums); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931, 939 (emphasizing that the first amendment value of furthering individual expression and participation in the political process compels broad protection of speech on government property); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 271 (criticizing the limited scrutiny the Court gave to the prohibition on political speech in city buses allowed in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)); Note, *The Public Forum: Minimum Access, Equal Access and the First Amendment*, 28 STAN. L. REV. 117, 137 (1975) (The government cannot automatically deny access to government property not traditionally used for expression even though the forum is not peculiarly suited to the speaker or the topic.) [hereinafter cited as Note, *Minimum Access*]; Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 143 (1982) (far-reaching demand that regulations of speech on all government property meet a "necessary to a compelling state interest" test) [hereinafter cited as Note, *Unitary Approach*].

3. Compare the scrutiny given regulations in a public forum where "the rights of the State to limit expressive activity are sharply circumscribed" with that used for other gov-

stead of requiring it to pass the more exacting compelling state interest test the Court applies when the government restricts speech or when a court determines that the property is a public forum.⁴ Yet, an equally invidious challenge arises when a trial court upholds the regulation and the appellate court defers to the trial court's fact-finding on the public forum issue. This deference may allow the regulation to escape serious scrutiny both at trial and on appeal.

Because historical facts are so crucial to support the conclusion that the government designated the property for expression, any meaningful review requires their independent evaluation.⁵ Such independence is impossible, however, unless the trial judge provides a thorough and complete account of the historical facts which support both the public forum label and the intermediate factual findings that determine whether the label is appropriate. This particularity allows the appellate court to further refine and define what it means for government property to be a public forum. Ironically, the distinctions that appellate courts draw between varied factual settings when they conduct this process of elaborating and defining the characteristics of a public forum increase the importance of the trial courts' subsidiary factual findings.

The appellate court's holding in *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Authority*⁶ inevitably raises these issues and concerns. The court held that Federal Rule of Civil Procedure 52(a)'s "clearly erroneous"⁷ standard governs its review of factual findings supporting the trial court's conclusion that Chi-

ernment property where limits are valid so long as they are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). See generally Comment, *Constitutional Law: First Amendment Restrictions Upon Nonpublic Forum Need Only Be Reasonable and Without Discriminatory Intent*, 23 WASHBURN L.J. 185 (1983). The Court has never rejected the government's attempt to limit access unless it considered the government property to be a public forum.

4. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 529, 540 (1980) (The Court required that a content-based regulation of speech be a precisely drawn means of serving a compelling state interest because the Court did not consider the forum government property.).

5. See *infra* note 101 and accompanying text.

6. 787 F.2d 1225 (7th Cir. 1985). Other courts have considered different issues arising from appellate review of public forum cases. See *infra* note 101.

7. FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.").

cago's transit system was a public forum.⁸ Planned Parenthood Association/Chicago Area (PPA) brought suit in federal court against the Chicago Transit Authority (CTA) alleging CTA violated its first and fourteenth amendments rights by refusing to run PPA's ads on CTA property.⁹ After a bench trial, the district court issued a permanent injunction ordering CTA to sell advertising space to PPA, but the court reserved the issue of damages for later resolution.¹⁰ On appeal, CTA directly challenged the applicability of Rule 52(a)'s "clearly erroneous" standard of review of the trial court's findings on the public forum issue. Specifically, CTA challenged the district court's findings that CTA had previously accepted "controversial public-issue advertising,"¹¹ and that CTA had no policy against accepting such advertising. The court of appeals held, however, that the clearly erroneous standard did apply to its review and that there was no clear error.¹²

CTA used an exclusive agent, Winston Network, Inc., to accept and place advertising in available CTA space. This space included car cards on the interiors of buses and trains. As a matter of routine, Winston did not seek approval from CTA before accepting full-rate advertising. Winston often sought such approval, however, when a nonprofit organization such as PPA wanted to have its message posted for a nominal rate.¹³ After Winston's request for advice, CTA rejected a PPA ad which did not mention abortion,¹⁴ and another ad which did refer to PPA's abortion service. Although PPA expressed its willingness to pay full rates, CTA refused to accept the ads.¹⁵ CTA defended its rejection as no more than applying its "long-standing, consistently-enforced policy . . . to reject controversial public-issue advertisements."¹⁶ The fundamental points of disagreement were whether any such policy in fact existed, and how to characterize the forum's past use. These factors determine whether the government property is a designated public forum.¹⁷

The limited appellate review in *Planned Parenthood* did not

8. 767 F.2d at 1229.

9. *Id.* at 1227.

10. *Id.*

11. *Id.* at 1228.

12. *Id.* at 1229-30.

13. *Id.* at 1227.

14. *Id.*

15. *Id.* at 1227 n.2.

16. *Id.* at 1227.

17. See *infra* notes 50-55 and accompanying text.

present an obvious threat to free speech interests precisely because the plaintiff was successful at trial. The court explicitly acknowledged that this influenced its reasoning by its argument that the "doctrine of independent review has never been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech."¹⁸ The question for the future is whether Rule 52(a)'s clearly erroneous standard will govern when the trial court denies relief to the free speech claimant. What if the trial court in *Planned Parenthood* had concluded that Chicago did in fact have a consistently enforced policy of accepting only noncontroversial subjects? PPA could, of course, raise on appeal the legitimacy of this particular limited subject-matter designation. But more importantly, one must assess the appropriate standard of review of the trial court's characterization of the forum's past use as noncontroversial. Is this the sort of factual conclusion that merits only limited appellate scrutiny? A final more broad-based danger is that appellate courts will begin to consider the "public forum" label itself a factual finding subject only to Rule 52(a)'s clearly erroneous standard.¹⁹

This latter danger is present because the Court defines the public forum label in terms of historical facts.²⁰ The Court uses an awkward two-step analysis, which first identifies government property as either a forum or a nonforum and then applies a given level of scrutiny.²¹ Although courts conduct legal-type balancing when they scrutinize a regulation of expression on government property, their decision as to which level of scrutiny to apply turns on historical facts. Professors Farber and Nowak recently explained how this approach "distracts attention from the first amendment values at stake in a given case. It almost certainly will hinder lower court judges from focusing on those values or from making sense of Su-

18. 767 F.2d at 1229.

19. It is the possibility that courts may see fit to consider the public forum label itself as a fact or an ultimate fact which presents the most direct challenge to first amendment values. This would severely restrict the scope of appellate review. See *infra* notes 72-75 and accompanying text. See generally Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944); Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) to Findings of Fact in Federal Nonjury Trials*, 53 MISS. L.J. 473 (1983); Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328 (1962).

20. See *infra* notes 62-66 and accompanying text.

21. The term "nonforum," which the Court itself has not used, is borrowed from Note, *Unitary Approach*, *supra* note 2, at 127.

preme Court precedent."²² They continued that "public forum doctrine is a useful heuristic device—a shorthand method of invoking this balance of interest. But when the heuristic device becomes the exclusive method of analysis, only confusion and mistakes result."²³ Another cogent point is that the "criteria upon which the Court has based its decisions to classify places as public forums or nonforums, however, do not ensure that restrictions on expression are necessary to the furtherance of important interests."²⁴ Justice Blackmun discussed these concerns in a recent dissent.²⁵ Critics direct their attack at the complete absence of traditional first amendment concerns in deciding whether the property is a public forum.²⁶

II. *Bose's* IMPACT ON REVIEW OF SUBSIDIARY FACTS DETERMINATIVE OF SPEECH'S PROTECTION

The Supreme Court's recent treatment of the law-fact dichotomy and Rule 52(a) in *Bose Corp. v. Consumers Union of United States*²⁷ further presses upon us the importance of thoughtfully addressing the appropriate standard of appellate review. The Court refused to apply the Rule's clearly erroneous standard to a federal appellate court's review of a finding of actual malice in a federal bench trial. The Court premised its reasoning on a body of first amendment precedent mandating that state appellate courts

22. Farber & Nowak, *supra* note 2, at 1224 (footnote omitted).

23. *Id.* at 1234-35.

24. Note, *Unitary Approach*, *supra* note 2, at 135-36.

25. "Thus, the public forum, limited public forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S. Ct. 3439, 3459 (1985) (Blackmun, J., dissenting).

26. An analysis of what standard courts should use in reviewing restrictions on expression on government property is beyond the scope of this paper. For a thorough review of traditional first amendment values in the public forum context, see Cass, *supra* note 2, at 1309-16 nn.140-61. A central theme of criticism is that the Court's analysis does not explicitly consider the compatibility of expression with the property's dedicated use. For a discussion of how first amendment values require that all access regulations be subject to a compelling state interest test, see Note, *Unitary Approach*, *supra* note 2, at 131-35. This would require access even where expression is incompatible with the property's dedicated use if the interest served thereby is insufficient to limit speech. *Id.* at 142. For a discussion of the view that prohibiting censorship is the core value of the amendment, see Farber & Nowak, *supra* note 2, at 1235.

27. 104 S. Ct. 1949 (1984). *Bose* began as a trade libel suit. The defendant, Consumers Union, published an article critical of the plaintiff's speakers. The article stated that the sound tended to wander "about the room"; but sitting without a jury, the judge found that the sound actually moved "along the wall" between the speakers. *Id.* at 1954. The crucial issue on appeal was knowledge of this factual "error" by an employee of Bose.

and the Supreme Court itself independently review the findings of state courts.²⁸ Significantly, the Court supported its analogy that

28. *Id.* at 1958, 1960-65. The Court in *Bose* said that it also conducted an independent review of a federal court's fact-finding in *Time, Inc. v. Pape*. *Bose*, 104 S. Ct. at 1964-65 (construing *Time, Inc. v. Pape*, 401 U.S. 269 (1971)). It is true that the Court in *Time* said that in "cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Time*, 401 U.S. at 284. Like *Consumers Union* in *Bose*, *Time* was the defendant in a libel suit. Yet, the procedural contexts of *Bose* and *Time* are significantly different.

The Court in *Time* considered the case only after the trial court at the close of evidence had granted *Time's* motion for a directed verdict. *Id.* at 283. The court of appeals reversed, holding that it was for the jury to decide whether *Time* acted with actual malice. *Id.* The Supreme Court reversed again. In this context, the Court decided as a matter of law that the evidence "was not enough to create a jury issue of 'malice' . . ." *Id.* at 290. Unlike *Bose*, the Court in *Time* did not independently review the evidence as found by a trial court or jury. Rather, the Court held that given the evidence, no reasonable jury could find the defendant to have acted with actual malice.

This procedural distinction is not merely academic. In *Tavoulaareas v. Piro*, the court used it to distinguish *Bose*. 763 F.2d 1472 (D.C. Cir.), denying petition for reh'g, 759 F.2d 90 (1985). In *Tavoulaareas*, the trial court had entered a judgment notwithstanding the verdict after the jury found the defendant had published false material with actual malice. *Tavoulaareas v. Piro*, 759 F.2d 90, 98 (D.C. Cir. 1985). In considering the petition for rehearing, the court of appeals said that the defendant "is confronted with an adverse jury verdict and that the law applicable to judgments notwithstanding the verdict . . . does not confer free reign to override the credibility findings inherent in the jury verdict. This case is not like *Bose* . . . which involved a bench trial and written findings by the judge." *Tavoulaareas*, 763 F.2d at 1473. In its conclusion, the court cited *Time* to support its own holding that the issue is solely "whether [all the evidence in the record] could constitutionally support a judgment for the plaintiff." *Id.* at 1480 (citing *Time, Inc. v. Pape*, 401 U.S. 269 (1971)).

If other appellate courts follow *Tavoulaareas's* lead, then *Bose* will have no impact on jury trials. But the Court's reasoning potentially has a broader application than just federal bench trials:

The intermingling of law and fact in the actual malice determination is no greater in state or federal jury trials than in federal bench trials. . . . And, of course, the limitation on appellate review of factual determinations under Rule 52(a) is no more stringent than the limitation on federal appellate review of a jury's factual determination under the Seventh Amendment, which commands that "no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Bose, 104 S. Ct. at 1964 n.27.

The unsettled question after *Bose* is whether in a libel suit a jury's factual finding is reviewed with greater deference than the findings of a federal judge. Although the court in *Tavoulaareas* concluded that it should, Justice Rehnquist said in his dissent in *Bose* that the opposite is true in a state jury trial. He said that "it is notable, however, that *New York Times* came to this Court from a state court after a jury trial, and thus presented the strongest case for independent fact-finding by this Court." *Bose*, 104 S. Ct. at 1969 n.2 (emphasis added). He favored independent review of state jury findings due to the "absence of a distinct 'yes' or 'no' in a general jury verdict as to a particular factual inquiry . . ." *Id.*

The majority in *Bose* cited *Fiske v. Kansas* as controlling the review of state court jury verdicts. *Id.* at 1964 n.27 (citing *Fiske v. Kansas*, 274 U.S. 380 (1927)).

And this Court will review the findings of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be with-

independent review should extend to federal bench findings by cit-

out evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts.

Fiske, 274 U.S. at 385-86.

The jury in a state trial convicted the defendant in *Fiske* of violating the Kansas Criminal Syndicalism Act by soliciting members for the Industrial Workers of the World (IWW). *Id.* at 381. The key issue before the Supreme Court was not whether the defendant had solicited members, but whether the IWW was an organization that taught criminal syndicalism as defined in Kansas. On this issue the trial judge instructed the jury members that they had to be satisfied beyond a reasonable doubt that the IWW was such an organization. *Id.* at 383-84. It is unclear which rationale the Court used in *Fiske* to justify its review. The Court noted that the defendant was convicted "without any . . . evidence" that the IWW taught criminal syndicalism. *Id.* at 387. But the Court also alluded to the intermingling of law and fact in this issue when it said the finding was unjustified "either as an inference of law or fact . . ." *Id.* at 386.

Whatever the holding of *Fiske*, the Court in *Bose* construed it as justifying independent review of state court decisions where issues of fact and law are intermingled. It is crucial to note that nothing in *Fiske* justifies independent review of subsidiary factual findings which are not somehow "intermingled." A case arising out of the state courts which is factually similar to *Bose* should not be subject to independent review as allowed in *Fiske* if Justice Rehnquist was correct on two points. He suggested first that the precedents of independent review cited by the majority were at best examples of such intermingled findings, and second, that the real issue in *Bose* was the historical fact of the defendant's knowledge without an intermingled component.

Justice Rehnquist distinguished the cases used by the majority to support independent review of the actual malice issue. The "obscenity and child pornography cases . . . and cases involving words inciting anger or violence . . . more clearly involve the kind of mixed questions of fact and law which call for de novo appellate review than do the *New York Times* 'actual malice' cases, which simply involve questions of pure historical fact." *Bose*, 104 S. Ct. at 1969 n.1. Not only is his characterization of these precedents defensible, but also some of these cases do not legitimately support the proposition that the Court independently reviewed any factual finding.

The Court in *Bose* cited the obscenity case *Miller v. California* as precedent for independent factual review. *Bose*, 104 S. Ct. at 1963 (citing *Miller v. California*, 413 U.S. 15 (1973)). Although the Court in *Miller* reviewed the defendant's conviction in a state jury trial for distributing obscene material, the Court did not independently review facts. *Miller*, 413 U.S. at 17. Instead, the Court independently reviewed the constitutionality of "a state law that regulates obscene material . . ." *Id.* at 25. It is also questionable whether the Court has ever really independently reviewed facts in the libel setting. For example, *Time* was a directed verdict requiring no independent review of its facts on appeal.

The Court in *Bose* cited another libel case, *Monitor Patriot Co. v. Roy*. *Bose*, 104 S. Ct. at 1965 (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971)). In *Monitor*, the Court reviewed a jury verdict that the defendant had committed libel. *Monitor*, 401 U.S. at 270. But the Court held that the trial court had improperly charged the jury and thus the jury had not necessarily applied the *New York Times* standard to an official running for public office. *Id.* at 277. (referring to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Even in *New York Times*, the Court's primary holding was a matter of law and not a review of facts. The Court held that the common law doctrine of libel per se was unconstitutional as applied. *New York Times*, 376 U.S. at 267. Only in applying its new actual malice standard did the Court analyze the facts. Its conclusion that the defendant had not acted with actual malice could not have been an independent review of the jury's findings, because the jury never even considered the actual malice issue. *Id.* at 285-86.

ing key cases from the public forum area.²⁹ *Bose*, then, directly

The Court also offered the public forum case of *Edwards v. South Carolina* as supporting the independent review of factual findings. *Bose*, 104 S. Ct. at 1962-64 (citing *Edwards v. South Carolina*, 372 U.S. 229 (1963)). In *Edwards* the factual findings were not in issue because there "was no substantial conflict in the trial evidence." *Edwards*, 372 U.S. at 230. The real thrust of the Court's holding in *Edwards* was that as a matter of law the "Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views." *Id.* at 237.

These criticisms of the Court's use of some precedents do not mean that the Court in *Bose* was unable to offer genuine precedents to support its independent review of state court findings. Indeed, the Court independently reviewed the whole record in later cases in both the areas of obscenity and the public forum. In *Jenkins v. Georgia*, the Court independently reviewed the state jury's finding that the film "Carnal Knowledge" was obscene. *Bose*, 104 S. Ct. at 1963 (citing *Jenkins v. Georgia*, 418 U.S. 153 (1974)). The Court reversed the defendant's conviction "even though a properly charged jury unanimously agreed on a verdict of guilty." *Jenkins*, 418 U.S. at 161. In *Cox v. Louisiana* the Court drew its own inferences despite a genuinely conflicting record of the facts. 379 U.S. 536, 540 n.1, 541 n.2, 546 n.9 (1965). To these one can add, as Justice Rehnquist did, the cases involving words inciting anger or violence: *Hess v. Indiana*, 414 U.S. 105 (1973); *Street v. New York*, 394 U.S. 576 (1969).

Yet simply acknowledging that there is precedent for independent review does not mean that it supports the Court's reasoning in *Bose*. Justice Rehnquist's proposition seems on point that the obscenity and fighting words cases are examples of "intermingled" fact and law issues. The legal standard is linguistically incapable of being sufficiently specific so as to render the issue factual. But a central theme of this note is that the Court in *Bose* actually conducted an independent review of the historical fact of the defendant's knowledge of the statement's falsity. Two responses are possible. The first is that despite the precedential legitimacy of *Bose*, it still stands as an example of subsidiary fact review.

The second response may actually shore up the legitimacy of extending independent review of subsidiary facts to the public forum setting. As mentioned above, the Court in *Cox* independently reviewed a factual record fraught with conflicting versions of the historical facts. *Cox* is a formative public forum case. See *infra* note 29. *Cox* is one of the best examples of the Court using its independent judgment to draw inferences that are not "intermingled" findings of fact and law. In this civil rights protest case, a judge sitting without a jury convicted the defendants of disturbing the peace, obstructing public passages, and courthouse picketing. *Cox*, 379 U.S. at 538. The Court simply could not use the *Edwards* solution and label the defendant's conduct peaceful and therefore automatically protected. The Court first had to characterize the defendant's conduct based upon a conflicting record. "Estimates of the crowd's size varied from 1,500 to 3,800." *Id.* at 540 n.1. "There were conflicting versions in the record as to the time the demonstration would take . . ." *Id.* at 541 n.2. "The cheering and shouting were described differently by different witnesses . . ." *Id.* at 546 n.9. The Court's thorough review of these historical facts indicated that restrictions on speech on government property required the Court to draw its own inferences from the record.

29. *Bose*, 104 S. Ct. at 1962-64 (explaining the duty to make an independent examination of the whole record recognized in *Edwards v. South Carolina*, 372 U.S. 229 (1963) and later in *Cox v. Louisiana*, 379 U.S. 536 (1965)). See *supra* note 28. For a colorful description of these early civil rights protest cases, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 4-10 [hereinafter cited as Kalven, *Public Forum*]. Professor Kalven displayed remarkable prescience in predicting that the vigorous defense of free speech found in *New York Times Co. v. Sullivan* would "find its exuberant formula put to hard tests when the speech is in public places." *Id.* at 3 (citing *Sullivan*, 376 U.S. 254 (1964)). See also Kalven, *The New York Times Case: A Note on "The Central Meaning of*

raises the possibility that independent review is also appropriate in the public forum context.

The Court in *Bose* conducted an independent review of the historical or pure fact of the defendant's knowledge of the statement's falsity.³⁰ Were the Court to defer to the trial court's finding on this issue, appellate review would be nearly perfunctory because such knowledge is sufficient to find actual malice.³¹ Yet, the Court's decision to forego the clearly erroneous standard is all the more remarkable because Rule 52(a) commands that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."³² In the public forum context certain historical facts have likewise become essentially determinative of whether the public forum label is appropriate.³³ *Bose* provides strong precedent for conducting a thorough appellate review of even subsidiary facts which are crucial in defining the protection afforded speech. Independent review is only appropriate when the trial court rejects the free speech claim because its purpose is to protect first amendment values. It is not so clear, however, that *Bose* can be read so narrowly. *Bose* may actually allow the party opposing the free speech claim to demand independent review when it is unsuccessful at trial.³⁴ The key precedents speak, though, of a denial of constitutional rights below.³⁵

the First Amendment," 1964 SUP. CT. REV. 191 [hereinafter cited as Kalven, *New York Times Case*].

30. The Court admitted that "the actual malice determination rests entirely on an evaluation of Seligson's [defendant's employee] state of mind when he wrote his initial report, or when he checked the article against that report." *Bose*, 104 S. Ct. at 1956. The Court also said that it does "not stretch the language of the rule to characterize an inquiry into what a person knew at a given time as a question of 'fact.'" *Id.* at 1958. For a discussion of the central issue in *Bose*, see *supra* note 27. See also Comment, *The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 MERCER L. REV. 711, 727 (1985).

The court in *Tavoulaareas v. Piro* did not interpret *Bose* as requiring an appellate court to independently review subsidiary factual findings. 763 F.2d 1472 (D.C. Cir.), *denying petition for reh'g*, 759 F.2d 90 (1985). This holding may be limited to an appellate court's review of directed verdicts in jury trials. See *supra* note 28. In *Tavoulaareas* the court said that "it is the application of the rule (the constitutional function) rather than the finding of subsidiary facts to which *Bose* primarily speaks." *Id.* at 1480. Whether or not *Tavoulaareas* is correct in its reading of *Bose*, the court does correctly narrow the issue as to "how deep into the initial fact finding process an appellate court must delve in a libel appeal." *Id.* at 1479.

31. *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964).

32. FED. R. CRV. P. 52(a).

33. See *infra* notes 78-82 and accompanying text.

34. Monaghan, *supra* note 19, at 245.

35. See *Bose*, 104 S. Ct. at 1958, 1960-65. In the public forum context appellate courts have been more likely to independently review factual findings where a trial court has denied a first amendment claim. See *infra* note 101.

The text of Rule 52(a) itself forces the federal courts to categorize issues as either fact or law.³⁶ A more detailed analysis of the status and history of public forum doctrine is necessary, of course, before one can coherently decide whether it is law or fact to consider government property a public forum. Only then is it appropriate to consider the "vexing nature"³⁷ of the law or fact issue. This latter inquiry will undoubtedly benefit, however, by eschewing the somewhat metaphysical deduction traditionally associated with these limited categories and more concretely analyzing the policy implications of either label. Choosing the factual label not only means limited appellate review, but also halts the process of further elaborating and defining the attributes of a public forum.³⁸

Policy favors keeping the ultimate label "public forum" a matter of law subject to plenary review so that appellate courts can continue to define what it means for property to be a public forum. Yet, crucial intermediate factual findings can effectively prohibit an appellate court from calling the property a public forum. The Court's reasoning in *Bose* provides strong precedent for independent review of even these subsidiary facts or inferences because the protection given to speech varies significantly and directly upon these findings.³⁹ It is crucial to remember that while Rule 52(a) applies only to federal bench trials, the categorization as either law or fact has implications for other forums and procedural contexts.⁴⁰

III. PUBLIC FORUM PRECEDENT

PPA did not argue that the car cards in CTA's buses and trains are a traditional public forum.⁴¹ These traditional forums such as streets and parks, "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens,

36. FED. R. CIV. P. 52(a) (clearly erroneous standard applies only to those findings properly classified as facts).

37. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1960 (1984) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1981), which in turn cites *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)). Unfortunately this particular line of precedent has contributed nothing to resolving the problem and it has probably done more damage by its treatment of ultimate facts. See *infra* note 83.

38. See *infra* notes 96-99 and accompanying text.

39. See *infra* notes 119-27 and accompanying text.

40. See *supra* note 28. See generally Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020 (1967); Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1020 (1966).

41. *Planned Parenthood*, 767 F.2d at 1231.

and discussing public questions."⁴² It is only in these traditional forums that a constitutional right of minimum access has evolved.⁴³ The traditional forum can never be completely closed because "the government may not prohibit all communicative activity."⁴⁴ Courts carefully scrutinize all regulations of speech, and even those "of the time, place and manner of expression which are content-neutral" must still be "narrowly tailored to serve a significant government interest, and to leave open alternative channels of communication."⁴⁵

The key feature distinguishing a traditional public forum from a nontraditional or designated forum is that there is never a constitutional right of access to the latter. The government is neither "required to create the forum in the first place," nor "required to indefinitely retain the open character of the facility . . ."⁴⁶ Indeed, the history of public forum doctrine indicates that the concept at its core is only related to the constitutional right of access principle.⁴⁷ Ironically, the appellate court in *Perry Local Educa-*

42. *Hague v. CIO*, 307 U.S. 496, 515 (1939). See Kalven, *Public Forum*, *supra* note 29, at 12-13 (contrasting this early dicta with that found in *Davis v. Massachusetts*, 167 U.S. 43 (1897)). *Davis* allowed the government the power to exclude all expression on government property, while *Hague* opened the door to a constitutional right of minimum access. Professor Kalven found the Court giving impressive content to the *Hague* dicta in the early handbill cases. See also *Schneider v. State*, 308 U.S. 147 (1939) (Clean streets are an insufficient government interest to prohibit handbill distribution.); *Jamison v. Texas*, 318 U.S. 413 (1943) (Distribution of handbills by a Jehovah's Witness accompanied by solicitation of contributions is not commercial expression and the government may not prohibit it.).

43. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, the Court unfortunately said that a "constitutional right of access" can be claimed for expression on an opened subject matter in a limited public forum. 460 U.S. 37, 48 (1983). Yet there is no denying that the government can prohibit all expression in the forum by closing it for all expression. See *infra* notes 46-47 and accompanying text. In many of the public forum cases upholding the right of expression, the Court actually relied upon procedural grounds instead of a minimum access theory. See Note, *Minimum Access*, *supra* note 2, at 121-25 (*Hague v. CIO*, 307 U.S. 496 (1939) (overbreadth); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (vagueness); *Cox v. Louisiana*, 379 U.S. 559 (1965) (vagueness); *Brown v. Louisiana*, 383 U.S. 131 (1966) (selective prosecution)); see also Cass, *supra* note 2, at 1298-99. But see *United States v. Grace*, 461 U.S. 171, 179 (1983) (prohibition of expression on sidewalks surrounding the Supreme Court is unconstitutional because sidewalks, "generally without further inquiry," are public forum property); *Perry*, 460 U.S. at 45 (1983) (government cannot close the streets and parks to expression).

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

45. *Id.* See also Note, *Time, Place and Manner Regulations of Expressive Activities in the Public Forum*, 61 *NEW ENG. L. REV.* 167 (1982).

46. *Id.* at 45-46. For an example of the greater latitude given to government in these regulations, see *infra* note 62. See generally Note, *The Public Forum and the First Amendment: The Puzzle of the Podium*, 19 *NEW ENG. L. REV.* 619 (1983-1984); Note, *Minimum Access*, *supra* note 2.

47. This proposition follows from the fact that the public forum doctrine developed in

*tors' Ass'n v. Holt*⁴⁸ attempted to simplify the terminology by limiting the public forum label to claims of absolute access, not equal access.⁴⁹ The Supreme Court rejected this approach, however, and held that the concept applies to claims for equal access to forums whose open character is dependent upon the state's goodwill.

If a forum's past use indicates that the government indeed opened or designated the forum for expressive activity, the government "is bound by the same standards as apply in a traditional public forum."⁵⁰ The inquiry into whether the government has opened its property is not as simple as it might sound. The Court reasons that a "public forum may be created for a limited purpose such as use by certain groups, (student groups) or for the discussion of certain subjects (school board business)."⁵¹ In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,⁵² the Court uses the term "opened" in discussing a "forum generally open to the public," but it uses "created" in analyzing permissible subject-matter restrictions. Nevertheless, a fair reading of *Lehman v. City of Shaker Heights*⁵³ leads one to conclude that the government may

response to claims for access to government property, not just claims of equal access. This is especially clear in the handbill cases where the Court held the prohibitions unconstitutional even though they would have banned all speakers. See *supra* note 42. A flat ban on access can, however, have a differential affect on expression of viewpoints on a particular subject matter. Where the government excludes the poor from government property their views may not be heard elsewhere. Accord Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 964 (1975) (The general thrust of Karst's argument runs against minimum access in favor of equal treatment of different viewpoints. Yet, he takes a broad view of what this equal treatment compels and denies that a prohibition would be legitimate if it served to effectively silence a particular viewpoint.); see Horning, *supra* note 2, at 939. One could fashion a theory requiring guaranteed minimum access only when a prohibition effectively accomplished viewpoint discrimination.

48. 652 F.2d 1286 (7th Cir. 1981).

49. "Convention has established the term "public forum" to denote a facility that may not constitutionally be closed to all private expression, but the absence of a natural phrase to describe a facility that the government may not open only to certain speakers or viewpoints has led some courts to use the same or confusingly similar phrases in that context as well." *Id.* at 1293.

50. *Perry*, 460 U.S. at 46. These same standards, however, do not amount to a constitutional right of access such that the government could not prohibit all expression.

51. *Id.* at 46 n.7 (citations omitted).

52. *Id.* at 45, 46 n.7.

53. 418 U.S. 298, 300 (1974). It is not at all obvious that the forum was not in a sense "created" only for commercial advertising. The city had never carried anything other than commercial advertising and it had never accepted a political advertisement. The Court emphasized that administrative concerns justified this decision. Yet, if the city had begun by accepting political advertisements and later concluded that these same problems demanded that it accept only commercial ads, *Lehman* would clearly allow it to do so. This would permit the city to open the forum only for a limited subject matter by closing it to others even though the city did not originally create it with such a limit.

open a forum only to limited subject matters although it did not "create" the forum for expression on only certain subjects. The Court in *Lehman* allowed the city to prohibit all political advertising from its public transportation system.⁵⁴

Given the Court's approach to determining whether the government has opened a forum for a limited subject matter, the key issue becomes solely historical and descriptive: has the government opened or designated the forum for expression? A court need not generally assess the government's reasons for having chosen only certain subject matters because, in the final analysis, the government may exclude all subjects from a nontraditional forum. This is not to say, however, that it is not the Court's role to say which subject-matter restrictions are per se illegal. In *Lehman*, the Court did have to initially approve of the city's consistently enforced written policy of accepting only commercial ads and rejecting all political and public-issue advertising from its public transportation system.⁵⁵ Yet, once the Court gives its approval to a particular subject-matter restriction in a given setting, future courts need only identify the forum's past use and determine whether the government has opened it for expression.

A history of access open to the public, however, is sometimes insufficient to label property a public forum. The access must be for expression, not simply for milling about. In *Greer v. Spock*⁵⁶ there were consistently enforced regulations prohibiting partisan political speech on a military base. This ban evidenced the government's desire not to designate the property as a public forum. Consequently, the Court held the public had not traditionally used the property for expression, although the government had traditionally allowed the public access to the property.

The Court's recent holding in *Cornelius v. NAACP Legal Defense and Education Fund*,⁵⁷ however, calls into question the very existence of the limited public forum concept. In dissent, Justice

54. By allowing the city to ban all political advertising, the Court in *Lehman* held that advertising on city buses and trains is not a traditional public forum. See *infra* notes 91-95 and accompanying text. The Court also held that in this particular setting the city had not designated the medium as a nontraditional public forum. The court in *Planned Parenthood* seized upon this distinction to distinguish *Lehman*. "While *Lehman* stands for the proposition that the interior of a transit system's cars and buses is not a traditional public forum, it does not stand for the proposition that such space may never become a public forum." *Planned Parenthood*, 767 F.2d at 1233.

55. *Lehman*, 418 U.S. at 304.

56. 424 U.S. 828 (1976).

57. 105 S. Ct. 3439 (1985).

Blackmun charged that "[t]he Court's analysis . . . flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited public forum concept of all its meaning."⁵⁸ The Court in *Cornelius* labeled the Combined Federal Campaign, a charity drive aimed at federal employees, a nonpublic forum.⁵⁹ It rejected the notion that the government designated a limited forum for the subject-matter of charitable solicitation. The Court reasoned that because the government had always limited participation in the drive to "appropriate" agencies, this traditionally selective approach to access failed to evidence the government's intention to designate a public forum for the broader category of all charitable organizations.⁶⁰ This argument fails to deflect the dissent's charge that the federal government created a limited forum.⁶¹

IV. PUBLIC FORUM: LAW OR FACT

Once the Court labels the government property as either a public forum or nonforum, the reasoning employed by the Court in defining the scope of permissible regulations of speech is purely legal.⁶² It is out and out value balancing of the competing state and

58. *Id.* at 3456.

59. *Id.* at 3451.

60. *Id.* at 3450-51.

61. *Id.* at 3460-61. Justice Blackmun sees the Court's reasoning as inconsistent with precedents requiring access even though there was a history of allowing expression on only a selective basis. The theater, in *Southeastern Promotions, Ltd. v. Conrad*, limited use of its facilities to "clean, healthful entertainment . . ." 420 U.S. 546, 549 n.4 (1975). Similarly, the university, in *Widmar v. Vincent*, had a policy restricting access to only registered non-religious groups. 454 U.S. 263 (1981). Perhaps what the Court really indicated in *Southeastern* and *Widmar* is that these particular narrow subject-matter restrictions (healthful entertainment and nonreligious groups) are per se unconstitutional. It then held that the government had designated the forums for the broader subject-matters of entertainment and student groups. Even so, it is impossible to see how the Court avoided the conclusion that the government opened the CFC for groups seeking charitable contributions or, alternatively, for the subject-matter of charitable solicitation.

Calling the CFC a limited public forum would require strict scrutiny of all challenges raised by groups denied access. The Court was most probably concerned that it simply could not establish any judicially principled way to distinguish between those seeking access. This is a very real concern. Yet, this simply highlights the fundamental weakness of pigeon-holing government property into the categories of forum or nonforum.

62. The balancing process is especially clear once the Court has determined the type of forum with which it is dealing. For discussion of the explicit balancing that accompanied the Court's invalidation of laws restricting leaflet distribution on public streets, see *Kalven, Public Forum*, *supra* note 29, at 16-21. Compare *Schneider v. State*, 308 U.S. 147, 162 (1939) (Keeping "the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.") with *Heffron v. International Soc'y for Krishna Consciousness, Inc.*,

first amendment interests. The initial classification as a public forum or nonforum only alters the weights in the scales.⁶³ Yet, the initial classification as a public forum is not so clearly a matter of balancing. The definitions of both traditional and nontraditional⁶⁴ public forums raise other issues. The traditional use and designation tests outlined in *Perry*⁶⁵ invite the trial court to conduct a factual inquiry. A trial court must search for evidence on two crucial issues: the forum's past use for expression and government policies to designate it for this use. If the results of this archeological dig fail to convince the trial court that the government property is a public forum, the court will give government regulations very limited scrutiny.⁶⁶

Because Rule 52(a) applies only to findings of fact, it compels the determination of whether it is a question of fact or law to label government property a public forum. When the Court rejects a plea for access to government property it clearly indicates that a traditional forum does not exist because there would be a constitutional right of access.⁶⁷ Consequently, one can say with some assurance that jailgrounds,⁶⁸ city transit cars,⁶⁹ military bases,⁷⁰ letterboxes,⁷¹ utility poles,⁷² grounds of the Supreme Court other than sidewalks,⁷³ internal school mail systems,⁷⁴ meet and confer sessions,⁷⁵ and the Combined Federal Campaign⁷⁶ are not traditional public forums. Yet once the Court makes these legal deter-

452 U.S. 640 (1981) (Court approved of regulations limiting distribution of literature to booths at state fair); *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2134 (1984) (Court upheld ban on posting signs on city utility poles based upon city's aesthetic concerns although property not considered a public forum).

63. See *supra* note 3.

64. The term "nontraditional" is not used in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). A nontraditional public forum is government property which the government has opened or designated for expressive activities. The government has not, in a long tradition, devoted it to assembly and debate. The government need not indefinitely retain the open character of the forum. See *id.* at 46.

65. 460 U.S. 37 (1983).

66. See *supra* note 3.

67. See *supra* notes 42-45 and accompanying text.

68. *Adderley v. Florida*, 385 U.S. 39 (1966).

69. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

70. *Greer v. Spock*, 424 U.S. 828 (1976).

71. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

72. *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984).

73. *United States v. Grace*, 461 U.S. 171 (1983).

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

75. *Minnesota State Bd. for Community Colleges v. Knight*, 104 S. Ct. 1058 (1984).

76. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S. Ct. 3439 (1985).

minations, other courts have a simpler job of inquiring whether the property fits into one of these categories such that a ban on all access is legitimate.⁷⁷ The same is true for the streets and parks, property the Court has identified as traditional public forums.⁷⁸ It is at this point that the trial court's factual categorization of the property becomes one with the traditional public forum label.

In traditional public forums the Court has so clearly defined the applicable properties that the public forum designation appears factual. Years of norm elaboration have established clear-cut rules of decision. Consequently, Rule 52(a) could restrict review of this "ultimate fact," as well as the subsidiary facts underlying it.⁷⁹ The appellate court in *McCreary v. Stone* did just that when it held that "the finding that [the government property] is a public forum is not clearly erroneous."⁸⁰ Because the property involved was a park, a traditional forum, the legal standard is quite precise.⁸¹ Yet, the inevitable but surprisingly subtle issue arose as to what exactly is a park within this standard. There was a war memorial on the property and the village of Scarsdale had denied most applications for first amendment access.⁸² As in *Planned Parenthood*, the challenge to free speech arises in the future. The trial court could hold that the property is not a "park" and consequently not a public forum, leaving the appellate court to evaluate this finding under the clearly erroneous standard.

The law or fact issue is important, but the Court's discussion of the distinction in *Bose* is confusing and inconsistent.⁸³ After

77. See *supra* note 55 and accompanying text.

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

79. *Bose Corp. v. Consumers Union of United States*, 104 S. Ct. 1949, 1959-60 (1984) ("Rule 52(a) applies to findings of fact, including those described as 'ultimate facts' because they may determine the outcome of litigation."). For a discussion of the uneven treatment of ultimate facts, see *infra* note 83.

80. *McCreary v. Stone*, 739 F.2d 716, 722 (2d Cir. 1984), *aff'd sub nom.* *Board of Trustees v. McCreary*, 105 S. Ct. 1859 (1985).

81. Parks, like sidewalks, "are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179 (1983).

82. *McCreary v. Stone*, 575 F. Supp. 1112, 1123 (S.D.N.Y. 1983).

83. 104 S. Ct. 1949 (1984). The Court in *Bose* said that Rule 52(a) covers "ultimate" facts. See *supra* note 79. For this proposition, *Bose* cites *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). *Bose* continued with the proposition that mixed findings of law and fact are not covered by Rule 52(a). *Bose*, 104 S. Ct. at 1960 (citing *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982)). Yet *Inwood* flatly does not support this proposition. Indeed, the Court in *Pullman* specifically refused to decide the relationship between Rule 52(a) and mixed questions of law and fact. 456 U.S. at 289 n.19. To this extent, *Bose* makes an important admission in removing mixed questions of law and fact

reading the Court's analysis, it seems perfectly appropriate to choose either label to identify a public forum. To its credit, however, the Court acknowledges the real matter at issue in choosing either label: what is the appropriate level of appellate review? "Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact."⁸⁴ This flexibility is possible only by making another candid observation on the failure of legal reasoning to discern a workable definition for law and fact. "A finding of fact in some cases is inseparable from the legal principles through which it was deduced."⁸⁵ Others have argued that there is a fundamental incoherence in the distinction.⁸⁶

This latter problem has unquestionably materialized in attempting to implement the Court's two-step public forum doctrine. In *Members of City Council v. Taxpayers for Vincent*,⁸⁷ the Court was unable to articulate why city utility poles were not traditional public forums, but it allowed a flat ban on posting signs on them. *Vincent* highlights the underlying tension between fact and law in the public forum context:

Just as it is not dispositive to label the posting of signs on public property as a discrete medium of expression, it is also of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum. Generally an analysis of whether property is a public forum provides a

from Rule 52(a)'s coverage. The Rule generally covers ultimate facts, but not mixed questions of fact and law. The issue then becomes one of discerning a difference between the two.

Pullman labels intentional discrimination a pure fact which is reviewable only under Rule 52(a)'s clearly erroneous standard. *Id.* at 286-87 n.16. In analyzing *Baumgartner v. United States*, *Pullman* distinguishes *Baumgartner's* holding that "ultimate facts" are independently reviewable because these facts clearly imply the application of standards of law. *Id.* (construing *Baumgartner*, 322 U.S. 665 (1944)). This is evidently in contrast to the finding of intent which is strictly historical and descriptive, requiring no law application. Yet, *Pullman* also says that the issue of whether a court correctly applies a rule of law to established facts is a matter of mixed law and fact. *Id.* at 289 n.19. Within *Pullman's* own language then, law application results in ultimate facts and is also a mixed question of law and fact. Rule 52(a) covers the former and not the latter.

84. *Bose*, 104 S. Ct. 1949, 1960 n.17.

85. *Id.*

86. See Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 n.24 (1985). In *Bose*, the Court also mentions L. GREEN, JUDGE AND JURY (1930). 104 S. Ct. at 1960-61 nn.20-21.

87. 104 S. Ct. 2118 (1984). See also Note, *Members of City Council v. Taxpayers for Vincent: The Constitutionality of Prohibiting Temporary Sign Posting on Public Property to Advance Local Aesthetic Concerns*, 34 DE PAUL L. REV. 197 (1984).

workable analytic tool. However, . . . "the question of whether a particular piece of personal or real property, owned or controlled by the government is *in fact* a public forum may blur at the edges"⁸⁸

The Court based its decision to waive the usual initial inquiry into whether the property is "in fact" a public forum upon unarticulated considerations. Yet, the decision to forego the test is legal, although of limited precedential value because the Court did not really explain why it did so. The Court is undoubtedly aware that "anterior to law application a crucial policy decision must be made: Should a further effort at norm elaboration be undertaken?"⁸⁹ The Court's answer in *Vincent* was no, but it emphasized that the real party at interest was the one to whom the Court allocated the law application and elaboration function.⁹⁰ The Court in *Vincent* chose not to give further definition to the traditional public forum label. Yet, it is perfectly clear that utility poles on government property are not traditional forums because the Court would have required minimum access for expression. Although it did not explain itself, the Court did give further meaning to the traditional public forum label by identifying property which does not qualify. From this perspective one can see how new factual settings give meaning to legal terms whether or not a court conducts explicit norm elaboration.

In dealing with claims for absolute or minimum access, the Court has already allowed the government to place a number of properties off limits.⁹¹ These properties are clearly not traditional forums. The inquiry into whether the government has opened or dedicated nontraditional property for expression generally or on limited subject-matters has also taken on an historical and factual flavor.⁹² Yet, the Court makes it clear in *Cornelius v. NAACP Le-*

88. *Vincent*, 104 S. Ct. at 2134 n.32 (emphasis added).

89. Monaghan, *supra* note 86, at 236-37.

90. Commentators have long recognized that the identification of law application is a discrete function not neatly fitting into the law and fact categories. See Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924). Professor Bohlen recognized that a jury's finding of negligence is neither law nor fact. Instead, the jury gives content to a "pre-existing broadly stated law by making it capable of application to the facts of specific litigated cases, and may be properly termed 'administrative.'" *Id.* at 115. There is a modern realization that the decision of which actor applies the law is a matter of policy. See Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1876 (1966); Monaghan, *supra* note 86, at 235.

91. See *supra* notes 68-76 and accompanying text.

92. See *supra* note 66 and accompanying text.

gal Defense and Education Fund⁹³ that the test is not as "mechanical" as the traditional public forum inquiry. The Court in *Cornelius* did, however, further define the governing norms when the government designates property, and it therefore made this determination hinge even further upon the trial court's fact-finding.⁹⁴ The difficulty is that just because the Court identifies a particular property as not a nontraditional public forum, it does not mean that type of property cannot ever become a nontraditional public forum. The nontraditional label hinges upon the government designating the property for expression. This inquiry is specific to each setting.⁹⁵

The choice between a law or fact label for the public forum issue implicates important policy considerations. By picking the fact label, courts will "avoid rigidity and the danger that standards and rules which, at the time they were enacted seem [sic] useful or necessary, may become impracticable and ridiculous under changed conditions."⁹⁶ If labeled a factual matter which a jury might eventually consider, we are assured that the "decision of a jury determines the standard for the one case, and for that case only."⁹⁷ Yet, the law designation is preferable where we desire uniformity, predictability, and further norm elaboration. There is particularly strong reason to reserve the issue as legal where certain historical facts are likely to recur.⁹⁸ In the public forum context this is certainly the case because certain types of government property repeatedly cause controversy and some rules of decision reflecting the interests at stake would directly affect future behavior.⁹⁹ This is true for both traditional and nontraditional forums.

V. ANOTHER LOOK AT DETERMINATIVE FACTS AND RULE 52(a)

The above discussion of law and fact supports the conclusions

93. 105 S. Ct. 3439 (1985). See *supra* notes 44-48 and accompanying text.

94. *Cornelius*'s "selective access" test to determine whether the property is a nontraditional public forum further defines what it means for government to designate a public forum. The trial court's job is then to assess the historical facts and decide whether access was selective. In this way the historical facts necessary to determine that a designated public forum exists become crucial. If it is a fact that access was selective, then it necessarily follows that there was not an intention to designate a public forum.

95. See *supra* note 54.

96. See Bohlen, *supra* note 90, at 115.

97. *Id.* at 116.

98. See Monaghan, *supra* note 86, at 268; Weiner, *supra* note 90, at 1924.

99. For the most exhaustive exercise at formulating rules of decision for specific properties, see Cass, *supra* note 2, at 1337-54.

that policy counsels against calling the public forum label some sort of ultimate fact within Rule 52(a)'s domain, and that the Court's discussion of ultimate facts and Rule 52(a) is flexible enough to support this approach. Yet, as discussed above, the Court has refined just exactly which historical facts are necessary to support the public forum label.¹⁰⁰ To this extent the historical facts themselves become of crucial concern and essentially determinative of whether a public forum label is appropriate. The finding that prior access was selective within *Cornelius's* meaning is certainly one step closer to an historical fact than it is to law application.

This brings to the forefront perhaps the most crucial issue: shall we limit review of these facts which are nearly dispositive of the public forum label to Rule 52(a)'s clearly erroneous standard? This issue is present in both the findings that public property is a "park," and that the government limited access to only appropriate groups in a nontraditional forum. It would have been present in *Planned Parenthood* had the trial court concluded that Chicago did have a policy of accepting only noncontroversial advertisements. Only a few federal appellate courts have considered the appropriate standard of appellate review of various issues in public forum settings.¹⁰¹

100. See *supra* notes 68-82 and accompanying text.

101. The court, in *Lebron v. Washington Metro. Area Transit Auth.*, specifically mentioned *Bose* and the need for an appellate court to conduct an independent review in cases raising first amendment issues. 749 F.2d 893, 897 n.9 (D.C. Cir. 1984). The district court upheld the Washington Metropolitan Area Transit Authority's (WMATA) rejection of a poster critical of President Reagan. *Id.* at 894. There was no dispute at trial or on appeal, however, that subway advertising had become a public forum. *Id.* at 894 n.2. The district court agreed with WMATA that the poster was deceptive and distorted and therefore not protected by the first amendment even in a public forum. *Id.* at 894. The appellate court conducted an independent review of the deceptiveness of the poster. The court likened deceptiveness to those facts described by the Court in *Bose* which are inseparable from the principles from which the Court deduced them. *Id.* at 897 n.9.

The court used similar reasoning in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985). The court explicitly stated that it would not be bound by the factual inferences drawn by the trial court based upon *Bose's* discussion of first amendment values. *Id.* at 542 n.3. The trial court entered a summary judgment for a student religious group seeking to meet during a regularly scheduled activity period. *Id.* at 541. The court of appeals reversed.

Many years of litigation over access to city welfare offices ended in *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718 (2d Cir. 1984). The plaintiff was a group which the government had banned from soliciting memberships in welfare offices. The group sought to educate welfare recipients as to their legal rights. *Id.* at 719. After the trial court originally entered judgment for the defendants, the court of appeals vacated and remanded on the solicitation ban issue. 677 F.2d 232 (2d Cir. 1982). The court identified the welfare office as a public forum for the purposes of speech pertaining to welfare issues and

There is a definite relationship between which limited subject-matters or groups are permissible as a matter of law and the appropriate level of appellate review. The Supreme Court has not decided the permissibility of allowing only "noncontroversial" speakers to use government property.¹⁰² The Court's decision in *Cornelius* to allow the government to restrict the Combined Federal Campaign to only "appropriate" groups strikes a close parallel. Both designations are inherently subjective and give the govern-

ordered the trial court to consider whether there was a less restrictive alternative than a complete ban on solicitations. *Id.* at 239. On its second look at this dispute, the appellate court held that the trial court's finding that there was no less restrictive alternative than a ban on solicitation is a finding of fact reviewable only under Rule 52(a)'s clearly erroneous standard. *Brezenoff*, 742 F.2d at 722.

In *White House Vigil for ERA Comm. v. Clark*, the court held that the narrowness of a "time, place and manner" regulation is a legal issue which Rule 52(a) does not cover. 746 F.2d 1518, 1528 (D.C. Cir. 1984). The appellate court reversed the district court which had struck down as unconstitutional regulations governing demonstrations on the sidewalks in front of the White House. The dissent, however, said the finding that the regulations were unnecessarily restrictive is factual and should be reviewed only under the clearly erroneous standard. *Id.* at 1542-43 (Wald, J., dissenting). The Supreme Court's reasoning in *Bose* played some part in Judge Wald's conclusion. *Id.* at 1543 n.1.

In *Glasson v. City of Louisville*, the court did not use Rule 52(a)'s clearly erroneous standard to review the good faith and reasonable conduct of a policeman. 518 F.2d 899, 903 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975). The district court found that the policeman acted reasonably by destroying a poster critical of the President of the United States as the plaintiff awaited the President's motorcade. *Id.* at 902. The court of appeals said that "determinations, whether called ultimate facts or conclusions of law, that attach legal significance to historical facts may be reversed if upon examination of the record they are found to be erroneous." *Id.* at 903.

After the district court dismissed the plaintiff's complaint, the court of appeals, in *Guzick v. Drebus*, said it was not bound by Rule 52(a)'s clearly erroneous standard. 431 F.2d 594, 599 (6th Cir. 1970). The plaintiff sought to wear an antiwar button in school, but the court of appeals denied his right to do so by distinguishing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969).

102. *Southeastern Promotions, Ltd. v. Conrad* most directly raised the issue, but the Court chose to frame its holding as deciding only that there had been an unconstitutional prior restraint. 420 U.S. 546, 552 (1975). See Karst, *Public Enterprises and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 246 (1976).

In *Lehman v. City of Shaker Heights*, the Court allowed the city to ban political advertising and to "limit car card space to innocuous and less controversial commercial and service oriented advertising . . ." 418 U.S. 298, 304 (1974). The holding, however, does not indicate that the Court permitted the city to accept only the subset of "less controversial" commercial advertisements. In context, the Court in *Lehman* used the modifier "less controversial" only in comparison with partisan political advertisements.

In *Consolidated Edison Co. v. Public Serv. Comm'n*, the Court held unconstitutional a regulation which would have prevented the utility from discussing nuclear power, but not topics that are not "controversial issues of public policy." 447 U.S. 530, 533 (1980). The key distinction, however, is that the Court considered the forum (billing envelopes) to be the utility's "own" property, not government property. See *supra* note 4. For the impact of *Cornelius v. NAACP Legal Defense & Educ. Fund*, 105 S. Ct. 3439 (1985), see text accompanying note 94.

ment great freedom to choose those who can participate in the forum. The trial court in *Planned Parenthood* made separate findings that Chicago had no such policy and that the government had not used the forum only for noncontroversial topics. The latter finding, of course, is clear evidence that the government did not consistently apply any so-called policy. *Cornelius* itself indicates that past use of the forum is evidence of the government's intention to designate it for expression.¹⁰³ Using the *Cornelius* selective access test, however, it is impossible for any court to determine whether or not only appropriate groups actually used the forum. A court could only determine whether the government controlled access in some manner; the court cannot evaluate the government's success at permitting only appropriate groups to use the forum.

The court in *Planned Parenthood* used Chicago's failure to dedicate its forum to only noncontroversial topics as evidence that it dedicated the forum to all sorts of expression. The trial court made a finding that past advertisements were controversial. The trial court concluded that Chicago had accepted controversial material such as political advertisements, a gun control message, messages regarding AIDS, and messages espousing views on nuclear war posted by antiwar groups.¹⁰⁴ Although these seem like controversial topics, CTA directly challenged the court's characterization of these advertisements and messages. The "gun control message" was a public service reminder that a Chicago law required the registration of firearms by a certain deadline. The "nuclear war" message was apparently an ad quoting President Eisenhower's statement that making weapons takes resources from the poor.¹⁰⁵ The impact on appellate review is that the inference that a particular subject is or is not controversial is always somewhat suspect. It is also apparent that the most honest way to address this issue is for the trial judge to provide a complete description of the advertisement in his statement of facts, not just bare conclusions. Perhaps an appellate court should more appropriately treat a finding that something is controversial like the unprotected speech category of pornography, which is always subject to independent review.¹⁰⁶

103. 105 S. Ct. 3439, 3449 (1985).

104. *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 592 F. Supp. 544, 547, 550 (N.D. Ill. 1984).

105. Brief of Defendants-Appellants at 16, *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985).

106. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

The advantages of keeping the ultimate label "public forum" a matter of law which is capable of further clarification can be seen in this area. If courts established as a matter of law that the only permissible subject-matter distinction is between political and commercial advertising, then the trier of fact's job seems more clear-cut.¹⁰⁷ The acceptance of any partisan political material would be sufficient to turn the property into a public forum.¹⁰⁸ The trial court would not then be called upon to make the more ambiguous finding that a particular advertisement is in fact controversial. Consequently, there may be less call to keep this sort of factual finding subject to independent appellate review.

The appropriate standard of review in this area should be consistent with both the purpose of Rule 52(a)'s¹⁰⁹ clearly erroneous standard and the reasons given in *Bose* for abandoning it. A trial court draws an inference when it characterizes a forum's past use as controversial, finds that the government had a policy of limiting access, and that the government had consistently applied this selective access policy. Although it involves the application of historical facts to these words which are themselves legal concepts, the application is still closer to the historical facts than is an ultimate fact.¹¹⁰ The circuits have historically varied greatly in their application of Rule 52(a) to inferences drawn from essentially undisputed or documentary evidence.¹¹¹ A proposed change to Rule 52(a) explicitly emphasizes the need for finality and that the Rule applies to documentary evidence.¹¹² An original advisory note to the Rule perhaps planted the seed of confusion by referring to "modern federal equity practice" which allowed for *de novo* review

107. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (holding this to be a constitutional subject-matter designation). The Court did not hold that this is the only permissible limitation in this context. See *supra* note 102.

108. See *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 896 n.6 (D.C. Cir. 1984) (acceptance of political advertising made subway a public forum); *Penthouse Int'l, Ltd. v. Koch*, 599 F. Supp. 1338, 1349 (S.D.N.Y. 1984) (same).

109. FED. R. CIV. P. 52(a).

110. "But the drawing of the inference is still the finding of a fact, and it is not to be confused, as it frequently is, with a determination of the 'ultimate conclusion,' often called the 'ultimate fact.'" Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 94 (1944) (footnotes omitted).

111. C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2587 (1983) [hereinafter cited as *FEDERAL PRACTICE*].

112. See Proposed Fed. R. Civ. P. 52(a), 98 F.R.D. 337, 359 (1983) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses and to the need for finality.").

of a judge's findings of fact.¹¹³ Yet a later note by the Advisory Committee criticized opinions which waived the clearly erroneous standard.¹¹⁴ The Court has itself been consistent in holding that the Rule's clearly erroneous standard applies to these cases.¹¹⁵

Our conclusion that the Rule has generally governed the scope of review of inferences from historical facts poses problems in the public forum area. The trial court infers that the government designated the forum for expression or that access was "selective." Consequently, the appellate court should use the clearly erroneous standard when it reviews these findings. Where the trial court makes a crucial inference which leads it to conclude that the property is not a public forum, the speech regulation need only be reasonable.¹¹⁶ If the appellate court takes these findings as a given and merely reapplies the reasonableness test, the regulation has once again escaped serious scrutiny. In its public forum cases, the Court has never struck down a regulation of speech as unreasonable unless it considered the property a public forum.¹¹⁷ The practical result is that speech is left very much unprotected when a regulation need only be reasonable, in much the same way that pornography and certain other categories of speech are left unprotected and subject to regulation.¹¹⁸

It is this reasoning which likens the public forum label to a category of unprotected speech—speech on government property which is not a public forum—which brings forward *Bose's* reasons for abandoning the clearly erroneous standard. When a court finds speech to be pornography, government may prohibit it entirely. The same is true when a court concludes that government property is not a public forum. The Court in *Bose* reasoned that it must give careful "case-by-case" consideration "in those cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unpro-

113. See generally Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) to Findings of Fact in Federal Nonjury Cases*, 53 Miss. L.J. 473 (1983).

114. See FEDERAL PRACTICE, *supra* note 111.

115. See *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1511-12 (1985); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *United States v. Gypsum*, 333 U.S. 364, 394 (1948).

116. See *supra* note 3.

117. *Id.*

118. See *Bose Corp. v. Consumers Union of United States*, 104 S. Ct. 1949, 1960-61 (1984). See generally Farber & Nowak, *supra* note 2, at 1226-39 (tracing development of categorical approach).

tected' speech."¹¹⁹ The Court has found that these general categories are simply not capable of precise enough definition to leave the issue to the trier of fact for application of the legal standard.¹²⁰

The actual malice standard likewise seems to be an indefinite legal standard whose borders need constant policing. Yet the Court has already refined the actual malice standard to mean knowledge or reckless disregard for the truth.¹²¹ This elaboration of the general standard resembles that in *Cornelius*, which held there to be no designation where access was selective because the government always limited participation to appropriate groups.¹²² In *Bose* the ultimate dispute concerned whether the defendant had knowledge. In discussing Rule 52(a) the Court itself said that it "surely does not stretch the language of the rule to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'"¹²³ Indeed, one wonders what other conclusion is possible given *Pullman-Standard v. Swint*'s¹²⁴ holding that discriminatory intent is a pure fact covered by the Rule's clearly erroneous standard. Both inquiries turn on the party's state of mind. Despite the Court's statements in *Bose* that it was merely applying a general legal category to historical facts,¹²⁵ it is more correct to conclude that the Court conducted a full-scale independent review of the pure fact or inference that the defendant had knowledge. The motive for such a thorough review was a desire to protect free expression.¹²⁶ The Court's explanation of what it was doing is less controversial because it resembles the traditional dispute about ultimate

119. *Bose*, 104 S. Ct. at 1961.

120. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose*, 104 S. Ct. at 1962.

121. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See generally, Kalven, *New York Times Case*, *supra* note 29.

122. See *supra* note 94 and accompanying text.

123. *Bose*, 104 S. Ct. at 1958.

124. *Pullman-Standard v. Swint*, 456 U.S. 273, 286-87 n.16 (1982). See *supra* note 83.

125. *Bose*, 104 S. Ct. at 1963-64 (citing *Sullivan* for the proposition that the Court must make certain that the actual malice standard is correctly applied). See Monaghan, *supra* note 86, at 231-32; see also Comment, *The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 MERCER L. REV. 711, 727 (1985) ("[T]he Court in *Bose* applied the principle of independent appellate review to a finding of pure fact.").

126. Independent review is necessary "to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Bose*, 104 S. Ct. at 1965.

facts and the clearly erroneous standard. Yet by independently reviewing the pure fact or factual inference of knowledge, the Court intrudes upon the trial court to a greater extent. The same solicitude for protecting the first amendment should urge that in the public forum context appellate courts independently review the findings where the trial court does not classify the property as a public forum.¹²⁷

VI. CONCLUSION

A federal judge in a bench trial must place the public forum label in his conclusions of law. This much is not controversial. It is absolutely essential, however, that he state the factual findings which support his conclusion with precision, completeness, and particularity. The most crucial findings are whether the government traditionally exercised selective access, had a policy governing the property's use for expression, and consistently enforced this policy. By providing a complete record of the historical facts, a trial judge allows the appellate court to further refine exactly what specific facts are necessary to support the public forum label. Only by fully developing and explaining the historical facts can an appellate court meaningfully review the ultimate conclusion that the property is a public forum. The difference in the protection afforded speech based upon this conclusion is simply too great to leave certain crucial facts for review under the clearly erroneous standard.

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127. For a persuasive argument that other areas of constitutional law application should receive independent review on a discretionary basis, see Monaghan, *supra* note 86.

* This article is dedicated to my father's memory and to my mother, Josephine Dorse, with love.