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First Amendment Inversions

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Case Note

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Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142 (D.N.J. 2001).

In *Lehman v. City of Shaker Heights*,[1] the Supreme Court held that a municipal transportation company could exclude political expression from its buses, even as it allowed commercial vendors to advertise. The Court reasoned that the transportation system was a nonpublic forum—an institution run by the government for specific purposes—and that the government could exclude political speech that interfered with those purposes. By permitting government to privilege commercial speech over political expression, *Lehman*'s nonpublic forum doctrine allows for the reversal of the usual First Amendment hierarchy. Later cases provided doctrinal props to ensure the fairness of such inverted[2] structures: In a nonpublic forum, the government can discriminate on the basis of subject matter but not on the basis of viewpoint.[3] Additionally, any restrictions on speech have to be reasonable in light of the forum's purpose.[4] These criteria ensure that the government, even in a nonpublic forum, cannot "suppress expression merely because public officials oppose the speaker's view."[5]

1. 418 U.S. 298 (1974).

2. Courts have used the metaphor of "inversion" to describe laws that privilege commercial speech over political expression. *See, e.g.*, Metromedia v. City of San Diego, 453 U.S. 490, 513 (1981) ("[Cases have] consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech.").

3. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

4. *Id.*

5. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981)).

Tenafly Eruv Ass'n v. Borough of Tenafly[6] uses the nonpublic forum doctrine to invert another, more fundamental, First Amendment hierarchy. Members of the Tenafly Jewish community sought to construct an *eruv*[7] around the town's perimeter. The mayor and town council opposed the *eruv*, citing a facially neutral ordinance that prohibited placing material on the town's utility poles.[8] As plaintiffs in the district court, supporters of the *eruv* argued that it constituted symbolic speech and was protected under the Free Speech Clause of the First Amendment. The district court agreed with the plaintiffs' characterization of the *eruv* as symbolic speech but found that the ordinance, as applied to the nonpublic forum where the *eruv* was to be built, placed valid restrictions on such expression. When the plaintiffs pointed out that the town allowed other religious structures in the nonpublic forum, the court denied that those structures constituted speech,[9] describing some as only "decorations"[10] and others as serving merely "utilitarian function[s]."[11]

Tenafly uses the nonpublic forum to invert the First Amendment in a novel way—privileging conduct even as it belittles speech. The *Tenafly* plaintiffs, reaching for the safeguards of the First Amendment, claimed that the *eruv* constituted speech. But the logic of the nonpublic forum turned

6. 155 F. Supp. 2d 142 (D.N.J. 2001).

7. Briefly, Orthodox Jewish law prohibits transporting objects through public areas (*reshut harabim*) on the Sabbath, but allows for the circumvention of that prohibition in semipublic areas (*karmelit*) through the *eruv*. An *eruv* is a "ceremonial demarcation of an area," *id.* at 142, which, by Jewish law, converts a semipublic domain into a semiprivate domain, permitting Orthodox Jews to carry within that area on the Sabbath. *See generally* MAIMONIDES, MISHNAH TORAH, HILKHOT SHABBAT 14:11; MAIMONIDES, MISHNAH TORAH, HILKHOT ERUVIN 1:1-3. In *Tenafly*, the contested portion of the *eruv* took the form of black plastic strips on utility poles. *Tenafly*, 155 F. Supp. 2d at 149. Pictures of the *eruv* are provided at the end of the court's opinion. *Id.* at 192-93 apps. A-B. The same court had previously held that a town did not violate the Establishment Clause if it erected an *eruv*. ACLU v. City of Long Branch, 670 F. Supp. 1293 (D.N.J. 1987).

8. Tenafly Ordinance 691 provides, in relevant part, that "[n]o person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly, N.J., Ordinance 691, art. VIII(7) (Oct. 26, 1954), *quoted in Tenafly*, 155 F. Supp. 2d at 176.

9. The court also provided alternative justifications for its decision, with which I do not take issue here. *Tenafly*, 155 F. Supp. 2d at 177.

10. *Id.* at 170. Every year holiday displays were placed on Tenafly's utility poles. Each display consisted of a wreath, a garland, a light fixture, and seasonal holiday lights. The court decided that these did not constitute speech, writing: "[M]indful that if it looks like a duck, walks like a duck and quacks like a duck, it's a duck—not a platypus, the Court finds that the decorations are what they are: decorations. They do not constitute symbolic speech as that term is understood in a constitutional sense." *Id.* at 177 (internal quotation marks omitted).

11. *Id.* at 178. The Tenafly right-of-way contained several church directional signs, some of which contained religious symbols. *Id.* at 169. The court asserted that the signs

> serve the utilitarian function of providing traffic directions. That the signs contain Christian symbolism is, if at all relevant, marginal to the purpose of the signs, since no one has questioned their primarily directional purpose. . . .
>
> Given the purely functional nature of the signs, similar to the holiday displays the Court finds that the church directional signs are of a different character than the [*eruv*].

Id. at 178.

this argument against itself. The court allowed the town to discriminate against the *eruv* specifically because, being speech, it differed from the permitted structures.

Many courts share *Tenafly*'s intuitive reliance on the speech/conduct dichotomy. *Lehman*, for example, can be seen as scrutinizing distinctions between political and commercial advertising (speech) but not distinctions between political advertising and walking down the aisle of a bus (not speech).[12] I argue that this intuition is incorrect: The relevant difference between advertising and walking is not that one is speech and the other conduct; and, in any case, the devices of *Lehman*'s progeny—viewpoint neutrality and reasonableness—cannot be coherently applied if one makes such a distinction. I conclude that, in the nonpublic forum, courts should eschew the vagaries of the speech/conduct distinction.

I

After *Lehman*, the Supreme Court required that any restrictions on expression in a nonpublic forum be reasonable and viewpoint neutral.[13] But *Tenafly* did not compare the viewpoints of the *eruv* and the decorations and did not apply the reasonableness test.[14] This Part accounts for those omissions, demonstrating why they are consistent with the logic of the speech/conduct inversion. I then contend that, despite this internal coherence, the *Tenafly* court should not have used the speech/conduct dichotomy simply to skip those tests.

Consider how *Lehman* tested for viewpoint neutrality and reasonableness. There, the fact that the expression took place in a nonpublic forum allowed the government to reverse the usual First Amendment priorities—regulating political expression while leaving commercial speech alone. Both categories of speech, however, remained within the broader

12. In *Lehman*, the Court sanctioned a prohibition on political advertisements on buses. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). Presumably, paying riders were still allowed to engage in the conduct of walking down the aisle of the bus. The Supreme Court did not explain why it compared political advertising to commercial advertising but did not compare it to walking. However, a plausible reading of the difference between these two types of behavior—commercial advertising and walking—is that the former is speech and the latter is conduct. *See also* United States v. Kokinda, 497 U.S. 720, 733 (1990) (comparing solicitation on a government-owned sidewalk, which was prohibited, to "other forms of speech" that were permitted on that property, but not to walking a dog, riding a bicycle, or selling balloons on the property).

13. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).

14. *Tenafly* did mention one factor that could have entered into such a "reasonableness" analysis. Specifically, the court mentioned that the *eruv* would be permanent, not temporary. *Tenafly*, 155 F. Supp. 2d at 177. However, the court only brought this up as part of an alternative basis for its decision, after assuming arguendo that perhaps "the holiday displays do have some de minimis expressive value." *Id.* The court never mentioned any reason why it was reasonable to discriminate between the *eruv* and the permanent directional signs.

constitutional ambit of protected expression. As a result, to justify regulation, the government still had to show that it had not chosen among different viewpoints. It also had to show that, in light of the property's purpose, the distinction between the two kinds of speech was reasonable.[15]

But *Tenafly* did not have two categories to compare. By defining all permissible behavior as "nonspeech," the court precluded analysis of that behavior under the nonpublic forum doctrine. For example, by classifying the decorations as conduct, the court effectively denied that they expressed any message at all. From this perspective, it was logically impossible for Tenafly to have discriminated between different viewpoints.[16] Similarly, the court saw no distinction that it should have examined for reasonableness. Once deaf to the decorations' expression, the court was also blind to any discrimination between different kinds of speech. In the end, what was left to compare with the *eruv* to assess its exclusion? The only regulatory differences were between speech and nonspeech, and nonspeech is, by designation, invisible to First Amendment analysis.

Tenafly shows why the principles of viewpoint neutrality and reasonableness cannot be applied to the speech/conduct inversion. Those standards do not bar the regulation of speech, but just require that any restrictions be applied across the entire domain of speech in a reasonable, viewpoint-neutral way. Thus, by excluding the decorations and signs from the domain of speech, *Tenafly*'s framework vitiates both the reasonableness and viewpoint-neutrality analyses. As the Supreme Court has insisted, however, those criteria are necessary to ensure the fairness of regulations in the nonpublic forum. Courts should not simply skip them, as *Tenafly* did, by applying formal categorizations.

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15. *Cf.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."). In describing the "reasonableness" test, I sometimes refer to reasonable *restrictions* and sometimes to reasonable *distinctions*. The term *restriction* assumes that the test incorporates requirements analogous to due process fairness: Any restriction must be reasonable in and of itself. The term *distinction* assumes that the test incorporates requirements analogous to equal protection fairness: Any restriction must be fair when compared to restrictions on similar behavior. *See id.* at 55 ("When speakers and subjects are similarly situated, the State may not pick and choose.").

16. The court simply dismissed the plaintiff's claims of viewpoint discrimination, finding no evidence that Tenafly "tolerated some private expression in the right-of-way but denied to Plaintiffs comparable access on the basis of their specific . . . perspective. In fact, the weight of the evidence points to the fact that as a general rule, Tenafly does not tolerate any private, non-commercial expression in its right-of-way." *Tenafly*, 155 F. Supp. 2d at 179. The court also asserted, "[T]here is no evidence that the Borough has tolerated some expressive uses of the poles while prohibiting other such uses . . . ." *Id.* The court pointed to sprinklers and transmitters as other examples of nonexpressive behavior that communicated no viewpoint. *Id.*

II

Aside from permitting *Tenafly* to shirk its doctrinal responsibilities, the speech/conduct distinction has normative faults. Outside the nonpublic forum, that dichotomy is grounded in constitutional text and jurisprudence. But inside the nonpublic forum, the dichotomy misdirects the moral thrust of the First Amendment. *Tenafly* only permitted the town to discriminate against the *eruv*, and in favor of the decorations, because it saw one as expression and the other as conduct. That cannot be correct. It is the reverse of the usual First Amendment rule, which *protects* behavior simply because it is expression. The First Amendment exists to provide special protection to speech. Even when the nonpublic forum allows restrictions on expression, the mere category of speech should never justify increased regulation.

Moreover, inside the nonpublic forum, the speech/conduct dichotomy undermines First Amendment protection for a minority's behavior.[17] Note how, outside the nonpublic forum, the dichotomy results in more protection for a minority's activities. A majority may see a minority's peculiar behavior as an intentional expression of that minority's culture. Moreover, since that conduct can easily be associated with a particular group, it may be easier for a member of the majority to understand that a message is being communicated.[18] For example, while courts have generally been unreceptive to the argument that students have a First Amendment right to wear long hair, they have been more sympathetic to that claim when Native Americans have argued that their specific hairstyles have expressive content.[19] Similarly, it may be easier to see the expressive intentions and impact of the Ku Klux Klan's costume than of more familiar dress.[20]

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17. For the argument that the purpose of constitutional jurisprudence should be to protect minorities, see JOHN HART ELY, DEMOCRACY AND DISTRUST 78-80 (1980). In the context of the First Amendment, this means that courts should shield minority expression from majoritarian censorship. *Id.* at 106 ("Courts must police inhibitions on expression . . . because we cannot trust elected officials to do so: ins have a way of wanting to make sure that the outs stay out.").

18. These two criteria—intentional expression and the potential understanding of the audience—are the standards used to determine whether behavior should be categorized as speech or conduct. *See* Spence v. Washington, 418 U.S. 405, 410-11 (1974). The *Spence* test asks whether an "intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.*

19. *Compare* Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1333-34 (E.D. Tex. 1993) (agreeing with the plaintiffs that wearing long hair "is an expressive or communicative activity to a Native American"), *with* King v. Saddleback Junior Coll. Dist., 445 F.2d 932, 937 (9th Cir. 1971) (finding that wearing long hair was not constitutionally protected because the plaintiffs "were not purporting to say anything. [One plaintiff] . . . flatly stated that his hair style was not a badge or a symbol of any group. On the contrary, he said that he was 'a minority of one'"). *See also* New Rider v. Bd. of Educ., 414 U.S. 1097, 1099 (1973) (Douglas, J., dissenting from denial of certiorari) ("Petitioners were not wearing their hair in a desired style simply because it was the fashionable or accepted style, or

Although *Tenafly* is unclear as to exactly why the court regarded the *eruv* as symbolic speech, the *eruv*'s explicit identification with a recognizable group seemed to play a large role.[21] Thus, the court considered the Jewish *eruv* to be symbolic speech even as it regarded similar structures as mere conduct. The *eruv* seemed to communicate the unusual message of a minority culture; the decorations and signs simply composed part of the regular cultural background.

Outside the nonpublic forum, this assessment would have given the *eruv* more protection than the decorations. But the nonpublic forum allows the government to suspend the usual First Amendment hierarchy, minimizing the protection granted to minority behavior. As any measurement of communication is inevitably calibrated to the prevailing cultural standard,[22] such inversions generate a bias against minority speech. Government will always hear the distinct tones of minority expression above the cultural cacophony, and may stifle those sounds. At the same time, it will remain deaf to the pervasive hum of majority behavior. *Tenafly*'s doctrinal framework, rather than exposing this bias, obscures it beneath the formalisms of the speech/conduct dichotomy.

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because they somehow felt the need to register an inchoate discontent . . . . They were in fact attempting to broadcast a clear and specific message to their fellow students and others—their pride in being Indian."). *But see* Hatch v. Goerke, 502 F.2d 1189, 1193 (10th Cir. 1974) (holding that an Indian student's long hair was not "symbolic speech" under the First Amendment).

20. *Compare* Church of the Am. Knights of the Ku Klux Klan v. City of Erie, 99 F. Supp. 2d 583, 587 (W.D. Pa. 2000) (finding the KKK costume to be protected speech because "white hoods worn by Plaintiffs' members would likely be understood by onlookers as symbolic of the Klan's identity"), *and* Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr., 800 F. Supp. 1344, 1351 (E.D. Va. 1992) (stating that although wearing a mask was not protected speech, the KKK robes and hoods were expression because they "symbolized the Klan's beliefs and were likely to be so understood by those who viewed them"), *with* Bivens v. Albuquerque Pub. Schs., 899 F. Supp. 556, 561 (D.N.M. 1995) (finding that wearing sagging pants was not protected speech because it was not "necessarily associated with a single racial or cultural group"), *and* Olesen v. Bd. of Educ., 676 F. Supp. 820, 822 (N.D. Ill. 1987) (holding that wearing an earring was not constitutionally protected because it only expressed a student's "individuality").

21. The court's factual account is replete with statements identifying the symbolism of the *eruv* with Orthodox Jews. *See Tenafly*, 155 F. Supp. 2d at 145-71. This strongly contrasts with the court's endorsement of the town's broad and ecumenical description of the holiday displays: "[Their] purpose is to promote a shopping atmosphere in downtown during the holiday season. They remain in place for approximately six weeks. They are intended to be nondenominational and are certainly nonreligious. They are intended to convey a wintry holiday theme and nothing else." *Id.* at 176-77.

22. Professor Tribe has asserted that "[t]he very notion of speech is . . . incomprehensible outside a cultural and social framework." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 831 (2d ed. 1988). The Supreme Court, in distinguishing between speech and conduct, explicitly refers to the cultural context of communication. *See Spence*, 418 U.S. at 408-11.

III

The lesson of *Tenafly* is that doctrinal structures—even fundamental, intuitive ones—should not always be taken seriously. In the nonpublic forum, courts should ignore the ambiguous categories of speech and conduct. In comparing two kinds of behavior in the nonpublic forum, it is simply not relevant whether one activity is, in comparison, more expressive. Outside the nonpublic forum, the speech/conduct dichotomy highlights the strong protection that the First Amendment extends to speech. But inside the nonpublic forum, the government may regulate both speech and conduct. There, drawing the same distinction ignores, and even distracts courts from considering, the relevant standard: ensuring compatibility with the purposes of the nonpublic forum.[23]

The only relevant question in comparing two activities is whether one is more disruptive. The court should have elaborated on specific arguments for the compatibility of one kind of behavior over the other, without hiding those reasons behind the speech/conduct categorization. If the town were to argue that the *eruv* visibly interfered with the right-of-way, then it should have to explain why, in comparison, the decorations did not. If the town were to argue that the *eruv* was controversial or offensive, it should have to articulate why the decorations and signs were not. Expressiveness may be a useful proxy for these kinds of disruptiveness, but it is a proxy that can hide discrimination behind a formal label. *Tenafly*'s unexpressed grounds for deciding that the *eruv*'s expression was disruptive were easily buried under the formalism of the speech/conduct distinction. Those reasons should have been unearthed, and *Tenafly* should have applied the criteria of viewpoint neutrality and reasonableness to those more specific reasons to ensure they were not discriminatory.

Tenafly's focus on the speech/conduct dichotomy is a hallmark of classic First Amendment jurisprudence. But the generalities of the speech/conduct dichotomy are not always an appropriate place to draw the line for First Amendment protection. The Constitution should prompt us to ask whether that hallmark itself might sometimes be a front for discrimination. That inquiry demands that the First Amendment move beyond a focus on speech to a more general emphasis on equality.

—Eli Greenbaum

23. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804 (1985) (stating that the government could limit expression "[i]n cases where the principal function of the property would be disrupted by expressive activity"); *see also* DANIEL A. FARBER, THE FIRST AMENDMENT 186 (1998) (stating that public forum doctrine allows the government to "ensure that the facilities which it creates are used in a way that is compatible with their basic purpose").

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