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Two strikes against freedom of expression in Washington

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Last spring, in his dissent from the Washington Supreme Court's decision in *Sanders v. City of Seattle*, 160 Wn.2d 198, 236 (2007) (Chambers, J., dissenting), Justice Chambers concluded that the court was participating in the "stripping away, one painful precedent after another, the First Amendment right of freedom of expression." Regrettably, the court's two most recent decisions concerning freedom of expression in public venues, *Sanders* and *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343 (2004) indicate that Justice Chambers was correct.

Following the lead of the U.S. Supreme Court, the Washington Supreme Court has used "public forum" doctrine to delineate the extent of constitutional protection afforded to expression on property controlled by the government. Originally invoked to vindicate First Amendment rights, in the 1970's the Burger Court transformed "public forum" into a categorical limit on the First Amendment. *See* Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 *U.C.L.A. L. Rev.* 1713, 1718-1745 (1987). The court did so by developing the category of "non-public forum." While restrictions on expression in "public fora" were prohibited unless narrowly tailored to advance an important government interest, in non-public fora such restrictions were held constitutional, so long as they were reasonable in light of the purpose of the property. *Id.* at 1739-1745.

It is almost universally recognized that the Supreme Court has adduced neither clear criteria for distinguishing public fora from non-public fora nor a credible justification for affording less constitutional protection to expression in non-public fora than in public fora. *Id.* at 1715-1716; *see American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099-1100 (9th Cir. 2003). These failings were abundantly displayed in *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-683 (1992) (plurality); *Id.* at 686-687 (O'Connor, J., concurring), in which a bare majority of the Supreme Court determined airports to be non-public fora, and accordingly affirmed a ban on solicitation in airports. The *Lee* decision rested on highly dubious grounds. For example, airports (being relatively recent creations) lacked a long history of serving as venues for expression, that expression is not a principal purpose of airports and that access to portions of airports is limited by certain security practices. *Id.*

In a separate opinion, Justice Kennedy, joined by three other justices, challenged the court's public forum analysis:

> The Court's error lies in its conclusion that the public forum status of public property

> depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. ... The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech.

Id. at 695 (Kennedy, J. concurring). Kennedy further noted that although the majority conceded that streets, sidewalks and parks qualified as public fora, facilitating expression likely is **not** a principal purpose in their creation. *Id.* at 696-697. What distinguished public fora, Kennedy explained, was that their: "objective physical characteristics ... and the actual public access and uses that have been permitted by the government indicate that expressive activity would be compatible with those uses." *Id.* at 698-699.

Despite the opinion's incoherence and speech suppressive impact, three years ago in *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d at 351-353 the Washington Supreme Court held that Washington's definition of public forum would be determined by the U.S. Supreme Court's definition of public forum. Accordingly, the *Mighty Movers* court held public utility polls to not be public fora, and thus approved a prohibition of postering on utility poles. *Id.* at 360-363. The *Mighty Movers* court justified binding Washington to the federal public forum definition with the dubious (as Justice Sanders dissenting, with Justices Chambers and Owens, noted), and, in any event, unpersuasive (as Chief Justice Alexander's concurrence noted) assertion that Washington Supreme Court decisions previously had relied on the federal public forum definition. *Id.* at 351-352; id. at 367-369 (Sanders J., dissenting); *id.* at 363-364 (Alexander, C.J., concurring).

Last spring in *Sanders v. City of Seattle* the Court further undermined the coherence and vigor of Washington's constitutional protection of expression. The plaintiffs in Sanders used a public easement covering most of the common areas in Westlake Center, a large private shopping mall in downtown Seattle, to access Seattle's monorail to travel to an anti-war protest. The shopping mall required them to lower (and thereby render largely invisible) their picket signs, while using the easement. *Sanders*, 160 Wn.2d at 203-204.

Relying principally on the fact that expression was not a "principal purpose" of the easement - as shown in the "easement operating agreement" through which the City had reserved the public's right to ingress and egress the monorail - the court held the easement to not be a public forum, and affirmed the constitutionality of the restriction. *Id.* at 213-217. Even though the court previously had bound itself to the federal public forum definition, that decision did not require consideration of whether expression was a "principal purpose" of the easement to determine whether it was a public forum. While the U.S. Supreme Court in *Lee* had cited the principal purpose of airports in deciding the public forum question in that case, the court never has held expression **must** be a principal purpose of property for it to qualify as a public forum.

Indeed, since *Lee*, U.S. Circuit Courts of Appeals have split on this point. On one side, the Second Circuit Court of Appeals has held the principal purpose of a venue to be a determinant of its forum status. *Hotel Employees and Restaurant Employees Union v. City of New York, Dept. of Parks*, 311 F.3d 534, 551-552 (2nd Cir. 2002). Accordingly, the court held an open public plaza in Manhattan to not be a public forum, which resulted in its affirming a ban on leafleting in the plaza. *Id.* at 555-556. On the other side, substantially for the reasons cited in Justice Kennedy's dissent in *Lee*, the Ninth and Tenth Circuits have disregarded whether expression was a principal purpose of property. As a result, those respective Courts have held that privately owned sidewalks and plazas covered by public easements were public fora. *Venetian Casino Resort, LLC v. Local Joint Exec. Bd.*, 257 F.3d 938, 945-948 (9th Cir. 2001); ACLU, 333 F.3d at 1102-110; *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1125-1126, 1130-1131 (10th Cir. 2002).

Without addressing any of the criticism of the principal purpose test, the *Sanders* court declined to follow the Ninth Circuit and Tenth Circuit on the grounds that the U.S. Supreme Court had relied on this test in some of its public forum cases as had the court in *Mighty Movers*. *Sanders*, 160 Wn.2d at 213. Since neither *Mighty Movers* nor any of the other cases the *Sanders* court cited had held the principal purpose of a venue being expression was a condition of its being a public forum, nor had any of the cases justified use of this condition in public forum analysis, the *Sanders* court's reasoning on this point was rather tenuous. *Id.* at 213.

The *Sanders* court attempted to buttress its holding by maintaining the easement was not suited to be a public forum, and that it differed materially from traditional public fora. *Sanders*, 160 Wn. 2d at 215-220. Yet, several of the court's own decisions, most recently in 1999, had affirmed that large shopping malls in fact are well suited to serve as public fora;

> [a]s property becomes the functional equivalent of a downtown areas or other public forum, reasonable speech activities become less of an intrusion on the owner's autonomy interests. When property is open to the public, the owner has a reduced expectation of privacy, and as a corollary, any speech activity is less threatening to the property's value.... The shopping center now performs a traditional public function equivalent of a town center or community business block.

Alderwood Associates v. Washington Environmental Council, 96 Wn.2d 230, 244, 246 (1981); *Waremart Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 632-634 (1999). Accordingly, the Court held the right to petition, guaranteed by Article II, section 1(a) of the Washington Constitution, and which does not require state action, is protected in large private shopping malls. *Id.* While Article 1, section 5 of the Washington Constitution, which guarantees other expressive rights, does require state action, the shopping mall easement was public property. Had the *Sanders* court followed its own precedents, it would have held the easement to be a public forum. Instead, the court ignored them.

The *Sanders* court acknowledged that even as a non-public forum, no medium of expression could be excluded from the shopping mall easement absent evidence the exclusion advanced a legitimate government interest. *Sanders*, 160 Wn.2d at 222. The shopping mall failed to adduce any objective evidence to support its professed safety justification. *Id.* at 205-206. The court affirmed the restriction on the ground that it did not bar a mode of expression, because it did not entirely exclude signs from the easement. *Id.* at 222-223. As noted in Justice Sanders' dissent, the requirement that signs be held low was a ban on picketing, whose status as a constitutionally protected mode of expression is beyond question. *Id.* at 227 (Sanders, J., dissenting); *see Edwards v. City of Couer d'Alene*, 262 F.3d 856, 865-867 (9th Cir. 2001). The *Sanders* majority does not mention picketing or the case law guaranteeing the right to picket.

Washington's Constitution once afforded a higher level of protection to expression than the U.S. Constitution. *See, e.g., O'Day v. King County*, 109 Wn.2d 796, 803-804 (1988). One might fairly argue, after *Sanders* and *Mighty Movers*, the opposite to be the case today.

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