The Public Forum Doctrine

A Primer for Municipal Attorneys

— by David W. Bushek and Stephen P. Chinn —

When an individual or a group seeks to engage in expressive activity on government property, the public forum doctrine is generally used to analyze the legality of any restrictions placed by the government on that expressive activity. The public forum doctrine has been applied by the courts in numerous settings, but certain aspects of this doctrine seem unsettled. This article is designed to provide a basic understanding of the doctrine, and explain some of the settings in which it has been applied to resolve disputes involving restrictions upon free speech on government property.

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The Public Forum Doctrine

The Free Speech Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law... abridging the freedom of speech." The United States Supreme Court "has adopted a forum analysis as a means of determining when the government's interest in limiting the use of [government] property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[1] The doctrine starts with the premise that:

> speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State.... The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather it has been reserved for specific official use.[2]

The Supreme Court has designated three different types of fora in which free speech may occur on government-owned property: (1) the traditional public forum; (2) the limited or designated public forum; and (3) the nonpublic forum.

Traditional Public Forum

"Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' Public streets and sidewalks fall into this category."[3] Regulations limiting speech in a traditional public forum are subject to strict scrutiny: the government must show a compelling state interest for the regulation, and show that the regulation is narrowly tailored to achieve the state interest.[4] The government may enforce content-neutral time, place and manner regulations, so long as the regulations are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication.[5]

Limited Public Forum

A limited or designated public forum is a nontraditional forum that the government has opened for "indiscriminate use" by the "general public."[6] When the government opens a nonpublic forum to expressive activity, "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the

public even if it was not required to create the forum in the first place."[7] Regulations in a limited public forum are also subject to strict scrutiny, as in a traditional public forum.[8] "Although the state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[9] Content-neutral time, place and manner regulations in a designated public forum must be reasonable.

Non-public Forum

A non-public forum is any government property that is neither a traditional, nor a designated or limited, public forum, and one which is not open for indiscriminate access by the general public.[10] "Limitations on expressive activity conducted on [a non-public forum] must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[11]

Viewpoint Discrimination

If the government has attempted to express a particular viewpoint on an issue, the regulation will be invalidated. The government may discriminate against a speaker based on the type of expressive activity in a limited public forum (content discrimination), but may never discriminate based on the speaker's viewpoint (viewpoint discrimination). For example, the government may prohibit all speech relating to the sale of tobacco in a certain forum, but may not prohibit an ad supporting tobacco consumption while allowing an ad criticizing tobacco use.

> [I]n determining whether the state is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, [there is] a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[12]

Confusion Regarding the Limited Public Forum

The law governing the limited public forum is unsettled. In the early formation of the doctrine, the Supreme Court held that a limited public forum was created when the government opened property for expressive use to certain groups and denied access to other groups.[13] In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[14] the Supreme Court shifted its view and held that a limited public forum can only be created where the government opens the forum for "indiscriminate use by the general public."[15] If the government does not open the property for indiscriminate use, but only to certain groups, this would appear to be classified as a non-public forum after *Perry*. The definition of a limited public forum in *Perry*, which requires indiscriminate use by the general public, creates inherent tension between the limited public and non-public forum. How can the government open a forum for "indiscriminate use by the general public," yet limit that same forum to use by certain groups? The effect of the Supreme Court's ruling in *Perry* seems to have been to increase the probability that any forum that is not clearly a traditional public forum will be held to be a non-public forum. Some commentators have argued that *Perry* has essentially destroyed the limited public forum category, because the forum can never be both open for indiscriminate use by the general public and limited to use by certain groups.[16]

Adding confusion to the doctrine, the Third Circuit has opined that the "limited public forum" is actually a *subcategory* of the "designated public forum," in that the limited forum opens an otherwise non-public forum to only certain types of First Amendment activities. In *Kreimer v. Bureau of Police*,[17] the Third Circuit held that

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a public library, open to allow the public to exercise only those rights that are "consistent with the nature of the Library" (i.e., reading and studying, but not talking loudly), was a limited public forum. The court stated that the limited public forum is a subcategory of the designated public forum. In this analysis, the Third Circuit circumvents the *Perry* holding by creating a forum that is essentially "less open" than the Supreme Court's designated public forum. This opinion appears to be in direct conflict with *Perry* and its progeny that hold that either the forum is open to the general public for indiscriminate use, or it is a non-public forum.[18] To further confuse the issue, the Third Circuit added in a footnote in *Kreimer*, "[w]hile we find that the 'limited' public forum would be a useful analytical concept, we would reach the same conclusion simply following the Supreme Court's declarations regarding the 'designated' public forum....Indeed, the Court itself, without focusing on the analytical distinction between 'designated' and 'unlimited' public fora as developed here, has used the words interchangeably."[19] All other courts, however, treat the "limited" and the "designated" forum as the same forum, and either apply the "open for indiscriminate use" test from *Perry*, or circumvent the issue altogether by holding that the municipality has engaged in viewpoint discrimination.

Determination of the Forum

If a court determines that a lawsuit involves expressive activity protected by the First Amendment and that no viewpoint discrimination has occurred, the court will determine the nature of the forum. This will involve the evaluation of one or more of the following factors.

Physical location and layout

Is the location of the forum enclosed in a place that is considered a non-public forum? For example, a sidewalk along a residential street in a municipality is viewed as a traditional public forum, while a sidewalk adjacent to residential structures on a military base is a non-public forum.[20] "[W]e have recognized that the location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction."[21] Is the property to which the speaker seeks access unique from its surroundings or similar governmental property? For example, in *Lebron v. National R.R. Passenger Corp.*,[22] an artist sought access to the "Spectacular," a display space that dominates the west wall of the rotunda on the upper level of Penn Station in New York City. The court held that the Spectacular, rather than all Penn Station advertising space, was the appropriate public forum for analysis. Similarly, when a speaker seeks access to advertising space in a sports arena, public forum inquiry focuses on the advertising space rather than the entire arena.[23] Some fora may not have a physical presence, but are nevertheless examined under the public forum doctrine. For example, in *Rosenberger v. Rector & Visitors of University of Virginia*,[24] the Court examined the University of Virginia's student activity fund under the forum analysis, noting that the fund "is a forum more in a metaphysical than a spacial or geographic sense, but the same principles are applicable."

Access

What access is sought by the speaker? "[F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property.... In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property."[25]

Traditional use

What expressive activity has historically been allowed on the public property? Has the property been open to expressive activity over a significant period of time, even though the government may not have expressly approved of such activity? If the traditional use of the forum has been to allow public expression, the court is likely to find that it is a traditional public forum. Sidewalks and streets are the most commonly cited traditional public forum.[26] Other locations historically open to the public, such as an open plaza adjoining a state capitol, are considered traditional public fora.[27]

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Government intent

Did the government intentionally open the forum to public expression? "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."[28] A court will look to the laws, regulations or expressly adopted policies to determine the government's intent regarding expression in the forum.

Written guidelines or policies and past practices

Has the government regulated the forum through a set of written guidelines or policies? If so, how has the government followed those guidelines or policies? What have been the government's actual past practices with respect to expressive activity in the forum? If there were written guidelines or policies, have the government's past practices conflicted with its guidelines? When the government does not have a written policy or guidelines regarding the speech allowed in the forum, the

court will look to the government's historical practices to determine what speech is intended to be allowed.[29] If the government's actual practice is different than the written policy, the court will analyze the forum based on the actual practice.[30] When neither past practices nor written policies determine the forum, the courts will compare past practices with the stated purposes of the forum to determine the true nature of the forum.[31]

Government as proprietor

Is the government acting as a proprietor rather than a lawmaker? A non-public forum will be found where the government is acting as a proprietor. A government's actions in that capacity, "managing its internal operations, rather than acting as lawmaker with the power to regulate or license...will not be subjected to the heightened review to which its actions as a lawmaker may be subject."[32]

Application of the Public Forum Doctrine

The courts have applied the public forum doctrine to analyze free speech issues in a wide variety of government property situations.

Bus and public transit advertisements

The United States Supreme Court has held that where the advertising space is generally limited to commercial speech and the government is acting in a proprietary capacity to manage the commercial speech through regulations, such space on the inside or outside of buses, or in other public transit settings, is a non-public forum.[33] Governmental bus or transit advertisement policies create a limited public forum where political, public service, and public issue advertisements and other forms of potentially controversial non-commercial speech are allowed.[34]

Public school property

The public forum doctrine has been applied in several public school settings. The United States Supreme Court held that a public school district internal mail system was a non-public forum, even though the system

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was opened by the school district to certain private organizations for the purpose of distributing mail to teachers.[35] The Supreme Court later held in *Lamb's Chapel v. Center Moriches School District*[36] that the use of public school property after school hours was a non-public forum because the school district did not open the school after hours for "indiscriminate public use," but rather, had adopted rules governing after-hours use of school property for ten specified purposes. In a recent case from the Ninth Circuit Court of Appeals, a baseball field fence at a public grade school was held to be a non-public forum because the school board had, by past practice, rejected controversial advertisements, including ads that would promote alcohol and tobacco consumption as well as an ad for Planned Parenthood.[37] The board rejected a proposed advertisement containing the text of the Ten Commandments because it might have caused disruption or have forced the board to accept other ads on religious or controversial subjects.

Adopt-A-Highway programs

A series of cases involving the Ku Klux Klan's attempts to gain access to state "adopt-a-highway" programs illustrates the difficulty of applying forum analysis in practice.[38] Three different courts were faced with the same issue: what type of forum analysis should be applied to the adopt-a-highway program when the Ku Klux Klan seeks, and is denied, access to the program? Each court analyzed the forum differently and reached a different conclusion. The Federal District Court for the Eastern District of Missouri held that the forum is the state highway right-of-way, which is a designated public forum; exclusion from the program violated the Klan's First Amendment rights.[39] The Federal District Court for the Western District of Arkansas also found that the forum is the state highway right-of-way and that exclusion of the Klan from the program violated the Klan's First Amendment rights, but held that such a location is a traditional public forum.[40] Taking a completely different view of the issue, the Fifth Circuit held that the forum is the adopt-a-highway program, which is a non-public forum; exclusion from the program did not violate the Klan's constitutional rights.[41]

Government offices

The United States Supreme Court has analyzed access to non-tangible aspects of government offices under the public forum doctrine. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[42] the Court held that an annual charitable fund-raising drive conducted in the federal workplace was a non-public forum. Charities that sought access to the program were required to obtain permission from federal and local campaign officials before participating, and the government's policy had been to limit participation in the program to "appropriate" voluntary agencies. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum."[43]

Other limited public fora include a municipal auditorium or theater,[44] a school board meeting,[45] and public university meeting place.[46] Other non-public fora include: military bases,[47] airport terminals,[48] mail boxes,[49] the lobby of a state welfare office,[50] school property designated for athletic purposes,[51] personal student workspaces at public school,[52] publications by government agency counselors serving individual clients,[53] and legal bar journals.[54]

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Conclusion

The public forum doctrine has been applied by the courts in many different circumstances where individuals seek access to government property for expressive purposes. Municipal attorneys should be aware of these settings and the manner in which the courts analyze these issues. The practitioner should also be aware of the confusion surrounding the limited public forum—the practical effect of the Supreme Court's rulings has been to increase the likelihood that certain settings will be measured under the nonpublic forum reasonableness standard of review. The courts will likely continue to expand the settings in which the doctrine is applied, but may continue to struggle with application of the limited forum category.

Notes

1. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985).
2. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (citations omitted).
3. *Cornelius*, 473 U.S. 788 at 802 (*citing* Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)).
4. *Perry*, 460 U.S. at 45.
5. *Id.*
6. *Id.* at 47.
7. *Id.* at 45.
8. *Id.* at 47.
9. *Id.* at 46.
10. Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).
11. *Id.* at 679.
12. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829-30 (1995).
13. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater was a designated public forum); Madison Joint Sch. Dist. v. Wisconsin Emp. Relations Comm., 429 U.S. 167 (1976) (school board meeting constituted a designated public forum); Widmar v. Vincent, 454 U.S. 263 (1981) (public university meeting place was a designated public forum).
14. 460 U.S. 37, 47 (1983).
15. *Id.* at 47.
16. See Note, *A Procedural Approach to Limited Public Forum Cases*, FORDHAM URB. L.J., Summer 1995, at 1225.
17. 958 F.2d 1242, 1263 (3d Cir. 1992).
18. *Perry*, 460 U.S. at 47.
19. *Kreimer*, 958 F.2d at 1261 n. 21. *See also* Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991).
20. *See* Greer v. Spock, 424 U.S. 828 (1976).
21. *Lee*, 505 U.S. at 680.
22. 69 F.3d 650 (2d Cir. 1995), *cert. denied*, 517 U.S. 118 (1996).
23. Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n, 797 F.2d 552 (8th Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).
24. 515 U.S. 819, 830 (1995).
25. *Cornelius*, 473 U.S. at 801.
26. United States v. Grace, 461 U.S. 171 (1983).
27. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).
28. *Cornelius*, 473 U.S. at 802.
29. Lebron v. National R.R. Passenger Corp., 69 F.3d 650, 658 (2d Cir.1995), *cert. denied*, 517 U.S. 118 (1996).
30. *See* Air Line Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1154 (7th Cir. 1995).
31. Christ's Bride Ministries, Inc. v. Southeastern Pa. Trans. Auth., 148 F.3d 242, 253 (3d Cir. 1998), *cert. denied*, 119 S.Ct. 797 (1999).
32. *Lee*, 505 U.S. at 678.
33. Lehman v. City of Shaker Heights, 418 U.S. 300 (1974). *See also* Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3713 (1999).
34. United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Auth., 163 F.3d 341 (6th Cir. 1998); Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985); New York Magazine v. Metropolitan Trans. Auth., 136 F.3d 123 (2d Cir. 1998); Christ's Bride Ministries, Inc. v. Southeastern Pa. Trans. Auth., 148 F.3d 242 (3d Cir. 1998), *cert. denied*, 119 S.Ct. 797 (1999).
35. *Perry*, 460 U.S. 37 (1983).
36. 508 U.S. 384 (1993).
37. Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., No. 98-56762, 1999 WL 1005118 (9th Cir. Nov. 8, 1999).
38. *See* Suzanne Stone Montgomery, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 Wash. U. L.Q. 557 (1999).
39. State of Missouri ex rel. Highway & Transp. Comm'n v. Cuffley, 927 F.Supp.1248 (E.D.Mo. 1996).
40. Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep't, 807 F. Supp.1427 (W.D.Ark. 1992).
41. Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995).
42. 473 U.S. 788 (1985).
43. *Id.* at 805.
44. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
45. Madison Joint Sch. Dist. v. Wisconsin Emp. Relations Comm., 429 U.S. 167 (1976).
46. Widmar v. Vincent, 454 U.S. 263 (1981).
47. Greer v. Spock, 424 U.S. 828 (1976).
48. *Lee*, 505 U.S. 672 (1992).
49. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114 (1981).
50. Families Achieving Independence and Respect v. Nebraska Dept. of Social Servs., 111 F.3d 1408 (8th Cir. 1997).
51. Student Coalition for Peace v. Lower Marion School, 776 F.2d 431 (3d Cir. 1985).
52. Fister v. Minnesota New Country School, 149 F.3d 1187 (8th Cir. 1999).
53. National Federation of Blind of Missouri v. Cross, 184 F.3d 973 (8th Cir. 1999).
54. Bernard v. Chamberlain, 897 F.2d 1059 (10th Cir. 1990). ML