The Constitutional Limitations on Regulating the Use of Public Spaces: A Scenario Based Discussion

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First Amendment Limitations on a Government's Ability to Regulate Demonstrations

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[1] The opinions in this paper are those of the author. They do not represent the views or policy of the city of Boulder.

The starting point is, of course, the First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. 1. The current Supreme Court is very protective of First Amendment rights. It appears to be the area in which the liberal and conservative justices can find common ground. This is generally not good news for the government practitioner. For example, most municipal lawyers had to rewrite their communities' sign codes after *Reed v. City of Gilbert.* We worry about demonstrations, because we know that often what seems like the common-sense approach to protecting public safety or convenience can have First Amendment implications. No one wants the ACLU knocking on their door. The job of the government lawyer often involves difficult real-world choices among unpalatable choices. We can, however, build a framework that may assist in making those choices with some degree of confidence or perhaps just less outright terror.

The law on government regulation of demonstrations is evolving. Thus, it is important for a government lawyer to stay abreast of developments in the courts, focusing not only on the Supreme Court, but also the Courts of Appeals and even the district courts. This was brought home to lawyers in Colorado when in September 2015, a district court struck down Grand Junction's panhandling ordinance as a content-based regulation under *Reed. Browne v. City of Grand*

Junction, 136 F. Supp. 3d 1276 (D. Colo. 2015). The author immediately proposed an emergency ordinance altering Boulder's panhandling ordinance to conform to the *Browne* decision. While it is not always necessary to act so quickly, in this case, the ACLU was looking for other defendants, Boulder would have been a high-profile target and the *Browne* court's analysis was well-founded.

I. The Basics

First Amendment analysis begins with a forum analysis. The ability to regulate expressive activity depends on where it occurs. There are four general areas that courts have described.

- Traditional Public Forum
- Limited Public Forum
- Designated Public Forum
- Non-public Forum

a. Traditional Public Forum

A traditional public forum is one that "time out of mind"[2] has been used for expressive activity. This generally includes places like public squares, sidewalks and parks. That is, every place where a group is likely to want to demonstrate. There is significant caselaw on what is and is not a traditional public forum. For example, the Ninth Circuit has held that a downtown pedestrian mall is a traditional public forum,

[2] The phrase "time out of mind" appears only to be used in cases describing traditional public forums or in old patent cases. Compare *Wright v. Postel*, 44 F. 352 (C.C.E.D. Pa. 1890) with *Verlo v. Martinez*, 262 F. Supp. 3d 1113 (D. Colo. 2017). A recent Westlaw search of all federal cases found 664 using that phrase, the vast majority of which were first amendment cases. Generally, when a court says "time out of mind" it means from time immemorial.

Am. Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003), but that public beaches are not. *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128 (9th Cir. 2011).

In traditional public forums, governments may adopt regulations of the time, place and manner of expressive activity that are content-neutral, are narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

b. Designated Public Forum

A designated public forum is a non-public forum that the government has intentionally opened for public discourse. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Although a government is not required to indefinitely retain the open character of the space opened to public discourse, if it does so it is bound by the same standards that apply in a traditional public forum. *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001). That is, a designated public forum is a traditional public forum in an area that would not generally be considered a traditional public forum.

c. Limited Public Forum

A limited public forum can be viewed as a type of designated public forum that the government has opened intentionally for a limited purpose. The government may not exclude speech in a manner that is not "reasonable in light

of the purpose served by the forum." A government may not discriminate against speech because of its viewpoint. Content discrimination is permissible if it preserves the purposes of that limited forum. Viewpoint discrimination is impermissible when directed against speech otherwise within the forum's limitations. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829–30 (1995). City council meetings are generally considered to be limited public forums. *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

d. Non-public Forum

Limitations in a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable considering the purpose served by the forum and are viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

II. Regulating Demonstrations

a. Permitting in Traditional Public Forums

The Supreme Court set the boundaries for how a government can regulate demonstrations in a traditional public forum in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). *Thomas* involved a facial challenge to an ordinance requiring permits "to conduct a public assembly, parade, picnic, or other event" for more than 50 people. The petitioners had sought permits to demonstrate in favor of marijuana legalization. The district granted some and

denied some. The ordinance provided that:

- Applications would be processed in order of receipt.
- Denial could only be based on 13 specified grounds.
- A denial was required to be in writing, stating the reason for denial and if feasible providing means to cure.
- If the denial was based on prior receipt of a competing application, the district was required to suggest alternate times or places.
- An unsuccessful applicant could appeal to the park superintendent within seven days and the superintendent must act within seven days.
- If affirmed the applicant could seek judicial review.

In upholding the ordinance, the Supreme Court relied on several factors, including that:

- The ordinance was not limited to expressive activity.
- The purpose of the permit system is to coordinate multiple uses of limited space, to preserve park facilities, to prevent uses that are dangerous, unlawful, or impermissible and to assure financial accountability for damage caused by the event.
- The ordinance provided narrowly drawn specific limitations, which constrain official discretion.

If a government intends to restrict activity in parks, streets and sidewalks with a permit system, the limitations approved by the Court in *Thomas* are helpful. Narrowly drawn limitations with ample alternatives generally will be upheld. *See, e.g., Occupy Sacramento v. City of Sacramento,* 878 F. Supp. 2d 1110 (E.D. Cal. 2012) (upholding a city ordinance requiring permits for after-hours use of parks).

b. Parade Permits

In contrast to Chicago's system reviewed in *Thomas,* was the City of

Seattle's parade ordinance overturned by the Ninth Circuit in *Seattle Affiliate, v. City of Seattle,* 550 F.3d 788 (9th Cir. 2008).[3] *Seattle Affiliate* involved an annual demonstration against what the demonstrators characterized as police brutality. The Seattle parade ordinance gave the police chief discretion to alter the route in the interest of pedestrian and traffic safety. In 2002, the permit issued required the marchers to use the sidewalks and obey traffic laws if there were fewer than 200 marchers. In 2003, there was no such language in the permit. Only 80 to 100 people participated in the demonstration in 2003. An officer directed them to use the sidewalk. Testimony at trial showed that there were no set guidelines for what constituted risk to pedestrian or traffic safety. One officer testified that it would be appropriate to move a march if it was going to inconvenience patrons at sidewalk cafes. The Ninth Circuit held that the parade ordinance was unconstitutional. The Seattle ordinance both as drafted and as applied gave the police discretion to deny access to the streets without real guidelines.

c. Buffer Zones

One of the more recent Supreme Court decisions involving demonstrations is *McCullen v. Coakley*, 573 U.S 464 (2014). This case is part of what appears to be a unique subset of cases involving demonstrations at abortion clinics, which

[3] In the interest of full disclosure, it should be noted that the author was the city attorney in Seattle at the time.

according to the late Justice Scalia, was based upon an "entirely separate, abridged edition of the First Amendment applicable to speech against abortion." *Id. at* 497. *McCullen* struck down a Massachusetts law limiting demonstrations at abortion clinics.

The law at issue in *McCullen* included the following provision:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of [thirty-five] feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Mass. Gen. Laws ch. 266, § 120E (2007), *invalidated by McCullen*, 134 S. Ct. 2518, *repealed by* 2014 Mass. Legis. Serv. ch. 197. The law exempted people using the clinic, employees entering or leaving, emergency personnel and passersby. The petitioners were sidewalk counselors. They presented as non-violent, peaceful advisors in stark contrast to some of the violent and even homicidal abortion opponents sometimes seen at clinics.[4] The named plaintiff, Eleanor McCullen was a seventy-seven-year-old grandmother who believed anger and violence were counterproductive.

The counselors' practice was to approach women entering the facility and ask questions such as "good morning, may I give you my literature," "is there

[4] For a good discussion of buffer zone regulations and the tactics of the petitioners in *McCullen* see Susan L. Gogniat, *McCullen v. Coakley and Dying Buffer Zone Laws*, 77 U. Pitt. L. Rev. 235, 241 (2015)

anything I can do for you," or "I'm available if you have any questions?" They considered it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. The Boston clinic used employee "escorts," who as clinic employees were exempt from the ordinance restrictions. The court held that the restrictions were not content-based and that the exemption for employees was not viewpoint-based. Nevertheless, the court held that the law substantially burdened the petitioners' speech because it was not narrowly-tailored and there are less-intrusive alternatives to the 35-foot buffer. The court noted that in two clinics, most of the patients arrived by car and parked in a lot within the 35-foot buffer.

In deciding *McCullen*, the Supreme Court limited, without expressly overruling, a previous case addressing buffer zones. *Hill v. Colorado*, 530 U.S. 703 (2000). The *Hill* court upheld a law that prohibited persons within 100 feet of a health care clinic from approaching within eight feet of another person for the purpose of passing "a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person ...." Colorado Rev. Stat. § 18–9–122(3). While the *McCullen* court did not expressly overrule *Hill*, the court did reject the *Hill* court's definition of content neutrality in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2229 (2015). Thus, any regulation based on the reasoning in *Hill*, is likely to be vulnerable.

The federal courts of appeal provide some guidance on what type of buffer zones might survive a First Amendment challenge. The Ninth Circuit struck down a buffer zone around the Cow Palace in San Francisco, because protesters were isolated in a parking lot preventing them from interacting with most visitors to the venue. *Kuba v. 1–A Agric. Ass'n*, 387 F.3d 850, 861 (9th Cir.2004). However, the Ninth Circuit, albeit in an unpublished opinion, upheld a ten-foot buffer zone around the entrance to the state fair. *Cuviello v. City of Oakland*, 434 Fed. Appx. 615, 617 (9th Cir.2011) (unpublished) *see also Cuviello v. Expo, No.* S-11-2456 KJM EFB, 2013 WL 3894164 (E.D. Cal. July 27, 2013) (denying motion for preliminary injunction against enforcement of buffer zones, but enjoining provision prohibiting leafleting).

Some courts, not including the Ninth Circuit, have upheld significant buffer zones when issues of public safety are implicated. *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007); *Marcavage v. City of New York*, 689 F.3d 98 (2d Cir.2012), *cert. denied*, 568 U.S. 1212 (2013). *Citizens for Peace in Space* involved a challenge to the security plan for meeting of NATO ministers. The plan included a complete exclusion zone around the hotel in which the meeting was taking place. The nearest point at which protestors could interact with participants was a checkpoint 310 yards from the hotel. The restriction was challenged as not sufficiently narrowly-tailored. The court held that the restriction was tied closely to the prevention of terrorism, basing its reason on the

likely impact radius of a bomb.

Marcavage involved a challenge to restrictions on demonstrations at the 2004 Republican National Convention. The decision was issued, however, in August 2012 less than a year after the September 11, 2011 terrorist attacks and therefore the court may have given additional consideration to the need for security. The convention was held at Madison Square Garden. The Garden sits on a "super-block" encompassing the area from 31st Street to 33rd Street between 7th and 8th Avenues. It was built above a rebuilt Pennsylvania Railroad Station, which is one of the main commuter hubs in the city. The security plan created three zones: a demonstration zone, a pedestrian-only zone which did not allow demonstrations and a no-entry zone. The no-entry zone was the sidewalk on the west side of 7th Avenue between 31st and 33rd Streets, adjacent to the entrance to the Garden. The pedestrian-only zone was the east side of 7th Avenue. Pedestrians were permitted on the sidewalk but required to keep moving. The demonstration zone encompassed the entire area of 8th Avenue between 31st and 33rd Streets. Although there are entrances on 8th Avenue, the main marquee for the Garden is on the 7th Avenue side. The court upheld the restrictions as reasonable time, place and manner restrictions. Interestingly, the court rejected the plaintiffs' arguments that there was no evidence of an actual security threat or a need for crowd control. The court relied upon common sense to support the city's rationale.

This raises the question of what evidence is required to support a government restriction on demonstrations. Dealing with potential security threats, the courts in *Citizens for Peace in Space* and *Marcavage* did not require any proof of an actual threat. In contrast, the Supreme Court in *McCullen* rejected similar arguments regarding sidewalk congestion, referring to the lack of evidence of such congestion in the record. *McCullen*, 573 U.S. at 493.

The *McCullen* court ultimately invalidated the Massachusetts statute because it was not sufficiently narrowly-tailored. *Id.* At 510-12. In 2017, the court rejected a North Carolina law restricting sex offenders' social media activity as not sufficiently narrowly-tailored. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). The petitioner was charged with violating the law because he posted the following message on Facebook after a traffic ticket was dismissed:

> Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!

Id. At 1734. The court noted that

> This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

Id. at 1736. Although, as in *McCullen*, the court found the law to be content-neutral, the court held that it restricted more speech than necessary. This decision demonstrates how difficult it can be to create a restriction that is sufficiently

narrowly-tailored to survive even intermediate scrutiny. In the context of demonstrations, where generally restrictions involve traditional public forums and therefore are subject to strict scrutiny, the bar is likely even higher.

d. Charlottesville

The tragedy that occurred in Charlottesville, Virginia is helpful to illustrate some of the challenges faced by government lawyers when addressing demonstrations. The City of Charlottesville changed the name of Robert E. Lee park to Emancipation Park and planned to remove a statue of Robert E. Lee. Jason Kessler applied for and received a permit to hold a demonstration in Emancipation Park. Emancipation Park is only one square block. In the following weeks the city granted permits to groups of counter-protestors at other parks. A week before the demonstration, the city, on the advice of outside counsel and against the advice of the city attorney, revoked Kessler's permit and issued one for a protest at Mcintire Park. Kessler's demonstration was the only one that the city moved. The police department also objected to the move, because they did not have time to develop an adequate security plan for the new location. Mcintire Park is over a mile away from Emancipation Park and is over 100 acres. Kessler sought a preliminary injunction. The court granted the injunction holding that the decision to revoke only Kessler's permit was content-based and that the restriction was not supported by a significant public interest. The court concluded as follows:

> In revoking the permit, the defendants cited 'safety concerns'

> associated with the number of people expected to attend Kessler's rally. However, the defendants cited no source for those concerns and provided no explanation for why the concerns only resulted in adverse action being taken on Kessler's permit.

Kessler v. City of Charlottesville, Slip. Op. No. 3:17CV00056 (Aug. 11, 2017) (copy attached). It turned out that the concerns were real. Perhaps these concerns can be used to support future arguments for restrictions on other future potentially dangerous demonstrations.

III. Takeaways

A practitioner should review special event, public permit and parade ordinances to determine the following:

- Are there specific criteria for denial?
- What, if any, discretion does the decision-maker have?
- Is there a process for review?
- Anything that could be considered content based?
- Anything that could be considered viewpoint based?

When regulating demonstrations:

- Clearly articulate government interest in regulating or restricting.
  - Tie interest closely to restriction.
  - Look to land use – any chance that the area is not a public forum?
- Review your rules for public spaces.
  - Are they adequate?
- Do you have an enforcement mechanism?

Signs, Graffiti, Projections:

- Are they banned where you want them banned?
- Are your rules enforced consistently?

- Do you have an enforcement mechanism?

City Council Meetings:

- Review your rules.
    - Do you have the ability to restrict disruptive activity?
- Do you have a plan to make an arrest?
    - Council members should not be involved in the decision to make an arrest.
- Do you have a reasonable sign restriction?
- Work with your presiding officer on how to handle demonstration