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

Purpose of Webinar

To address the following questions

- How can cities effectively prepare in advance of public demonstrations? How can cities respond to protests as they unfold?
- What legal strategies are available to cities to regulate panhandling, sleeping, or vending in public space?

Methdology

Using compelling, real-life and hypothetical scenarios, this webinar will explore the constitutional framework for municipal regulation of public demonstrations and other uses of public space.

Traditional Public Forum

- Public squares, sidewalks and parks.
- 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).
- A government can regulate park uses. The regulation should be:
  - Not-content based
  - Neutral purpose – to coordinate use of limited space
  - Narrowly tailored with specific limitations to constrain official discretion
- *Thomas v. Chicago Park District*, 534 U.S. 316 (2002)

First Amendment Refresher

- **Traditional Public Forum – Strongest Protections**
  - Areas where people traditionally express themselves, like parks, public streets, sidewalks
- **Designated Public Forum – Strongest Protections**
  - A forum opened by the government, like public theatres and meeting halls, that is treated like a traditional forum
- **Limited Public Forum – Limited Protections**
  - Designated for certain kinds of speech by the government, like schools limiting access to school-related activities or City Council chambers, e.g. "A council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as content-based regulations are viewpoint neutral and enforced that way." *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010)
- **Nonpublic Forum – Very Limited Protections**
  - Government property traditionally not open to the free exchange of ideas, like courthouse lobby, prison, military base, or airport terminals

First Amendment Refresher

- Content Neutral Regulations Must Meet "Intermediate Scrutiny" Legal Test:
  - "We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)
- ***What does "narrowly tailored" mean?***

Comparison of Legal Tests

Content Neutral

Intermediate Scrutiny

- *Significant or Substantial* Government Interest
- Narrowly Tailored (substantial government interest would be achieved less effectively absent the regulation)
- Leaves Open *Ample Alternative Channels* of Communication

Content-Based

Strict Scrutiny

Presumptively Invalid

- Necessary for a *Compelling* Government Interest
- Uses the *Least Restrictive Means* to Further that Interest

What Information Do You Need to Support First Amendment Regulations?

- Legislative Findings Alone Are Not Enough
  - The "new" post-*McCullen* Intermediate Scrutiny analysis requires the following:
    - The government bears the burden of proof of showing safety harms
    - Evidence that less restrictive alternatives have been actually attempted and have been unsuccessful
    - Evidence that regulations are tailored to match varying conditions like traffic intensity, park use, or other demonstrable public safety conditions

In sum, you need to show a "body count:"

"The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. *The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.* Respondents have but one reply: 'We have tried other approaches, but they do not work.' We cannot accept that contention. Although respondents claim that Massachusetts 'tried other laws already on the books,' *they identify not a single prosecution brought under those laws within at least the last 17 years*. And while they also claim that the Commonwealth 'tried injunctions,' *the last injunctions they cite date to the 1990s*. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective."

McCullen v. Coakley, 573 U.S. 464, 493 (2014)

Scenario 1

Scenario 1

- You are the new city attorney. Your city manager asks you to review the 1995 special events ordinance. She thinks it's OK, but wants you to give it a quick review.
- The special events ordinance does not allow the city to prohibit any event but provides a means to schedule and to avoid conflicts. It encourages notification of any event expected to draw 50 or more participants.

Scenario 1

- Two days into your review, the American Nazi party notifies your city manager of its intention to celebrate Adolph Hitler's birthday on April 20th in the main town park. Your city manager issues a permit. She does so having reason to believe that only a few Nazi demonstrators will attend so that City police resources will not be overburdened.
- The City Manager subsequently learns that a national anti-hate organization plans a counter-protest to "confront" the Nazis. They announce through social media and press releases that they expect 5,000 counter-protesters. Some of the social media responses suggest the potential for violence.
    - What do you do?

Scenario 2

Scenario 2

- Every Saturday afternoon, faith-based organizations provide food to the homeless in a city park.
- City residents are complaining to the city council.
  - Your city manager asks what to do.
  - You ask yourself, “what’s the first thing I need to know?”

Scenario 2

- Is park feeding potentially expressive behavior protected by the First Amendment?
  - *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018)
  - *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006)
    - Note Assembly Bill 2178 (2018) on charitable feeding operations

Scenario 3

Scenario 3

Every year on St. Patrick's Day, large groups of individuals come to your downtown to celebrate. The bars charge a single cover charge allowing celebrants to walk from bar to bar all night long. Your police department expresses concerns about the rowdiness of the crowds and the number of DUIs. They want your advice on what they can do to restrict or eliminate the event.

- The First Amendment does not protect violence. *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).
  - Preventing and containing violence is a significant government interest.
- Emergency order closing off parts of downtown was a reasonable time place and manner restriction that allowed for reasonable alternative means of expression. *Menotti v. City of Seattle,* 409 F.3d 1113, 1138 (9th Cir. 2005)

Scenario 4

Scenario 4

- Occupy Yourtown shows up on the courthouse lawn. They set up five tents. They announce that they are staying until the 2020 election. Your city manager asks what you can do.
- Two days later there are 150 tents and 700 people. Your mayor demands you take action to remove the tents.

Scenario 4

- A city can pass an ordinance requiring permits for after-hours use of parks. *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110 (E.D. Cal. 2012)
- The right not to be arrested for protesting is clearly established. The protestors were arrested after the capitol grounds closed at 6:00 pm *Occupy Columbia v. Haley*, 738 F.3d 107, 113 (4th Cir. 2013).
- Business Hour limitation on a permit violated the first amendment. *Occupy Eugene v. U.S. Gen. Servs. Admin*., 43 F. Supp. 3d 1143 (D. Or. 2014).

Scenario 5

Scenario 5

A group called Public Lawyers for Justice announces that over two hundred individuals intend to protest lawyers pay by blocking the main state highway passing through your town. They plan to block the highway between 4 and 6 p.m., which are the busiest times for travel on the highway.

Your police department reaches out to the organizers and attempts to negotiate alternatives to blocking the highway, but does not reach any agreement. On the date of the protest, five individuals arrive and stand in the street with signs.

Your city has an ordinance the prohibits pedestrians interfering with vehicles. Your police chief calls to ask whether they can arrest the protestors for pedestrian interference.

Scenario 5

- *Seattle Affiliate v. City of Seattle*, 550 F.3d 788 (9th Cir. 2008)
  - Quick facts: Longstanding annual anti-police brutality march had dwindling crowds. The year before the permit had a provision authorizing police to move them onto the sidewalk. The operative permit did not have that language.
  - When only 80 or so people showed, an officer directed them to use the sidewalk. Court found that unfettered officer discretion (no safety guidelines) to direct the location of the marchers violated the First Amendment
    - Note the inherent difficulty in managing protests that are in themselves protests against the police.

Scenario 6


SPRINGFIELD
PrideFest
3rd Saturday in May
June is Pride Month
Phoenix Center
109 E Lawrence Ave

Scenario 6

Your city provides light pole brackets to advertise events in town. You have no rules regarding their use. A city employee takes applications on a first come, first served basis. Your city has an annual gay pride event. The organizers submit an application to celebrate the event. A local minister complains to the city manager and demands that the banners be taken down. What do you do?

- *Cimarron All. Found. v. City of Oklahoma City, Okla.*, 290 F. Supp. 2d 1252 (W.D. Okla. 2002)
  - Utility Poles were a Designated Public Forum
    - OKC had allowed unrestricted placement of displays for over 13 years.
  - Restriction was subject to strict scrutiny
  - OKC had adopted an ordinance that prohibited banners from any "political, religious or social advocacy organization or any political, religious or social advocacy message."
  - No clear criteria for application.
  - The ordinance was not narrowly tailored to serve a compelling interest.