TAKEING IT TO THE STREETS:  
Banners and Manners

I. Introduction

In the wake of the September 11th terrorist attacks, an American citizenry united in grief, fear, and defense of country, joined in a spontaneous display of patriotism. Across America, her great national emblem, the United States flag, and its colors, became ubiquitous, appearing everywhere — from cars to homes, buildings to clothes. The President of the United States, on September 21, 2001, addressed the nation: "The only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it and destroy it where it grows." This declaration of a "war" on terrorism heightened the patriotic fervor, and, according to the California Department of Transportation ("CalTrans"), resulted in the proliferation of flags on California's highways.

Highway 17 in Santa Cruz, California, was no exception. Private individuals hung flags from the highway's overpasses. On November 27, 2001, Amy Courtney and Cassandra Brown, concerned over the public's apparent failure to question the prospect of going to war, hung a responsive banner adjacent to a flag reading, "At What Cost?" \(^1\)

This language began the 9th Circuit's discussion of the age-old question of first amendment rights, but in a new and remarkably different light. As this passage indicates, the question of one's freedom of speech and expression was now measured against the strong, national sentiment brought about by an event of national terrorism. Questions of the public fora, governmental speech, and time place and manner restrictions were now particularly pertinent as examined in light of this overwhelming national loss, and the resultant sentiment that the nation should speak with one voice.

This paper is an attempt to analyze the constitutional issues as presented by the exercise of first amendment rights as specifically related to street banners, and how courts have generally confronted constitutional challenges in this area. This analysis is particularly focused on the

\(^1\) Brown v. California Dept. of Transp. (9th Cir. 2003) 321 F.3d 1217, 1220.
issue of the creation of a forum on government property, especially as related to non-traditional public fora as illustrated in *Brown v. California Dept. of Transp.*. Finally, this paper presents a methodology by which cities may examine their ordinances and policies on both traditional and non-traditional open fora, in order to safeguard against constitutional challenges.

**II. Identifying the Speech and the Speakers**

City policies generally reflect city governments acting in either of two capacities: either as the regulator of public speech, or as the property owner and thus the speaker itself. With regard to its regulatory function, government ordinances and policies related to speech are generally categorized according to whether the targeted speech is commercial, non-commercial, mixed commercial, or protected commercial, or whether they are targeted towards fighting words, defamation, obscenity or clear and present danger. While most policies targeting any form of expression should be content-neutral, federal courts have allowed governments to enact these content-based restrictions, according to the general rule that such speech is not protected by the First Amendment.

Specific judicial rules have developed with regard to government policies on prior restraints on public speech, essentially mandating that in order to pass constitutional muster, licensing policies must avoid vesting unbridled discretion in a government official as to whether to permit or deny expressive activity. Federal and state case law have illustrated that such governmental acts or policies resulting in prior restraints, including injunctions against certain speech, permit requirements and policies on news-rack displays must be carefully scrutinized such that the end

---

result is not ultimate censorship of the speech involved.\textsuperscript{3} Along these lines, federal courts have ruled that with regard to permit and licensing ordinances and statutes, one who is subject to the statute or ordinance may challenge it facially, even without having applied for and having been denied, such license or permit. Further, federal law has allowed governments to enact time, place and manner restrictions on certain categories of speech, as long as such restrictions are content-neutral, and are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.\textsuperscript{4} Time, place and manner restrictions have been applied to the operation of adult entertainment businesses, leafleting, parades and parade permits and street vending or solicitations even for charitable causes.

Acting in its capacity as a property owner, a city government must comply with an additional framework regarding the regulation of speech. To this end, the Supreme Court has applied a three-step analysis to be used when analyzing restrictions on private speech on government property.\textsuperscript{5} As explained in the seminal case of \textit{Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.},

\begin{quote}
[f]irst, the court must determine whether the speech at issue is protected by the First Amendment. [\textit{Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.}, 473 U.S. 788 (1985)] at 797. If so, the court must then 'identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic. \textit{Id.} Third, the court 'must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard,' e.g., whether a content-based restriction can survive strict scrutiny, whether a content-neutral restriction is a valid regulation of the time, place, or manner of speech, or whether a restriction in a nonpublic forum is reasonable. \textit{Id.}
\end{quote}

However, as a property owner, a city government faces an additional step in formulating a policy on First Amendment expression—identifying who, in fact, is speaking. Largely relying upon a 1991 decision of the United States Supreme Court, several federal courts have added the

\begin{itemize}
\item \textsuperscript{4} \textit{Sebago, Inc. v. City of Alameda} (1989) 211 Cal.App.3d 1372.
\item \textsuperscript{5} \textit{Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.} (1985) 473 U.S. 788.
\end{itemize}
doctrine of 'government speech' to their analysis of First Amendment rights. According to the Tenth Circuit, the U.S. Supreme Court has established that,

[when the government speaks, either directly or through private intermediaries, it is constitutionally entitled to make 'content-based choices,' [Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)], and to engage in 'viewpoint-based funding decisions,' Legal Serv. Corp. v. Velazquez, 121 S. Ct. 1043, 1048 (2001). Thus, our analysis of restrictions that arise in the context of government speech is 'altogether different' than the analysis set forth in Cornelius. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).]

To complicate matters, this doctrine has been applied sparingly, at best, and only once by the Supreme Court itself. However, the Tenth Circuit's analysis has provided the following framework within which governments may analyze whether the government speech doctrine is invoked,

[i]n deciding that the sign constituted government speech, we adopted and considered four factors: (1) whether the central purpose of the sign was to promote the views of the municipality; (2) whether the municipality exercised editorial control over the content of the sign; (3) whether the literal speaker was an employee of the municipality; and (4) whether ultimate responsibility for the content of the sign rested with the municipality.

As indicated by these opinions, once the government speech doctrine is invoked, the usual guidelines discouraging content-based restrictions are relaxed. For example, under the government speech doctrine, a government may constitutionally sustain a prohibition on abortion-related advice by recipients of federal funds designated for family-planning counseling; similarly, a public university radio station may constitutionally reject a sponsorship offer from the Ku Klux Klan—which sponsorship would have allowed the organization to submit an

---

announcement to be made on its behalf by the radio station—on the basis that the announcement constituted government speech.  

However, even though the government speech doctrine appears to tolerate content-based, and even viewpoint-based restrictions, the Supreme Court has indicated that there is at least some limitation on the government's discretion in this capacity. In a 2003 opinion, the Supreme Court expressly limited its seminal holding in *Rust v. Sullivan*, stating that,

> Rust addresses only the government's ability to exclude from a government-funded program speech that is incompatible with the program's objectives.  

As further stated by the Supreme Court in a 2001 opinion,

> [t]he latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, '[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.'

The ability of the government to make content and viewpoint based restrictions on its own speech is thus predicated upon (1) the consistency of that viewpoint with the applicable governmental objective, and (2) the ability of the electorate to express an alternative viewpoint through the voting process. Ultimately then, this doctrine still requires that governments maintain a forum that is open to all viewpoints, even where the government only expresses its own.

For expression for which the government speech does not apply, but still occurs on public property, courts have established a three-part analysis to identify the appropriate level of scrutiny based upon identification of the forum in which the expression occurs. Thus, following the

---

9 *Brown v. California Dept. of Transp. supra* note 1, 321 F.3d at 1224.
initial step of determining which category of speech targeted by a given ordinance or regulation, cities must take steps to identify—and further, properly articulate—the forum within which the speech takes place. It is perhaps this step which is the most crucial in formulating a workable city policy with regard to First Amendment speech, especially as related to street banners.

III. Identifying the Forum

As indicated in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, all governmental property is not equally accorded public access for purposes of expressive activity. The Supreme Court stated that,

> [e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.¹¹

Accordingly, federal courts have categorized governmental property with regard to its status as a traditional public forum, as a designated or limited public forum or a non-public forum, according to each a different degree of constitutional scrutiny.¹²

A. Traditional Public Forum

As the title suggests, traditional public fora are those portions of governmental property that have traditionally been used by the public for the free exchange of ideas. As illustrated by the wellspring of judicial analysis on this topic, this category includes public parks, sidewalks, and other locations that,

> 'by long tradition or by government fiat,'...has been 'devoted to assembly and debate.'¹³

---

¹¹ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.* supra note 5, 473 U.S. at 799-800.
¹² Id. at 802.
Within a traditional public fora, governments may exercise content-neutral, time, place and manner restrictions, provided that such restrictions are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.\(^{14}\)

Alternatively, should city governments enact content-based restrictions, such restrictions must survive strict scrutiny—thus they must be narrowly tailored to further a compelling governmental interest.\(^{15}\) The Supreme Court has further opined that for such content-based restrictions, if there exists a less restrictive alternative that would serve the government's compelling interest, the government must use that alternative instead.\(^{16}\)

### B. Non-Public Fora and Non-Fora

Equally clear is the concept of the non-public forum or non-forum. As stated by the Supreme Court,

[n]ot every instrumentality used for communication, however, is a traditional public forum or a public forum by designation [citations omitted]…[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.' [citation omitted]. We will not find that a public forum has been created in the face of clear evidence of a contrary intent, [citation omitted], nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.\(^{17}\)

Thus, the Supreme Court has found that military reservations, jailhouse grounds, and a school district's internal mail systems all constituted non-public fora to which there was no right of public expression.\(^{18}\) Even with regard to advertising spaces on city buses, the Supreme Court

---


\(^{15}\) *Id.* *See also Wells v. City and County of Denver*, (10th Cir. 2001) 257 F.3d 1132, 1145.


ruled that when the city intended to limit access thereto, and had done so for 26 years, the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the advertising space as a public forum.\(^\text{19}\) Ultimately, case precedent clarifies that,

\[\text{[i]n cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.}\(^\text{20}\)

\textbf{C. Non-Traditional and Designated Public Fora}

As perhaps the most controversial factor in forum analysis is the non-traditional or designated public forum. As explained by the Supreme Court, this forum is essentially a hybrid of the other two categories, and as further described,

\['\text{[t]he designated public forum, whether of a limited or unlimited character, is one a state creates 'by intentionally opening a non-traditional forum for public discourse.'...Designated public fora differ from traditional public fora in that 'a State is not required to indefinitely retain the open character of the facility....'}\(^\text{21}\)

Further, it is clear that even though a designated forum may not be held open to the same extent as a traditional forum, during the time that it is open, a designated forum is subject to essentially the same content neutral restrictions that would be imposed upon a traditional forum.\(^\text{22}\)

Some federal court circuits have also recognized 'limited public fora' as a distinct subset of designated public fora.\(^\text{23}\) According to the Ninth Circuit, a limited public forum is a nonpublic forum that the government has deliberately limited to certain groups or to certain topics.


\(^{20}\) \textit{Cornelius v. NAACP Legal Def. & Educ. Fund, Inc. supra} note 5, 473 U.S. at 804.


\(^{22}\) \textit{Wells v. City and County of Denver}, supra note 5, 257 F.3d 1132 at 1145.

\(^{23}\) \textit{Hopper v. City of Pasco}, (Ninth Cir. 2001) 241 F. 3d 1067, 1074.
Inherently, such a forum is content-based, thus in a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible. Significantly, this standard differs from the strict scrutiny standard otherwise applied to traditional and designated public fora, and is instead, similar to the standard used for non-public fora. In determining whether a government has intended to create a non-public or limited public forum, the Sixth Circuit has created the following framework which evaluates:

1) the government's policy; 2) the government's practice; 3) the nature of the forum and its compatibility with expressive activity; 4) and the context in which the forum is found.24

In essence, the equal scrutiny accorded to governmental policies in both traditional and non-traditional fora often makes the distinction between the two fora unnecessary for purposes of rendering a judicial opinion. Conversely, the necessity of this distinction becomes remarkably evident within the context of limited public fora, and city government policy-making. Specifically, when a city endeavors to open a non-traditional public forum for limited purposes, how will these purposes be limited? Is the limitation obvious? And to what extent may the content be limited, without danger of limiting the viewpoint as well?

IV. Articulating the Degree to which the Forum has been opened

A. Designation of non-traditional forum-circumstances as confined to street banners

Amidst the plethora of First Amendment activities subject to governmental regulation, regulation of signs and street banners has emerged as its own sub-set of First Amendment law. Federal courts have opined on the ability of cities to regulate license plates, political posters, billboard bans, bans on pole signs, monuments displaying the Ten Commandments and unpopular holiday images.25 For those media that are considered traditional public fora—such as

24 Kincaid v. Gibson (6th Cir. 2001) 236 F.3d 342, 349.
billboards and other city property maintained for the purpose of commercial and non-commercial public use—courts have generally employed the guidelines for a traditional public forum in determining the constitutionality of city-regulations affecting their use. However, those decisions that have involved non-traditional or designated public fora, the analyses have differed based upon the purpose for which the forum has been designated.

Implicit within the designation of a limited public forum is the idea that such designation is content-based. For example, a City may constitutionally limit the use of advertisement-space on city buses to commercial advertisements, without further opening this forum to allow advertisement space to anti-abortion and civil rights organizations. By such limitation, the city clearly chooses the content of such expression, yet the city's choices must remain viewpoint-neutral in order to pass constitutional muster.

This directive gains particular significance when applied to street signs and banners. For example, in the City of Port Clinton, Ohio, the city had a policy of permitting organizations to display banners along a local street located within the city's limits. The City erected a pole structure particularly for the purpose of displaying such banners, and drafted an ordinance allowing non-profit and civic organizations to apply for a permit to hang banners advertising community functions and events. The ordinance specifically limited the content of such banners, stating that, "[n]o banner will be displayed containing political or religious material." Pursuant to the permit procedures described in the ordinance, Heartbeat of Ottawa County, a pro-life organization, submitted an application for a street banner containing the following statement:

---


26 Children of the Rosary v. City of Phoenix (9th Cir. 1998) 154 F.3d 972.


Heartbeat of Ottawa County
Annual Walk for Life
September 23, 2000

The city denied this application on the basis that the advertisement was political in nature; according to the City's Director of Safety and Service,
…the message advocated a pro-life position on the issue of the legality of abortion.30

In the resulting First Amendment challenge, the Northern District Court of Ohio relied upon the access sought by the speaker in determining the nature of the forum and thus the appropriate analysis. Thus, the court explicitly disagreed with Heartbeat's assertion that the relevant forum was the public street,—which would have been designated a traditional public forum—and instead relied upon prior federal court precedent in ruling that,

[i]n determining what property constitutes the relevant forum, courts focus on the access sought by the speaker.31 [citations omitted] Here, Heartbeat seeks access to the pole structure, not the street in general. Thus, the pole structure and not the public street is the relevant forum.31

The court went on to find that despite the fact that the city had enacted an ordinance allowing the display of banners on the poles, the pole structures still constituted a non-public forum. Working through the four-part analysis for limited and non-public fora—analyzing the policy, practice, nature of the property and compatibility with expressive activity, and context of the forum-- the Sixth Circuit began its analysis by evaluating the government's policy, or intention in creating the forum. Accordingly, the Court found that the ordinance had not opened the forum for general public use, but rather had restricted it such that only certain groups were allowed access. The Court explained that,

\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}
[t]he government indicates an intent to create a limited public forum when it makes public property "generally' available to a class of speakers." [citations omitted]. In contrast, the government indicates that the property is to remain a nonpublic forum 'when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it."32

Thus, the Court ruled that from the clear language of the ordinance—and thus the policy of the city—it was clear that the ordinance only opened the forum to a certain class of speakers—namely those non-profit and civic organizations described within the ordinance. Further, even with regard to this class of speakers, the ordinance limited their access to the forum in designating the size, shape, design and content of the banners, and further requires that would-be speakers apply for a permit in order to obtain such access. In demonstrating that the City had strictly abided by the policy as stated in the ordinance, the Court ruled that the 'practice' prong of the four-part test had also been met.33

In determining the nature and compatibility of the forum with expressive activity, the Court found that the City's policy and practice of limiting the forum to announcements about community events and fundraisers, illustrated that the pole structures were not completely open to all free and open dialogue. Finally, the Court ruled that with regard to the context prong of its analysis, despite the pole's placement on a public street, this fact was not dispositive on the question of forum identification.34

While the Court conclusively ruled against Heartbeat in determining that the pole structure was in fact a nonpublic structure, the Court ultimately found the City's decision to deny Heartbeat's permit as an impermissible violation of the organization's First Amendment rights, based upon the information used by the City in denying the permit. Specifically, the Court found that in determining that Heartbeat's message was of an impermissible political nature, the Court

33 Id.
34 Id.
concluded that such determination was made based not upon the content of the announcement, but rather upon the city's analysis of the views held by the organization's members. Thus, while the Court approved of the ordinance itself, the City's enforcement of the ordinance resulted in a failure to recognize Heartbeat's First Amendment rights.35

This opinion is instructive on many different aspects of First Amendment analysis. First, from a policy-making standpoint, this opinion offers cities a step-by-step tutorial on the creation and articulation of a forum that is clearly and decidedly limited to a certain category of speakers and topics. As indicated, a city must begin with a structure that is not, by its nature a traditional public forum. Next, a city should create a written policy specifically designating who is authorized to access such forum. Further, a city should take the additional step of expressly stating the category of speech for which the forum may be used. It is important to note on this point that any classifications for both speakers as well as speech content are implicitly allowed to be content-based, but within such categories, should be viewpoint neutral. Finally, the policy should allow for a permit process by which members of the designated classes may apply for permission to use such fora. As indicated in Heartbeat, a policy created and practiced under these guidelines should result in a forum that need not be considered a content-neutral free-for-all.

Further, Heartbeat is instructive on the issue of banner placement as related to the public street. Specifically, while it is clear that a public street is typically a traditional forum, this opinion makes clear that banners over such streets are not automatically considered traditional public fora. Of particular significance in this opinion is that the poles were actually erected for the specific purpose of some form of First Amendment activity, and even this factor did not compromise their designation as a non-public forum.

Additionally, Heartbeat is consistent with the small number of federal court opinions discussing a government's decision to open a forum under unique and tragic circumstances.

35 Id.
With regard to a plaintiff's claim of selective enforcement of a city's ban against unattended displays on city property, the Tenth Circuit stated the following with regard to a memorial that had been allowed on the steps of City Hall following the Columbine High School shootings in 1999,

"[I]ke the district court, we believe that the Columbine shooting was so unique and so extraordinarily horrific that the mayor's decision not to remove the mourners' teddy bears and flowers is simply not probative as to the general operation of the unattended display ban….On direct examination, even [the plaintiff] expressed doubts as to whether the Columbine display was properly described as 'an exception to their policy [concerning] unattended displays.'

These decisions indicate that a city does not necessarily risk creation of a traditional or designated forum when allowing on selective and specific situations, use of governmental property is allowed for a particular category of expression.

On the other hand, *Heartbeat* raises questions regarding future decisions on street banners. First, it is unclear how this *Heartbeat* would apply to cities if in fact the banners were considered government speech. As discussed above, federal courts have employed a four-part method of determining that the government is the speaker, and not the public at large. As indicated by federal courts' application of the government speech doctrine, it is often employed based upon the ultimate responsibility—and perhaps even financial responsibility—of the municipality itself with regard to the speech at issue. Thus, if a banner policy was enacted which demonstrated substantial governmental responsibility with regard to banners, it is unclear whether the government would then be entitled to reject *Heartbeat*'s application in accordance with the viewpoint-based decisions allowed under the government speech doctrine. While it would appear that such a decision would be allowable, the limitations on the doctrine specifying that such viewpoint-based decisions are only allowable to the extent that they are consistent with the governmental objective in the governmental program renders this answer inconclusive.

---

36 *Wells v. City and County of Denver* supra note 6, 257 F.3d at 1151.
37 See notes 6,7.
38 See note 9.
V. Conclusion

Federal and state law is replete with application and analysis of First Amendment rights. Within the plethora of expression embarked upon by members of the public, it is conceivable that the rather quiet, non-obtrusive street banner may not garner the same attention as the noisy street march, picket line, or crowd of leaf-letters. However, a city's policy on street banners is just as likely to be subject to a first amendment challenge as its policies and practices on any other First Amendment activity. Thus, it is imperative that cities not only understand the speech, speakers and fora existent within their confines, but also ensure that their policies are clearly articulated and practiced.