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Public Forum Doctrines

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According to the public forum doctrines, the government may not exclude all expressive activities from property that it owns and manages. The Supreme Court first articulated this principle in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), where it struck down a municipal ordinance that prohibited citizens from assembling in public streets or parks without a permit. Writing for the plurality, Justice Owen J. Roberts noted that although the government holds literal title to

streets and parks, citizens traditionally have had a right of access to these locations to gather and express their opinions. “Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens,” Justice Roberts explained. The Court voided the permit ordinance as an arbitrary limitation on speech because it gave city officials complete discretion to grant or deny permit requests.

More recently, the Court in *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1977), identified three categories of public forums where speech activities may take place, each subject to different First Amendment rules. Traditional public forums include places such as streets and parks that historically have been associated with assembly and debate. Citizen speech within traditional public forums is entitled to the strongest First Amendment protection. The government may not close these quintessential public forums, nor may it impose content based restrictions on speech therein unless those regulations advance a compelling state interest (<http://uscivilliberties.org/themes/3631-compelling-state-interest.html>) pursuant to the strict scrutiny test. Other places identified by the Court as traditional public forums include open areas near a state capitol (*Edwards v. South Carolina*, 372 U.S. 229, 1963), public space surrounding a foreign embassy (*Boos v. Barry*, 485 U.S. 312, 1988), and public sidewalks adjoining the Supreme Court building (*U.S. v. Grace*, 461 U.S. 171, 1983). On the other hand, the Court ruled in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), that city airport terminals are not traditional public forums because they have not “historically been available for speech activity.”

The Court’s second forum category, limited public forums (sometimes also referred to as designated public forums (<http://uscivilliberties.org/themes/3693-designated-public-forums.html>)), consists of government property that the state has chosen to make available for expressive purposes. Unlike the traditional public forum, the state is free to open and close limited public forums at its discretion.

Nonetheless, the state may not impose content based restrictions on speech within a limited public forum unless those regulations are narrowly drawn to achieve a compelling state interest (<http://uscivilliberties.org/themes/3631-compelling-state-interest.html>). The Court first recognized the limited public forum concept in *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), where it overturned Chattanooga city officials' refusal to allow the musical Hair to be performed in a municipal auditorium. The Court held that the auditorium, which the city previously had rented for diverse activities, was a designated public forum and that the city's decision constituted an unjustified prior restraint on speech.

Although traditional public forums must be open to all speakers, the government may impose reasonable access restrictions in limited public forums. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court noted that although a state university had created a limited public forum by allowing student groups to conduct meetings on its premises, the university was free to deny nonstudent groups similar use of those facilities. The Court, however, invalidated as an unconstitutional content restriction the university's policy of allowing all student organizations except religious groups to use its meeting rooms. That limited public forums need not have a physical location was established in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). In that case, the Court held that by using mandatory student activity fees to pay printing costs for various student publications, the university established a "metaphysical" limited public forum for student expression. The university had committed unconstitutional viewpoint discrimination, the Court concluded, by authorizing the use of student activity fees to finance secular, but not religious, student publications. Whereas content and viewpoint discrimination are forbidden in traditional or limited public forums, content neutral regulation of the time, place, and manner of speech will be allowed if the limitations serve a significant government interest, are narrowly tailored to achieve that interest, and leave open ample alternative channels for similar communication. For example, the Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), upheld content neutral city regulations that limited the volume of amplified music emanating from a limited public forum, in this case a city park bandshell.

The final forum category, the nonpublic forum, consists of publicly owned property that has not traditionally been used or set aside by the state for public expression. Speech in the nonpublic forum receives a significantly lower level of First Amendment protection. According to the Court in *Perry*, the state may restrict speech in a nonpublic forum if the restriction is "reasonable" and viewpoint neutral. Content based regulations on speech are therefore permissible in the nonpublic forum context. Places identified by the Court as nonpublic forums include army bases (*Greer v. Spock*, 424 U.S. 828, 1976), private homeowners' mailboxes (*U.S. Postal Service v. Greenburgh Civic Association*, 453 U.S. 114, 1981), and a public school's internal mail system (*Perry*).

The crucial question, then, under the public forum doctrine becomes how to distinguish a limited public forum, where speech receives a high level of First Amendment protection, from a nonpublic forum, where speech can be restricted for any viewpoint-neutral purpose deemed reasonable by the

state. In answering this question, the Court has given great deference to the government's purported intent. In *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985), for example, a plurality of the Court upheld an executive order that excluded legal defense and political advocacy groups from participating in a federal charity drive. The Court accepted the government's argument that although it allowed certain "appropriate" agencies to participate in the drive, it never meant to create a limited public forum for charitable solicitation. As a result, although the government would not normally be allowed to exclude offensive speakers from a limited public forum, a danger exists that the government may be able to accomplish this result by simply denying any intention to establish a limited public forum in the first place.

NICOLE B. CA' SAREZ

References and Further Reading

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See also [Public/Nonpublic Forums Distinction](#); [Universities and Public Forums](#)



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