



Virtue and Vice: First Amendment Considerations for Local Government

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Session Outline

- Introductory concepts
- Public forum doctrine
 - Social media: can government restrict speech and expression (**comments**) on its social media?
- The right to record
 - Can government restrict or confiscate recordings of police, public officials, etc.?
- Door to Door Solicitation
 - Can government impose curfews and permitting requirements?
- Questions and answers

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**.*

INTRODUCTORY TOPICS

Free Speech Concepts

- Marketplace of ideas: better to have more speech rather than less
- Prior Restraint: better to punish speech after than prohibit it from being expressed
- Some speech is *not* protected
 - Obscenity (contemporary community standards)
 - Child pornography (even if not obscene)
 - Threats of imminent harm (“let’s beat-up those protesters”)
 - “Fighting words” (you piece of --, your mother is a --)

Free Speech Concepts

- Speech about ideas has somewhat more protection than speech only about commercial activity; *e.g.*, an election sign vs. a “for sale” sign
- Regulations based on content of speech are scrutinized much more than “content-neutral” regulations; *e.g.*, election sign vs. “yard” sign
- Where speech occurs makes a difference: greatest protection for speech in “traditional public forum”; *e.g.*, sidewalk in front of city hall vs. inside city council chambers

Free Speech Concepts

- Content (or message) neutrality
- Time, place or manner regulations
- Commercial vs. non-commercial speech
- Bans and exceptions
- Over/Underinclusive
- Permits and prior restraints
- Vagueness and Overbreadth

Commercial speech vs. Non-commercial speech

Commercial speech

- “speech that proposes a commercial transaction” or promotes intelligent market choices
- protected under 1st amendment ... but not as much as “traditional” (non-commercial) speech

Non-commercial speech

- speech about political, ideological, religious, ideas, etc.
- highest degree of 1st amendment protection

Viewpoint Neutrality

- In a limited or nonpublic forum, the court will ask: “***is the regulation viewpoint neutral?***”
- Viewpoint neutrality looks at **point of view**
 - A ban on **posts that criticize government** is not viewpoint neutral
 - A ban on political posts is viewpoint neutral
- Examples
 - Ban on signs that criticize foreign government within 500 feet of an embassy: VIEWPOINT BASED (*Boos v. Barry*, 485 U.S. 312 (1988))
 - Restriction on advertising that is demeaning or disparaging: VIEWPOINT NEUTRAL (*AFDI v. King County*, 796 F.3d 1165 (9th Cir. 2015))

Content Neutrality

- In a traditional or designated public forum, the court will ask: “is the regulation content neutral?”
- Content neutrality looks at **subject matter**
 - A ban on **all political signs** is *not* content neutral but *is* viewpoint neutral
 - A limitation on the time at which a protest may occur is content neutral and viewpoint neutral
- Examples
 - A requirement that performers in a public band shell use public sound amplification devices: CONTENT NEUTRAL (*Ward v. Rock Against Racism*, 491 U.S. 781 (1989))
 - A prohibition on location of a KKK rally due to concerns about violent outbursts: CONTENT BASED (*Christian Knights of KKK Invisible Empire, Inc. v. Dist. of Columbia*, 972 F.2d 365 (D.C. Cir. 1992))

Content Neutrality

Examples of content neutral “time, place or manner” regulations:

- “Sound amplification may not exceed 75 db.”
- “Public Plaza may be used for public assemblies between the hours of 8 a.m. and 10 p.m.”

Levels of Scrutiny

- Content neutral regulations get *intermediate* scrutiny, while content based regulations get *strict scrutiny*
- Constitutional scrutiny looks at:
 - Governmental purpose
 - Means-ends tailoring
- Types of constitutional scrutiny:

Type of Scrutiny	Governmental Interest	Tailoring
Strict	Compelling	Least-restrictive means
Intermediate	Significant	Narrow, with ample alternative channels
Reasonableness	N/A	“Reasonable in light of the purposes of the forum”

Bans and exemptions

- Generally disfavored
- Supreme Court has upheld some total bans...
 - commercial billboards in *Metromedia*
 - signs posted on public property in *Vincent*
 - protests in non-public forum
- ...But has struck down others
 - real estate lawn signs in *Linmark*
 - personal lawn signs in *Ladue*

Overinclusiveness/Underinclusiveness

- Overinclusive regulation: restricts speech that doesn't implicate the government interest
 - If government can serve the interest while burdening less speech, it should
- Underinclusive regulation: allows speech that undermines the government's interest
 - Government shouldn't exempt speech from a ban if it undermines the interest

Vagueness and Overbreadth

Vagueness

- a regulation should specify what is/isn't regulated and how
- if it doesn't, it may be void for vagueness

Overbreadth

- a regulation that restricts "too much" may be struck down as overbroad

Prior Restraint

- Any time someone must get a permit before they can "speak" there's a potential prior restraint
- Less of a problem if:
 - content-neutral regulation
 - strict limits on discretion
 - reasonable timeframe for decision



PUBLIC FORUM DOCTRINE

Public Forum Doctrine: Introductory Concepts

- Answers the question: “When and how can the government control speech and expression on government property?”
- Requires consideration of the type and function of government property in question
- Nature of regulation is subject to varying degrees of judicial scrutiny

Public Forum Classifications



Public Forum Classifications



Traditional Public Forum

- Streets
- Sidewalks
- Parks



“[S]treets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.” --Hague v. CIO, 307 U.S. 496, 515 (1939)

Designated Public Forum

- Government may, by fiat and intentionally, open up some government property for speech activity akin to traditional public fora
- Open to all speakers and topics
- Subject to closure
- Examples:
 - Plazas in front of government buildings
 - Squares on college campuses
 - Flagpoles in front of city hall (*see Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224 (4th Cir. 2013))
 - County facility where leafleting is allowed (*see Paulsen v. Cnty. of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991))

Limited or Nonpublic Forum

- Government property opened up for limited range of speakers or topics
- Subject to closure
- Examples:
 - Student group meetings (*see* *Widmar v. Vincent*, 454 U.S. 263 (1981))
 - Utility poles (*see* *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984))
 - Sidewalks at post offices (*see* *U.S. v. Kokinda*, 497 U.S. 720 (1990))
 - Airport advertising or protest
 - Bus advertising
 - Mailboxes

Nonforum

- Government property not opened for speech activity at all
- Examples:
 - Prisons
 - Military bases (*see* *Greer v. Spock*, 424 U.S. 828 (1976))

Judicial Review: Three Steps

Step 1: What type of forum is it?

Step 2: Is the regulation content neutral? Is the regulation viewpoint neutral?

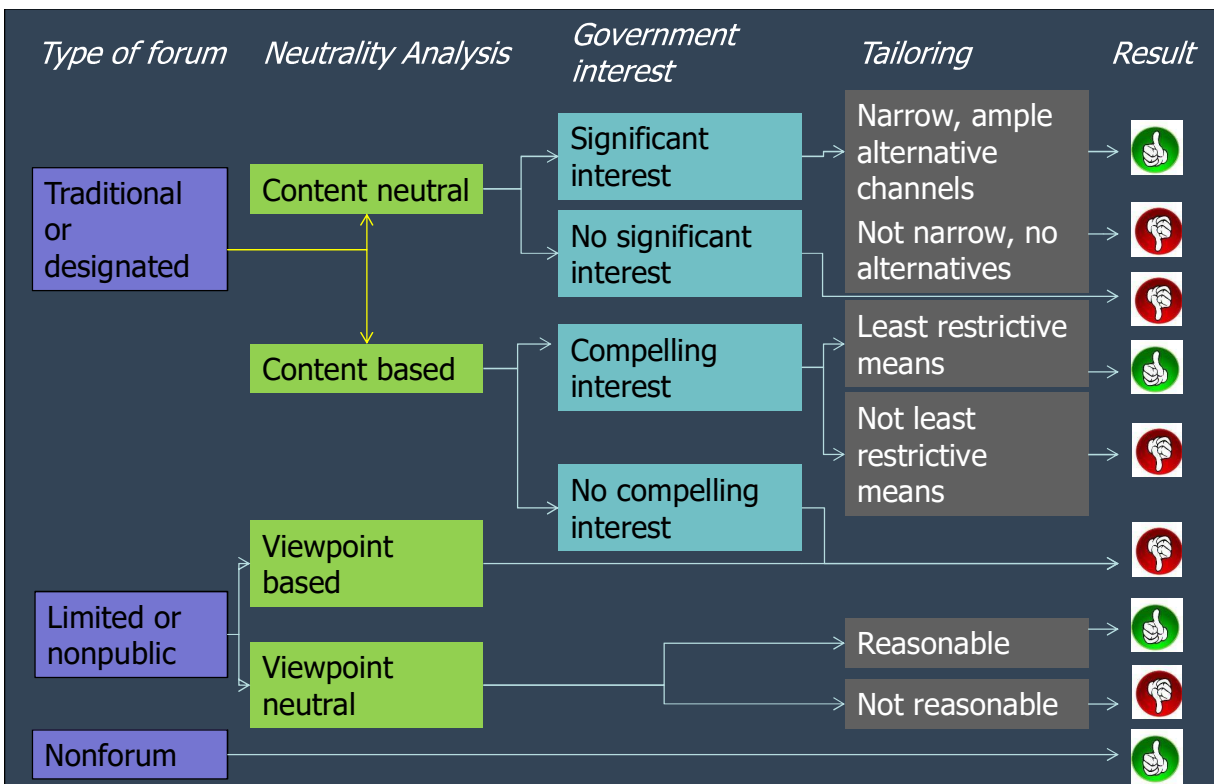
Step 3: Is the regulation appropriately tailored?

Neutrality in the Fora

- Traditional and designated public fora: require content neutral regulation
- Limited and nonpublic fora: require viewpoint neutral regulation
- Nonfora: no limitation

Application of Levels of Scrutiny

- TPF or DPF and content based: **strict**
- TPF or DPF and content neutral: **intermediate**
- LPF or NPF and viewpoint neutral: **reasonableness**
- LPF or NPF and viewpoint based: **invalid**
- Nonforum: **reasonableness**



Public Fora and Social Media

- While the government speech itself (ex: it's own Facebook post) is not a public forum, many courts have held invited public response on the accounts (ex: comments, posts) to be within a public forum
- Analysis factors:
 - Is there government ownership or control?
 - Is the application of forum analysis consistent with the purpose, structure, and intended use of the account and space at issue?

Examples

Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018)

- President Trump uses the same Twitter account both personally and in his official capacity, showing government control
- Trump blocked certain users from commenting on his tweets
- This “interactive space” of the account is a designated public forum
- Blocking users based on political comments was impermissible viewpoint discrimination



Source: CNN

Examples

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)

- Local official created and ran a Facebook page for her office
- Official deleted a critic's comment on the page
- The official's posts were government speech, but the invited public comments were a public forum
- Deleting the comment was impermissible viewpoint discrimination in any type of public forum

Examples

Robinson v. Hunt Cty., 921 F.3d 440 (5th Cir. 2019)

- County Sheriff Office Facebook page openly censored ("ANY post filled with foul language, hate speech . . . and comments that are considered inappropriate will be removed and the user banned")
- Facebook page stated "this is NOT a public forum," but County did not make that argument at trial; Fifth Circuit assumed it a public forum
- County not immune in 42 U.S.C. § 1983 action because censorship action directly from stated policy that discriminates on viewpoint

Examples

Landman v. Scott., 1:19-cv-01367 (D. Colo.) (filed 05/13/19)

- Complaint filed against Colorado State Senator for blocking the plaintiff from the interactive portions of his official Facebook and Twitter accounts
- Plaintiff claiming violation of her First Amendment rights by a viewpoint-based restriction on speech in a public forum



RIGHT TO RECORD

Right to Record: Overview

- Citizen typically charged under state wiretapping law
- Supreme Court yet to rule on a case
- Six circuits of the U.S. Court of Appeals have recognized a right to record public officers conducting duties in public areas
 - First, Third, Fifth, Seventh, Ninth, Eleventh
- Right to record grounded in the right of access to information about officials' public activities
- No difference between rights of individuals and press
- Policy rationale: uncovering of abuses, concern of retaliation

Evolution of the Right

- Changing technology has impacted law
- "The First Amendment protects the right to gather information about what officials do on public property, and specifically, a right to record matters of public interest." (*Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995))
 - Early in the line of cases, broad
- The right to record has since been more explicitly stated
 - See, e.g., *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017) (explicitly recognizing a First Amendment right to film the police)

Examples: First Circuit

Iocabucci v. Boulter, 193 F.3d 14 (1st Cir. 1999)

- Right to peacefully videotape a public meeting

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011)

- Plaintiff, suspecting use of excessive force, filmed police officers arresting a young man on the Boston Common
- Clearly established right to record on-duty officer in traditional public forum
- Peaceful recording did not interfere with officers' performance of duties
- Officers had no qualified immunity

Gericke v. Begin, 751 F.3d 1 (1st Cir. 2014)

- Plaintiff claimed a First Amendment right to film a public traffic stop

Examples: Third Circuit

Fields v. Philadelphia, 862 F.3d 353 (3rd Cir. 2017)

- Case 1: Officer physically prevented woman from moving to a vantage point to video record an arrest at a protest
- Case 2: College student used iPhone to photograph police breaking up house party; officer confiscated phone and detained him
- Because the recordings did not interfere with police activity, officers' actions unjustifiably infringed on right to record
- Did not entertain argument that right hinged on expressive intent

Examples: Fifth Circuit

Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017)

- Explicitly recognized a First Amendment right to film the police
- Qualified immunity because Plaintiff did not meet burden to show violation of a clearly established right or objectively unreasonable actions

Examples: Seventh Circuit

ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012)

- Reject argument that police have privacy right in their public actions
- "Audio and audiovisual recording are communication technologies, and as such, they enable speech."
- Broad-reaching state eavesdropping law cannot be enforced against those who openly record police publicly performing official duties

Pending: Tenth Circuit

Frasier v. Evans, (No. 19-1015)

- Plaintiff recorded police arrest and submitted to a news station
- District court: no qualified immunity, recognize a right to record police officers publicly performing duties

Examples: Traffic Stop

- Ability to restrict right depends on circumstances and need to do so for safety

Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010)

- Adopt a narrow view of the right to record – say no clear rule on videotaping in traffic stop circumstances, which are “inherently dangerous situations”
- Because no clearly established right- find qualified immunity

Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014)

- Plaintiff had First Amendment right to film a public traffic stop when no police order to stop

Permissible Restrictions

- Right to film may be subject to reasonable time, place and manner restrictions that leave open ample alternative channels of communication (*Glik, Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))
 - Ex: restriction on videotaping a planning committee’s meeting can be constitutional when observers can take notes (*Whiteland Woods L.P. v. Township of West Whiteland*, 193 F.3d 177, 183 (3rd Cir. 1999))

Qualified Immunity

- Two-pronged analysis (*Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 1996)):
 - Do the facts alleged make out a violation of a constitutional right that a reasonable defendant would have perceived his conduct to violate?
 - Was the right “clearly established” at the time of the violation?



DOOR TO DOOR SOLICITATION

Door to Door Solicitation: Overview

- Any right to door-to-door solicitation is subject to certain limits, keeping a balance with local interest
- Important to determine whether commercial or non-commercial speech is regulated
- Government should identify strong interests in regulation, backed up with evidence
- Common restrictions include curfews and registration requirements

Non-Commercial Speech

- Non-commercial speech includes political and religious speech
- Afforded greater First Amendment protection than commercial speech

Commercial Speech

- Commercial speech includes advertisements
- Commercial speech is reviewed differently from noncommercial speech
 - Commercial speech gained First Amendment protection in 1975
 - Content neutrality not required (but...)
- *Central Hudson* test: (1) lawful speech, (2) substantial governmental interest, (3) regulation must directly advance governmental interest, and (4) no more extensive than necessary

Terminology

- Ordinances usually define relevant terms, including “solicit” and “canvass”
- Solicitation often includes commercial speech; canvassing often includes non-commercial speech

First Amendment Right

- Many cases have recognized the importance of door-to-door solicitation, particularly when the speaker has limited resources
 - *See, e.g. Watchtower Bible and Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 162 (2002)
- This is balanced with local government interest in regulation

Implied License

- Door-to-door solicitors can also be seen as exercising an implied license to doorsteps
 - *See Florida v. Jardines*, 569 U.S. 1, 8 (2013)
- This license can also be restricted
- Entering uninvited upon private property used for private purposes is not protected speech
 - *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972)
- “A speaker must seek access to public property or to private property dedicated to public use to First Amendment concerns.”
 - *Cornelius v. N.A.A.C.P. Legal Defense and Educ., Fund, Inc.*, 473 U.S. 788, 801 (1985)

Restrictions?

- Strength of the asserted government interest?
- Is the restriction content-neutral and sufficiently narrow?
- Are there ample alternative methods to communicate?
- *Watchtower* suggests approval of sufficiently narrow restrictions on commercial solicitation
- *Vivint Louisiana, LLC v. City of Shreveport*, 213 F. Supp. 3d 821 (2016) upheld a ban, with exceptions for farm and garden products, on commercial door-to-door solicitation

Restrictions?



Source: Working America

Working America, Inc. v. City of Bloomington, 142 F. Supp. 3d 823 (D. Minn. 2015)

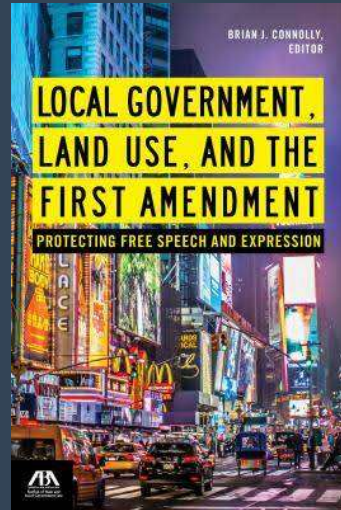
- City solicitor licensing ordinance applied against labor union activities
- "Going from place-to-place (1) advertising or selling any product, service, or procuring orders for the sale of merchandise or personal services for future delivery or future performance; or (2) seeking donations of money or property on behalf of any person, organization or cause."
- Content based, subject to strict scrutiny, unconstitutional

Restrictions?

- Still, many courts have struck down curfews and/or permit requirements
 - *Citizens Action Coalition of Indiana, Inc. v. Town of Yorktown, Ind.*, 58 F. Supp. 3d 899 (S.D. Ind. 2014)
 - *Project 80's Inc. v. City of Pocatello*, 942 F.2d 635 (9th Cir. 1991)
- Not dispositive whether a permit fee is required
 - Compare *Yorktown* (charge for a permit, regulation not upheld) with *Watchtower* (no charge for a permit, regulation not upheld)

Resources

Brian J. Connolly, ed., **Local Government, Land Use, and the First Amendment** (ABA Publishing 2017)



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Questions and Answers



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