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First Amendment Boot Camp

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SpencerFane®

Snow Christensen & Martineau

Cultural Climate

- Politically charged
- Everyone has a phone, everything is recorded
- Ever-revolving news cycle

First Amendment

“Congress shall make no law ... abridging the freedom of speech.” U.S.Const. Amend. I.

But “[n]othing 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.” *Minn. voters all. v. Mansky*, 138 s. ct. 1876, 1885 (2018) (quotations omitted).

How do municipalities regulate speech on government property?

Topics

Standards

Specific Issues

Recent Cases

Recommendations

Standard

- Burden on government
 - “[D]uly enacted laws are ordinarily presumed constitutional.” *Matter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014)
 - “But “when a law infringes on the exercise of First Amendment rights, its proponent” – here, Utah – bears the burden of establishing its constitutionality.” *Matter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014)
 - “[The] presumption [of constitutionality] does not apply when the challenged statute infringes upon First Amendment rights.” *Doe v. City of Albuquerque*, 667 F.3d 1111, 1120 (10th Cir.2012)

Outline of Analysis

*(Brewer v. City of Albuquerque, 18 F.4th 1205, 1218
(10th Cir. 2021))*

- Is it protected speech?
- What is the forum?
- Is the ordinance/conduct content-neutral?
- Does the ordinance/conduct satisfy the applicable standard?

Protected Speech



Types of Speech – General Principles

- Categories
 - Government speech
 - Private speech on government property

Government Speech



When the government speaks, its speech is not subject to the First Amendment

The Supreme Court has held, “[w]hile government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property” *Pleasant Grove City, Utah v. Summum*, 550 U.S. 460, 469 (2009).

“When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say.” *Shurtleff v. City of Boston, Mass.*, 142 S.Ct. 1583, 1589 (2022).



Factors to determine whether speech qualifies as government speech

“...the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.” *Shurtleff*, at 1589-1590 (emphasis added).

Private speech on government property is not government speech, and government actors must regulate such speech according to the forum where the speech occurs

Forums

- Traditional public forums
- Designated public forums
- Limited public forums
- Non-public forums

Traditional Public Forums

- City parks, public streets, sidewalks
 - “In traditional public forums, ‘any restriction based on the content of speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.’” *Pollak v. Wilson*, 2022 WL 17958787, *1 (10th Cir. 2022) (unpublished) (Citations omitted).
 - “Content-neutral restrictions ‘must be narrowly tailored to advance a significant government interest.’” *Id.* (Citations omitted).

Designated Public Forums

- Libraries, senior centers
 - Public spaces dedicated to a specific purpose
 - Speech regulation subject to strict scrutiny, like a public forum

Limited Public Forums

- State fair, public comment at city council meeting
 - Public events with a limited time and purpose
 - “In a limited public forum, the government may impose restrictions so long as they are ‘reasonable in light of the purpose served by the forum and viewpoint neutral.’ *Pollak v. Wilson*, 2022 WL 17958787, *1 (10th Cir. 2022) (unpublished) (citations omitted).

Non-Public Forums

- Airport terminals, courthouses
 - Places that are not open to the public for airing of viewpoints
 - “A restriction is viewpoint-based if it ‘denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.’”
Pollak v. Wilson, 2022 WL 17958787, *1 (10th Cir. 2022) (unpublished) (citations omitted).
 - “This standard, which is less demanding on the government than the traditional public forum standard, also applies to a nonpublic forum.” *Id.* (Citations omitted).

Content-Based v. Content-Neutral

Content-based

- “The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
- “Content-based regulations are presumptively invalid.” *Id.*, 382.

Content-neutral

- “Content-neutral regulations of speech ... must meet intermediate scrutiny.” *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1220 (10th Cir. 2021) (citations omitted).
 - The ordinance is narrowly tailored to achieve significant government interests.
 - The ordinance leaves open ample alternative channels of communication.

Specific Issues

- Special events and permits
- Public displays
- Parades
- Protest zones
- Noise regulations

Special Events & Permit

- Municipalities may limit the use of their property, so long as the limitation satisfies the First Amendment framework on speech and the property type
- “The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated ... The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purposes.” *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

Special Events & Permits

- Depends on the type of forum it is (traditional, designated, limited, non-public)
 - Once a city opens a facility for public use (a large gathering room at City Hall for rental, for example), any content-based restrictions will be subject to strict scrutiny
- Political rallies
 - Municipalities may allow political rallies on municipal property, so long as regulation is content-neutral (*Sistrunk v. City of Strongville*, 99 F.3d 194 (6th Cir. 1996))

Permits & Charges

- Permits and charges are allowed. *See Thomas v. Chicago Park Distr.*, 534 U.S. 316 (2002) (Supreme Court upheld a municipal permitting ordinance for the use of public spaces like parks).
- Must be content-neutral
- Must be *applied* in a content-neutral manner

Special Events & Permits

- Recommendations / Best Practices
 - Application forms
 - Training
 - Appeal process
 - User fees

Public Displays



Public Displays

- Examples: art exhibition
- Content-neutral
 - “Denying partisan groups the same opportunity to participate in Christmas in the Park as non-partisan groups discriminates against the partisan groups based on the “partisan” content of their expression. Such discrimination is content-based, not content-neutral.” *Eagon through Eagon v. City of Elk City, Okl.*, 72 F.3d 1480 (10th Cir. 1996)

Public Displays

- Recommendations / Best Practices
 - Focus on specific purpose (municipal heritage)
 - Application form
 - Employee training
 - Appeal process
 - User fees

Parades

- Issues: controversial submissions, political campaigning
- Parade ordinances
 - Application of ordinances must be content-neutral. See *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006)

Parades

- Recommendations / Best Practices
 - Review parade ordinance
 - Training
 - Application
 - Appeal process
 - Fees

Protest Zones

- Standard (*from Minnesota State Fair case, Hartman v. Thompson*, 931 F.3d 471 (6th Cir. 2019))
 - Legitimate, viewpoint-neutral reason
 - Patron safety
 - Orderly movement of vehicle/pedestrian traffic
 - Normal functions of fairgrounds
 - Reasonable in light of purpose served by forum
- Tenth Circuit has upheld protest zones and arrest of individuals who don't comply with related rules.
 - *Asprey v. Northern Wyoming Comm. College Distr.*, 823 Fed.Appx. 627 (10th Cir. 2020)
 - *Pahls v. Thomas*, 718 F.3d 1210 (10th Cir. 2013)

Protest Zones

- Recommendations
 - Establish beforehand
 - Make sure they are close enough for protestors to express their viewpoint
 - Train first-hand responders on appropriate responses

Noise Regulations

- Noise ordinances are permitted, so long as they are content-neutral and reasonable

Noise Regulations

- Recommendations
 - Application of decibel-level limits
 - Ensure consistency with zoning
 - Application process
 - Appeal process

General Recommendations

- Regular review of ordinances
- Regular training of first-line city actors
 - Police officers
 - Employees handling permit applications and appeals
 - Training has two-prong effect
 - Municipal employees will be better prepared
 - Evidence in Court of Municipality's intent to uphold the law
- Engagement of legal counsel

Conclusion

- Difficult area of the law
- High profile, highly politicized, and highly emotional

Thank You!



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