
Coates' Canons Blog: Limited Public Forum Analysis Revisited

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When it comes to litigation involving freedom of expression in public places, the three-part forum analysis is, by now, pretty familiar. There's the traditional public forum, the nonpublic forum, and the limited (sometimes called "designated" or "quasi") public forum. Courts consistently use these categories to analyze what kinds of restrictions government can impose without impinging on constitutional rights. The three types of forums are generally thought to represent a spectrum or continuum, with the nonpublic forum representing the greatest degree of allowable governmental restrictions on expressive activity, and the traditional public forum representing the most limited. But not all of these categories are created equal.

Courts define the traditional public forum based on the historical and traditional use of the place. To some extent, this is also true of the nonpublic forum. In contrast, the public entity itself defines what expressive activity is allowed in a limited public forum. A limited public forum, after all, is essentially a nonpublic forum that the government has intentionally designated for some specified, limited, expressive use.

A classic case is *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). That's the one where the two labor unions were competing for access to the public school employees' internal mailboxes. The Court ultimately held that the mailboxes were nonpublic forums. Even though the school system allowed the existing union (an organization external to the public entity) to place material in the mailboxes, the Court said it was okay to exclude the other union. Allowing access by the existing union didn't create a public, or even a limited public forum. As the Court said in *Perry*, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

It's common for governmental attorneys and other officials to worry about allowing or excluding particular expressive activities in public places and spaces. For example: If we invite a particular speaker to address council during the regular business part of a meeting (not the public comment section), have we converted the whole meeting into a public forum at which anyone must be allowed to speak? (For more on this question see, *Open Meetings and the Public's Right to Speak*.) Or, with regard to the growing use of virtual public spaces: Can we place limits on what we allow people to post on our website or Facebook page? (For more on this question see, *Free Speech Rights in Government Social Media Sites*.)

Assuming a traditional public forum is not involved, a court has to decide whether the place or space is a nonpublic forum, or whether the public entity has created a limited public forum for particular categories of expression. If it's the latter, the focus of the court's analysis is on 1) for what purposes did the governmental entity intend to allow expressive use of the forum; and 2) does the expression at issue fit within the purpose so designated? Courts defer to a public entity's choice of allowable expressive activity, and will uphold it as long as it's reasonable. Even though this is a type of content-based limitation, courts recognize that a government's decision to allow only certain types or categories of speech isn't necessarily the same as viewpoint discrimination. But if particular types of speech are within the categories for which the forum was designated, the rules for a traditional public forum apply: only content-neutral, time, place, and manner limitations are allowed.

In the situations described above—the speaker at the council meeting and posts on virtual public spaces, it's up to the public entity to define what type of speech is allowed. Court cases arise, typically, when particular (usually controversial) expression is excluded. If the public entity hasn't clearly designated the purpose or parameters of a forum, a decision to allow some speech and not others is likely to be, or to be perceived as, viewpoint based. And that's a no-no in any type of forum



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