Free Speech Considerations for Local Governments

Introduction

The First Amendment to the U.S. Constitution grants Americans the right to free speech,[1] a right that permeates American society. The right protects speech that we hate, speech that scares us, but many Americans, blessed with this freedom, never stop to think about how it operates. Although Americans enjoy enormous freedom to voice dissenting, contrarian and controversial viewpoints, the First Amendment is not carte blanche to say or do anything at any time. For instance, when thinking about the First Amendment, one might ask why it is legal to burn a flag[2] but not a draft card?[3] The First Amendment's grant of free speech is filled with nearly 300 years of history and nuance. And each year that technology advances and new avenues of communication open, that nuance grows and expands and creates new uncertainties.

This article is a guide to that nuance, an explanation of the First Amendment's freedom of speech as applied to local governments. Local government officials should be concerned with a number of free speech issues and should have some familiarity with how courts analyze those issues. Analysis of government regulation of free speech generally begins with a classification of the type of speech, whether private speech or government speech, followed by the location of the speech, whether a public forum, a limited public forum, or a non-public forum. Similarly, that is where this article will begin. The difference between government speech and private speech will be outlined. Then, each type of forum will be explained with a focus on how each forum is created and any unique characteristics of that forum. Following the explanation of that construct, and for the practical use of localities, this article will discuss how the forum analysis applies in particular situations, both the areas settled by current judicial precedent and hypothetical situations that courts may address in the future.

1 U.S. Const. amend. 1.
2 *See* Texas v. Johnson, 491 U.S. 397, 397 (1989).
3 *See* United States v. O'Brien, 391 U.S. 367, 272 (1968).

Government Speech versus Private Speech

When discussing whether speech, or the regulation of speech, is constitutional, the first step is to classify the speaker. There are three kinds of speakers – governments, individuals and corporations – the first two of which are important for our purposes. A government's right to speak and a government's right to regulate speech is an important distinction to understand. The First Amendment – though explicitly a grant to private parties – operates in practice to control how governments regulate private speech, it does not regulate government speech.[4]

The U.S. Supreme Court has recognized that a government "has the right to 'speak for itself.'"[5] It may "say what it wishes,"[6] and more importantly, may "select the views it wants to express."[7] Moreover, governments may use, even compel, private financial assistance to convey a government endorsed message.[8] This freedom, though substantial, is not unlimited. Governments are limited by, among other things, the Establishment Clause, other laws and regulations and the electorate at the ballot box.[9] Therefore, the distinction between what governments may say – or compel private parties to financially support – and private speech is important. The former is not subject to First Amendment scrutiny, so the forum is irrelevant. The latter, however, is subject to First Amendment regulation by governments and the legality of that regulation, if not viewpoint based, is almost entirely dependent on the forum.

Public Forum Analysis

The first step in the analysis of free speech regulation is to identify the relevant forum. Courts generally define the forum narrowly. Courts identify the requested avenue of communication; if a party is seeking limited access, then

4 Johanns v. Livestock Marketing Assn., 544 U.S. 550, 553 (2005).
5 Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1125, 1131 (2009) (quoting Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000)).
6 Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).
7 Pleasant Grove City, 129 S.Ct. at 1131.
8 *Id.*
9 *Id.*

courts will define the forum narrowly.[10] For instance, when the communication sought was advertising space on local buses, the U.S. Supreme Court identified the relevant forum as the advertising space and not the buses themselves.[11] Similarly, the D.C. Circuit Court of Appeals, in a case involving advertising in a military publication, defined the relevant forum as the advertising section and not the entire publication.[12] Thus, even though a larger forum may be a traditional public or designated public forum, the actual access sought may be a distinct, smaller forum, encompassed by the larger forum and may individually be nonpublic.

The power of local governments to regulate speech is at its lowest ebb when the speech is in a public forum. There are two types of public forums, traditional public forums and designated, or limited, public forums. In the words of the U.S. Supreme Court, traditional public forums are those that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[13] Public streets and parks are the quintessential example. A designated public forum, on the other hand, is government property that, although not a traditional public forum, the government has specifically opened for open communication and free expression of ideas.[14] Governments may impose reasonable time, place and manner restrictions on expression in any public forum.[15] Any restriction on the content of speech, however, is subject to strict scrutiny and must be narrowly tailored to achieve a compelling governmental interest.[16] Lastly, viewpoint restrictions are strictly prohibited.[17]

If a local government wants to create a forum for individuals to voice concerns but does not want to create unfettered access, then the government may create a limited public forum. In limited public forums, an individual may not engage in every type of speech;[18] indeed, the government "may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics."[19] But again, governments do not have unfettered discretion. They cannot discriminate against different viewpoints and "any restriction must be 'reasonable in light of the purpose served by the forum.' "[20] For instance, discussion at city council meetings may be limited to speech germane to the issue at hand.[21]

If specific government property is not a traditional public forum, designated – or limited – public forum, then that property is a nonpublic forum. The power of local governments to regulate speech is at its highest in nonpublic forums. A government can restrict speech "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[22] Governmental intent is the determining factor in whether a forum is public or not.[23] Indeed, "[t]he government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."[24] The court will examine both the government's stated purpose and the government's objective treatment of the forum, including "the nature of the property, its compatibility with expressive activity, and the consistent policy and practice of the government."[25]

Practical Guidance for Localities

With the analysis of forums outlined, this article will shift to an examination of how courts apply these principles. The following examination will include outdoor public spaces, public buildings, public debates, public transportation, internet, and advertisements generally. As noted above, there are areas in free speech, public forum jurisprudence that are unsettled, particularly regarding the internet; the following will identify those areas and discuss competing arguments.

10 Bryant v. Gates, 532 F.3d 888, 895 (2008); *see also* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46-47 (1982); Lehman v. City of Shaker Heights, 418 U.S. 298, 300-04 (1974) (plurality opinion).
11 *Lehman*, 418 U.S. at 300-04.
12 *Bryant*, 532 F.3d at 895.
13 Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) (Opinion, Roberts, J.); *see also Pleasant Grove*, 129 S. Ct. at 1132, Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).
14 *Pleasant Grove*, 129 S. Ct. at 1132.
15 *Id.*
16 *Id.*
17 *Id.*; Carey v. Brown, 447 U.S. 455, 463 (1980).
18 Good News Club v. Milford Central School, 533 U.S. 98, 106 (2001).
19 *Id.* (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
20 *Id.* (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).
21 *See infra* Public Debates section.
22 Cornelius, 473 U.S. at 800.
23 Bryant v. Gates, 532 F.3d 888, 895 (2008).
24 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).
25 Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1016-17 (D.C. Cir. 1988).

Outdoor Public Spaces

Outdoor public spaces include more than just public parks and streets, but the treatment that courts give public parks and streets is a good starting point. As a general matter, public parks and streets are traditional public forums.[26] Therefore, it is difficult for local governments to regulate much speech that occurs in most public parks and on most public streets. However, there are a number of well established caveats to that general rule. First, the U.S. Supreme Court has upheld an ordinance prohibiting the posting of political material on public property.[27] More recently, the U.S. Supreme Court upheld a locality's refusal to display a monument in a public park.[28] In Pleasant Grove v. Summum, the City of Pleasant Grove in Utah rejected a religious organization's offer to erect a religious monument in a public park.[29] Notably, the park already had a monument containing the Ten Commandments[30] and at least 11 permanent displays donated by private parties.[31] The city denied construction of the requested monument based on a practice "to limit monuments in the Park to those that 'either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community.' "[32] While the Tenth Circuit Court of Appeals found that the City of Pleasant Grove could not reject the offered monument absent a compelling justification and a narrow tailoring, the U.S. Supreme Court disagreed.[33] The Court classified the permanent monuments on public property as government speech, regardless of whether the idea or even the funding was private.[34] Because the Court found that government speech was involved, it did not conduct the forum analysis and upheld the city's decision.[35]

The general public forum categorization of streets and sidewalks is a little misleading, as governments may regulate a number of speech related activities on streets and sidewalks. For starters, localities may impose certain licensing requirements, including fees, when groups hold events on public property.[36] Courts, however, strongly disfavor regulations or permit schemes that allow governmental actors to exercise broad discretion.[37] The U.S. Supreme Court does not want governmental actors making arbitrary decisions on who is able to speak.[38] Although governments otherwise have quite a bit of latitude with permit schemes, the Court applies a heavy presumption of invalidity on any prior restraint[39] on the content of the speech.[40] Any such restriction faces a presumption of unconstitutionality.[41] One of the broader powers that localities may exercise is the ability to issue regulations that prohibit people or groups from blocking sidewalks from the free flow of pedestrians.[42] Courts, however, will closely scrutinize such regulations and may still protect activity closely related to the speech at issue.[43] However, a regulation that controls the time, place, and manner of speech is fine if it is: (1) content neutral; (2) narrowly tailored and serves a significant government interest; and (3) adequate alternative channels are left open for communication.[44]

In addition to the above exceptions, the U.S. Supreme Court has held that a sidewalk in front of a post office, segregated by a parking lot from the sidewalk abutting the street, is not a public forum.[45] Notably, the sidewalk in question was solely for individuals with postal business and was not a general public passageway.[46] Similarly, the Supreme Court has held that sidewalks on military bases are not public forums.[47] Additionally, localities may impose reasonable time, place and manner restrictions on the

26 Perry Ed. Assn., 460 U.S. at 45.
27 Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 790-91 (1984).
28 Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009).
29 *Id.* at 1129-30.
30 *Id.*
31 *Id.* at 1129.
32 *Id.* at 1130.
33 *Id.*
34 *Id.* at 1132-34.
35 *See id.* at 1132 (discussing the parameters of the forum analysis but not applying it to the facts of the case).
36 Cox v. New Hampshire, 312 U.S. 569, 577 (1941).
37 Forsyth County, Ga. V. Nationalist Movement, 505 U.S. 123, 130 (1992).
38 *Id.*
39 A prior restraint is any governmental restriction on the content of speech prior to the publication of the speech at issue.
40 Thomas v. Chi. Park Dist., 534 U.S. 316, 320-21 (2002).
41 *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (citing cases).
42 International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997) (regulation prohibiting tables on sidewalks was reasonable time, place, and manner restriction on pamphleteering)
43 One World One Family Now v. City of Key West, 852 F. Supp. 1005 (S.D. Fla. 1994) (group's portable tables were afforded First Amendment protection because of their limited use in facilitating the sale of expressive t-shirts, while chairs, umbrellas, and boxes were not protected because they were not sufficiently related to the expressive message and constituted "permanent-type" structures)
44 *Forsyth County*, 505 U.S. at 130; Ward v. Rock Against Racism, 401 U.S. 781, 791 (1989); *see also* Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (2007) (upholding a time, place, and manner restriction on all speech within a designated security zone).
45 U.S. v. Kokinda, 497 U.S. 720, 720 (1990).
46 *Id.*
47 Greer v. Spock, 424 U.S. 828, 838 (1976).

picketing of individual residences.[48] Furthermore, courts have upheld reasonable notice and disclosure requirements when dealing with picketers on public streets, sidewalks, and parks.[49] Localities may not, however, enact ordinances that act as blanket prohibitions on door-to-door solicitations,[50] nor may localities require notice – even just for identification purposes – of door-to-door solicitations,[51] or prohibit the distribution of literature on sidewalks.[52]

Buffer Zones

One very interesting and timely[53] aspect of free speech regulation is a locality's ability to regulate the time, place and manner of protests. One of the most recent circuit court cases to address this issue is Brown v. City of Pittsburgh.[54] The issue in Brown revolved around an ordinance enacted by the City of Pittsburgh.[55] The ordinance created a "fifteen-foot 'buffer zone' and one hundred-foot 'bubble zone' around hospitals, medical offices, and clinics."[56] The plaintiff, who engaged in "sidewalk counseling" and leafleting, sued the city claiming that the ordinance violated her First Amendment rights of free speech. The interesting twist in Brown was that the ordinance at issue combined two kinds of zones around hospitals, both of which the U.S. Supreme Court previously considered and upheld.

The Court considered bubble zones[57] in Hill v. Colorado.[58] In fact, the bubble zone at issue in Hill was exactly the same as that in Brown.[59] The Hill Court held that the Colorado statute in question was content neutral – it did not discriminate between speaker's viewpoints – and sufficiently tailored to the government's legitimate objectives because the barrier was only eight feet.[60] Thus, the Third Circuit held the bubble zone in Brown, by itself, was facially valid.[61] When considering the fifteen foot buffer zone, the Third Circuit also relied on U.S. Supreme Court precedent, specifically Schenck v. Pro-Choice Network of W.N.Y.[62] and Madsen v. Women's Health Ctr., Inc.,[63] where the Supreme Court upheld buffer zones of fifteen and thirty-six feet, respectively.[64] Because the buffer zone in Brown was only fifteen feet (like the one in Schenck), it was facially valid when considered by itself.[65] The court, however, found both the buffer zone and the bubble zone, when considered together, not sufficiently tailored to the government's interest.[66] The important point to take from Brown is that the "layering of two prophylactic measures is 'substantially broader than necessary to achieve' " the government's interest.[67] However, with a legitimate governmental interest at stake, like the free flow of pedestrian traffic to clinics, localities may adopt either a bubble zone or a buffer zone ordinance.

Public Buildings

Unlike public parks, sidewalks and streets, public buildings are not traditional public forums. Therefore, as a general matter, buildings only become public forums when localities intentionally open the building to expressive conduct – typically creating a limited public forum. Again, unlike with designated public forums or traditional public forums, localities can control access to limited public forums, to some extent. For example, a court upheld an ordinance making library meeting rooms generally available, except for worship services.[68] Additionally, the U.S. Supreme Court has upheld a public school's decision to open its rooms for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community," as a limited public forum.[69] But if a governmental entity is not careful, it may create a designated public forum and then only be able to

48 Frisby v. Schultz, 487 U.S. 474 (1988). *But see* Carey v. Brown, 447 U.S. 455 (1980) (Supreme Court invalidated Illinois residential picketing statute because peaceful labor picketing was exempted).
49 Green v. City of Raleigh, 523 F.3d 293 (4th Cir.2008).
50 Martin v. City of Struthers, Ohio, 319 U.S. 141 (1943).
51 Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610 (1976).
52 Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 107 (1939).
53 The U.S. Supreme Court heard *Snyder v. Phelps* in October 2010, the issue in the case was whether a family member of a deceased service member could sue funeral picketers for tort damages, including intentional infliction of emotional distress. Ian Shapira, *Westboro Baptist Church, Phelps family speak out about funeral-protest case*, Wash. Post, Oct. 6, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100602605.html.
54 586 F.3d 263 (3rd Cir. 2009).
55 *Id.* at 266.
56 *Id.*
57 A bubble zone is one in which individual solicitors or protestors are not allowed to approach within so many feet of individuals unless such individuals express an interest in being approached.
58 530 U.S. 703 (2000).
59 *Brown*, 586 F.3d at 271.
60 *Hill*, 530 U.S. at 726-29.
61 *Brown*, 586 F.3d at 273.
62 519 U.S. 357 (2009).
63 512 U.S. 753 (1994).
64 *Brown*, 586 F.3d at 276.
65 *Id.*
66 *Id.* at 282.
67 *Id.* at 279 (*quoting* Ward, 491 U.S. at 800).
68 Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891, 908 (2006).
69 Good News Club v. Milford Central School, 533 U.S. 98, 102 (2001).

exclude speech when there is a compelling state interest. For example, the Ninth Circuit Court of Appeals ruled that if a city hall opened to artwork, but limited acceptance to only those that are not "controversial," it created a designated public forum.[70] Similarly, a senior center opened for "discussive purposes," including "lectures and classes on a broad range of subjects by both members and non-members" can become a designated public forum.[71] Furthermore, many public buildings and enclosed areas are nonpublic forums entirely, including airports,[72] welfare offices,[73] military bases,[74] the government workplace,[75] and especially, a courthouse.[76] In contrast, at least one court has held that public malls can be, in some circumstances, traditional public forums.[77]

Public Debates

Courts typically consider public meetings and debates, where discussion is open to the public generally, designated public forums.[78] Thus, content based restrictions on free speech in such public meetings and debates are subject to strict scrutiny.[79] For example, the U.S. Supreme Court invalidated a Wisconsin Employment Relations Commission order that prohibited non-union teachers from speaking at public school board meetings about on-going contract negotiation issues.[80] Because the school board meetings were open to the public, the Court held that such an explicit content restriction could not stand.[81] Individuals, however, are not given unlimited free reign to say whatever they please, and for however long, when public meetings and debates are opened for discussion.[82] For instance, the Eleventh Circuit Court of Appeals held that a city commission could silence and remove an individual from a meeting because the presiding officer believed the individual was disruptive.[83] Moreover, the Supreme Court, in Arkansas Educational Television Commission v. Forbes, held that a public broadcaster could exclude a candidate for public office from participating in televised debates[84] because the debate was a nonpublic forum.[85]

Advertisements on Government Property

With the increasing variety of government-owned property – from public transportation, to athletic fields, to internet websites – a similar question has continued to pop up: when a governmental entity opens its property to advertisement, what limits may the government place on the advertisements it accepts? The federal courts' treatment of advertisements on public transportation is a good framework in which to explore this area of the law. Localities frequently open these vehicles for advertising, so the issue courts have wrestled with is whether localities can regulate what advertisements they accept and which they do not. For instance, in Lehman v. City of Shaker Heights, the Supreme Court ruled that public transit authorities may allow a significant amount of speech but yet still discriminate based on content.[86] The key was that the city, as the operator of the public transportation system, was acting in a proprietary capacity.[87] However, localities do not have unbridled discretion – the distinctions must still be reasonable.[88] For instance, the First Circuit invalidated an ordinance when the Massachusetts Bay Transportation Authority denied an AIDS group advertising space for a sexually explicit advertisement.[89] Notably, the Authority had approved movie advertisers

70 Hopper v. City of Paseo, 241 F.3d 1067 (9th Cir. 2001).
71 Church of the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir. 1996).
72 *Int. Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992). But see* Board of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (ordinance banning "All First Amendment" activity in Los Angeles Airport was unconstitutionally overbroad), and Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993) (ban on newsracks found unconstitutional).
73 Make the Road by Walking, Inc. v. Turner, 378 F.3d 133 (2nd Cir. 2004).
74 *Greer v. Spock, 424 U.S. 828,* at 838 n. 10 (1976).
75 Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788 (1985).
76 Berner v. Delahanty, 129 F.3d 20 (United States v. Bader, 698 F.2d 553, 556 (1st Cir.1983)); Claudio v. United States, 836 F. Supp. 1219, 1224-25 (E.D.N.C.1993), *aff'd*, 28 F.3d 1208 (4th Cir.1994); *see also* Helms v. Zubaty, 495 F.3d 252, 256 (6th Cir. 2007) (reception area of judge's office is nonpublic forum, even with an open-door policy).
77 American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003).
78 *See* City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976); Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989);
79 *Jones*, 888 F.2d at 1331.
80 *City of Madison*, 429 U.S. at 167.
81 *Id.*
82 Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984).
83 *Jones*, 888 F.2d at 1328; *see also* Steinberg v. Chesterfield County Planning Com'n, 527 F.3d 377, 390 (4th Cir. 2008) (holding that the exclusion of an individual from a public meeting because the individual was being disruptive did not violate the First Amendment).
84 523 U.S. 666, 666 (1998).
85 *Id.*
86 418 U.S. 298 (1974).
87 *Id.*; *see also* AIDS Action Committee of Mass., Inc. v. Mass. Bay Transp. Authority, 42 F.3d 1, 9-10 (1st Cir. 1994).
88 *AIDS Action Committee*, 42 F.3d at 1.
89 *Id.*

with sexually explicit movies.[90] Also, the D.C. Circuit held that the Washington D.C. Metropolitan Transit Authority's refusal to display an anti-Reagan ad, when it had accepted other political advertising, was an unconstitutional prior restraint.[91] The Transit Authority's acceptance of other political ads transformed the subway stations into public forums.[92] In contrast, the Ninth Circuit held that the treatment of governmental advertisement space as a nonpublic forum, where that space is limited to commercial speech, extends to advertisements on the exterior of public transportation, not merely the interior.[93]

One case in particular highlights a key dichotomy in the area of free speech and advertisements, namely, the distinction between government speech and other kinds of speech. The case, Johanns v. Livestock Marketing Association, dealt with a government program that required mandatory contributions from beef producers.[94] The federal government used the contributions to fund a beef promotion and research board.[95] The plaintiffs, two associations and several individuals had paid the contribution and sued the Secretary of Agriculture because they disagreed with the board's message.[96] The plaintiffs claimed that the board's actions constituted "compelled" speech and thus violated the First Amendment.[97] The Court held, however, that even though a non-governmental entity, the beef board, was tasked with researching issues and developing messages, the real speech was made by the federal government, which controlled the message by statute and regulation.[98] And because the Court found it was government speech, the board was not subject to First Amendment scrutiny.[99] Thus, if the speech or advertisement at issue is government speech, then the first amendment will not apply. In such cases, there must be some threshold level of editorial control by the government over the message. In a similar vein, courts have consistently upheld a government's right to promote a ballot measure.[100]

When the government is not the speaker, or advertiser, courts have frequently found the relevant forum to be nonpublic or limited public. For instance, in Bryant v. Gates the D.C. Circuit held that the military's Civilian Enterprise Newspaper's (CEN's) advertising section was a nonpublic forum.[101] The plaintiff sued the Secretary of Defense because the editors of the CEN refused to publish overtly political and highly controversial advertisements.[102] The plaintiffs argued that the military failed to apply the policy of not publishing political material in a consistent manner because several pseudo political advertisements were accepted.[103] The court held, however, that the accepted advertisements were materially different than the advertisements the government rejected.[104] The government did not open up the advertising section for "communication or assembly of the public," and applied its policy in a consistent manner.[105] Similarly, in Diloreto v. Downey Unified School District Board of Education, the Ninth Circuit Court of Appeals held that the outfield fence of a high school baseball field was a limited public forum for the purposes of advertising.[106] The school district solicited local businesses to advertise on the outfield fence of the baseball field.[107] In response to this solicitation, the plaintiff submitted a lengthy ad containing the Ten Commandments, which the high school principal refused to post.[108] In finding that the fence was a limited public forum, the Ninth Circuit held that the principal's decision and the accompanying policy not to post advertisements that were "disruptive to the educational purpose of the school" were reasonable.[109]

In the area of advertising, the distinction between government speech, nonpublic forums and limited public forums has carried over into government websites. As a starting point, federal regulations prohibit localities with .gov domain names from posting advertisements.[110] That regulation, however, only covers .gov domain names, any other domain is governed by First Amendment regulation. The first case to directly consider restrictions on advertisements on government websites was Putnam Pit, Inc. v. City of Cookeville.[111] In Putnam Pit, the Sixth Circuit

90 *Id.*
91 Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893, 896 (D.C. Cir. 1984).
92 *Id.*
93 Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998).
94 544 U.S. 550 (2005).
95 *Id.*
96 *Id.* at 555-56.
97 *Id.*
98 *Id.* at 560-61.
99 *Id.* at 561-62.
100 Kidwell v. City of Union, 462 F.3d 620, 626 (6th Cir. 2006) (city could promote ballot measure); Cook v. Baca, 95 F. Supp. 2d 1215, 1227-29 (D.N.M. 2000) (same); Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 818-21 (N.D. Ala. 1988) (same).
101 532 F.3d 888, 898 (D.C. Cir. 2008).
102 *Id.* at 892.
103 *Id.* at 894.
104 *Id.* at 896-98.
105 *Id.*
106 196 F.3d 958 (9th Cir. 1999).
107 *Id.* at 962-63.
108 *Id.*
109 *Id.* at 967-69.
110 Guidance on Advertising, WebContent.gov, http://www.usa.gov/webcontent/getting_started/naming/advertising.shtml.
111 221 F.3d 834 (6th Cir. 2000).

held that Cookeville's website was a nonpublic forum.[112] The plaintiff, a small, free, tabloid newspaper that reported on public corruption, requested that the city place a link from the city's webpage to The Putnam Pit's webpage.[113] The city had, in the past, placed links on its webpage for internet service providers, an attorney, and a local technical college, but the city's computer operations manager denied Putnam Pit's request and expressed a policy of limiting access to non-profit organizations, which then transformed into a policy to only link to websites that would promote the City of Cookeville.[114] The court found that unlike with a designated public forum, the City of Cookeville never opened the city's website to public discourse.[115] Thus, the website was a nonpublic forum and the city's policy of limiting access to either non-profit organizations or those promoting Cookeville, was reasonable.[116]

In Page v. Lexington County School District One, the Fourth Circuit held that links on a school district website, which the district selected, constituted government speech. Important to the decision was that the district retained "sole control over [the] message."[117] Unlike Putnam Pit, however, the Fourth Circuit based its decision on the government speech doctrine, finding that the district was within its rights, and not subject to First Amendment scrutiny, to refuse access to an individual who wanted to voice opposition to a bill that the school district supported.[118] Finally, in an unreported case from federal district court in New Hampshire, the court upheld a school district's refusal to post a link to a non-school sponsored event.[119] The court found the website was a non-public forum and the restriction was reasonable.[120]

Several key issues that are undecided in public forum case-law relate to government-controlled websites. For instance, the question whether a governmental entity may sell advertisements on its website – like it might on a bus or a subway – has not yet arisen. In looking at the public transportation cases and the few website cases out there, it seems likely that such advertisements would be fine. But what parameters may governments put on acceptance or rejection? A safe guess would be a policy of not accepting political or religious advertisements could be upheld. The question arises about when a government's website that would otherwise be a nonpublic or limited public forum becomes a designated public forum. What if a town government posts articles on its website about town issues and citizens are allowed to comment? Does that create a designated public forum for advertising purposes and thus restrict what advertisements the town may reject? What if it they are not comments but actual chat rooms? In such a case, it is far more likely there is a designated public forum. These are questions that courts have not addressed but likely will in the future.

112 *Id.* at 844.
113 *Id.* at 838-42.
114 *Id.* at 841.
115 *Id.* at 843.
116 *Id.* at 843-44.
117 531 F.3d 275, 285 (4th Cir. 2008).
118 *Id.* at 278-85.
119 Sutliffe v. Town of Epping, Civil No. 06-cv-474-JL. (D.N.H. Nov. 13, 2008)
120 *Id.*

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