



The Government-Sponsored Speech Doctrine

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Overview

- The Free Speech Clause of 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.”
- Scope of the Free Speech Clause:

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If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.

from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S.

Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)

Forum Analysis

- Courts will conduct a forum analysis to determine what level of scrutiny applies to a First Amendment issue on government-owned property.
- There are 3 possibilities:
 1. Public forum
 2. Limited/designated public forum
 3. Nonpublic forum

1. Public Forums

- Traditional Public Forum
 - Places which “by long tradition or by government fiat have been devoted to assembly and debate.” *Perry Ed. Ass’n. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 45 (1983).
- Examples: public streets, parks, sidewalks



2. Limited/Designated Public Forums

- Government property may be converted into a nontraditional limited or designated public forum “by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).
- Examples: locations on university campuses, municipal meeting rooms, interoffice mailboxes

Restrictions on First Amendment Activity in Public Forums

- Restrictions on free speech must withstand strict scrutiny:
 - Content-neutral;
 - Narrowly-tailored to meet
 - A compelling government interest; and
 - Leave open ample alternate channels for communication.
- Reasonable time, place, and manner restrictions may be imposed to ensure general public has access to public spaces.

3. Nonpublic Forums

- A nonpublic forum is “property that is not compatible with general expressive activity.” *Cornelius*, 473 U.S. at 819.
- Example: military bases
- The Supreme Court has held that airports are nonpublic forums. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

Restrictions on First Amendment Activity in Nonpublic Forums

- Test: Reasonableness and viewpoint-neutral.
 - “Access to a nonpublic forum ... can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.” *Cornelius*, 473 U.S. at 800.
- Note: “In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.” *Cornelius*, 473 U.S. at 804.

The Government Speech Doctrine

- The Government Speech Doctrine eliminates the need for viewpoint neutrality and forum analysis.

553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S.

Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)

Policy Behind the Government Speech Doctrine

- The government must be able to express itself to function properly.
 - Private parties should not be able to restrict government speech simply because they disagree with a specific policy.

Indeed, it is not easy to imagine how government could function if it lacked this freedom. “If every citizen were to have a right to insist that no one paid by public funds U. S., at 574 (SOUTER, J., dissenting) (“To govern, government has to say something, and a First Amendment heckler’s veto of any forced contribution to raising the government’s voice in the ‘marketplace of ideas’ would be out of the question” (footnote omitted)).

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Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)

Limits to the Government Speech Doctrine

- Government speech is still subject to constitutional and statutory limitations.
- The Establishment Clause is a primary limitation on government speech.
- The government is also “accountable to the electorate and the political process for its advocacy.”
 - *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000)
- Courts will also examine whether the government is speaking for itself, or whether it is inappropriately using the Government Speech Doctrine to privilege certain private views over others.

Legal Test for Government Speech

- The primary question is whether the government is speaking on its own behalf or whether it is creating a forum for private speech.
- Courts will examine three factors:
 1. “Whether governments have traditionally spoken to the public in the manner at issue;
 2. Whether observers of the speech at issue would reasonably interpret it to be that of the government; and
 3. Whether the government maintained editorial control over the speech.”
 - *Higher Soc'y of Indiana v. Tippecanoe Cty., Indiana*, 858 F.3d 1113, 1117 (7th Cir. 2017)

Major Cases – *Pleasant Grove City, Utah v. Summum*, *555 U.S. 460 (2009)*

- Facts:
 - Pleasant Grove City was in possession of 11 privately donated displays, including a Ten Commandments monument.
 - Summum, a religious organization, wanted the city of Pleasant Grove to display a monument containing the “Seven Aphorisms of Summum.”
 - Pleasant Grove City denied the request, explaining that the city only displayed monuments related to the city’s history or to groups with longstanding community ties.
 - Summum sued.

Major Cases – *Pleasant Grove City v. Summum*

- Legal Analysis:
 1. Whether governments have traditionally spoken to the public in the manner at issue (public monuments);
- Easily met:
 - Governments have used monuments to speak to the public since ancient times.
 - “Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance.”
 - » *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009)



Major Cases – *Pleasant Grove City v. Summum*

- Legal Analysis:
 2. Whether observers of the speech at issue would reasonably interpret it to be that of the government;
- Also met:
 - Governments are unlikely to permit installation on their property of “permanent monuments that convey a message with which they do not wish to be associated.”
 - It did not matter that the displays were privately donated.
 - Governments are allowed to convey an image to the public of the identity of a city.
 - Monuments do not have to convey a single idea and can be subject to multiple interpretations.
 - They can also be affected by the various other monuments on display around it.

Major Cases – *Pleasant Grove City v. Summum*

- Legal Analysis:
 3. Whether the government maintained editorial control over the speech.
- Also met:
 - Pleasant Grove City exercised “final approval authority” over which monuments were chosen for the public park.

Major Cases – *Pleasant Grove City v. Summum*

- Holding:
 - The placement of a permanent monument in a public park is a form of government speech, and not subject to Free Speech scrutiny.



Temporary v. Permanent Displays

- Temporary artistic displays may be subject to forum analysis and viewpoint neutrality, as many different viewpoints can be displayed over time.
- In *Pleasant Grove City*, the Supreme Court distinguished permanent and temporary displays:

Respondent compares the present case to *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753

Christmas tree and a menorah. See *id.*, at 758. Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.

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Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)

Major Cases – *Higher Society v. Tippecanoe County* (7th Circuit)

- Facts:
 - Tippecanoe County declared its courthouse grounds a “closed forum” after a controversy over a nativity scene displayed on public grounds.
 - The County Board of Commissioners adopted a policy to allow only speakers and events that echoed the County’s views and were sponsored by the Board.
 - “Higher Society,” a non-profit group advocating for the legalization of marijuana, attempted to hold a rally on the courthouse steps.
 - The County denied the request and Higher Society sued.

Major Cases – *Higher Society v. Tippecanoe County*

- Legal Analysis:
 1. Whether governments have traditionally spoken to the public in the manner at issue (public monuments);
 - Not met:
 - No indication courthouse steps were used by the government to communicate to its constituency.
 2. Whether observers of the speech at issue would reasonably interpret it to be that of the government;
 - Not met:
 - Reasonable people would not attribute rallies held on public property to solely the government.
 3. Whether the government maintained editorial control over the speech.
 - Not met:
 - County did not participate in controlling the content of the speeches given on courthouse steps.

Major Cases – *Higher Society v. Tippecanoe County*

- Holding:
 - Events held on courthouse grounds are not government speech and therefore subject to First Amendment Scrutiny.



Major Cases – *Illinois Dunesland Pres. Soc'y v. Illinois Dep't of Nat. Res.*, 584 F.3d 719 (7th Cir. 2009)

- Facts:
 - Illinois Beach State Park is a large state park that abuts Lake Michigan in northeastern Illinois.
 - Illinois Dunesland Preservation Society published a pamphlet that warned the public of the dangers of asbestos in the park.
 - Studies had shown that asbestos levels in the park were not dangerous.
 - The Illinois Department of Natural Resources refused to display the asbestos pamphlet in its display racks.
 - Illinois Dunesland Preservation Society sued.
 - The pamphlet was alarmist in its warnings to the public:
 - “The message of the plaintiff's pamphlet is: you think you're in a nice park but really you're in Chernobyl, so if you're dumb enough to come here be sure not to step on the sand because that would disturb or agitate it, and to scrub under your fingernails as soon as you get home.”
 - Judge Richard Posner, *Illinois Dunesland Pres. Soc'y v. Illinois Dep't of Nat. Res.*, 584 F.3d 719, 725 (7th Cir. 2009)

Major Cases – *Illinois Dunesland Pres. Soc'y v. Illinois Dep't of Nat. Res.*

- Holding:
 - Pamphlet display racks are government speech.
- Legal Analysis:
 - Pamphlet racks are similar to monuments displayed in public parks.
 - Private requests for display would overwhelm capacity and force the government to do away with the medium entirely.
 - Displaying the pamphlet would give it a weight that the Department of Natural Resources is not obligated to acknowledge.
 - Illinois Dunesland had ample alternatives to express its views: it could still hand out its pamphlets to park visitors.

Summary of Case Holdings

- Government Speech:

- Permanent monuments in public parks.
 - *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460 (2009)
- Pamphlets in display racks in public parks
 - “Quintessential government speech”
 - *Illinois Dunesland Pres. Soc'y v. Illinois Dep't of Nat. Res.*, 584 F.3d 719 (7th Cir. 2009)
- License plate designs
 - *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015)

- Not Government Speech:

- Rallies held on county courthouse steps, even if sponsored by County.
 - *Higher Soc'y of Indiana v. Tippecanoe Cty., Indiana*, 858 F.3d 1113 (7th Cir. 2017)
- Trademarks
 - The government cannot deny trademarks on the basis that a mark may disparage, because trademarks are a forum for the holder, not the government.
 - *Matal v. Tam*, 137 S. Ct. 1744 (2017)

Recommendations

- A public body should be wary of temporary displays or transitory expressive acts.
 - Longer-term displays and monuments are less likely to be seen as private speech.
- A government should maintain ultimate discretion in the selection of any public displays.
- A government should emphasize the “municipal identity message” of the display, even if no one single message is readily apparent.
- Potential new contexts for application:
 - “Government website hyperlinks, promotional streetlight banners, and co-sponsored public special events.”
 - *Pleasant Grove City v. Summum: The Supreme Court’s First Look at Municipal Government Speech*, Mary Jean Dolan

Chicago Airport System Art and Exhibits Policy



Standard Operating Procedures Chicago Airport System Temporary Art and Exhibits Program

The City of Chicago Department of Aviation ("DOA") manages the Chicago Airport System Art and Exhibits Program ("Program"). The Program is not a public forum; it is government speech. In accordance with DOA's overall

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To achieve this purpose, DOA searches for and selects quality works of art and world class airport system. By extending the City of Chicago's global renown as an artistic and cultural nexus to the airports, the Program expresses DOA's message that the airport system is one of the premier airport systems in the world and a desirable destination in its own right. Conveying DOA's message through the Program in this way also improves airport users' experiences while in Chicago's airports by entertaining them with engaging, aesthetically pleasing and enlightening art and exhibits.

DOA's purpose for the Program. As part of the selection process, the Committee may also consider, as applicable, issues such as the artistic merit and technical proficiency of the art, suitability of the medium for display in the airport, accuracy of information presented, and the professional finish of the exhibit design.

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Standard Operating Procedures Chicago Airport System Temporary Art and Exhibits Program

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The Committee will have sole discretion to accept or reject any proposal based on its determination that it would or would not accomplish DOA's purpose, or to accept any proposal contingent on the exhibitor's making certain changes to the art or exhibit. The Committee will have the right to edit any and all exhibit text to ensure that the text is consistent with DOA's purpose for the Program. If an

enlightening art and exhibits.

To achieve this purpose, DOA searches for and selects quality works of art and

Proposals will normally be accepted for a specific display period, typically six months, but the DOA may display art or exhibits for any period that serves the purpose of the Program. Exhibitors whose proposal has been accepted have no right to a specific display location. Art will be displayed in such locations as the Committee believes best serves the purpose of the Program. For any reason and at any time, DOA may remove or relocate art.

Art will be selected on the basis of the Committee's determination that it achieves DOA's purpose for the Program. As part of the selection process, the Committee may also consider, as applicable, issues such as the artistic merit and technical proficiency of the art, suitability of the medium for display in the airport, accuracy of information presented, and the professional finish of the exhibit design.

Questions?