AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Bowman v. White, 444 F.3d 967** (8th Cir. 2006)

*Gary Bowman was a traveling street preacher. Among his stops was the University of Arkansas at Fayetteville. The university adopted a policy governing the use of campus space that required “non-university entities” to reserve space on campus, including outdoor space, for up to five days per semester and requires three-day advance notice for such permits. There were various additional restrictions on the permits, but permits were not necessary for non-university entities to engage in one-on-one conversations on campus. Bowman received permits in 1998, but in 2000 he was granted blanket permission to appear on campus after he complained about the difficulty in scheduling specific dates for his visits. During the fall of 2000, he spoke some twenty times on the campus. The university received many complaints about his offensive speech, and campus police often had to engage in crowd control and manage potentially violent outbursts from students. He was denied comparable blanket permission for the spring semester of 2001. For the fall of 2001, the university granted him permits for five days on campus, which was inconsistent with Bowman’s plan of discussing doing a daily presentation on each of the Ten Commandments. Bowman was again capped in the spring of 2001, but tried to make use of sponsorship by a student group for a sixth day. The university required that a representative of the student group be physically present with Bowman during the entirety of his visit for the sixth day, which hampered Bowman’s ability to present his message.*

*Bowman then filed suit in federal district court challenging the details of the university’s permitting policy as violating his First Amendment rights. The district court concluded that the university campus was a nonpublic forum and that the restrictions on Bowman’s speech were reasonable. On appeal, the federal circuit court reversed that ruling in part. The court emphasized that the university campus has many different kinds of spaces, and the outdoor spaces that Bowman used were best understood as comparable to a traditional public forum in which speech can only be regulated very lightly. Although the permitting requirement was reasonable in this context, the limit on the number of days that Bowman could be on campus was not.*

JUDGE MELLOY.

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"[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James* (1972). However, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Education Association v. Perry Local Educators’ Association* (1983). . . .

The government's ability to restrict speech is most circumscribed in a traditional public forum. . . . A traditional public forum is a type of property that "has the physical characteristics of a public thoroughfare, . . . the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, [and] historical[ly] and traditional[ly] has been used for expressive conduct. . . ." "`[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be `public forums.'" *United States v. Grace* (1983).

A content-based restriction on speech within a traditional public forum must be necessary to serve a compelling government interest and be narrowly drawn to achieve that interest. A restriction on speech that is not content-based and that restricts the time, place or manner in which speech may be communicated is subjected to a different, less restrictive standard. The government may enforce a reasonable, content-neutral time, place and manner restriction in a traditional public forum if the restriction is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.

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The district court found that the campus of the University of Arkansas at Fayetteville is not a public forum. We disagree. The facts of this case show that the University's grounds cannot be labeled as only one type of forum and that the areas in question in this case are unlimited designated public fora.

A modern university contains a variety of fora. Its facilities may include private offices, classrooms, laboratories, academic medical centers, concert halls, large sports stadiums and arenas, and open spaces. . . . Thus, labeling the campus as one single type of forum is an impossible, futile task. *Justice for All v. Faulkner* (5th Cir. 2005). . . . Some places on the University's campus, such as the administration building, the president's office, or classrooms are not opened as fora for use by the student body or anyone else. As Bowman concedes, these areas are nonpublic fora. Other campus locations, such as auditoriums or stadiums allow for certain speech on certain topics. These locations may be described as designated public fora. Further, the public streets and sidewalks which surround the campus but are not on the campus likely constitute traditional public fora. . . .

Bowman desires to speak at various locations throughout the campus including the streets, sidewalks, and open areas located inside and directly adjacent to the campus. . . .

The objective evidence in the record shows these particular areas combine the physical characteristics of streets, sidewalks, and parks, and are open for public passage. They do not include university buildings or stadiums, but they are located within the boundaries of the campus. . . .

In the case of the University, although it "possesses many of the characteristics of a public forum," such as open sidewalks, "[it] differs in significant respects from public forums such as streets or parks or even municipal theaters." *Widmar v. Vincent* (1981). A university's purpose, its traditional use, and the government's intent with respect to the property is quite different because a university's function is not to provide a forum for all persons to talk about all topics at all times. Rather, a university's mission is education and the search for knowledge — to serve as a "`special type of enclave' devoted to higher education." Thus, streets, sidewalks, and other open areas that might otherwise be traditional public fora may be treated differently when they fall within the boundaries of the University's vast campus.

The University argues that the areas at issue should be treated as nonpublic fora. This argument is contrary to how the University itself, through its policies and procedures, has treated the Union Mall, the Peace Fountain, and the Brough Commons. The Policy, which permits speech by University and Non-University Entities, offers strong evidence that the University "intentionally open[ed]" areas of the campus "for public discourse." . . . The Policy provides strong evidence that the University, like many public colleges, has opened select portions of its campus "to facilitate discussion on issues of public concern." As such, the Policy indicates that the University itself designated the areas in question as locations for free expression.

College campuses traditionally and historically serve as places specifically designated for the free exchange of ideas. The Supreme Court has advanced the idea that universities have traditionally opened parts of their campuses to speech. . . . *Rosenberger v. Rector & Visitors of the University of Virginia* (1995). Indeed, in times of great national discussion, such as during the height of the Vietnam War or the debate over the war in Iraq, college campuses serve as a stage for societal debate. Often those speaking on college campuses are not enrolled students, but rather people like Bowman, who travel from campus to campus to spread their message. Thus, public university campuses historically contain places where space is specifically designated by society and universities themselves for speech.

This tradition of free expression within specific parts of universities, the University's practice of permitting speech at these locations, and the University's past practice of permitting both University Entities and Non-University Entities to speak at these locations on campus demonstrate that the University deliberately fosters an environment that permits speech "subject to the limits necessary to preserve the academic mission and to maintain order." *Hays County Guardian v. Supple* (5th Cir. 1992). . . .

We must next decide whether the forum is limited or unlimited in its character. In this case, although the University gives preferential treatment to University Entities over Non-University Entities in regard to use of University space, there is little evidence that the University intended to limit the use of University space to a particular type of speech or speaker. Accordingly, we hold that the spaces at issue are unlimited designated public fora.

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There is no evidence that the Policy is anything but content neutral. Our analysis, therefore, focuses on whether the Policy is narrowly tailored to serve a significant government interest. The University has identified a number of interests that justify a restriction on speech. One significant interest is protecting the educational experience of the students in furtherance of the University's educational mission. . . . A second significant interest is in ensuring public safety. Like education, safety is a fundamental human need without which the desire to speak one's mind becomes moot. . . . Finally, a third significant interest asserted by the University is the fostering of a diversity of uses of University resources.

A regulation is narrowly tailored when it furthers a significant government interest that would be achieved less effectively without the regulation. *Thorburn v. Austin* (8th Cir. 2000). . . .

The University's requirement that a Non-University Entity obtain a permit before "using" outdoor space is a prior restraint on speech against which there is a heavy presumption of unconstitutionality. . . .

The University's policy does not delegate overly broad discretion to its officials, nor does it allow the denial or revocation of permits on the basis of content. The Policy applies to all not-for-profit Non-University Entities. The Policy grants the University the right to deny or revoke a permit for the use of a space by a Non-University Entity only for limited reasons, such as interference with the educational activities of the institution.

The University has a significant public safety interest in requiring a permit because of the time and resources necessary to accommodate the crowds that Bowman attracts. *Thomas v. Chicago Park District* (2002); *Grossman v. City of Portland* (9th Cir. 1994). . . .

. . . . [A]lthough the Policy admittedly does burden Bowman's speech by requiring him to plan sufficiently in advance to obtain a permit, it is not overly burdensome so as to make the permit requirement unconstitutional.

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The University's interest in fostering a diversity of viewpoints and avoiding the monopolization of space serves a significant interest. However, the five-day cap is not sufficiently narrowly drawn to achieve that interest. The Policy as written does not by itself foster more viewpoints; it merely limits Bowman's speech. If no one else wants to use the space after Bowman has used his five permits, the space will go unused even if Bowman still wants to use the space. A more narrowly tailored policy might grant Bowman more than just five days per semester to speak if the space is not being used, but give preference to other speakers who have not already obtained five permits. Furthermore, a policy that allows speakers to obtain permits for a limited number of events at any one time might be permissible to further the significant interest of keeping spaces open for an array of groups and a diversity of uses. This type of policy would further the University's interest in preventing a single entity from monopolizing a specific space by reserving that space for an entire semester with a single permit request.

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. . . . In light of the modest nature of the [three-day advance notice] requirement and what the district court described as the University's reduced capacity to address "the exigencies of determining what, if any, security, crowd control, additional insurance, etc., will be required for a particular event," we conclude that the advance notice requirement is sufficiently narrowly tailored, and thus permissible.

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Here, the university reasonably justified a modification of its unlimited designated forum during discrete times of the academic year when an abundance of speakers would be likely to interfere with the educational mission. During these periods, the university restricts not only outside speakers like Bowman, but also university-related activities (such as athletic contests and work on the physical plant) that have a potential to hinder students in their preparation for examinations. We think it was reasonable for the administration to conclude that University Entities who do reserve space in the designated forums on these dates are more likely to be attuned to the special needs of the university community during examination and commencement periods, and thus less likely to disrupt the campus during these sensitive times. In effect, the university has elected to limit the designated forums to certain classes of speakers during these narrow windows in the academic year, and it is well established that the government is not required "to indefinitely retain the unlimited open character of" a designated public forum. Accordingly, we conclude that the dead day ban passes constitutional muster.

*Reversed in part*.

JUDGE BYE, concurring.

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. . . . I cannot adopt the Court's view as to public areas on a public university campus not being traditional public fora but instead designated public fora which the University can redesignate to a non-public forum on a whim.

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. . . . The issue is not whether the mission of the University as a whole is to provide full access to everyone on all topics, but whether the University created the spaces for public access and a purpose not incompatible with expressive conduct and such spaces have historically been used for expressive conduct. The University's overall mission is irrelevant to a proper First Amendment forum analysis.

Should the University's mission be relevant, it would not be dispositive of whether a space is a traditional public forum. "The primary factor in determining whether property owned or controlled by the government is a public forum is how the locale is used." *Hotel Employees & Restaurant Employees Union, Local 100 of New York & Vicinity, AFL-CIO v. City of New York Department of Parks and Recreation* (2nd Cir. 2002). . . .

The Court's analysis gives rather short shrift to another significant factor in the traditional public forum analysis: whether the space was created for a purpose incompatible with expressive conduct. The Court does not suggest how expressive conduct, occurring in the Union Mall, Peace Fountain, or Brough Commons is "basically incompatible" with a mission of promoting higher education. *Greer v. Spock* (1976). Indeed, courts have consistently held expressive conduct is compatible with a purpose of promoting education. *Keyishian v. Board of Regents of the University of New York* (1967). . . .

In analyzing the particular spaces, it is undisputed the Union Mall, Peace Fountain, and Brough Commons are public thoroughfares open to public access. It is also undisputed these areas are used and have historically been so for expressive and non-expressive activities by both University and Non-University Entities. The Court's analysis discounts such significant factors in favor of a lesser one – the University's mission – which is largely irrelevant to a traditional public forum analysis.

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Once a space is deemed something other than a traditional public forum, even if an unlimited designated public forum, the government is free to redesignate the space to limit further expressive conduct or to prohibit it completely. . . . This is a concept inconsistent with our basic understandings of a public university.

To safeguard a public university street, sidewalk, or park's role as a place for students to assemble and speak, these areas must be considered the type of property which would fall within the traditional public forum category. Whether a particular public university street, sidewalk, or park is a traditional public forum will depend upon the purpose for which it was created and its traditional use. However, there is no forum more appropriately considered a "marketplace of ideas" and historically used by all members of the public to present both socially acceptable and unacceptable speech than a street, sidewalk, or park found on a public university campus.

Indeed, there is no reason students who may or may not pay tuition and who may or may not live on campus should have more expressive rights upon a campus street than should non-students who directly support the public university with tax dollars. The non-student public attends civic, sporting, theater, and other events on public university campuses. In this sense, a public university belongs just as much to a community as it does to the students. Nor is a public university's educational mission limited to its students-a university and its faculty publish books to benefit the public good and use public tax dollars to conduct important research. If we are to protect any space as a traditional public forum for expressive purposes, a public university street, sidewalk, or park must be such a space.

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The Court wholly fails to acknowledge the University did not formally regulate expressive conduct on its public thoroughfares until it enacted the Policy in 1993. Because the University now chooses to regulate speech, however, may not be sufficient to overcome the objective indicia of contrary purpose.

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When a plaintiff makes a prima facie showing a space is a traditional public forum, the defendant should bear the burden to produce objective evidence of the (1) physical characteristics, (2) original purpose, or (3) historical and traditional use of the space which would rebut plaintiff's prima facie showing.

Here, the University failed to produce evidence which would establish anything other than a traditional public forum regarding the purposes for which the Union Mall, Peace Fountain, and Brough Commons were created or regarding the historical and traditional uses of those spaces.. . .

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