

Time, Place & Manner

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

The National Park Service recently proposed to significantly limit the scope of demonstrations in front of the White House or on the National Mall, the nearby 1000-plus acre swath of green space, memorials, and other historic installations.

The proposals were closely scrutinized (and criticized at length) during a round of public comment closing on October 15th. Unless the final regulations are substantially defanged, the ink in the *Federal Register* likely won't be dry before the ACLU and other rights organizations file suit.

For now, what's interesting is how the Park Service proposal is a classic example of “time, place, and manner” regulation of protected free speech. Such “content-neutral” regulation occupies an “intermediate-scrutiny” position between restrictions suppressing certain subjects or points of view, on the one hand, and limits on speech (such as defamation or “fighting words”) that receives no First-Amendment protection, on the other. Significantly, the intermediate constitutional hurdles government must overcome when it regulates the time, place or manner of protected speech pose highly subjective and practical questions. Reasonable minds – judicial and otherwise -- can definitely differ.

The result is clearer when governments regulate speech lacking *any* First Amendment protection. Such regulation typically wins as long as it is not “irrational.” Example: Because “obscenity” is unprotected speech, governments have wide latitude to ban or criminalize it as long as prohibitions aren't arbitrary. It would be arbitrary, to suggest an unlikely hypothetical, to only criminalize obscenity involving actors whose last names start with A through L.

At the opposite end of the spectrum, constitutional doctrines are especially suspicious of regulation that discriminates against certain subjects (such as “political speech”) or particular viewpoints (such as political speech criticizing an Administration policy). “Content-based” speech suppression almost always loses because it is *presumed invalid* unless the government can meet very high hurdles – by showing that the law is the only practical way of furthering a truly “compelling” interest.

But when governments regulate protected speech on a basis other than content censorship – the core concern behind the First Amendment -- judicial vigilance ratchets down. This would happen to the current National Park proposal, because it's a classic regulation of public protest – regardless of its content -- based on time (for example, by limiting immediately spontaneous protests), place (by narrowing the present 25-foot corridor for protests in front of the White House lawn to a 5-foot swath), and manner (by

tightening control over demonstrations using small stages or sound systems and by charging fees for trash cleanup or damage restoration).

To defend a “time, place, and manner” restriction, government just needs a “significant,” not a “compelling” interest. Far from semantic hair-splitting, the difference would allow the Park Service to claim a broader range of less-dramatic, non-security objectives, such as keeping public property in good order and preventing littering.

If the Park Service passed this barrier, the real acid test would be requirements that the regulation be not “substantially” more restrictive than necessary and leave “ample alternative forums” for protest. Translation: although the Park Service can suppress a minor amount of speech beyond what’s strictly necessary, it can’t over-regulate by a lot or in practice stifle all meaningful protest. Obviously, what’s “insubstantial” versus “substantial” over-regulation – especially on such a sensitive matter as Americans’ core right to dissent – is in the eyes of the beholder.

For example, is cutting the available protest space in front of the White House front lawn by 80% “substantially” more restrictive than valid security and other interests require? Is it relevant that the Park Service is installing a higher, climb-proof fence? Is a five-foot swath wide enough for robust protest?

Such are the difficult and subjective judgment calls required of time, place and manner limits.

If you were the judge, how would YOU rule?