Public Schools as Public Forums: Use of Schools by Non-School Publics

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by

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With love and gratitude, the chapter sponsors this fastback in memory of Virginia Allison, 1933-1989. A charter member of the chapter, Virginia Allison exemplified the committed, caring teacher. She is truly missed by her kindergarten children, by their parents, and by her colleagues.
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Introduction

Public schools are "public" places in a number of senses. They have a public function in the compulsory education of the young. They are places to which members of the public are invited now and then and through which members of the public frequently pass. They are often the most convenient — sometimes the only — readily available places for certain kinds of public meetings.

But schools are public places in a legal sense as well. They are under the ownership and control of government. They are governed by state and municipal law, which frequently assigns them non-school public functions (for example, as polling places). Their operation is guided by a publicly elected board of education charged with holding them in trust for the people. And they are directly supervised by a public official, a principal, and staffed by public employees.

In a series of cases beginning in 1939 and extending through the 1980s, the U.S. Supreme Court formulated a theory of First Amendment interpretation that applies to places that are public in this legal sense. The theory is called the "public forum doctrine."

The practical effect of the public forum doctrine is to limit and sharply define the powers of government agencies and officials to regulate or restrict the exercise of First Amendment activity — free exercise of religion, expression, association, or assembly — in places that fall under its jurisdiction. In certain circumstances schools do. This fast-
back examines the status of the schools as public forums as that status affects use of schools and school facilities by members of the non-school public.

"Non-school public" should be understood to encompass all members of the public other than properly enrolled students and properly employed teachers and staff members engaged in official school business. It includes students, teachers, and staff members wishing to use the school for non-school purposes (for example, for the distribution of non-school publications, picketing, or other forms of individual or group expression) as well as citizens from outside the immediate school community.

"Non-school purposes" should be understood to encompass any that are not definite parts of the official business of the school, notably those that are not curriculum-related or school-sponsored. They include, among other things, invited speeches by members of the community, distribution of non-school literature in school, and use of buildings and facilities after hours by community groups.

"Schools" should be understood in the broadest sense, encompassing public school buildings, grounds, facilities, and even non-curriculum-related activities, such as voluntary meetings of students during activity periods that are under the control of state and local education officials.

The focus of this account is on case law. The controversy surrounding the use of schools by the non-school public has a long judicial history. Some of the landmark cases have been decided in the Supreme Court and are no doubt familiar, but many that have been decided in lower federal and state courts or even in the Supreme Court are not so well known. Early cases — roughly those decided from the middle of the 19th century, not long after the establishment of compulsory education in many states, through the middle of the 20th century — deal with the power of school officials to open schools for other than official educational purposes. Later cases — roughly those decided in the second half of the 20th century — deal with the
much more difficult constitutional question of the right of the general public to use schools for non-school purposes.

In this fastback I summarize the results of the early case law and describe how the public forum doctrine developed and has been applied to the schools in recent years. I examine the application of the doctrine to non-school uses of schools, first by students and teachers and then by members of the general public. Finally, I suggest some policy guidelines by which officials may successfully regulate non-school uses of the schools without running afoul of constitutional protections.
Before the Public Forum Doctrine

Questions about the use of public school buildings and facilities for non-school purposes arose almost with the beginnings of the public school movement in the early decades of the 19th century. Since education was not mentioned in the federal Constitution, the development of public schools was left to the states. Therefore, when disputes arose concerning the power of school officials to open the schools for non-school purposes, they fell to state courts to decide.

State courts tended to decide the questions, case by case, in light of local tradition and practice and state statutory authority. Since state statutes were (and remain) anything but uniform, tradition and practice tended to rule.

Before the era of automobiles and modern transportation systems, school buildings, especially one-room schools in rural areas, served as “general use” public meeting places. Courts generally recognized this tradition, permitting use of schools for a variety of non-school purposes — private instruction, dances, meetings, even religious services — when the use was approved by the local school authorities (usually with the consent of the local population), and denying such use when local officials or the local population objected.

Absent constitutional or other federal authority, a body of case law evolved in the states that tended to allow non-school activities in the schools when they occurred during non-school times and did not disrupt the normal educational program. Case law tended to prohibit non-school uses when they occurred during the school session (as opposed
to summers), occurred on a regular or frequent basis (rather than an episodic or infrequent one), or threatened significant wear and tear on, or actual damage to, school property.

There were some early constitutional challenges to opening schools for non-school purposes. Non-school uses were challenged, for example, on grounds that they amounted to diversion of tax funds to private purposes or misappropriation of property held in public trust.

With respect to taxation, the courts tended to hold that as long as taxes had been collected for the legitimate purpose of supporting a school, incidental use of the school for other purposes did not constitute an unlawful diversion.

With respect to misappropriation, the most significant objections were that use of school property for certain quasi-commercial ends, such as presentation of theatrical entertainments, constituted unfair competition with owners of private commercial property, and that use of schools for religious meetings and services violated constitutional guarantees of religious freedom. The courts almost uniformly rejected both claims.

With respect to unfair competition, for example, it was said that "if the use made of the school building and grounds is lawful, it matters not that such use is competitive . . . or that plaintiff's income has been impaired by such competitive use." Quasi-commercial use of the schools would be invalidated only if undertaken maliciously, or with intent to injure a private business (Beard v. Board of Education, 1932).

With respect to the claim of violation of religious guarantees, it was said that a school district "has the power to exercise a reasonable discretion to permit the use of school buildings during non-school hours for any legal assembly which includes religious meetings" (Southside Estates Baptist Church v. Board of Trustees, 1959), and "it is a wholesome thing to have the school buildings, which are maintained at large expense by the taxpayers, used for the purposes and by the groups whose exclusion is here sought" (Lewis v. Board of Education, 1935).
Over the years the climate of public opinion came increasingly to favor opening the schools for a variety of non-school purposes. Legitimate educational purposes grew to encompass not only a myriad of extracurricular school activities (plays, sports, concerts, speeches, etc.) but also various kinds of adult education (for example, English language instruction and citizenship preparation for immigrants), as well as the kind of "educational" activity associated with cultural programs or meetings of political or other "social action" groups (including parent-teacher associations) concerned with public questions but with no or few readily available public forums for discussion.

The courts quickly recognized this trend. State legislatures and local school boards were slower to respond, often denying access to school property and facilities to some groups while allowing it for others, thereby discriminating among possible users. Thus a legal conflict arose concerning the right of citizens to use the schools for non-school purposes.

The onset of these conflicts is reflected in a pamphlet published by the American Civil Liberties Union in 1934, titled *School Buildings as Public Forums: A Survey of Discrimination Against Unpopular Minorities in the Use of Public School Buildings*. The pamphlet reported that as of 1934 only 21 states had specific provisions allowing opening the schools for non-school uses, and only five of those included legal safeguards against discrimination among users by school officials. Thirteen states had no provisions for opening school buildings, but 14 had statutes with language sufficiently general to allow opening of schools for non-school uses with local school authorities' approval.

"School boards," said the ACLU, "have in many cases definitely discriminated against types of organizations regarded as controversial or subversive." The ACLU, the pamphlet concluded:

"Stands on the principle that the freest possible discussion of public issues should be encouraged in the best available public meeting places in every community — the schoolhouses — and at the lowest possible
cost. No discrimination whatever should be shown in granting permits for such community use of the school buildings, except to protect school property and to prevent disorder. No censorship whatever should be exercised over programs or speakers. Ordinarily the majority interests or the influential interests in any community have free access to the use of public school buildings or of court houses as meeting places. The same freedom should be extended to all groups interested in public issues whatever their program or purpose.

The ACLU recommended that “our friends in all states work for legislation to open school buildings to public meetings and without discrimination” and that “school boards in those states where discretion is granted them adopt regulations guaranteeing in substance what the laws provide others.”

The ACLU pamphlet appears to contain the first reference in U.S. legal literature to public schools as “public forums” or, indeed, to “public forums” generally in the modern sense of the term. The ACLU had good reason to be ahead of its time: for some years it had been denied permission to hold meetings in otherwise open school rooms, even once for a meeting on “Old-fashioned Free Speech” because it refused to repudiate its “definition” of free speech!

The conflict described in the ACLU pamphlet was a harbinger of a number of other cases concerning the use of public places that eventually led to development of the public forum doctrine (others were street meetings and use of public parks for religious services). It was not until formulation of the public forum doctrine by the U.S. Supreme Court in the second half of the 20th century, however, that the concept of a “public place” was given precise meaning under the U.S. Constitution. And it was not until the doctrine was applied to the schools after 1969 that the constitutional powers and duties of school officials, as agents of government, were more precisely defined. Let us now turn to a discussion of the public forum doctrine.
Public Schools as Public Forums

As historian Lawrence Cremin notes in *American Education: The National Experience, 1783-1876* (1980), "Definitions of public and private were neither precise nor static," but were "in process of evolution" with respect to the schools until quite recently. Before the mid-20th century the determination of what constituted "public" places and what were proper or appropriate uses of them was left almost entirely to the states.

But in the 1920s the Supreme Court began the process of "selective incorporation" of the Bill of Rights under the Fourteenth Amendment due process clause, which brought application of federal constitutional rules, including the First Amendment, to the states (see, for example, *Fiske v. Kansas*, 1925, incorporating the free speech clause). Then, in 1939, the Court rendered an opinion that gave birth to a First Amendment rule that public places, state or federal, were protected in certain circumstances against discrimination among their users. The rule, which later came to be called the "public forum doctrine," finds its roots in the opinion of Justice Roberts writing for the Court in *Hague v. C.I.O.* (1939).

Wherever the title of streets and parks may rest, they 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. Such use of the streets
and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

As Justice Roberts' opinion suggests, the public forum doctrine originally applied only to streets, sidewalks, and parks, which are now called "pure" or "traditional" public forums. In more recent times, however, the Supreme Court has extended its protections to "public property which the State has opened for use by the public as a place for expressive activity" (Perry Education Assn. v. Perry Local Educators' Assn., 1983). Such places are now called "limited" or "semi-public" forums and include, among others, state fairgrounds and, in some cases, public buildings and facilities such as municipal theaters and schools.

The landmark case, as the quotation above indicates, is Perry Education Assn. v. Perry Local Educators' Assn., a case brought by a rival teachers union challenging restricting the use of a school's internal mail system to only the teachers union that had won exclusive collective bargaining rights (see p. 22). In this case the Supreme Court summarized public forum rules as they now apply to places other than the traditional forums of streets, sidewalks, and parks. Said the Court:

A second category [of public places] consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are per-
missible, and a content-based prohibition must be narrowly drawn to

effectuate a compelling state interest. (emphases added)

A third category of public places, the Court said, consists of "pub-

clic property which is not by tradition or designation a forum for public

communication":

The First Amendment does not guarantee access to property simply

because it is owned or controlled by the government. In addition to

time, place, and manner regulations, the State may reserve the [non-

public] forum for its intended purposes, communicative or otherwise,

as long as the regulation on speech is reasonable and not an effort
to suppress expression merely because public officials oppose the

speaker’s view. . . . Implicit in the concept of the nonpublic forum is
the right to make distinctions in access on the basis of subject matter

and speaker identity. . . . The touchstone for evaluating these distinc-
tions is whether they are reasonable in light of the purpose which the
forum at issue serves. (emphases added)

It is now generally conceded that the Supreme Court extended at
least some of the First Amendment protections granted in the second

category of places (limited or semi-public forums) to students and
teachers in school when it held, in Tinker v. Des Moines Community

School District (1969), that 1) "First Amendment rights, applied in
light of the special characteristics of the school environment, are avail-
able to teachers and students"; 2) these rights are "not confined to
the supervised and ordained discussion which takes place in the class-
room," but extend as well to "the cafeteria, or . . . the playing field,
or . . . the campus during the authorized hours"; and 3) they may
not be abridged unless exercise of them "materially disrupts class-
work or involves substantial disorder or invasion of the rights of
others." Although the Court has recently excluded curriculum-related
and school-sponsored activities (see fastback 274 Student Press and
the Hazelwood Decision) from these protections when the activities
have not been opened for free expression by students or teachers by
declaring them to be non-public forums, *Tinker* still applies to all other First Amendment activity by students or teachers in school.

Similarly, on the basis of *Hague v. C.I.O.* and *Tinker* the Court has held that "the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public" (including students and teachers), but such activity may be limited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" (*Grayned v. City of Rockford*, 1972).

The Supreme Court has never decided a case concerning the public forum status of the schools and their facilities for persons who are not students or teachers; but decisions in lower federal courts have established that once officials have opened school facilities for public meetings, speeches, debates, distribution of messages, and the like, those facilities become limited public forums. (See "Public Forum Rights of Citizens," p. 24; also see Murphy, "Access to Public School Facilities and Students by Outsiders," *School Law Bulletin* 9 [1985], p. 16.)

Thus it is now clear that public school buildings, grounds, and facilities are limited public forums for students and teachers acting outside of the curriculum or school-sponsored activities. For all other groups, and even for students and teachers acting within the curriculum and school-sponsored activities, they may be turned into limited or semi-public forums by the actions of state or local school officials. In short, the public forum doctrine and its related precedents place substantial responsibilities on school officials for both the protection of First Amendment rights in school and the determination of where and when those rights may be exercised.

The next section examines these responsibilities with respect to students and teachers.
Public Forum Rights of Students and Teachers

For many years after the Supreme Court's 1969 decision in *Tinker v. Des Moines*, federal and state courts read the decision as declaring that public schools were, by their very nature as government enterprises, limited or semi-public forums in which First Amendment protections automatically applied for those who studied and taught in them. However, decisions taken by the Court in the decade of the 1980s modified this broad-brush reading, which has resulted in dividing the question of public forum rights of students and teachers in school into two separate issues.

The first issue arises when First Amendment activity takes place in school but outside of the curriculum or school-sponsored programs. The second arises when such activity takes place in or out of school but within the curriculum or school-sponsored programs, including extracurricular activities. (Students and teachers acting outside of school and outside of school-sponsored programs are, of course, citizens protected by the full panoply of First Amendment rights, which school officials have little power to curtail.)

**Students' Public Forum Rights**

With regard to the first issue, which "addresses educators' ability to silence a student's personal expression that happens to occur on school premises," students cannot be punished for or prohibited from expressing their views "unless school authorities have reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of others" (Hazelwood). The burden of proof is on school officials and is very difficult to meet. Thus in this area Tinker and its "material disruption" standard still stand; that is, the places in school, such as hallways, restrooms, cafeterias, and playgrounds, in which students freely congregate and through which they freely pass, are limited or semi-public First Amendment forums, which students may use not only for conversation and association but also for such non-curriculum-related expression as the wearing of armbands or other political symbols and the distribution of non-school publications.

The second student public forum issue dealt with in Hazelwood concerns

school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . [and which] may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Here the Hazelwood Court distinguished activities that school officials have "by policy or practice" opened "to indiscriminate use by its student reporters and editors, or by the student body generally," from those that they had reserved for their intended purposes as supervised learning experiences. (See fastback 274 Student Press and the Hazelwood Decision, pp. 17-21.)

In the former case, where school space, facilities, or activities have been opened for general student use, Tinker and public forum protections apply, and the power of officials to restrict expression in them
is circumscribed just as it is in non-school activities. In *Bender v. Williamsport Area School District* (1986), for example, the Court upheld the applicability of public forum protections to school-sponsored activities such as meetings of student groups during activity periods that school officials had opened for voluntary expression and association. In addition, the federal Equal Access Act, which is based on public forum precedents, provides that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(See fastback 253 *Voluntary Religious Activities in Public Schools: Policy Guidelines*, pp. 29-34.)

In *Hazelwood*, however, where school space, facilities, or activities have not been opened for general student use,

> Educators are entitled to exercise greater control over . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that views of the individual speaker are not erroneously attributed to the school.

In them the school may “disassociate itself” from “speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane” and “must be able to set high standards for the student speech that is disseminated under its auspices . . . [and] take into account the emotional maturity of the intended audience."

That is, school officials

> retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsi-
ble sex, or conduct otherwise inconsistent with the "shared values of a civilized order," or to associate the school with any position other than neutrality on matters of political controversy . . . [and] do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns. (emphasis added)

Public Forum Rights of Teachers

Teachers, the Court has said, may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens" merely because they are employed by the state as teachers. This includes the right to "comment on matters of public interest in connection with the operation of the public schools in which they work," as long as their comments are not knowingly or recklessly false (Pickering v. Board of Education, 1968; see also Connick v. Meyers, 1983). But the full extent of First Amendment protection is available to teachers only in the context of non-school-sponsored activities.

With respect to First Amendment activity that takes place in school but outside school-sponsored programs, two cases settle the question of teachers' public forum rights.

First, if officials have opened a space, facility, or activity for use by teachers or other members of the public, Madison School District v. Wisconsin Employment Relations Comm. (1976) rules. In this case a teachers union had complained that a school board had committed an unfair labor practice by allowing a non-union teacher to speak at one of its regularly scheduled meetings about a salary matter pending in current negotiations. The Court said:

Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings.
The Court goes on to say:

The participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.

Second, if officials have not opened a space, facility, or activity for use by teachers or the public generally, *Perry Education Assn. v. Perry Local Educators' Assn.* (1983) rules. Recall, this is the case where a rival teachers' union sought access to a school district's internal mail system, use of which had previously been granted only to the teachers union with exclusive bargaining rights. Said the Court:

There is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system . . . must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course. . . . Moreover, even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. . . . Because the school mail system is not a public forum, the School District had no constitutional obligation per se to let any organization use the school mailboxes.

However much teachers might wish to assert public forum rights, in the guise of "academic freedom" or otherwise, in the context of the school curriculum and other school-sponsored activities, these are not public forums. While the precise extent of teachers' First Amendment rights in them is unclear, it is clear that they are very limited. (See, for example, Goldstein, "The Asserted Constitutional Right of
Public School Teachers to Determine What They Teach," University of Pennsylvania Law Review 124 [1976], p. 1293

Selection of basic texts, method of instruction, which courses shall be taught, what the basic content of a course shall be, and the like are the prerogative of the school board. Teachers retain limited authority to introduce supplementary content and activities, but they may not countermand the basic interests of the board in so doing. They may be prohibited, for example, from introducing content or activities that threaten material or substantial disruption or invasion of the rights of others, is not relevant, is shocking or disturbing to students, is obscene or near-obscene, is religiously sectarian or politically partisan, or does not serve a legitimate educational purpose.

Public school teachers, it should be noted, are also "officials" of the state for public forum purposes. On one hand, knowingly or otherwise, they may open curricular or other school-sponsored activities as public forums — by, for example, inviting a partisan or sectarian speaker into the school or introducing partisan or sectarian materials. On the other hand, once a program or activity has been opened as a public forum, teachers may no more restrict expression in it in an arbitrary, capricious, or discriminatory manner than may a school principal.

It is thus vital that teachers have a clear understanding with the principal and, where appropriate, with the school board as well, of the precise extent of their constitutional powers and responsibilities. More problems are created by ignorance than by ill intent!

Let us now turn to the public forum rights of citizens with regard to use of schools and their facilities.
Public Forum Rights of Citizens

Although the Supreme Court has never decided a public forum case concerning use of school facilities by citizens who are not students or teachers, a substantial body of federal case law precedent clearly outlines both the public forum rights of members of the non-school community and the responsibilities of school officials with respect to them.

For purposes of discussion, the precedents may be divided into four categories: 1) use of schools by unpopular groups or individuals or for expression of unpopular viewpoints; 2) use of schools for religious meetings; 3) invitations to outside speakers or other visitors during school hours; and 4) use of school facilities other than classrooms, the auditorium, or the gymnasium.

Unpopular Groups, Individuals, or Viewpoints

The main line of cases concerning use of schools by members of the non-school community deals with denial of access to unpopular groups, individuals, or viewpoints when education officials have opened use of space or facilities for others. Three federal cases illustrate current public forum principles.

In National Socialist White People's Party v. Ringers (1973) a U.S. Court of Appeals upheld the right of the Party to meet in New York school auditoriums. The court said: "The Board's repeated exercise
of its discretionary authority to rent the . . . auditorium for a nominal fee during non-school hours to public and private groups for public and private meetings on a first-come first-served basis [constitutes] partial dedication as a forum for the exercise of First Amendment rights and "makes the school auditorium conceptually indistinguishable for First Amendment purposes as a 'public place' from streets and parks."

While limitations on its use as a forum to permit it to serve its prime function (school purposes), to serve the general comfort and convenience, and to preserve peace and good order, including the protection of property, may be sustained, regulation which limits the exercise of First Amendment guarantees should be stricken.

Specifically, the expression of racist and anti-semitic views in a public place and the right to assemble in a public place for the purpose of communicating and discussing racist and anti-semitic views are protected activities and may not be circumscribed by the state, except where advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. (emphasis added)

Similarly, in Knights of the Ku Klux Klan v. East Baton Rouge (1978), a case involving denial of use of a high school gymnasium for a "patriotic meeting" sponsored by the Klan, a U.S. Court of Appeals held that the school board "threw open the doors of the gymnasium in question for after-hours use by all comers, on a first-come, first-served basis. Thereafter, its only additional function was the housekeeping one of scheduling — determining who came first to apply for a particular time." Here the board would "have the state take a hand in the matter by franking those whose ideas and policies it finds suitable for public expression and gagging those it does not — and this in the name of equal protection and civil rights. We do not find this an attractive suggestion." (See also Carson v. City of Jacksonville, 1974.)

And, in Lawrence University Bicentennial Commission v. City of Appleton (1976), a group of college students were denied permission
to rent a high school gymnasium for a lecture by a known member of the Communist Party (Angela Davis) under a policy prohibiting use of school facilities for "religious or political activities unless the activity is non-partisan or non-denominational." A U.S. district court held that while "the state is under no duty to make school buildings available for public meetings," here the school board had "committed themselves to a policy of encouraging the use of public school buildings by the people in the community" and "a municipality cannot deny the use of a public building to one organization while permission is freely granted to others." Said the court:

The convictions or affiliations of one who requests the use of a school building as a forum is of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or the market place. . . . It is much too late in the history of the First Amendment to seriously suggest that public officials managing a public facility may pick and choose the philosophical and ideological content of programs using public auditoriums.

In other instances state courts also have held that a school board could not deny use of a school auditorium for a concert by a singer whose political views were unpopular when it had routinely allowed community groups to hold concerts there (East Meadow Community Concerts Association v. Board of Education, 1966). And it could not deny open meeting facilities to a group of parents who were critical of the school board (Hennessey v. Independent School District, 1976).

Religious Meetings

There is no question that religious worship and discussion are forms of speech and association protected by the First Amendment (Widmar v. Vincent, 1981). On the other hand, the First Amendment establishment of religion clause restricts the power of state officials to adopt policies that do not have a secular purpose, that either advance...
or inhibit religion, or that unnecessarily entangle government with religion (see *Lemon v. Kurtzman*, 1971).

In *Country Hills Christian Church v. Unified School District* (1983) a U.S. district court set down the operative public forum rules under these two constitutional principles. The school district policy stated that "when school facilities are not in use for school programs, they may be made available at reasonable times and reasonable rates to recognized community organizations," but only for "non-religious meetings." Said the court: "By allowing their facilities to be used during non-school hours by non-school community groups, defendants have created a public forum" and having done so "cannot exclude plaintiffs from the forum because of the religious content of [their] intended speech."

The Court held that the district policy: 1) had a secular purpose because "all community organizations [were] welcome"; 2) would neither advance nor inhibit religion because any benefit a religious group might derive from access would be "merely incidental"; but 3) presented an unacceptable degree of entanglement with religion because "the School District must determine in every questionable case what words and conduct constitute religious use or religious worship." (See also *Resnick v. East Brunswick Township Board of Education*, 1978; *Southside Estate Baptist Church v. Trustees*, 1959; and *Baer v. Kolmorgen*, 1958.)

**Outside Speakers and Visitors**

This line of cases involves inviting outsiders into school or onto school grounds and thereby exposing students and teachers to them during school hours. *Clergy and Laity Concerned v. Chicago Board of Education* (1984) is the ruling precedent.

In this case a group of anti-war activists brought suit against a school board that had allowed military recruiters to hand out literature, post advertisements, conduct workshops, counsel students on careers, and administer vocational tests in school, as well as to advertise in the
school paper, but prohibited the anti-war group from doing the same. "Plainly," said the district court, "the school board is discriminating against plaintiffs based on the content of the message they want to convey." The court went on to say, "Once it opens a forum for the expression of views, under the dual mandate of the First Amendment and the equal protection clause [of the Fourteenth Amendment], defendants as agents of state government cannot pick and choose which views they feel should be expressed in the forum" (emphasis added).

Other School Facilities

The final line of cases concerns use by outsiders of school facilities other than rooms and grounds, such as mailboxes, message distribution systems, announcements in school publications, and even school bulletin boards and public address systems. Such facilities are not normally public forums, of course, but can be made so if school officials use them, or allow them to be used, as such. Two cases illustrate the point.

Most schools have some form of "fan-out" system whereby messages produced at the school or district level are carried home to parents via students. In Buckel v. Prentice (1978) school officials had permitted a wide variety of general, noncontroversial information — about theatrical events, home safety, etc. — to be carried home to parents this way. A group of parents sought to use the system to distribute a circular they had written to other parents. They were denied permission and brought suit, arguing that the school itself had used the system for similar purposes and had thereby created a public forum. The court of appeals held, however, that "dissemination of such material [as the school had distributed] is a logical and a proper extension of the educational function of schools . . . and such dissemination does not of itself give rise to any right of access to student distribution by parents or other concerned citizens."

Furthermore, said the court, "since the materials prepared by the plaintiffs were not offered in response to anything previously distri-
buted from the school by way of student messengers, the plaintiffs were seeking to create a forum rather than to use one created by the defendants."

Had the parents sought to respond to, or take issue with, materials previously distributed through the system by the school officials or others, the decision would have been quite different. In *Bonner-Lyons v. School Committee of City of Boston* (1973) the school board planned to use its message distribution system to send notices opposing use of busing to achieve integration in the city's schools. A group of parents asked the board to allow them to use the system to distribute pro-busing notices. The board denied the request and the parents sought an injunction to prohibit use of the system as planned or an order compelling permission to distribute their pro-busing notices. The court of appeals held that the board, by authorizing distribution of partisan notices, had "sanctioned use of the school distribution system as a forum for discussion of at least those issues which were treated in this notice." The board's refusal to allow parents to distribute opposing messages violated the First Amendment and the equal protection clause of the Fourteenth Amendment, and the board was enjoined from using the system to distribute anti-busing notices "unless fair and reasonable timely opportunity is afforded to others having differing views to use the same channels."

In 1946, well before the Supreme Court had formulated the public forum doctrine or applied it to the schools, a California court decided a landmark case concerning use of the schools by outsiders. California Chief Justice Traynor's opinion in this case expresses the basic components of public forum doctrine as they are applied to use of the schools by federal and state courts to this day. The case was *Danskin v. San Diego Unified School District*.

Members of the San Diego Civil Liberties Union were denied permission by the local school board to use a school auditorium for meetings on the theme "Bill of Rights in Postwar America" unless Union officials signed an oath stating that they did not advocate overthrow
of the present government. At issue was a stipulation in the California education code that created "a civic center at each and every public school building and grounds . . . where citizens . . . may meet and discuss, from time to time, as they may desire, any subject and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens." The code denied use of such centers to so-called "subversive" organizations.

The California court overturned the board's denial. Chief Justice Traynor wrote:

The state is under no duty to make school buildings available for public meetings. If it elects to do so, however, it cannot arbitrarily prevent any member of the public from holding such meetings. Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property.

It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting. School desks and blackboards, like trees or street lights, are but the trappings of the forum; what imports is the meeting of minds and not the meeting place. (emphasis added)

Legal scholar Robert B. McKay has appropriately said of Justice Traynor's opinion, "The eloquent statement in [this] case, somewhat ahead even of the United States Supreme Court, has been vindicated by later decisions of the High Court, but never more forcefully or directly" ("Constitutional Law: Ideas in the Public Forum," California Law Review 53 [1965], p. 67).
Policy Guidelines for Use of Schools by Non-School Publics

A local school board derives its powers from the education code of the state. It holds the schools in trust for the public under color of state statute and may not act counter to state legislation or state constitution. Therefore, the first place school officials must look to understand their powers and duties with respect to non-school uses of schools and school facilities is to state law.

A review of state legislation controlling the powers of boards with respect to use of the schools is not possible in the space limitations of this fastback. Suffice it to say, the laws are not uniform. Some states confer on local officials very general, unspecified supervisory discretion. Some expressly authorize school authorities to open schools for non-school uses. Some actually require that the schools be opened for such uses. And some prohibit certain non-school uses. Thus school officials are well advised, before they make decisions concerning use of the schools for non-school activities, to study the laws of their state, the record concerning legislative intent in passing those laws, and any relevant cases interpreting them.

Regardless of the particular wording of state legislation, all states delegate some power over use of the schools to local officials. Thus all school officials inevitably will face public forum questions. The most important of these are: 1) What actions might create a public forum? 2) What constitutional responsibilities apply once a forum is created? 3) How can public forum problems be prevented?
Creating a Public Forum

Buildings and facilities do not become even limited or semi-public forums just because they are owned or controlled by agencies of government. Only public streets, sidewalks, and parks — the so-called "pure" public forums — are presumptively open to everyone for First Amendment activity. Other spaces, however, can be turned into public forums to be used for certain purposes or by certain publics through acts of government or its officials. Some of these "other spaces" can be schools and school facilities — grounds, bulletin boards, mail systems, etc.

Schools may be opened as First Amendment forums in a number of ways. One of these is by official policy, for example, when state law or local regulation makes schools available for certain non-school uses such as meetings of citizen groups. A second is by official decision, for example, when a local board permits non-school uses under discretionary authority granted it by the state. A third is by official action, for example, when a board or local school officials themselves make use of the school or its facilities for partisan purposes, such as supporting proposed legislation or expressing a controversial view. A fourth is by official inaction, for example, when officials inadvertently or otherwise do not prevent certain non-school uses when they have the right to do so.

Public Forum Responsibilities

Regardless of how schools are turned into public forums, once they become so, very restrictive rules apply; and attempts to prohibit groups or individuals from using them will undergo strict constitutional scrutiny. The following five guidelines will help school officials in developing policy for non-school use of schools and school facilities.

1. First and foremost, use of an open forum may not be denied to groups or individuals, who by policy or practice are entitled to use them, because of organizational membership, speakers' point of view,
or content of message, unless the state can show that the denial is based on a compelling state interest and is narrowly drawn to achieve that end.

2. Use of an open forum may be regulated as to time, place, and manner, as long as the regulations are content-neutral, narrowly tailored to achieve a significant state interest, and leave open alternative channels of expression. As the Court said in *Grayned v. City of Rockford* (1972):

> The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

3. Use of a forum may be restricted to those categories of groups or purposes to which it has been opened — for example, students, recognized community groups, and nonprofit organizations; and activities in some way related to the business of the school. Use may not be denied to such groups or for purposes that legitimately fall within the categories, however.

4. Even if a place has been opened, use of it need not be granted indefinitely. A new policy can make previously open places into non-public forums. However, until a new policy is explicitly announced and publicized, all public forum rules apply.

5. Use may be denied to activities that threaten material and substantial disruption of the work of the school, invasion of the rights of others, or are otherwise illegal (libelous, obscene, or violent); but the burden of proof of a "clear and present danger" rests with the state, and it can be difficult to establish.

**Steps in Developing a Policy for Use of School Facilities**

The responsibility for administering non-school uses of school facilities ultimately rests with local school authorities. From the case
law reviewed in this fastback, it should be clear that many factors must be considered in developing and implementing a policy that protects the rights of students, teachers, and citizens in the community. To prevent problems, it behooves school officials to establish, with the advice of counsel, a clear and consistent policy for the use of school facilities and to communicate it to principals, teachers, students, and the general public (see fastback 253 Voluntary Religious Activities in Public Schools: Policy Guidelines, pp. 35-40).

A successful policy will have a number of components. First, it will have a precise statement setting out the conditions under which the school and its facilities are available for non-school use. It should specify 1) the spaces or facilities that are available for non-school use (and those that are not); 2) the times when they are available (and when they are not); and 3) the categories of groups (students, recognized community groups, nonprofit organizations) or purposes (discussion of matters of public interest, cultural, educational, political, social, and recreational activities) to which they are available.

Second, it will have a precise statement of the procedure by which groups or individuals may obtain permission to use the school for non-school purposes. It should specify 1) the circumstances under which prior permission for non-school use must be obtained; 2) the method by which application for permission is to be made; and 3) where, when, and to whom it is to be made. Prior permission can not be required, of course, for those such as students and teachers who wish to engage in activities protected under the Tinker standard for non-curriculum-related and non-school-sponsored activities.

The method may be formal, such as completing a written form, but may not be onerous. The application process should be clear and simple as to where, when, and to whom application should be made. The instructions might read: “Application should be addressed to the principal of the school in which use of facilities is sought and should be submitted at the school office during normal office hours of 8:00 a.m.-5:00 p.m. Monday through Friday.”
Third, a successful policy will identify the specific school official(s) who are empowered to grant or deny permission and a definite time period within which they will make a decision. The decision-making authority should be clearly stated (principal, superintendent, or school board) and the time period required for decision should be brief, typically no more than a few days.

Fourth, the policy should have a precise statement of the reasons for which permission may be denied. These should be consistent with case law precedents, many of which are reviewed in this fastback.

Fifth, the policy should have a detailed description of the procedures for appealing denial of permission. These should specify the official(s) to whom appeal may be made (superintendent or the school board) and a brief time period within which a decision on the appeal will be made.

Regardless of the specific language of a school or district policy, it must meet certain well-established constitutional standards. At the least, it must be reasonable in light of the purposes of the school and its unique circumstances. It must not be vague; students, teachers, and others should never be in doubt as to what is proscribed. It must not be overbroad, such that it is open to interpretations that would allow unnecessary curtailment of protected speech or association. It must be fair to all potential users and must be nondiscriminatory as to content, speaker, group, or viewpoint. Finally, it must be consistently and evenhandedly applied in all circumstances. No one is entitled to make arbitrary decisions where fundamental rights are at stake!
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