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The Public Forum Doctrine and Public Housing Authorities: Can You Say That Here?

*Martin J. Rooney**

I. INTRODUCTION

Although a public housing development may look like a typical neighborhood or even a small town, they are in fact unique government properties. As such unique issues relating to freedom of expression arise. In two cases, the United States Court of Appeals for the Eleventh Circuit has applied the so-called public forum doctrine under the First Amendment and has upheld the power of public housing authorities to control what was said and when it was said on their properties.¹ However, the Supreme Judicial Court of Massachusetts took exception with those holdings and found that a housing authority's attempt to limit the speech rights of persons on its premises violated the First Amendment – essentially engaging in a direct attack on the analysis of the Eleventh Circuit and that court's careful review of the nature of the property and its intended uses.² Other courts, including the United States Supreme Court, have become involved with the issue.³

This article will review briefly the status of the public forum line of cases under the First Amendment, and then consider these conflicting decisions with a view to the public policy issues raised by this interesting question of the free speech rights of subsidized housing tenants. While it is true that under the classic public forum line of analysis the government can often restrict or prohibit speech on property it owns and operates, where that public property is the homes of poor families or the elderly and appears to be a typical neighborhood, a different answer could be necessary, as the Massachusetts court so held.⁴

I will suggest, however, that the Massachusetts court has misinterpreted federal law and reached an incorrect conclusion. A careful

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1. Daniel v. City of Tampa, Fla., 38 F.3d 546 (11th Cir. 1994); Crowder v. Hous. Auth. Atlanta, 990 F.2d 586 (11th Cir. 1993).

2. Walker v. Georgetown Hous. Auth., 677 N.E.2d 1125, 1128 n.10 (Mass. 1997).

3. See *infra* Part III.

4. See *Walker*, 677 N.E.2d at 1128.

and considered review of all the facts relating to the property and its use, and not just of the facial appearance of the property, should be required under modern public forum case law analysis. Such analysis balances the needs and responsibilities of the government as property owner with the constitutional rights of tenants and others who use the property. The government acting as landlord with respect to its own property, rather than as sovereign with respect to others' property, needs to be accorded more leeway with regard to restrictions on expression than it would otherwise possess.

II. BACKGROUND

A. *Public Housing Authorities*

Federal statutes create a funding mechanism by which local entities are able to buy, build, and operate various housing programs for the poor.⁵ The local housing authority takes this money, perhaps together with state or local funds,⁶ and creates apartment buildings. These buildings, ranging from high rises in massive complexes to small townhouses in the country,⁷ are made available by the government to families and elderly or disabled individuals who meet the various regulations governing tenant selection.⁸ In most respects, these public housing authority developments resemble privately-owned housing and are, of course, the homes of the residents of those developments.

B. *The Government's Right to Control First Amendment Activities on Property it Owns: The Public Forum Doctrine*

Beginning with *Perry Education Association v. Perry Local Educators' Association*,⁹ the United States Supreme Court has handed down a series of cases¹⁰ implementing a tripartite analysis of claims involving First Amendment challenges to restrictions on the use of government-owned property for speech activities. In doing so, the Court has established what has become known as the public forum analysis.¹¹

5. *See, e.g.*, 42 U.S.C. §§1437–1441 (2005).

6. *See, e.g.*, MASS. GEN. LAWS ch. 121B, esp. §§ 8–16, 26–40 (1986).

7. *See, e.g.*, *Walker*, 677 N.E.2d at 1126 n.2.

8. 24 C.F.R. pt. 960 (2006) (tenant admission and occupancy regulations); 760 MASS. CODE REGS. 5.00 (2005).

9. 460 U.S. 37 (1983).

10. *See infra* notes 30–49 and accompanying text.

11. CHEMERINSKI, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 11.4.2.1 at p.1085 (2d ed. 2002).

This analytic methodology is designed to “strike[] [a] balance between the public’s right of access to public property for expressive activity and the government’s interest in limiting the property’s use based on the character of the property at issue.”¹²

In *Perry*, a school district granted the teachers’ union, as part of a collective bargaining agreement, the exclusive right to access the interschool mail system and teacher mailboxes within that system.¹³ A rival union challenged this practice, seeking similar access.¹⁴ The Court found that there was no violation of the First Amendment.¹⁵ In its reasoning, the Court recognized three different categories of publicly owned property, or public fora: (1) “traditional” or “quintessentially public” fora, (2) limited public fora, and (3) non-public fora.¹⁶ A traditional public forum is one that “by long tradition or by government fiat [has] been devoted to assembly and debate.”¹⁷ A limited public forum is one that is “generally open to the public even if [the government entity] was not required to create the forum in the first place.”¹⁸ A non-public forum is one that “is not by tradition or designation a forum for public communication.”¹⁹ This analysis followed from the fact that the government in this type of case is not acting as a sovereign attempting to control activities on property owned by others, but as a proprietor of property: “[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”²⁰

In a public forum, the government landowner may limit speech and impose content-based exclusions from the forum only upon a showing of a “compelling state interest” and upon a showing that the limitations and exclusions are “narrowly drawn to achieve that end.”²¹ Further, content-neutral regulations of the time, place, or manner of expression are permissible only when they are “narrowly tailored to serve a significant government interest” and the regulations “leave open ample alternative

12. *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1323 (1st Cir. 1993) (quoting *Perry*, 460 U.S. at 44).

13. 460 U.S. at 40.

14. *Id.* at 41.

15. *Id.* at 55.

16. *Id.* at 44–46.

17. *Id.* at 45.

18. *Id.*

19. *Id.* at 46. *See also id.* at 47 (“[S]elective access does not transform government property into a public forum.”).

20. *Id.* at 46 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)) (internal quotation marks omitted).

21. *Id.* at 45.

channels of communication.”²² In a limited public forum, the government is bound by the same rules as in the general all purpose public forum.²³ However, the government may limit the purpose of the forum, that is, limit the forum’s use to certain groups only, or for expression on certain subjects only.²⁴

In non-public fora, the rules are different. The First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”²⁵ In addition to time, place, and manner restrictions, the government may “reserve the 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.”²⁶

In sum, where the government has fully dedicated property it owns and controls to expressive use, only the most limited and important interests support preventing expressive activities in that forum. In limited public fora, a particular range of expressions are allowed, subject to those same stringent constraints on restricting speech. But in non-public fora, outright bans on speech can be imposed based merely on a reasonable relation between the restriction and the nature of the property.²⁷

Applying this framework, in *Perry* the Court found that the internal mail facility at the school was not a public forum and therefore could be reserved for the use of the union that represented all teachers in the city. Access by a competing union not officially representing the entire body of teachers was not required.²⁸ As the Court summed,

22. *Id.*

23. *Id.* at 46.

24. *Id.* at 46 n.7. For example, the forum can be reserved for student groups at the school, *Widmar v. Vincent*, 454 U.S. 263 (1981), or for discussion of school board business only, *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976).

25. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981).

26. *Perry*, 460 U.S. at 46 (citation omitted).

27. As stated by the *Perry* Court,

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. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Id. at 49.

28. *Id.* at 53 (“But the internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum’s official business.”).

When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.²⁹

After *Perry*, the Supreme Court applied its decisional framework in a number of cases. The Court struck down a statute prohibiting picketing on the public sidewalks surrounding the Supreme Court building, finding that the sidewalks were the type of government-owned property historically dedicated to unlimited free speech.³⁰ Accordingly, the sidewalks were public fora where the government could not ban picketing without a compelling state interest.³¹ However, a time limitation on the use of public parks was upheld despite the park's nature as a public forum.³² The limitation was a reasonable "time, place, or manner" restriction that was content neutral, left open other avenues of communication, and was designed to support the government's interest in the use of public parks.³³ The Supreme Court has also held that a city may ban the posting of signs on public property for the aesthetic and economic interests of eliminating clutter and visual blight.³⁴ Street light posts, for example, are not a type of property historically dedicated to public communication and thus are not a public forum.³⁵

In determining whether the government property in question is or is not a public forum, the governmental owner's intent—including the government's original, historical intent, i.e., tradition—is a key factor. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,³⁶ the Supreme Court found that a charity campaign, conducted on federal property, was not a public forum.³⁷ The intent of the charity campaign was not to provide a forum for expressive activities, but rather to allow a limited group to solicit a specific type of contribution; therefore there was no purposeful designation of the charity drive for general public

29. *Id.* at 55.

30. *United States v. Grace*, 461 U.S. 171, 179 (1983).

31. *Id.* at 179–80, 183.

32. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

33. *Id.* at 298–99.

34. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

35. *Id.* at 814–15.

36. 473 U.S. 788 (1985).

37. *Id.* at 801 ("We agree with respondents that the relevant forum for our purposes is the CFC [Combined Federal Campaign].").

use.³⁸ Restrictions on the number and type of charities allowed to participate and the length of the messages were proper under the lower reasonableness standard applied to non-public fora.³⁹ The Court noted that it will not reach to find a public forum “in the face of clear evidence of a contrary intent, nor will [it] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”⁴⁰

Thus, even in what might at first blush appear to be a location by tradition dedicated to communication activities that is therefore a public forum, the Court will find even this location to be a non-public forum if its unique characteristics evince the owner’s intent not to hold it open to communicative activities. Speech on sidewalks in front of post offices, for example, can be restricted because clear sidewalks are needed to insure efficient operation of the mail system. Such a restriction would be upheld unless it proved to be “arbitrary, capricious, or invidious,” that is, not reasonable or viewpoint neutral.⁴¹ Similarly, publicly-owned airport terminals were not found to be public fora.⁴² Rather, the Court found that the government had not dedicated this type of property to expressive use from time immemorial.⁴³ As the terminals were not public fora, the Court upheld the ban on solicitations as a reasonable restriction on the use of the property.⁴⁴ However, the majority⁴⁵ went on to find that

38. *Id.* at 788–806.

39. *Id.* The court elaborated in this fashion:

The Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. . . . Nor is there a requirement that the restriction be narrowly tailored or the Government’s interest to be compelling. . . .

The reasonableness of the Government’s restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.

Id. at 808–09.

40. *Id.* at 803. As the Court of Appeals for the First Circuit has stated, “[T]hese cases suggest that courts should hinge their analyses largely on whether the government *intended* that the property become a designated public forum.” *AIDS Action Comm., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 9 (1st Cir. 1994).

41. *United States v. Kokinda*, 497 U.S. 720, 725–34 (1990) (plurality opinion) (quoting *Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974)) (plurality opinion); *see also Greer v. Spock*, 424 U.S. 828 (1976) (explaining that sidewalks on government reservation not public fora).

42. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

43. *Id.* at 679–81.

44. *Id.* at 683–85.

45. The Court upheld the solicitation ban on a 5–4 split with Chief Justice Rehnquist, Justice White, Justice O’Connor, Justice Scalia, and Justice Thomas forming the majority. *Id.* at 685. The Court struck down the literature ban with a 5–4 split with Justice Blackmun, Justice Stevens, Justice O’Connor, Justice Kennedy, and Justice Souter forming the majority. *Lee v. Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (per curiam). Justice O’Conner filed a concurring opinion explaining her swing vote. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672,

an outright ban on the free distribution of literature on the property was not reasonable, as such distribution presented few problems other than perhaps litter.⁴⁶

Even in a location that by tradition and intent is a public forum—a polling place—certain government imposed restrictions may still be upheld.⁴⁷ The Court has upheld a regulation that banned all political speech—but only political speech—within the 100-foot area surrounding the entrance of a polling place.⁴⁸ Though this is without doubt a content-based restriction, the regulation serves a compelling state interest and is sufficiently narrowly tailored.⁴⁹ As will be seen in the next section, this is an unusual result.

Thus, the Supreme Court has consistently used a tripartite analysis of examining whether the location is a public, limited public or non-public forum to determine when the government may restrict expression on property it owns. In non-public locations, so long as the restrictions remain reasonable and viewpoint neutral, they will typically be upheld.

C. The Government's Right to Control First Amendment Activities in Public Fora or on Property It Does Not Own

While governmental efforts to restrict speech activities in non-public fora have been routinely upheld, similar efforts in public fora or limited public fora have just as routinely been met without success. In *Lovell v. City of Griffin*⁵⁰ and its progeny, the Court addressed the right of municipalities to restrict speech activities on their streets and sidewalks. Such efforts have generally been doomed to failure because common public streets and sidewalks have been the quintessential public fora for the exercise of free speech rights since the beginning of our nation's history:

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

685 (1992) (O'Connor, J., concurring in judgment).

46. *Lee*, 505 U.S. at 831; *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 690.

47. *Burson v. Freeman*, 504 U.S. 191 (1992).

48. *Id.* at 193–94, 211 (plurality opinion).

49. *Id.* at 197–99, 209–11. Justice Scalia found that the area in issue was not a “traditional public forum,” as polling places had traditionally not been public fora. *Id.* at 214–16 (Scalia, J., concurring in judgment). Therefore the regulation was a reasonable regulation of a nonpublic forum. *Id.*

50. 303 U.S. 444 (1938).

the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.⁵¹

In *Martin v. Struthers* the Court employed similar reasoning to reject the constitutionality of a regulation banning door-to-door solicitation within the City of Struthers, Ohio.⁵² Again speaking in sweeping language, the Court noted:

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants.⁵³

Content-related partial bans on the use of the streets and sidewalks for expressive activity have had a hard row to hoe to pass constitutional muster. Ordinances that prohibit picketing on a public way within a set distance of a school, except for peaceable labor picketing, have failed to

51. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

52. 319 U.S. 141 (1943).

53. *Id.* at 141. The court explained the rationale for this view:

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. . . . “Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.”

Id. at 145 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)); see also *Jameson v. Texas*, 318 U.S. 413, 416 (1943) (“[O]ne who is rightfully on a street which the state has left open to the public carries with him . . . [the] right to express his views in an orderly fashion.”) (ban on orderly distribution of religious leaflets on public streets violated First Amendment); *Loper v. N.Y. City Police Dep’t.*, 999 F.2d 699 (2d Cir. 1993) (prohibiting statutory ban on all begging and soliciting on streets despite concerns about fraud, intimidation, coercion, harassment, and other criminal conduct). The court added, again in broad brush strokes,

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Martin, 319 U.S. at 146–47.

get over the constitutional hurdle.⁵⁴ A regulation that banned only certain types of news racks on sidewalks in Cincinnati was not permissible, as it was a content-based restriction relating to commercial speech and was not a valid time, place or manner restriction.⁵⁵ Similarly, a regulation that banned charitable solicitations on a door-to-door basis unless at least seventy-five percent of the receipts were used for charitable purposes was struck down as violative of the First Amendment.⁵⁶ Such results can even be found in a case involving non-publicly owned streets or sidewalks, but streets in a privately-owned town. The outright ban on the distribution of religious literature on privately-owned sidewalks and streets in a “company town,” which in all significant respects were identical to public town sidewalks and streets, has been held to violate the First Amendment.⁵⁷ The Supreme Court also struck down a total ban by a school district on using district property for religious purposes, as such a ban was not viewpoint-neutral.⁵⁸

Under the public/limited public/non-public forum analysis, the Supreme Court has been extremely reluctant to uphold restrictions imposed by the government as sovereign on property that is either a traditional public forum or on property owned by others. The next question is how the courts have applied this line of analysis to the unique issue of publicly owned housing.

54. *Police Dept. v. Mosley*, 408 U.S. 92 (1943). The court stated:

But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. at 95–96.

55. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428–31 (1993).

56. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 622 (1980); *see also Bellotti v. Telco Comm’ns, Inc.*, 650 F. Supp. 149 (D. Mass. 1986).

57. *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the property where the ban on the distribution of religious literature had occurred,

ha[d] all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, [and] a sewage disposal plant A deputy of the Mobile County Sheriff, paid by the company, serves as the town’s policeman. . . . The town and the surrounding neighborhood . . . cannot be distinguished from the Gulf property by anyone not familiar with the property lines

Id. at 502–03; *see also id.* 509 (striking down the ban on distribution within the company town, the Court stated that “the right to exercise the liberties safeguarded by the First Amendment ‘lies at the foundation of free government by free men.’” (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939))).

58. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also Rosenberger v. Rector and Visitors of Univ.*, 515 U.S. 819 (1995) (reviewing public forum doctrine).

III. APPLICATION OF THE PUBLIC FORUM DOCTRINE TO PUBLIC HOUSING AUTHORITIES

A. *Initial United States Supreme Court Attention to Governmentally Owned Housing and the First Amendment: Tucker v. Texas*

The United States Supreme Court has on one occasion addressed the specific situation where a public housing authority (or at least what was called a housing authority) attempted to restrict speech on its property. In *Tucker v. Texas*,⁵⁹ the Supreme Court addressed an appeal from the County Court of Medina, Texas in which Tucker had been convicted of what was essentially trespass after notice.⁶⁰ Tucker was a Jehovah's Witness engaged in the distribution of religious literature to "willing recipients."⁶¹ The locale of his activities was the Hondo Navigation Village.⁶² Owned by the Federal Government, the village was constructed under congressional authority to create housing for workers engaged in national military services during the World War II time period and was apparently under the administration of the Federal Public Housing Authority.⁶³ The Court noted that "[a]ccording to all indications the village was freely accessible, open to the public, and had the characteristics of a typical American town."⁶⁴ The village manager ordered Tucker to discontinue his religious activities on the premises, and when Tucker refused his arrest followed.⁶⁵

The Court held that there was no principled difference between the case at bar and the *Marsh*⁶⁶ company town case, the negligible difference between the two cases simply being that instead of a private corporation owning the town, the federal government owned the town.⁶⁷ "This difference [did] not affect the result."⁶⁸ The Court held, some thirty years *prior* to the *Perry* decision, that "neither Congress nor federal agencies acting pursuant to congressional authorization may abridge the freedom

59. 326 U.S. 517 (1946).

60. *Id.* at 518.

61. *Id.*

62. *Id.*

63. *Id.* at 518–19.

64. *Id.* The manager testified at trial that a regulation promulgated by the Washington D.C. office gave him full authority to regulate the conduct of those living in the village, and that he did not allow preaching without a permit issued in his discretion. *Id.* at 519.

65. *Id.* at 519 n.1 (upholding the state court's decision that the manager had the authority noted, but stating in a footnote that there was no such regulation it could find in its research).

66. *Marsh v. Alabama*, 326 U.S. 501 (1946); *see supra* note 58 and accompanying text.

67. *Tucker*, 326 U.S. at 520.

68. *Id.*

of press and religion safeguarded by the First Amendment.”⁶⁹ Thus, in the first housing authority case to come before the Supreme Court, long before the development of the public forum doctrine, the Court struck down the regulation of speech when grounded merely in the government’s ownership of public housing.

B. The Federal Circuits Address the Issue of When a Public Housing Authority May Regulate First Amendment Expressive Activities on its Property

1. The Eleventh Circuit’s approach to the problem

In *Crowder v. Housing Authority*⁷⁰ and *Daniel v. Tampa, Florida*,⁷¹ the Eleventh Circuit had cases before it arising out of public housing authorities’ attempts to control the use of their property for certain expressive activities. In *Crowder*, a tenant attempted to hold Bible study meetings in the common facility of the apartment building he lived in, which was owned by the Atlanta Housing Authority (AHA).⁷² Crowder wanted to use both the building’s auditorium and its library.⁷³ After some complaints, Crowder’s activities were initially forbidden; then, a tenant vote was held on whether and when to permit the meetings, resulting in Crowder being restricted to holding his activities on Friday nights only.⁷⁴ When Crowder attempted to hold a meeting at another time, he was arrested for “violation of a lawful order to leave.”⁷⁵

The Eleventh Circuit began its analysis by reviewing the public forum doctrine under *Perry*.⁷⁶ It held that the auditorium was a limited public forum, as it was opened by the AHA for a “wide range of expressive activities,” including religious services.⁷⁷ The library was found to be a non-public forum, as it was at best irregularly and infrequently used by the tenants for any type of meeting.⁷⁸ Given the nature of the property, the circuit court held that the initial complete ban on all meetings run by Crowder was not reasonable and was not a valid

69. *Id.*

70. 990 F.2d 586 (11th Cir. 1993).

71. 38 F.3d 546 (11th Cir. 1994).

72. 990 F.2d at 589.

73. *Id.*

74. *Id.* at 589–90.

75. *Id.* at 590.

76. *Id.* at 590–91 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983)).

77. *Id.* at 591.

78. *Id.*

time, place, or manner restriction.⁷⁹ Likewise, the court held that the tenant majority vote requirement was an improper content-based decision prohibited by the First Amendment.⁸⁰ The circuit court held that the adoption of the Friday night restriction was also improper.⁸¹ Even if this restriction was assumed to be content-neutral, to be proper it had to be a time, place, or manner restriction that was narrowly tailored to serve a significant governmental interest under Supreme Court precedent.⁸² “Because the facilities were not in constant use during the daytime, the Friday-night-only rule was not narrowly tailored to serve the substantial government interest in avoiding scheduling conflicts.”⁸³ Finally, addressing the specific arrest of Crowder, the court held that since the library was a non-public forum, and was being used at the time of the arrest to temporarily store furniture, the management’s actions were “reasonable and lawful” on that date.⁸⁴

A year later, the Eleventh Circuit returned to this problem in the *Daniel* case,⁸⁵ which began when Daniel sought a preliminary injunction from the federal district court.⁸⁶ Daniel was a member of a black rights organization who wished to engage in door-to-door political expression within two Tampa Housing Authority (THA) developments.⁸⁷ The developments had a history of serious drug and crime problems—particularly crime caused by non-residents—that led the THA to create a policy barring anyone from being on the property who was not specifically “authorized, licensed, or invited.”⁸⁸ Daniel challenged the policy as being overbroad and a violation of his and other tenants’ First Amendment rights.⁸⁹ The district court, upholding the magistrate judge’s recommendation, issued the preliminary injunction.⁹⁰ The district court relied upon *Martin v. Struthers*⁹¹ as creating a right in the homeowner to

79. *Id.* at 592.

80. *Id.*

81. *Id.* at 593.

82. *Id.* at 592.

83. *Id.* at 593.

84. *Id.* Even if the court assumed that the library was a limited public forum, the court would find that the use of the library by others pursuant to a first come, first serve basis to avoid scheduling conflicts was a permissible content-neutral restriction on the use of the forum, and such a policy would withstand strict scrutiny review. *Id.*

85. *Daniel v. City of Tampa, Fla.*, 818 F. Supp. 1491 (M.D. Fla. 1993) [hereinafter *Daniel I*].

86. *Id.* at 1491.

87. *Id.* at 1492–93.

88. *Id.* at 1492 (quoting FLA. STAT. § 810.09 (1989)).

89. *Id.*

90. *Id.* at 1494. The court enjoined the THA from arresting Daniel for trespass while engaged in door-to-door political expression at reasonable times on the various THA properties.

91. 319 U.S. 141 (1943)

decide whether or not to receive distributors of literature.⁹² Thus, Daniel had shown a likelihood of success on the merits, warranting the issuance of an injunction.⁹³ This was despite the fact that both the magistrate and the district court held that the THA property was a non-public forum.⁹⁴

Daniel's success was short-lived. When the case went to trial on the merits, the THA prevailed before a different district court judge.⁹⁵ The district court decision begins by noting that it is far from clear that the forum analysis is applicable in the first instance, as Daniel's physical presence on the property, which was the root cause of his arrest for trespassing, was in and of itself not expressive conduct, and thus could be considered to not involve any First Amendment issue at all.⁹⁶ Assuming Daniel's claim could be construed as involving expressive activities, the court held that the property of the THA was "neither a traditional public forum nor a designated [(or limited)] public forum."⁹⁷ The purpose of the THA's property was to be the private residences of low income individuals, "not for the public exposition of ideas," and thus was not a limited forum.⁹⁸ The court contrasted the property with traditional forums, such as public streets and parks, noting that the THA had never allowed activities such as solicitation, canvassing or the distribution of literature on its property.⁹⁹ Accordingly, the property was a non-public forum¹⁰⁰ and the restrictive policy "easily" met the requirement that it be reasonable and not content-based, and thus withstood constitutional scrutiny.¹⁰¹ The court therefore entered judgment as a matter of law for the city at the conclusion of the plaintiff's case.¹⁰²

92. *Daniel I*, 818 F. Supp. at 1493.

93. *Id.* at 1493-94.

94. *Id.* at 1494. The court rejected, however, Daniel's argument that he had a First Amendment right to distribute his materials and engage in expressive conduct on other common area portions of the THA's property apart the actual apartment entrances. *Id.* The court similarly rejected the void for vagueness claim. *Id.*

95. *Daniel v. City of Tampa, Fla.*, 843 F. Supp. 1445 (M.D. Fla. 1993) [hereinafter *Daniel II*].

96. *Id.* at 1447.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* The court also noted that the lack of a formal written policy forbidding such activities was not the equivalent of a designation allowing such activities. *Id.*

101. *Id.* at 1447-48.

102. *Id.* at 1448. The court wrote:

Simply put, the public's compelling interest in keeping out dangerous drug dealers and addicts far outweighs Daniel's desire to post fliers or leaflets on Housing Authority property. Daniel is provided an alternative public forum only yards away [(the city streets)], which he has used extensively and without incident in the past. To the extent that the enforcement of the trespass statute constitutes a time, place, or manner

Not surprisingly, the case went up on appeal to the Court of Appeals for the Eleventh Circuit. The circuit court¹⁰³ reviewed and applied the public forum doctrine, affirmed the district court's decision and agreed that the property at issue was a non-public forum.¹⁰⁴ The court noted in support of this determination that the housing authority's mission "is to provide safe housing for its residents" and that access to the property is controlled and limited to "residents, their invited guests, and those conducting official business."¹⁰⁵ The court held that the access restrictions were content-neutral and were a reasonable means of combating crime within the Authority's property.¹⁰⁶ Accordingly, the restrictions passed constitutional muster.¹⁰⁷ The Eleventh Circuit has thus spoken twice on the issue of the proper analysis of freedom of expression issues on public housing authority property and has correctly applied the Supreme Court's tripartite public forum analysis.

2. *The Fifth Circuit's approach*

The Fifth Circuit has also addressed the problem of analyzing the freedom of expression rights of individuals on public housing authority property. In *Vasquez v. Housing Authority*, first the District Court for the Western District of Texas¹⁰⁸ and then a panel of the Fifth Circuit¹⁰⁹ dealt with a First Amendment challenge to a no-trespass regulation adopted by the Housing Authority of the City of El Paso (HACEP). The district

restriction, it is a slight one, and in any event amply justified.

Id. The court went on to reject the overbreadth challenge, finding that the First Amendment impact of the trespassing policy was not substantial "[w]hen 'judged in relation to [its] plainly legitimate sweep,'" and thus not overbroad. *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Interestingly, although the decision in *Daniel II* came down seven months after *Crowder*, the district court did not cite to the *Crowder* decision.

103. *Daniel v. Tampa, Fla.*, 38 F.3d 546, 548 (11th Cir. 1994) [hereinafter *Daniel*].

104. *Id.* at 550.

105. *Id.*

106. *Id.*

107. *Id.* *Daniel* had argued that *Martin v. Struthers*, 319 U.S. 141 (1943), controlled the decision of the case. The circuit disagreed:

The [Supreme] Court's opinion in *Martin* rests upon the premise that a city may not "substitute the judgment of the community for the judgment of the individual householder," and divest the homeowner of the decision of whether to speak with the canvasser. This concern is not implicated where, as here, the regulated property is government-owned.

Daniel, 38 F.3d at 549 n.7 (internal citation omitted).

108. *Vasquez v. Hous. Auth.*, 103 F. Supp. 2d 927 (W.D. Tex. 2000) [hereinafter *Vasquez I*], *rev'd*, 271 F.3d 198 (5th Cir. 2001), *vacated and reh'g granted*, 289 F.3d 350 (5th Cir. 2002).

109. *Vasquez v. Hous. Auth.*, 271 F.3d 198 (5th Cir. 2001), *vacated and reh'g granted*, 289 F.3d 350 (5th Cir. 2002).

court upheld the regulation.¹¹⁰ Factually the case closely resembled the Massachusetts *Walker* case.¹¹¹ Vasquez was a non-resident who wanted to go door-to-door within an HACEP development to campaign for a county office.¹¹² The development was a typical housing development bounded by public streets, with some public streets running through the development.¹¹³ The HACEP allowed residents and certain “legitimate” non-residents on the property to go door-to-door, but otherwise denied access to the property.¹¹⁴ Vasquez was denied the right to go door-to-door campaigning, and a resident—de la O—alleged he was denied the right to receive such campaigning.¹¹⁵ The district court began with a review of the Supreme Court public forum case law and particularly noted the Eleventh Circuit’s *Daniel* decision.¹¹⁶ The court rapidly found that the development was a non-public forum.¹¹⁷ Accordingly, the court turned to the issue of whether or not the regulations were reasonable.¹¹⁸ The court found that the regulations passed muster after noting that the regulations combated crime, that there was ready access to city streets, that tenants could specifically invite campaigners into the property, and that the regulations were content-neutral.¹¹⁹

The matter was appealed to the Fifth Circuit.¹²⁰ The majority opinion

110. *Vasquez*, 103 F. Supp. 2d at 932–33.

111. *Walker v. Georgetown Hous. Auth.*, 677 N.E.2d 1125 (Mass. 1997).

112. *Vasquez*, 103 F. Supp. 2d at 929.

113. *Id.* at 929 n. 1.

114. *Id.* at 929 n. 2.

115. *Id.* at 929–30.

116. *Id.* at 932–33 (citing *Daniel v. Tampa, Fla.*, 38 F.3d 546 (11th Cir. 1994)).

117. *Id.* at 933 (“the [c]ourt pauses only momentarily to conclude that HACEP’s complexes are ‘non-public forums’”).

118. *Id.*

119. *Id.* In a related case, the same district court judge reached the same conclusions as in this matter. In *De La O v. Housing Authority*, the court had before it essentially an identical claim as in *Vasquez*, with the exception of there not being a plaintiff who was an actual political candidate. 316 F. Supp. 2d 481, 484 n.4 (W.D. Tex. 2004), *aff’d in part and vacated in part*, 417 F.3d 495 (5th Cir. 2005), *cert. denied*, 126 S.Ct. 808 (2005). The court again found that the HACEP properties were non-public fora and that the restrictions imposed by the Authority were both viewpoint-neutral and reasonable, and accordingly passed First Amendment muster. *Id.* at 487. The court also rejected an overbreadth challenge to the restrictions, finding that the Authority rules did not tread upon any expression or associational rights. *Id.* at 488. Further, the district court rejected an equal protection challenge, finding no constitutionally protected category of individuals to be involved and that the restrictions were rationally related to the goals of the HACEP. *Id.* at 488–89. An appeal followed. *See De La O v. Hous. Auth.*, 417 F.3d 495 (5th Cir. 2005), *cert. denied*, 126 S.Ct. 808 (2005); *See also infra* notes 136–149 and accompanying text.

120. *Vasquez v. Hous. Auth.*, 271 F.3d 198 (2001) [hereinafter *Vasquez II*], *vacated and reh’g granted*, 289 F.3d 350 (5th Cir. 2002) (granting petition for rehearing en banc). Apparently, de la O died before the Fifth Circuit could issue an en banc opinion and the appeal was dismissed as moot. *See De La O*, 417 F.3d at 498 (“The [*Vasquez*] case, however, was voted en banc, and after briefing and argument had concluded, de la O died. Because Vasquez had not filed an appeal, the absence of a living plaintiff rendered the case moot, and it was dismissed.”).

also began by repeating the now familiar outline of the Supreme Court's forum analysis.¹²¹ The majority quickly agreed that the HACEP developments were non-public fora.¹²² The key factors in this decision were that residency was limited to a certain class of people, that there were generally no public streets or parks within the developments, that the developments were created for the purpose of providing affordable housing to those with low income, and that the government did not create the housing to provide a public meeting place.¹²³ As the majority held, "This [purpose] necessarily mandates a finding that the HACEP developments differ in character from the areas previously categorized by the Court as designated public fora."¹²⁴

Despite finding that the HACEP developments were non-public fora, the court went on to find that the HACEP regulations were not reasonable and thus did not pass even minimum rationality review.¹²⁵ While the regulations were viewpoint-neutral, the regulations were not reasonable under the circumstances.¹²⁶ The court agreed that safety and crime prevention were legitimate purposes for the regulations.¹²⁷ However, the developments resembled private neighborhoods in the city, and residents were permitted under the regulations to campaign and distribute literature on a door-to-door basis, subject to identification, prior permission, and time restrictions.¹²⁸ Additionally, certain guests were permitted to enter.¹²⁹ In light of these facts, the court stated, "We are persuaded beyond peradventure that the wholesale exclusion of political candidates and their volunteers from this category [of those permitted access to the property] unreasonably and unnecessarily interferes with what may well be the primary connection between many of the HACEP's residents and the democratic process."¹³⁰

The dissent pointed out that, under *Cornelius*¹³¹ and other Supreme Court case law, the regulations merely needed to be reasonable, not the "most reasonable or [the] only reasonable limitation."¹³² The dissent

121. *Vasquez II*, 271 F.3d at 202.

122. *Id.* at 202–03.

123. *Id.* at 202.

124. *Id.* at 202–03.

125. *Id.* at 203.

126. *Id.* at 203–04.

127. *Id.* at 204.

128. *Id.* at 204 & n.22.

129. *Id.* at 205.

130. *Id.* (noting that "requiring political campaigners to seek the same authorization as other individuals" allowed on the property for legitimate business would be reasonable in light of the goals of crime prevention).

131. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

132. *Vasquez II*, 271 F.3d at 207 (Barksdale, J., dissenting) (quoting *Cornelius*, 473 U.S. at

would have found the differentiation made by the HACEP based on the identity of the speaker reasonable and therefore would have upheld the regulations.¹³³

Following the issuance of this opinion, the Fifth Circuit granted a request for rehearing *en banc* and vacated the panel opinion.¹³⁴ Subsequently the named plaintiff died, leading to the appeal being dismissed as moot prior to *en banc* reconsideration of the issue.¹³⁵

The Fifth Circuit did eventually return to this issue in the related case of *De La O v. Housing Authority*.¹³⁶ The *De La O* case was brought by the widow of one of the plaintiffs—de la O—from the *Vasquez* case.¹³⁷ After the HACEP prevailed in the district court on the same basis as it had previously done so,¹³⁸ this second appeal followed. While appeal to the Fifth Circuit was pending, the HACEP amended its regulations to allow non-residents to go door-to-door for political or religious activities within its developments.¹³⁹

The Fifth Circuit rejected a mootness challenge made in light of the amendments and began its constitutional analysis by noting that the plaintiff, a non-campaigning resident, had the same First Amendment protections as a receiver of information as the actual campaigners would possess.¹⁴⁰ The court then toured the landscape of the public forum doctrine and noted that public housing developments “have repeatedly been held to constitute non-public fora.”¹⁴¹ Noting that the HACEP’s primary purpose was to house needy individuals and families and not to provide a facility for the expression of ideas or a meeting place for the populace, the court held that “it [was] obvious, therefore, that for purposes of our further analysis, HACEP’s facilities [were] non-public fora.”¹⁴²

808 (emphasis added)).

133. *Id.* at 209.

134. *Vasquez v. Hous. Auth.*, 289 F.3d 350 (5th Cir. 2002).

135. *See De La O v. Hous. Auth.*, 417 F.3d 495, 498 (5th Cir. 2005), *cert. denied*, 126 S.Ct. 808 (2005) (“The [*Vasquez*] case, however, was voted *en banc*, and after briefing and argument has concluded, de la O died. Because *Vasquez* had not filed an appeal, the absence of a living plaintiff rendered the case moot, and it was dismissed.”).

136. 417 F.3d 495 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 808 (2005).

137. *Id.* at 498; *see supra* notes 108-135.

138. *See De La O v. Hous. Auth.*, 316 F. Supp. 2d 481, 486–87 (W.D. Tex. 2004), *aff’d in part and vacated in part*, 417 F.3d 495 (5th Cir. 2005), *cert. denied*, 126 S.Ct. 808 (2005).

139. *De La O*, 417 F.3d at 498.

140. *Id.* at 499–500, 502; *see also* *Walker v. Georgetown Hous. Auth.*, 677 N.E.2d 1125, 1127 (Mass. 1997).

141. *De La O*, 417 F.3d at 502, 503 (text and n. 13). Interestingly, the court did not cite the *Walker* decision, which held that the housing development area there in dispute was a public forum. *See Walker*, 677 N.E.2d at 1128.

142. *De La O*, 417 F.3d at 503–04.

Addressing the issue of whether the revised regulations passed constitutional muster, the circuit held that it was beyond question that the regulations were content-neutral and thus passed scrutiny if they were reasonable in light of the purpose of the forum.¹⁴³ The HACEP's interest in crime prevention was obviously weighty, there were multiple alternative channels of communication, and the burden on the plaintiffs to use those alternative channels was minimal.¹⁴⁴ The regulations were constitutionally valid.¹⁴⁵

Turning to the problem of the original regulations, the Fifth Circuit noted that its prior panel in *Vasquez* had found the regulations an unreasonable restriction, even for a non-public forum.¹⁴⁶ However, this panel did not adopt that position. The panel did note that these prior regulations presented a "closer question," but held that "in light of the overriding need to provide safe housing, they are constitutional."¹⁴⁷ The panel went on to address an issue not previously discussed: whether the requirement that the HACEP must pre-approve the content of any flyer or handout violated the First Amendment.¹⁴⁸ Finding it "undeniable" that viewpoint restrictions on content would violate the Constitution, the case was remanded for the district court to make findings on that specific issue.¹⁴⁹

The federal courts of appeal seem to be quite consistent in their approach to the problem of restrictions on freedom of expression on property owned by public housing authorities; however, as the next section will show, Massachusetts has taken a noticeably different tack.

C. The Massachusetts Contrary Approach to the Problem

The Supreme Judicial Court of Massachusetts addressed the issue of freedom of expression on public housing authority property in *Walker v. Georgetown Housing Authority*.¹⁵⁰ The plaintiff—Walker—was a tenant of the Georgetown Housing Authority (GHA) who challenged the ban imposed by the GHA on door-to-door campaigning and soliciting within a development for the elderly.¹⁵¹ The trial court granted summary

143. *Id.* at 504.

144. *Id.*

145. *Id.* at 506.

146. *Id.*

147. *Id.* at 507–08.

148. *Id.* at 507.

149. *Id.* at 507–08.

150. 677 N.E.2d 1125 (Mass. 1997). The author was counsel for the Housing Authority in this case.

151. *Id.* at 1126.

judgment to the tenant under both the Federal Constitution and Massachusetts Declaration of Rights, finding that the policy violated the free speech rights of the tenant.¹⁵²

On appeal, the Supreme Judicial Court upheld the decision of the trial court under both the First Amendment and the state constitution.¹⁵³ The court began by noting that a similar ban on all door-to-door canvassing imposed by a municipality would not withstand constitutional scrutiny.¹⁵⁴ The court then stated, “[w]e reject the authority’s claim that its streets and sidewalks and the doorways of its apartment buildings are not areas to which the same rights [(as exist with respect to a municipality)] apply.”¹⁵⁵ The court relied heavily on the 1943 U.S. Supreme Court decision in *Martin v. Struthers* for this position, and rejected the GHA’s position that the streets and sidewalks of its development were a non-public forum.¹⁵⁶ The court declined to adopt the public forum doctrine as a decisional tool under the state constitution.¹⁵⁷ Addressing the federal claim, the court immediately found that the streets and sidewalks “fall squarely within the classification of a public forum.”¹⁵⁸

The authority is a public entity. Its property is publicly owned. There is no apparent distinction between its streets and sidewalks and those of a private development. A technical distinction that its ways are not accepted public ways but rather appear to be private ways open to the public makes no difference. The constitutional right of the authority’s tenants to receive communications may not be abridged by the blanket prohibition of campaigning and solicitation.¹⁵⁹

Rather than carefully looking at the intent of the government entity with regard to the use of the property (as more modern federal precedent

152. *Id.* at 1126–27.

153. *Id.* at 1127.

154. *Id.*

155. *Id.*

156. *Id.* at 1127–28. The court quoted from *Martin* with approval:

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.

Id. at 1127 (quoting *Martin v. Struthers*, 319 U.S. 141, 141 (1943)).

157. *Id.* at 1128.

158. *Id.*

159. *Id.*

such as *Perry* and *Cornelius* required), the Massachusetts court took a somewhat formalistic approach to the issue—if it looks like an ordinary city street or a sidewalk, it is a public forum.¹⁶⁰ It would appear that short of perhaps creating gated communities with check points, or similar frank differentiation from the surrounding streets, the Massachusetts court would not find housing authority streets and sidewalks to be anything other than prototypic public fora, regardless of the intent of the housing authority.¹⁶¹ Public ownership with a facial similarity to typical streets led to the conclusion that the area was a prototypic public forum.¹⁶² No specific evidence was cited by the Supreme Judicial Court that the housing property had been the type of property historically reserved and used for expressive purposes, other than its observation that the streets and sidewalks looked like municipal streets and sidewalks. In reaching its conclusion, the Massachusetts court directly attacked the reasoning and position of the Eleventh Circuit—and perhaps by inference that of the United States Supreme Court—stating,

[T]he reasoning of the court in the *Daniel* case is questionable. It seems that, because the authority had limited access to its property, the court concluded that the property was not a public forum. The proper question, it seems to us, was whether the authority had a right to limit access in the first place.¹⁶³

The Supreme Judicial Court's opinion is a challenge to the core analytic methodology of the public forum doctrine, as the touchstone of the public forum analysis is the intent of the governmental entity with regard to property that it owns—rather than property owned by others. The Eleventh Circuit looked at the intent of the housing authority and was chastised by the Massachusetts court for so doing.

160. *Id.*

161. *But see* *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985) (severe restrictions on access might infringe tenants constitutional and/or statutory rights); *McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332 (2d Cir. 1981). Interestingly, the Supreme Judicial Court, in attempting to distinguish *Daniel*, stated that the GHA had not offered any public safety justification for its barring policy. *Walker v. Georgetown Hous. Auth.*, 677 N.E.2d 1125, 1128 n.10 (Mass. 1997). However, earlier in the opinion the court had noted that the record below showed that the board adopted the regulation “in response to tenants’ concerns about safety, privacy, and peace and quiet.” *Id.* at 1126 n.5.

162. *See id.* at 1128.

163. *Id.* at 1128 n.10 (citation omitted).

D. The Supreme Court Revisits the Issue via the Commonwealth of Virginia

In 2003, the issue of how to address restrictions on freedom of expression on public housing authority property percolated its way back to the Supreme Court in *Virginia v. Hicks*.¹⁶⁴ The case took a long route to get to the Supreme Court. The first reported decision was out of the Virginia Court of Appeals in 2000.¹⁶⁵ In this initial decision, a panel of the Court of Appeals addressed a fairly typical factual situation. A development of the Richmond Redevelopment and Housing Authority (RRHA) was deeded certain former city streets by the City of Richmond.¹⁶⁶ The RRHA posted “no trespassing” signs on the streets and gave Hicks a no-trespassing order.¹⁶⁷ Hicks was eventually arrested for violating the order and challenged the constitutionality of the trespass policy in his criminal trial.¹⁶⁸ The policy indicated that non-residents who were invited to the property or who were there for legitimate business were not affected by the policy, which further included a process for lifting a “barment” order barring a person from trespassing on the property.¹⁶⁹ There was also a process for requesting permission to access the property to distribute flyers or other materials.¹⁷⁰

The majority opinion for the Virginia Court of Appeals found that the policy did not violate the First Amendment.¹⁷¹ Relying upon the *Daniel*¹⁷² opinion, the majority found, with little discussion, that the premises were a non-public forum and that the trespass policy was both reasonable and content-neutral.¹⁷³ The dissent, however, would have found that the property was a traditional public forum.¹⁷⁴ Echoing the Massachusetts Supreme Judicial Court in *Walker*, the dissent emphasized that the streets were not gated or barricaded and remained open to all vehicular traffic and that the sidewalks remained open to all passers-

164. 539 U.S. 113 (2003).

165. *Hicks v. Commonwealth*, 535 S.E.2d 678 (Va. Ct. App. 2000), *reh'g granted*, 537 S.E.2d 616, (Va. Ct. App. 2000), *vacated*, 548 S.E.2d 249 (Va. Ct. App. 2001), *aff'd*, 563 S.E.2d 674 (Va. 2002), *rev'd*, 539 U.S. 113 (2003).

166. *Id.* at 680.

167. *Id.*

168. *Id.* at 680–81.

169. *Id.* at 681.

170. *Id.*

171. *Id.* at 683.

172. *Daniel v. City of Tampa, Fla.*, 38 F.3d 546 (11th Cir. 1994).

173. *Hicks v. Commonwealth*, 535 S.E.2d 678, 683 (Va. Ct. App. 2000). The majority went on to also reject a First Amendment right of association challenge to the trespass policy, as well as a vagueness or overbreadth challenge. *Id.* at 683–84.

174. *Id.* at 685 (Coleman, J., dissenting).

through.¹⁷⁵ In light of these facts, the dissent would have held that while the “grounds and buildings of a public housing development [were] a ‘non-public forum’ designed to provide safe housing for its residents, the public streets and sidewalks” were a public forum.¹⁷⁶ The dissent distinguished *Daniel*¹⁷⁷ and relied upon the *Marsh*¹⁷⁸ decision to support its approach.¹⁷⁹

Review *en banc* by the Virginia Court of Appeals followed.¹⁸⁰ The *en banc* court held that the barment-trespass procedure violated the First Amendment and reversed the underlying criminal conviction.¹⁸¹ In a six-to-five decision, the majority applied the public forum doctrine to analyze the matter.¹⁸² Again reminiscent of *Walker*,¹⁸³ the majority noted that the “streets and sidewalks surrounding Whitcomb Court did not lose their public forum status when the City of Richmond deeded them to the RRHA and put some signs on the street indicating they were now private property.”¹⁸⁴ Accordingly, when the strict scrutiny standard of review was applied, the no-trespass policy did not pass muster.¹⁸⁵

The dissent in the *en banc* decision would have rejected the plaintiff’s challenge as an “improper collateral attack on his barment status.”¹⁸⁶ Additionally, the dissent would have found the barment rule not constitutionally overbroad under the First Amendment because its legitimate overall scope exceeded the scope of any impermissible application.¹⁸⁷ Finally, the dissent would have found that the physical characteristics of the property were sufficient to establish the area as a non-public forum and that the restrictions on speech surmounted the constitutional hurdle by being reasonable, limited, and justified.¹⁸⁸

175. *Id.*

176. *Id.* at 686 (citation omitted).

177. *Daniel v. City of Tampa, Fla.*, 38 F.3d 546 (11th Cir. 1994).

178. *Marsh v. Alabama*, 326 U.S. 501 (1946).

179. *Hicks*, 535 S.E.2d at 686–88 (Coleman, J., dissenting). The dissent concluded that any attempt to turn what had been without question a traditional public forum when a city street into a non-public forum simply failed on these facts. *Id.*

180. *Hicks v. Commonwealth*, 548 S.E.2d 249 (Va. Ct. App. 2001) [hereinafter *Hicks II*] (*en banc*), *aff’d*, 563 S.E.2d 674 (Va. 2002), *rev’d*, 539 U.S. 113 (2003).

181. *Id.* at 256–57.

182. *Id.* at 253–54.

183. *See Walker v. Georgetown Hous. Auth.*, 677 N.E.2d 1125, 1128 (Mass. 1997).

184. *Hicks II*, 548 S.E.2d at 254. (“Because the streets appear no different from other streets in Richmond and serve the same function they did prior to ‘privatization,’ ‘we can discern no reason why they should be treated any differently’ from any other street or sidewalk.” (quoting *United States v. Grace*, 461 U.S. 171, 179 (1983))).

185. *Id.* at 256.

186. *Id.* at 257 (Humphreys, J., dissenting).

187. *Id.* at 259.

188. *Id.* at 260–61.

Appeal to the Supreme Court of Virginia followed. The Supreme Court of Virginia reached only the overbreadth argument and, on that basis, reversed and remanded the matter.¹⁸⁹ The court noted that in its view, the United States Supreme Court has consistently held that governmental policies that grant officials “broad and unfettered discretion to regulate speech” violate the overbreadth doctrine.¹⁹⁰ After review of the factual record, the Supreme Court of Virginia concluded that the RRHA official—Rogers—did have

unfettered discretion to determine not only who has a right to speak on the Housing Authority’s property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature. However, a citizen’s First Amendment rights cannot be predicated upon the unfettered discretion of a government official.¹⁹¹

The majority specifically noted, but did not consider, the public forum doctrine arguments raised by the parties and the courts below.¹⁹²

The dissent in the Virginia Supreme Court would have found that Hicks did not have standing to raise a facial challenge to the trespass policy.¹⁹³ The dissent noted that by its terms, the policy was directed not at pure speech, but at conduct, i.e., trespassing.¹⁹⁴ As such, the dissent opined that the court should have applied a different standard, that being “where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”¹⁹⁵ A facial challenge would not lie where the policy was not substantially overbroad in a relative sense.¹⁹⁶ Applying this standard, the dissent found that the policy was not substantially overbroad, and thus Hicks could not raise a facial challenge.¹⁹⁷

189. *Commonwealth v. Hicks*, 563 S.E.2d 674, 680–81 (Va. 2002), *rev’d*, 539 U.S. 113 (2003).

190. *Id.* at 678 (noting the U.S. Supreme Court precedents).

191. *Id.* at 681.

192. *Id.*

193. *Id.* at 681–83 (Kinser, J., dissenting).

194. *Id.* at 683.

195. *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 770 (1982)).

196. *Id.*

197. *Id.* The dissent went on to note that even a facial challenge should have been analyzed under the public forum doctrine. *Id.* at 684. Then the dissent noted that since Hicks was not engaged in speech or expressive association at the time of his arrest (he was delivering diapers to his child), the only constitutional right Hicks could raise was that of intimate association. *Id.* at 684. Visiting

The matter then reached the United States Supreme Court. Justice Scalia, writing for a unanimous court, reversed the judgment of the Virginia Supreme Court, holding that the no-trespass policy was not constitutionally overbroad.¹⁹⁸ The Supreme Court reviewed the factual history and noted particularly that Hicks was not engaged in constitutionally protected conduct when he was arrested.¹⁹⁹ The Court began its analysis by narrowly defining the issue before it as the facial validity of the trespass policy under the overbreadth doctrine.²⁰⁰ In analyzing the matter, the Court reiterated its overbreadth jurisprudence and stressed that a law's application to protected speech under the First Amendment must be substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation."²⁰¹

Applying the rule set out, the Supreme Court noted that the policy—written and unwritten—did not appear to implicate First Amendment activities, as the policy *in toto* included such protected First Amendment activities within the scope of the provision for entry onto the property for legitimate business or social purposes.²⁰² Even as applied to entries for First Amendment covered activities by someone after being barred from the property, the Court stated that such trespass punishment is directed not at the protected activity—speech—but the non-protected, non-expressive conduct of re-entry.²⁰³ Accordingly, the Supreme Court held that Hicks had failed to show that the trespass policy "prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications."²⁰⁴ The Court reversed the Virginia Supreme

family members and delivering diapers has not been recognized as a fundamental right under the Fourteenth Amendment. *Id.* at 684–85. Therefore, a rational basis test was applied to test the constitutionality of the application of the policy to Hicks. *Id.* at 685. The policy here easily met this rational basis test. *Id.* at 685.

198. *Virginia v. Hicks*, 539 U.S. 113 (2003).

199. *Id.* at 118.

200. *Id.* at 115.

201. *Id.* at 119–20 (citation omitted) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Hicks bore the burden of proving that substantial overbreadth existed. *Id.* at 122. This analysis is of course the same analysis applied by the dissent in the Virginia Supreme Court.

202. *Id.* at 122–23.

203. *Id.* at 123. ("Punishing [the trespass policy's] violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hick's non-expressive conduct—his entry in violation of the notice-barmen rule—not his speech, for which he is punished as a trespasser.")

204. *Id.* at 124. Indeed, the Court went on to state that "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Id.*

Court and remanded the matter for further proceedings.²⁰⁵

On remand, the Virginia Supreme Court rejected Hicks's remaining First Amendment challenge: that the policy was unconstitutionally vague.²⁰⁶ Applying well-settled law that a plaintiff may not challenge the facial vagueness of a law as applied to the conduct of others where he has engaged in some conduct that is clearly proscribed by law, the Virginia Supreme Court held that the no-trespass policy could not have been clearer regarding Hicks's conduct.²⁰⁷ Accordingly, his vagueness challenge failed and, after the passage of much time, the trespass conviction of Mr. Hicks was upheld.²⁰⁸

Throughout the long and torturous trail of the *Hicks* case the Virginia appellate courts struggled to apply the public forum doctrine to the specific facts involving property owned by a unique governmental entity, the local housing authority in Richmond. Unfortunately, when the *Hicks* matter finally reached the U.S. Supreme Court, that Court decided the case under the First Amendment overbreadth doctrine and did not take the opportunity to discuss the possible conflicting lines of cases involving expressive restrictions on unique types of government property: *Marsh, Tucker, and Walker* versus *Daniel, Crowder, Vasquez, and Perry*. Since the U.S. Supreme Court last dealt specifically with public housing authority property in the context of restrictions on freedom of expression in *Tucker* in 1946,²⁰⁹ additional guidance in this field would have been welcome.

205. *Id.* The Court did note that specific applications of the policy that violate the First Amendment could still be addressed through "as-applied" constitutional challenges, rather than the "strong medicine" of the overbreadth doctrine. *Id.*

206. *Commonwealth v. Hicks*, 596 S.E.2d 74, 78 (Va. 2004).

207. *Id.*

208. *Id.* at 77–78, 81. The Virginia Supreme Court went on to also reject Hicks's Fourteenth Amendment substantive due process challenge based upon the claimed right of intimate association. *Id.* at 80. Hicks was claiming a right to visit his child and the child's mother to deliver diapers. *Id.* at 79–80. The court concluded that Hicks had failed to prove any such relationship actually existed. *Id.* at 80. Further, even if the relationship existed, the no-trespass order did not infringe upon the relationship as Hicks was free to exercise his associational rights, just not on the property of the Housing Authority. *Id.* A review of the issues raised by associational rights challenges to no trespass orders is beyond the scope of this article.

209. *See supra* Part III(a).

IV. PROPER ANALYSIS: BALANCING THE RIGHTS AND RESPONSIBILITIES
OF THE PARTIES IN THE PUBLIC HOUSING CONTEXT

The public forum doctrine as applied in the public housing context has received varied academic review, from a frank “advocacy article” on how to oppose these no-trespass orders,²¹⁰ to sweeping calls for legislative reforms,²¹¹ to various case reviews.²¹² Resolving the balance of the rights and responsibilities of all the parties requires sensitivity to many different facts and policies.

Essentially every federal court to address this issue has applied the United States Supreme Court’s modern public forum doctrine without reservation, while the Virginia appellate courts struggled with this problem and in *Walker v. Georgetown Housing Authority*, the Supreme Judicial Court of Massachusetts explicitly refused to adopt this doctrine for use under that state’s constitution.²¹³ In fact, the Massachusetts court even questioned the validity of this system of analysis under federal case law, relying instead on much earlier Supreme Court precedent to resolve the balancing of the particular rights and responsibilities of the varied parties.²¹⁴

In this author’s opinion, the proper consideration of cases involving the regulation of First Amendment expressive activities at a public housing authority mandates a clear and detailed factual review by the courts, as required by modern United States Supreme Court precedent and as applied by the courts of appeal. Critical facts examined in this review must begin with the intent of the governmental owner and the specific nature of the premises involved. The Massachusetts court

210. Elena Goldstein, Note, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L. L. REV. 215 (2003).

211. David G. Lazarus, Note, *Here Comes the Neighborhood—Virginia v. Hicks and How the New York Legislature Should Empower Law Enforcement with More Powerful Trespass-Barmen Statutes as a Tool to Combat Crime in Public Housing Projects*, 29 SETON HALL LEGIS. J. 315 (2004).

212. Gregory A. Beck, *Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?*, 2004 U. ILL. L. REV. 1223; Nancy Soonpaa, *Fifth Circuit Survey: Civil Rights Cases*, 34 TEX. TECH. L. REV. 597, 606–08 (2003); Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327, 375–384 (2003); Christopher D. Pelliccioni, Comment, *Political Speech in the Nonpublic Forum: Can Public Housing Facilities Limit Access to Political Canvassers?*, 53 CASE W. RES. L. REV. 569 (2002); *The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law: 2 Internet Filtering As a Condition of Federal Library Funding*, 117 HARV. L. REV. 349, 359–369 (2003).

213. 677 N.E.2d 1125, 1128 (Mass. 1997) (“We need not decide whether we would find the Supreme Court’s public, nonpublic, and limited public forum classifications instructive in resolving free speech rights under our Declaration of Rights.”).

214. *Id.* at 1128 n.9 (“There is concern about these classifications.”) (citing Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683–85 (1992)); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 993 (2d ed. 1988).

rejected this approach.²¹⁵ Relying heavily upon *Martin v. Struthers*,²¹⁶ the Massachusetts *Walker* court rejected the contention that a public housing authority's streets and sidewalks differed at all from the property of any municipality.²¹⁷ The Massachusetts court focused almost exclusively on the fact that the housing authority was a public entity and its streets and sidewalks appeared facially identical to municipal streets and sidewalks.²¹⁸ The Massachusetts court suggested that a public housing authority should not be able to limit access to such locales at all. The intent of the government entity—the local housing authority—should not be material.²¹⁹ In doing so, the Massachusetts court relied upon the early U.S. Supreme Court decisions of *Tucker*²²⁰ (government village case) and *Marsh*²²¹ (company town case).²²² The majority opinion of the Virginia Court of Appeals in its *en banc* consideration of the *Hicks* case echoed this analysis.²²³ The Massachusetts court even challenged the analysis used by the Eleventh Circuit in deciding the *Daniel*²²⁴ case:

[T]he reasoning of the court in the *Daniel* case is questionable. It seems that, because the authority had limited access to its property, the court concluded that the property was not a public forum. The proper question, it seems to us, was whether the authority had a right to limit access in the first place.²²⁵

Yet, the United States Supreme Court has made clear in more recent decisions that it is essential, in deciding cases involving the free-speech use of publicly owned property, to look to the intent of the government

215. See, e. g., *supra* Part III(b) and (d).

216. 319 U.S. 141 (1943).

217. *Walker v. Georgetown Hous. Auth.*, 677 N.E.2d 1125, 1127–28 (Mass. 1997); see also *Hicks v. Commonwealth*, 548 S.E.2d 249 (Va. App. Ct. 2001) (en banc majority decision); *Hicks v. Commonwealth*, 535 S.E.2d 678, 685 (Va. App. Ct. 2000) (Coleman, J., dissenting).

218. *Id.* at 1128. Specifically, the court stated,

The authority is a public entity. Its property is publicly owned. There is no apparent distinction between its streets and sidewalks and those of a private development. A technical distinction that its ways are not accepted public ways but rather appear to be private ways open to the public makes no difference. The constitutional right of the authority's tenants to receive communications may not be abridged by the blanket prohibition of campaigning and solicitation.

Id.

219. See *id.* at 1127–29.

220. *Tucker v. Texas*, 326 U.S. 517 (1946).

221. *Marsh v. Alabama*, 326 U.S. 501 (1946).

222. *Walker*, 677 N.E.2d at 1128.

223. *Hicks v. Commonwealth*, 548 S.E.2d 249 (Va. App. Ct. 2001) (en banc); see also *Hicks v. Commonwealth*, 535 S.E.2d 678, 685 (Va. App. Ct. 2000) (Coleman, J., dissenting).

224. *Daniel v. City of Tampa, Fla.*, 38 F.3d 546 (11th Cir. 1994).

225. *Walker*, 677 N.E.2d at 1128 n.10.

owner and the historical use of the property.²²⁶ Of course, the proper application of a nuanced, three-part public forum analysis does not necessarily lead to results where the housing authority universally prevails. A nuanced public forum analysis best balances the rights and needs of all the parties by carefully reviewing all factual elements, including the intent of the governmental entity, the nature of and historic use of the specific property, and the specific proposed solution.

As the Supreme Court has recently reaffirmed, courts must keep in mind that there is a difference between the government acting as sovereign and the government acting as landowner.²²⁷ A governmental actor acts as sovereign when it regulates individuals as members of the general populace.²²⁸ When the government acts to regulate a specific piece of its property and those particular individuals who use that property, it does not act as sovereign but as a unique type of landowner.²²⁹ The modern public forum doctrine applied to public housing authorities takes into proper account this difference. While a sidewalk or street owned by a municipality has traditionally been considered a public forum, the modern public forum doctrine requires a more detailed analysis when the sidewalk is in a public housing authority. Because attention must be given to the different nature of the property and the different intent of the government with regard to the use of the property, restriction may well be proper on the property of a public housing authority that no court would contenance on “Main Street, U.S.A.”

As the *Crowder*,²³⁰ *Daniel*,²³¹ and *Vasquez*²³² opinions indicate, the circuit courts have not been reluctant to strike down restrictions in non-

226. See *supra* notes 10-49 and accompanying text.

227. *Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002) (“But both of these cases deal with the acts of government as sovereign. In *Scales [v. United States]*, 367 U.S. 203, 224-225 (1961), the United States criminally charged the defendant with knowing membership in an organization that advocated the overthrow of the United States Government. In [*Southwestern Telegraph & Telephone Co. v. Danaher*] 238 U.S. 482 (1915), an Arkansas statute forbade discrimination among customers of a telephone company. The situation in the present cases is entirely different. The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required. *Scales* and *Danaher* cast no constitutional doubt on such actions.”).

228. *Id.*

229. *Id.*

230. *Crowder v. Hous. Auth.*, 990 F.2d 586 (1993).

231. *Daniel v. City of Tampa, Fla.*, 38 F.3d 546 (11th Cir. 1994).

232. *Vasquez v. Hous. Auth.*, 271 F.3d 198, 203-206 (5th Cir. 2001) (The 5th Circuit struck down the complete ban on political campaigning on the premises of the HACEP as being unreasonable even in a nonpublic fora, but upheld a registration requirement applied to all individuals conducting business on the property including campaigners).

public fora²³³ where such restrictions are not tailored to meet the governmental intent and sweep too broadly. As those cases note, a total ban on campaigning and soliciting, for instance, can certainly be seen as an unreasonable restriction not tailored to the problem sought to be addressed by the authority and may not pass even minimal rationality review.

Indeed a fact specific analysis of restrictions on access to public housing property for expressive purposes *guarantees* a more careful and thoughtful review because the reviewing court must look at the nature of the property in issue, the problem being addressed, the access requested, the intended use and the need for access in a historical context. Such nuanced balancing of conflicting rights and responsibilities contrasts with Massachusetts' approach in *Walker* or the majority opinion in the Virginia Appeals Court *Hicks* decision—if it appears to be public and is owned by a governmental entity, it must be a public forum. Indeed, this type of per se approach may invite a policy of segregating or gating off public housing from the neighborhood in which it sits. If one primary way to achieve non-public forum treatment under the First Amendment is to erect physical barriers between public housing and its environs, what impression is being conveyed concerning public housing residents? How would such barriers conflict with other statutory and constitutional rights of public housing tenants rights?²³⁴

V. CONCLUSION

A careful balancing of the rights of the government entity as property owner (not as sovereign), the rights of all the tenants (even if those rights conflict), and the rights of those who seek to pursue First Amendment activities within a housing development is the most reasonable approach to dealing with the complex public policy concerns raised by freedom of expression restrictions within a public housing authority's property. The public forum doctrine developed by the Supreme Court since the 1980's and subsequently applied by the circuit courts of appeal subsequently in the context of public housing authorities properly strikes this balance. The Massachusetts court, and some of the judges of the intermediate Virginia appellate court, by relying on dated precedent to question the

233. *See also* Daily v. N.Y. City Hous. Auth., 221 F. Supp. 2d 390 (E.D.N.Y. 2002) (a ban on religious bible study meetings even in nonpublic or limited public forum—community center—is neither viewpoint neutral nor reasonable); *compare* Concerned Residents of Taylor-Wythe v. N.Y. City Hous. Auth., No. 96 Civ. 2349, 1996 U.S. Dist. LEXIS 11460 (S.D.N.Y. Aug. 8, 1996) (New York City Housing Authority's restrictions reserving the community center, a non-public forum, to official tenant organizations was valid).

234. *See supra* note 161.

validity of this approach, adequately addressed neither the realities of the unique nature of public housing nor the real differences between the government acting as sovereign versus landowner. The general history of the First Amendment shows that the expressive rights protected under its umbrella are not absolute,²³⁵ and the considered approach of the federal courts under the modern public forum doctrine is the best available approach for resolving these complicated issues.

235. *See, e.g.*, NOWAK & ROTUNTA, CONSTITUTIONAL LAW, §§ 16.1, 16.7, 16.25 (6th ed. 2000).