

First Amendment Rights vs. Public Safety

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Goals of this presentation

- Outline *general* principles of First Amendment law as it relates to balancing the right to freedom of speech with a municipality's interest in public safety.
- Lay out some clear dos and don'ts and confirm whether you have a constitutional parade ordinance.
- Give you enough background to spot potential free speech issues and seek legal advice before making a decision.

The First Amendment Protects Against State Intrusion on the Freedom of Speech and is Applicable to the States

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, of *abridging the freedom of speech*, or of the press; or *the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances.” U.S. Const. Amend. I (emphasis added).

While the Bill of Rights originally applied only to limit the power of the federal government, the Fourteenth Amendment, enacted in the aftermath of the Civil War, provides that no State may abridge “the privileges or immunities of citizens of the United States” or deprive “any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. 14 § 1.

The United States Supreme Court held that the Fourteenth Amendment “incorporated” most of the rights set out in the Bill of Rights against the States. *See McDonald v. City of Chicago*, 561 U.S. 742, 759-66 (2010). Thus, States (and their political subdivisions) cannot unconstitutionally burden a citizen’s right to freedom of speech.

What are some typical ways in which the right to speech is “abridge[ed]?”

If you are *lawfully* engaged in exercising the right to free speech, the State cannot:

- Charge you with a criminal offense for engaging in speech or expressive conduct, e.g. disorderly conduct, obstructing a governmental operation.
- Allowing some groups to assemble but denying others the right to assemble based on the content of their speech or the viewpoint expressed.
- Retaliating against a citizen for engaging in protected speech, e.g. denying a citizen a zoning variance because he criticized the Mayor on Facebook.

Skin in the Game: Civil Liability for Violations of Federal Constitutional Rights

Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, *subjects, or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution* and laws, *shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress 42 U.S.C.A. § 1983 (emphasis added).

This statute provides for civil liability against individual state actors for violating clearly established federal constitutional rights and against municipalities where the constitutional violation is the result of a policy, practice, or custom of the municipality.

A (*Very*) Rough Analysis for a Free Speech Claim

1. Was the citizen engaging in protected speech when the state regulation occurred?
2. *Where* did the speech occur?
 - Public forums, limited public forums, and non-public forums.
3. If the citizen was engaging in protected speech in a public forum or limited public forum, was the state's regulation related to the *content* of the speech or the speaker's *viewpoint*?
 - If so, then the action most likely violated the speaker's constitutional rights.
 - If the regulation was a content-neutral time, place, or manner regulation, then it is permissible if it serves an important government interest and leaves open adequate alternative places for speech.
4. The government can require a license for speech in public forums only if there is an important reason, clear criteria leaving almost no discretion to the licensing authority, and there are procedural safeguards such as the prompt determination of license requests and judicial review of license denial.

When is speech constitutionally protected?

Simple: speech is constitutionally protected unless it belongs to one of those *narrow* categories of speech recognized as unprotected by the Supreme Court.

- Incitement to *imminent* illegal activity. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- “Fighting words,” i.e. words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
- A “true threat” where a “speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Virginia v. Black*, 538 U.S. 343, 360 (2003).
- Obscenity, i.e. material that (1) appeals to the prurient interest applying contemporary community standards, (2) depicts sexual conduct in a way that is “patently offensive,” and (3) taken as a whole “lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

Where does the speech occur? This determines the level of protection to which the speech is entitled.

- Traditional public forum, i.e. public property that since “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 450 U.S. 37, 45 (1983).
 - Includes streets, sidewalks, and parks. *Does not* include courthouse corridors, jails, and airports.
- A designated public forum is “government property that has not traditionally been regarded as a public forum” but that has been “intentionally opened up for that purpose.” *Christian Legal Soc. V. Martinez*, 561 U.S. 661, 679 n. 11 (2010).
- A limited public forum is created when the government opens up its property to expressive activity but limits its use to certain groups or dedicate it solely to the discussion of certain subjects. *Christian Legal Soc.*, 561 U.S. at 679 n. 11.

Permissible Regulations

Traditional or designated public fora

The only permissible regulation is a content-neutral time, place, or manner restriction that is narrowly tailored to achieve a significant government interest and leaves open ample alternative channels of communication.

Limited public forum

Regulations need only be reasonable and viewpoint neutral.

A speaker may be excluded if he is not a member of the class of speakers for whose especial benefit the forum was created.

Examples of permissible content neutral time, place, and manner regulations

- Prohibition on selling or distributing written materials at state fair except from fixed location. *Heffron v. International Soc. For Krishna Consciousness*, 452 U.S. 640 (1981).
- “Buffer zones,” particularly those required to allow access to health clinics. *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997) (upholding fixed 15-foot buffer zone outside abortion clinics).
- Ordinances prohibiting unreasonable noise. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Parade Permits

- A municipality has the authority to control the use of its public streets for parades or processions. *Cox v. State of New Hampshire*, 312 U.S. 569, 576 (1941).
- The decision to grant or withhold a parade permit cannot be content-based.
- The power to grant a license or permit is unconstitutional unless there are “narrow, objective, and definite standards to guide the licensing authority” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (invalidating ordinance that granted city commission “virtually unbridled” discretion to grant parade permit).

Important: The decision to grant a parade ordinance *cannot* take into account the anticipated cost of protecting against counter protestors

- The Supreme Court invalidated a parade ordinance with an increasing permit fee based on the anticipated cost of providing police protection for counter-demonstrators even though the fee had a \$1,000 cap. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).
- The court held this permit requirement was impermissibly content based because the “fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content.” *Forsyth Cnty.*, 505 U.S. at 134.
- However, the Eleventh Circuit has held that a permit fee that varies based *only* on the number of anticipated demonstrators, that *specifically excludes* the cost of police protection, and that is otherwise “nominal” is permitted. *See Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301 (11th Cir. 2000).

Sample Constitutionally Valid Parade
Ordinance: City of Hoover

Preliminary Injunction Against Auburn University
to Allow Richard Spencer to Speak

Conclusions

- Avoid content-based regulation of speech in public fora.
- Make sure any regulation on speech in a public forum is content neutral, narrowly tailored towards a significant gov't interest such as public safety, and leaves open ample opportunity for alternative channels of communication.
- Make sure you have a parade ordinance in place with sufficient guidance for the issuing authority.
- If in doubt about regulating speech in a public forum, seek legal guidance before making a decision if at all feasible.

Questions

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