

From Protests and Rallies to Employee Speech and Public Comment: The First Amendment's Impact on Cities

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The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

Free Speech & Social Media

Individual or Official Speech?



Columbia Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019)

The President of the United States continued to use his personal Twitter account after he came into office, and he blocked some followers, which is allowed under Twitter's terms of service.

Did the president violate the First Amendment?

ANSWER: Yes.

Columbia Univ. v. Trump

How do we know when a government official is using social media in his official capacity?

Three Questions:

(1) How is the account described?

(2) To whom is the account made available?

(3) How do others, including government officials and agencies, regard and treat the account?

Moderating Public Comments



Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2021)

A public-school board of trustees adopted a policy of using “word filters” to block commenters who repeatedly and frequently posted comments critical of the school district.

Did the school board violate the First Amendment?

ANSWER: Yes.

Garnier v. O'Connor-Ratcliff

How do we know when a social media page is a “public forum”?

Three Questions:

- (1) Has the government made the page “available for use by the public”?
- (2) Does the government have a policy or practice of regulating the content on the page?
- (3) Is the control “clear and consistent”?

Free Speech & Protests



Managing Protests

Abolish Abortion Ore. v. City of Grants Pass, 593 F. Supp. 3d 1047 (D. Or. 2022)

City of Grants Pass enforced a noise ordinance against protestors using microphones, bullhorns, and other amplified noise, including citing them for “disorderly conduct” misdemeanors.

Did the City violate the protestors’ First Amendment Rights?

ANSWER: No.



Abolish Abortion Oregon v. City of Grants Pass

When are protest restrictions allowed?

Four Questions:

- (1) Are they directed at “noncommunicative” aspects of speech?
 - Examples include volume of noise, amplification, or physical behaviors such as blocking a sidewalk.
- (2) Do they serve a legitimate government interest?
- (3) Is it narrowly tailored to that purpose?
- (4) Does it leave open ample alternative channels of communication?

Free Speech & Government Employees

Speech-Related Discipline

Barone v. City of Springfield, 902 F.3d 1091
(9th Cir. 2018)

City police officer was disciplined after she told the Springfield City Club that she had received reports of racial profiling.

Did the City violate her First Amendment Rights?

ANSWER: No.



Barone v. City of Springfield

How do we know whether an employee is speaking as a private citizen or a public employee?

Five Questions:

(1) Did she speak on a matter of public concern?

(2) Did she speak as a private citizen rather than a public employee?

- Did she speak with a person with whom she would normally have contact at work?
- Does the speech interfere with the employer's regular operation?
- Was her speech pursuant to her official duties?

First Amendment Principles

Viewpoint Discrimination

- THE BIG ONE
- What it means: That the government cannot regulate speech on the basis of the viewpoint that the speaker supports.
 - Viewpoint discrimination is often referred to as “censorship.”
 - It is often the result of **noble** impulses, not nefarious ones.
 - It is **never** allowed.

Examples of Viewpoint Discrimination

- Prohibiting some protests but allowing others
- Banning or removing commenters on city social media pages on the basis that they support or oppose a particular policy
- Selectively prosecuting only some political protesters
- Giving traffic tickets to drivers with bumper stickers supporting a certain party or candidate
- Banning political insignia for some groups but not others
- Restricting comments at public meetings to allow only certain viewpoints or perspectives
- Adopting an ordinance prohibiting certain offensive terms or slurs
- Prohibiting only certain groups from meeting in otherwise-available public spaces

Time, Place, Manner

- THE OTHER BIG ONE
- What it means: Laws that control when, where, and how speech can take place, regardless of what is being said.
 - Think of these restrictions as rules. Everyone has to follow them, regardless of the team they play for.
 - Time, place, manner restrictions are **almost always** okay...
 - ... as long as they apply the same to everyone.

Questions?



Thank You



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