# Municipalities and the First Amendment

The First Amendment to the United States Constitution protects individual liberties, granting freedom of religion, speech and peaceful assemblage from intervention by the federal government. These individual liberties are protected from invasion by state and local governments by the Fourteenth Amendment.

The language of the First Amendment is broad, making it subject to a wide range of interpretation. It states that "Congress shall make no law respecting an establishment of religion, or 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 the redress of grievances." The Attorney General's office has held that a determination regarding whether a municipal ordinance is constitutional can only be made by the courts. AGO 2000-104.

Municipal officials must be aware of the latest interpretations of the First Amendment. The parameters of the amendment are constantly being redefined by the courts. This article surveys the First Amendment as it relates to municipalities and provides an overview of the major areas involving problems for municipal regulation.

**Freedom of Religion**

For many individuals, no personal freedom is more important than the freedom to worship. Wars continue to be fought in many parts of the world to secure this freedom. Every child is taught that this desire was one of the principal reasons the original colonies sought independence from England.

The First Amendment guarantees that every person has the right to worship, or refuse to worship, as he or she chooses. The First Amendment also ensures that government, on any level, will not become involved in establishing one religion over another.

The Establishment Clause was intended to erect a "wall of separation between the church and the state." *Illinois v. Board of Education*, 333 U.S. 203 (1948). The goal was not only to stop the intrusion of government into private affairs of religion, but also to prevent the intrusion of the church into the affairs of state. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The goal is governmental neutrality where religion is concerned. Municipalities must exercise care to avoid either improperly endorsing or burdening religious activities.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the United States Supreme Court set out a three-part test for determining whether a governmental act violates the Establishment Clause by endorsing a religion. First, the act must reflect a clearly secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. And, third, it must avoid excessive governmental entanglement with religion. If these three criteria are met, a governmental act does not violate the Establishment Clause.

The Supreme Court has also formulated a test for determining whether a governmental act unconstitutionally burdens the free exercise of religion. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972) the Court stated that first a court must determine whether the regulation in question constitutes such a burden. Then, a court must decide whether the governmental objective can be achieved by a less restrictive method, regardless of whether the governmental interest is of a greater magnitude. Ordinances are to be construed, if possible, to remove any possible danger that might be used to restrain or burden freedom of worship. *See, People v. Barber*, 46 N.E.2d 329 (1943).

Prayer at public meetings is often a source of friction involving the First Amendment. In *Town of Greece v. Galloway*, 134 S.Ct. 1811, 572 U.S. ___ (2014), the U.S. Supreme Court held that local governments may open their meetings with prayers that are explicitly religious. Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. So long as the town maintained a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The town's prayer practice did not violate the Establishment Clause because it did not compel its citizens to engage in a religious observance.

The 11th Circuit Court of Appeals has held that when determining whether a governmental body's prayer violates the Establishment Clause of the First Amendment, the content of the prayer is not of concern if there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief. The impermissible motive standard for determining whether a government action violates the Establishment Clause of the First Amendment does not require that all faiths be allowed the opportunity to pray, but instead prohibits purposeful discrimination. *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, (11th Cir.2013).

At Christmas, many municipalities want to display nativity scenes. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court ruled that a nativity scene displayed at Christmas is permissible. It should be noted that the display at issue in this case was merely one part of a much larger display of figures and traditions associated with the Christmas season. Taken in this light, the majority in this case was willing to permit the display. It is still undecided whether a display of just a nativity scene would be interpreted as a violation of the Establishment Clause. It has been held that allowing the unattended privately-sponsored display of a 15-foot menorah in the rotunda of a state capitol that is designated a public forum does not violate the Establishment Clause. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

In two cases, the Supreme Court further elaborated on the issue of endorsement of religion. In *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court held that chapter 2 of the 1981 Education Consolidation and Improvement Act, which channels federal funds to local education agencies to acquire, for use in public and private schools, instructional and educational materials, has a secular purpose and does not have the effect of advancing religion and therefore does not violate the First Amendment's Establishment Clause.

At the same time, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court held that a public school district's policy authorizing high school students to vote on whether to include a student delivered "invocation" or "message" at football games, and, if so, to elect a student to deliver it, involves state sponsored religious speech, rather than private speech, and results in coerced participation of those present at games in religious exercise and violates the First Amendment's Establishment Clause. The distinction appears to be that in this case, the activity took place at a school sponsored event.

However, in a case released a year later, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Court seemed to contradict this holding. There, a group of students were refused permission to use the school facilities after school hours for meetings. The school did make allowances for other student groups to meet during this time for social and recreational activities. The Court held that this refusal violated the First Amendment because it amounted to viewpoint discrimination. The key appears to be that this was not a school sponsored activity – instead, the school merely allowed students with similar interests time to meet together on school property. The fact that this particular student group's interest was prayer-related did not matter.

Two other U.S. Supreme Court cases have further examined the issue of public endorsement of religion. In *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court held that evidence that displays of framed copies of the Ten Commandments in county courthouses accompanied by copies of secular documents allegedly significant to the foundation of the American government were installed for a predominantly religious purpose demonstrates that the displays violate the First Amendment's Establishment Clause under the "secular purpose" prong of the test promulgated in *Lemon v. Kurtzman*.

In *Van Orden v. Perry*, 545 U.S. 677 (2005), though, the Court ruled that the display of a monument inscribed with the Ten Commandments on the grounds of the state capitol amid other monuments and markers reflecting a state's history does not violate the First Amendment's Establishment Clause.

Municipalities frequently confront First Amendment issues when they attempt to regulate solicitation because many entities involved in soliciting funds are religious in nature. These entities frequently challenge municipal authority to regulate their activities. A city ordinance, which required anyone conducting a "large group feeding" within a downtown park district to obtain a permit first and which limited the maximum number of permits that a person or organization could obtain to two per year per park, was, as applied to an organization of political activists, a reasonable time, place, or manner restriction. The city neither attempted to ban large group feedings generally nor to ban them everywhere in the parks. The ordinance left open ample channels of communication and furthered the city's substantial interest in managing its parks and spreading the burden of large group feedings. *First Vagabonds Church of God v. City of Orlando, Fla.*, 638 F.3d 756 (11th Cir.2011).

It must be noted that Congress has passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) that prohibits municipalities from taking any action that constitutes a significant burden on religious activities. Additionally, Alabama voters passed Amendment No. 622, Alabama Constitution, 1901, the "Alabama Religious Freedom Amendment", which prohibits government from taking any action that constitutes a burden on religion. These actions will have a tremendous impact on the relationship between municipal governments and religious institutions. The goal of avoiding governmental endorsement of religion does not require eradication of all religious symbols in the public realm. The Establishment Clause does not

oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework. *Salazar v. Buono,* 130 S.Ct. 1803 (U.S.2010).

**Freedom of Speech**

The First Amendment also provides that Congress shall make no law abridging the freedom of speech or freedom of the press. This ban, likewise, is made applicable to state and local governments by the Fourteenth Amendment.

In construing municipal legislation which restricts freedom of speech, a court must examine the effect of the legislation and weigh the circumstances and the substantiality of the reasons advanced favoring the regulation. An ordinance is to be construed, if possible, to remove any danger of its impairing free speech. *See, People v. Barber,* 46 N.E.2d 329 (1943). Any doubt as to whether an ordinance unconstitutionally infringes upon freedom of speech should be resolved against the ordinance.

In analyzing the free speech rights granted by the First Amendment, it is important to know the context, manner or place in which the speech is to be expressed. Case law makes a distinction between a public forum, a limited public forum or a non-public forum. When a First Amendment free speech challenge arises from a restriction on speech on government owned or controlled property, the classification of the forum as a traditional public forum, designated public forum, or limited public forum determines the contours of the First Amendment rights that a court recognizes when reviewing the challenged governmental action. A council meeting is generally a limited public forum for which regulation of speech is required only to be viewpoint-neutral and reasonable. Even if a limitation on speech in a limited public forum is a reasonable time, place, and manner restriction, there is a First Amendment violation if the defendant applied the restriction because of the speaker's viewpoint. *Galena v. Leone*, 638 F.3d 186 (3rd Cir.2011).

A public forum is one which, by long tradition or by governmental declaration, has been devoted to public assembly and debate. The right of a government to regulate speech in these areas is sharply limited.

Public forums are places, like city parks and sidewalks, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used to purposes of assembly, communicating thoughts between citizens, and discussing public questions. For the government to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations on the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication." *Perry Educational Assoc. v. Perry Local Educators Assoc.*, 460 U.S. 37 (1983) (citations omitted).

A limited public forum is one that has been set aside by a government for expressive activity. The government may limit the length of time the forum will remain open or limit discussion to specific topics. As long as the forum remains open, however, the government is bound by the same standards that apply to a public forum.

The First Amendment does not guarantee public access to a non-public forum, even when the forum is owned or controlled by the government. A non-public forum is one that is not traditionally open for public communication, or that has never been set aside by the government for this purpose. In these areas, the government may reserve the use of the property for its intended use, and may regulate speech, as long as the regulation is reasonable and is not an effort to suppress speech merely because public officials oppose the viewpoint.

Freedom of speech does not prevent the exercise of police or other sovereign powers in many circumstances. For instance, even though streets and parks are recognized as traditional gathering places for the dissemination of ideas and the communication of thoughts, a municipality may require a permit to use the park, provided the permit is not subject to unguided official discretion. *Jamison v. Texas*, 318 U.S. 413 (1943). In order to be valid, a permit requirement must provide standards officials are to follow in issuing the permit. Officials cannot have unbridled discretion in whether to award a permit, or the cost or conditions under which a permit will be awarded. For instance, in *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123 (1992), the Supreme Court held that an ordinance which required applicants for a parade permit to pay in advance a fee of up to $1,000, adjustable by the county administrator on a case-by-case basis, violated the First Amendment. More information on parade regulation is included below.

The use of sound trucks, loudspeakers or amplifiers is subject to reasonable regulation, provided there is no arbitrary discretion vested in an official to permit or refuse the use of such equipment.

Reasonable time, place and manner restrictions will be upheld as long as the restriction is narrowly tailored to serve a significant government interest and provided alternative channels of communication exist. *Perry Education Association v. Perry Local Educator's Association,* 460 U.S. 37 (1983).

The Eleventh Circuit Court of Appeals has held that a municipal ordinance that bans barkers from distributing handbills in certain districts is designed to reduce litter and sidewalk congestion and does not violate the First Amendment. *Sciarrino v. Key West, Fla.,* 83 F.3d 364 (11th Cir. 1996). Commercial speech is subject to more regulation than political or religious

speech. In addition, the protection of the First Amendment does not extend to conduct which is not associated with the communication of speech. *See, City of Chattanooga v. McCoy*, 645 S.W. 2d 400 (Tenn. 1983). The United States Supreme Court held in *Hartman v. Moore*, 547 U.S. 250 (2006), that a plaintiff who alleged that he was criminally prosecuted for exercising his First Amendment rights must prove that there was no probable cause to support the criminal charge.

Speech at a public place on a matter of public concern cannot be restricted simply because it is upsetting or arouses contempt, because if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Speech of church members who picketed near a funeral of a military service member was of public concern and therefore was entitled to special protection under the First Amendment. *Snyder v. Phelps*, 562 U.S. 443 (U.S. 2011). A protester who belongs to a church that believes that war casualties are God's punishment of America for tolerance of homosexuality and who pickets at military funerals is entitled, under the First Amendment, to a preliminary injunction against Missouri statutes prohibiting picketing at a funeral site within an hour before or after the scheduled service. *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007). A statute regulating protests at funerals was predominantly content-neutral, qualifying for First Amendment analysis under intermediate scrutiny standard, even though statute was admittedly enacted in reaction to single church's practice of harassing funeral attendees with messages insulting homosexuals or homosexuality; statute applied to protests advancing speech of any kind, and had content-neutral goal of preventing interference with funerals and protecting attendees from hearing any unwanted messages. *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D. Ky. 2006).

A city policy requiring all persons wishing to participate in a protest near a military base to submit to a mass metal detector screening at a checkpoint blocks away from the actual protest site violates the protestor's right to be free from unreasonable searches and seizures under the Fourth Amendment and their First Amendment free speech rights. *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004).

**Employees**

The U.S. Supreme Court has established the *Pickering-Connick* four-stage analysis for examining retaliatory treatment cases involving a public employee's exercise of First Amendment rights, that requires a trial court to determine (1) whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern, and if that is established; (2) whether, under the balancing test, the interests of the employee outweigh the interest of employer, considering the context and circumstances of the employee's speech, and if first two stages are satisfied, the fact-finder must determine; (3) whether the identified protected speech played a substantial part in the employment decision, and, if so; (4) whether the employer has proven that it would have reached the same decision even in the absence of the protected speech. See *Pickering v. Board of Education,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983).

In *Smith v. State Dept. of Public Safety*, 716 So.2d 693 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that although a letter to the editor written by a police officer addressed a matter of public concern, the potential disruption to the department and on-going investigations outweighed the officer's right to free speech. Therefore, termination of his employment was proper.

The United States Supreme Court has held that a public employee who makes a statement as part of his official duties (in this case, an assistant district attorney who wrote an official memo objecting to pursuing a prosecution) is not speaking as a citizen and thus is not protected by the First Amendment from employer discipline for his statement. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In another case the Eleventh Circuit Court of Appeals held that even if an employee's tasteless and vulgar personal attack on a county commissioner during the public comment time of a meeting of the board of county commissioners was protected speech under the First Amendment, the county's termination of the employee for directly insulting and showing contempt for a county commissioner did not violate the First Amendment. The First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, personal attack, even if such an attack touches on a matter of public concern; if the manner and content of an employee's speech is disrespectful, demeaning, rude, and insulting, and is perceived that way in the workplace, the public employer is within its discretion to take disciplinary action. *Mitchell v. Hillsborough County*, 468 F.3d 1276 (11th Cir. 2006).

The Eleventh Circuit has also held that speech of a former assistant fire chief who served on city's pension board regarding his disagreement with city's handling of budget and pension issues was made in furtherance of his job responsibilities, and thus, did not constitute protected speech, as required to support employee's First Amendment retaliation claim arising from his termination. The city's interest in avoiding dissention and discord within the fire department outweighed the interests of a city employee. *Moss v. City of Pembroke Pines,* 782 F.3d 613, 2015 WL 1423662 (C.A.11 Fla.2015).

When a public employee sues a government employer for retaliation under the First Amendment's Speech Clause, the

employee must show that he or she spoke as a citizen on a matter of public concern. Even if a public employee speaks as a citizen on a matter of public concern, his or her speech is not automatically privileged, since the First Amendment interest of the employee must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (U.S.2011).

**Cable Television Franchises**

In *Los Angeles v. Preferred Communications, Inc*., 476 U.S. 488, (1986), a unanimous Supreme Court held that First Amendment rights to freedom of speech are implicated when a city refuses to permit a second cable television company to operate within the city limits. In this case, Los Angeles held an auction to decide which of several cable television companies would be granted an exclusive franchise to provide cable television services to the city's residents. Preferred Communications, Inc. did not participate in the auction, either because it chose not to or because it did not know about the auction. When Preferred Communications requested permission from the Los Angeles Department of Water and Power to lease space on its utility poles in order to run its cables, the department stated that it would not lease the space unless the company could obtain a franchise from the city. Los Angeles refused to grant the franchise because Preferred did not participate in the auction.

Preferred Communications sued, arguing that the furnishing of cable service was a First Amendment right and because the Los Angeles area was large enough to support more than one cable company, the city had violated the company's right to free speech by denying the franchise. The city admitted that Los Angeles was large enough to support more than one cable company, but contended that the physical scarcity of available space on public utility structures and the limits of economic demand for cable service justified the city's decision to restrict access to its facilities.

The Supreme Court held, if the facts as alleged proved to be true, that the First Amendment rights of Preferred Communications had been violated. The Court noted that because cable operators exercise editorial control over what programming they will air, cable television "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers and pamphleteers."

However, the Court stated that the city could still legally restrict the company's right to free speech if the interests of society, when balanced against the First Amendment right implicated, outweighed the right to free speech, because, in this case, speech is combined with conduct. The Court declined, though, to formulate a standard for the city to use in deciding whether to grant a cable franchise. A concurring opinion stated that such a standard could only be formulated after factual information concerning the case was gathered at trial.

In *Warner Communications, Inc. v. Niceville*, 911 F.2d 634 (11th Cir. 1990), the Eleventh Circuit Court of Appeals upheld the right of a municipality to operate its own cable company, in part holding that the operation of a municipal cable company did not violate the private provider's First Amendment rights.

**Regulation of Adult Businesses**

Another First Amendment area in which cities must be careful is the regulation of adult businesses. First Amendment challenges are given priority by the courts. The First Amendment of the United States Constitution requires that a licensing scheme for adult businesses provide applicants challenging a denial of a license with a "prompt judicial determination" of the constitutionality of the denial, as opposed to mere prompt access to judicial review. *Littleton, Colo. v. Z.J. Gifts D-4, LLC,* 541 U.S. 774 (2004). In *Renton v. Playtime Theaters, Inc.,* 475 U.S. 41 (1986), the Supreme Court upheld a zoning ordinance designed to restrict adult businesses to a particular area of the city. However, adult businesses are still protected by the First Amendment which would prohibit a total ban.

The Supreme Court, though, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), concluded that the First Amendment's guarantee of free expression only "marginally" protects nude dancing, and that such expressive conduct is "within the outer perimeters of the First Amendment." In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court noted that an adult use regulation is narrowly tailored "so long as the… regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Provided "the means chosen are not substantially broader than necessary to achieve the government's interests, the regulation will not be invalid simply because a court concludes that the government's interest could have been adequately served by some less-speech-restrictive alternative." *Ward* thus seems to expressly reject a requirement that the government utilize the "least restrictive means" or the "least restrictive alternative" in order to meet the narrowly tailored requirement.

Municipalities attempting to regulate adult business generally do so in one of two ways. Either they attempt to control the location and use of these businesses through zoning power, or they use a public nudity ordinance. Each of these ordinances requires meeting different standards to be valid. Although the cases are confusing and somewhat complicated, certain principles can be drawn, at least here in the Eleventh Circuit.

In *Peek-a-boo Lounge of Bradenton v. Manatee County, FL.,*337 F.3d 1251 (11th Cir. 2003), the Eleventh Circuit Court of Appeals identified a three-part test that must be answered before a zoning adult-use ordinance can be upheld: "first, the court must determine whether the ordinance constitutes an invalid total ban [which would be impermissible] or merely a time, place and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication."

The court found that a four-part test applies to public nudity ordinances. "According to this test, public nudity ordinances that incidentally impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest."

To pass either type of ordinance, a city must demonstrate, by a record of findings, that such businesses cause some secondary effect, such as increased crime, which requires city regulation. These findings may be based on the experiences of other cities. It is not necessary that the city choose the same method of regulation as was used by the city that made the survey.

In *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), though, the Court stated that this does not mean:

> "... that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

Thus, there must be evidence showing what secondary effects the municipality is attempting to avoid. In *Peek-a-boo Lounge*, for instance, the Eleventh Circuit Court of Appeals held that a zoning ordinance that imposed requirements on the physical layout of adult dancing establishments and allowed the county sheriff to search such premises without a warrant violated the First Amendment. The court held that even if the ordinance was a valid time, place and manner regulation that was properly subject to intermediate scrutiny, the county, when enacting the ordinance, failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the county's interest in combating secondary effects. While the public entity does not have to conduct its own studies, it must rely on evidence it reasonably believes relevant that is before the entity *at the time the ordinance is enacted*. This evidence must be relevant to the problem the municipality seeks to eliminate.

To accomplish this goal, the ordinance must be "content neutral." That is, it must be designed to eliminate the secondary effect without unnecessarily limiting alternative avenues of expression. The goal must be to regulate the time, place and manner of expression rather than to completely eliminate adult businesses from the community. As long as the ordinance is content neutral, however, the actual intent of the municipal governing body is irrelevant.

For instance, in *Trop, Inc. v. City of Brookhaven*, --- S.E.2d ----, 2014 WL 4958232 (Ga.2014), the Georgia Supreme Court held that a City's sexually-oriented business ordinance did not unconstitutionally infringe on sexually-oriented entertainment club's free speech rights. The ordinance was content-neutral in light of the city council's goal of combatting pernicious secondary effects coupled with a lack of evidence to establish improper motive on the part of city council. The ordinance furthered an important governmental interest of attempting to preserve the quality of urban life and reducing criminal activity which was unrelated to any desire to suppress speech, any incidental restriction on speech caused by the ordinance was no greater than essential to further the governmental interests, and the ordinance's application was narrowly tailored to modes of expression implicated in the production of negative secondary effects, those establishments that provided alcohol and entertainment that required an adult entertainment license.

**Newsbox and Newsrack Regulations**

In *New York Times v. Lakewood*, 791 F.2d 934 (6th Cir. 1986), and in *Plain Dealer Publishing Co. v. Lakewood*, 794 F.2d 1139 (6th Cir. 1986), two challenges were filed against an ordinance of the city of Lakewood, Ohio, which prohibited the installation of newspaper boxes on city property without paying rent and which forbade the installation of such boxes on private property without the consent of the owner. The city also passed a zoning ordinance designed to prevent the installation of newspaper boxes on residential property.

The court in *Plain Dealer* held that a newspaper does not secure any property rights on city property because of the First Amendment. In addition, the court ruled that newspaper boxes are subject to reasonable zoning ordinances and that

placing such boxes on city property without paying rent amounts to a taking of city property. The court felt, however, that Lakewood's ordinance gave unbridled discretion to the mayor to grant and deny rental permits, and that requiring insurance for the boxes, as Lakewood's ordinance did, was unconstitutional. The Supreme Court affirmed. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

Municipal regulation of news racks is also subject to First Amendment concerns. In *Cincinnati v. Discovery Network Inc.,* 507 U.S. 410 (1993), the Supreme Court held that a city's ban on the distribution of commercial publications through news racks located on public property, while permitting such distribution of noncommercial publications, violated the First Amendment for lack of a reasonable fit between the city's legitimate interests in maintaining safety and aesthetics and its selective method of achieving those interests. The distinction between news racks distributing commercial and noncommercial speech bears no relationship to the city's asserted interests and thus cannot be justified by the lesser First Amendment protection afforded commercial speech. The ban was based on the content of the publications distributed and thus cannot be upheld as a valid time, place or manner restriction on protected speech.

Protection of traffic appears to be a valid governmental interest. In a case similar to news box regulations, the Eleventh Circuit Court of Appeals upheld a municipal ordinance banning tables from public sidewalks as a narrowly-tailored, content neutral regulation. *International Caucus of Labor Committees v. Montgomery, Ala.*, 111 F.3d 1548 (11th Cir.1997).

**Sign Ordinances**

A town's content-based sign code which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, did not survive strict scrutiny and thus violated the First Amendment. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (U.S.2015). The Court noted that "[t]he Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem." A speech regulation targeted at specific subject matter (i.e. ideological, political, temporary) is content based, and thus subject to strict scrutiny, even if it does not discriminate among viewpoints within that subject matter.

Following *Reed*, the Fourth Circuit Court of Appeals held that a city sign ordinance exempting governmental or religious flags and emblems, but applying to private and secular flags and emblems, and exempting works of art that were unrelated to a product or service but applying to art that referenced product or service was content-based speech restriction, and thus was subject to strict scrutiny in commercial property owner's action against city challenging ordinance on First Amendment free speech grounds. The ordinance was on its face content based because it applied or did not apply as result of content, that is, topic discussed or idea or message expressed. *Central Radio Co., Inc. v. City of Norfolk, Va.*, 811 F.3d 625 (C.A.4 Va. 2016).

The placement and purpose of signs can also raise concerns. In *McLean v. City of Alexandria,* 106 F.Supp.3d 736, 2015 WL 2097842 (E.D.Va.2015), a federal district court held that a city ordinance prohibiting parking vehicle on any city street for the purpose of displaying the vehicle for sale unconstitutionally restricted commercial speech, as applied to truck owner who wished to park his truck on a city street with a "For Sale" sign in the window. Owner's "For Sale" sign accurately informed the public about lawful activity, and there was no evidence that the ordinance directly advanced city's purported substantial interest in promoting traffic and pedestrian safety and regulating aesthetics.

The *Reed* case has called all previous First Amendment cases regarding sign regulation into question. In a case before the Supreme Court*, Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), the Court struck down an ordinance seeking to prohibit all outdoor signs other than on-premise advertising signs.

The ordinance provided certain exceptions, permitting some speech in areas where other speech was prohibited. The Court stated that insofar as the ordinance regulated commercial speech, there was no problem. The ordinance proposed to improve safety and the appearance of the city, which were substantial government interests and directly served those goals. However, under certain specified exceptions, the city chose to allow some noncommercial speech while banning others. This, the Court ruled, is not a permissible time, place and manner regulation.

In a second case before the U.S. Supreme Court, *Member of the City Council of the Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984), the ordinance prohibited the posting of signs on public property. Taxpayers for Vincent, a group supporting a candidate running for election to the city council, placed campaign ads on utility poles and other public property. City workers routinely removed these signs. The taxpayers filed suit, alleging that the ordinance abridged their freedom of speech.

The Court held that the ordinance was silent concerning any speaker's point of view and evidence revealed that it was applied in an evenhanded manner. The Court stated that the accumulation of signs on public property presented a substantial government interest which was within the power of the city to prohibit.

Further, the Court found no merit in the argument that the property covered by the ordinance should be considered a public forum subject to special First Amendment protection. The Court stated that the mere fact that the government property could be used as a means for communication does not require this use be permitted.

In examining these two cases, it seems clear that an ordinance which proposes to ban all advertising, both commercial and noncommercial, on public property which does not constitute a public forum, is valid. A city ordinance banning signs that displayed electronically-changeable messages that continuously scrolled or flashed was upheld because it was a content-neutral regulation, served substantial government interests, was narrowly tailored and left open reasonable alternative channels of communication. *Naser Jewelers, Inc., v. City of Concord, New Hampshire*, 538 F.3d 17 (1st Cir. 2008). Further, restriction of commercial advertising to specifically enumerated areas of town also seems permissible. The Department of Transportation is prohibited by statute from issuing permits for outdoor advertising signs within 500 feet of one another on the same side of a state highway, as this would be in violation of Section 23-1-274, Code of Alabama, 1975. *State Dept. of Transportation v. Sanford*, 970 So.2d 784 (Ala.Civ.App. 2007)

However, when a city provides an exception for certain types of speech, then it is possible that the ordinance is not content neutral and is invalid. This appears to be the major distinction between these two cases. So, to ban signs, a city must, as in all areas of First Amendment speech, be content neutral not only in the wording of the ordinance, but in the enforcement of it as well.

This point is exemplified in the case of *Ladue, Mo. v. Gilleo*, 512 U.S. 43 (1994), where the Supreme Court held invalid a municipal ordinance designed to protect valid governmental interests in aesthetics by barring homeowners from displaying any signs on their property except identification, for sale and safety warning signs, while permitting businesses, churches and nonprofit agencies to erect signs not permitted at residences. Again, the ordinance was not content neutral and, therefore, was unconstitutional.

In another case from the Eighth Circuit Court of Appeals, it was held that an ordinance imposing durational limits on political signs and holding the candidates liable for violations violates the First Amendment. *Whitton v. Gladstone, Mo*., 54 F.3d 1400 (8th Cir. 1995).

While these conclusions appear to still be consistent with the *Reed* decision, the League urges municipal officials to correct provisions of their sign ordinances that might be construed as content-based, and be consistent in their application.

**Parades**

Parades, rallies and marches are concerns for municipal officials. They may require closing streets, erecting decorations and clean up. Security is always an issue. Municipal officials frequently must confront the conflicting issues of allowing a specific group to present possible unpopular views in a public arena versus protecting the public safety. While many parades are peaceful, the prospects of a planned neo-Nazi or Ku Klux Klan rally raises security problems that aren't present at most Christmas and homecoming parades.

A case in point is *Handley v. Montgomery*, 401 So.2d 171 (Ala. Crim. App. 1981), *cert. denied*, 401 So.2d 185 (Ala. 1981). In this case, a Klan group planned a march from Selma to Montgomery. In order to comply with Montgomery's parade ordinance, a permit had to be issued by the city council. The group missed the deadline for placing their request on the council agenda. Federal courts refused to grant a temporary restraining order to allow the parade to proceed.

Despite the fact that no permit was issued, a group of marchers entered the city's police jurisdiction on Saturday, August 11, 1979. They were stopped by police and told that they could not march without a permit. They were allowed to disperse. The next day, 200 marchers began parading. The defendants were arrested.

According to the stipulated facts presented at trial, Montgomery required the issuance of parade permits to "provide for the safety of its citizens, not only those who parade, but also those along the parade route." In order to make plans for traffic and crowd control, and for general public safety, the city needed advance notice of parades. Therefore, the city required parade applicants to request permission to appear on the agenda by noon, Friday, preceding the next regular council meeting on Tuesday. The city contended that it was not trying to control the content of speech, pointing to the fact that two other Ku Klux Klan groups had been issued parade permits during the year.

The city also noted that the police needed advance notice of Klan marches because weapons may be involved. Advance police intelligence reports of the planned march indicated there would Klansmen with "ax handles, pick axes, hoe handles, bows and arrows, shotguns, and rifles." Also, a Klansman had been quoted as saying, "We will destroy the enemy on our march to the capitol of Montgomery, Alabama."

The defendants argued that the ordinance was an unconstitutional prior restraint. The court disagreed, stating, "It is uncontroverted that a municipality must rightfully exercise a great deal of control in the use of its public streets and sidewalks in the interest of traffic regulation and public safety." The court noted that parade regulations are not per se unconstitutional, even though they impinge on First Amendment rights. The government, though, bears the burden of justifying its restrictions.

The court felt that Montgomery had ample reasons for requiring potential marchers to timely request a parade permit. The court noted that the ordinance did not invest officials with unbridled discretion, and that the council was required to issue a permit upon receiving a proper application. Additionally, the ordinance in question required the council to "administer this

section ... free from improper or inappropriate considerations and from unfair discrimination with a systematic, consistent and just order of treatment ...” Therefore, the court held that the ordinance was not facially invalid.

After disposing of this question, though, the court next had to address whether the ordinance had been properly applied under the facts of this particular case. A facially valid ordinance may still be applied in an unconstitutional manner. Because of the potential for violence, the court held that application of the ordinance to these facts was proper. The court stated that “arrangements had to be made to prevent jeopardizing public safety and welfare; any contrary evaluation would demonstrate a reckless indifference to the value of human life and public property.” Montgomery’s ordinance required a minimum notice of four day’s before a planned demonstration. The maximum time that might elapse would be 11 days. The court, therefore, felt that the time required by the city for issuing the permit and preparing for the parade was reasonable.

How much advance notice of a planned parade or march may a municipality require? In a presentation to the 1994 New York State Conference of Mayors and Municipal Officials titled “Use of Municipal Property: First Amendment Implications,” Barbara J. Samel points out that “The notice required to get the permit cannot be excessive; a 24-hour notice period and a 10-day notice period have been upheld by the courts. A law which required 20 day notice was held unconstitutional.”

**Selected Court Decisions**

**Note:** These summaries are not intended as a substitute for reading the decision itself.

- The United States Supreme Court has held that a municipal government may not retaliate against independent contractors or regular suppliers of products for their campaign stances or opinions. In this case, a wrecker company was removed from a city rotation list because the owner of the company refused to contribute to the mayor’s re-election campaign. *O’Hare Truck Service, Inc. v. Northlake*, 518 U.S. 712 (1996).
- In *Boerne, Texas v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that the Religious Freedom Restoration Act of 1993 exceeds Congress’ power, thus allowing a municipality to deny a building permit to a church based on historic preservation grounds.
- In *Duffy v. Mobile*, 709 So.2d 77 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals held that a noise ordinance which prohibited noise that was plainly audible from a distance of 50 feet was unconstitutionally broad.
- In *Mobile v. Weinacker*, 720 So.2d 953 (Ala. Civ. App. 1998), the Alabama Court of Civil Appeals held that Mobile’s sign ordinance was unconstitutional because it was vague and ambiguous and provided review boards with unbridled discretion.
- In *Moore v. Montgomery*, 720 So.2d 1030 (Ala. Crim. App. 1998), the Alabama Court of Criminal Appeals upheld the City of Montgomery’s distance-based noise ordinance against a constitutional challenge that the ordinance was vague, unreasonable, and overly broad.
- The Supreme Court held that a public indecency ordinance that makes it a summary offense to knowingly appear in a public place in a “state of nudity,” defining a “public place” to include “places of entertainment, taverns, restaurants, [and] clubs,” is a content neutral regulation that does not violate the First Amendment. *Erie, Pa. v. Pap’s A.M.,* 529 U.S. 277 (2000).
- The Supreme Court held that Chapter 2 of the 1981 Education Consolidation and Improvement Act, which channels federal funds to local education agencies to acquire, for use in public and private schools, instructional and educational materials has a secular purpose and does not have the effect of advancing religion, and therefore does not violate the First Amendment’s Establishment Clause. *Mitchell v. Helms*, 530 U.S. 793 (2000).
- The Supreme Court held that a public school district’s policy authorizing high school students to vote on whether to include a student delivered “invocation” or “message” at football games, and, if so, to elect a student to deliver it involves state sponsored religious speech rather than private speech and results in coerced participation of those present at games in religious exercise is in violation of the First Amendment’s Establishment Clause. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
- The Eleventh Circuit Court of Appeals held that a public school does not violate the establishment clause when it allows high school seniors to vote on whether to have opening and closing messages at a graduation ceremony. Additionally, it is acceptable for the students to elect a student speaker whose message may not be reviewed by school officials, because this lacks state control over content, and therefore does not foster state sponsored religious speeches in violation of the Establishment Clause of the U.S. Constitution, First Amendment. *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001).

- The Eleventh Circuit Court of Appeals has held that a residence equipped with cameras through which paying Internet subscribers can view the activities of the residents who are paid to live in the house is not subject to a zoning ordinance that defines adult businesses as those which offer adult entertainment "to members of the public." *Voyeur Dorm LC v. Tampa, Fla*., 265 F.3d 1232 (11th Cir. 2001).
- A lower court decision invalidated, at the summary judgment stage, a municipal ordinance that prohibited more than one adult entertainment business in the same building or structure, on the grounds that the city failed to present evidence upon which it could reasonably rely on to demonstrate a link between multiple-use adult establishments and negative secondary effects, is reversed and remanded for further findings. *Los Angeles v. Alameda Books Inc.*, 535 U.S. 425 (2002).
- A municipal ordinance that makes it unlawful to engage in noncommercial door-to-door solicitation without a permit violates the First Amendment. *Watchtower Bible & Tract Society of New York v. Stratton, Ohio*, 536 U.S. 150 (2002).
- The city's policy of not allowing pawnshops and other types of business to advertise on city bus benches was reasonable, and therefore, did not violate the pawnshop's First Amendment rights; the city feared that allowing "less desirable" businesses to advertise on bus benches might inhibit "more desirable" business from buying advertising on the benches, thus negatively affecting revenue, and pawnshop had numerous other avenues in which to advertise. *Uptown Pawn and Jewelry v. Hollywood, Fl.* 337 F.3d 1275 (11th Cir. 2003).
- The definition of the term "weed" in a municipal ordinance making it a public nuisance to have weeds over 12 inches in height on private property was not unconstitutionally vague nor did the ordinance violate due process. Further, the defendant's garden did not have sufficient communicative elements to bring it within the protections afforded by the First Amendment. Finally, enforcement of the ordinance did not constitute an unlawful taking. *Montgomery v. Norman*, 816 So.2d 72 (Ala. Crim. App. 1999).
- A municipal ordinance banning commercial advertising on a city's navigable waters did not violate advertising a boat owner's First Amendment rights where the city passed the ordinance to preserve the natural beauty of the coastline and to prevent the creation of a carnival-type atmosphere; although the advertising was protected commercial speech, the aesthetic value of the coastline for a city that is heavily dependent on tourism could not be overstated and there was no narrower ban on waterfront advertising that would effectively avoid the problem. *Ex parte Walter v. Gulf Shores*, 829 So.2d 186 (Ala. 2002).
- A governmental entity, when acting in a proprietary capacity under a statutory mandate to be self-sufficient, may, without violating the First Amendment, charge fees for speakers' use of distribution facilities in a non-public forum that exceed administrative costs tied to such use. *Atlanta Journal & Constitution v. Atlanta Dept. of Aviation*, 322 F.3d 1298 (11th Cir. 2003).
- A city policy requiring all persons wishing to participate in a protest near a military base to submit to a mass metal detector screening at a checkpoint blocks away from the actual protest site violates the protestor's right to be free from unreasonable searches and seizures under the Fourth Amendment and their First Amendment free speech rights. *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004).
- A municipal ordinance prohibiting political demonstrations by five or more persons without a permit and requiring permit applicants to furnish indemnification in a form satisfactory to the municipal attorney violates the First Amendment to the United States Constitution both as a content based speech restriction that is not narrowly tailored to advance a legitimate interest and as a measure that confers standardless discretion on the municipal attorney to accept or reject indemnification agreements. *Burk v. Augusta-Richmond Co., Ga*., 365 F.3d 1247 (11th Cir. 2004).
- A state law requiring public disclosure of the names and addresses of signers of referendum petitions in general does not facially violate the First Amendment freedoms of speech or association. *John Doe No. 1 v. Reed*, 130 S.Ct. 2811 (U.S. 2010)
- A statute restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors and forbidding drug manufacturers from using such information to market their products violates the First Amendment's Free Speech Clause. The First Amendment directs courts to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. *Sorrell v. IMS Health Inc*., 131 S.Ct. 2653 (U.S. 2011).
- A law prohibiting the sale or rental of "violent video games" to minors was unconstitutional where the state failed to show either that the law was justified by a compelling government interest or that law was narrowly drawn to serve that interest. While states no doubt possess legitimate power to protect children from harm, that power does not include a

free-floating power to restrict ideas to which children may be exposed. Constitutional limits on governmental action apply, even when protection of children is the object. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (U.S. 2011).

- Lies about having received military awards may be speech protected by the First Amendment. *U.S. v. Alvarez*, 132 S.Ct. 2537 (U.S. 2012).
- A Montana state law providing that a "corporation may not make an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party" violated First Amendment political speech rights. *American Tradition Partnership, Inc. v. Bullock,* 132 S.Ct. 2490 (U.S. 2012).
- A state campaign finance law requiring groups who spent money to influence elections to form political committees subject to disclosure requirements did not violate the First Amendment in ballot issue elections. *Worley v. Florida Secretary of State*, --- F.3d ----, 2013 WL 2659408 (11th Cir.2013).
- Alabama's ballot access laws did not violate First Amendment associational rights. *Stein v. Alabama Secretary of State,* 774 F.3d 689 (C.A.11 2014)
- A municipal employee's subpoenaed testimony regarding fraudulent activity by another employee is inherently citizen speech protected by the First Amendment. *Lane v. Franks*, --- S.Ct. ----, 2014 WL 2765285 U.S. 2014.
- Business of tattooing is protected by the First Amendment as speech, to the same extent that the tattoo itself is protected. City's denial of the tattoo artist's application for special-use zoning permit to open a tattoo parlor violated the First Amendment. First Amendment protection of tattoos, as speech, does not mean that cities and states cannot regulate tattoo parlors with generally applicable laws, such as taxes, health regulations, or nuisance ordinances. *Jucha v. City of North Chicago*, --- F.Supp.2d ----, 2014 WL 4696667 (N.D.Ill.2014).
- A municipal ordinance prohibiting picketing or protesting within 50 feet of any dwelling unit did not, on its face, violate free speech rights, but an ordinance allowing city officers to enforce a "no loitering" sign posted by a person residing in a dwelling unit on which the sign was posted violated, on its face, free speech rights. *Bell v. City of Winter Park, Fla,* 745 F.3d 1318, (C.A.11 Fla. 2014).
- Protesters were not likely to succeed on claim that city ordinance designed to create an area surrounding health care facilities that was quiet and free from shouting or other amplified sound violated their First Amendment right to free speech, and thus preliminary injunction barring enforcement of the ordinance was not warranted, where ordinance was content neutral, city had a substantial interest in protecting citizens and the area surrounding health care facilities from unwelcome noise, ordinance was narrowly tailored to target only loud, raucous, or unreasonably disturbing noise, and ordinance left open robust alternative channels of communication. *Pine v. City of West Palm Beach, FL*, 762 F.3d 1262 (C.A.11 Fla. 2014).
- Massachusetts statute establishing buffer zone at abortion clinics violated free speech guarantees. *McCullen v. Coakley*, 573 U.S. 464 (U.S. 2014)
- North Carolina statute making it a felony for registered sex offenders to access social networking websites was not narrowly tailored to serve significant government interest in protecting children from abuse, and therefore, violated First Amendment speech rights of offenders; various social networking websites were principal sources for knowing current events and checking advertisements for employment, such websites were the modern public square, and convicted criminals could receive legitimate benefits in accessing the websites. *Packingham v. North Carolina*, 137 S.Ct. 1730 (U.S. 2017).

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